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NEW MEXICO'S ANALOGUE TO 28 U.S.C. §1292(b): INTERLOCUTORY APPEALS COME TO THE STATE COURTS

The 1971 New Mexico Legislature enacted into law an analogue to 28 U.S.C. § 1292(b).[1] The new statute provides:

> A. In any civil action or special statutory proceeding in the district court, when the district judge makes an interlocutory order or decision which does not practically dispose of the merits of the action and he believes the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation, he shall so state in writing in the order or decision.
>
> B. The Supreme Court or court of appeals has jurisdiction over an appeal from such an interlocutory order or decision, as appellate jurisdiction may be vested in these courts. Within ten days after entry of the order or decision, any party aggrieved may file with the clerk of the supreme court or court of appeals an application for an order allowing an appeal, accompanied by a copy of the order or decision. If an application has not been acted upon within twenty days, it shall be deemed denied.
>
> C. Application under this section for an order allowing appeal does not stay proceedings in the district court unless so ordered by the district judge or judge or justice of the court to which application is made.[2]

Prior to the enactment of this statute, New Mexico law restricted appeal in civil actions to "final" decisions[3] and interlocutory "judgments, orders, or decisions of the district courts, as practically dispose of the merits of the action."[4] The new statute creates appellate jurisdiction over a new class of cases in which neither final judgment nor practical disposition of the case has occurred.

The analogous federal statute's purpose was set out in the Senate Report on the bill. The state statute's purpose is presumably the same:

> The bill results from a growing awareness of the need for expedition of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to enter-

1. *See* N.M. Stat. Ann. § 21-10-3 (Repl. 1970, Supp. 1971). With minor exceptions the wording used in the two statutes is identical.
2. N.M. Stat. Ann. § 21-10-3 (Repl. 1970, Supp. 1971).
3. N.M. Stat. Ann. § 21-2-1(5.1) (Repl. 1970).
4. N.M. Stat. Ann. § 21-2-1(5.2) (Repl. 1970).

> tain motions at an early stage in the proceedings, which, if determined, against the plaintiff, result in a final order which would then be appealable to the circuit courts of appeals of the United States. However, such motions, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable. For example, in a recent case a motion to dismiss for want of jurisdiction was filed in the district court early in the proceedings. The district court denied the motion and the matter then proceeded to trial. The disposition of that case took almost 8 months. Upon final order the case was appealed and the court of appeals determined that the district court did not have jurisdiction and entered an order accordingly. Had this legislation been in effect at that time, the district judge could have stated in writing his opinion that the motion was controlling and the defendant could thereupon make application to the court of appeals for a review of the order denying the motion. Had the court of appeals entertained such motion and reached the conclusion that it ultimately did, it would have resulted in a saving of time of the district court and considerable expense of the litigants.[5]

Guidelines for use of the New Mexico statute can be derived from examination of decisions in the federal courts. A hasty examination of the cases decided under the federal statute may lead to uncertainty as to what types of orders are appealable, the meaning of the statutory terms, and the mechanical requirements of the statute's operation.[6] In many respects the Senate Report on the bill is misleading in that it implies that the statute's operation is restricted to "exceptional" cases and is inapplicable to the ordinary negligence action. On the other hand, looming in the background is the danger that the statute may be used by defendant's lawyers as a method of unnecessarily delaying trial level litigation. This comment surveys some of the rules that have been applied to the federal statute in the hope that New Mexico courts can avoid some of the sources of difficulty on the federal level.[7]

SECTION 1292(b) OF THE JUDICIAL CODE: THE FEDERAL PRACTICE

A. Orders Appealable

Federal courts have not limited appeal to a specific type of order but rather have looked to the underlying principles of the statute.

5. S. Rep. No. 2434, 85th Cong. 2d Sess. at 2-3 (1958), 158 U.S. Code Cong. & Ad. News 5256.

6. *See* Annot., 28 U.S.C.A. § 1292(b) (1966).

7. For a further discussion of the applicability of 28 U.S.C. § 1292(b) (1966) *see* Holtzoff, *Interlocutory Appeals in the Federal Courts*, 47 Geo. L.J. 474 (1959); Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199 (1959); Comment, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L.J. 333 (1959).

Although this approach precludes categorizing of appealable orders, the proper application of the statute requires flexibility.

District courts have certified orders denying motions for summary judgment rather consistently.[8] Denials of motions to dismiss, except on jurisdictional[9] or constitutional[10] grounds, have generally not been certified.[11] District Courts have refused to certify discovery orders,[12] orders denying a stay,[13] orders granting[14] or denying[15] a new trial, orders denying a motion to vacate attachment,[16] and orders denying a motion to quash service.[17] On the other hand, they have certified for appeal questions of venue,[18] denial of a motion to strike certain defenses in an answer,[19] and an order to an attorney to cease representing a particular client.[20]

Federal circuit courts have refused to entertain certified appeals involving discovery orders,[21] denial[22] and issuance[23] of orders for

8. Tyndal v. United States, 295 F. Supp. 448 (E.D.N.C. 1969); Keogh v. Pearson, 244 F. Supp. 482 (D.D.C. 1965); Martorano v. Hughes, 222 F. Supp. 789 (E.D.N.Y. 1963); King v. Int'l Ass'n of Mach., 215 F. Supp. 351 (N.D. Cal. 1963); Mamula v. Local 1211, United Steelworkers of America, 202 F. Supp. 348 (W.D. Pa. 1962). *Contra,* Marco v. Dulles, 177 F. Supp. 533 (S.D.N.Y. 1959); Afran Transp. Co. v. Nat'l Maritime Union, 177 F. Supp. 610 (S.D.N.Y. 1959); Securities & Exch. Comm'n v. Central Foundry Co., 167 F. Supp. 821 (S.D.N.Y. 1958).

9. Northland Paper Co. v. Mohawk Tablet Co., 271 F. Supp. 763 (S.D.N.Y. 1967); Brantley v. Devereaux, 237 F. Supp. 156 (E.D.S.C. 1965); Hendricks v. Alcoa Steamship Co., 206 F. Supp. 693 (E.D. Pa. 1962).

10. Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968); Bell v. Georgia Dental Ass'n, 231 F. Supp. 299 (N.D. Ga. 1964).

11. Chas. Pfizer & Co. v. Laboratori Pro-Ter Prodotti Therapeutici, 278 F. Supp. 148 (S.D.N.Y. 1967); DeLorenzo v. Fed. Dep. Ins. Corp., 268 F. Supp. 378 (S.D.N.Y. 1967); Securities & Exch. Comm'n v. Wong, 254 F. Supp. 66 (D.P.R. 1966); Barett v. Burt, 250 F. Supp. 904 (S.D. Iowa 1966); Petit v. Am. Stock Exch., 217 F. Supp. 21 (S.D.N.Y. 1963); Berger v. United States, 170 F. Supp. 795 (S.D.N.Y. 1959). *Contra,* Kauffman v. Dreyfus Fund, Inc., 51 F.R.D. 18 (D.N.J. 1969).

12. Pub. Util. Dist. No. 1 v. General Electric Co., 230 F. Supp. 744 (W.D. Wash. 1964) (motion to require an answer to interrogatories); McSparran v. Bethlehem-Cuba Iron Mines Co., 26 F.R.D. 619 (E.D. Pa. 1960) (motion to produce).

13. Ratner v. Chemical Bank N.Y. Trust Co., 309 F. Supp. 983 (S.D.N.Y. 1970).

14. United States v. Canale, 176 F. Supp. 568 (E.D. Pa. 1959).

15. Winston v. Roe, 246 F. Supp. 246 (E.D. Tenn. 1965).

16. Wilcox v. Richmond, F. & P. R.R., 270 F. Supp. 454 (S.D.N.Y. 1967).

17. Martinez v. Karageorgis, 235 F. Supp. 1012 (D.P.R. 1963); Haraburda v. United States Steel Corp., 187 F. Supp. 86 (W.D. Mich. 1960).

18. Orzulak v. Fed. Commerce & Navigation Co., 168 F. Supp. 15 (E.D. Pa. 1958).

19. Brunswick Corp. v. Chrysler Corp., 291 F. Supp. 117 (E.D. Wis. 1968).

20. E. F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969).

21. United States v. Salter, 421 F.2d 1393 (1st Cir. 1970) (order in Internal Revenue Service subpeona); United States v. Woodbury, 263 F.2d 784 (9th Cir. 1959) (motion to produce); *see* Judge Wright's dissent in Groover, Christie & Merritt v. LoBianco, 336 F.2d 969, 973 (D.C. Cir. 1964) (motion to produce).

22. Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969); United States Rubber Co. v. Wright, 359 F.2d 784 (9th Cir. 1966); Kraus v. Bd. of County Road Comm'ns, 364 F.2d 919 (6th Cir. 1966). *Contra,* R. J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963).

23. Spurlin v. General Motors, 426 F.2d 294 (5th Cir. 1970); Markham v. Holt, 369 F.2d 940 (5th Cir. 1966).

summary judgment, denial of motions for interpleader,[24] denial of motions to dismiss,[25] orders extending the time for filing of claims,[26] and rulings on the admissibility of evidence.[27] Denial of motions to amend complaints[28] and pretrial orders[29] have been denied consistently. At the same time, circuit courts have permitted interlocutory appeals from an order granting a stay in the proceedings,[30] but have denied appeals when the order to stay had been denied appeal at the district court level.[31]

B. Technical Requirements

A number of technical requirements have been imposed by the federal courts, the most conspicuous being that an appeal will not be heard unless the district judge has issued his certificate.[32] This requirement stems from the desire to grant both appellate *and* trial courts the opportunity to review the justification for the appeal.[33] Federal courts also have required that the certificate contain an actual statement that the question meets the criteria imposed by the statute.[34] Certification need not be included in the original order, but an order can subsequently be amended to include certification.[35] If the original order does not contain the certificate, the Tenth Circuit has adopted the rule that the time in which to petition for appeal begins on the date of the supplemental or amended order.[36]

Appellate courts have refused to entertain appeals where the court felt that the question certified was not "ripe,"[37] or where a decision

24. Thompson v. Am. Airlines, Inc., 422 F.2d 350 (5th Cir. 1970).

25. Molybdenum Corp. of America v. Kasey, 279 F.2d 216 (9th Cir. 1960); Gottesman v. General Motors Corp., 268 F.2d 194 (2d Cir. 1959). *Contra,* Oskoian v. Canuel, 264 F.2d 591 (1st Cir. 1959).

26. Petition of World Shipping, Ltd., 373 F.2d 860 (2d Cir. 1967).

27. Control Data Corp. v. Int'l Business Mach. Corp., 421 F.2d 323 (8th Cir. 1970).

28. D'Ippolito v. Cities Service Co., 374 F.2d 643 (2d Cir. 1967); DeNubilo v. United States, 343 F.2d 455 (2d Cir. 1965); Wall v. Cheasapeake & Ohio R.R., 339 F.2d 434 (4th Cir. 1964).

29. Carey v. Greyhound Co., 424 F.2d 485 (9th Cir. 1970).

30. Lear Siegler, Inc. v. Adkins, 330 F.2d 595 (9th Cir. 1964).

31. Japan Line, Ltd. v. Sabre Shipping Corp., 407 F.2d 173 (2d Cir. 1969).

32. Baxter v. United Forest Products Co., 406 F.2d 1120 (8th Cir. 1969); Williams v. Maxwell, 396 F.2d 143 (4th Cir. 1968); Cram v. Sun Ins. Office, Ltd., 375 F.2d 670 (4th Cir. 1967); United States v. Al-Con Dev. Corp., 271 F.2d 901 (4th Cir. 1959); Milbert v. Bison Laboratories, 260 F.2d 431 (3d Cir. 1959).

33. *See* H.R. Rep. No. 1667, 85th Cong., 2d Sess. 1 (1958).

34. Benton Harbor Malleable Indus. v. Int'l U., U.A.A. & A.I.W., 355 F.2d 70 (6th Cir. 1966); United States v. Gottfried, 278 F.2d 426 (2d Cir. 1960).

35. Beverly Hills Fed. S. & L. Ass'n v. Fed. Home Loan Bank Bd., 234 F. Supp. 698 (D.D.C. 1964); Milbert v. Bison Laboratories, 260 F.2d 431 (3d Cir. 1958).

36. Houston Fearless Corp. v. Teter, 313 F.2d 91 (10th Cir. 1962).

37. Molybdenum Corp. of America v. Kasey, 279 F.2d 216 (9th Cir. 1960).

in the matter would be "hypothetical or advisory."[38] The federal statute is inapplicable to matters that have otherwise obtained finality for appeal purposes.[39]

These technical requirements are essential in that they insure that the statute will not be abused. They demand that "[e]ach application be looked at in light of the underlying purpose of the statute."[40] Since it is discretionary with both trial and appellate courts to permit or deny appeal, the statute has built-in safeguards which should prevent its abuse. If judges on either level have legitimate misgivings about the disruptive effects that an appeal might have on the litigation, appeal should be denied. Since the statute is double discretionary, mandamus generally does not lie to compel certification.[41]

THREE CONTROLLING TERMS

At the heart of both federal and state statutes are three controlling terms: (1) the order or decision must be one that involves "a controlling question of law"; (2) the question must be one "as to which there is substantial ground for difference of opinion"; and (3) appeal from the order or decision must be one that "may materially advance the ultimate termination of the litigation."

A. A Controlling Question of Law

This requirement was designed to insure that the statute not be used as a delaying tactic by permitting spurious appeal. Federal legislative history indicates that the term probably means "serious to the litigation either practically or legally."[42] Questions collateral to the basic issues in the lawsuit are not controlling, but the question need *not* be dispositive of the litigation.[43] Controlling questions include

38. Control Data Corp. v. Int'l Business Mach. Corp., 421 F.2d 323 (8th Cir. 1970).

39. Johnston v. Cartwright, 355 F.2d 32 (8th Cir. 1966). Moore says the statute is also inapplicable to orders otherwise appealable as of right, *e.g.*, under 28 U.S.C. § 1292(a), or under the *Forgay-Conrad* or *Cohen* rules. *See* 9 J. Moore, Federal Practice ¶ 110.22[2], at 259 (2d ed. 1970) [hereinafter cited as Moore, Fed. Practice].

40. Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702 (5th Cir. 1961). Courts have cited "urgency" as justification for federal court appeal. *See* Mamula v. Local 1211, United Steelworkers of America, 202 F. Supp. 348 (W.D.Pa. 1962).

Disregard of this approach presents innumerable difficulties with which many federal courts have struggled, *e.g.*, Kroch v. Texas Co., 167 F. Supp. 947, 949 (S.D.N.Y. 1958), holding that the statute is to be used only in exceptional cases. The exceptional case approach has been uniformly criticized. *See* 9 Moore, Fed. Practice, at 259; Wright, *supra* note 7, at 205; Comment, *supra* note 7, at 359.

41. D'Ippolito v. Cities Service Co., 374 F.2d 643 (2d Cir. 1967).

42. *See Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 2d Sess., ser. 11, at 18 (testimony of Judge Maris).

43. United States v. Woodbury, 263 F.2d 784 (9th Cir. 1959).

"[a] question of whether a claim exists as a matter of law; a question of whether a defense is available, if, being available, it will defeat the claim; a question as to jurisdiction of the subject matter; a question of the efficacy of process; a question as to proper venue; and a question as to the right to maintain the action (footnotes omitted)."[44] Moore lists as additional controlling questions orders involving "transfer of the action, right to jury trial, disqualification of counsel, or discovery."[45]

B. Substantial Ground for Difference of Opinion

A question involving "substantial ground for difference of opinion" should be certified when the other statutory criteria have been met and the arguments opposing the decision may create doubt as to its correctness. It applies to the ruling where decisions on the point of law are indefinite or unclear,[46] or where the decision may be contrary to established law in the jurisdiction. A question of first impression falls into this category,[47] as do questions where the precedents are conflicting.[48]

C. Materially Advance Ultimate Termination of the Litigation

This requirement is satisfied when the appeal may result in an acceleration of the litigative process. Competency of witnesses, prejudicial statements to the jury, instructions to the jury, and rulings of law as to the burden of proof seldom qualify since they

44. Moore, Fed. Practice, *supra* note 39, *citing* Mills v. Electric Autolite Co., 403 F.2d 429 (7th Cir. 1968), *rev'd* 396 U.S. 375 (1970), Benitez Rexach v. United States, 390 F.2d 631 (1st Cir. 1968), *cert. denied,* 393 U.S. 833 (1969); Falik v. United States, 343 F.2d 38 (2d Cir. 1965) ("... question[s] of whether a claim exists as a matter of law ...."); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969); Shapiro v. Paramount Film Distrib. Corp., 274 F.2d 743 (3d Cir. 1960); Banana Distribs., Inc. v. United Fruit Co., 269 F.2d 790 (2d Cir. 1959) ("... whether a defense is available, if, being available, it will defeat the claim ...."); Tcherepin v. Knight, 371 F.2d 374 (7th Cir. 1967), *rev'd* 389 U.S. 332 (1967); Pennsylvania Turnpike Comm'n v. McGinnes 268 F.2d 65 (3d Cir. 1959); Rogers v. Schilling, 268 F.2d 584 (D.C. Cir. 1959) ("... jurisdiction of the subject matter ...."); Penrod Drilling Co. v. Johnson, 414 F.2d 1217 (5th Cir. 1969), Construction Prods. Corp. v. Di-Noc Chem. Arts, Inc. 343 F.2d 166 (4th Cir. 1965) ("... proper venue ...."); Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960); Pavlovscak v. Lewis, 274 F.2d 743 [sic 523] (3d Cir. 1960) ("... efficacy of process ...."); Federal Resources Corp. v. Shoni Uranium Corp., 408 F.2d 875 (10th Cir. 1969); Matthies v. Seymour Mfg. Co., 270 F.2d 365 (2d Cir. 1959) *cert. denied* 361 U.S. 962 (1960); Corabi v. Auto Racing, Inc. 264 F.2d 784 (3d Cir. 1959) ("... right to maintain the action ....").

45. *See* Moore, Fed. Practice, *supra* note 39, at 260. For "right to jury trial," Moore cites Ross v. Bernhard, 403 F.2d 909 (2d Cir. 1968), *rev'd on merits,* 396 U.S. 531 (1970).

46. Keogh v. Pearson, 244 F. Supp. 482 (D.D.C. 1965).

47. Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968).

48. *See* Ozulak v. Fed. Commerce & Navigation Co., 168 F. Supp. 15 (E.D. Pa. 1958).

generally occur too near judgment.[49] An exception here is an order granting a motion for a new trial, since reversal would make the second trial unnecessary.[50]

USING THE STATUTE

Mechanics of the statute's use are relatively simple. If the order is such that it "does not practically dispose of the merits of the action"[51] or, in the federal courts, "is not otherwise appealable,"[52] the parties may, either at the hearing where the order is denied or through subsequent amendment of the order, request that the district court certify the question for appeal. The party petitioning the court states the controlling question of law and the reasons that the order should be appealed. If the district judge finds that appeal should be permitted, he states that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion. . . ." An application for leave to appeal, including the copy of the order and motion, are sent to the appellate court with jurisdiction over the matter.[53] The district court judge may or may not stay the action at this point.[54] If after review the appellate court decides to permit the appeal, it issues an order and the appeal is taken.[55] If an application has not been acted upon within twenty days at the appellate court level, it is "deemed denied."[56]

CONCLUSION

Permitting interlocutory appeals should add considerable flexibility to the State's appellate procedure. The statute, for example, might be used to facilitate prompt appellate determination of important new questions of law.[57]

The federal courts have not restricted use of the interlocutory appeals statute to any rigid category of orders. The significant consideration is not what type of order is before the court but instead whether or not certification of the order would conform to the

49. Comment, *supra* note 7, at 358-59.
50. *Id.* at 359.
51. N.M. Stat. Ann. § 21-10-3(A) (Repl. 1970, Supp. 1971).
52. 28 U.S.C. § 1292(b) (1966).
53. N.M. Stat. Ann. § 21-10-3(B) (Repl. 1970, Supp. 1971). *See* 4A Bender's Federal Practice Forms, Form 4758, at 392 (Rev. 1970), for an example of an application for interlocutory appeal under 28 U.S.C. § 1292(b) (1966).
54. N.M. Stat. Ann. § 21-10-3(C) (Repl. 1970, Supp. 1971).
55. *See* 4A Bender's Federal Practice Forms, Form 4759, at 395 (Rev. 1970).
56. N.M. Stat. Ann. § 21-10-3(B) (Repl. 1970, Supp. 1971).
57. Comment, *supra* note 7, at 335, *citing* 4 Moore, Fed. Practice at 1220.

underlying purpose of the statute. The statute appears to be designed to allow review of those interlocutory district court decisions which might be reversed on appeal, and if reversed, would either terminate the litigation or settle a matter which could prolong litigation either by unnecessarily complicating issues to be tried or requiring litigation based on issues that lack legal merit. Careful application of the statute should minimize the dangers inherent in permitting appellate review of interlocutory orders.