

**INTERLOCUTORY APPEALS  
IN THE 21<sup>st</sup> CENTURY**

**RUSSELL S. POST  
Hogan Dubose & Townsend, L.L.P.  
4200 Bank of America Center  
700 Louisiana Street  
Houston, Texas 77002  
(713) 222-8800  
rpost@hdtlaw.com**

**STATE BAR OF TEXAS  
ADVANCED CIVIL APPELLATE PRACTICE COURSE  
September 12-13, 2002  
Austin, Texas  
CHAPTER 18  
Table of Contents**

# INTERLOCUTORY APPEALS IN THE 21st CENTURY

## INTRODUCTION

As a rule, interlocutory orders cannot be appealed until after a final judgment. Traditionally, interlocutory appeals represent a narrow exception to this general rule of finality. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001). But the right to pursue an interlocutory appeal has expanded significantly in the last decade, and the past year has witnessed important developments in this area.

In 2001, the Legislature amended the general interlocutory appeal statute, Section 51.014 of the Civil Practice and Remedies Code, in two ways. First, the Legislature enacted a new provision for “agreed interlocutory appeals,” permitting an immediate appeal of orders that would otherwise be unappealable. Second, the Legislature amended the statute to narrow the automatic stay provision, providing that trial is automatically stayed while an interlocutory appeal is pending only if certain requirements have been satisfied.

Part I of this paper addresses the text and the initial judicial interpretations of these amendments. In addition, it offers practical commentary on the use and interpretation of the new provisions.

Part II addresses recent developments in state interlocutory appeal practice, focusing on decisions since 2000 under the “new” appellate rules.

## I. RECENT AMENDMENTS TO THE INTERLOCUTORY APPEAL STATUTE

### A. Agreed Interlocutory Appeals

#### 1. The statutory text

Even if an interlocutory order would not otherwise be appealable, Section 51.014(d) of the Civil Practice and Remedies Code now permits an immediate appeal under certain circumstances. The new statute provides:

- (d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:

The new Texas statute was originally drafted as a duplicate of the federal statute. *See* Tex. H.B. 978, 77th Leg., R.S. (2001). The

(1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for a difference of opinion;

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and

(3) the parties agree to the order.

(e) An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings;

(f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

TEX. CIV. PRAC. & REM. CODE § 51.014(d)-(f).

#### 2. Legislative history and federal origins

This new alternative for interlocutory appeal is based on a federal statute. *See* 28 U.S.C. § 1292(b). Under the federal practice, a district judge may certify an unappealable order for immediate appeal by stating in writing that the 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.” *Id.* The court of appeals has discretion to accept or decline an immediate appeal of the order. *Id.*

purpose of the statute was to provide an efficient means of deciding issues that are central to a case, but that are not appealable. *Hearings on*

*Tex. H.B. 978 Before the House Comm. on Civil Practices, 77th Leg., R.S. (Feb. 21, 2001) (statement of Rep. Eiland) (“Hearings”).*<sup>1</sup>

However, the Texas statute adds a requirement not found in federal practice: the parties must agree. TEX. CIV. PRAC. & REM. CODE § 51.014(d)(1)-(3). The bill’s author added this consent requirement to eliminate the possibility of trial judges abusing the new procedure by certifying multiple orders to clear their dockets and delay cases. *See Hearings* (statement of Rep. Eiland); *see also* HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Comm. Substitute for H.B. 978, 77th Leg., R.S. (2001).

Because of this unusual requirement, I refer to this new device as an “agreed interlocutory appeal.” As I will explain, this consent requirement poses unusual challenges for both courts and practitioners, and it is the defining feature of the procedure. Thus, it seems proper to call the new procedure what it is: an agreed interlocutory appeal.

### 3. Effective date

The new amendments became effective on September 1, 2001, and apply only to a suit that is commenced on or after that date. Suits commenced before that date are governed by the previous law. *See* Acts 2001, 77th Leg., ch. 1389 § 3.

### 4. Early judicial interpretations

Only one opinion has been issued construing the agreed interlocutory appeal. *See In re D.B.*, 2002 WL 1371228 (Tex. App.—Dallas June 26,

2002, n.p.h.) (publication pending). *In re D.B.* follows the tradition of construing interlocutory appeals narrowly and requiring strict compliance with the statute.

*In re D.B.* dismissed the appeal for want of jurisdiction, relying on three jurisdictional defects: (1) absence of evidence that the appellee consented to appeal; (2) absence of an “application” to appeal; and (3) untimely filing of the notice of appeal. Because this is the first interpretation of the statute, all three of these holdings deserve examination.

First, *In re D.B.* held that the record must affirmatively demonstrate that all parties agreed to an immediate appeal. Although the appellee in that case evidently did not contest its agreement, the court of appeals raised this issue *sua sponte* and found no evidence of the appellee’s consent. *See In re D.B.*, 2002 WL 1371228 at \*  .

Second, *In re D.B.* took a mechanical view of the requirement that an “application” for the right to appeal must be made to the court of appeals. Neither the statute nor the appellate rules provide any guidance about the form of such an application, so courts will be forced to fashion their own rules. The Dallas court held that a docketing statement, a “notice of accelerated appeal,” and a brief—none of which cited the agreed appeal statute—did not constitute an “application.” *See In re D.B.*, 2002 WL 1371228 at \*  . Until this issue has been definitively resolved, either by a new rule or by a series of appellate decisions, appellants would be wise to file a formal “application” with the court of appeals.

---

<sup>1</sup> The author is indebted to Dana Livingston Cobb for sharing legislative research on this statute. The legislative history summarized here is recounted in greater detail in her excellent paper, *Permissive Interlocutory Appeals in State Court*, 12TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS (Univ. of Texas 2002). Anyone handling an agreed interlocutory appeal should be sure to obtain a copy, which includes a comparison to the federal practice and extensive practice tips.

Third, *In re D.B.* held that the application for an agreed interlocutory appeal must be filed in the court of appeals within ten days after the order is signed—and that period *cannot* be extended. Unlike the other species of interlocutory appeals, which are subject to the 20-day deadline provided in TEX. R. APP. P. 26.1(b), the agreed appeal statute provides a shorter opportunity to appeal. See TEX. CIV. PRAC. & REM. CODE § 51.014(f) (application must be filed in the court of appeals “not later than the 10th day” after order is signed). Because this deadline is provided by the statute, the Dallas court held it cannot be extended under the ordinary extension rule of TEX. R. APP. P. 26.3. “When a statute provides the deadline for perfecting an appeal, compliance with that statutory deadline, not the deadline in the rules of appellate procedure, is necessary to give the appellate court jurisdiction.” *In re D.B.*, 2002 WL 1371228, \*3.

*In re D.B.* is characteristic of the strict approach Texas courts have taken to interlocutory appeals. But one might fairly ask whether the strict approach exemplified by *In re D.B.* best accomplishes the purposes of the agreed interlocutory appeal statute. As courts (and practitioners) confront their first agreed interlocutory appeals under the new statute, perhaps we should rethink our usual approach.

##### 5. Towards a functional interpretation of the agreed interlocutory appeal statute

As noted above, the strict approach illustrated by *In re D.B.* is consistent with the traditional view that interlocutory appeals are a narrow exception to the finality requirement. See *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001). That traditional hostility to interlocutory appeals flows from the policy against piecemeal litigation, which is designed to preserve judicial economy. Consistent with that policy, interlocutory appeals are allowed only when they promote judicial economy. *Id.* at 358. Mindful of this policy, the courts might wish to construe the new statute more generously.

As a practical matter, because the Texas statute requires the consent of all parties to take a permissive appeal, these appeals will be most useful as a device to assist parties who wish to settle their case but are unable to agree about its value. Thus, courts should regard agreed interlocutory appeals as settlement aids,

and should construe the statute to facilitate that purpose.

Although the statute provides that an agreed interlocutory appeal may raise only a “controlling question of law as to which there is a substantial ground for difference of opinion,” that rule must be construed in harmony with the consent requirement. Unlike the federal practice, in which a federal district court can force an immediate appeal of a dispositive issue, the Texas version of this appeal is available only with the consent of all the parties. Courts should be very reluctant to reject the parties’ agreement that an issue is a “controlling question.” Simply put, if the parties think that an issue is “controlling,” then it probably is (for purposes of a particular case)—even if it does not appear to be “controlling” in the technical sense.

The greatest value of the agreed interlocutory appeal is the opportunity to resolve hotly disputed questions that will significantly influence the value of the case and that could go either way on appeal. If the parties agree to an immediate appeal to resolve those issues, it is much more likely that they will be able to settle their case once the issue is decided. For this reason, when the parties agree, trial courts should be very generous in granting permission to appeal and appellate courts should be very generous in accepting such appeals. This practice will further the interests of judicial economy by reducing the need for full litigation of the case before the issue can be decided after final judgment, and it will foster the public policy favoring settlements.

In this sense, the agreed interlocutory appeal shares some of the hallmarks of arbitration, and it should be construed similarly. Because it furthers the socially favored objective of resolving disputes efficiently and with minimal judicial intervention, arbitration is strongly favored by the Texas courts. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992). As a result, contrary to their usual hostility to interlocutory appeals, Texas courts are receptive to appeals (and mandamus proceedings) involving arbitration, even going so far as to resolve any doubts in favor of compelling arbitration. *E.g.*, *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996).

As with arbitration, an agreed interlocutory appeal can take place only with the parties’ consent. As with arbitration, an agreed interlocutory appeal will serve the policy in favor of efficient resolution of legal disputes and will promote judicial economy. Thus, the

generous rules favoring arbitration should provide a model for judicial construction of the new agreed interlocutory appeal.

The conventional wisdom among practitioners has been that the consent requirement makes the new agreed interlocutory appeal toothless, because the prevailing party in the trial court will rarely consent to an immediate appeal—especially one that might deprive it of valuable settlement leverage. *See, e.g., Cobb, supra*, at 6 (“many times the party who has prevailed on a ‘controlling issue’ in the trial court is not highly motivated to give up such a valuable bargaining chip—especially when the ruling tangibly affects settlement value—by agreeing to immediate appellate court review”). Based on this assumption, some commentators already have called for the consent requirement to be eliminated. *Id.*

Until the Legislature acts on these proposals, practitioners must choose between ignoring the new agreed interlocutory appeal or learning how to make the most of it. Contrary to the conventional wisdom, there is reason to believe that the veto problem can be overcome and the agreed interlocutory appeal can be a valuable weapon in the arsenal of a creative appellate lawyer.

The challenge posed by giving one party a “veto” over the preferences of another is not new; other areas of law have devised a variety of strategies for dealing with “hold-out” problems. These lessons are useful in suggesting ways to overcome the veto problem posed by the new agreed interlocutory appeal. But in order for these lessons to be most effective, courts will need to construe the statutory phrase “the parties” to require the consent only of the parties to the particular order on appeal, not all the parties to the entire case.

(a) *Buying the veto and bargaining for issues*

First, in the field of property, parties seeking to assemble a large parcel of land routinely encounter “hold-outs” who refuse to sell. Potential buyers must develop solutions to overcome that veto problem. *See Patricia Munch, An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473 (1976); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 81-82 (1986). Some of those strategies might be effective here.

First, a party wishing to appeal immediately might “purchase” the veto rights of another party, giving something in exchange for a promise not to

6. Strategies for overcoming the veto problem and maximizing the value of the agreed appeal

exercise the veto. In multi-party litigation in which one party holds out, this strategy might be as simple as settling with the hold-out to “buy” the veto power. This would create an obvious incentive to hold out, with consequences that I discuss below.

More interesting is the possibility of “trading” for appealable issues in one interlocutory appeal. The conventional wisdom holds that parties will not agree to interlocutory appeals because one party has nothing to gain from the appeal. That obstacle could be overcome if a party desiring to appeal one issue offered to “trade” for an appeal of another issue. Because it gives both parties an incentive to agree, this tactic could overcome the veto problem.

This possibility illustrates one way in which the consent requirement could define issues that would “materially advance the ultimate termination of the litigation,” and underscores the point made above: if the parties believe an immediate appeal would materially advance the termination of the litigation, the courts ought to agree—even if the issues do not look that way from the ivory tower.

(b) *High-low settlements*

Another promising strategy to overcome the veto problem is the use of a “high-low” settlement. The high-low settlement is a device by which parties define the limits of a defendant’s ultimate liability, conditioned upon the outcome of pending litigation. *E.g., ASI Technologies, Inc. v. Johnson Equip. Co.*, 75 S.W.3d 545, \_\_\_ (Tex. App.—San Antonio 2002, pet. filed) (discussing a conventional high-low deal in which a plaintiff was guaranteed a maximum recovery of \$900,000 and a minimum recovery of \$300,000, depending on the jury verdict).

Because high-low agreements eliminate the risk of extreme outcomes for all parties (by contract) while permitting room for intermediate outcomes (by litigation), they are especially useful in cases where a close question generates uncertainty and prevents the parties from being able to evaluate the settlement value of the case with confidence. Thus, high-low agreements are often useful in the appeal of novel or questionable legal theories, enabling parties to obtain a decision on the issue (and agree on the value of the

case under different scenarios) while protecting each

This scenario is precisely what the new statute was designed to address. It arises when there is a “controlling question of law as to which there is a substantial ground for difference of opinion,” and an immediate appeal would “materially advance the ultimate termination of the litigation.” Therefore, the high-low device might be an ideal “carrot” to overcome the veto problem.

Here’s how it would work: Imagine a plaintiff sues a defendant on a cause of action for negligence. The liability facts are compelling and the damages are significant—precisely the type of case in which a fair settlement should usually be possible—but the defendant believes it owed no duty to the plaintiff. If the motion for summary judgment on that ground is denied, then both parties have a tiger by the tail. The plaintiff has no incentive to agree to an appeal, preferring to maximize its leverage after judgment—but it is risking a take-nothing judgment on appeal. If the defendant wants to preserve its right to appeal in order to assert its no-duty argument, it must run the gauntlet of trial and risk a catastrophic judgment. Based on their different views of the duty argument, the parties may have wildly different views about the value of the case, which dooms any settlement. But by agreeing to a high-low settlement and an immediate appeal, the parties can resolve the case without incurring the costs of litigating the case, burdening the trial courts, and risking a catastrophic result for either side. Under these circumstances, both parties would have an incentive to agree to the immediate appeal, overcoming the veto problem. Thus, high-low settlements are a perfect device to maximize the value of the new statute.

*(c) The prisoner’s dilemma and agreed appeals in multi-party litigation*

These suggestions have assumed, for the sake of simplicity, a conventional two-party lawsuit. Obviously, in modern multi-party litigation the veto problem becomes exponentially more complicated. In particular, requiring the consent of every party to an interlocutory appeal in a multi-party lawsuit creates incentives for individual parties to “hold out” and refuse their consent unless they receive special concessions from the others. Even in a case in which a plaintiff and defendant wished to appeal, therefore, a “hold-out” might be able to block the appeal and extract valuable concessions.

party from the risk of a catastrophic result.

This raises an interesting interpretive question: what does the law mean by the phrase “the parties”? See TEX. CIV. PRAC. & REM. CODE § 51.014(d)(3) (requiring that “the parties” agree to the appeal). Does that mean “the parties” to the case, or simply “the parties” affected by the order to be appealed? In multi-party litigation, it is not unusual for parties to assert a motion against one party, but not others. In that circumstance, must the parties who are not affected by the order agree to the appeal? And if so, given that they have nothing to gain from the appeal, do they not have a significant incentive to hold out and demand concessions from the other parties? Courts should take these incentives into account in construing the phrase “the parties.”

Consider a case in which a plaintiff sues several defendants, who then cross-claim against each other. Suppose that one of the defendants files a summary judgment motion against the other defendant on the cross-claim, raising arguments that do not affect the plaintiff’s right to recover. If that motion is denied, and the defendants wish to take an immediate appeal to definitively resolve their respective liabilities, must the plaintiff consent to the appeal? And if so, why should the plaintiff not demand a concession (perhaps a favorable settlement from the defendant that stands to gain the most on appeal) in return for its consent?

Or consider the situation in which one party asserts identical motions against multiple parties. (For example, imagine that a defendant files motions for summary judgment on the basis of limitations against multiple plaintiffs in a mass tort lawsuit). Because an interlocutory appeal from the denial of the summary judgment motions could be dispositive, the plaintiffs will have no incentive to agree to it. Thus, the conventional wisdom holds that the new agreed appeal statute will be useless in this case.

But what if the defendant takes a page out of the prosecutor’s handbook and divides the plaintiffs, offering a substantial benefit (perhaps a generous settlement with terms that would not moot the claim, such as a high-low deal) to the *first* plaintiff who agrees to an appeal? Assuming the grounds for the motion would apply equally to every other plaintiff, all the plaintiffs would face the same risk of having their claims extinguished in the interlocutory appeal. On the other hand, the plaintiff who agreed to appeal would be guaranteed the benefits of the settlement. Therefore, each plaintiff would have an individual incentive to agree to the appeal.

