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Permissive Appeals in the Wake of *Sabre Travel*

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Table of Contents

	Page
I. Introduction.....	1
II. Section 51.014(d) and Related Rules.....	2
III. Section 51.014(d) in Practice.....	4
A. Step One: The Trial Court’s Permission to Appeal	4
B. Step Two: The Court of Appeals’ Permission to Appeal.....	5
IV. Recent Cases Addressing 51.014(d) Appeals	6
A. What is the scope of the appellate court’s discretion?	6
B. What is the scope of the appeal?	8
C. How should the statutory requirements be analyzed?.....	8
(1) What constitutes a controlling question of law?	8
(2) When is there a substantial ground for difference of opinion?	10
(3) When will an immediate appeal materially advance termination of the litigation?.....	10
V. Statistics Since <i>Sabre Travel</i>	12
A. Petitions for Permissive Appeal Post- <i>Sabre Travel</i>	13
B. Lessons from Post- <i>Sabre Travel</i> Cases.....	14
(1) Limitations of the Statistics.....	14
(2) Other Issues	15
VI. Conclusion	16

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 Props., Inc.*, No. 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).

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 outlines the requirements of a permissive interlocutory appeal under section 51.014(d) and examines how appellate courts have applied those requirements. While the case authority is still somewhat scant on the exact application of some of the statutory requirements, there are cases that provide some guidance.

A prior version of this article also looked at how often appellate courts granted permission to appeal and looked at common reasons for denial. That article found that statewide, about 40% of petitions for permission to appeal were granted and that many denials were based on the courts’ conclusion that one or more statutory requirements were not met. The statistics also showed that grant rates tended to be higher in the smaller appellate courts.¹

In 2019, the Supreme Court of Texas decided *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 729 (Tex. 2019). While the Supreme Court confirmed that appellate courts have discretion over whether to grant permission to appeal, the Court strongly encouraged courts to grant permission when the statutory requirements are met. Thus, this version of the article looks at some statistics about how appellate courts have responded to *Sabre Travel*. It will also look at some lessons that can be drawn from post-*Sabre Travel* decisions on petitions for permission to appeal.

¹ That article also noted that the statistical analysis was limited by the fact that the appellate courts do not always track or report how many petitions for permission to appeal were filed or granted.

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

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

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