INTERLOCUTORY APPEALS IN THE SIXTH CIRCUIT: A PRIMER

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When faced with a non-final, unfavorable ruling in a Federal Court sitting in Michigan - one which could completely alter the future trajectory of the case - what interlocutory appellate remedies are potentially available to the affected party? Of equal importance, do the costs involved and the chances of success warrant pursuit of these interlocutory appellate remedies? As will be seen more fully below, there are two potential appellate options, depending on the nature of the order from which appeal is sought: (1) a discretionary appeal in the federal system; or (2) if involving an undecided yet controlling issue of Michigan Law, a discretionary certified question procedure to the Michigan Supreme Court. Both options, however, involve significant undertakings and potentially high costs to achieve, at best, jurisdiction that is completely discretionary. Furthermore, neither option offers a high probability of success – a factor which must be carefully considered when deciding whether to pursue such remedies.

PERMISSIBLE DISCRETIONARY REVIEW IN THE SIXTH CIRCUIT COURT OF APPEALS

Generally, the Sixth Circuit has jurisdiction over only "final decisions" of the District Courts.[ii] Pursuant to 28 U.S.C. § 1292(b), a party may request that the District Court certify a non-final order for interlocutory review.[iii] This is an extremely limited avenue for potential relief. However, as the Sixth Circuit has recently noted, 28 U.S.C. § 1291 jurisdiction over final decisions is greatly favored because it adheres to the "one case, one appeal" rule and discourages a party from pursuing piecemeal appellate litigation.[iv] The statutory grant of discretionary review authority in the federal system adds several hurdles and imposes significant financial burdens on parties who seek appellate review over controlling questions of law before a

final judgment is rendered by the Trial Court, and must therefore be carefully considered before being pursued.

As a threshold matter, the party seeking review must first convince the District Court Judge to certify the question as warranting immediate appellate review. Consequently, without a District Judge's blessing, the Sixth Circuit generally will not even consider whether to take an interlocutory appeal.[v] Where there is a declination to certify the question by the District Judge, this effectively means an end to the possibility of an interlocutory appeal to the Sixth Circuit, unless the party chooses to pursue a mandamus petition, which allows the Sixth Circuit to proceed, but only where there is an "extraordinary need" for immediate appellate review.[vi]

More specifically, in conferring first line discretion upon the Trial Court, 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an Order not otherwise appealable under this section, shall be 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 litigation, he shall so state in writing in such Order.[vii]

This statute has been uniformly interpreted as granting the District Court first line discretion over interlocutory appeals.[viii] Significantly, the Sixth Circuit has cautioned that 28 U.S.C. § 1292(b) review should be granted "sparingly" and only in "exceptional cases."[ix] Thus, as a practical matter, a party faces long odds of even meeting the threshold of getting the District Judge to certify a question, particularly when it comes to routine, run-of-the-mill cases not involving important and novel legal issues. Most relevant to members of the Negligence Section, the Sixth Circuit has specifically cautioned that "[t]his statute was not intended to authorize Interlocutory Appeals in ordinary suits for personal injuries or wrongful death that could be tried and disposed of on their merits in a few days."[x]

If one does wish to pursue certification of a question in the District Court, then that party must convince the District Judge that three prongs are met: (1) that the Order presents a controlling issue of law, (2) that a substantial ground for difference of opinion exists as to the controlling issue of law, and (3) that certification of the issue for immediate appeal materially advances the termination of litigation.[xi] Even then, of course, whether to certify the question presented for interlocutory appellate review is entirely within the District Court's discretion.

With regard to the first requirement, that the Order presents a controlling issue of law, the issue need not terminate the litigation in order to be "controlling."[xii] Rather, a question of law is considered "controlling" where resolution of the question on appeal could materially affect the outcome of the litigation in the District Court.[xiii]

As to the second prong, whether a substantial ground for difference of opinion exists as to a controlling issue of law, the party must show that either (1) the question is difficult, novel and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions; (2) the question is difficult and of first impression; (3) a difference of opinion exists within the controlling circuit; or (4) the circuits are split on the question.[xiv] Finally, the third requirement, that certification of the issue would materially advance termination of the litigation, is closely tied to the second prong, and where the litigation would be conducted in substantially the same manner regardless of the decision on appeal, this requirement is not met.[xv]

Even if a party can demonstrate to the District Court that these requirements are all met, and even if the District Court agrees to certify the issue for immediate appellate review, the party must still clear another hurdle in pursuit of an interlocutory appeal: It must convince the Sixth Circuit to exercise its discretion and take the appeal before final judgment has been entered. This

involves filing a Petition for Permission to Appeal to the Sixth Circuit, which is governed by Federal Rule of Appellate Procedure 5(b), and is in essence a full-fledged Brief on Appeal, requiring a statement of facts, question presented, relief sought, and an explanation as to why the appeal should be taken immediately and not later.

As a practical matter, a Petition for Permission to Appeal must be undertaken before the District Court's decision as to whether to certify the issue for interlocutory appeal is even decided. Under 28 U.S.C. § 1292(b), such a Petition must be filed in the Court of Appeals within ten days of entry of the Certification Order by the District Court. Given the quick turnaround time, the Petition and the considerable costs associated with it should be undertaken before the District Court even decides whether to certify the issue in order to avoid a mad scramble to draft the Petition in the 10-day post-certification window.

As if this set of obstacles to successfully bringing an interlocutory appeal were not enough, even if a District Court has certified an issue for appeal and the party has timely filed a Petition for Permission to Appeal, whether to grant that Petition is still soundly within the Court of Appeals' discretion.[xvi] And, to the dismay of parties seeking interlocutory appeals, the Sixth Circuit routinely exercises that discretion to deny Petitions for Permission to Appeal despite District Courts' having already certified cases for appeal.[xvii]

Parties should remain mindful of the fact that the interlocutory appeal process is purely discretionary both in the District Court through the certification process, as well as in the Court of Appeals, when deciding whether an interlocutory appeal is worth pursuing. Given the hurdles involved in pursuing an interlocutory appeal to the Sixth Circuit and the low probability of success, before proceeding, a party should carefully consider the costs and time likely to be required, and just as importantly, whether the issue upon which appeal is sought is one which

would be a good candidate for interlocutory appellate review. In a routine personal injury or wrongful death action, the interlocutory appeal stone is often best left unturned.

THE CERTIFIED QUESTION PROCEDURE TO THE MICHIGAN SUPREME COURT

The other option available for seeking immediate appellate review of a non-final District Court Order would be to seek to have the Michigan Supreme Court decide the issue as a Certified Question. MCR 7.305(B) provides that:

> When a federal court, state appellate court, or tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the Court may on its own initiative or that of an interested party certify the question to the Michigan Supreme Court.

Thus, where the issue sought to be appealed is one of Michigan law and there is no Michigan Supreme Court precedent, the MCR 7.305(B) Certification procedure may be appropriate. Once again, however, Michigan Supreme Court certification is discretionary and comes with its own set of hurdles.

Seeking to present a Certified Question before the Michigan Supreme Court still requires cooperation at the District Court level. Such a Certificate may be produced by the District Court at its discretion.[xviii] Alternatively, if opposing counsel also agrees that the issue should be reviewed by the Michigan Supreme Court, then the parties can agree to prepare the Certificate by stipulation.[xix] By logical extension, if there is no cooperation by either the District Court or the opposing party, then the MCR 7.305(B) procedure is essentially dead on arrival.

Even if the District Court is willing to issue the Certificate, or if the opposing party will agree to stipulate thereto, this does not mean that the Michigan Supreme Court will consider the issue. Again, even if there is agreement to certify at the District Court level, the Michigan Supreme Court still has discretion to decide whether it wishes to resolve the question.[xx] Further, an attempt to invoke the MCR 7.305(B) procedure made after the District Court has already

decided an issue may be considered untimely, and would undoubtedly add to the headwinds working against convincing the Court or the opposing party to agree to certification.[xxi]

Despite the slim chances of success in pursuing this appellate option, it again requires a party to shoulder substantial costs. If a Certificate is successfully obtained from the District Court, then the party must provide the Michigan Supreme Court not only with the Certificate, but also with a full-fledged Brief on Appeal and accompanying Appendix.[xxii] Consequently, as with the federal interlocutory appeal procedure, a party must carefully weigh the costs, time, and other expenses involved, given the high risk/low probability of success proposition that such an undertaking represents.

CONCLUSION

Though there are two potential routes available for a party seeking an interlocutory appeal of a Federal District Court's non-final Order, both come with substantial costs and involve a low probability of success, given their entirely discretionary nature. While counsel should certainly be mindful to keep these options available in the appellate arsenal, they are not appropriate for routine, run-of-the-mill cases, and should generally be reserved for the novel or otherwise extraordinary case in which the Court is likely to exercise its discretion in favor of immediate resolution.

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[ii] See 28 USC § 1291; *Firestone Tire & Rubber Co v Risjord*, 449 US 368, 373 (1981).

[iii] *Coopers & Lybrand v Livesay*, 437 US 463, 466, n 5 (1978).

[iv] *Page Plus of Atlanta, Inc v Owl Wireless, LLC*, 733 F3d 658, 661 (CA6 2013).

[v] See *Turi v Main Street Adoption Services*, 633 F3d 496, 504 (CA 6, 2011); *In re Lott*, 424 F3d 446, 449 (CA 6, 2005).

[vi] See *In re Powerhouse Licensing, LLC*, 441 F3d 467, 471 (CA 6, 2006).

[vii] 28 USC § 1292(b).

[viii] See *Swint v Chambers County Comm*, 514 US 35, 47 (1995); *Turi v Main Street Adoption Services, LLP*, 633 F3d 496, 504 (CA 6, 2011); *Archie v Lanier*, 95 F3d 438, 442 (CA 6, 1996).

[ix] *In re City of Memphis*, 293 F3d 345, 350 (CA6 2002).

[x] *Cardwell v Chesapeake & Ohio RR Co*, 504 F2d 444, 446 (CA 6, 1974).

[xi] See *Eagan v CSX Transp, Inc*, 294 F Supp 2d 911, 916 (ED Mich 2003).

[xii] *In re Baker & Getty Fin Services, Inc*, 954 F2d 1169, 1172 n 8 (CA 6 1999).

[xiii] *Id.*

[xiv] *Eagan*, 294 F Supp 2d at 916.

[xv] *In re City of Memphis*, 293 F3d at 351.

[xvi] See 28 USC § 1292.

[xvii] *In re Miedzianowski*, 735 F3d 383, 384 (CA 6 2013).

[xviii] See MCR 7.305(B)(2).

[xix] Id.

[xx] *In re Certified Questions from U.S. Court of Appeals for Sixth Circuit*, 472 Mich 1225, 696 NW2d 687 (2005).

[xxi] See *City of Columbus v Hotels.com*, 693 F3d 642, 654 (CA 6 2012).

[xxii] MCR 7.305(B)(3).