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Interlocutory Appeal Update

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I. INTRODUCTION

The Legislature continues to expand the types of interlocutory orders that are subject to immediate appeal. There are now 13 specific orders that can be immediately appealed under Texas Civil Practice and Remedies Code Section 51.014(a). In 2011, the Legislature amended the permissive-appeal provision, Section 51.014(d), to remove the requirement that the parties agree and to make Section 51.014(d) more similar to the federal statute on permissive appeals. The Legislature has also added new interlocutory appeal provisions in other statutes. And it seems that in each legislative session, at least one or two new interlocutory-appeal provisions are proposed.

This article is, to some extent, an update of Pam Baron's excellent article for the 20th Annual Conference on State and Federal Appeals, *Interlocutory Appeal Update 2010*. The focus of this article is on cases decided since 2010 and on new statutory provisions.

We have also included some statistics about permissive interlocutory appeals under Section 51.014(d). It has now been several 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. GENERAL PRINCIPLES

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 to 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). As a result, a careful reading of the applicable authorizing statute is essential to ensure that all prerequisites have been met and that the order is being properly appealed. Failure to comply with the statutory restrictions will result in dismissal of the appeal.

A written order of some sort is required before an interlocutory appeal can be taken. *E.g.*, *Reyes v. Burrus*, No. 08-14-00080-CV, 2014 WL 2013404 Tex. App.—El Paso May 14, 2014, no pet.). Even if the trial court has orally indicated that it

intends to make the ruling, the appeal cannot be filed until the order is reduced to writing. *E.g.*, *State v. Nine Hundred Eighty-Two Thousand One Hundred Ten Dollars*, No. 08–11–00253–CV, 2011 WL 4068011 at *1 (Tex. App.—El Paso Sept. 14, 2011, no pet.).

Parties have occasionally tried to avoid the strict time limits for an interlocutory appeal by filing a mandamus petition instead. These attempts have been unsuccessful because the existence of the interlocutory appeal right prevents any argument that the party lacks an adequate remedy by appeal. *In re Kansas City S. Ry. Co.*, No. 14–11–00336–CV, 2011 WL 1638634 at *1 (Tex. App.—Houston [14th Dist.] Apr. 28, 2011, no pet.).

If there is any doubt about the availability of an interlocutory appeal, it may be advisable to file not only an interlocutory appeal but also a protective mandamus proceeding. Courts will frequently consolidate the two proceedings and consider them together. *E.g.*, *CMH Homes v. Perez,* 340 S.W.3d 444, 452–53 (Tex. 2011). An appellant can also request that the appellate court treat the interlocutory appeal as a mandamus proceeding, if necessary. *E.g.*, *In re Estate of Aguilar*, 435 S.W.3d 831, 833 (Tex. App.—San Antonio 2014, no pet.).

Courts continue to wrestle with whether a party waives its complaints by failing to take an interlocutory appeal and waiting to challenge the order until an appeal after final judgment. In *Hernandez v. Ebrom*, the Texas Supreme Court considered whether failure to pursue an interlocutory appeal waived the defendant's right to challenge the adequacy of an expert report in a healthcare-liability claim. 289 S.W.3d 316, 319-20 (Tex. 2009). The Court first observed that the statute granting the right of interlocutory appeal states that the defendant "may" appeal. *Id.* Therefore, the Court found that the appeal was not mandatory. *Id.* The Court noted that certain types of interlocutory appeals can be waived if they become moot as a result of later orders in the case. *Id.* The Court specifically noted that the right to appeal a class-certification order and the right to appeal a temporary injunction are lost if an interlocutory appeal is not pursued. *Id.*

One court has suggested (without deciding) that failure to pursue a venue appeal under Texas Civil Practice and Remedies Code Section 15.003 could waive the right to challenge the venue decision post-trial. *Nalle Plastics Family Ltd. P'ship v. Porter, Rogers, Dahlman & Gordon, P.C.*, 406 S.W.3d 186, 197 (Tex. App.—Corpus Christi 2013, pet. denied).

Most cases have held that an order appointing a receiver must be immediately appealed, or error will be waived. *Gibson v. Cuellar*, 440 S.W.3d 150, 153-54 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (listing cases). But at least one court has reached the opposite conclusion. *Brawley v. Huddleston*, No. 02-11-00358-CV, 2012 WL 6049013 (Tex. App.—Fort Worth Dec. 6, 2012, no pet.).

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