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APPELLATE LAW

Interlocutory Jurisdiction

By Aaron S. Bayer

INTERLOCUTORY APPEALS are permitted in a wide variety of circumstances. But what happens to the rest of the case while the appeal is pending? Generally, the district court retains jurisdiction over other aspects of the case, but the extent of the court's authority to act, and its discretion to stay further proceedings, depend on the type of interlocutory appeal and the circumstances presented.

Court can change its mind after accepting appeal

■ *Appeals under Section 1292*. Most interlocutory appeals are brought under 28 U.S.C. 1292. Section 1292(a)(1) provides an appeal as of right from certain interlocutory orders granting, denying or altering injunctions. It is silent on the subject of staying further proceedings in the district court. Its counterpart, § 1292(b), provides for a discretionary appeal of other interlocutory orders, based on the district court's certification that the order involves a controlling, and unsettled, question of law and that immediate appeal may materially advance the ultimate termination of the litigation.

Section 1292(b) expressly provides that an interlocutory appeal does not stay further proceedings unless the district court or the court of appeals orders a stay. Although neither statute specifies, as a practical matter, a party should first seek a stay in the district court and pursue one in the court of appeals only if that fails. See, e.g., *Newton v. Lynch*, 259 F.3d 154, 165 n.6 (3d Cir. 2001).

In considering whether to seek a stay, counsel should bear in mind that neither the outcome nor the scope of the appeal may be known at the outset. First of all, until the court of appeals has decided whether to permit a § 1292(b) appeal, the district court has "inherent procedural power" to revoke its certification of the appeal. *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001).

Even after the appellate court has accepted a § 1292(b) appeal, it can change its mind, much as the U.S. Supreme Court can decide that certiorari was improvidently granted. See, e.g., *Church of Scientology Flag Service Org. v. City of Clearwater*, 777 F.2d 598, 607 (11th Cir. 1985) (remanding because leave to appeal under § 1292(b) was "improvidently granted"); *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 863-64 (2d Cir. 1996) (accepting an § 1292(b) appeal but remanding after "further reflection").

For the party that opposed § 1292(b) certification, these cases serve as a reminder that there is a continuing opportunity to argue that the right to appeal was improvidently granted, either in a motion to dismiss the appeal or in briefing on the merits.

Counsel should also recognize that what actually gets decided in a § 1292 appeal may go beyond the issue on which the appellant sought review. Under § 1292(b), the appellate court has jurisdiction over the entire order that is the subject of the appeal, not just the question of law certified by the district court. *Yamaha Motor Corp. USA v. Calhoun*, 516 U.S. 199, 204-05 (1996). The appellate court may even review aspects of the order that the district specifically declined to certify for appeal. See *Schlumberger Technologies Inc. v. Wiley*, 113 F.3d 1553, 1557 n.6 (11th Cir. 1997).

The appellate court also may consider other district court orders that are "inextricably intertwined" with the certified order, even if they are not otherwise appealable. See, e.g., *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1114-15 (10th Cir. 1999) (pendent jurisdiction over "intertwined" cross-appeal, even though party never moved for § 1292(b) certification); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1365 (11th Cir. 1997) (in an appeal of discovery sanctions order, court can review order compelling discovery as well).

In interlocutory injunctive appeals under Section 1292(a)(1), appellate courts have similar authority to review orders that are "inextricably bound" to the order on appeal (e.g., *Casey v. Planned Parenthood*, 14 F.3d 848, 855-56 (3d Cir. 1994) (order granting new trial)), or are "closely related" to the order on appeal, if it is "more economical" to review them together (*Parks v. Pavkovic*, 753 F.2d 1397, 1402 (7th Cir. 1985)).

■ *Stays under Section 1292*. Courts have

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broad discretion in deciding whether to stay proceedings during a §1292(b) appeal.

In general, courts understandably focus on whether granting or denying a stay would materially advance the termination of the litigation, granting a stay, for example, when the certified issue is dispositive and a ruling on appeal may avoid a protracted trial (e.g., *Federated Rural Elec. Ins. Exch. v. R.D. Moody & Assocs.*, 2005 WL 2386218, at *5 (M.D. Ga. Sept. 29, 2005); *AXA Rosenberg Group v. Gulf Underwriters*, 2004 WL 1844846, at *10 (N.D. Calif. Aug. 16, 2004)), or when it would "avoid expensive and burdensome proceedings in the district court" (*Watson v. Philip Morris Cos.*, 2003 WL 23272484 at *23 (E.D. Ark. Dec. 12, 2003)).

By contrast, when the case is close to trial, and the parties already have expended significant resources in preparing for trial, the court may conclude neither a stay nor certification under § 1292(b) is warranted because an appeal would not materially advance the termination of the litigation. E.g., *Boomsma v. Star Transp. Inc.*, 202 F. Supp. 2d 869, 879-80 (E.D. Wis. 2002); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 29 F. Supp. 2d 825, 839 (N.D. Ohio 1998) (refusing certification and stay because "the parties have already expended large resources to prepare for [trial and]...a stay and immediate appeal, even if successful, will not stop the expense of a proportionally large amount of judicial or party resources").

A court may condition a stay on conduct promised by the parties that would help to ensure that the interlocutory appeal advances the litigation. See, e.g., *APCC Servs. Inc. v. Sprint Communs. Co.*, 297 F. Supp. 2d 90, 101 (D.D.C. 2003) (granting stay of discovery but admonishing parties that they are "expect[ed]... to seek expedited review in the court of appeals"); *Brown v. Bullock*, 194 F. Supp. 207, 248-50 (S.D.N.Y. 1961), aff'd, 294 F.2d 415 (2d Cir. 1961) (stay granted on condition that defendants agree to remove companion case in state court from trial calendar and that stay will be lifted if defendants "do not consent to a cease-fire in the State action").

A strong public interest in the subject matter of the litigation may lead a court to grant a stay pending a § 1292(b) appeal (see, e.g., *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218, 221 (S.D.N.Y. 2003) (granting stay in enemy combatant case "in the face of the government's insistence that issues of national security are at stake")), but it also may lead a court to deny a stay (see, e.g., *Reed v. Rhodes*, 549 F.2d 1046, 1052 (6th Cir. 1976) (vacating stay pending appeal in school desegregation case, "where the value of the constitutional rights to be protected far outweighs administrative costs that might be incurred")).

■ *District court's continuing jurisdiction.* Absent a stay, what is the scope of the district court's jurisdiction while an interlocutory appeal is pending? Once the appellate court has accepted an interlocutory appeal under § 1292, "the district court is divested of jurisdiction over that aspect of the case," and the court generally cannot take actions that would interfere with the appellate court's jurisdiction over the appeal. *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063-64 (5th Cir. 1990) (district court lacked jurisdiction to permit plaintiffs to amend complaint to drop statutory claims and omit nondiverse defendant while § 1292(b) appeal dealing with these issues was pending).

Courts focus on whether granting or denying a stay would materially advance the termination of the litigation.

Court retains authority to modify injunctive order

That general rule, however, has its limits. During an interlocutory appeal under § 1292(a)(1), the district court retains authority to modify the injunctive order on appeal to ensure continued compliance with the injunction (see, e.g., *A&M Records Inc. v. Napster Inc.*, 284 F.3d 1091, 1098-99 (9th Cir. 2002)), and to preserve the status quo (see, e.g., *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 578-79 (5th Cir. 1996)). In some circumstances, the court may modify a preliminary injunction under Fed. R. Civ. P. 62(c), even if it alters the status quo, in order to preserve the integrity of an issue on appeal. See, e.g., *Ortho Pharm. Corp. v. Amgen Inc.*, 887 F.2d 460, 464 (3d Cir. 1989).

If no stay order is in place, district courts have authority to proceed to trial on the merits during the pendency of a § 1292(a)(1) appeal (see, e.g., *West Pub. Co. v. Mead Data Cent. Inc.*, 799 F.2d 1219, 1229 (8th Cir.1986)), and appellate courts have chastised district courts for staying proceedings during such appeals (see *U.S. v. Price*, 688 F.2d 204, 215 (3d Cir. 1982)).

The district court is free to issue a permanent injunction and enter a final judgment, thereby rendering moot a pending interlocutory appeal of a preliminary injunction under § 1292(a)(1). See, e.g., *Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996). Consistent with the general principle that interlocutory orders merge with a final judgment, an order not ruled on during an interlocutory appeal under § 1292(b) or § 1292(a)(1) is reviewable on appeal from a final judgment. See, e.g., *Balla v. Idaho State Bd. of Correction*, 869 F.2d 461, 468 (9th Cir. 1989) (when a permissive interlocutory appeal is not taken under § 1292(a) or § 1292(b), " 'the interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment' ") (quoting *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976)); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 608 (7th Cir. 1993).

If a final judgment is entered while an interlocutory appeal is still pending, it is imperative to file a timely appeal from the final judgment to avoid losing all appeal rights. NLJ