St. Mary's Law Journal

Volume 29 | Number 3 Article 1

1-1-1998

Toward Permissive Appeal in Texas.

Renee Forinash McElhaney

ST. MARY'S LAW JOURNAL

VOLUME 29 1998 NUMBER 3

ARTICLES

TOWARD PERMISSIVE APPEAL IN TEXAS

RENÉE FORINASH McELHANEY*

* Participating Associate, Fulbright & Jaworski L.L.P.; B.A. University of Texas; J.D., St. Mary's School of Law.

The author gratefully acknowledges the input provided by Steve Rogers, Polly Estes, and the Appellate Section of the San Antonio Bar Association in the creation of this Article.

I. A Case Study: Presenting the Value of Permissive Appeal

A comparison of *April Marketing & Distributing Corp. v. Diamond Shamrock Refining & Marketing Co.*[1] ("*April Marketing*"), which pended in federal court, and *Barshop v. Medina County Underground Water Conservation District*[2] ("*Barshop*"), which pended in state court, illustrates the value of permissive appeal. Both cases developed procedurally on parallel tracks, dealt with controlling questions of law;[3] and were anticipated to take several weeks in trial, creating the inevitable legal costs and judicial expenditures. However, the cases differ because the federal case allowed for a permissive appeal; the state court did not.

---

1. 103 F.3d 28 (5th Cir. 1997).
2. 925 S.W.2d 618 (Tex. 1996).
3. *See April Mktg.*, 103 F.3d at 29 (deciding that a cause of action for constructive termination does not exist under the PMPA); *Barshop*, 925 S.W.2d at 623 (determining whether the Edwards Aquifer Act "is constitutional on its face, not whether it is unconstitutional when applied to a particular landowner").

In *April Marketing*, the plaintiff, a gasoline retail franchisee, sued its franchisor, Diamond Shamrock Oil & Refining Co. ("Diamond Shamrock"), when Diamond Shamrock allegedly opened a competing gasoline retail facility.[4] The plaintiff argued that Diamond Shamrock's conduct resulted in the constructive termination of its franchise.[5] Moreover, the plaintiff contended that the Petroleum Marketing Practices Act (PMPA)[6] creates a cause of action for franchisees against franchisors for constructively terminating a franchise.[7] As a result, *April Marketing* presented a pristine question of law: whether the PMPA permits recovery under a theory of constructive termination when a franchisor opens an allegedly competing gasoline retail facility.[8]

Barshop also presented controlling questions of law. In that case, the plaintiffs, the Medina County Underground Water Conservation District, the Uvalde County Underground Water Conservation District, the Texas and Southwestern Cattle Raisers Association, Russell Brothers Cattle Company, and Bruce Gilleland, sued the individual directors of the Edwards Underground Aquifer Authority, the City of San Antonio, and the State of Texas seeking to enjoin the implementation of the Edwards Aquifer Act (the "Act").[9] The Act created the Edwards Underground Author-

---

4. *See April Mktg.*, 103 F.3d at 29.

5. *See id.*

6. 15 U.S.C. §§ 2801 *et seq.* (1994) (setting out a laundry list of events which may reasonably cause a termination of the franchise relationship). The events that may cause termination include: (1) fraud or criminal misconduct; (2) bankruptcy or judicially determined insolvency; (3) condemnation; or (4) "loss of franchisor's right to grant possession of the leased marketing premises. . . ." *See* 15 U.S.C. § 2802(e) (1994). The PMPA legislates the parameters of the relationship between petroleum marketing franchisors (generally refiners) and franchisees (generally retail gasoline distributors). *See id.* § 2801 (creating a cause of action of constructive termination for franchisees against franchisors). This statute prohibits altogether certain franchise terminations and dictates the process to terminate petroleum marketing franchises when termination is permitted. *See id.*

7. *See* April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28, 30–31 (5th Cir. 1997) (arguing a franchisor's actions may be a PMPA termination and explaining that Congress limited a "franchisor's ability to employ the 'extreme remedy' of termination").

8. *See April Mktg.*, 103 F.3d at 29–30.

9. *See* Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 623 (Tex. 1996). This case addressed the argument between landowners and the state regarding the regulation of these landowners' rights to use the water underneath their land. *See id.* The entire issued was raised due to fear that the lack of rain and the increased withdrawal of water from the Edwards Aquifer would detrimentally affect the general public. *See id.* As a result, the Texas Legislature "enacted the Edwards Aquifer

ity, which regulates and manages use of the Edwards Underground Aquifer.[10] The plaintiffs contended that various provisions of the Act were unconstitutional.[11]

In both *April Marketing* and *Barshop*, the defendants filed motions for summary judgment regarding the controlling questions of law.[12] The trial court, in both cases, denied the motions for summary judgment.[13]

The two cases then diverged procedurally. With their motion for summary judgment denied, the defendants in *Barshop* had no choice but to prepare and try their case. The *April Marketing* defendants, however, had an alternative: Diamond Shamrock sought permission to appeal the trial court's interlocutory order denying its motion for summary judgment.[14] Following the procedures of the federal permissive appeal statute,[15] Diamond Shamrock filed a motion in the district court to certify under 28 U.S.C. § 1292(b) the order denying the motion for summary judgment.[16] The court

---

Act . . . to manage the aquifer and to sustain the diverse economic and social interests dependent on the aquifer water." *Id.* at 624. The landowners brought suit against the state questioning the constitutionality of the Edwards Aquifer Act. *See id.*

10. *See* Act of May 30, 1993, 73d Leg., R.S., ch. 626, §§ 1.02, 1.14, 1993 Tex. Gen. Laws 2353, *amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Sess. Law Serv. 2505; *Barshop*, 925 S.W.2d at 623–24. The Edwards Aquifer, located in central Texas, is a series of underground water-bearing formations. *See id.* It serves as the primary water source for much of south central Texas. *See id.*

11. *See id.* at 623 (noting that plaintiffs claimed the Act violated the Texas Constitution because the Act does more than just regulate use of the aquifer water; "it actually deprives the landowner of a vested property right").

12. *See* April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28, 30 (5th Cir. 1997); Interview with Steve Rogers and Polly Estes, representing the Edwards Aquifer Authority with regard to the *Barshop* case, in San Antonio, Tex. (Spring 1998) (on file with the *St. Mary's Law Journal*).

13. *See April Mktg.*, 103 F.3d at 29; Interview with Steve Rogers and Polly Estes, representing the Edwards Aquifer Authority with regard to the *Barshop* case, in San Antonio, Tex. (Spring 1998) (on file with the *St. Mary's Law Journal*).

14. *See* Agreed Motion to Certify Order Under 28 U.S.C. § 1292(b) at 10, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*).

15. *See* 28 U.S.C. § 1292(b) (1994) (allowing an interlocutory appeal if the district judge believes that substantial grounds for a difference of opinion about the controlling question of law exist).

16. *See April Mktg.*, 103 F.3d at 29. The plaintiff joined in the motion to certify order. *See* Agreed Motion to Certify Order Under 28 U.S.C. § 1292(b) at 1, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*).

granted the motion to certify,[17] and Diamond Shamrock filed a petition for permission to appeal with the United States Court of Appeals for the Fifth Circuit.[18]

The Fifth Circuit granted permission to appeal, and the case was briefed like any other appeal.[19] The Fifth Circuit expeditiously granted the parties' request for oral argument. After argument, the Fifth Circuit issued its ruling, resolving the legal question presented by the permissive appeal in Diamond Shamrock's favor.[20] On remand, the district court entered a final judgment based upon the Fifth Circuit's opinion.[21]

The permissive appeal process greatly streamlined the adjudication of the *April Marketing* case. The parties not only avoided the significant expense of final discovery and an extended trial, but the district court avoided what would have been a considerable waste of limited judicial resources. In addition, permissive appeal was much more efficient from an appellate perspective. If the case was tried and then been appealed, the appeal might well have been significantly more complex. No doubt, the appellant would have requested review of factual insufficiency issues, evidentiary issues and charge error issues, along with the legal question of the proper statutory construction of the PMPA. Instead of a single pristine legal question, the Fifth Circuit might have faced a monstrous rec-

---

17. *See* United States District Court Order at 9–10, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*). Judge Solis, United States District Judge for the Northern District of Texas, denied the Defendant's Motion for Partial Summary Judgment, granted the Agreed Motion to Certify Pursuant to 28 U.S.C. § 1292(b), and certified his order for appellate review pursuant to 28 U.S.C. § 1292(b). *See id.*

18. *See* April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28, 29 (5th Cir. 1997). *See generally* Appellant's Petition for Permission to Appeal, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*).

19. *See April Mktg.*, 103 F.3d at 29.

20. *See id.* at 29–31 (holding that a petroleum marketing franchisor does not constructively terminate a franchise by opening another gasoline retail facility in the same market area as its franchisee).

21. *See* Order Granting Final Judgment at 4, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*) (discussing that, following remand, the plaintiff amended its pleadings; however, because the plaintiff based its new claim on the same facts decided by the Fifth Circuit, the court held, like the Fifth Circuit, that the complaint did not establish a valid claim against the defendant).

ord and convoluted legal and factual arguments that would have taken months to review.

The *Barshop* parties and the Texas judicial system did not fare as well. With no avenue for review of the trial court's interlocutory order denying summary judgment and failing to resolve the controlling (and dispositive) legal issues in the case, the *Barshop* parties faced costly discovery, including extensive expert testimony regarding factual issues that were irrelevant to the dispositive legal questions the case presented.[22] As a result, the parties and the court tried the factually complicated water-rights case over a five-week period, spending fifteen days in trial.[23]

During the *Barshop* trial, the plaintiffs called a number of individuals who testified at length regarding the impact of water regulation on their businesses and lifestyles.[24] The plaintiffs also presented extensive expert testimony regarding the characteristics of the Edwards Aquifer and the recharge zone and the economic impact of regulating water use.[25] Throughout the trial, the admissibility of this evidence was hotly contested.[26] At the conclusion of the extended trial, the trial court entered judgment for the plaintiffs and enjoined implementation of the Edwards Aquifer Act.[27] As expected, the defendants appealed.[28]

The Texas Supreme Court reviewed the case but did not consider any of the factual and expert evidence presented by the plaintiffs. Rather, the supreme court focused upon the dispositive legal ques-

---

22. *See* Interview with Steve Rogers and Polly Estes, representing the Edwards Aquifer Authority with regard to the *Barshop* case, in San Antonio, Tex. (Spring 1998) (on file with the *St. Mary's Law Journal*).

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See* Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 625 (Tex. 1996) (noting that the district court made numerous, "sweeping" findings concerning the Edwards Aquifer Act, which it ultimately concluded amounted to an unconstitutional taking because the Act allowed the State to regulate the water beneath a landowner's private property).

28. *See id.* (explaining that because the trial court had enjoined implementation of the Edwards Aquifer Act on the ground that the statute was unconstitutional, the defendants filed a direct appeal with the Texas Supreme Court). The Texas Government Code permits direct appeals to the supreme court of trial court orders "granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state." TEX. GOV'T CODE ANN. § 21.001(c) (Vernon Supp. 1998).

tion — the constitutionality of the Edwards Aquifer Act.[29] Noting that the Act had not yet been applied, the supreme court was swayed by defendants' argument, raised by summary judgment, that the Edwards Aquifer Act will not always operate unconstitutionally.[30] Thus, the supreme court reversed the trial court's judgment and held the Act constitutional solely upon legal grounds.[31] Consequently, the events of and the evidence offered during the five-week trial were essentially unnecessary.

Both *April Marketing* and *Barshop* turned upon a question of law. In both cases, the facts and circumstances underlying the plaintiffs' claim were largely irrelevant. However, only the participants in the *April Marketing* case, the federal court case, were able to avoid the unnecessary and wasteful expenditure of resources to present inconsequential factual evidence to a trier of fact. In *April Marketing*, Diamond Shamrock could seek interlocutory review of the district court's order denying the motion for summary judgment on the dispositive question of law.[32] The federal system ac-

---

29. *See Barshop*, 925 S.W.2d at 623.

30. *See id.* at 631 (concluding that the plaintiffs could not meet their burden in the facial challenge "of establishing that, under all circumstances, the Act will deprive them of their property in violation of the Texas Constitution"). Article I, Section 17 of the Texas Constitution provides:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money . . . .

TEX. CONST. art. I, § 17. The plaintiffs' primary argument was that the Edwards Aquifer Act violated this provision of the constitution. *See Barshop*, 925 S.W.2d at 628. The State conceded that the plaintiffs had "significant rights" to the water under their land. *See id.* at 626. However, the State also emphasized that supreme court opinions "have long recognized the necessity of legislation that conserves and preserves our limited water resources." *Id.* Thus, the supreme court was required to balance landowners' property ownership rights in underground water with the need for legislative regulation of water. *See id.* The supreme court concluded that even assuming that plaintiffs had a vested property right in water beneath their land, "the State still can take the property for a public use *as long as compensation is provided.*" *Id.* at 630 (emphasis added). The Act expressly provides for such compensation; thus, the court "must assume that the [l]egislature intends to compensate [p]laintiffs for any taking that occurs." *Id.* at 631. Thus, the court could not conclude that the Act would constitute an unconstitutional taking in all cases. *See id.* at 631.

31. *See Barshop*, 925 S.W.2d at 625.

32. *See* April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28, 29 (5th Cir. 1997) (stating that the district court denied the motion for summary judgment on a question of law and certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b)).

commodates such permissive appeals.[33] Texas does not.[34] The *Barshop* defendants had no alternative but to participate in — and bear the cost of — an unnecessary trial. To remedy the inefficiency in Texas' judicial system illustrated by *Barshop*, this Article proposes that Texas adopt permissive appeal.

II. The Genesis of the Problem: A Formalistic Approach to the Final-Judgment Rule

One of the strident trends in the tort-reform movement is the emphasis on docket management and efficient use of both litigant and judicial resources.[35] The obvious waste resulting from the inability to appeal interlocutory orders denying motions for summary judgment on controlling and dispositive questions of law stands in stark contrast to the tort-reform movement. However, the seeds of this predicament lie in a longstanding and often praised principle referred to as the final-judgment rule, which is followed by a majority of states, including Texas.[36]

1. Generally, Only Final Judgments Are Appealable — Defining Final Judgment

A final judgment is an order that terminates the litigation on the merits.[37] As the law is applied in Texas, a judgment is not final

---

33. *See* 28 U.S.C. § 1292(b) (1994) (allowing interlocutory appeal when a district judge decides that an order "involves a controlling question of law as to which there is substantial ground for difference of opinion").

34. *See* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 n.12 (Tex. 1992) (noting that "Texas does not have a statute comparable to 28 U.S.C. § 1292(b) (1994)," which permits permissive appeals).

35. *See* Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections of Tort Reform*, 30 Ga. L. Rev. 627, 696 (1996) (discussing some existing problems with the use of docket management in conjunction with tort reform such as the cost and time involved); *cf.* Valle Simms Dutcher, *The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases*, 10 Pace Envtl. L. Rev. 955, 971 (1993) (indicating that with docket management, large numbers of asbestos cases can be grouped together creating greater judicial efficiency).

36. While the venerable final-judgment rule may be the reason Texas has not yet adopted a procedure allowing permissive appeals, "[n]ot choice but habit rules the unreflecting herd." William Wordsworth, *Reflections (1821)*, *reprinted in* 7 The Complete Poetical Works of William Wordsworth, 1816–1822, at 319 (3d ed. 1919). This Article is offered as an opportunity to reconsider our habit of formalistically applying the final-judgment rule.

37. *See* North East Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966) (adhering steadfastly "through the years to the rule, with certain exceptions not applicable

unless it disposes of all parties and issues.[38] Texas courts have strictly applied the final-judgment rule.[39] In attempting to prevent the appeal of nondispositive issues, neither summary judgments nor default judgments are presumed to be final judgments in Texas.[40]

Federal courts also follow the final-judgment rule.[41] Pursuant to 28 U.S.C. § 1291, the courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except when a direct review may be had in the Supreme Court. . . ."[42] No exact definition of a "final decision" exists.[43] Nonetheless, "as a general rule a district court's decision is appealable under this section only when the decision ends the litigation

---

here, that an appeal may be prosecuted only from a final judgment and that to be final a judgment must dispose of all issues and parties in a case"); Zamarripa v. Sifuentes, 929 S.W.2d 655, 656 (Tex. App.—San Antonio 1996, no writ) (stating that "[a] judgment must dispose of all parties and all issues before the trial court in order for it to be considered final and appealable."); Woosley v. Smith, 925 S.W.2d 84, 86 (Tex. App.—San Antonio 1996, no writ) (noting that "[i]n order to be final, a judgment must dispose of all parties and issues in a lawsuit."); *see also* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992) (stating that "[u]nder Texas procedure appeals may be had only from final orders or judgments.").

38. *See* State v. Owens, 907 S.W.2d 484, 485 (Tex. 1995) (per curiam) (noting that "[a]n order which purports to dispose of all issues and all parties . . . is a final and appealable order."); Mafrige v. Ross, 866 S.W.2d 590, 591 (Tex. 1993) (stating that "[i]n order to be a final, appealable summary judgment, the order granting the motion must dispose of all parties and all issues before the court."); *Northeast Indep. Sch. Dist.*, 400 S.W.2d at 895 (emphasizing that final judgments dispose of all issues and parties).

39. *See* Joseph v. City of Ranger, 188 S.W.2d 1013, 1015 (Tex. Civ. App.—Eastland 1945, writ ref'd) (stating that "there can be no appeal from a judgment that is not final"); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (Vernon 1986) (listing necessary elements for appealing a judgment as: (1) "judgment or amount in controversy exceeds $100;" and (2) "an appeal to the court of appeals [must be] from a final judgment of the district or county court"); Sheerin v. Exxon Corp., 923 S.W.2d 52, 56-57 (Tex. App.—Houston [1st Dist.] 1995, no writ) (Hedges, J., dissenting) (urging that appellate courts should not bend the rules regarding finality of judgments in order to avoid what may be perceived as an unfair result).

40. *See* Teer v. Duddlesten, 664 S.W.2d 702, 704 (Tex. 1984) (stating that no presumption exists as to whether summary judgments are final judgments); *see also* David Peeples, *Trial Court Jurisdiction and Control over Judgments*, 17 ST. MARY'S L.J. 367, 376 (1986) (acknowledging that default and summary judgment orders are not final).

41. *See* 28 U.S.C. § 1291 (1994) (providing that federal courts of appeal "shall have jurisdiction of appeals from all final decisions of the district courts").

42. *Id.*

43. *See* Vaughn v. Mobil Oil Exploration & Prod., Southeast, Inc., 891 F.2d 1195, 1197 (5th Cir. 1990) (noting that courts have "various yardsticks" in determining a judgment's finality).

on the merits and leaves nothing for the court to do but execute the judgment."[44] In other words, like Texas state courts, a judgment is final and appealable only when it disposes of all parties and all claims and effectively ends the litigation.[45]

2. The Policy Reasons Behind the Final-Judgment Rule

Both Texas and federal courts have adopted the final-judgment rule in order to avoid piecemeal appeals.[46] As the Fifth Circuit explained, "The final-judgment rule is based on the policy against piecemeal appeals and the inevitably attendant delay and increase in costs that result from piecemeal appeals."[47] The Fifth Circuit has even expressly recognized the final-judgment rule as the "dominant rule of federal appellate practice."[48]

A. *Texas Has Adopted Limited Exceptions to the Final-Judgment Rule*

Despite its almost vehement allegiance to the final-judgment rule, Texas permits appellants to seek review of a confined group of interlocutory orders. Most of these exceptions to the final-judgment rule are found in section 51.014 of the Texas Civil Practices and Remedies Code ("Section 51.014").[49] While the list is limited,

---

44. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1987) (quoting *Catlin*, 324 U.S. at 233).

45. *See* Thompson v. Betts, 754 F.2d 1243, 1245 (5th Cir. 1985) (declaring that "any decision that adjudicates the liability of fewer than all the parties does not terminate the action"); *see also* Borne v. A&P Boat Rentals No. 4, Inc., 755 F.2d 1131, 1133 (5th Cir. 1985) (concluding that the disposition of one party did not resolve all claims when the intervenor remained).

46. *See Catlin*, 324 U.S. at 233-34; Cobbledick v. United States, 309 U.S. 323, 324–26 (1940); *accord* De Los Santos v. Occidental Chem. Corp., 925 S.W.2d 62, 65 (Tex. App.—Corpus Christi 1996), *rev'd on other grounds*, 933 S.W.2d 493 (Tex. 1996); *see also* El Paso Dev. Co. v. Berryman, 729 S.W.2d 883, 887 (Tex App.—Corpus Christi 1987, no writ) (stating that "[t]he ultimate legal rights of the parties should not be decided piecemeal in an appeal from an interlocutory order . . . .").

47. Commodity Future Trading Comm. v. Preferred Capital Inv. Co., 664 F.2d 1316, 1318 (5th Cir. 1982).

48. *In re* 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d 1293, 1297 (5th Cir. 1978).

49. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 1998) (listing eight interlocutory orders subject to early appeal); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 171.017(a)(1) (Vernon Supp. 1997) (permitting interlocutory appeal of order denying application to compel arbitration).

the legislature has recently broadened the category of orders that can be subject to interlocutory review. For example, in the 1997 regular session, the Texas legislature added two new interlocutory orders that can be reviewed before entry of a final-judgment.[50]

Under Section 51.014, an appellant may seek interlocutory review of orders that: (1) appoint a receiver or trustee;[51] (2) overrule a motion to vacate an order appointing a receiver or trustee;[52] (3) certify or deny certification of a class action;[53] (4) grant or deny a temporary injunction;[54] (5) grant or overrule a motion to dissolve a temporary injunction;[55] (6) deny a motion for summary judgment based upon official immunity;[56] (7) deny a motion for summary judgment on behalf of a member of the electronic or print media based upon freedom of the press or speech;[57] (8) grant or deny a defendant's special appearance;[58] or (9) grant or deny a plea to the

50. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 1998).

51. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(1) (Vernon 1997 & Supp. 1998); *see also* Bayoud v. North Cent. Inv. Corp., 751 S.W.2d 525, 526–27 (Tex. App.—Dallas 1988, writ denied) (designating an appeal from an order appointing a receiver as an interlocutory appeal).

52. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(2) (Vernon 1997 & Supp. 1998).

53. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(3) (Vernon 1997 & Supp. 1998); *see also* Intratex Gas Co. v. Beeson, 960 S.W.2d 389, 393 (Tex. App.—Houston [1st Dist.] 1998, no pet. h.) (reviewing an appeal from a class certification interlocutory order).

54. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (Vernon 1997 & Supp. 1998); *see also* Golden Rule Ins. Co. v. Harper, 925 S.W.2d 649, 650–51 (Tex. 1996) (permitting the use of interlocutory appeal to remedy a temporary injunction).

55. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (Vernon 1997 & Supp. 1998).

56. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon 1997 & Supp. 1998); *see also* Newman v. Obersteller, 40 Tex. Sup. Ct. J. 497, 498 (Apr. 18, 1997) (holding that an interlocutory appeal of a motion for summary judgment based upon official immunity is permissible); Urban v. Canada, 963 S.W.2d 805, 807 n.1 (Tex. App.—San Antonio 1998, no pet. h.) (allowing interlocutory appeal despite official immunity under Section 51.014(a)(5) and *Newman v. Obersteller*).

57. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (Vernon 1997 & Supp. 1998); *see also* Grant v. Wood, 916 S.W.2d 42, 46 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding) (discussing that an interlocutory appeal may be brought upon denial of a summary judgment by both electronic or print media when brought on free speech grounds).

58. The 75th Legislature added this category of order to the list that is permitted interlocutory review in 1997. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 1998) (reflecting 1997 amendments).

jurisdiction.[59] This formalistic rule requires that unless an appellant can categorize the offending order as one of these orders, the appellate court will not consider the appeal.[60]

B. *Exceptions to the Final-Judgment Rule in the Federal System*

Like Texas, the federal system also permits appeals from interlocutory orders; however, the federal government has adopted a less formalistic approach.[61] Federal circuit courts have jurisdiction over three types of appeals: final orders;[62] certain specific types of interlocutory appeals, such as those involving injunctive relief;[63] and appeals from cases in which a federal district court has certified a question as final pursuant to either Federal Rule of Civil Procedure 54(b)[64] ("Rule 54(b)") or 28 U.S.C. § 1292(b)[65] ("Section 1292(b)").

---

59. The legislature also added this category to the permissible list of interlocutory appeals in 1997. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon Supp. 1998).

60. *See* Jack B. Anglin v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992) (noting that interlocutory orders are only appealable " if permitted by statute;" thus, the court refused to review the trial court's order denying arbitration because it did not fall within an exception); Johnson v. Parish, 547 S.W.2d 311, 313 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (stating that a statute must explicitly give permission for an interlocutory appeal from a temporary order or no right of appeal exists). In *Anglin*, the supreme court considered exercising appellate jurisdiction over a trial court's refusal to enforce an arbitration agreement under the Federal Arbitration Act (FAA), 9 U.S.C. § 1.16. *See Anglin*, 842 S.W.2d at 272. The supreme court held that the final-judgment rule precludes the court from reviewing the trial court's order. *See id.* The result created what the supreme court called "an unnecessarily expensive and cumbersome rule." *Id.* In situations where a contractor seeks to enforce an arbitration agreement under both the Texas General Arbitration Act (TGAA), TEX. REV. CIV. STAT. ANN. art. 224–238.6 (Vernon 1973), and the FAA, the contractor must pursue two proceedings: an interlocutory appeal of the trial court's order denying arbitration under the TGAA and a writ of mandamus of the order denying arbitration under the FAA. *See id.* Because of this inefficient approach, the supreme court urged the legislature to amend the TGAA to permit interlocutory appeal of denials under either that statute or the FAA. *See id.*

61. *See* Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders*, 44 Sw. L.J. 1045, 1085 (1990) (stating that multiple avenues for interlocutory review exist in the federal courts as the federal system follows a liberal approach); *see also* 28 U.S.C. § 1292(b) (1994) (permitting the court of appeals to hear in its discretion an otherwise nonappealable interlocutory order if a district judge certifies in writing that the order involves a controlling question of law in which "a substantial ground for difference of opinion [exists] and that an immediate appeal . . . may materially advance the ultimate termination of the litigation").

62. *See* 28 U.S.C. § 1291 (1994).

63. *See* 28 U.S.C. § 1292(a)(1) (1994).

64. *See* FED. R. CIV. P. 54(b) (stating that when an action contains more than one claim of relief or when multiple parties are involved, the court may enter a final judgment

1. The Collateral Order Rule

Certain collateral orders are considered final, and thus, appealable under the federal system even though they do not dispose of all claims and all parties. The general rule is that the judicially created—collateral order doctrine is applicable only when the order "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment."[66] Collateral orders include, but are not limited to, orders denying a claim of immunity,[67] orders refusing to require posting of a bond in a shareholder's derivative action,[68] and orders imposing the costs of notice to class members on the defendant.[69] However, the denial of class certification[70]

---

for one or more but less than all of the claims or parties upon a determination that there is no reason for delay).

65. *See* 28 U.S.C. § 1292(b) (1994) (allowing courts of appeals to hear an appeal from an order that involves a controlling question of law where there is "substantial ground for difference of opinion . . .").

66. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

67. *See* Mitchell v. Forsyth, 472 U.S. 511, 525 (1985) (stating that the "denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action").

68. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949) (holding the collateral order regarding a shareholder derivative suit is appealable "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it").

69. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 (1974) (holding that the district court's "judgment on the allocation of notice costs was 'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it'" and thus, was a final decision under Section 1291 (quoting *Cohen*, 337 U.S. at 546–47)). The Court explained that Section 1291 "does not limit appellate review to 'those final judgments which terminate an action' . . . but rather that the requirement of finality is to be given a 'practical rather than a technical construction.'") *See id.* (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 545–46 (1949)). This inquiry "requires some evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *See id.* at 171 (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)).

70. *See Coopers & Lybrand*, 437 U.S. at 468–69 (stating that orders passing on requests for class certification are not excepted from the final-judgment rule).

and the refusal to disqualify counsel[71] are not collateral orders.

2. Rule 54(b)

Under Rule 54(b), a federal district court can also, in its discretion, certify as a final judgment an order that disposes of some claims and parties in litigation.[72] The rule states,

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.[73]

Therefore, in order to certify a question as a final judgment, a federal district court must determine that the case involves multiple claims for relief or multiple parties,[74] and the court's order serves as a final determination of at least one, but fewer than all the claims or parties.[75] Moreover, the district court must specifically — but not necessarily expressly[76] — certify its partial judgment as a final judgment under Rule 54(b).[77] Therefore, Rule 54(b) is lim-

---

71. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) (holding that an order which denies a motion to disqualify counsel is not appealable before final judgment in the underlying litigation).

72. *See* FED. R. CIV. P. 54(b); *see also* Ackerman v. FDIC, 973 F.2d 1221, 1224 n.6 (5th Cir. 1992) (noting that the court must weigh a variety of factors).

73. FED. R. CIV. P. 54(b).

74. *See* H&W Indus., Inc. v. Formosa Plastics Corp., U.S.A., 860 F.2d 172, 175 (5th Cir. 1988) (noting that "[b]y its terms, Rule 54(b) only applies when multiple parties or multiple claims are involved.").

75. *See id.* (stating that other claims or parties must remain in the lower court).

76. *See Ackerman*, 973 F.2d at 1225 (expressing that "[i]f the language in the order appealed from, either independently or together with related portions of the record referred to in the order, reflects the district court's unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable . . . ." (quoting Kelly v. Lee's Old Fashioned Hamburgers, Inc., 908 F.2d 1218, 1220 (5th Cir. 1990))).

77. *See* Pettinelli v. Danzig, 644 F.2d 1160, 1161 (5th Cir. 1981) (noting that before appeal, a district court must certify its partial judgment as a final judgment pursuant to Rule 54(b)).

ited to orders that would be final if the case involved one defendant, one plaintiff, and a single claim.[78]

The district court makes the decision to certify an order as a final judgment under Rule 54(b).[79] However, appellate courts can review the district court certification order using the abuse-of-discretion standard of review.[80] Because appellate courts try to avoid piecemeal appeals, certification under Rule 54(b) is not routine.[81] Nonetheless, the Fifth Circuit has established a two-part appellate review of Rule 54(b) certifications: a de novo review as to whether more than one legal claim was presented,[82] and an abuse-of-discretion review as to whether entry of a final judgment was appropriate under the facts of the particular case.[83] Finally, the Fifth Circuit has recognized the difficulty in "differentiat[ing] nicely between the legal and discretionary aspects of rule 54(b) judgments. . . ."[84]

3. Section 1292(a)

Section 1292 establishes two other groups of interlocutory orders that may be appealable under the federal system. Under Section 1292(a), three types of orders are appealable: (1) interlocutory orders "granting continuing, modifying, refusing or dissolving injunc-

78. *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435–38 (1956) (setting forth the claims to which Rule 54(b) is limited).

79. *See* FED. R. CIV. P. 54(b).

80. *See* PYCA Indus., Inc. v. Harrison County Waste Water Management Dist., 81 F.3d 1412, 1421 (5th Cir. 1996) (noting that abuse of discretion is the correct standard in reviewing the district court certification).

81. *See id.* (underlining that "[a] district court should grant certification only when there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal; it should not be entered routinely as a courtesy to counsel.").

82. *See* Samaad v. City of Dallas, 940 F.2d 925, 930–31 (5th Cir. 1991). The Fifth Circuit identified several "rules of thumb" for determining if one legal claim for relief is presented: (1) whether the facts underlying the putatively separate claims are the same; (2) whether common underlying facts preclude the existence of similar claims; and (3) whether a claimant has pleaded alternative legal theories but whose recovery is limited to only one of them. *See id.*

83. *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956) (describing the abuse of discretion rule); Ackerman v. Federal Deposit Ins. Corp., 973 F.2d 1221, 1225 n.8 (5th Cir. 1992) (noting the abuse of discretion rule); Samaad v. City of Dallas, 940 F.2d 925, 929-30 (5th Cir. 1991) (discussing whether abuse of discretion review was appropriate). One of the factors considered is whether the claims of the parties are too attenuated. *See* Federal Sav. & Loan Ass'n v. Cribbs, 918 F.2d 557, 559 (5th Cir. 1990) (stating that where relationship between one claim or party and others is so attenuated Rule 54(b) certification is encouraged).

84. *Samaad*, 940 F.2d at 930.

tions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court";[85] (2) interlocutory orders "appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property";[86] and (3) interlocutory orders "determining the rights and liabilities of the parties to admiralty cases."[87]

4. Section 1292(b)

Under Section 1292(b), the federal system entertains appeals — by permission of both the district and appellate court — from interlocutory orders that address substantive issues of law and satisfy certain criteria.[88] Orders denying dispositive motions regarding questions of law are reviewable under Section 1292(b),[89] the procedure under the federal system for permissive appeal.

III. The Permissive Appeal: An Exceptional Exception to the Final-Judgment Rule

A. *Federal Permissive Appeals*

1. The Policy Underlying Permissive Appeals in the Federal System

The committees of the Judicial Conference of the United States drafted Section 1292(b) after significant study.[90] The Judicial Conference and the circuit courts subsequently adopted the provision

85. 28 U.S.C. § 1292(a)(1) (1994).

86. *Id.* § 1292(a)(2).

87. *Id.* § 1292(a)(3).

88. *See id.* § 1292(b) (noting that an order must "involve[ ] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal will materially advance the ultimate termination of the litigation").

89. *See id.* (noting orders involving a controlling question of law are appealable); April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28, 29 (5th Cir. 1997) (reviewing an order denying motion for summary judgment under Section 1292(b)).

90. *See* Charles Allen Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199, 202 (1959). The section reflects a compromise between those who favored allowing interlocutory appeal at the discretion of the appellate court and those who favored a strict adherence to a final-judgment rule. *See* Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 378 (1961).

without dissent,[91] and Congress subsequently enacted Section 1292(b) as proposed without amendment or debate on the basis of recommendations contained in the hearings and judicial committee reports.[92] The following legislative history of Section 1292(b) demonstrates the congressional intent embodied in this permissive appeal procedure:

> [This statute will apply to] cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action. The shortening of the period between commencement of an action and its ultimate termination, together with avoidance of unnecessary work and expense, are the imperative considerations which impel the committee's recommendation for change in the existing law.[93]

Based on this language, it is evident that Congress enacted the Interlocutory Appeals Act as an exception to the final-judgment rule and designed Section 1292(b) to provide an early opportunity to review important interlocutory orders before they result in what may prove to be wasted expense and fruitless litigation.[94] Explaining the adoption of Section 1292(b), the Fifth Circuit stated,

> [T]here are occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of

---

91. *See* Charles Allen Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199, 202 (1959) (stating that the Judicial Conference endorsed the Interlocutory Appeals Act); *see also* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 379 (1961) (explaining that the courts of appeals "have been successful in expediting rulings on 1292(b) applications").

92. *See* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 611 (1975) (noting that Congress held limited hearings on the Act without debate and relied upon recommendations contained in committee reports).

93. Hearings on H. R. 6238 and H. R. 7260 *Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. 14 (1958) (hereinafter "Hearings") (report of the Tenth Circuit Committee).

94. *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978) (stating that interlocutory appeals should be confined to cases where such appeals will increase judicial efficiency and decrease litigation costs); Katz v. Carte Blanche Corp., 496 F.2d 747, 753–54 (3d Cir. 1974) (en banc) (stating that one of the things that the draftsmen focused on was "avoiding the wasted effort of a possible protracted litigation"); Fisons Ltd. v. United States, 458 F.2d 1241, 1245–46 (7th Cir. 1972) (noting that antitrust litigation was the type of protracted case the Interlocutory Appeals Act intended for immediate appeal so as to avoid waste and cost).

> law, of substance or procedure, upon which in a realistic way the whole case or defense will turn. The amendment [Section 1292(b)] was to give to the appellate machinery of [Section] 1291 through [Section] 1294 a considerable flexibility operating under the immediate, sole and broad control of Judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided.[95]

2. The Mechanics of Permissive Appeal in the Federal System

Section 1292(b) authorizes a district court to certify an order for an immediate appeal when it determines "that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ."[96] Therefore, Section 1292(b) contains three criteria: (1) the order to be certified must deal with a controlling question of law;[97] (2) grounds for substantial disagreement regarding this question exist;[98] and (3) an immediate appeal will materially advance the ultimate termination of the litigation.[99] This procedure ensures that interlocutory review will be limited to appropriate cases and avoids jurisdictional battles in the courts of appeals.[100]

Once a district court has certified a question for interlocutory review under Section 1292(b), the appellate court has complete dis-

---

95. Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 703 (5th Cir. 1961).

96. 28 U.S.C. § 1292(b) (1994).

97. *See* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 379 (1961) (explaining that "an order seemingly presents a controlling question of law if resolution of the question would be a basis for reversal of the final judgment")

98. *See id.* (noting that "the extent of difference of opinion [must] refer[ ] to the likelihood that the judge has erred").

99. *See id.* (recognizing that prompt action by the appellate court may either terminate the litigation or eliminate a later retrial); *see also* Ducre v. Mine Safety Appliances, 573 F. Supp. 388, 395 (E.D. La. 1983) (holding that an appeal will materially advance the ultimate termination of the litigation). The legislative history of the section confirms that an interlocutory appeal should be permitted when review would avoid protracted and expensive litigation. *See* H.R. REP. NO. 1667, 85th Cong. 2d Sess. 1 (1958) (noting that the purpose of Section 1292 "is to expedite the ultimate termination of litigation and thereby save unnecessary expense and delay").

100. *E.g.*, Johnson v. Jones, 515 U.S. 304, 318 (1995); Swint v. Chambers County Comm'n, 514 U.S. 35, 46 (1995); Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978).

cretion to accept or reject the appeal.[101] The appellate court is not required to defer in any manner to the district court's order of certification and can deny a petition for permission to review for any reason.[102] *April Marketing*, the case examined in the introduction of this Article, illustrates how the required criteria of Section 1292(b) can be satisfied.

a. A Controlling Question of Law

A controlling question of law is one that deeply affects the ongoing process of litigation.[103] If resolution of the question will considerably shorten the time, effort, and expense of fully litigating the case, the question is controlling.[104] Generally, if the viability of a claim rests upon the court's determination of a question of law, the question is controlling and the first criterion of Section 1292(b) is satisfied.[105]

This criterion was easily satisfied in *April Marketing*. In that case, both parties questioned the statutory construction of the PMPA.[106] The district court rejected Diamond Shamrock's argument that the PMPA does not permit recovery for constructive ter-

---

101. *See* 28 U.S.C. § 1292(b) (1994) (stating that the appellate court has discretion to accept or reject an appeal); *see also* Michael Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts,* 58 GEO. WASH. L. REV. 1165, 1195 (1990) (noting that an appellate court may accept or reject appeal).

102. *See Coopers & Lybrand*, 437 U.S. at 475 (holding that the court may deny petition for permission to review for any reason, including docket congestion).

103. *See In re* Cement Antitrust Litig. (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir.), *appeal dism'd*, 459 U.S. 961 (1982); R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776, 778 (5th Cir. 1963); *see also* Tucker v. Scott, 66 F.3d 1418, 1419 (5th Cir. 1995) (stating that the question of scope of work to be performed by appointed counsel is a controlling question of law).

104. *See* Joe Grasso & Son, Inc. v. United States, 42 F.R.D. 329, 334 (S.D. Tex. 1966) (noting that "[a] useless trial is a luxury none can afford." (quoting United States v. Egbert, 347 F.2d 987, 988 (5th Cir. 1965), *aff'd*, 380 F.2d 749, 752 (5th Cir. 1967))).

105. *See R.J. Reynolds Tobacco Co.*, 314 F.2d at 778 (affirming certification because "[i]f the contentions of the tobacco company are correct, the case should be dismissed and judgment granted to the defendant as a matter of law. 'It is obvious that [such] a denial may settle a great deal.'"); *see also* Adkinson v. International Harvester Co., 975 F.2d 208, 212 (5th Cir. 1992) (affirming propriety of trial court certification of question of application of Mississippi law regarding whether contribution and indemnity apply to claims for breach of implied warranty of merchantability.)

106. *See* April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28, 30 (5th Cir. 1997) (noting how the plaintiff argued that "a franchisor's actions, even if compliant with the terms of the franchise, can be considered a PMPA termination because franchises are contracts of adhesion," which the court rejected).

mination and denied its motion for partial summary judgment.[107] Diamond Shamrock then sought to certify the court's interlocutory order for immediate review,[108] arguing that the determination of whether a claim exists as a matter of law is a controlling question of law.[109] Diamond Shamrock further explained that "if the district court had ruled that the PMPA does not provide for a constructive termination cause of action, the district court would have granted Diamond Shamrock's motion for partial summary judgment."[110] Because granting the motion for summary judgment would have disposed of the plaintiff's central claim (*i.e.*, the claim for constructive termination),[111] the district court and the Fifth Circuit were convinced that the constructive termination question was a controlling question of law.[112]

---

107. *See id.* (stating that "[t]he district court denied the motion and certified its order for interlocutory appeal [to the Fifth Circuit]"). Diamond Shamrock also asserted a second legal question: the application of the continuing violation doctrine to the PMPA statute of limitations. *See* Appellant's Petition for Permission to Appeal at 4, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3-91-0101) (on file with the *St. Mary's Law Journal*); *see also* Agreed Motion to Certify Order Under 28 U.S.C. § 1292(b) at 6-8, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3-91-0101) (on file with the *St. Mary's Law Journal*). Both the district court and the Fifth Circuit granted permission to appeal this issue as well. However, because the Fifth Circuit decided the construction termination questions against the plaintiff, crediting Diamond Shamrock's interpretation of the PMPA, the Fifth Circuit was not required—and chose not—to consider the continuing violation doctrine question. *See April Mktg.*, 103 F.3d at 31.

108. *See* Agreed Motion to Certify Order Under 28 U.S.C. § 1292(b) at 9, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3-91-0101) (on file with the *St. Mary's Law Journal*).

109. *See* Appellant's Petition for Permission to Appeal at 5, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3-91-0101) (on file with the *St. Mary's Law Journal*) (citing Lewis v. Intermedics Intraocular, Inc., 56 F.3d 703, 706 (5th Cir. 1995), the court concluded that whether federal law preempts a state law informed consent claim is a controlling question of law). In *Bailey v. Johnson*, the court recognized that the question of whether a private cause of action exists under the Food, Drug, and Cosmetic Act is a controlling question of law. *See* Bailey v. Johnson, 48 F.3d 965, 966 (6th Cir. 1995). In *Tokio Marine & Fire Ins. Co.*, the court noted that the question of the existence of a cause of action against a common carrier under 49 U.S.C. § 11707 is a controlling question of law. *See* Tokio Marine & Fire Ins. Co., 996 F.2d 874, 875 (7th Cir. 1992).

110. Petition for Permission to Appeal at 5, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3-91-0101) (on file with the *St. Mary's Law Journal*).

111. *See id.* at 6.

112. *See* April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28, 29 (5th Cir. 1997); United States District Court Order at 6-7, April Mktg. & Dis-

b. Ground for Substantial Disagreement Regarding a Question of Law

Under the second criteria of Section 1292(b), there must be substantial disagreement regarding the question that is the subject of the district court's order.[113] Substantial grounds for disagreement exist when the question presented to the court is novel or difficult, when controlling circuit law is doubtful, when controlling circuit law is in disagreement with other courts of appeals, and when there simply is little authority upon which the district court can rely.[114] Like the first criterion, this second requirement was easily satisfied in *April Marketing*.

When Diamond Shamrock sought certification, only one unpublished Fifth Circuit case addressed the existence of a constructive termination cause of action under the PMPA.[115] In addition, case law from other circuits provided little direction.[116] Because of this

---

trib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*) (noting that the constructive termination question was a controlling question of law, because it involved the "threshold matter of the right to sue").

113. *See* 28 U.S.C. § 1292(b) (1994) (requiring the district court to set forth in writing that a difference of opinion exists as to a controlling question of law, thus giving the appellate court jurisdiction over an otherwise unappealable order).

114. *See* Ducre v. Mine Safety Appliances, 573 F. Supp. 388, 395–96 (E.D. La. 1983) (finding substantial ground for difference of opinion as the highest court of Louisiana had not provided definitive answers or guidance as to the issue before the court); *see also* Oyster v. Johns-Manville Corp., 568 F. Supp. 83, 86 (E.D. Pa. 1983) (explaining that certification also requires a "substantial ground for disagreement . . . by demonstrating conflicting and contradictory opinions of courts that have ruled on the issue"), *appeal dism'd*, 770 F.2d 1073 (3d Cir. 1985); Gunter v. Hutcheson, 492 F. Supp. 546, 565 (N.D. Ga. 1980) (noting that if a certified question deals with an issue of first impression, the certification is proper); *cf.* Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1529 n.1 (10th Cir. 1993) (noting that Section 1292(b) permits interlocutory appeals from orders involving "a controlling question of law as to which there is substantial ground for difference of opinion . . .[,]" and granting the petition to bring the appeal).

115. *See* Appellant's Petition for Permission to Appeal at 6, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*) (citing McGinnis v. Star Enter., No. 93–1234, 8 F.3d 20 (5th Cir. Dec. 21, 1993) (not designated for publication)). In *McGinnis*, the Fifth Circuit reasoned that because the PMPA is a derogation of common law rights, it must be strictly construed. *See April Mktg.*, 103 F.3d at 29–30 n.2 (discussing *McGinnis*, No. 93–1234, 8 F.3d 20 (5th Cir. Dec. 21, 1993) (not designated for publication)). "The plain meaning of the statute does not provide for 'constructive termination . . . . '" *Id.* As such, the court held that no cause of action under the PMPA existed. *See id.*

116. *See* Appellant's Petition for Permission to Appeal at 6, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No.

lack of case law, both the district court and Fifth Circuit found that there were substantial grounds for disagreement concerning the proper statutory construction of the PMPA.[117]

c. Immediate Appeal Will Considerably Advance the Final Resolution of the Lawsuit

The order certifying the case for immediate appeal must contain a finding that the appeal will facilitate final resolution of the case.[118] Generally, a district court will make this finding when resolution of the legal question dramatically affects recovery in a lawsuit.[119]

In *April Marketing*, Diamond Shamrock focused on the burden to the court and the litigants of trying a case fraught with factual issues in the face of a dispositive legal issue.[120] Diamond Shamrock explained that trying the case would require approximately three weeks and the presentation of a large number of witnesses and a mountain of documentary evidence.[121] To adequately try the constructive termination claim, Diamond Shamrock noted that both litigants would inevitably need to bring before the district court numerous legal complexities, which would not be presented if the lawsuit involved only the state-law claims.[122] Thus, Diamond

---

3–91–0101) (on file with the *St. Mary's Law Journal*) (noting cases from other circuits which mentioned constructive termination, but were unhelpful). In *Little Oil Co. v. Atlantic Richfield Co.*, 852 F.2d 441, 445 (9th Cir. 1988), the court expressly declined to decide whether PMPA provides for a constructive termination cause of action. However, in both *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 362 (4th Cir. 1986), and *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989), the court recognized a constructive termination claim *in the context of an invalid assignment* of a franchise relationship.

117. *See* United States District Court Order at 7–8, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*) (noting that substantial ground for disagreement exists because there is little or no case law addressing the issue at hand).

118. *See* 28 U.S.C. § 1292(b) (1994) (providing that the order must materially advance termination of the litigation).

119. *Cf.* Ducre v. Mine Safety Appliances, 573 F. Supp. 388, 397 (E.D. La. 1983) ("[c]onsidering the magnitude and extent of the unresolved legal issues, it requires no judicial Nostradamus to predict that appeals are bound to follow.").

120. *See* Agreed Motion to Certify Order Under 28 U.S.C. § 1292(b) at 8–9, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*) (outlining defendant's argument and noting the burden to the court).

121. *See id.* at 8.

122. *See id.*

Shamrock emphasized that trying the constructive termination claim could result in a profound waste of resources.[123]

Diamond Shamrock also stressed the pristine condition of the permissive appeal and the potential value of interlocutory review on the final resolution of the case.[124] Diamond Shamrock asserted that at this particular phase in the litigation process, the constructive termination issue could be resolved by the Fifth Circuit with limited factual inquiry.[125] In addition, Diamond Shamrock described the strong possibility that appellate resolution of the constructive termination would encourage a settlement.[126] Finally, Diamond Shamrock believed that such resolution would provide firm guidance for the court and the parties and would undoubtedly assist the parties in their settlement analysis, possibly eliminating the need for a trial.[127]

The district court and the Fifth Circuit found these arguments compelling, and both courts held that Diamond Shamrock had satisfied the third requirement to qualify the district court's order to immediate interlocutory review.[128] With all three elements satisfied, the district court granted the motion to certify under 28 U.S.C. § 1292(b),[129] and the Fifth Circuit granted the petition for permission to appeal.[130]

---

123. *See id.*

124. *See id.* at 3, 9 (noting that the issue was one of first impression as the Fifth Circuit had only addressed the issue in an unpublished opinion, and emphasizing that settlement between the parties was unlikely until the issue was decided by appellate review).

125. *See* Agreed Motion to Certify Order Under 28 U.S.C. § 1292(b) at 8, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*).

126. *See id.* at 9 (noting that the parties are unlikely to settle until the issue is resolved on appeal).

127. *See id.*

128. *See* United States District Court Order at 8–9, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*) (finding that immediate appeal will speed final resolution of the litigation).

129. *See* United District Court Order at 10, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*) (granting the motion to certify).

130. *See* Fifth Circuit Order Granting Petition for Permission to Appeal, April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) (No. 3–91–0101) (on file with the *St. Mary's Law Journal*) (granting the petition for permission to appeal).

3. *Recapping Federal Permissive Appeal*

Certainly, the path to permissive appeal under Section 1292(b) is narrow, and the hurdles to satisfy the required elements are significant.[131] Yet, the path exists, and works. Litigants can obtain interlocutory review of orders denying summary judgment on compelling questions of law — questions that could be dispositive of the entire case and enable the litigants and the court to avoid unnecessary discovery and trial. The federal system's "shortcut" certainly has the potential to ameriolate the injustice that may result from a formalistic application of the final-judgment rule.[132] Thus, it is no surprise that several states have followed the federal system's lead by adopting similar procedures to allow permissive appeals.[133]

---

131. *See* Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing": A Final Judgment Through Voluntary Dismissal of Peripheral Claims,* 48 MERCER L. REV. 979, 994 (1997) (listing the requirements to qualify for permissive appeal); John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review,* 44 DUKE L.J. 200, 219 nn.133–35 (1994) (noting that between 1985 and 1989, district courts certified 1,411 appeals and only 501 were accepted for review by the appellate courts).

132. *See* Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing": A Final Judgment Through Voluntary Dismissal of Peripheral Claims,* 48 MERCER L. REV. 979, 994 (1997) (explaining that "[i]nterlocutory appeals prevent injustice . . . "and "[w]ithout such avenue of appeal, certain interlocutory orders are effectively unreversible from a final decision.").

133. Many states have followed the federal system—either in whole or in part—to permit interlocutory appeal of orders that address controlling questions of law. *See, e.g.,* ALA. R. APP. P. 5 (allowing for permissive appeal if, "in the judge's opinion, the interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion, that an immediate appeal from the order would materially advance the ultimate termination of the litigation and that the appeal would avoid protracted and expensive litigation"); ALASKA R. APP. P. 610(b) (permitting interlocutory appeal "when the sound policy behind the general rule of requiring appeals to be taken only from final judgments is outweighed because . . . the order or decision involves a controlling question of law on which there is a substantial ground for difference of opinion, and an immediate review of the order may materially advance the termination of the proceedings in the other forum"); D.C. CODE ANN. § 11–721(d) (1981) (authorizing permissive appeal when "a judge . . [is] of the opinion that the ruling or order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from the ruling or order may materially advance the ultimate termination of the litigation or case"); IDAHO R. APP. P. 12 (stating the criteria for permission to appeal as any order "which involves a controlling question of law as to which there is substantial grounds for differences of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation"); ILL. S. CT. R. 308(a) (allowing interlocutory appeal by permission "[w]hen the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate

appeal from the order may materially advance the ultimate termination of the litigation"); KAN. STAT. ANN. § 60–2102(b) (1996) (authorizing interlocutory appeal when a district judge "is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation"); MISS. R. APP. P. 5(a) (noting than "[a]n appeal from an interlocutory order may be sought if the order grants or denies certification by the trial court that a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may: (1) [m]aterially advance the termination of the litigation and avoid exceptional expense to the parties; or (2) [p]rotect a party from substantial and irreparable injury; or (3) [r]esolve an issue of general importance in the administration of justice."); N.M. STAT. ANN. § 39–3–4(A) (Michie 1978) (permitting an interlocutory appeal "when the district judge makes an interlocutory order or decision which does not practically dispose of the merits of the action and [the judge] believes the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal form the order or decision may materially advance the ultimate termination of the litigation"); N.Y. C.P.L.R. 5701(a)(2) (McKinney 1995) (enumerating that when a motion was made upon notice and there is a controlling question of law an appeal may be taken to an appellate court); PA. CONS. STAT. ANN. § 702(b) (West 1998) (allowing interlocutory appeals by permission "[w]hen a court . . . [is] of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter"); VT. R. APP. P. 5(b) (permitting appeal of interlocutory orders "if the judge finds that the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation"); *see also* American Legion Post No. 57 v. Leahey, 681 So. 2d 1337, 1338 (Ala. 1996) (stating that pursuant to ALA. R. APP. P. 5, the order involved a controlling question of law and an immediate appeal would be permitted); Johnson v. Alaska, 577 P.2d 706, 709 n.7 (Alaska 1978) (noting that Alaska Appellate Rules 23 and 24, now Rule 610, allow for review of interlocutory orders where there are "important or substantial" reasons such as an order or decision involving a controlling question of law); Asch v. Taveres, 467 A.2d 976, 977 n.2 (D.C. 1983) (seeking an interlocutory appeal as permitted under D.C. CODE § 11–721(c) (1981), where "in the words of the statute" a controlling question of law is included); Kindred v. Amalgamated Sugar Co., 795 P.2d 309, 311 (Idaho 1990) (appealing under I.A.R. 12 is permitted when the order involves a question of law); Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1024 (Ill. 1991) (finding the motion and subsequent Illinois ruling involved a question of law where there were grounds for a difference of opinion and an immediate appeal "would materially advance the ultimate termination of [the] case"); Banco Mortgage Co. v. Steil, 351 N.W.2d 784, 786–87 (Iowa 1984) (noting that interlocutory appeals are usually granted when the issue involves a controlling question of law); State *ex rel.* State Bd. of Healing Arts v. Beyrle, 941 P.2d 371, 372 (Kan. 1997) (requiring under K.S.A. 60–2102(b) that such interlocutory order involve a controlling question of law); Laverdiere v. Marden, 333 A.2d 701, 702 (Me. 1975) (calling ME. R. CIV. P. 72(c) "a device" for interlocutory appeal of important or doubtful questions); McDaniel v. Ritter, 556 So. 2d 303, 306 (Miss. 1989) (stating interlocutory appeals which are governed under MISS. S. CT. R. 5 may be sought if there is a difference of opinion on a question of law); Bogle Farms, Inc. v. Baca, 925 P.2d 1184, 1186 (N.M. 1996) (applying for an interlocutory appeal of a collateral estoppel issue which involved a controlling question of law); N.Y. Diversified Properties, Inc. v. City of Springfield, 738 P.2d 1010, 1010 n.2 (Or. Ct. App. 1987) (denying defendant's motion for summary judgment but

B. *The Permissive Appeal Under State Law*

States like New York, Massachusetts, and Alaska have adopted the broadest rules permitting interlocutory appeal.[134] In fact, a New York litigant can appeal almost any order that involves some part of the merits of the case or that affects a substantial right.[135] These two categories serve as "enormous magnets," attracting almost all interlocutory orders into the appellate system.[136] In New York, there are only three types of orders that are not appealable

---

allowing plaintiff's interlocutory appeal as there were substantial grounds involving a controlling question of law); P.R. Hoffman Materials v. Workmen's Compensation Appeal Bd., 694 A.2d 358, 360 (Pa. Commw. Ct. 1997) (making an interlocutory order under 42 PA. C.S. § 702(b) within the jurisdiction of the court where such order involves a controlling question of law); County Amusement Co. v. County Bd. of Assessment Appeals, 692 A.2d 300, 302 n.7 (Pa. Commw. Ct. 1997) (certifying the issue as involving a controlling question of law); White Current Corp. v. Vermont Elec. Coop., 609 A.2d 222, 223 (Vt. 1992) (granting leave to file an interlocutory appeal under V.R.A.P. 5(b) upon the finding of controlling questions of law).

134. *See* N.Y. C.P.L.R. 5701(a)(1) (McKinney 1995) (permitting review of virtually any interlocutory order); MASS. GEN. LAWS ANN. ch. 231, § 118 (West 1997) (permitting appeals of interlocutory orders from superior, probate, housing and land courts); Johnson v. Alaska, 577 P.2d 706, 709 (Alaska 1978) (permitting appeal of many different kinds of interlocutory orders).

A party may appeal as a matter of right almost every interlocutory order in New York, including orders granting, refusing, continuing, or modifying a provisional remedy. *See* N.Y. C.P.L.R. 5701(a)(2)(i). Provisional remedies are attachment, preliminary injunction or temporary restraining order, receivership, and notice of pendency. *Cf.* N.Y. C.P.L.R. 6501 (McKinney 1980) (settling, granting, or refusing an application to resettle a transcript or statement on appeal); N.Y. C.P.L.R. 5701(a)(2)(ii) (granting or denying motions for new trial). *See id.* 5701(a)(2)(iii).

135. *See* N.Y. C.P.L.R. 5701(a)(2)(iv) & (v) (granting an appeal when the order "involves some part of the merits" or "affects a substantial right"). As a party may appeal almost any civil order, New York is arguably the most liberal jurisdiction in the United States. *See* La Buy v. Howes Leather Co., 352 U.S. 249 267–68 (1957) (Brennan, J., dissenting). The Court indicates in *La Buy* that

> [t]he federal policy of limited interlocutory review stresses the inconvenience and expense of piecemeal reviews and the strong public interest in favor of a single and complete trial with a single and complete review. The other view, of which the New York practice of allowing interlocutory review as of right from most orders is the *extreme example*, perceives danger of possible injustice in individual cases from the denial of any appellate review until after judgment at the trial.

Id. (emphasis added).

136. *See* David Scheffel, Comment, *Interlocutory Appeals in New York—Time Has Come for a More Efficient Approach*, 16 PACE L. REV. 607, 616 (1996) (noting that New York's interlocutory appeal provision four, which allows appeals when orders "involve some part of the merits," and provision five, which allows appeals when orders "affect a substantial right," are "enormous magnets" for other interlocutory orders) (quoting DAVID D. SIEGAL, NEW YORK PRACTICE 816 (2d ed. 1991)).

as a matter of right, but which require permission for the litigant to obtain interlocutory review — orders in a proceeding challenging the actions of an agency or office state government, orders regarding pleading a more definite statement, and orders requiring or refusing a request to strike prejudicial matter from a pleading.[137]

Massachusetts has also adopted a very broad interlocutory appeals procedure.[138] In that state, all interlocutory orders from superior, probate, housing, and land courts are immediately appealable.[139] However, the appeal is reviewed by only a single justice — one of the judges of the Massachusetts appellate courts.[140]

In Alaska, Appellate Rule 610 establishes procedures for interlocutory appeals.[141] However, to fall under this rule, the trial court must determine that a sound policy and substantial reasons to deviate from the final-judgment rule exist.[142] Under Appellate Rule 601(b)(2), to obtain interlocutory review, the order the party seeks to subject to appellate scrutiny must be a controlling question of law, there must be substantial differences of opinion regarding the question, and it must appear that immediate review may materially facilitate final resolution of the case.[143] Appellate Rule 601(b)(1) incorporates a hardship analysis.[144] Under this rule, an interlocutory appeal may be permitted if "postponement of review until normal appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors."[145]

Appellate Rule 610 focuses more upon the social utility of early review and the infirmity of the trial court's interlocutory order.[146] Under Appellate Rule 610, interlocutory appeal is permitted when the order or decision is so substantial and important that deviating

---

137. *See id.* at 617–18.

138. *See* MASS. GEN. LAWS ANN. ch. 231, § 118 (West. Supp. 1997).

139. *See id.*

140. *See id.*

141. *See* ALASKA APP. R. 610.

142. *See* ALASKA APP. R. 610(b).

143. *See* ALASKA APP. R. 610(b)(2) (listing the prerequisites to obtain an interlocutory appeal in Alaska).

144. *See* ALASKA APP. R. 610(b)(1).

145. *Id.*

146. *See* ALASKA APP. R. 610(b) (noting that review will be granted only when the sound policy behind the general rule is outweighed).

from the final-judgment rule is justified; the order or decision is of such importance to the petitioner that justice demands interlocutory review; and the trial court's order or decision is so far departed from judicial proceeding that the appellate court feels compelled to provide the trial court with supervision and review.[147]

Mississippi has adopted a permissive interlocutory appeal procedure that is less strict than Section 1292(b).[148] Under Rule 5 of the Mississippi Supreme Court Rules, a litigant can seek appellate review of an order addressing a controlling issue of law if the order grants or denies a request that the order be certified for immediate appellate review.[149] In other words, if the party sought permission from the trial court to take an interlocutory order addressing a controlling question of law, the party can petition the appellate court for review. The key is to first seek permission to appeal from the trial court. Mississippi law does not require that the litigant receive that permission.[150] The Advisory Committee Comment to Rule 5 explains that "the rule contemplates that either the trial court will grant an interlocutory appeal subject to the appellate review of that decision, . . . or the [Mississippi] Supreme Court will grant the appeal itself."[151]

The scope of the appeal is limited. The litigant can seek review of only those issues raised in its petition for permission to appeal filed with the trial court.[152] However, once the appellate court accepts the appeal, the appellate court has the authority over any issue if it is "in the interest[s] of justice and economy."[153]

Oregon follows the same permissive appeal procedure as the federal system, but the language of Oregon's permissive appeal

147. *See* ALASKA APP. R. 610(b)(2) & (3). Alaska has also adopted its own version of Federal Rule of Civil Procedure 54(b), granting trial courts the authority to make final an order "determining at least one claim or the entire interest of at least one party" when the trial court also finds that there is no just reason for delay. ALASKA CIV. R. 54(b).

148. McDaniel v. Ritter, 556 So. 2d 303, 306 (Miss. 1989) (noting that regardless of whether the trial court granted a requested interlocutory order, under Mississippi Supreme Court Rule 5, the Mississippi Supreme Court may decide to grant an interlocutory appeal).

149. *See* MISS. SUPREME CT. R. 5.

150. *See id.*

151. MISS. SUPREME CT. R. 5. advisory committee's notes.

152. *See* McDaniel v. Ritter, 556 So. 2d 303, 306 (Miss. 1989) (stating that the scope of appeal "is ordinarily and practically restricted only by the contents of the petition . . . not the order of the trial court").

153. *Id.*

statute is more liberal than its federal counterpart. Orders denying summary judgment are appealable if the trial court certifies that the issue addressed by the summary judgment is a controlling issue of law *or* fact.[154] Thus, while Section 1292(b) limits its application to controlling questions of law, Oregon allows permissive appeals of controlling questions of both law *and* fact.[155]

While several states have broadened permissive interlocutory appeals beyond the scheme in Section 1292(b), many of the states that have adopted a permissive appeal procedure follow the federal standard.[156] For example, Iowa enacted an appellate rule ("Rule 2(a)") that mirrors Section 1292(b).[157] However, when the Iowa Supreme Court first applied the permissive appeal rule, its application was so restrictive that the rule was all but defunct.[158] Initially, the Iowa Supreme Court interpreted narrowly Rule 2(a), holding

---

154. *See* Diversified Properties, Inc. v. City of Springfield, 738 P.2d 1010, 1010–11 n.2 (Or. Ct. App. 1987) (stating that when a summary judgment is denied, the order denying summary judgment is appealable if the trial court certifies that the summary judgment issue is a controlling issue of law or fact).

155. *Compare* 28 U.S.C. § 1292(b) (1994) (permitting appeals of interlocutory orders that involve a controlling question of law), *with Diversified Properties*, 738 P.2d at 1010–11 n.2 (indicating that an interlocutory appeal is proper in both questions of law and fact).

156. *See* State *ex rel.* State Bd. of Healing Arts v. Beyrle, 941 P.2d 371, 372 (Kan. 1997) (noting that litigants can seek permission to pursue an interlocutory appeal if the interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" (quoting KAN. STAT. ANN. § 60–2102(b) (1994))). Once the litigant obtains permission from the trial court, he must obtain permission from the court of appeals to accept the interlocutory appeal. *See* KAN. SUP. CT. R. 4.01; *see also* Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1023 (Ill. 1991) (establishing a procedure to permit an interlocutory appeal of an order addressing a controlling question of law). In Illinois, from the petitioner's perspective, the scope of the appeal is limited; however, once the appeal is accepted by the appellate court, the court will review the entire case. *See* Robbins v. Professional Constr. Co., 380 N.E.2d 786, 789 (Ill. 1978); *see also* Laverdiere v. Marden, 333 A.2d 701, 702 (Me. 1975) (stating that under Maine Rule of Civil Procedure 72(c), a party can appeal interlocutory orders when the order addresses a controlling issue of law). The Maine Supreme Judicial Court succinctly explained the policy behind Rule 72(c): "We are aware that interlocutory appeals under Rule 72(c) can serve the cause of justice by mitigating the harshness of the final judgment rule and by sparing the parties arduous trial litigation when important questions of law can be determined by the Law Court." *Id.* at 702.

157. Under Iowa Rule of Appellate Procedure 2(a), a party can make application for permission to appeal in advance of a final-judgment. *See* IOWA R. APP. P. 2(a).

158. *See* Banco Mortgage Co. v. Steil, 351 N.W.2d 784, 786–87 (Iowa 1984) (noting that the application of the permissive appeal rule produced fewer appeals and was very restrictive).

that a litigant could not obtain interlocutory appellate review of those rulings that would eventually be incorporated in the final judgment and subject to appellate review.[159] However, in *Banco Mortgage Co. v. Steil,*[160] the Iowa Supreme Court broadened its narrow application of Rule 2(a), referring to its prior ruling as "unduly rigid."[161] The court reasoned,

> In exceptional situations, the interest of sound and efficient judicial administration can best be served by allowing interlocutory orders to be appealed in advance of final judgment even if such orders will ultimately be reviewable on appeal from the final judgment in the case. These situations will usually involve a pretrial determination of a controlling issue of law as to which there is substantial basis for a difference of opinion and immediate appellate resolution of the issue will materially advance the progress of the litigation.[162]

In this manner, the Iowa Supreme Court expressly reformed its application of permissive appeal procedure to follow the federal standard in Section 1292(b).[163]

Several states adopted the federal system's concept of permitting appeals but dramatically limited its application. For example, Connecticut adopted a permissive appeal procedure but decided not to mirror Section 1292(b).[164] Under Title 52, Section 52–265a of the Connecticut General Statutes, a litigant can appeal an interlocutory order that involves an issue of "substantial public interest" when delaying review until after final judgment may cause "substantial injustice."[165] This permissive appeal is extremely limited, making permissive appeals rare in Connecticut.[166]

Maryland has also adopted a very narrow permissive interlocutory appeal statute.[167] The Maryland rule has more in common

---

159. *See* Lerdall Constr. Co. v. City of Ossian, 318 N.W.2d 172, 174–76 (Iowa 1982) (determining whether an intermediate order is valid based upon Dorman v. Credit Reference & Reporting Co., 241 N.W. 436, 438 (1932)).

160. 351 N.W.2d 784 (Iowa 1984).

161. *See Banco Mortgage Co.*, 351 N.W.2d at 787.

162. *Id.*

163. *See id.*

164. *See* CONN. GEN. STAT. § 52–265a (1991); Melia v. Hartford Fire Ins. Co., 520 A.2d 605, 607 (Conn. 1987).

165. *See* CONN. GEN. STAT. § 52–265a (1991).

166. *See Melia*, 520 A.2d at 607–08 (dismissing appeals that addressed privacy questions and attorney-client communications).

167. *See* MD. CODE ANN. RULES 2–602 (1998).

with Federal Rule of Civil Procedure 54(b) than Section 1292(b).[168] The only interlocutory orders that are eligible for permissive appeal are those that possess characteristics of finality.[169] Furthermore, Maryland courts have admonished trial judges for certifying orders for final judgment except in extraordinary circumstances or to prevent "sufficient hardship or unfairness."[170]

C. *The Wisconsin-ABA Plan*

The Commission on Standards of Judicial Administration of the American Bar Association (the "Commission") drafted Standards of Judicial Administration for Appellate Courts (the "ABA Plan"), which Wisconsin adopted in 1978.[171] Under the ABA Plan, litigants have no right to appeal in the absence of a final judgment.[172] The appeal of interlocutory orders is solely within the discretion of the appellate courts.[173] The ABA Plan allows for permissive appeal "when the courts finds that immediate review would (1)

---

168. *See* MD. CODE ANN. RULES 2–602 (1998). Rule 2–602 states:

(a) *Generally.* Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, crossclaim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:

(1) is not a final judgment;

(2) does not terminate the action as to any of the claims or any of the parties; and

(3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

(b) *When Allowed.* If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:

(1) as to one or more but fewer than all of the claims or parties; or

(2) . . . for some but less than all of the amount requested in a claim seeking money relief only.

Id.

169. *See* Shofer v. Stuart Hack Co., 669 A.2d 201, 205 (Md. Ct. Spec. App. 1996) (requiring for finality, that an order be dispositive of an entire claim).

170. Planning Bd. v. Mortimer, 530 A.2d 1237, 1241–42 (Md. 1987); *Shofer*, 669 A.2d at 205.

171. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 776 (1993) (citing ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS, § 3.12, at 25 (1977)).

172. *See id.*; John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 214–15 (1994) (explaining the ABA approach to discretionary interlocutory appeals).

173. *See* Law v. National Collegiate Athletic Assoc., 134 F.3d 1025, 1028 (10th Cir. 1998) (stating that appellate courts have jurisdiction over interlocutory appeals); ABA

'[m]aterially advance the termination of the litigation or clarify further proceedings therein,' (2) '[p]rotect a party from substantial and irreparable injury;' or (3) '[c]larify an issue of general importance in the administration of justice.'"[174]

Commentators have criticized the ABA Plan for interjecting uncertainty into the appellate process as the decision whether to permit interlocutory review will be made on a case-by-case basis.[175] Moreover, critics have predicted that a wave of interlocutory appeals will flood the appellate court dockets.[176] Proponents of the ABA Plan counter by pointing to Wisconsin, which adopted the ABA Plan,[177] noting that Wisconsin appellate courts have not been deluged with interlocutory appeals.[178] Furthermore, those who advocated for the ABA Plan argue that such a plan would enable appellate courts to better manage their dockets and would allow them to avoid the sometimes harsh and unfair effect of the final-judgment rule.[179]

COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS, § 3.12, at 25 (1977).

174. Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 752 (1993) (citing ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS, § 3.13, at 25 (1977)).

175. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 777 (1993) (noting that the opportunity for discretionary review would "create judicial exceptions to the final judgment rule" (citing ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS, § 3.13, at 25 (1977))).

176. *See id.* (predicting that appellate courts "would be inundated with applications for leave to appeal interlocutory orders, thus increasing rather than decreasing their workloads").

177. *See id.* (noting the successful adoption of the ABA Plan by Wisconsin in 1978).

178. *See id.* (reporting that Wisconsin's adoption of and strict adherence to the ABA Plan has allowed appellate courts to regulate its case load, thus promoting greater judicial efficiency).

179. *See* Donald I. Gitlin, Note, *Special Proceedings in Ohio: What is the Ohio Supreme Court Doing with the Final Judgment Rule?*, 41 CLEV. ST. L. REV. 537, 562 (1993) (indicating that critics advocate for the adoption of the ABA plan because it allows courts to manage their dockets and "provides built-in flexibility to accommodate the various rationales that in the past have led to judicial exceptions to the final judgment rule").

IV. TOWARD PERMISSIVE APPEAL IN TEXAS

Although Texas has not adopted a permissive appeal similar to Section 1292(b),[180] Texas appellate courts are charged with considering appeals of certain interlocutory orders on controlling questions of law.[181] Because Texas recognizes the importance of allowing certain interlocutory appeals, Texas should follow the federal system and its sister states by adopting a permissive appeal statute.

The case of *Urban v. Canada*[182] illustrates the beneficial use of interlocutory appeals and how controlling questions of law may be settled in an efficient and effective manner in Texas.[183] In *Urban*, Herlinda Canada sued her supervisors at the San Antonio State

---

180. *See* Jack B. Anglin Co., Inc. v. Tipps, 842 S.W.2d 266, 272 n.12 (Tex. 1992) (recognizing that no statute comparable to 28 U.S.C. § 1292(b) exists in Texas).

In 1933, the Texas Legislature enacted a statute that permitted certification from the district court when (1) the constitutionality of a law or order was attacked and (2) resolution of the constitutional question was material to the merits of the case. *See* Morrow v. Corbin, 62 S.W.2d 641, 643 (Tex. 1933) (discussing TEX. CIV. STAT. ANN. art. 1851a ("Article 1851a")). Unlike permissive appeal under Section 1292(b), and other states' laws, Article 1851a permitted certification of questions before trial on the merits — before the legal issue was even considered by the trial court. *See id.* at 643–44. Thus, Article 1851a effectively permitted the trial courts to avoid their nondelegable duty to decide questions of law. *See id.* at 645. Shortly after the legislature enacted Article 1851a, the Texas Supreme Court held Article 1851a unconstitutional because the statute attempted to create appellate jurisdiction without a trial court judgment, order, or decree. *See id.* at 651. The supreme court also found Article 1851a unconstitutional because it called for rendition of advisory opinions. *See id.* The permissive appeal suggested by this Article, however, does not similarly contravene the Texas Constitution. A litigant cannot seek permissive appeal until after the trial court considers and rules on a motion for summary judgment or some other dispositive pleading (like special exceptions). Thus, an order had been entered and the certified question will not seek merely an advisory opinion.

181. *See* Urban v. Canada, 963 S.W.2d 805, 809 n.1 (Tex. App.—San Antonio 1998, no pet. h.) (illustrating that appellate courts consider controlling questions of law when they consider appeals pursuant to Section 51.014(a)(5)).

182. 963 S.W.2d 805 (Tex. App.—San Antonio 1998, no pet. h.).

183. *See Urban*, 963 S.W.2d at 809 n.1 (basing the court's jurisdiction on TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5)). Under Section 51.014, a governmental employee can appeal an order of a trial court denying his motion for summary judgment based on the issue of qualified immunity. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon 1997 & Supp. 1998). The question of whether a governmental employee is entitled to qualified immunity is primarily a question of law. *See Urban*, 963 S.W.2d at 807 (stating that affirmative defenses, like qualified immunity, must be conclusively proved as a matter of law). If the employee is found to possess qualified immunity for his actions, that legal finding is dispositive of the entire case against the governmental employee. *See id.* at 808. Therefore, the task of deciding a controlling question of law at an interlocutory phase of a lawsuit is not an uncommon task for Texas appellate courts.

Hospital (the "Hospital"), Rosie Urban and Ernest E. Marshall, for libel.[184] Canada based her claims on Section 73.001 of the Texas Civil Practices and Remedies Code.[185] Canada also named the Hospital as a defendant, but failed to plead the Texas Tort Claims Act (TTCA).[186] The Hospital answered, asserting the affirmative defense of sovereign immunity, and specially excepting to Canada's failure to plead the TTCA.[187] Canada then moved to dismiss the Hospital with prejudice, and the court granted the motion.[188]

The individual defendants, Urban and Marshall, moved for summary judgment, arguing that because the claims against the Hospital had been resolved, Section 101.106 of the Texas Civil Practices and Remedies Code ("Section 101.106") barred Canada from recovering against them.[189] Canada argued that because she had never pleaded the TTCA, Section 101.106 did not apply.[190] The trial court agreed and denied Urban and Marshall's motion for summary judgment; therefore, Urban and Marshall sought appellate review of the interlocutory order under Section 51.014.[191]

The question presented by Urban and Marshall's appeal was purely legal: Does Section 101.106 apply to bar claims against a governmental employee when the plaintiff does not specifically plead a claim under the TTCA against the governmental employer?[192] This issue was subject to interlocutory review under Section 51.014.[193] Therefore, the Fourth Court of Appeals in San Antonio reviewed the pristine legal issue and reversed the trial

---

184. *See Urban*, 963 S.W.2d at 806–09.

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.*

189. *See* Urban v. Canada, 963 S.W.2d 805, 807 (Tex. App.—San Antonio 1998, no pet. h.).

190. *See id.*

191. *See id.*

192. *See id.* (stating that the question for the court was "whether a plaintiff bars her own claims against government employees when she dismisses the government from her lawsuit").

193. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon 1997 & Supp. 1998).

court's order denying Urban and Marshall's motion for summary judgment.[194]

The *Urban* case illustrates that Texas appellate courts are no strangers to appeals of interlocutory orders denying motions for summary judgment on dispositive and controlling questions of law. Texas appellate courts are certainly adept at reviewing the kinds of cases that will be presented by permissive review if Texas adopts a permissive appeal procedure.

Urban also illustrates the value of a permissive appeal. If an interlocutory appeal had not been available to Urban and Marshall, the litigants in *Urban* would have been forced to engage in full discovery to prepare for trial, expending a vast amount of time and money. Instead, the Urban litigants not only saved litigation costs for themselves, but judicial resources as well.

Finally, it is quite possible that the appellate review of the case after trial would have been significantly more complex than review upon interlocutory appeal. Instead of a limited record, the Fourth Court would have likely faced volumes of clerk's records and thousands of pages in trial transcripts. The *Urban* interlocutory appeal, however, required no transcript — no reporter's record. Furthermore, if *Urban* was tried and then appealed, the appellant would have undoubtedly presented much more than one pristine legal issue. The Fourth Court could have faced factual insufficiency, evidentiary, and charge error complaints. The *Urban* appeal would have been much more complex, requiring a significant amount of time to review. The interlocutory appeal saved all the players — the litigants, the attorneys, the trial court and the appellate court — from wasting limited resources.

A number of states and the federal government have adopted a limited procedure to review interlocutory orders that address controlling issues of law. The policy behind this widespread practice is apparent. In many instances, the final-judgment rule is not only unfair but counterproductive. To require parties to invest the time and expense to develop a case for trial when the case rests upon a legal issue is the antithesis of efficient case management in light of the costly written discovery, document production, depositions, and time-consuming discovery and evidentiary hearings a trial

194. *See* Urban v. Canada, 963 S.W.2d 805, 808 (Tex. App.—San Antonio 1998, no pet. h.).

would entail. Forcing litigants and the courts to try a case in order to resolve factual issues that have no bearing on the dispositive legal issue is waste — not justice.

Because appellate jurists face heavy dockets, peppered with complex legal issues, appellate jurists might initially grimace at the prospect of creating yet another interlocutory appeal. However, permissive appeals could actually lighten the appellate workload. As the comparison of *April Market* and *Barshop* and the interlocutory appeal in *Urban* illustrate, an interlocutory appeal of an order denying summary judgment regarding a dispositive controlling question of law presents the court with a pristine legal issue for analysis and a limited record to review. While trial may result in a verdict for the defendant, which the plaintiff might not appeal, there is just as great a chance that the defendant will not prevail. With a controlling legal issue preserved, an appeal would be all but guaranteed, and the appeal would raise many more issues than just the question of law. The appeal would likely raise factual insufficiency complaints, along with evidentiary and charge errors and would require reviews of a much larger clerk record and a trial transcript. In contrast, resolution by permissive appeal would require significantly less appellate resources than the appeal of the case after all the facts have been established once tried.

V. Conclusion

Texas should follow the federal government's and its sister states' lead by adopting a permissive appeal. Certainly, any permissive appeal statute should strike a balance between the efficiency of interlocutory review and the need to protect from a deluge of appeals. Still, permissive appeal will counteract the unfair consequences that may result from a formalistic application of the final-judgment rule. Clearly, this procedure would manage litigant, trial court and appellate court resources. It is time for permissive appeal in Texas.