

PRESENTED AT

32nd Annual Conference on State and Federal Appeals

June 16–17, 2022

Austin, TX

Statutory Stays, Rule 29.3 Orders, and Other Short-Term Fixes

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I. Introduction

Unlike federal courts, which must generally analyze whether an interlocutory appeal is appropriate based on the “cumbersome-yet-unhelpful framework” of the collateral order doctrine, *see Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 172 (5th Cir. 2009) (quoting Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238–39 (2007)), Texas courts allow interlocutory appeals if allowed by one of the statutes governing interlocutory appeals. *See* Tex. Civ. Prac. & Rem. Code §§ 51.014(a) (listing 13 interlocutory orders that are subject to interlocutory appeal), 51.014(d) (permissive appeals).¹

Interlocutory appeals are described as “accelerated” under the rules. Tex. R. App. P. 28.1(a). But the reality is that interlocutory appeals are typically decided on the same timeline as other appeals and may not be decided by a court of appeals for months if not years. And even then, it is possible the

interlocutory appeal will not be sent back to the trial court because since 2017, interlocutory appeals can be reviewed by the Texas Supreme Court. *See* Act of May 29, 2017, 85th Leg., R.S., ch. 150, § 5, 2017 Tex. Gen. Laws 291, 292 (repealing statute that limited review to a certain subset of appealable interlocutory orders). This review could further delay by months even if the petition for review is not granted.

The significant time required to decide interlocutory appeals raises an obvious question: What happens in the trial court while the interlocutory appeal is pending? And when the answer to that question is “nothing” (perhaps because a statutory stay ties the trial court’s hands), what authority do appellate courts have to issue Rule 29.3 order and other short-term fixes?

II. Statutory Stays

Statutory stays of trial court proceedings are putatively the exception — and not the rule — when an interlocutory appeal is filed. This means that an interlocutory appeal may delay the trial, but it doesn’t necessarily prevent the underlying litigation from proceeding. *See* Tex. Civ. Prac. & Rem. Code 51.014(b). In these cases, trial courts generally have discretion to continue presiding over the

¹ *See also* Tex. Civ. Prac. & Rem. Code §§ 15.003 (certain motions to transfer venue), 51.016 (matters subject to the Federal Arbitration Act); Tex. Gov’t Code §§ 1205.103, 1205.104, 1205.105, 1205.068 (certain orders in public security declaratory judgment actions); Tex. Health and Safety Code § 1101.104 (orders regarding disclosure of environmental or health and safety audit reports in civil or administrative

proceedings); Tex. Bus. Org. Code § 2.106 (orders denying motion for summary judgment based on an assertion of immunity by nonprofit corporation as trustee); Tex. Ins. Code § 102.151 (orders denying motion for summary judgment based on an assertion of immunity by a person or entity involved in issuing a qualified charitable gift annuity).

underlying litigation while the interlocutory appeal is pending subject to a few important limitations. This general discretion has limits. The trial court cannot enter orders that are inconsistent with any order by the appellate court. Tex. R. App. P. 29.5. The trial court may decide whether the challenged interlocutory order should be suspended while the interlocutory appeal is pending, and that decision can be reviewed by the appellate court. Tex. R. App. P. 29.2. Nor may the trial court enter any order that interferes with or impairs either (1) the jurisdiction of the appellate court or (2) the “effectiveness of the relief sought or that may be granted on appeal.” Tex. R. App. P. 29.5. If a party believes the trial court has entered an order that runs afoul of any limits imposed by Rule 29.5, that party can seek relief from the court of appeals. Tex. R. App. P. 29.6.

Some interlocutory appeals do stop all trial court proceedings as soon as the notice of appeal is filed. This subset of interlocutory appeals — those involving class action certifications, governmental immunity issues, and motions to dismiss under the Texas Citizens Participation Act (“TCPA”) — do not merely delay trial. *See* Tex. Civ. Prac. & Rem. Code § 51.014(b). Instead, these interlocutory appeals automatically stay all “proceedings in the trial court pending resolution of that appeal.” *Id.* These automatic statutory stays can create problems.

When an automatic, statutory stay prevents a trial court from presiding over a case while the interlocutory appeal is pending, problems can result. Particularly when the case involves injunctive relief that is preventing irreparable

harm. One case, *In re Geomet Recycling, LLC*, 578 S.W.3d 82 (Tex. 2019), illustrates the problems that can arise when a statutory stay prevents a trial court from preventing mischief during an interlocutory appeal.

Geomet helps illustrate the issues that can arise when a statutory stay is triggered by an interlocutory appeal. In *Geomet*, the plaintiffs (a scrap metal recycling business and affiliated entities, collectively referred to as “EMR”) sought injunctive relief against Geomet Recycling and several affiliated individuals (collectively “Geomet”) and obtained a Temporary Restraining Order (“TRO”) against Geomet. *Id.* at 85. Geomet filed a motion to dismiss under the TCPA, and EMR filed its motion for temporary injunction and also filed a motion for contempt, alleging Geomet was violating the TRO. *Id.* Before ruling on EMR’s temporary injunction motion or contempt motion, the trial court denied Geomet’s TCPA motion. *Id.* at 86. Geomet filed an interlocutory appeal which triggered the automatic stay of “all other proceedings in the trial court pending resolution of that appeal.” *Id.* (citing Tex. R. Civ. Prac. & Rem. Code § 51.014(b)). This left EMR with the problem of (in its view) imminent, irreparable harm that the trial court no longer had any ability to address.

Faced with this problem, EMR asked the appellate court to lift the stay so the trial court could consider its motions for temporary injunction and contempt, and the court of appeals complied. *Id.* The appellate court’s decision is understandable. Texas appellate courts routinely enforce injunctions, *see, e.g., Ex parte Barnett*, 600 S.W.2d 252, 255 (Tex.

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First appeared as part of the conference materials for the 32nd Annual Conference on State and Federal Appeals session "Statutory Stays, Rule 29.3 Orders, and Other Short-Term Fixes"