Presented:
25th Annual Conference on State and Federal Appeals

June 4-5, 2015
Austin, Texas

Interlocutory Appeal Update

Richard B. Phillips, Jr.
Michael Schneider

Author contact information:
Richard B. Phillips, Jr.
Thompson & Knight LLP
Dallas, Texas
rich.phillips@tklaw.com
214-969-1148

Michael Schneider
Thompson & Knight LLP
Houston, Texas
michael.schneider@tklaw.com
713-653-8896

TABLE OF CONTENTS

Page

I. Introduction 1

II. General Principles 1

III. Procedural Issues 3

A. Perfecting the Appeal 3

B. Findings of Fact and Conclusions of Law 5

C. The Record 5

D. Briefing Deadlines 6

E. Submission, Decision, and Post-Judgment Proceedings 6

F. What happens in the trial court while the interlocutory appeal is pending? 7

(1) Texas Rule of Appellate Procedure 29 7

(2) Statutory Provisions 8

IV. Specific Interlocutory Orders 9

A. Texas Civil Practice and Remedies Code § 51.014(a) 9

(1) Certain orders relating receivers or trustees 9

(2) Orders certifying or refusing to certify a class action 10

(3) Orders granting or refusing a temporary injunction or granting or overruling a motion to dissolve a temporary injunction 12

(4) Orders denying a summary-judgment motion based on an assertion of immunity by "an individual who is an officer or employee of the state or a political subdivision of the state" 13

Page

(5) Orders denying a summary-judgment motion in certain cases involving members of the media 15

(6) Orders granting or denying a special appearance 17

(7) Order granting or denying a plea to the jurisdiction by a governmental unit 17

(8) Orders relating to expert reports in health care liability claims 19

(9) Orders denying a motion to dismiss asbestos- or silica-related claims under Texas Civil Practice and Remedies Code § 90.007 20

(10) Orders denying a summary-judgment motion regarding the limited liability of certain electric utilities. 20

(11) Orders denying a motion to dismiss under the Texas Citizens Participation Act 20

B. Other Statutes 21

(1) Venue 21

(2) Arbitration 22

(3) Orders denying a motion to dismiss under the Texas Citizens Participation Act 26

(4) Orders denying a motion to dismiss a suit against a licensed professional for failure to include a certificate of merit 26

(5) Orders under Texas Rule of Civil Procedure 76a 26

(6) Orders relating to discovery of a privileged environmental, health, and safety audit 27

(7) Certain orders relating to the validity of public securities 27

Page

(8) Miscellaneous orders under the Health and Safety Code 28

(9) Certain orders relating to juveniles 28

(10) Orders appointing a receiver under the Family Code 29

(11) Orders denying summary judgment based on immunity of a non-profit corporation....29

(12) Orders denying a plea to the jurisdiction based on exclusive or primary jurisdiction in a class action when the class is later certified....30

(13) Orders on class certification in a suit for unfair competition or unfair practices under the Insurance Code 30

V. Permissive Interlocutory Appeals 30

A. 2011 Amendments to Section 51.014(d) 31

B. Procedural Issues 34

(1) Step One: The Trial Court's Permission to Appeal 34

(2) Step Two: The Court of Appeals' Permission to Appeal....34

C. Statistics Related to Appeals under Section 51.014(d) 36

D. Practice Tips for Permissive Appeals 40

VI. Taking it to the Supreme Court.... 44

Appendices

Appendix 1 — Chart of Common Interlocutory Appeals

Appendix 2 — List of Permissive Interlocutory Appeal Orders and Opinions

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 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.[1]

We have also included some statistics about permissive interlocutory appeals under section 51.014(d). It has now been almost four 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

The general rule is that an interlocutory order cannot be appealed absent specific authority to do so. *E.g.*, *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 92 (Tex. 2012). 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.).

---

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

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 also file 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.)

There is also a split of authority on whether a special appearance must be challenged by interlocutory appeal or waived. Several courts have held that a denial of a special appearance can be appealed after final judgment. *E.g.*, *GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 866–67 (Tex. App.—Austin 2008, no pet.). But at least

one court has held that the special appearance is waived if the defendant does not pursue an interlocutory appeal. *Matis v. Golden*, 228 S.W.3d 301, 305 (Tex. App.—Waco 2007, no pet.).

When in doubt, the safest course is likely to pursue the interlocutory appeal. Even if the authorizing statute says that an appeal "may" be pursued, if there is a chance that later orders could render any further appeal moot, the interlocutory appeal should be pursued.

III. PROCEDURAL ISSUES

Interlocutory appeals are "accelerated appeals" and are therefore governed by different rules than appeals from final judgments. TEX. R. APP. P. 28.1(a). Additionally, because interlocutory appeals are all creatures of a specific statutory grant, some procedural issues (such as the deadline to file the notice of appeal) may be controlled by the statute that grants the right of interlocutory appeal rather than by the rules.

A. Perfecting the Appeal

Generally, the notice of appeal from an interlocutory order must be filed within 20 days of the order that is being appealed. TEX. R. APP. P. 26.1(b). But if the statute sets a different deadline for the notice of appeal, the statute will control. TEX. R. APP. P. 28.1(b); *see also* TEX. HEALTH & SAFETY CODE § 574.070(b) (requiring notice of appeal within 10 days of the order). Additionally, as discussed more fully in Section V.(B)(2) below, the deadline to file a petition for permission to appeal in the court of appeals under section 51.014(d) is 15 days from the date the trial court signs the order granting permission to appeal. TEX. R. APP. P. 28.3(c).

Unlike in an appeal from a final judgment, filing a motion for new trial, another post-order motion, or a request for findings of fact will ***not*** extend the time for filing the notice of appeal. TEX. R. APP. P. 28.1(b).

Denial of a motion to reconsider an interlocutory order will not usually reset the deadline to appeal. *See Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 358 (Tex. 2001) *("*"Allowing interlocutory appeals whenever a trial court refuses to change its mind…would invite successive appeals and undermine the statute's purpose of promoting judicial economy."); *Diggs v. Knowledge Alliance, Inc.*, 176 S.W.3d 463, 464 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Denton Cnty. v. Huther*, 43 S.W.3d 665, 667 (Tex. App.—Fort Worth 2001, no pet.).

But a motion that presents a new ground for relief and creates a new order that can be appealed will reset the deadline for perfecting the appeal. *See*

Cameron Cnty. v. Carrillo, 7 S.W.3d 706, 708-09 (Tex. App.—Corpus Christi 1999, no pet.) (holding that the county's "renewed" summary-judgment motion actually contained a ground for relief not included in the first motion and that the deadline to appeal the trial court's order on the new ground for relief ran from the ruling on the "renewed" motion). Simply "repackaging" a denied motion in a new procedural cloak will not revive the right to appeal. *Tex. Cityview Care Ctr. LP v. Foster*, No. 02–13–00315–CV, 2015 WL 736559 at *3 (Tex. App.—Fort Worth, 2015, no pet.).

Although it is unlikely to arise often, Rule 26.1(d) would allow a cross-appeal to be filed within 14 days after a notice of appeal is filed. Nothing in Rule 26.1(d) excludes interlocutory appeals. *See Fjell Tech. Grp. v. Unitech Int'l, Inc.*, No. 14–14–00255–CV, 2015 WL 457805 at *1 (Tex. App.—Houston [14th Dist.] Feb. 3, 2015, no pet.) (appeal and cross-appeal from an order granting in part and denying in part special appearance filed by multiple parties).

Just as with an appeal from a final judgment, the appellate court can grant an extension of up to 15 days to perfect the appeal. TEX. R. APP. P. 26.3. The motion must be filed in the court of appeals, not in the trial court. TEX. R. APP. P. 26.3(b). But the notice of appeal should be filed with the clerk of the trial court at the same time that the motion for extension of time is filed. TEX. R. APP. P. 26.3(b).

If the appeal could be taken to more than one court of appeals, the safest course would be to file the motion to extend time in both courts. *See Johnson v. Sprint Transp., Inc.*, 811 S.W.2d 953, 955 (Tex. App.—Houston [1st Dist.] 1991, no writ) (noting in a similar situation that filing the motion "in *both* the First and Fourteenth Courts of Appeals is appropriate") (emphasis in original). But some courts have also expressed a willingness to consider a motion filed in one court as though it had been filed in the other court as well. *See Harris v. Borne*, 933 S.W.2d 535, 537 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (per curiam order); *Johnson*, 811 S.W.2d at 955.

Moreover, just as with an appeal from a final judgment, if the notice of appeal is filed late (but within 15 days after the deadline), but no motion for extension of time is filed with it, the appellate court will imply a motion. *E.g.*, *RSL-3B-IL, Ltd. v. Prudential Ins. Co. of America*, No. 01–13–00933–CV, 2014 WL 3107663 at *2 (Tex. App.—Houston [1st Dist.] July 8, 2014, no pet.). But the party will still be required to provide a reasonable explanation for missing the deadline. *E.g.*, *Munoz v. City of Balcones Heights*, No. 04–13–00439–CV, 2013 WL 6115994 at *2 (Tex. App.—San Antonio Nov. 20, 2013, pet. denied).

It now appears fairly settled that Texas Rule of Civil Procedure 306a(4) (which provides for an extension of time when a party does not receive notice of the judgment) can apply to interlocutory appeals. *See LDF Constr., Inc. v. Tex.*

Friends of Chabad Lubavitch, Inc., No. 14–14–00113–CV, 2015 WL 1020766 at *2-3 (Tex. App.—Houston. [14th Dist.] Mar 5, 2015, no pet.) (affirming trial court's application of Rule 306a to extend deadline for notice of appeal); *Pilot Travel Ctrs., LLC v. McCray*, 416 S.W.3d 168, 176 (Tex. App.—Dallas 2013, no pet.) ("If applicable, rule of civil procedure 306a may operate to extend the deadline for filing a notice of appeal of an interlocutory order."); *Smith v. Adair*, 96 S.W.3d 700, 704-05 (Tex. App.—Texarkana 2003, pet. denied) (holding that Rule 306a applies to an interlocutory appeal even though the deadline was set by statute, and not by rule).

B. Findings of Fact and Conclusions of Law

Rule 28.1(c) provides that the trial court "need not file findings of fact and conclusions of law but may do so within 30 days after the [interlocutory] order is signed." Although findings of fact are not required, it is advisable to request them when appealing an interlocutory order. *E.g.*, *Fin. Strategy Grp., PLC v. Lowry*, No. 01–14–00273–CV, 2015 WL 452265 at *8 (Tex. App.—Houston [1st Dist.] Jan. 27, 2015, no pet.) ("Here, because the trial court did not make express findings in support of its denial of Financial Strategy's special appearance, we imply all facts necessary to support the judgment that are supported by the evidence."); *Shamrock Foods Co. v. Munn & Assocs., Ltd.*, 392 S.W.3d 839, 844 (Tex. App.—Texarkana 2013, no pet.) ("Because no findings of fact or conclusions of law were filed, we must uphold the trial court's decision if there is sufficient evidence to support it on any legal theory asserted.").

But because they are not required, findings of fact receive less deference in an interlocutory appeal. *E.g.*, *Elliott v. Weatherman*, 396 S.W.3d 224, 228 (Tex. App.—Austin 2013, no pet.) (noting that findings of fact issued in conjunction with an interlocutory order do not carry the same weight as findings issued under Texas Rule of Civil Procedure 296 and they are not binding on the appellate court, even if not challenged).

C. The Record

If the appeal is to be decided with a record, the deadline to file the record is 10 days after the notice of appeal is filed. TEX. R. APP. P. 35.1(b).

Rule 28.1(e) allows the court to hear the appeal on either "the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers." And just as with other appeals, the parties can also agree to proceed on a stipulated record. TEX. R. APP. P. 34.2.

At the time of this writing, there is a bill pending in the Legislature to ensure that court reporters have at least 60 days to prepare the record in an appeal. H.B.

1494, 84th Leg., R.S. But if this bill is enacted and signed, it will not affect the time to file the record in interlocutory appeals. *Id.*

D. Briefing Deadlines

The rules provide shorter briefing deadlines in accelerated appeals. The appellant's brief is due 20 days after the record is filed. TEX. R. APP. P. 38.6(a). The appellee's brief is due 20 days after the appellant's brief is filed, or 20 days after the appellant's brief was due, if one was not filed. TEX. R. APP. P. 38.6(b). Just as with other appeals, a reply brief (if one is filed) is due 20 days after the appellee's brief. TEX. R. APP. P. 38.6(c).

Just as with appeals from final judgments, these deadlines can be extended by the court. TEX. R. APP. P. 38.6(d). The court can also, in the interest of justice, shorten the deadlines. *Id.*

Rule 28.1(e) allows the appellate court to order the case submitted without briefs. TEX. R. APP. P. 28.1(e); *see also Roma Indep. Sch. Dist. v. Guillen*, No. 04–13–00133–CV, 2013 WL 684781 at *2 (Tex. App.—San Antonio Feb. 25, 2013, pet. filed) (on motion of the appellee, deciding an interlocutory appeal in a time-sensitive challenge to election procedures without briefs); *City of Corpus Christi v. Friends of Coliseum*, 311 S.W.3d 706, 708 n.2 (Tex. App.—Corpus Christi 2010, no pet.) (on motion of the appellant, deciding without briefs in a time-sensitive appeal in a case involving the demolition of the Corpus Christi Coliseum).

E. Submission, Decision, and Post-Judgment Proceedings

The general rules regarding notice of oral argument apply to interlocutory appeals. TEX. R. APP. P. 39.1 (allowing the court to decide whether to hear oral argument); TEX. R. APP. P. 39.8 (requiring notice at least 21 days before submission (either on the briefs or on oral argument)).

Appellate courts are supposed to give precedence to accelerated appeals when determining the order in which civil cases will be decided. TEX. R. APP. P. 40.1(b).

The court of appeals' judgment takes effect when the mandate is issued. TEX. R. APP. P. 18.6. The court has discretion to issue the mandate with its judgment or wait to issue the mandate "until the appeal is finally disposed of." *Id.*

The appellate court can either shorten the time to file a motion for rehearing or deny the right to file a rehearing motion at all. TEX. R. APP. P. 49.4.

F. What happens in the trial court while the interlocutory appeal is pending?

(1) Texas Rule of Appellate Procedure 29

The interlocutory order can be superseded pending appeal, but only if the trial court permits it and the appellant provides security in accordance with Texas Rule of Appellate Procedure 24. TEX. R. APP. P. 29.2. If the trial court refuses to allow the appellant to supersede the order, the appellant can ask the appellate court to review that order for abuse of discretion. *Id.*

Rule 29.3 allows the appellate court to issue temporary orders to preserve the parties' rights pending resolution of the appeal. TEX. R. APP. P. 29.3. The appellate court cannot suspend the trial court's order if the appellant's rights could be adequately protected through Rule 24. *Id.* One court has held that a party need not seek relief in the trial court before asking the appellate court for temporary orders under Rule 29.3. *Maples v. Muscletech, Inc.*, 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.).

Rule 29.5 provides that, unless prohibited by statute, the trial court retains jurisdiction during the appeal and may make any further additional orders, including an order dissolving the order on appeal. TEX. R. APP. P. 29.5; *see also Tex. Health & Human Servs. Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 623-24 (Tex. App.—Austin 2013, no pet.) (holding that trial court had power to amend temporary injunction to bring it into compliance with Texas Rules of Civil Procedure 683 and 684).

But the trial court cannot take any action that is inconsistent with any temporary order issued by the appellate court or that would interfere with or impair the jurisdiction of the appellate court or the effectiveness of relief that could be granted on appeal. TEX. R. APP. P. 29.5*; see also Bruns v. Top Design Inc.*, No. 01–08–00070–CV, 2008 WL 4965365 at *2 (Tex. App.—Houston [1st Dist.] Nov. 20, 2008, no pet.) (vacating trial court's order transferring venue while interlocutory appeal was pending because transferring venue would have removed the case from the jurisdiction of the appellate court).

While the appeal is pending, the appellate court can also review the following orders entered by the trial court: (1) a further appealable interlocutory appeal on the same subject matter or (2) any interlocutory order that interferes with the effectiveness of any relief that could be granted on appeal. TEX. R. APP. P. 29.6.

(2) Statutory Provisions

Interlocutory appeals under Texas Civil Practice and Remedies Code section 51.014(a) (except for an appeal granting or refusing a temporary injunction and in suits under the Family Code) automatically stay commencement of trial. TEX. CIV. PRAC. & REM. CODE § 51.014(b). In addition, an appeal of certain orders will automatically stay all proceedings in the trial court while the appeal is pending: (1) orders granting or denying a motion to certify a class; (2) orders denying summary judgment based on official immunity; (3) orders that grant or deny a plea to the jurisdiction filed by a governmental entity; and (4) orders denying a motion to dismiss under the Texas Citizens Participation Act. *Id.*

There is still an open question about what exactly constitutes "commencement of trial." No court has definitively decided whether a dispositive proceeding such as a summary-judgment motion constitutes "commencement of trial." In *Lincoln Properties Co. v. Knowles*, the Dallas Court of Appeals reasoned that a summary-judgment hearing or hearing on another dispositive motion would be "commencement of trial" for purposes of section 51.014(b). 110 S.W.3d 712, 714 (Tex. App.—Dallas 2003, no pet.). But that statement is dicta because the court dismissed the appeal as moot because no party objected to the trial court ruling on the summary-judgment motion. *Id.* at 715. No other court has had occasion to address the issue.

For certain orders, the automatic stay does not apply unless the motion is filed and heard within a statutory deadline. *Id.* § 51.014(c). Those orders are: (1) denial of a summary-judgment motion based on official immunity; (2) denial of a special appearance; and (3) denial of a plea to the jurisdiction. *Id.*

An appeal under Texas Civil Practice and Remedies Code section 15.003(b) of an order that a plaintiff in a multi-plaintiff case did or did not independently establish proper venue also automatically stays commencement of trial pending resolution of the appeal. TEX. CIV. PRAC. & REM. CODE § 15.003(d).

The statutory stay is not jurisdictional and any error related to the trial court proceeding in violation of the automatic stay can be waived. *See Roccaforte v. Jefferson Cnty.*, 341 S.W.3d 919, 923 (Tex. 2011) ("The trial court's rendition of final judgment while the stay was in effect was voidable, not void, and Roccaforte's failure to object to the trial court's actions waived any error related to the stay."). Although *Roccaforte* addressed the statutory stay under section 51.014(c), it is likely that the reasoning would also apply to an appeal under section 15.003.

IV. SPECIFIC INTERLOCUTORY ORDERS

The most common statutory authorizations for interlocutory appeals are found in Texas Civil Practice and Remedies Code section 51.014(a). This list has been continually expanding over the last 10 years. Each expansion opens new opportunities for immediate appeals and for disagreements about the scope of the expansion.

In addition to section 51.014(a), the right to an interlocutory appeal is granted in other acts scattered throughout Texas statutes. Some of these will be discussed in section IV.B., below.

Appendix 1 is a chart of the appealable orders under section 51.014(a) and a several other common interlocutory orders for which appeal is allowed by another statute.

A. Texas Civil Practice and Remedies Code § 51.014(a)

As of this writing, there are 13 specific orders listed in section 51.014(a). But there are two different provisions labeled 51.014(a)(12). Both sections were adopted by the same Legislature, and the bills containing the competing subsections were considered by the same House committee. *See* Acts 2013, 83rd Leg., R.S., Ch. 44, § 1; Acts 2013, 83rd Leg., R.S., Ch. 1042, § 4. In fact, they were enacted on the same day. Because the two acts are not inconsistent with each other, both can be effective. TEX. GOV'T CODE § 311.025(b). Therefore, before relying on section 51.014(a)(12), it is important to be sure which subsection (12) is at issue.

The two acts also contained differing versions of section 51.014(b), which addresses the automatic stay imposed by an interlocutory appeal. One of the acts adds its version of subsection (12) to the list of appeals that will stay all other proceedings in the trial court. *See* Acts 2013, 83rd Leg., R.S., Ch. 1042, § 4.

This issue should not exist for long. A Legislative fix has been proposed in SB 1296. As of this writing, SB 1296 has passed the Senate and has been sent to the House for review. SB 1296 would renumber one of the subsections as 51.014(a)(13). It would also adopt the version of 51.014(b) that adds the new interlocutory appeal to the list of those that automatically stay all proceedings in the trial court.

(1) Certain orders relating receivers or trustees

Sections 51.014(a)(1) and (a)(2) allow interlocutory appeals from orders appointing a receiver or trustee (section (a)(1)) and orders "overruling a motion to vacate an order appointing a receiver or trustee" (section (a)(2)).

The scope of these two sections is strictly construed. *E.g.*, *Spiritas v. Davidoff*, No. 05–14–00068–CV, 2015 WL 870125 at *8 (Tex. App.—Dallas Feb. 27, 2015, no pet.). For example, an order appointing a successor to a permanent receiver or a successor trustee is not immediately appealable. *Haluska v. Haluska-Rausch*, No. 03–11–00312–CV, 2012 WL 254639 at *2 (Tex. App.—Austin Jan. 24, 2012, no pet.); *Ahmed v. Shimi Ventures, L.P.*, 99 S.W.3d 682, 688 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *In re Estate of Dillard*, No. 07–00–00504–CV, 2001 WL 139082 at *4 (Tex. App.—Amarillo Feb. 5, 2001, no pet.).

An order denying appointment of a receiver is not appealable under these sections. *Balias v. Balias*, 748 S.W.2d 253, 255 (Tex. App.—Houston [14th Dist.] 1988, writ denied). Orders appointing similar officers are not appealable. *See Diana Rivera & Assocs. v. Calvillo*, 986 S.W.2d 795, 796 (Tex. App.—Corpus Christi 1999, pet. denied) (order appointing an auditor is not appealable); *De Ayala v. Mackie*, 193 S.W.3d 575, 579-80 (Tex. 2006) (order denying motion to remove an executor of an estate not appealable).

But in deciding whether a particular order may be appealed, the court will look at the substance of the order, not just its title. Thus, in *Chapa v. Chapa*, the court found that it had jurisdiction over an appeal from an order titled "Order Appointing Special Master" because in substance, the special master was given the duties and powers of a receiver. No. 04–12–00519–CV, 2012 WL 6728242 at *6 (Tex. App.—San Antonio Dec. 28, 2012, no pet.).

Moreover, orders relating to the administration of a receivership do not fall within these sections. *N & J Enters., LLC v. Owens*, No. 02–11–00004–CV, 2011 WL 856874 at *1 (Tex. App.—Fort Worth Mar. 10, 2011, no pet.) (no jurisdiction over an appeal of an order to pay a portion of the receiver's fees); *Wells Fargo Bank, N.A. v. JRK Villages at Meyerland, LLC*, No. 01–10–01076–CV, 2011 WL 61170 at *1 (Tex. App.—Houston [1st Dist.] Jan. 6, 2011, no pet.) (no jurisdiction over an amended order imposing a new condition on the receiver).

Some receivership orders, however, may be immediately appealable as final orders. *See Hinton v. F.D.I.C.*, 800 S.W.2d 845, 848 (Tex. 1990).

(2) Orders certifying or refusing to certify a class action

Section 51.014(a)(3) permits an appeal from an order that "certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3). Here, Texas law differs from federal law, in which an appeal from a class-certification decision is a permissive appeal, rather than an appeal as of right. *See* Fed. R. Civ. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-

action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.").

Again, this section is strictly construed, and appeal is allowed only from an order that certifies or refuses to certify a class, not from other orders related to class actions or in cases that are similar to class actions. For example, the Supreme Court has held that an order striking a shareholder derivative claim is not an order refusing to certify a class and is therefore not immediately appealable under this section. *Stary v. DeBord*, 967 S.W.2d 352, 353 (Tex. 1998).

Additionally, an order decertifying a class may be immediately appealable, *see Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 368–69 (Tex. App.—Houston [14th Dist.] 1987, no writ), but that is unclear. *See Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 358 (Tex. 2001) (citing *Grant* but without expressly approving or denying its holding). An order refusing to decertify a class is not immediately appealable. *Bally Total Fitness*, 53 S.W.3d at 358.

Although this appears to be a fairly clear standard, it becomes less clear when the order at issue modifies a prior order certifying a class. The standard for distinguishing appealable orders from non-appealable orders is found in *De Los Santos v. Occidental Chemical Corp.*, 933 S.W.2d 493, 495 (Tex. 1996) (per curiam). If the order "alters the fundamental nature of the class," then it is immediately appealable as an order that certifies a class. *Id.* The order in *De Los Santos* changed the class from an opt-out class to a mandatory class. *Id.*

Application of this standard has proven somewhat difficult in practice. In *Phillips Petroleum Co. v. Yarbrough*, 405 S.W.3d 70 (Tex. 2013), the court of appeals had relied on the *De Los Santos* standard to hold that it did not have jurisdiction to consider an appeal from an order that modified the class-certification order to allow the class to pursue a new claim. The Texas Supreme Court disagreed, reasoning that the new claim was significantly different from the claim that had already been certified, and the new order "raises other concerns regarding the propriety of certification that were not present" in the original certification order. *Id.* at 78. The new claim also required different proof about different conduct. *Id.* at 80.

The following types of changes have been held insufficient to allow an appeal:

- An order increasing the size of the class. *Pierce Mortuary Colls., Inc. v. Bjerke*, 841 S.W.2d 878, 881 (Tex. App.—Dallas 1992, writ denied)

- An order narrowing the time limit for claims and more specifically defining the geographic area covered by the class. *Koch Gathering Sys.,*

Inc. v. Harms, 946 S.W.2d 453, 455 (Tex. App.—Corpus Christi 1997, writ denied)

- An order approving notice to the class after a bench trial that found in favor of the class. *Citgo Ref. & Mktg., Inc. v. Garza*, 94 S.W.3d 322, 324 (Tex. App.—Corpus Christi 2002, no pet.)

(3) Orders granting or refusing a temporary injunction or granting or overruling a motion to dissolve a temporary injunction

Section 51.014(a)(4) allows an immediate appeal of an order that "grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4).

The question that usually arises is whether the order is actually a temporary injunction. The issue is resolved by looking to the substance of the order, not its title or form. *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809-10 (Tex. 1992). Thus, a trial court cannot prevent review of a temporary injunction by calling it something else or refusing to enter a writ of injunction. *Id.* Nor can a party obtain review by calling an order a "temporary injunction," if the order is not an injunction in effect. *Bobbitt v. Cantu*, 992 S.W.2d 709, 713 (Tex. App.—Austin 1999, no pet.).

The following orders have been held to be appealable:

- An order styled as an order granting a motion to compel but requiring the defendant to provide maintenance and cure payments under the Jones Act. *Helix Energy Solutions Grp., Inc. v. Howard*, 452 S.W.3d 40 (Tex. App.—Houston [14th Dist.] 2014, no pet.)

- An order denying a motion to dissolve an order that was effectively a temporary injunction. *City of Houston v. Downstream Envtl., L.L.C.*, No. 01–13–01015–CV, 2014 WL 5500486 (Tex. App.—Houston [1st Dist.] Oct. 30, 2014, pet. filed)

- An order requiring parties to comply with terms of a mediated settlement agreement, including noncompetition provisions. *In re Robinson Family Entities*, No. 11–12–00258–CV, 2014 WL 4347838 (Tex. App.—Eastland Aug. 29, 2014, no pet.)

The following orders have been held to be unappealable:

- An order abating a case without addressing the plaintiff's request for a temporary injunction. *Chicago Bridge & Iron Co. (Del.) v. Delman*, No. 09–14–00468–CV, 2015 WL 1849669 at *2 (Tex. App.—Beaumont, Apr. 23, 2015, no pet. h.)

- An order enforcing a previously entered temporary injunction. *DeLitta v. Schaefer*, No. 03–14–00426–CV, 2014 WL 5802025 (Tex. App.—Austin Nov. 6, 2014, no pet.)

- An order refusing plaintiff's request to enjoin the defendant from pumping plaintiff's water, but permitting plaintiff to install a meter. *Panamerican Operating, Inc. v. George Land & Cattle Co., LLC*, No. 06–14–00049–CV, 2014 WL 4311042 (Tex. App.—Texarkana Aug. 25, 2014, no pet.)

- An order denying a petition for a writ of habeas corpus filed under the Indian Child Welfare Act. *In re S.R.B.*, No. 02–13–00249–CV, 2013 WL 5175578 (Tex. App.—Fort Worth Sept. 12, 2013, no pet.)

- An order denying a request for a temporary restraining order. *Rakowitz v. Bexar Cnty. Sheriffs Dep't*, No. 04–13–00093–CV, 2013 WL 2446725 (Tex. App.—San Antonio June 5, 2013, no pet.)

Certain types of temporary injunctions may be appealed directly to the Texas Supreme Court: "An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal." TEX. GOV'T CODE § 22.001(c). Such direct appeals are governed by Texas Rule of Appellate Procedure 57. The Court does not have to take jurisdiction over direct appeals. TEX. R. APP. P. 57.2. If the Court does not note probable jurisdiction, then the appeal can be taken to the court of appeals within 10 days after the Supreme Court's disposition. TEX. R. APP. P. 57.3.

(4) Orders denying a summary-judgment motion based on an assertion of immunity by "an individual who is an officer or employee of the state or a political subdivision of the state"

Section 51.014(a)(5) permits appeals from an order that "denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5).

Resolving a split among the courts of appeals, the Texas Supreme Court has held that denial of a motion to dismiss based on official immunity is appealable under section 51.014(a)(5), even though the statute refers only to denial of a summary-judgment motion. *Austin State Hosp. v. Graham*, 347 S.W.3d 298 (Tex. 2011). The Court found no reason to restrict the right to appeal based on the procedural vehicle through which immunity was sought.

Applying this principle, the San Antonio Court of Appeals held that denial of a motion for reconsideration that, for the first time, asserted official immunity, could be appealed under section 51.014(a)(5). *Dorrough v. Faircloth*, 443 S.W.3d 278 (Tex. App.—San Antonio 2014, no pet.)

The Supreme Court has also held that the right to appeal is not restricted to the governmental employee or officer. Rather "an employer may rely on its employee's assertion of immunity for purposes of invoking interlocutory appellate jurisdiction under section 51.014(a)(5)." *William Marsh Rice Univ. v. Refaey*, --- S.W.3d ----, 58 Tex. Sup. Ct. J. 741, 2015 WL 1869890 at *4 (Tex. Apr. 24, 2015).

Other issues arise from questions about whether the person seeking to appeal is an employee of a governmental unit or a political subdivision. The Supreme Court has held that even if the person is not employed by the state or a subdivision, appeal is proper if the person is designated as a "state employee" by statute. *Klein v. Hernandez*, 315 S.W.3d 1, 8 (Tex. 2010). But a defendant is required to conclusively prove that he or she is an employee to be entitled to appeal. *Franka v. Velasquez*, 332 S.W.3d 367, 375 (Tex. 2011).

A peace officer employed by a private, nonprofit hospital was held not to be an "officer" for purposes of section 51.014(a)(5). *Methodist Hosps. of Dallas v. Miller*, 405 S.W.3d 101 (Tex. App.—Dallas 2012, no pet.). But the Texas Supreme Court recently held that a peace officer employed by a private university *is* an officer of the state for purposes of section 51.014(a)(5). *Refaey*, 2015 WL 1869890 at *4. The Court in *Refaey* did not cite or discuss the decision in *Miller*. The different results in these two cases appears to hinge on the fact that the officer in *Refaey* was a commissioned officer under a section of the Education Code that defines such officers as "state officers." *Refaey*, 2015 WL 1869890 at *2-4. But the officer in *Miller* could not point to a similar statute covering peace officers employed by private hospitals.

But a person registered as an "accessibility specialist" by the Texas Department of Licensing and Registration is not a state official. *Rogers v. Orr*, 408 S.W.3d 640, 643 (Tex. App.—Fort Worth 2013, pet. denied).

(5) Orders denying a summary-judgment motion in certain cases involving members of the media

Section 51.014(a)(6) allows an immediate appeal from an order that "denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6).

This section permits an appeal only of the denial of the media-defendant's motion. It does not permit a plaintiff to appeal when the motion is granted or to appeal the denial of a counter-motion. *See Mayfield v. Cuoco*, No. 14–12–00037–CV, 2013 WL 1450923 (Tex. App.—Houston [14th Dist.] Apr. 9, 2013, pet. denied).

Appeals under this section present two main issues: (1) whether the right to appeal applies only to free-speech based defenses or can extend to other defenses asserted by the media member; and (2) who qualifies as a member of the media.

First, the divide over the scope of the appeal continues. Some courts have held that the court can review the entire order and all issues presented, not just the free-speech based issues. *See N.Y. Times, Inc. Doe*, 183 S.W.3d 122 (Tex. App.—Dallas 2006, no pet.); *Cox Tex. Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 720-21 (Tex. App.—Austin 2001, pet. denied); *Am. Broad. Cos. v. Gill*, 6 S.W.3d 19, 26-27 (Tex. App.—San Antonio 1999, pet. denied) *disapproved on other grounds*, *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000); *K-Six Television, Inc. v. Santiago*, 75 S.W.3d 91 96 (Tex. App.—San Antonio 2002, no pet.). But others have held that the appeal must be limited to the defendant's free-speech defenses. *See KTRK Television, Inc. v. Fowkes*, 981 S.W.2d 779, 787 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) *disapproved on other grounds*, *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000); *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 625 (Tex, App.—Fort Worth 2007, pet. denied).

Second, courts look at whether the defendant is a "media defendant." One of the issues courts are wrestling with is whether a defendant is a "media defendant" simply by virtue of publishing content through "electronic media" and the internet. Courts have recognized that simply publishing online content does not make the person a member of the electronic media. *See Serv. Emps. Int'l Union Local 5 v. Prof'l Janitorial Serv. of Houston, Inc.*, 415 S.W.3d 387, 395 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) ("[S]ection 51.014(a)(6) cannot be read to permit everyone who communicates on the Internet to appeal the denial of a summary judgment based in whole or in part upon a claim or defense

arising under the free speech or free press clauses of the United States and Texas Constitutions or Chapter 73 of the CPRC."). The focus should be on "who speaks, not on how they speak." *Id.*

The Fort Worth Court of Appeals has articulated a multi-factor test for deciding who is a member of the electronic media. *Kaufman v. Islamic Soc'y of Arlington*, 291 S.W.3d 130, 137–43 (Tex. App.—Fort Worth 2009, pet. denied). This test looks to "the character and text of the communication itself, its editorial process, its volume of dissemination, the communicator's extrinsic notoriety unconnected to the communication, the communicator's compensation for or professional relationship to making the communication, and other relevant circumstances as the facts may dictate." *Id.* at 142.

The First District looked at similar factors to decide whether "the person's primary business is reporting the news" and whether the person was engaging in that business when the actions at issue took place. *See Serv. Emps. Int'l Union Local 5,* 415 S.W.3d at 395.

Courts have also looked to the definitions of "journalist" and "news medium" in the statute governing a journalist's qualified testimonial privilege in civil cases. *Id.*; *Main v. Royall*, 348 S.W.3d 381, 387 (Tex. App.—Dallas 2011, no pet.); (both citing TEX. CIV. PRAC. & REM. CODE § 22.021).

A physician who was sued for content he self-published on two websites was held to be a member of the electronic media because "he also published editorials in a weekly newspaper, hosted a radio broadcast, and had thirty years' experience as a political writer and journalist." *Hotze v. Miller*, 361 S.W.3d 707, 711–12 (Tex. App.—Tyler 2012, pet. denied). Additionally, a book author and book publishers were held to be members of the media. *Main*, 348 S.W.3d at 387.

But a defendant who was a published author, but who was not being sued for statements made in the published books, was not entitled to pursue an interlocutory appeal under section 51.014(a)(6). *State v. Valerie Saxion, Inc.*, 450 S.W.3d 602 (Tex. App.—Fort Worth 2014, no pet.).

This section also has a unique provision for recovery of costs on appeal, including attorneys' fees. TEX. CIV. PRAC. & REM. CODE § 51.015. If the order is affirmed on appeal, the appellate court is required to order the appellant "to pay all costs and reasonable attorney fees of the appeal." The award of fees is mandatory. *Franco v. Cronfel*, 311 S.W.3d 600, 609 (Tex. App.—Austin 2010, no pet.); *Gaylord Broad. Co. v. Francis*, 7 S.W.3d 279, 286 (Tex. App.—Dallas 1999, pet. denied). This is true even if the appellee does not request that fees be awarded. *Franco*, 311 S.W.3d at 609 n.10.

(6) Orders granting or denying a special appearance

Section 51.014(a)(7) allows an immediate appeal of an order granting or denying a special appearance, except in a suit brought under the Family Code. Application of this section is fairly straightforward.

As with other sections, the appeal is limited to the special appearance. The court cannot consider orders on other motions. *Henry v. Fin. Cas. & Sur. Inc.*, No. 01–13–00672–CV, 2014 WL 2767394 (Tex. App.—Houston [1st Dist.] June 17, 2014, no pet.) (considering special appearance but declining to rule on forum non conveniens motion); *Lisitsa v. Flit*, 419 S.W.3d 672, 682 n.10 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("When a litigant challenges both appealable and unappealable interlocutory orders, we review the portion of an order which is appealable but do not consider the portion which is not.").

There is a split of authority about whether a party must take an interlocutory appeal to preserve a challenge to personal jurisdiction. Most courts have held that waiting until after final judgment to appeal does not waive the right to challenge personal jurisdiction. *E.g.*, *DeWolf v. Kohler*, 452 S.W.3d 373 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (holding that interlocutory appeal is not mandatory and collecting cases that reach the same conclusion). But the Waco Court of Appeals has reached the opposite conclusion. *Matis v. Golden*, 228 S.W.3d 301, 305 (Tex. App.—Waco 2007, no pet.) (concluding that a challenge to the trial court's order denying the defendant's special appearance, raised for the first time on appeal from final judgment, was untimely).

(7) Order granting or denying a plea to the jurisdiction by a governmental unit

Section 51.014(a)(8) allows an immediate appeal from an order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). No particular type of motion is required to invoke section 51.014(a)(8). Just as with rulings on official immunity, courts focus on the substance of the motion and order, rather than on the title of the pleading. *E.g.*, *Coll. of the Mainland v. Glover*, 436 S.W.3d 384, 390-91 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

Some governmental units have sought interlocutory appeals of orders that do not expressly deny a plea to the jurisdiction by arguing that the order implicitly denied the jurisdictional challenge. In *Thomas v. Long*, the Supreme Court found that the trial court's order implicitly denied the jurisdictional challenge because the trial court ruled on the merits of a claim that was subject to the plea to the jurisdiction. 207 S.W.3d 334, 339-40 (Tex. 2006). But in *Waller County v. City of Hempstead*, the court found that the jurisdictional challenge had

not been implicitly denied because the trial court expressly declined to rule on the jurisdictional challenge and did not address the merits of any of the claims that were subject to that challenge. 453 S.W.3d 73, 75-76 (Tex. App.—Houston [1st Dist.] 2014, pet. filed). Additionally, the jurisdictional challenge had been raised only in a no-evidence summary-judgment motion, which was not a proper procedural vehicle. *Id.* Nor can a denial be implied simply from the trial court's failure to act on the jurisdictional plea. *City of Beaumont v. Jackson*, No. 09–14–00412–CV, 2014 WL 5776202 (Tex. App.—Beaumont Nov. 6, 2014, no pet.). There still must be some signed order. *Id.*

The Texas Supreme Court has also resolved a dispute among the courts of appeals about whether jurisdictional challenges can be raised for the first time on interlocutory appeal. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). Before *Rusk*, the majority of appellate courts had held that the strict limitations on interlocutory appeals meant that jurisdictional issues could not be raised for the first time in an interlocutory appeal. *Id.* at 95 n.3 (citing cases). But the Supreme Court held that nothing in section 51.014(a) restricts an appellate court's ability to decide whether it has jurisdiction to consider an appeal. *Id.* Therefore, jurisdictional issues can be raised for the first time during an interlocutory appeal. *Id.*

Another issue has been whether the party is a "governmental unit," and therefore entitled to an interlocutory appeal of the denial of a plea to the jurisdiction. In *LTTS Charter School, Inc. v. C2 Construction, Inc.*, the Texas Supreme Court concluded that an open-enrollment charter school is a "governmental unit." 342 S.W.3d 73, 78 (Tex. 2011). The Court pointed to statutes granting an open-enrollment charter school specific authority, including all powers given to public schools and access to public funding. *Id.* The charter school was also subject to "a host" of statutes that govern governmental entities. *Id.* In short, the Court looked at the statutory framework governing the operation of the charter school to determine that the "Legislature considers" the charter school to be a governmental unit. *Id.* at 78.

The following entities have been held to be "governmental units":

- A municipal economic development corporation — *City of Leon Valley Econ. Dev. Corp. v. Little*, 422 S.W.3d 37, 40 (Tex. App.—San Antonio 2013, no pet.)

- A local workforce development board —*Arbor E & T, LLC v. Lower Rio Grande Valley Workforce Dev. Bd., Inc.*, No. 13–13–00139–CV, 2013 WL 8107122 at *6 (Tex. App.—Corpus Christi Dec. 5, 2013, no pet.)

On the other hand, the Electric Reliability Council of Texas ("ERCOT") was held not to be a "governmental unit." *HWY 3 MHP, LLC v. Electric Reliability Council of Tex.* No. 03–14–00303–CV, 2015 WL 1610465 (Tex. App.—Austin Mar. 12, 2015, no pet h.)

(8) Orders relating to expert reports in health care liability claims

Section 51.014(a)(9) allows an immediate appeal from an order that "denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9). And section 51.014(a)(10) allows an appeal of an order that "grants relief sought by a motion under Section 74.351(*l*)." *Id.* § 51.014(a)(10). Section 74.351(b) requires the trial court to dismiss a healthcare-liability action if the plaintiff does not file an expert report. *Id.* § 74.351(b). Section 74.351(*l*) requires the trial court to dismiss a healthcare-liability claim if it appears that the plaintiff did not make an objective good-faith effort to comply with the requirements of the statute. *Id.* § 74.351(*l*).

The Texas Supreme Court has held that because no interlocutory appeal is available from an order granting an extension to file an amended report, no interlocutory appeal is available from a denial of a motion to dismiss that is coupled with the grant of an extension of time. *Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007). But because the trial court cannot grant an extension when ***no*** report is filed, an appeal from a denial of a motion to dismiss for failure to submit a report is permitted, even if that order is coupled with an extension of time. *Badiga v. Lopez*, 274 S.W.3d 681, 684-85 (Tex. 2009).

These sections do not permit an interlocutory appeal from an order granting dismissal for failure to serve an expert report. *E.g.*, *Fisher v. Med. Ctr. of Plano*, No. 05–14–01441–CV, 2015 WL 73441 (Tex. App.—Dallas Jan. 6, 2015, no pet.). But they ***do*** permit an interlocutory appeal from an order granting dismissal based on the inadequacy of a report that was served. *Riggs v. Perlman*, No. 01–13–00974–CV, 2014 WL 2627841 at *1 (Tex. App.—Houston [1st Dist.] June 12, 2014, no pet.). An order that sustains some but not all objections to an expert report and does not dismiss the case can be appealed by both the plaintiff and the defendant. *Bailey v. Amaya Clinic, Inc.*, 402 S.W.3d 355, 361 n.6 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

While section 51.014(a)(9) is not limited to denial of a "motion to dismiss," an appeal is not permitted from an order that effectively seeks reconsideration of a motion to dismiss. *Tex. Cityview Care Ctr. LP v. Foster*, No. 02–13–00315–CV, 2015 WL 736559 at *3 (Tex. App.—Fort Worth Feb. 19, 2015, no pet.) (holding that a summary-judgment motion seeking dismissal under section 74.351 was

effectively a motion to reconsider the failure to dismiss on defendant's earlier motion and that there was no jurisdiction over an interlocutory appeal from denial of the summary-judgment motion).

(9) Orders denying a motion to dismiss asbestos- or silica-related claims under Texas Civil Practice and Remedies Code § 90.007

Section 51.014(a)(11) permits an immediate appeal from an order that "denies a motion to dismiss filed under Section 90.007." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(11). Texas Civil Practice and Remedies Code section 90.007 allows an asbestos or silica defendant to move to dismiss a suit if the plaintiff does not timely serve an adequate expert report under sections 90.003 or 90.004. TEX. CIV. PRAC. & REM. CODE § 90.007.

One court has rejected an argument that an interlocutory appeal was not available because Texas Civil Practice and Remedies Code Chapter 90 is preempted by the Federal Employers' Liability Act ("FELA"). *Kan. City S. Ry. Co. v. Oney*, 380 S.W.3d 795, 798 (Tex. App.—Houston [14th Dist.] 2012, no pet.). The plaintiff argued that because Chapter 90 is preempted, the motion to dismiss was really a motion to dismiss under FELA. *Id.* The court of appeals rejected this argument because the motion was expressly filed under section 90.007. *Id.* Interestingly, the majority ultimately agreed that Chapter 90 is preempted by FELA. *Id.* at 809.

(10) Orders denying a summary-judgment motion regarding the limited liability of certain electric utilities

One version of section 51.014(a)(12) permits an immediate appeal of an order that "denies a motion for summary judgment filed by an electric utility regarding liability in a suit subject to Section 75.0022." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) (as enacted by Acts 2013, 83rd Leg., R.S., Ch. 44, § 1). Texas Civil Practice and Remedies Code section 75.0022 limits the liability of certain electric utilities.

This section has not yet been applied by an appellate court.

(11) Orders denying a motion to dismiss under the Texas Citizens Participation Act

The other version of section 51.014(a)(12) allows an immediate appeal of the denial of a motion to dismiss under Texas Civil Practice and Remedies Code section 27.003. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) (as enacted by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 4). As discussed above, there is a pending bill in the Legislature that would renumber this item as 51.014(a)(13).

Section 27.003 is the section of the Texas Citizens Participation Act ("TCPA") that provides for dismissal of certain claims. TEX. CIV. PRAC. & REM. CODE § 27.003. An appeal is allowed under one of two circumstances. First, appeal is permitted if the trial court denies the motion to dismiss. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) (as enacted by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 4). Second, appeal is permitted if the trial court fails to dispose of a motion within the deadlines imposed by the TCPA, such that the motion is overruled by operation of law. TEX. CIV. PRAC. & REM. CODE § 27.008.

One court has held that a defendant cannot bring an interlocutory appeal from an order that grants the motion to dismiss but refuses to award attorneys' fees. *Paulsen v. Yarrell*, 455 S.W.3d 192, 195-96 (Tex. App.—Houston [1st Dist.] 2014, no pet.). The court reasoned that such an order is not a "partial denial" of the motion to dismiss because the defendant obtained all the relief to which he was entitled—dismissal. *Id.* The court held that the denial of the request for attorneys' fees was a separate, non-appealable interlocutory order. *Id.*

This section is also interesting because it duplicates a right of interlocutory appeal granted within the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 27.008(a). Adoption of this section (and section 27.008) was intended to resolve a split among the appellate courts about whether an interlocutory appeal is allowed from an order denying dismissal under the TCPA. *See In re Lipsky*, --- S.W.3d ----, 58 Tex. Sup. Ct. J. 707, 2015 WL 1870073 at *2 n.2 (Tex. Apr. 24, 2015).

B. Other Statutes

(1) Venue

Most venue decisions are not subject to interlocutory appeal or mandamus. But there are two statutory exceptions. First, if the trial court denies a motion to transfer venue premised on a mandatory venue provision, that decision is reviewable by mandamus. TEX. CIV. PRAC. & REM. CODE § 15.0642. As Pam Baron observed, although this is called a mandamus proceeding, it is effectively an interlocutory appeal. The statute sets a deadline for seeking review (before the 90th day before trial starts or the 10th day after the party receives notice of trial date, whichever is later). *Id.* The Texas Supreme Court has also held that the party does not need to prove that it lacks an inadequate remedy by appeal. *In re Lopez*, 372 S.W.3d 174, 177 (Tex. 2012); *In re Tex. Dep't of Transp.*, 218 S.W.3d 74, 76 (Tex. 2007).

The Texas Supreme Court has also held that this section can be invoked when a party seeks to transfer venue under Texas Civil Practice and Remedies Code section 15.020, which allows a motion to transfer venue to enforce a venue-selection provision in a "major transaction." *In re Fisher*, 433 S.W.3d 523, 532-33

(Tex. 2014). If the venue-selection provision in the contract is mandatory, then it can be enforced on appeal under section 15.0642. *Id.*

Second, Texas Civil Practice and Remedies Code section 15.003 allows an immediate appeal of an order in a multi-plaintiff case determining that "(1) a plaintiff did or did not independently establish proper venue; or (2) a plaintiff that did not independently establish proper venue did or did not establish the items prescribed by Subsections (a)(1)-(4)." TEX. CIV. PRAC. & REM. CODE § 15.003(b). Section 15.003(a) requires that if the case has more than one plaintiff, each plaintiff must independently establish proper venue. *Id.* § 15.003(a). If a plaintiff does not do so, that plaintiff's claim should be transferred to a proper venue or dismissed, unless the plaintiff can meet a four-part test. *Id.*

There is a split among the courts of appeals about whether an appeal under section 15.003 is limited to decisions based on the joinder requirements of section 15.003(a). The San Antonio Court of Appeals has held that it is limited. *Basic Energy Servs. GP, LLC v. Gomez*, No. 04–10–00128–CV, 2010 WL 4817053 at *4-5 (Tex. App.—San Antonio Nov. 24, 2010, pet. denied). On the other hand, several other courts have held that, regardless of the basis for denial, a denial of a motion to transfer venue in a case with multiple plaintiffs is a finding that each plaintiff independently satisfied the venue requirements, and that order is therefore appealable. *Union Pac. R. Co. v. Stouffer*, 420 S.W.3d 233, 237-38 (Tex. App.—Dallas 2013, pet. dism'd); *Nalle Plastics Family Ltd. P'ship v. Porter, Rogers, Dahlman & Gordon, P.C.*, 406 S.W.3d 186, 195 n.7 (Tex. App.—Corpus Christi 2013, pet. denied) (collecting cases).

Under section 15.003(c) "[t]he appeal may be taken by a party that is affected by the trial court's determination under Subsection (a)." TEX. CIV. PRAC. & REM. CODE § 15.003(c). It is not clear exactly how broadly the phrase "a party that is affected" can be construed. Clearly, regardless of the ruling, any defendant would be a party affected. And if the court finds that one of the multiple plaintiffs has not established venue, that plaintiff would clearly be a party that is affected. But it is not clear whether another plaintiff (who has established venue) could argue that it is "affected" by an order transferring or dismissing another plaintiff's claims.

(2) Arbitration

Texas Civil Practice and Remedies Code section 171.098 allows an immediate appeal from orders:

> (1) denying an application to compel arbitration made under Section 171.021;

(2) granting an application to stay arbitration made under Section 171.023;
(3) confirming or denying confirmation of an award;
(4) modifying or correcting an award; or
(5) vacating an award without directing a rehearing.

TEX. CIV. PRAC. & REM. CODE § 171.098(a).

The following orders have been held not to be immediately appealable under section 171.098:

- An order compelling arbitration is not immediately appealable. *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 839–40. (Tex. 2009).

- An order that merely has the effect of denying arbitration without mentioning arbitration is not immediately appealable. *See Ground Force Constr., LLC v. Coastline Homes, LLC*, No. 14–13–00649–CV, 2014 WL 2158160 at *3 (Tex. App.—Houston [14th Dist.] May 22, 2014, no pet.).

- A partial award of an arbitration panel cannot be reviewed in court. Arbitration must be complete before review is available. *Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 586–87 (Tex. 2012); *Armstrong v. SCA Promotions, Inc.*, No. 05–14–00300–CV, 2014 WL 1678988 at *2 (Tex. App.—Dallas Apr. 24, 2014, no pet.).

- An order staying arbitration, but reserving the final determination about whether the parties will be compelled to arbitrate is not appealable. The parties must wait until the trial court has finally decided whether the suit is referable to arbitration. *Ruff v. Ruff*, No. 05–13–00317–CV, 2013 WL 2470750 at *1 (Tex. App.—Dallas June 10, 2013, no pet.).

- An order clarifying the parties' rights under an arbitration agreement is not immediately appealable. *Academy, Ltd. v. Miller*, 405 S.W.3d 152, 154 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

- An order appointing a new arbitrator is not immediately appealable. *Jones v. Brelsford*, 390 S.W.3d 486, 497 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

- An order that partially vacates an arbitration award and remands it for clarification or other limited rehearing is not immediately appealable. *Hassan v. Yazdani-Beioky*, No. 14–11–00916–CV, 2012 WL 407262 at *1-2 (Tex. App.—Houston [14th Dist.] Feb. 9, 2012, no pet.)

- An order denying a request for an injunction to stop an arbitration proceeding is not immediately appealable because parties cannot simply change the title of their motion in order to obtain review of an order that would otherwise be unappealable. *Zachary v. SIS-Tech Applications, LLP*, No. 01–10–00834–CV, 2011 WL 2089767 at *3 (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.)

The following orders have been held to be immediately appealable under section 171.098;

- An order denying a request to compel an existing arbitration panel to hear an additional dispute is immediately. *Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 799 (Tex. App.—Houston [1st Dist.] 2011, no pet.)

- An order vacating an arbitration award and requiring a new arbitration is immediately appealable. *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 270 (Tex. 2010).

Additionally, Texas Civil Practice and Remedies Code section 51.016 provides:

> In a matter subject to the Federal Arbitration Act (9 U.S.C. Section 1 *et seq.*), a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16.

TEX. CIV. PRAC. & REM. CODE § 51.016. This statute resolves a gap that required appellants to file both an interlocutory appeal and a mandamus proceeding to ensure the ability to get review of certain arbitration-related orders. Because there was no state statute specifically authorizing an interlocutory appeal under the Federal Arbitration Act ("FAA"), a mandamus proceeding was required if the case could arguably be covered by the FAA. Now, only an interlocutory appeal is needed. *See CMH Homes v. Perez,* 340 S.W.3d 444, 448 (Tex. 2011).

Under 9 U.S.C. § 16(a) the following orders may be appealed:

> (1) an order—
> (A) refusing a stay of any action under section 3 of this title,
> (B) denying a petition under section 4 of this title to order arbitration to proceed,

> (C) denying an application under section 206 of this title to compel arbitration,
> (D) confirming or denying confirmation of an award or partial award, or
> (E) modifying, correcting, or vacating an award;
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
> (3) a final decision with respect to an arbitration that is subject to this title.

9 U.S.C. § 16(a). Section 16(b) specifically prohibits appeals from orders:

> (1) granting a stay of any action under section 3 of this title;
> (2) directing arbitration to proceed under section 4 of this title;
> (3) compelling arbitration under section 206 of this title; or
> (4) refusing to enjoin an arbitration that is subject to this title.

Id. § 16(b).

While the language of 9 U.S.C. § 16(a) and Texas Civil Practice and Remedies Code section 171.098 are nearly identical, Texas courts and federal courts have sometimes reached differing conclusions about the construction of similar language. For example, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008), the Supreme Court held that the parties cannot agree to expand the grounds for judicial review of arbitration awards under the FAA. But in *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 97 (Tex. 2011), the Texas Supreme Court held that nearly identical language in the Texas Arbitration Act permits the parties to contract for expanded judicial review. Therefore, Texas Civil Practice and Remedies Code section 51.016 creates the possibility that a party could appeal an arbitration-related order under the FAA in Texas state court that it could not appeal if the case were pending in federal court.

For example, in *Hart v. Flagship Homes, Ltd.*, the appellants sought to appeal arbitration orders that neither confirmed nor vacated an arbitration award. Nos. 04–14–00452–CV, 04–14–00568–CV & 04–14–00597–CV, 2014 WL 6979666 at *1 (Tex. App.—San Antonio Dec. 10, 2014, pet. denied). Instead, the trial court's orders simply denied the applications to confirm. *Id.* The appellate court noted that the Fifth Circuit has held that an order that merely denies confirmation is not appealable under the FAA. *Id.* at *2. But the court also noted that the Texas Supreme Court has held that similar language in the Texas Arbitration Act permits an appeal of an order that neither confirms nor vacates an award. *Id.* Therefore, the appellate court held that under section 51.016, it could construe the FAA to allow the appeal. *Id.*

(3) Orders denying a motion to dismiss under the Texas Citizens Participation Act

Texas Civil Practice and Remedies Code section 27.008 allows an immediate appeal of a denial (or denial by operation of law) of a motion to dismiss under the Texas Citizens Participation Act. These orders are addressed in section IV.A.(11) above, because appeal is also authorized by Texas Civil Practice and Remedies Code section 51.014(a)(12) (as enacted by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 4).[2]

(4) Orders denying a motion to dismiss a suit against a licensed professional for failure to include a certificate of merit

Texas Civil Practice and Remedies Code section 150.002(f) allows an immediate appeal from an order denying a motion to dismiss under Chapter 150. TEX. CIV. PRAC. & REM. CODE § 150.002(f). Chapter 150 requires suits against certain licensed professionals to be accompanied by a certificate of merit. *Id.* § 150.002. A defendant can move to dismiss if there is no certificate or if the certificate is inadequate. *Id.*

The statute also contains a limited provision for an extension of time to comply with the certificate-of-merit requirement. *Id.* § 150.002(c). The Texas Supreme Court has held that if the trial court simultaneously refuses to dismiss a case for failure to provide a certificate of merit and grants an extension under section 150.002(c), the defendant may appeal the denial of the motion to dismiss. *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 389 (Tex. 2014). This holding was based on the Court's conclusion that if no certificate of merit is filed, the plaintiff is not entitled to request an extension of time to file an adequate certificate. *Id.*

(5) Orders under Texas Rule of Civil Procedure 76a

Texas Rule of Civil Procedure 76a(8) provides for an immediate appeal of "[a]ny order (or portion of an order or judgment) relating to sealing or unsealing court records" by providing that these orders are deemed severed from the case and are final judgments. TEX. R. CIV. P. 76a(8). But courts still refer to appeals

---

[2] Note that this section also makes an appeal from a final judgment under the TCPA an accelerated appeal. TEX. CIV. PRAC. & REM. CODE § 27.008 ("An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005."). Thus, even if the judgment is final, the shortened appellate deadlines for an accelerated appeal would apply.

under this rule as "interlocutory." *See, e.g.*, *Fudzie v. Williams*, No. 05–12–00511–CV, 2012 WL 6685527 at *1 n.2 (Tex. App.—Dallas Dec. 21, 2012, no pet.); *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992). Therefore, in an abundance of caution, it would be wise to comply with the deadlines for accelerated appeals, rather than appeals from final judgments.

Courts continue to struggle with the breadth of "any order" in Rule 76a(8). Most recently in *Cortez v. Johnston*, No. 06–13–00120–CV, 2014 WL 1513306 (Tex. App.—Texarkana Apr. 16, 2014, no pet.), the Texarkana Court of Appeals analyzed the highly fractured opinion from the Texas Supreme Court in *In re Dallas Morning News*, 10 S.W.3d 298 (Tex. 1999). The *Cortez* panel concluded that allowing an appeal from "any order" does not permit piecemeal appeals during the Rule 76a process. *Id.* at *3. The panel concluded that in *In re Dallas Morning News*, four justices unequivocally held that an appeal was available "only when the trial court entered an order fully disposing of a Rule 76a motion," and that four other justices "agreed that the appellate remedy was appropriately from an order 'fully disposing of' a Rule 76a motion." *Id.*

Moreover, an order about whether a document is subject to a pretrial protective order is not an order under 76a and it is therefore not immediately appealable. *Icon Benefit Adm'rs II, L.P. v. Mullin*, 405 S.W.3d 257, 262 (Tex. App.—Dallas 2013, mand. denied).

(6) Orders relating to discovery of a privileged environmental, health, and safety audit

The Texas Environmental, Health, and Safety Audit Privilege Act allows an immediate appeal from an order requiring disclosure of a portion of a privileged environmental or health and safety audit in a civil or administrative proceeding. Tex. Rev. Civ. Stat. art. 4447cc, § 7(e). As with other interlocutory-appeal statutes, courts have strictly construed the types of orders that may be appealed. Only an order that is based on a decision that disclosure is required under section 7 can be appealed. *Waste Mgmt. of Tex., Inc. v. Blackwell*, 130 S.W.3d 337, 341 (Tex. 2004). If the Court decides that disclosure is permitted under another section of article 4447cc, no appeal is available. *Id.* Moreover, appeal is allowed only from an order requiring disclosure; there is no appeal from an order denying disclosure. *Id.* at 341-42 & n.4.

(7) Certain orders relating to the validity of public securities

Texas Government Code Chapter 1205 allows an issuer of public securities to seek a declaratory judgment that the securities are valid. A party opposing the declaration can be required to post a bond to continue to assert the challenge. Section 1205.068 permits an immediate appeal of an order setting the bond or

dismissing a party for failure to post the bond. TEX. GOV'T CODE §§ 1205.068; 1205.105.

(8) Miscellaneous orders under the Health and Safety Code

Texas Health and Safety Code section 574.070(a) allows an immediate appeal from "an order requiring court-ordered mental health services, or from a renewal or modification of an order." TEX. HEALTH & SAFETY CODE § 574.070(a). The appeal must be filed within 10 days of the order. *Id.* An order for protective custody is not an order requiring mental health services, and therefore cannot be appealed under this section. *In re M.M.*, 357 S.W.3d 381, 382 (Tex. App.—Waco 2011, no pet.).

Section 81.191(b) allows an immediate appeal of orders for the management of a person with a communicable disease. TEX. HEALTH & SAFETY CODE § 81.191(b).

Section 574.108 allows an immediate appeal of an order authorizing the administration of psychoactive medication. *Id.* § 574.108.

Even though these statutes require the notice of appeal to be filed with the court of appeals, a notice of appeal filed in the district court has been held sufficient. *In re J.J.*, 900 S.W.2d 353, 354-55 (Tex. App.—Texarkana 1995, no writ).

(9) Certain orders relating to juveniles

There are several provisions in the Family Code that allow immediate appeals from orders in juvenile criminal proceedings.

Section 51.03(b) allows the state to appeal certain orders in a juvenile case in which a grand jury has approved the petition. Specifically, the State can appeal an order that:

> (1) dismisses a petition or any portion of a petition;
> (2) arrests or modifies a judgment;
> (3) grants a new trial;
> (4) sustains a claim of former jeopardy; or
> (5) grants a motion to suppress evidence, a confession, or an admission and if:
>
> > (A) jeopardy has not attached in the case;
> > (B) the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay; and
> > (C) the evidence, confession, or admission is of substantial importance in the case.

TEX. FAM. CODE § 56.03(b). An appeal under this section must be filed within 15 days. *Id.*

Texas Family Code section 56.01(c) allows an appeal from the following orders relating to juveniles:

- An order under Section 54.03 with regard to delinquent conduct or conduct indicating a need for supervision;
- An order under section 54.04 disposing of the case;
- An order under section 54.05 respecting modification of a previous juvenile court disposition; or
- An order under Chapter 55 by a juvenile court committing a child to a facility for the mentally ill or mentally retarded.

TEX. FAM. CODE § 56.01(c).

(10) Orders appointing a receiver under the Family Code

Texas Family Code section 6.507 provides that most orders in a case under the Family Code are not immediately appealable, but that an order appointing a receiver is appealable. TEX. FAM. CODE § 6.507.

This prohibition has the effect of preventing an interlocutory appeal in a case under the Family Code even if that order would otherwise be appealable under another statute. *See Martin v. Martin*, No. 01–10–00966–CV, 2011 WL 6015681 at *1 (Tex. App.—Houston [1st Dist.] Dec. 1, 2011, pet. denied).

(11) Orders denying summary judgment based on immunity of a non-profit corporation

Texas Business Organizations Code section 2.106 allows a non-profit corporation to act as a trustee of certain trusts. TEX. BUS. ORG. CODE § 2.106(a). Section 2.106(b) gives the non-profit corporation "immunity from suit (including both a defense to liability and the right not to bear the cost, burden, and risk of discovery and trial) as to any claim alleging that the corporation's role as trustee of a trust described in this section constitutes engaging in the trust business in a manner requiring a state charter as defined in Section 181.002(a)(9), Finance Code." *Id.* § 2.106(b). And if a summary-judgment motion seeking to enforce this immunity is denied, the corporation can immediately appeal. *Id.*

Texas Business Organizations Code section 102.151 and Texas Revised Civil Statutes article 1396-2.31(B) provide a similar appeal right for other immunities granted to non-profit corporations.

(12) Orders denying a plea to the jurisdiction based on exclusive or primary jurisdiction in a class action when the class is later certified

Texas Civil Practice and Remedies Code section 26.051(b) allows an interlocutory appeal of an order denying a motion to dismiss based on exclusive or primary jurisdiction of a state agency. TEX. CIV. PRAC. & REM. CODE § 26.051(b). But the appeal cannot be taken unless the case is later certified as a class action. *Id.*

(13) Orders on class certification in a suit for unfair competition or unfair practices under the Insurance Code

Texas Insurance Code section 541.251 allows a member of the insurance-buying public or the attorney general to bring a class action for unfair competition or unfair practices under the Insurance Code. TEX. INS. CODE § 541.251(a). An order certifying or refusing to certify a class under this section is immediately appealable. *Id.* § 541.251(b).

V. PERMISSIVE INTERLOCUTORY APPEALS

In addition to specific orders that can be immediately appealed, Texas Civil Practice and Remedies Code section 51.014 also allows the trial court to permit an appeal from an interlocutory order that is "not otherwise appealable" if the order to be appealed involves a controlling question of law and its resolution is material to the advancement of the case. TEX. CIV. PRAC. & REM. CODE § 51.014(d).

This relatively new provision was enacted in 2011. The prior version of section 51.014(d) permitted such 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. In 2011, the Legislature amended section 51.014(d), making it 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.

After summarizing the amendment and the procedural requirements for a permissive interlocutory appeal, we will present the results of a review of all the cases we could find in which a party attempted to bring a permissive appeal under this section.

A. 2011 Amendments to Section 51.014(d)

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).[3]

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 may 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.

---

[3] 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).

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 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.
>
> (b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.

TEX. R. APP. P. 28.3(a), (b). In addition, Rule 28.3(e) specifies the required contents for a permissive-appeal petition. Under this rule, the petition must:

> (1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;
> (2) attach a copy of the order from which appeal is sought;
> (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and
> (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation.

TEX. R. APP. P. 29.3(e).

Texas Rule of Civil Procedure 168 was also added in 2011 to implement the new permissive-appeal procedure. The rule states:

> On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not

> otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.

TEX. R. CIV. P. 168. Under this rule, the trial court's permission, the controlling legal issue, and the reasons why an immediate appeal will materially advance the litigation must be stated in the order to be appealed. TEX. R. CIV. P. 168.

In sum, following the 2011 amendments to section 51.014, the amendment to Texas Rule of Appellate Procedure 28, and the related enactment of Texas Rule of Civil Procedure 168, the following must occur to perfect a permissive appeal:

(1) on a party's motion or on its own initiative, the trial court must issue a written order (or amend a prior order) that includes both an interlocutory order that is not otherwise appealable and a statement of the trial court's permission to appeal this order under Texas Civil Practice and Remedies Code § 51.014(d);

(2) in this statement of permission, the trial court must identify the controlling question of law as to which there is a substantial ground for difference of opinion and must state why an immediate appeal may materially advance the ultimate termination of the litigation;

(3) after the trial court signs an order granting permission in accordance with Texas Civil Practice and Remedies Code § 51.014(f) and Texas Rule of Appellate Procedure 28.3, the appellant must timely file a petition seeking permission from the court of appeals to appeal; and

(4) the court of appeals must grant the petition for permission to appeal.

See TEX. CIV. PRAC. & REM. CODE § 51.014(d)-(f); TEX. R. APP. P. 28.3 & cmt; TEX. R. CIV. P. 168. The procedure for bringing a permissive appeal is discussed in greater detail in the following section.

B. Procedural Issues

(1) Step One: The Trial Court's Permission to Appeal

The appeal process under section 51.014(d) begins in the trial court. After an interlocutory order is entered, a party seeking appeal should file a motion with the trial court for permission to appeal. TEX. R. CIV. P. 168. The motion should explain how the order to be appealed involves "a controlling question of law" as to which there is a substantial ground for difference of opinion and why an immediate appeal may "materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX. R. CIV. P. 168. There does not appear to be a deadline for a party to ask the trial court to amend an order to grant permission to appeal. *Id.* The trial court may also grant permission to appeal on its own initiative. TEX. R. CIV. P. 168.

If the trial court grants permission to appeal, it must state its permission in the order being appealed, not in a separate order. TEX. R. CIV. P. 168. The court may amend a previously entered interlocutory order to include the required information. TEX. R. CIV. P. 168. The trial court's order must "identify," not explain or discuss, the controlling legal question as to which there is a substantial ground for difference of opinion. But the order must explain the basis for the court's finding that the order to be appealed involves a controlling issue of law, and it must state why an immediate appeal may materially advance the ultimate termination of the litigation. *See* TEX. R. CIV. P. 168; *Stewart Title Guar. Co. v. Vantage Bank Tex.*, No. 04-15-00228-CV, 2015 WL 2124802, at *2 (Tex. App.—San Antonio May 6, 2015, no. pet. h.) (denying review because the order did not explain the trial court's basis for finding that the order involved a controlling question of law).

(2) Step Two: The Court of Appeals' Permission to Appeal

After the trial court enters the order granting permission to appeal, the appellant must file a petition for permissive appeal in the court of appeals. Prior to the 2011 amendment, when the trial court authorized an agreed permissive appeal, the court of appeals could not reject the appeal unless it lacked jurisdiction. Under the new statute and amended rules, the court of appeals ultimately decides whether an interlocutory appeal may proceed. *See* TEX. R. APP. P. 28.2.

The petition for permissive appeal must be filed with the clerk of the court having jurisdiction over the action. TEX. R. APP. P. 28.3(b). For appeals that would go to either the First or the Fourteenth Court of Appeals, the petition should be filed with the clerk of the First Court during the first half of the calendar year and with the clerk of the Fourteenth Court during the second half of the calendar

year. 1st & 14th Tex. App. Loc. R. 1.6. The petitions are then assigned to either the First or the Fourteenth Court on an alternating basis. *Id.*

The time period to file the petition is relatively short: the petition must be filed within 15 days after the order to be appealed is signed, unless the order is amended to add the permission to appeal, in which case the 15-day period runs from the date on which the amended order is signed. TEX. R. APP. P. 28.3(c). An extension may be granted if the party files the petition within 15 days after the deadline and files a motion complying with Texas Rule of Appellate Procedure 10.5(b).

The petition for permission to appeal must: (1) contain the information required for a notice of appeal Texas Rule of Appellate Procedure 25; (2) attach a copy of the order from which appeal is sought; (3) contain a table of contents, an index of authorities, issues presented, and a statement of facts; and (4) argue "clearly and concisely" why the order at issue "involves a controlling question of law as to which there is a substantial ground for difference of opinion." TEX. R. APP. P. 28.3(e). The petition must also explain "how an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. R. APP. P. 28.3(e). In the First and Fourteenth Courts, the petition must also state whether a related appeal or original proceedings has previously been filed in or assigned to either the First or the Fourteenth Court. 1st & 14th Tex. App. Loc. R. 6.1(d).

The briefing schedule for a petition for permission is abbreviated, although the court has discretion to grant extensions. A cross-petition may be filed within 10 days after an initial petition is filed. TEX. R. APP. P. 28.3(f). A response to a petition or cross-petition is due 10 days after the petition or cross-petition is filed. TEX. R. APP. P. 28.3(f). A petitioner or cross-petitioner may reply to any matter in a response within 7 days after the day on which the response is filed. TEX. R. APP. P. 28.3(f). The petition and any cross-petitions, responses, and replies, must comply with the word-count and page limitations for petitions generally. TEX. R. APP. P. 28.3(g). This means a petition and response cannot exceed 4,500 words, and a reply is limited to 2,400 words. *See* TEX. R. APP. P. 9.4(i)(2)(D)–(E).

The court will generally rule on a petition without oral argument "no earlier than 10 days after the petition is filed." TEX. R. APP. P. 28.3(j). In some cases, the court may order additional jurisdictional briefing from the parties. *See generally, Double Diamond-Del., Inc. v. Walkinshaw*, No. 05-12-01140-CV, 2013 WL 3327523, at *1 (Tex. App.—Dallas June 27, 2013, no pet.) (requesting additional jurisdictional briefing); *Bank of N.Y. Mellon v. Guzman*, 390 S.W.3d 593, 594 (Tex. App.—Dallas 2012, no pet.) (requesting additional briefing under former 51.014(d)).

If the petition for permissive appeal is granted, the notice of appeal is deemed to have been filed under Appellate Rule 26.1(b) on the date the petition is granted, and the appellant is not required to file a separate notice of appeal. TEX. R. APP. P. 28.3(k). The case is considered an accelerated appeal with the appellant's brief on the merits due 20 days after filing of the clerk's record. TEX. R. APP. P. 28.3(i).

Granting permission to appeal does not automatically stay proceedings in the trial court. Either the parties must agree to a stay or the trial court or court of appeals must order a stay. TEX. CIV. PRAC. & REM. CODE § 51.014(e)(1), (2).

C. Statistics Related to Appeals under Section 51.014(d)

Permissive appeals under section 51.014(d) are available only in cases filed on or after September 1, 2011. In the four years since permissive interlocutory appeals have been available, Texas courts of appeals have considered approximately 71 interlocutory appeals brought under amended section 51.014(d).[4] The Texas Supreme Court has not reviewed an appeal under amended section 51.014(d).[5] This section will present some basic statistics about how Texas courts have handled those 71 appeals.[6]

Texas courts have taken various approaches in addressing appeals under section 51.014(d), including: (a) dismissing or denying the appeal for failing to satisfy one of the statutory requirements, (b) requesting additional jurisdictional briefing from the parties, (c) denying the appeal as moot, and (d) granting review. The courts primarily rely on written opinions, as opposed to orders, to address appeals brought under section 51.014(d) and to explain the court's reasoning for granting or denying review. In a few (approximately 7) cases,

---

[4] Courts have also reviewed agreed interlocutory appeals under former section 51.014(d) for cases filed prior to September 1, 2011. *See, e.g.*, *Gomez v. Am. Honda Motor Co., Inc.*, No. 04-14-00398-CV, 2015 WL 1875954, at *1 (Tex. App.—San Antonio Apr. 22, 2015, no. pet. h.).

[5] The Court has reviewed agreed permissive appeals under former § 51.014(d), *see. e.g., Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 69 (Tex. 2011). *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 468 (Tex. 2011).

[6] **Methodology**: In preparing this paper, we used a combination of WestlawNext, LexisAdvance, and the Texas Courts Online Database to search for every case, written order, or written opinion citing to section 51.014(d). We then removed opinions and orders arising out of cases filed before September 1, 2011 and eliminated cases from non-Texas jurisdictions citing to section 51.014(d). The results of our analysis of the remaining cases, opinions, and orders citing to or interpreting amended section 51.014(d) appears in this section. All 71 cases are listed in Appendix 2, organized by court of appeals district.

however, courts have used written orders, instead of opinions, to: (a) dismiss an appeal for failing to comply with statutory requirements, (b) order additional briefing, or (c) grant review of the interlocutory appeal.

The following chart breaks down the number of petitions addressed by each court of appeals and the outcomes for those petitions.[7]

Court of Appeals	Petitions Filed	Petition Dismissed or Denied	Review Granted	% Granted
Houston [1st]	8	4	4	50%
Fort Worth [2nd]	4	2	2	50%
Austin [3rd]	4	3	1	25%
San Antonio [4th]	5	3	2	40%
Dallas [5th]	12	10	2	17%
Texarkana [6th]	4	2	2	50%
Amarillo [7th]	3	3	0	0%
El Paso [8th]	6	4	2	33%
Beaumont [9th]	8	2	6	75%
Waco [10th]	1	1	0	0%
Eastland [11th]	1	0	1	100%
Tyler [12th]	4	2	2	50%
Corpus Christi [13th]	5	5	0	0%
Houston [14th]	6	5	1	16%
Totals	**71**	**46**	**25**	**35%**

[7] Note that the "Review Granted" category includes situations where the court granted review of the appeal after requesting additional briefing from the parties.

Thus, the majority (46 of the 71) of petitions for permission to appeal under amended section 51.014(d) were dismissed or denied. The most common reason for denial was problems with, or the omission of, the trial court's order granting permission to appeal. In several cases, the appellant simply failed to establish that the trial court granted permission to appeal, *see e.g., Davis v. State Farm Lloyds Tex.*, No. 03-14-00540-CV, 2014 WL 6845106, at *1 (Tex. App.—Austin Nov. 26, 2014, no pet.), or, the trial court failed to rule on the ultimate issue to be appealed. *See, e.g., McCroskey v. Happy State Bank*, No. 07-14-00027-CV, 2014 WL 869577, at *1 (Tex. App.—Amarillo Feb. 28, 2014, no pet.).

In other cases, the reviewing court found that the dispute did not concern a controlling question of law, *see, e.g., Gunter v. Empire Pipeline Corp.*, 395 S.W.3d 269, 271 (Tex. App.—Dallas 2013, no pet.); *Trailblazer Health Enters., LLC v. Boxer F2, L.P.*, No. 05-13-01158-CV, 2013 WL 5373271, at *1 (Tex. App.—Dallas Sept. 23, 2013, no pet.) (denying the petition for review because interpretation of contract provision at issue is not "controlling question of law"); or that there was no substantial difference of opinion between the parties. *See, e.g., Target Corp. v. Ko*, No. 05-14-00502-CV, 2014 WL 3605746, at *1 (Tex. App.—Dallas July 21, 2014, no pet.). The following chart shows the reasons for dismissing or denying appeals under amended section 51.014(d).

Reasons for Dismissal or Denial of Petition	**Number of Cases**
Trial court's order did not comply with the statutory requirements	16
No controlling question of law	14
Issues with procedure in the trial court	7
No substantial difference of opinion between the parties	4
Review not available under 51.014(d) because case arose under the Family Code (*See* TEX. CIV. PRAC. & REM. CODE § (d-1))	3
Denied without specific reason	2

The majority of petitions brought under amended section 51.014(d) involve the review of orders granting or denying motions for partial summary judgment. *See Certain Underwriters at Lloyd's, London v. Cardtronics, Inc.*, 438 S.W.3d 770 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (affirming summary judgment in favor

of insured); *Byrd v. Phillip Galyen, P.C.*, 430 S.W.3d 515 (Tex. App.—Fort Worth 2014, pet. denied) (reversing and remanding trial court's granting of motion for partial summary); *ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers*, 390 S.W.3d 603 (Tex. App.—Dallas 2012, no pet.) (reviewing denial of motion for summary judgment).

Courts have also reviewed trial court orders denying and granting motions to dismiss, *see Davis v. Motiva Enters., L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *1 (Tex. App.—Beaumont Apr. 2, 2015, pet. filed) (affirming trial court's grant of motion to dismiss based on the Communications Decency Act); as well as a trial court order denying a motion to apply certain governing law. *See Winspear v. Coca-Cola Refreshments, USA, Inc.*, No. 05-13-00712-CV, 2014 WL 2396142, at *1 (Tex. App.—Dallas Apr. 9, 2014, pet. denied) (explaining that motion to apply Georgia law ultimately advanced the litigation because application of Georgia law would render the contract at issue unenforceable); *Am. Nat. Ins. Co. v. Conestoga Settlement Trust*, 442 S.W.3d 589, 593 (Tex. App.—San Antonio 2014, pet. denied) (reviewing motion to apply New York Law); *but see Autobuses Ejecutivos, LLC v. Cuevas*, No. 05-13-01379-CV, 2013 WL 6327207, at *1 (Tex. App.—Dallas Dec. 4, 2013, no pet.) (denying review of motion to apply Mexican law).

However, a trial court's grant of a motion to quash was held to not be subject to review under section 51.014(d) because the issue involved did not materially advance the litigation. *See Gunter v. Empire Pipeline Corp.*, 395 S.W.3d 269, 271 (Tex. App.—Dallas 2013, no pet.); *see also Blakenergy, Ltd. v. Oncor Elec. Delivery Co.*, No. 02-14-00241-CV, 2014 WL 4771736, at *1 (Tex. App.—Fort Worth Sept. 25, 2014, no pet.) (denying review of trial court orders relating to the appellants expert witness and relating to denials of appellants other discovery related motions).

The following table summarizes the outcomes for the 24 cases in which the court granted permission to appeal:

Outcome of Reviewed Cases	**Number of Cases**
Affirmed	10
Reversed	5
Affirmed in part, reversed in part	4
Other	6

"Other" includes situations where the court simply issued an order or opinion granting review or requesting additional briefing without reaching the merits of the appeal.

D. Practice Tips for Permissive Appeals

The disposition of these 71 petitions for permission to appeal carry a few key takeaways for would-be appellants. Most notably, strict compliance with the statutory requirements is essential. *See Blakenergy, Ltd. v. Oncor Elec. Delivery Co.*, LLC, No. 02-14-00241-CV, 2014 WL 4771736, at *1 (Tex. App.—Fort Worth Sept. 25, 2014, no pet.) (stating that courts are required to strictly construe section 51.014).

Practice Tip 1:

Nearly one-third of the denials of petitions for permission to appeal resulted from failure to follow the statutory requirements. Carefully review section 51.014(d), Texas Rule of Appellate Procedure 28, and Texas Rule of Civil Procedure 168 to ensure compliance.

Appellate courts have denied permission to appeal because the record on appeal did not indicate that the trial court granted permission to appeal. *See Davis v. State Farm Lloyds Tex.*, No. 03-14-00540-CV, 2014 WL 6845106, at *1 (Tex. App.—Austin Nov. 26, 2014, no pet.); *Bell v. Harris*, No. 05-14-01281-CV, 2015 WL 302775, at *1 (Tex. App.—Dallas Jan. 23, 2015, no pet.); *Rig Tools, Inc. v. Leamer*, No. 06-13-00001-CV, 2013 WL 177419, at *1 (Tex. App.—Texarkana Jan. 17, 2013, no pet.); *Hebert v. JJT Constr.*, 438 S.W.3d 139, 142 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (denying review where appellants failed to allege that the trial court granted permission and failed to provided a signed order granting permission); *Bosch v. Harris Cnty.*, No. 14-13-00739-CV, 2013 WL 5503744, at *1 (Tex. App.—Houston [14th Dist.] Oct. 1, 2013, no pet.); *Shannon v. Hall*, No. 03-13-00312-CV, 2013 WL 4516144, at *2 (Tex. App.—Austin Aug. 22, 2013, no pet.).

Even where the trial court's order granting permission is in the record, review has been denied where the order does not comply with the requirements of Texas Rule of Civil Procedure 168. *See Double Diamond Del., Inc. v. Walkinshaw*, No. 05–13–00893–CV, 2013 WL 5538814, at *2 (Tex. App.—Dallas Oct. 7, 2013, no pet.) ("Inherent in these jurisdictional requirements is that the trial court make a substantive ruling on the specific legal question presented on appeal."); *Stewart Title Guar. Co. v. Vantage Bank Tex.*, No. 04-15-00228-CV, 2015 WL 2124802, at *2 (Tex. App.—San Antonio May 6, 2015, no. pet. h.) (denying review where record was silent as to specific basis for court's ruling); *Great Am. E&S Ins. Co. v. Lapolla Indus., Inc.*, No. 01-14-00372-CV, 2014 WL 2895770, at *2 (Tex. App.—Houston [1st Dist.] June 24, 2014, no pet.) (appeal dismissed where the trial court did not

substantively rule on the controlling legal issue presented); *Corp. of President of Church of Jesus Christ of Latter-Day Saints v. Doe*, No. 13-13-00463-CV, 2013 WL 5593441, at *2 (Tex. App.—Corpus Christi Oct. 10, 2013, no pet.) (denying petition where the basis for the trial court's denial of the appellant's motion for summary judgment was unclear); *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, No. 14-13-00991-CV, 2015 WL 393407, at *4 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.) (denying petition where trial court's order did not explain under § 51.014(d)(2) why an appeal from its order may materially advance the ultimate termination of the litigation).

Practice Tip 2:

The second-most common basis for denial of permission to appeal is that the issue to be appealed is not a controlling question of law or its resolution does not materially advance the litigation. For example, see:

- *Gunter v. Empire Pipeline Corp.*, 395 S.W.3d 269, 271 (Tex. App.—Dallas 2013, no pet.) (denying appeal because issues in motion to quash were not controlling questions of law material to advancement of the litigation)

- *Autobuses Ejecutivos, LLC v. Cuevas*, No. 05-13-01379-CV, 2013 WL 6327207, at *1 (Tex. App.—Dallas Dec. 4, 2013, no pet.) (denying appeal of denial of motion to apply Mexican law where appellants' only argument for materiality of the issue was that it would require additional discovery)

- *In re Estate of Fisher*, 421 S.W.3d 682 (Tex. App.—Texarkana 2014, no pet.) (denying permissive appeal of order involving controlling issues of fact rather than of law)

Unfortunately, as one court has noted, "[t]here has been little development in the case law construing section 51.014 regarding just what constitutes a controlling legal issue about which there is a difference of opinion and the resolution of which disposes of primary issues in the case." *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, No. No. 14–13–00991–CV, 2015 WL 393407 at *4 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.).

One commentator has suggested a few characteristics of a "controlling question of law:"

- The issue "deeply affects the ongoing process of litigation."

- Resolution of the issue "will considerably shorten the time, effort, and expense of fully litigating the case."

- "[T]he viability of a claim rests upon the court's determination" of the question.

Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 747–49 (1998) (cited with approval by *Gulf Coast Asphalt*, 2015 WL 393049 at *4)).

Texas courts seem less likely to find that an issue is a "controlling issue of law" where there are several other major issues pending in the litigation. *See Trailblazer Health Enters., LLC v. Boxer F2, L.P.*, No. 05-13-01158-CV, 2013 WL 5373271, at *1 (Tex. App.—Dallas Sept. 23, 2013, no pet.). One obvious way to show that the question is "controlling" is to show that resolving the question will speed up the resolution of the case as a whole. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d)(1); *see also Gale v. Lucio*, 445 S.W.3d 849, 853 (Tex. App.—Houston [1st Dist.] 2014, pet. filed) (finding a controlling question of law where the issue addressed the statute of limitations).

Moreover, courts appear to be interested in knowing precisely how the question will impact the resolution of the case. *Trailblazer Health Enters.*, 2013 WL 5373271, at *1. Therefore, a petition that explains consequences of the appellate court's decision, and in particular, discusses whether the court's resolution of the permissive appeal will accelerate or simplify future trial proceedings, will have a better chance of success.

Courts have also been careful to maintain the line between questions of fact and questions of law. Therefore, an appeal of the denial of a summary-judgment motion will not present a controlling question of law when there are material fact disputes. *Id.*; *see also Diamond Prods. Int'l v. Handsel*, 142 S.W.3d 491, 494 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (construing predecessor statute).

Practice Tip 3:

Make sure there is an actual difference in opinion as to the controlling question of law. A controlling legal question alone is not sufficient. There must also be "a substantial ground for difference of opinion" on the question. TEX. CIV. PRAC. & REM. CODE § 51.014(d)(1); *Tex. Farmers Ins. Co. v. Minjarez*, No. 08-12-00272-CV, 2012 WL 5359284, at *1 (Tex. App.—El Paso Oct. 31, 2012, no pet.); *see also* House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 978, 77th Leg., R.S. (2001) (explaining that the addition of the predecessor statute would promote judicial efficiency by "allowing the trial court to certify a question for appeal" when "the trial court rules on an issue that is pivotal in a case but about which there is legitimate disagreement").

Courts are particularly mindful of this requirement. The fact that the trial court disagreed with the appellant's position is not sufficient to satisfy the threshold for "substantial ground for difference of opinion." Courts have refused to review an issue that has already been fully resolved by Texas courts.

- *Minjarez*, 2012 WL 5359284, at *1 (denying review of appeal where controlling issue of whether insured had a duty to seek appraisal under insurance policy was already decided by Texas Supreme Court and therefore no substantial difference of opinion existed as to ultimate issue);

- *Jones v. Neil*, No. 05-14-00617-CV, 2014 WL 3605747, at *1 (Tex. App.—Dallas July 21, 2014, no pet.) (denying petition where there was no disagreement among authorities regarding the controlling question of law);

- *Target Corp. v. Ko*, No. 05-14-00502-CV, 2014 WL 3605746, at *1 (Tex. App.—Dallas July 21, 2014, no pet.) (denying petition for appeal where no substantial difference for opinion exists as to the controlling question of law—although the law was well-settled on the issue, "the fact that the trial court may have erred in not granting summary judgment is not a basis for permissive appeal");

- *King-A Corp. v. Wehling*, No. 13-13-00100-CV, 2013 WL 1092209, at *3 (Tex. App.—Corpus Christi Mar. 14, 2013, no pet.) (disapproving the notion that this standard is met by default whenever a trial court rules against a petitioner for permissive review).

To satisfy this requirement, petitioners should highlight any split in authority concerning the issue presented, as well as any novel issues or issues of first impression presented by the question in dispute.

Practice Tip 4:

Make sure to verify the applicable version of section 51.014(d) for the particular case on appeal. Although this may seem like an obvious proposition, a court has very recently denied a petition to appeal brought under section 51.014(d) where the case originated prior to September 1, 2011 because there was no agreement among the parties granting the permissive appeal. *See Cooke v. Karlseng*, No. 05-15-00441-CV, 2015 WL 2128809, at *1 (Tex. App.—Dallas May 7, 2015, no. pet. h.) (denying attempt to bring interlocutory appeal under amended section 51.014(d) because former section 51.014(d) applied and the parties had not agreed to the appeal as required by former section 51.014(d)); *see also State*

Farm Lloyds v. Gulley, 399 S.W.3d 242, 243 (Tex. App.—San Antonio 2012, no pet.) (same).

VI. TAKING IT TO THE SUPREME COURT

Generally, the decision of the court of appeals is final in an interlocutory appeal. TEX. GOV'T CODE § 22.225(b)(3). But there are still at least four methods for obtaining jurisdiction in the Supreme Court in an interlocutory appeal.

First, Government Code section 22.225(d) specifically gives the Supreme Court jurisdiction in certain interlocutory appeals. *Id.* § 22.225(d). Specifically, the Supreme Court has jurisdiction to hear appeals from orders under sections 51.014(a)(3) (orders granting or denying class certification), 51.014(a)(6) (orders denying summary-judgment in certain cases against media members), 51.014(a)(11), and 51.014(d) (permissive interlocutory appeals).

Second, section 22.225(c) also allows an appeal to the Supreme Court when "the justices of the courts of appeals disagree on a question of law material to the decision." This type of jurisdiction is frequently referred to as "dissent jurisdiction," but a dissent alone is not enough. It requires that the dissent disagree with the majority on a question of law, not a question of fact. *Id.* Moreover, if the disagreement over a material question of law is found in a concurrence, jurisdiction is still proper. *Travis Cnty. v. Pelzel & Assocs.*, 77 S.W.3d 246, 247 & n.2 (Tex. 2002). Finally, if the material disagreement is found in a dissent from a denial of *en banc* review, that is sufficient to confer jurisdiction. *Am. Type Culture Collection Inc. v. Coleman*, 83 S.W.3d 801, 805 (Tex. 2002). If the court has "dissent jurisdiction," it can exercise jurisdiction over the whole case, not just the material question on which the court of appeals' justices disagree. *See Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001).

Third, the Supreme Court also has jurisdiction when "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court." *Id.* This is commonly called "conflicts jurisdiction." In 2003, the Legislature greatly broadened the definition of a conflict. Section 22.225(e) provides that for purposes of section 22.225(c) "one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *Id.* § 22.225(e). When the court has conflicts jurisdiction, it has jurisdiction over the entire case, not just the issue on which there is a conflict. *Sw. Refining Co. v. Bernal*, 22 S.W.3d 425, 432 (Tex. 2000).

Finally, even if there is no dissent jurisdiction or conflicts jurisdiction, the Supreme Court can decide whether the court of appeals properly determined its jurisdiction. *See LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73 (Tex.

2011). Thus, if the court of appeals refuses an interlocutory appeal on the ground that it does not have jurisdiction, the Supreme Court can grant a petition for review to decide whether the court of appeals correctly decided the jurisdictional issue.