One of These Things is Not Like the Other

The Differences in Interlocutory Appeals in State and Federal Courts

By Jill M. Wheaton

If you seek advice from an appellate specialist about a potential interlocutory appeal in your civil case, the first question will undoubtedly be whether your case is in state or federal court. This is because the two systems are very different when it comes to interlocutory appeals. An understanding of these differences and your resulting options (or lack thereof) is crucial for Michigan litigators.

Orders Immediately Appealable By Statute or Caselaw Because of Their Nature

In the state court system there is one type of interlocutory order that is appealable by right: orders granting or denying motions for summary disposition based on claims of governmental immunity.[1] This is the only type of nonfinal order from which you can immediately appeal in state court without having to get certification from the circuit court or permission from the Court of Appeals. Review of all other state court interlocutory orders must be sought by an application for leave to appeal.

In federal court, on the other hand, a few types of pretrial orders are immediately appealable. These include orders granting or denying injunctive relief or modifying, continuing, or dissolving an injunction;[2] certain types of orders regarding receiverships;[3] orders denying motions to compel arbitration;[4] remand orders in cases removed to federal court under the Class Action Fairness Act;[5] and certain bankruptcy court decisions[6] or orders in admiralty cases.[7]

The federal system also has the "collateral order" doctrine, under which certain orders have been held to be immediately appealable. That doctrine allows an immediate appeal from an order that would "conclusively determine" an "important issue completely separate from the merits of the action," which is "effectively unreviewable" on appeal from a final judgment.[8] Under this doctrine, orders denying motions for leave to intervene, or claims of immunity from suit,[9] have been deemed immediately appealable. Because this doctrine is to be infrequently applied, careful review of the caselaw is necessary to determine if the collateral order doctrine applies to your type of order.

FAST FACTS

Interlocutory appeals, whether by right or by leave, differ significantly between the state and federal court systems. An understanding of these differences, as well as the types of orders that may or may not be immediately appealed in each forum, is integral to the Michigan litigator.

Orders Immediately Appealable Because of Certification By the Trial Court

When a case involves multiple claims or parties, a federal district court may enter a "final" judgment as to one or more—but fewer than all—of the claims or parties if the court expressly finds "no just reason for delay" of an appeal of that order.[10] A judgment certified under Rule 54(b) is immediately appealable without obtaining further permission from the federal Court of Appeals. The Michigan court rule is the opposite, with one exception. Michigan Court Rule 2.604 provides that an order adjudicating fewer than all of the claims or the rights and liabilities of fewer than all of the parties is *not* appealable as of right, but may be the subject of an application for leave to appeal.[11] The only circumstances under which a state circuit court can deem a nonfinal order "final" for purposes of appeal is in "receivership and similar" actions, and here, too, the court must expressly find "no just reason for delay."[12]

Orders Immediately Appealable By Leave Granted

Based on the above, it may seem that the federal system is more permissive when it comes to interlocutory appeals, but that is not the case. Although the federal system has more types of orders that are immediately appealable by statute, court rule, or caselaw, it generally does not permit the filing of an application for leave to appeal any other type of interlocutory order, with the exception of petitions for mandamus (discussed below). In contrast, MCR 7.203(B) permits a party to file an application for leave to appeal virtually any interlocutory order directly with the Michigan Court of Appeals without any form of certification from the circuit court. Therefore, although fewer orders are automatically appealable, you can seek leave to appeal any type of order in state court.

This is not the case in the federal court system, in which an application for leave to appeal (known as a "petition for permission to appeal") may, with one exception, only be filed if the district court has certified the order sought to be appealed pursuant to 28 USC 1292(b).[13] Under that statute, a district court may rule that its 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 the litigation…."[14] This is usually done by a motion to certify the order for interlocutory appeal, filed after the order has been issued. But even if the district court grants the motion for certification, the Sixth Circuit may still deny the petition

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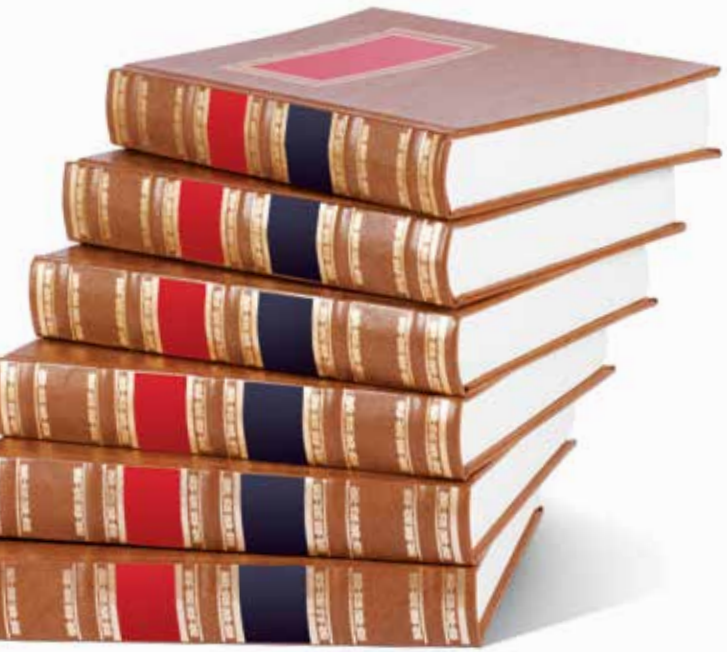
for permission to appeal, and, indeed, petitions for permission to appeal are rarely granted by the Sixth Circuit. If the district court does not grant 1292(b) certification, the petition cannot even be filed with the Sixth Circuit. The only exception is for orders on motions for class certification, which may be the subject of a direct petition for permission to appeal to the Court of Appeals.[15]



Finally, if no other options exist, a federal court litigant may consider filing a petition for a writ of mandamus. The Sixth Circuit considers the following factors when deciding whether to grant mandamus:

- whether there is no other means to obtain the relief requested
- whether the petitioner will be damaged or prejudiced in a way that is not correctable on later appeal
- whether the order is clearly erroneous as a matter of law
- whether the order is an "oft-repeated error or manifests a persistent disregard of the federal rules"
- whether the order raises issues of law of first impression[16]

Writs of mandamus are considered "drastic" and are rarely granted.[17] But they do represent a potential avenue for interlocutory review that may be appropriate in certain circumstances.

In sum, interlocutory appeals are treated very differently in the two systems. Litigants should consult the rules and talk with an appellate specialist before advising clients regarding their appellate options. ■

Jill M. Wheaton is a member of the Litigation Department at Dykema where she heads the Appellate Practice Group.

FOOTNOTES

1. MCR 7.202(C)(6)(a)(iv).
2. 28 USC 1291(a)(1).
3. 28 USC 1291(a)(2).
4. 9 USC 16.
5. 28 USC 1453(c)(1).
6. 28 USC 158(d)(2).
7. 28 USC 1292(a)(3).
8. *Johnson v Jones*, 515 US 304, 310; 115 S Ct 2151; 132 L Ed 2d 238 (1995).
9. See *Stringfellow v Concerned Neighbors*, 480 US 370, 377–378; 107 S Ct 1177; 94 L Ed 2d 389 (1987); *Nixon v Fitzgerald*, 457 US 731, 743; 102 S Ct 2690; 73 L Ed 2d 349 (1982).
10. FR Civ P 54(b).
11. MCR 2.604(A).
12. MCR 2.604(B).
13. See FR App P 5.
14. 28 USC 1292(b).
15. FR Civ P 23(f).
16. *In re Parker*, 49 F3d 204, 207 (CA 6, 1995).
17. See *US v Young*, 424 F3d 499, 504 (CA 6, 2005).