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Strategies for Certified Interlocutory Appeals in State Court

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I. INTRODUCTION

Interlocutory orders cannot be appealed absent specific authority to do so. *E.g.*, *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 92 (Tex. 2012). “Appellate courts do not have jurisdiction over interlocutory appeals in the absence of a statutory provision permitting such an appeal.” *De La Torre v. AAG Properties, Inc.*, 14-15-00874-CV, 2015 WL 9308881, at *1 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet.); *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011); *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007); *Hebert v. JJT Constr.*, 438 S.W.3d 139, 140 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In addition granting authority for interlocutory appeals from an ever-increasing list of specific orders, the Legislature has also granted trial courts the authority to certify other orders for immediate appeal if certain criteria are met. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d).

The current version of section 51.014(d) was enacted in 2011. The prior version permitted an interlocutory appeal only with the parties’ agreement. *See* Act of May 27, 2005, 79th Leg., R.S., ch. 1051, § 1, 2005 Tex. Gen. Laws 3512, 3513. The 2011 amendment made section 51.014(d) similar to federal law. *See* Act of May 25, 2011, 82d Leg., ch. 203, § 3.01, 2011 Tex. Gen. Law 758 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(d)); TEX. R. APP. P. 28.3 cmt.; *see also* 28. U.S.C. § 1292(b).

This article examines amended section 51.014(d) and how the courts have received permissive interlocutory appeals since September 2011.¹ We have also included some statistics about permissive interlocutory appeals under section 51.014(d). It has now been almost five years since section 51.014(d) was amended, and we now have a large enough sample size to draw some conclusions about how the appellate courts are responding to petitions for permission to appeal.

II. SECTION 51.014(D) AND RELATED RULES

The amendment to section 51.014(d) was introduced as part of tort reform legislation aimed at lowering the costs of litigation and improving judicial efficiency by allowing appellate courts to address and answer controlling questions of law without the need for the parties to incur the expense of a full trial. *See* House Research Organization, Bill Analysis, H.B. 274, 82d Leg., R.S. (2011).²

¹ We would also like to acknowledge the invaluable assistance of Thompson & Knight associate Catherine Clemons in preparing this article.

² The amendment was deemed an important component of tort reform legislation aimed at making the Texas civil justice system “more efficient, less expensive,

As amended, section 51.014(d) authorizes a trial court, on the motion of a party or on its own initiative, to permit an appeal from an order that is not otherwise appealable if (1) the order involves a controlling question of law as to which there is a substantial ground for disagreement; and (2) an immediate appeal will materially advance the termination of the litigation. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d). The amendment eliminates the previous requirement that the parties agree to an immediate appeal and allows the trial court to grant an appeal on its own initiative or on the motion of a party. The amendment also imposes a two-tiered approval process in which both the trial court and the appellate court must authorize the appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(f).

Section 51.014(f) specifies the procedure for bringing a permissive interlocutory appeal under section 51.014(d):

- (f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

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

The Rules of Appellate Procedure were also amended in 2011 to address the new permissive interlocutory appeal procedure. *See* TEX. R. APP. P. 28.3 cmt. (noting that the amendment to section 51.014(d) necessitated the addition of Rule 28.3 and the adoption of Rule of Civil Procedure 168). Appellate Rule 28.3 was added to provide in part:

- (a) *Petition Required.* When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.

and more accessible.” C.S.H.B. 274, Committee Report, Bill Analysis; *see* TEX. CIV. PRAC. & REM. CODE § 51.014(d). *See also* Lynne Liberato, Will Feldman, *How to Seek Permissive Interlocutory Appeals in State Court*, 26 APP. ADVOC. 287, 287 (2013).

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