INTERLOCUTORY APPEALS
AND MANDAMUS
IN
FEDERAL COURT

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FEDERAL INTERLOCUTORY APPEALS AND MANDAMUS

By Dana Livingston Cobb

I. INTRODUCTION

In federal court, there are many possible avenues for seeking review of an order before entry of a final judgment. To be appealable, an order must be final within the meaning of 28 U.S.C. § 1291, it must fall within the specific class of interlocutory orders made appealable by statute or rule, or it must fall within some jurisprudential exception. See Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc., 170 F.3d 536, 538-41 (5th Cir. 1999); Kmart Corp. v. Aronds, 123 F.3d 297, 299 (5th Cir. 1997). See generally 15A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3911–3913 (2d ed. 1992 & Supp. 2004). This paper discusses the most popular avenues for seeking an appeal before a traditional final judgment has been entered, describing when and how to take advantage of them. A discussion of review from final judgments precedes the discussion of the various ways to obtain review in federal court before final judgment.

Appended to this paper are several useful resources. The first appendix is a one-page, “at a glance” reference tool that lists all the vehicles discussed in the paper, along with a shorthand version of the standards and procedures for each. The second appendix is a table containing examples of recent cases in which appellate jurisdiction over a controlling question of law was accepted, focusing on the Fifth Circuit and cases that were ultimately reviewed by the United States Supreme Court. The last three appendices track various statistics for the years 2002 through 2004 concerning permissive appeals under section 1292(b) and Rule 23(f), including the numbers filed, responded to, granted, the time for disposition, and in which district courts the cases originated.

II. SECTION 1291 FINALITY

A. Provisions of Section 1291

Section 1291 provides:

§ 1291. Final decisions of district courts

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court.


B. History and Purpose of Section 1291’s Finality Requirement

The Supreme Court recently described the history of the finality requirement:

Section 1291 of the Judicial Code generally vests courts of appeals with jurisdiction over appeals from “final decisions” of the district courts. It descends from the Judiciary Act of 1789 where “the First Congress established the principle that only ‘final judgments and decrees’ of the federal district courts may be reviewed on appeal.” In accord with this historical understanding, we have repeatedly interpreted § 1291 to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case. . . . Consistent with these purposes, we have held that a decision is not final, ordinarily, unless it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”

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1 This paper will not address other avenues for obtaining interlocutory review: (1) appeals in receiverships and admiralty cases, 28 U.S.C. § 1292(a)(2)–(3); (2) interlocutory appeals to the Federal Circuit and the Court of International Trade, 28 U.S.C. §§ 1292(c)–(d), 1295–1296; (3) bankruptcy appeals, 28 U.S.C. § 158; (4) appeals from three-judge district courts, 28 U.S.C. § 1253; (5) appeals from administrative actions by federal agencies, 28 U.S.C. § 2342; and (6) appeals under the “final decision” rules in 9 U.S.C. § 16(a) of the Federal Arbitration Act.


Second, the finality requirement “minimizes a party’s opportunities to defeat the valid claims of his opponents through an endless barrage of appeals.” In re Grand Jury Subpoena, 190 F.3d 375, 379-80 (5th Cir. 1999). As Justice Frankfurter explained nearly 60 years ago, “[the finality requirement] avoid[s] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.” Cobbledick v. United States, 309 U.S. 323, 325 (1940).

Finally, the finality rule “promotes efficiency by removing obstacles that work to impede judicial process.” Grand Jury Subpoena, 190 F.3d at 379-80 By their nature, interlocutory appeals are disruptive, time-consuming, and expensive. Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 294-95 (1st Cir. 2000). “To be effective, judicial administration must not be leden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.” Cobbledick, 309 U.S. at 325. In our legal system, “the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice.” Id. Therefore, requiring an individual to await final judgment before advancing an appeal does not, in and of itself, deny justice; in determining what justice requires, courts must balance the costs the individual must bear in awaiting final judgment against the societal and institutional hardships caused by allowing an immediate appeal. Grand Jury Subpoena, 190 F.3d at 379-80

C. Procedure for Appealing a Traditional Final Judgment

If the order from which you are appealing is a traditional final judgment—if it “ends the litigation on the merits” by resolving all claims between all parties “and leaves nothing for the court to do but execute the judgment”—then section 1291 provides appellate jurisdiction, and the method for appealing is set forth in Fed. R. App. P. 4, which governs appeals “as of right.” Catlin v. United States, 324 U.S. 229, 233 (1945).

The general rule is that a party wishing to appeal from a final judgment must file a notice of appeal in the district court within 30 days of the entry of the order or judgment from which appeal is taken. Fed. R. App. P. 4(a)(1)(A).2 (Counsel should note that Fed. R. Civ. P. 58 and Fed. R. App. P. 4 were substantively amended, effective December 1, 2002. The extensive amendments to Fed. R. Civ. P. 58 revamped the timing for entry of judgment and the separate-document rule. The Fed. R. App. P. 4(a)(7) amendments mirror the amendments to Fed. R. Civ. P. 58. These amendments should be studied carefully because they may affect the date from which appellate

2More specifically, if none of the motions listed in Rule 4(a)(4)(A)(i)-(vi) is timely filed, the notice of appeal must be filed with the clerk of the district court within 30 days after the entry of the judgment or order from which the appeal is taken. Fed. R. App. P. 4(a)(1)(A). If the United States or an agency thereof is a party, the notice of appeal must be filed by any party within 60 sixty days after such entry. Fed. R. App. P. 4(a)(1)(B). In the event of the timely filing of one of the motions listed in Rule 4(a)(4)(A)(i)-(vi) by any party, even if the motion is incorrectly labeled, the time for appeal for all parties runs from the entry of the order disposing of the last such motion remaining. Fed. R. App. P. 4(a)(4). An untimely postjudgment motion does not toll the time for appealing. Midwest Employers Cas. Co. v. Williams, 161 F.3d 877, 878 (5th Cir. 1998). See Dana Livingston Cobb, The Nuts and Bolts of Practice Before the Fifth Circuit, in Univ. Tex., 9TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS 1-5 (1999) (setting forth in detail the procedure for appealing from a traditional final judgment); see also Dana Livingston Cobb, Fifth Circuit Internal Operating Procedures Beyond the I.O.P.s, in Univ. Tex., 11TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS 1-3, 11-38 (2001) (same, plus internal processing information).
The notice of appeal must be actually received by the district court clerk within the time prescribed by Fed. R. App. P. 4; simply mailing the notice of appeal by that date is not sufficient. In re Arbutke, 988 F.2d 29 (5th Cir. 1993); Cyrak v. Lemon, 919 F.2d 320, 323 (5th Cir. 1990). The filing fee for the notice of appeal is $255 (which reflects a recent increase that went into effect on November 11, 2003). The fee is payable to the clerk of the district court. The appellant then has the duty to file a transcript order form within 10 days after filing the notice of appeal, even if no transcript is necessary, so that the clerk’s office, which has the duty to compile the appellate record, will know when the entire record is ready to be forwarded to the court of appeals. In appropriate cases, the appellant also may desire to stay enforcement of the district court’s judgment.

After filing the notice of appeal, paying the filing fees, filing the transcript order form, and staying enforcement, if necessary, an appellant need not take any other steps until the court of appeals sends a docketing letter with further instructions.

III. Jurisprudential Exceptions to the Final-Judgment Rule

A. Collateral Order Doctrine

The collateral order doctrine is sometimes called the Cohen collateral order doctrine, named for the landmark United States Supreme Court decision, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). When we talk about an order being final and appealable under the collateral order doctrine, we are still talking about an order that is appealable under section 1291.

The general rule is that “a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation can be ventilated.” Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994). Accordingly, as noted in the preceding section, a decision is ordinarily considered final and appealable under section 1291 only if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” Catlin v. United States, 324 U.S. 229, 233 (1945); see Digital Equip., 511 U.S. at 863 (quoting Catlin). The Supreme Court has recognized, however, “a narrow class of collateral orders which do not meet this definition of finality, but which are nevertheless immediately appealable under § 1291.” Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996). “Since Cohen, [the Supreme Court has] had many opportunities to revisit and refine the collateral-order exception to the final-judgment rule.” Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988).

1. Three-prong test for the collateral order doctrine

The Supreme Court has articulated a three-prong test to determine whether an order that does not finally resolve litigation is nonetheless appealable under section 1291. See Coopers v. Lybrand v. Livesay, 437 U.S. 463, 468 (1978). First, the order must “conclusively determine the disputed question.” Id. Second, the order must “resolve an important issue completely separate from the merits of the action.” Id. Third and finally, the order must “effectively unreviewable on appeal from a final judgment.” Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 431 (quoting Coopers & Lybrand, 437 U.S. at 468); accord Cunningham v. Hamilton County, 527 U.S. 198, 202 (1999) (“[C]ertain orders may be appealed, notwithstanding the absence of final judgment, but only when they ‘are conclusive, . . . resolve important questions separate from the merits, and . . . are effectively unreviewable on appeal from the final judgment in the underlying action.’” (quoting Swint v. Chambers County Comm’n, 514 U.S. 35, 42 (1995))); see also Doleac ex rel. Doleac v. Michelson, 264 F.3d 470, 490-91 (5th Cir. 2001) (restating the Cohen test as a four-step analysis: the decision (1) cannot be tentative, informal, or incomplete; (2) must deal with claims of right separable from, and collateral to, rights asserted in the action; (3) must be effectively unreviewable on the appeal from final judgment; and (4) must involve an issue too important to be denied review).

Under the first prong—that the order conclusively determine the disputed question—the
Supreme Court has observed that there are two kinds of nonfinal orders: those that are “inherently tentative,” and those that, although technically amendable, are “made with the expectation that they will be the final word on the subject addressed.” Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 n.14 (1983). The latter category of orders meets the first prong of the collateral order doctrine.

Under the second prong—that the issue be separate from the merits—the Court has described it as a “distillation of the principle that there should not be piecemeal review of ‘steps towards final judgment in which they will merge.’” Moses H. Cone, 460 U.S. at 12 n.13 (quoting Cohen, 337 U.S. at 546). A classic case meeting the third prong of the collateral order doctrine—unreviewable on appeal from a final judgment—are denials of immunity from suit. As the Fifth Circuit explained in a recent case involving an appeal from a district court order denying a sheriff’s motion for summary judgment in an “official capacity” suit,

> Official-capacity suits, in contrast [to personal-capacity suits], ‘generally represent only another way of pleading an action against an entity of which an officer is an agent.’” ... [T]he plea [here] ranks as a ‘mere defense to liability’” [rather than immunity from suit]. Because an erroneous ruling on liability may be reviewed effectively on appeal from final judgment, the order denying the Sheriff’s summary judgment motion in this “official capacity” suit was not an appealable collateral order.

Burge v. Parish of St. Tammany, 187 F.3d 452, 476-77 (5th Cir. 1999) (citations omitted); see Cunningham, 527 U.S. at 202.

As its stringent requirements indicate, the collateral order doctrine is not to be applied liberally. “Rather, the doctrine “is ‘extraordinarily limited’ in its application.” Pan E. Exploration Co. v. Hufo Oils, 798 F.2d 837, 839 (5th Cir. 1986). Moreover, appealability under the collateral order doctrine must be determined “without regard to the chance that the litigation might be speeded, or a ‘particular injustice’ averted by a prompt appellate court decision.” Digital Equip., 511 U.S. at 868.

2. Examples of orders appealable under the collateral order doctrine

- Orders denying claims of immunity from suit asserted in a motion to dismiss or motion for summary judgment when the order is based on a conclusion of law:
  
  
  
  
  - Eleventh Amendment immunity. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993); Martinez v. Tex. Dep’t of Crim. Justice, 300 F.3d 567, 573 (5th Cir. 2002); Reickenbacker v. Foster, 274 F.3d 974, 976 (5th Cir. 2001); see also Sherwin v. Peterson, 98 F.3d 849, 851 (5th Cir. 1996) (denial of state’s motion to dismiss is appealable even if the district court’s order is not based on an express finding of no immunity if the end result is the same).

- Refusal to rule on a claim of immunity from suit. Helton v. Clements, 787 F.2d 1016, 1017 (5th Cir. 1986).

- Successive appeal of denial of qualified immunity defense. Behrens v. Pelletier, 516 U.S. 299 (1996) (holding that there can be two interlocutory appeals under the collateral order doctrine of denials of
qualified immunity defenses in the same case: one appeal from the denial of a motion to dismiss, and a second appeal from the denial of a motion for summary judgment).

Abstention-based stay, dismissal, and remand orders:

- Under Pullman abstention. Moses H. Cone, 460 U.S. at 9 & n.8 (citing Idlewild Liquor Corp. v. Epstein, 370 U.S. 713 , 715 (1962)).

Pre-rendam decisions made by a district court if that decision is “separable” from the remand order and independently reviewable through a mechanism such as the collateral order doctrine. Dahiya v. Talmidge Int’l, Ltd., No. 02-31068, 2004 WL 1098838 (5th Cir. May 18, 2004) (citing City of Waco v. United States Fid. & Guar. Co., 293 U.S. 140 (1934); Heaton v. Monogram Credit Card Bank, 297 F.3d 416, 421 (5th Cir. 2002); Doleac ex rel. Doleac v. Michelson, 264 F.3d 470, 486 (5th Cir. 2001); Arnold v. State Farm Fire & Cas. Co., 277 F.3d 772, 776 (5th Cir. 2001); Linton v. Airbus Industrie, 30 F.3d 592, 597 (5th Cir. 1994); Angelides v. Baylor Coll. of Med., 117 F.3d 833, 837 (5th Cir. 1997); Soley v. First Nat’l Bank, 923 F.2d 406, 410 (5th Cir. 1991); see also In re Benjamin Moore & Co., 318 F.3d 626 (5th Cir. 2002) (addressing the separable order doctrine to determine if collateral order doctrine conferred jurisdiction on the court to review the order of remand in a mandamus proceeding).

- Order denying motions to intervene. Edward v. City of Houston, 78 F.3d 983, 992 (5th Cir. 1996) (en banc). But see Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987) (order granting motion to intervene but conditioning or restricting it is not immediately appealable; appeal must await final judgment).

- Order deciding that plaintiff is not required to post security for payment of costs. Cohen, 337 U.S. at 547.


- Order remanding action to state court pursuant to a contract between the parties. McDermott Int’l, Inc. v. Lloyds Underwriters, 944 F.2d 1199 (5th Cir. 1991).

- Discovery orders directed to third parties. Church of Scientology v. United States, 506 U.S. 9, 18 n.11 (1992) (Although discovery orders are normally reviewed by mandamus or on appeal from a contempt order, “A discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.”).

Pre-contempt appeals by the President of the United States to avoid unnecessary constitutional confrontations between two coordinate branches of government. See United States v. Nixon, 418 U.S. 683 (1974).

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3A district court order abstaining may take the form of an abstention-based stay order or an abstention-based remand order. The Supreme Court addressed the appealability of abstention-based remand orders in Quackenbush. Most “remand” orders—those remanding removed cases back to state court for lack of subject-matter jurisdiction—are not reviewable by appeal or otherwise because of the bar to appellate review embodied in 28 U.S.C. § 1447(d). See Quackenbush, 517 U.S. at 714. If, on the other hand, a district court remands a case to state court for a reason other than lack of subject-matter jurisdiction, for example, in the interest of docket congestion, the bar to review in section 1447(d) does not apply, and the decision is reviewable. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352-53 (1976).
Order requiring turnover of documents claimed to be privileged as attorney work product when the documents are already in the court’s possession because, “if the court already has lawful possession of the documents, a subsequent turnover order will be immediately enforceable without the necessity of holding the subpoenaed party in contempt.” In re Grand Jury Proceedings, 43 F.3d 966, 970 (5th Cir. 1994) (citing Perlman v. United States, 247 U.S. 7 (1918)).

Turnover order allowing a receiver to take possession of and sell corporate assets of nonparties. Maiz v. Virani, 311 F.3d 334, 339 n.4 (5th Cir. 2002).

Order approving receiver’s plan to distribute assets of investment company whose assets were frozen after the SEC investigated it for securities fraud. SEC v. Forex Asset Mgmt. LLC, 242 F.3d 325, 330 (5th Cir. 2001).

Order refusing to modify a prior consent decree where enforcement of the consent decree ran afoul of the State’s Eleventh Amendment Immunity. Frazar v. Gilbert, 300 F.3d 530, (5th Cir. 2002) (finding order also reviewable under 28 U.S.C. § 1291(a) because it was an order “refusing to dissolve or modify” an injunction), rev’d on other grounds, Frew ex rel. Frew v. Hawkins, 124 S. Ct. 899 (2004).

Order determining that former Department of Justice attorneys were eligible to act as fact and expert witnesses for private party in civil rights suit brought by government. EEOC v. Exxon Corp., 202 F.3d 755, 757 (5th Cir. 2000).

Orders affecting the media’s First Amendment rights. United States v. Brown, 250 F.3d 907, 913 n.8 (5th Cir. 2001) (orders protecting juror anonymity (citing United States v. Gurney, 558 F.2d 1202, 1206-07 (5th Cir. 1977)); Ford v. City of Huntsville, 242 F.3d 235, 240 (5th Cir. 2001) (court closure orders or confidentiality orders (citing Davis v. E. Baton Rouge Parish Sch. Bd., 78 F.3d 920, 926 (5th Cir. 1996)); see also United States v. Brown, 218 F.3d 415, 420 (5th Cir. 2000) (gag order that applied to attorneys, parties, and witnesses and prohibited them from discussing case with any public communications media was appealable under the collateral order doctrine by criminal defendant in whose trial the gag order was issued). But see United States v. Edwards, 206 F.3d 461, 462 (5th Cir. 2000) (per curiam) (collateral order doctrine did not apply to criminal defendant’s motion to lift gag order).

3. Examples of orders not appealable under the collateral order doctrine


Order denying claim of immunity from liability (as opposed to immunity from suit). Swint, 514 U.S. at 42 (citing Mitchell, 472 U.S. at 526).

Order denying claim of immunity from suit that turns on factual determinations. Stena Rederi A.B. v. Comision de Contratos, 923 F.2d 380, 385-86 (5th Cir. 1991). But cf. Mitchell, 472 U.S. at 528 (the resolution of
legal issues which are appealable under the collateral order doctrine often will entail some “consideration of the factual allegations that make up the plaintiff's claim for relief”).

Order denying claim of immunity from suit based on sufficiency of the evidence, i.e., whether there is a genuine issue of fact. Johnson v. Jones, 515 U.S. 304 (1995); Kinney v. Weaver, No. 00-40557, 2004 WL 811724, at *6 n.9 (5th Cir. Apr 15, 2004); Martinez v. Tex. Dep't of Crim. Justice, 300 F.3d 567, 576 (5th Cir. 2002) (“For a qualified immunity appeal, however, our review of any factual disputes is limited to their materiality, not their genuineness.”).

In rare instances, denial of claims of immunity on the eve of trial. Edwards v. Cass County, 919 F.2d 273, 276 (5th Cir. 1990) (“If every denial of a motion for leave to file a summary judgment motion asserting qualified immunity were immediately appealable, defendants would have a guaranteed means of obtaining last-minute continuances. We read Mitchell v. Forsyth as affording defendants a reasonable opportunity to obtain review of their qualified immunity claims without losing part of their immunity rights by having to stand trial. However, Mitchell is not designed as an automatic exemption from the orderly processes of docket control.” “To hold otherwise would be to open the floodgates to appeals by defendants seeking delay by asserting qualified immunity at the last minute (or even, as here, following jury selection).”).

Order denying the summary judgment of government officials sued in their personal or individual capacities is not an appealable collateral order. Burge v. Parish of St. Tammany, 187 F.3d 452, 476-77 (5th Cir. 1999) (citing Swint, 514 U.S. at 42).

Order denying or granting stays pending arbitration. Rauscher Pierce Rfdsnes, Inc. v. Birenbaum, 860 F.2d 169 (5th Cir. 1988).

Order denying certification of a class. Coopers & Lybrand, 437 U.S. at 935 (now appealable by permission under Rule 23(f)).


Orders concerning post-judgment discovery. Piratello v. Philips Elecs. N. Am. Corp., 360 F.3d 506, 508 (5th Cir. 2004) (order compelling party to appear at a deposition by a particular date, to answer questions regarding assets, and to produce documents requested, over a claim of self-incrimination; no jurisdiction over district court’s order under 1291 or collateral order doctrine; instead, the remedy was by appealing a contempt order).4

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4 Piratello, 360 F.3d at 508 (“This court has indicated its agreement with the Fourth Circuit’s view that the availability of an appeal through a contempt order renders the collateral order doctrine inapplicable to discovery orders. See A-Mark Auction Galleries, 233 F.3d at 898-99 (noting, with approval, the holding of MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 119 (4th Cir. 1994)).”). In MDK, the Fourth Circuit said: “Courts have long recognized that a party sufficiently exercised over a discovery order may resist that order, be cited for contempt, and then challenge the propriety of the discovery order in the course of appealing the contempt citation. [citations omitted] Indeed, the Supreme Court has pointed to this path to appellate review as a reason why discovery orders are not appealable under Cohen.” MDK, Inc., 27 F.3d at 121
As a general matter, pre-trial discovery orders do not constitute final decisions under § 1291, and therefore, are not immediately appealable. See A-Mark Auction Galleries, Inc. v. Am. Numismatic Ass'n, 233 F.3d 895, 897 (5th Cir. 2000) (citing Church of Scientology v. United States, 506 U.S. 9, 18 n.11 (1992)); see Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377 (1981). The Supreme Court has held that a party that wishes to immediately appeal a discovery order “must [first] refuse compliance, be held in contempt, and then appeal the contempt order.” Church of Scientology, 506 U.S. at 18 n.11 (citing United States v. Ryan, 402 U.S. 530 (1971)). See infra p. 43 (mandamus may also be available when the discovery order requires disclosure of information claimed to be privileged).

Order granting or denying a motion to transfer venue under section 1404(a). Brinar v. Williamson, 245 F.3d 515, 517-18 (5th Cir. 2001); La. Ice Cream Dists. v. Carvel Corp., 821 F.2d 1031, 1033 (5th Cir. 1987).

Order of civil contempt. FDIC v. LeGrand, 43 F.3d 163, 168 (5th Cir. 1995); Lamar Fin. Corp. v. Adams, 918 F.2d 564, 566 (5th Cir. 1990).

Order of an agency review board remanding to an ALJ for further factfinding and consideration before final agency decision is rendered. Exxon Chems. Am. v. Chao, 298 F.3d 464, 469-70 (5th Cir. 2002).

B. Other Common-Law Doctrines of Finality
1. Gillespie “pragmatic finality” doctrine
Under the Gillespie doctrine, the requirement of finality is to be given a practical rather than a technical construction in determining the appealability in marginal cases of an order falling within what the Gillespie decision called the “twilight zone” of finality. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964). Counsel should avoid relying on the Gillespie doctrine.

The Supreme Court has distinguished Gillespie on grounds that, according to Professor Wright and his collaborators, “bury it quietly.” 15A Charles A. Wright et al., Federal Practice and Procedure § 3913, at 479 (2d ed. 1992). In Coopers & Lybrand v. Livesay, the Supreme Court refused to apply the Gillespie doctrine to permit appeal from an order decertifying a class action, even on the assumption that the result would be termination of the litigation. Rather than expanding Gillespie, the Court wrote that permitting such appeals under section 1291 would be plainly inconsistent with the policies underlying section 1292(b) and that “[i]f Gillespie were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.” Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978) (noting that Gillespie concerned a marginally final order disposing of an unsettled issue of national significance and that review of the issue “unquestionably implemented the same policy Congress sought to promote in § 1292(b)”).

In fact, the most recent pronouncement from the Fifth Circuit about the vitality of the Gillespie doctrine is that the Fifth Circuit “no longer recognizes the exception.” Kmart Corp. v. Aronds, 123 F.3d 297, 300 (5th Cir. 1997); see Sherri A.D. v. Kirby, 975 F.2d 193, 202 n.12 (5th Cir. 1992) (calling practical finality more chimerical than real); United States v. Garner, 749 F.2d 281, 288 (5th Cir. 1985) (pragmatic finality approach has been virtually limited to facts of Gillespie). As the Fifth Circuit explained, Gillespie’s case-by-case approach to determining pragmatic finality is in fundamental conflict with the values and purposes of the final-judgment rule. See Pan E. Exploration Co. v. Hufo Oils, 798 F.2d 837, 841-42 (5th Cir. 1986); Newpark Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d 399 (5th Cir. 1984) (en banc).

If counsel finds a case supporting finality that sounds like it is based on practical or pragmatic finality, counsel should carefully trace the cases supporting the theory of finality to make sure that Gillespie is not the ultimate source of authority for that theory. An opinion’s pedigree is important. Counsel should make an informed decision about relying on those cases that rely on or are indirect progeny of Gillespie.

(citing Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377 (1981)).
2. **“Death knell” doctrine**

   Under the “death knell” doctrine, which is sometimes equated with the Gillespie doctrine, a case is final when a party is “effectively out of court.” *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *see McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). The doctrine provides that any decision forcing a plaintiff to give up his claim, in effect, sounds the “death knell,” making it final for purposes of appeal. *Coopers & Lybrand*, 437 U.S. at 465-69.

   Like the Gillespie doctrine, many commentators have argued that the death knell doctrine is all but a dead letter. Although the Fifth Circuit in the past noted that the Supreme Court did not actually overrule the death knell doctrine in *Coopers & Lybrand*, *see McKnight*, 667 F.2d at 479, the Fifth Circuit noted that the U.S. Supreme Court’s post-Cooper decision “in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), declared that its prior decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), sounded the death knell to that doctrine.” *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1103 n.3 (5th Cir. Feb. 1981).

   And, more recently, the Fifth Circuit observed that the Supreme Court did “limit the death knell exception” in *Coopers & Lybrand* and in its later decision, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 10 n.11 (1983). *See Kmart Corp. v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997).

   In *Moses H. Cone*, the Supreme Court held that *Idlewild’s* reasoning was limited to abstention or similar doctrines where all or an essential part of the federal suit goes to a state forum. *Aronds*, 123 F.3d at 300. Further, even in cases involving stays, the Fifth Circuit has stated that while it liberally construed the death knell exception in the past, it could no longer do so because the exception was limited to cases where the stay requires all or essentially all of the suit to be litigated in state court. *See Aronds*, 123 F.3d at 300 (citing *United States v. Garner*, 749 F.2d 281, 288 (5th Cir. 1985), and *Kershaw v. Shalala*, 9 F.3d 11, 14 (5th Cir. 1993)). And even in cases involving abstention doctrines, resort to the death knell doctrine is usually unnecessary; direct reliance may be placed on *Moses H. Cone* and the Supreme Court’s more recent decision in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996).

3. **Forgay “hardship–irreparable injury” exception**

   The Forgay doctrine, or, as it is sometimes called the “hardship and irreparable injury” exception to the final-judgment rule, grew out of *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848). Today, the Forgay doctrine—if it has any continuing validity—is viewed a narrow exception to the final-judgment rule; it allows immediate appellate court review of district court orders that adjudicate part of one claim by directing the immediate delivery of property from one party to another, when there is the possibility that the losing party will experience irreparable harm or hardship if appeal of the execution is not allowed. *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506, 512 n.8 (6th Cir. 2001) (citing Forgay, 47 U.S. at 204); *see also* 15A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3910, at 328 (2d ed. 1992) (noting that the Forgay doctrine “is likely to be applied only to orders that improvidently direct immediate execution of judgments that involve part of the merits of a claim and are outside the limits of Rule 54(b)”).

   Although the Forgay doctrine is occasionally cited, it—like the Gillespie and death knell doctrines—is probably a dead letter. *Petties v. Dist. of Columbia*, 227 F.3d 469, 473 (D.C. Cir. 2000) (“[W]e are not at all sure that Forgay has continuing vitality apart from the collateral order doctrine . . . .”); *see Digital Equip.*, 511 U.S. at 868 (appealability under the collateral order doctrine must be determined “without regard to the chance that the litigation might be speeded, or a ‘particular injustice’ averted by a prompt appellate court decision”); *see, e.g.*, *Maiz v. Virani*, 311 F.3d 334, 339 n.4 (5th Cir. 2002) (holding that it had appellate jurisdiction under the collateral order doctrine over an order directed at two nonparty corporations to turnover property “worth tens of millions of dollars”).

   In fact, the two most recent Fifth Circuit cases citing the Forgay doctrine as a possible jurisprudential exception to finality were decided more than a decade ago. *Goodman v. Lee*, 988 F.2d 619, 626 (5th Cir. 1993) (citing Forgay for a narrow proposition, but distinguishing it); *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 n.7 (5th Cir. 1991) (citing it in dicta).
The *Forgay* category of hardship finality is narrow, and according to the Wright & Miller treatise, has not generated a large number of appeals. 15A **Charles A. Wright et al., Federal Practice and Procedure § 3910 (2d ed. 1992).** The most common, and the most expansive, jurisprudential exception to the final-judgment rule is the collateral order doctrine. Despite its stringent requirements and arguably limited applicability, the collateral order doctrine is the best chance of establishing appellate jurisdiction on a jurisprudential exception. *Pan E. Exploration Co. v. Hufo Oils*, 798 F.2d 837, 839 (5th Cir. 1986). But, if the facts of your case fit into the narrow and specific facts of the *Forgay* doctrine, counsel may wish to consider citing both the collateral order and *Forgay* doctrines and reviewing the Wright & Miller treatise’s treatment of the doctrine, which argues that “within its restricted sphere it provides a highly desirable elaboration of the final judgment rule.” 15A **Wright et al., supra, § 3910, at 329 (2d ed. 1996).**

**C. Procedure for Appealing Under the Collateral Order Doctrine**

“An appeal taken under the collateral order doctrine is subject to all the usual appellate rules and time periods, including Rule 4 of the Federal Rules of Appellate Procedure.” *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992); see also *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 386 (5th Cir. 1999) (“While we said in *Moats* that appeals taken pursuant to the collateral order doctrine are subject to all of the usual appellate rules governing interlocutory appeals, we also specifically identified Rule 4.”). A party seeking to appeal under the collateral order doctrine should follow the appeal procedures under Fed. R. App. P. 4 that apply to appeals “as of right” from traditional final judgments (e.g., invoke the appellate court’s jurisdiction by filing a notice of appeal in the district court within the time specified by Fed. R. App. P. 4). See *supra* note 2 & accompanying text.

**D. Seek a Stay, If Desired**

If a party pursuing a collateral order appeal wants a stay of the trial court proceeding pending resolution of the attempted appeal, it must move for such order. Federal Rule of Appellate Procedure 8 governs motions for stay or injunctions while an appeal is pending. Fed. R. App. P. 8(a)(1)(C).

Rule 8 provides that a party must ordinarily move *first* in the district court for a stay of the order of a district court pending appeal or for an “order suspending, modifying, restoring, or granting an injunction” while an appeal is pending. Fed. R. App. P. 8(a)(1)(A), (C).

1. **Contents and requirements of motion for stay filed in the Fifth Circuit**

A party may bypass the district court and move for that relief in the court of appeals in the first instance by filing a motion showing that “moving first in the district court would be impracticable.” Fed. R. App. P. 8(a)(2)(A)(i).

If a party unsuccessfully sought a stay from the trial court, that party may seek a stay from the court of appeals by filing a motion stating that “a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.” Fed. R. App. P. 8(a)(2)(A)(ii).

Under either scenario—whether a stay was or was not sought in the district court in the first instance—any motion for stay in the court of appeals must also include:

(i) the reasons for granting the relief requested and the facts relied on;
(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and
(iii) relevant parts of the record.


The Federal Rules of Appellate Procedure also require that the moving party give reasonable notice of the motion to all parties, including when, where, and to whom the application for stay or injunction is to be presented. Fed. R. App. P. 8(a)(2)(C). An original and three copies of the motion and supporting papers, together with a
certificate of service, should be filed with the circuit clerk of the court of appeals. The motion does not need a cover, but must be securely bound so as to not obscure the text and so that it will lie reasonably flat when open.

There is no separate filing fee for filing a motion for stay or injunction in the court of appeals, but all required fees must have been paid in the underlying action before the court of appeals will act on the motion. Counsel should generally consult Fed. R. App. P. 27(a) and (d), 5th Cir. R. 27.4, and the Internal Operating Procedure following 5th Cir. R. 27.5 (which was effective December 1, 2002) concerning the requirements and format for motions. In particular, counsel should note that all motions should indicate whether they are opposed or not. And, because a motion for stay or injunction is not merely a “procedural motion,” it must contain a certificate of interested persons. See 5th Cir. R. 27.4.

The Fifth Circuit Internal Operating Procedures now clarify a gap in that existed in the rules until a few years ago regarding the lack of a regulation of the font size for motions. The Internal Operating Procedure following 5th Cir. R. 27.5 makes clear that motions must comply with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6), which means that motions must be in no smaller than 14 point proportional typeface (or not more than 10½ characters per inch in monospaced typeface). The length of motions is limited to 20 pages, exclusive of the corporate disclosure statement (in the Fifth Circuit, the certificate of interested persons) and any accompanying documents authorized by Rule 27(a)(2)(B) and, in the specific context of a motion for stay or injunction, by Rule 8(a)(2)(B). Fed. R. App. P. 27(d)(2).

2. Response to motion for stay

Federal Rule of Appellate Procedure 8 governing motions for stay is silent concerning responses and replies. The general rule concerning motions provides that any party may file a response in opposition to a motion “within 8 days after service of the motion unless the court shortens or extends the time.” Fed. R. App. P. 27(a)(3)(A). In computing your response time, counsel should note that the computation-of-time rule in the Federal Rules of Appellate Procedure was recently amended (effective December 1, 2002) and now provides that if the time for taking an action under the Federal Rules of Appellate Procedure is less than 11 days, then intervening Saturdays, Sundays, and legal holidays are excluded, unless the time period specifies that it is stated in calendar days. Fed. R. App. P. 26(a)(2).

Because the court may act on motions authorized by Rule 8 (for stay or injunction) in fewer than 8 days by giving reasonable notice that it intends to act sooner, if a party intends to respond to a motion for stay or injunction, it is a good idea to notify the clerk’s office as soon as possible and to transmit your response to the clerk’s office by overnight delivery as soon as it is ready. All responses received by the clerk before action on the motion are presented to the court for consideration.

As a general rule, the Fifth Circuit no longer sends a letter to the parties advising them that the court has received and filed a motion and identifying the deadline to file any response. The Fifth Circuit’s website advises of this change in its internal operating procedures and suggests that counsel register for the Fifth Circuit’s event notification service on its website to get notice right away of the filing any motions.

Any response is limited to 20 pages and, like the motion, must comply with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6). Fed. R. App. P. 27(d)(2); I.O.P. following 5th Cir. R. 27.5

3. Reply

Although Fed. R. App. P. 27(a)(4) permits a reply to a response within 5 days after service of the response, the Fifth Circuit’s website warns that the court looks upon replies with great disfavor. Not surprisingly, then, the court does not—as a general rule—grant extensions of time to file a reply to a response. Any reply is limited to 10 pages. Fed. R. App. P. 27(d)(2).

4. Internal processing

A motion for stay filed in the court of appeals normally will be considered by a panel of the court. Fed. R. App. P. 8(a)(1)(D). “But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.” Fed. R. App. P. 8(a)(1)(D). If the motion is an emergency
motion, the clerk’s office immediately assigns the motion to the next administrative judge in rotation on the court’s administrative log and simultaneously sends copies of the motion to the other panel members.

Motions are ordinarily considered without oral argument. Fed. R. App. P. 27(e).

The court of appeals may condition relief on a party’s filing a bond or other appropriate security in the district court. Fed. R. App. P. 8(a)(1)(E).

5. Appellate court jurisdiction to rule on a motion for stay or injunction

Practitioners should note that neither a motion for stay nor a motion for injunction transfer jurisdiction to the appellate court. For the court of appeals to have jurisdiction to consider a motion for stay or for injunction, the court of appeals’ jurisdiction must first be properly invoked by the filing of a notice of appeal, in the case of a collateral-order appeal or section 1292(a)(1) appeal for example, or by the pendency of an original proceeding or a petition for permission to appeal. The motion for stay can be filed concurrent with a document invoking the appellate court’s jurisdiction, but it cannot precede the invocation of the appellate court’s jurisdiction.

6. Reconsideration

A party aggrieved by the court’s ruling on a motion may file a “motion for reconsideration,” (not a motion or petition for “rehearing”). A motion for reconsideration of action on a motion must be filed within 14 days (unless the United States is a party in a civil case, see 5th Cir. R. 27.1). Counsel should note that a motion for reconsideration must be physically received by the clerk’s office by the deadline; the mailbox rule does not apply to motions. Reconsideration requests are limited to 15 pages.

IV. Rule 54(b) Certification

A. Provisions Rule 54(b)

Federal Rule of Civil Procedure 54(b) allows a district court dealing with multiple claims or parties to direct the entry of final judgment as to fewer than all the claims or parties if the court makes an express determination that there is no just reason for delay. See Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1 (1980). Accordingly, “a decision that fails to adjudicate the rights and liabilities of all parties, while not technically final, can be certified as final pursuant to Federal Rule of Civil Procedure 54(b).” Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc., 170 F.3d 536, 538-41 (5th Cir. 1999) (quoting Witherspoon v. White, 111 F.3d 399, 402 (5th Cir. 1997)). Rule 54(b) provides:

Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

B. Purpose of Rule 54(b)

“Rule 54(b) reflects a balancing of two policies: avoiding the ‘danger of hardship or injustice through delay which would be alleviated by immediate appeal’ and ‘avoid[ing] piecemeal appeals.’” Eldredge v. Martin Marietta Corp., 207 F.3d 737, 740-42 (5th Cir. 2000) (quoting PYCA Indus. v. Harrison County Waste Water Mgmt. Dist., 81 F.3d 1412, 1421 (5th Cir. 1996)). Rule 54(b) also alleviates the perceived restrictions resulting from liberal federal joinder rules by
allowing the district court to effect a severance of part of a case for resolution by immediate appeal. See Colson v. Grohman, 174 F.3d 498, 505 n.3 (5th Cir. 1999) (referring to the district court’s Rule 54(b) order as an order that certain claims be “severed from the remaining claims pursuant to Federal Rule of Civil Procedure 54(b)”).

While 54(b) effects a type of “severance,” Rule 54(b) certification should not be confused with a traditional severance under Rule 21. They are not the same. Sidag Aktiengesellschaft v. Smoked Foods Prods. Co., 813 F.2d 81, 84 (5th Cir. 1987). “Severance under Rule 21 creates two separate actions or suits where previously there was but one.” United States v. O’Neil, 709 F.2d 361, 369 (5th Cir. 1983). “An entire claim may be severed under Rule 21 regardless of whether any portion of it, or of other claims in the suit, has been determined.” Sidag, 813 F.2d at 84. “And thus the severed claims becomes an entirely separate suit or judicial unit, so that a final adjudication of it is appealable, notwithstanding that there remain unresolved claims pending in the original action from which the severance was granted and that no Rule 54(b) certificate has been issued. Id. In that scenario, “the time for appeal of the disposed-of case runs from the entry of the judgment therein, notwithstanding that the severance may have been erroneous.” Gomez v. Dep’t of the Air Force, 869 F.2d 852, 859 (5th Cir. 1989).

By contrast, “[w]here a claim is wholly determined, it is nevertheless not appealable in the absence of a Rule 54(b) certificate if other claims which have not been wholly determined remain pending in the same suit.” Sidag, 813 F.2d at 84. “Rule 54(b) does not create two separate actions as Rule 21 does, but rather entitles the claimant to an expedited appellate review of a finally-decided, discrete single suit, even though other claims therein remain unresolved.” Gomez, 869 F.2d at 859 n.16.

C. Requirements for Rule 54(b) Certification

As both the rule’s text and the Supreme Court have made clear, a district court deciding whether to certify a judgment under Rule 54(b) must make two determinations. See Curtiss-Wright, 446 U.S. at 7-8. First, the district court must determine that “it is dealing with a ‘final judgment.’” Id. at 7. The judgment is final if “it is an ultimate disposition of an individual claim entered in the course of a multiple claims action.” Id. (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 436 (1956)). The second determination the district court must make is whether any just reason for delay exists. Id. at 8. According to the text of Rule 54, this determination must be made expressly.

Before certifying an order as final, the district court should act as a “dispatcher,” id., and “weigh a variety of factors to determine whether [its] disposition is appropriate for Rule 54(b) certification.” Ackerman v. FDIC, 973 F.2d 1221, 1224 (5th Cir. 1992). Before the district court can justify certifying its judgment for appeal under Rule 54(b), it must find that at least some of those factors combine to outweigh the important concerns that underlie “the historic federal policy against piecemeal appeals.” Curtiss-Wright, 446 U.S. at 8 (quoting Sears, Roebuck & Co., 351 U.S. at 438). For example, one Rule 54(b) concern is “whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.” Id.

Even when a district court certifies an order as final under Rule 54(b), the court of appeals will independently evaluate whether the district court’s ruling was suitable for entry as a final judgment under Rule 54(b). See Eldredge v. Martin Marietta Corp., 207 F.3d 737, 740-42 (5th Cir. 2000); see, e.g., N.W. Enters. Inc. v. City of Houston, 352 F.3d 162, 179 (5th Cir. 2003). Thus, although an appeal from an order properly certified under Rule 54(b) is not discretionary with the appellate court, if the court of appeals concludes that the order was not appropriate for Rule 54(b) certification, it will dismiss the appeal.

1. Final judgment

The Fifth Circuit reviews de novo the final-judgment determination. Curtiss-Wright Corp., 446 U.S. at 7-8. The court of appeals will dismiss an appeal from a Rule 54(b) judgment that disposes of some but not all elements of damages for a particular claim that the judgment purports to resolve. See, e.g., Monument Mgmt. Ltd. P’ship I v. City of Pearil, 952 F.2d 883 (5th Cir. 1992); see also N.W. Enters., 352 F.3d at 179 (“At best, the court certified only elements of what it viewed as separate claims concerning the public parks and
multi-family residence components. The certifications satisfy neither the ‘final judgment’ nor ‘separate claim’ requirements of Rule 54(b).”

2. **Multiple claims**

   Rule 54(b)’s requirement that the district court must have disposed of “one or more . . . claims or parties” is jurisdictional, is reviewed de novo, and may be raised sua sponte by the court of appeals even though the parties may not have challenged it. *Eldredge*, 207 F.3d at 740; see *Tubos de Acero de Mexico, S.A* v. *Am. Int’l Inv. Corp.*, 292 F.3d 471, 485 (5th Cir. 2002).


   But the Supreme Court’s writings have failed to lead the circuit courts to a consensus as to the handling of what the Fifth Circuit has recently called a “confusing area of law.” *Eldredge*, 207 F.3d at 740; accord *United States v. Phillips*, 303 F.3d 548, 550 (5th Cir. 2002) (“[I]t is not entirely clear what constitutes a ‘claim’ for relief . . . .”)

   Instead, various methods to determine what constitutes a “claim for relief” for purposes of Rule 54(b) have percolated among the circuits. *Id.* One approach “[focus] upon the possibility of separate recoveries under arguably separate claims.” *Samaad*, 940 F.2d at 931. If the alleged claims for relief do not permit more than one possible recovery, then they are not separately enforceable nor appropriate for Rule 54(b) certification. *Eldredge*, 207 F.3d at 740-42; see *Brandt v. Bassett (In re Southeast Banking Corp.)*, 69 F.3d 1539, 1547 (11th Cir. 1995) (concluding that allegations seeking damages against holding company’s directors for failing to consider merger possibilities over several years stated one claim because relief could only be recovered once); *Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981) (Wisdom, J., sitting by designation) (“At a minimum, claims cannot be separate unless separate recovery is possible.”).

   Another approach “concentrate[s] on the facts underlying the putatively separate claims.” *Samaad*, 940 F.2d at 931. If the facts underlying those claims are different, then those claims may be deemed separate for Rule 54(b) purposes. *See Jack Walters & Sons v. Morton Bldg.*, 737 F.2d 698, 702 (7th Cir. 1984); see also *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979). “By the same token, if there is a great deal of factual overlap between the decided and the retained claims, they are not separate, and appeal must be deferred till the latter are resolved.” *Jack Walters & Sons*, 737 F.2d at 702. Although the Supreme Court held in *Cold Metal* that separate claims could arise out of the same transaction and occurrence, the Fifth Circuit has said that the *Cold Metal* view does not necessarily conflict with the factual approach. *Eldredge*, 207 F.3d at 740-42 (citing *Minority Police Officers Ass’n v. City of S. Bend*, 721 F.2d 197, 200-01 (7th Cir. 1983)).

   “A prime basis for the factual approach is ‘to spare the court of appeals from having to keep relearning the facts of a case on successive appeals.’” *Id.* (quoting *Jack Walters & Sons*, 737 F.2d at 702); see, e.g., *Eldredge*, 207 F.3d at 740-42 (because facts pertaining to time-barred portion of appellants’ claim may conceivably be admitted in the pending district court trial to buttress appellants’ allegations that appellees trespassed and damaged certain property within the prescription (limitations) period, the appeal of the partial summary judgment was improper); *Minority Police Officers Ass’n v. City of S. Bend*, 721 F.2d 197 (7th Cir. 1983) (district court order barring liability for racially discriminatory acts beyond a certain time period, but allowing plaintiffs to proceed with allegations based on more recent acts, did not resolve a separate claim, and the Rule 54(b) final judgment was therefore improper).

   Finally, at least one circuit has expressed that claims are not distinct when they are “so closely related that they would fall afool of the rule against splitting claims if brought separately.” *Tolson v. United States*, 732 F.2d 998, 1001 (D.C. Cir. 1984) (quoting *Local P-171*, 642 F.2d at 1071).
The Fifth Circuit has still not resolved which among these methods is the preferable method of discerning what a claim is for purposes of Rule 54(b), and it expressly declined to do so four years ago and again two years ago. *Eldredge*, 207 F.3d at 740-42; *see Tubos de Acero de Mexico, S.A. v. Am. Int’l Inv. Corp.*, 292 F.3d 471, 485 (5th Cir. 2002) (reminding that “[t]his Court has not expressly adopted a method for determining what constitutes a distinct ‘claim for relief’ under Rule 54(b”).) Rather, the Fifth Circuit uses the cases from other circuits as “guideposts for future deliberations.” *Eldredge*, 207 F.3d at 740-42. The Fifth Circuit has “recognized, however, that various courts have looked to the possibility of separate recoveries, have concentrated on the underlying facts, and have invoked claim-preclusion rules.” *Tubos de Acero*, 292 F.3d at 485. Moreover, “[w]hen some of the same facts form the basis for several claims, the existence of separate claims for purposes of Rule 54(b) depends on an analysis of their distinctness.” *Id.*

3. **Express determination that there is no just reason for delay**

The district court must make an “express determination that there is no just reason for delay.” *Fed. R. Civ. P. 54(b).* This requirement is not jurisdictional and is reviewed for an abuse of discretion. *Eldredge*, 207 F.3d at 740; *see Samaad v. City of Dallas*, 940 F.2d 925, 930 (5th Cir. 1991).

An express determination does not, in the Fifth Circuit, require the use of the “magic words” of the rule. *Kelly v. Lee’s Old Fashioned Hamburger*, Inc., 908 F.2d 1218 (5th Cir. 1990) (en banc). The Fifth Circuit has developed a fairly lenient approach to applying the standard for determining whether a district court in fact certified an order as final under Rule 54(b). *See Briargrove Shopping Cir. Joint Venture v. Pilgrim Enters., Inc.*, 170 F.3d 536, 538-41 (5th Cir. 1999) (describing *Kelly*, 908 F.2d at 1220).

Although Rule 54(b) requires an “express determination that there is no just reason for delay,” the Fifth Circuit has said that “a district court’s judgment meets the requirements of the rule if it satisfies the following standard”: “If the language in the order appealed from, either independently or together with related portions of the record referred to in the order, reflects the district court’s unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable. We do not require the judge to mechanically recite the words ‘no just reason for delay.’” *Briargrove Shopping Cir.*, 170 F.3d at 538-41 (quoting *Kelly*, 908 F.2d at 1220). The Fifth Circuit also does not require that the district court include a statement explaining its reasons for finding that there is no just reason to delay entry of judgment. *Rothenberg v. Sec. Mgmt. Co.*, 617 F.2d 1149, 1150 (5th Cir. 1980). *But see, e.g., Cullen v. Margiotta*, 811 F.2d 698, 711 (2d. Cir. 1987) (determination that there is no just cause for delay must be accompanied by a reasoned, if brief, explanation of the court’s conclusion).

4. **Determining whether the district court certified an order under Rule 54(b)**

The intent to enter a partial final judgment under Rule 54(b) “must be unmistakable.” *Briargrove*, 170 F.3d at 538. “[T]he intent must appear from the order or from documents referenced in the order; we can look nowhere else to find such intent, nor can we speculate on the thought process of the district judge.” *Compare id.* (looking for the district court’s intent only in the final judgment and the declaratory judgment, but finding no unmistakable intent to enter a partial final judgment under Rule 54(b) where the district court nowhere mentions Rule 54(b), and no party moved for 54(b) certification) *with Kelly*, 908 F.2d at 1221 (complaining party moved for Rule 54(b) certification, the order appealed from was captioned “F.R.C.P. 54(b) JUDGMENT,” and it directed “that there be final judgment entered pursuant to Federal Rule of Civil Procedure 54(b)”).

Labeling a nonfinal order as a “final judgment” does not suffice as a Rule 54(b) certification. *Witherspoon v. White*, 111 F.3d 399, 403 (5th Cir. 1997); *see also Askanase*, 981 F.2d at 810 (concluding that the court lacked jurisdiction even though the district court indicated that the order was “appealable”). The label does not indicate any intent by the district court that the order should be immediately appealable. *Briargrove*, 170 F.3d at 538-40; *cf. Curtiss-Wright Corp.*, 446 U.S. at 8 (“Not all final judgments on individual claims should be immediately appealable, even if they are in some sense
separable from the remaining unresolved claims.”). This understanding comports with the text of Rule 54(b), which states that any order, “however designated,” does not terminate the action as to any claims when the court has not made a determination that there is no just reason for delay of the appeal. 

**Briargrove**, 170 F.3d at 538-40. Although the Fifth Circuit does not require the mechanical recitation of Rule 54(b), 

**Kelly**, 908 F.2d at 1220, it does require a showing of an “unmistakable intent” to enter the judgment under Rule 54(b). 

**Briargrove**, 170 F.3d at 538-40.

In **Briargrove**, the Fifth Circuit even refused to consider the district court’s order approving the supersedeas bond as evidence that the district court intended for its judgment to be immediately appealable. 

**Briargrove**, 170 F.3d at 538-40. The court reasoned that it could not consider the approval of the supersedeas bond as evincing the district court’s intent to certify its order as final under Rule 54(b) because the order approving the bond was not referenced in the order appealed from. 

**Briargrove**, 170 F.3d at 540; see **Kelly**, 908 F.2d at 1220 (“If the language in the order appealed from, either independently or together with related portions of the record referred to in the order, reflects the district court’s unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable.”). The court even went so far as to take the position that “even if we were to consider the order approving the supersedeas bond, that order nevertheless fails to reflect an ‘unmistakable intent to enter a partial final judgment under Rule 54(b).’” 

**Briargrove**, 170 F.3d at 540 (quoting **Kelly**, 908 F.2d at 1220).

Once the court of appeals determines that the trial court made the requisite express determination that there is no just reason for delay, the court of appeals does not review the district court’s reasons for that determination, unless challenged by the appellee, because this determination does not go to the appellate court’s jurisdiction. 

**Eldredge**, 207 F.3d at 740; see **Samaad**, 940 F.2d at 930. Even if challenged, however, the court of appeals gives substantial deference to the district court’s determination that there is no just reason for delay and should reversed only if “clearly unreasonable.” 

**Curtiss-Wright**, 446 U.S. at 10.

### D. Examples of Orders in Which Review Was Sought Under Rule 54(b)

Because the orders certified for appeal under Rule 54(b) are individual to each case, the following examples of questions taken on a Rule 54(b) appeal are extremely diverse.

1. **Rule 54(b) certification was proper**

- In consolidated lawsuits, order dismissing all claims against one of three parties. 


- Order granting summary judgment on all claims asserted against one of several defendants. 

**Austin v. Wil-Burt Co.**, 361 F.3d 862, 866 (5th Cir. 2004).

- Summary judgment order denying one party’s claim for policy benefits, despite the existence of multiple claims and multiple parties. 


- In an appeal arising out of an action brought by 105 individuals and 88 adult entertainment establishments challenging city ordinances, the district court properly certified under Rule 54(b) its decision that the 1,500-foot buffer zone, increased from 750 feet, is “content based” and unconstitutional under a strict scrutiny standard. 

**N.W. Enters. Inc. v. City of Houston**, 352 F.3d 162, 179 (5th Cir. 2003) (finding Rule 54(b) certification of a different issue improper).

- Claim for retirement garnishment was separate from claim for garnishment of inheritance where the garnishment order directed immediate payment of the retirement funds, and the inheritance garnishment claim was still pending. 

**United States v. Phillips**, 303 F.3d 548, 550 (5th Cir. 2002).

- Order dismissing breach of contract claim, but leaving bad faith claim alive, was properly
certified for appeal under Rule 54(b) because the bad faith facts were “wholly separate from” the breach of contract claim. *Tubos de Acero de Mexico, S.A. v. Am. Int’l Inv. Corp.*, 292 F.3d 471, 486 (5th Cir. 2002).

✔ Judgment dismissing all of plaintiffs’ Eighth Amendment claims, except the retaliation claim against one defendant. *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999).

✔ Partial summary judgment as to one defendant, but not the other. *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 355 (5th Cir. 1999).

2. **Rule 54(b) certification was not proper**

✖ In an appeal arising out of an action brought by 105 individuals and 88 adult entertainment establishments challenging city ordinances, the district court certified two issues for review under Rule 54(b). One was proper and the other was not. The district court certified under Rule 54(b) its partial approval of the public parks and multi-family residence components of the buffer zone, but, finding fact issues extant, it expressly declined to complete the analysis of those components. The Fifth Circuit held that it lacked Rule 54(b) appellate jurisdiction over the certification of those issues, holding that the certification was flawed: “the court certified only elements of what it viewed as separate claims concerning the public parks and multi-family residence components. The certifications satisfy neither the ‘final judgment’ nor ‘separate claim’ requirements of Rule 54(b).” *N.W. Enter. Inc. v. City of Houston*, 352 F.3d 162, 179 (5th Cir. 2003) (finding Rule 54(b) certification of another issue was proper).

✖ Because facts pertaining to time-barred portion of appellants’ claim could have conceivably been admitted in the pending district court trial to buttress other claims that were not time barred, the appeal of the partial summary judgment was improper.

✖ District court order barring liability for racially discriminatory acts beyond a certain time period, but allowing plaintiffs to proceed with allegations based on more recent acts, did not resolve a separate claim, and the Rule 54(b) final judgment was therefore improper. *Minority Police Officers Ass’n v. City of S. Bend*, 721 F.2d 197 (7th Cir. 1983).

✖ Order denying oil drilling rig pressure testing contractor’s summary judgment motion as to indemnity in contractor’s declaratory judgment action against rig operator was improperly certified as final under Rule 54(b) because issue of contractor’s breach of contract between operator and contractor was unresolved. *Greene’s Pressure Testing & Rentals, Inc. v. Flournoy Drilling Co.*, 113 F.3d 47 (5th Cir. 1997).

E. **Procedure for Appealing Under Rule 54(b)**

Unless the trial court sua sponte certifies an order as final under Rule 54(b), counsel should move for certification.

After the trial court certifies an order as final under Rule 54(b), counsel should follow the normal appeal procedures under Fed. R. App. P. 4 by filing a notice of appeal in district court within the times specified in that rule. See Fed. R. App. P. 4 (normally 30 days). See supra note 2 and accompanying text.

The party prevailing on the claim certified for appeal under Rule 54(b) has the right to execute unless the losing party obtains a stay of proceedings to enforce the judgment under Rule 62(h). Rule 62(h) provides: “When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.” Fed. R. Civ. P. 62(h). If a stay of execution is desired, counsel should file the necessary motions and post bond. See Fed. R. Civ. P. 62(h). Even if the party obtains a stay of execution, that party may need to deposit
the amount of judgment in the court’s registry. Curtiss-Wright, 446 U.S. at 13 n.3.

In the event that the party seeking the Rule 54(b) certification also wants a stay of the trial court proceedings pending resolution of the attempted appeal, the party should follow the procedures outlined in Federal Rule of Appellate Procedure 8. See supra pp.10-12 for procedures on seeking a stay.

V. SECTION 1292(A)(1) APPEALS OF INJUNCTIONS

A. Provisions of Section 1292(a)(1)

Subsection (1) of 1292(a), providing appellate jurisdiction over orders dealing with injunctions, is probably the most frequently used portion of section 1292(a). Section 1292(a)(1) provides that, with specific exceptions, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving an injunction or refusing to dissolve or modify an injunction, except where direct review may be had in the Supreme Court;


Once an order has been deemed appealable under section 1292(a)(1), however, the entire order—not merely the propriety of injunctive relief—comes within the appellate court’s scope of review. See In re Lease Oil Antitrust Litig. (No. II), 200 F.3d 317, 319-20 (5th Cir. 2000); In re Seabulk Offshore, Ltd., 158 F.3d 897, 899 n.2 (5th Cir. 1998); see, e.g., Casas v. Am. Airlines, Inc., 304 F.3d 517, 520 & n.3 (5th Cir. 2002) (when an injunction was appealable pursuant to section 1292(a)(1), the court exercised jurisdiction over a cross-appeal of the district court’s preemption ruling). The Fifth Circuit has recognized, however, “that this discretion should be exercised ‘only in rare and unique circumstances.’” Gates v. Cook, 234 F.3d 221, 228 n.5 (5th Cir. 2000) (quoting Gros v. City of Grand Prairie, 209 F.3d 431, 436 (5th Cir. 2000)).

For example, in Gates, judgment had already been entered in the form of a consent decree, and nothing was left pending before the district court, except its continuing jurisdiction over the decree. In deciding to exercise its pendent appellate jurisdiction over a motion to substitute counsel, the Fifth Circuit noted, “Given the procedural posture of this case, we feel it is appropriate to exercise our discretion and review the petitioners’ motion to substitute counsel. Absent the exercise of our discretion, the petitioners will be deprived of any meaningful opportunity to have their motion reviewed.” Id.

B. Standards for Appealing Under Section 1292(a)(1)

Section 1292(a)(1) provides jurisdiction over appeals involving not only permanent injunctions, but also preliminary injunctions. Sherri A.D. v. Kirby, 975 F.2d 193, 202 (5th Cir. 1992). To establish appellate jurisdiction over an order expressly falling under 1292(a)(1), the appealing party need make no other showing, i.e., irreparable harm or probable right to relief. Atwood Turnkey Drilling, Inc. v. Petroleo Brasiliiero, S.A., 875 F.2d 1174, 1176 (5th Cir. 1989).

Although temporary restraining orders ordinarily are not appealable under 1292(a)(1), Belo Broad. Corp. v. Clark, 654 F.2d 423, 426 (5th Cir. Unit A Aug. 1981), an order labeled as a temporary restraining order but entered after full notice, hearing, and participation by all parties, may be appealable under section 1292(a)(1) as a preliminary injunction.

To determine whether an order is refusing an injunction, this Court examines whether the district court specifically denied the injunctive relief. EEOC v. Kerrville Bus Co., 925 F.2d 129, 132 (5th Cir. 1991). An order that does not expressly deny an “injunction” may still be appealable under section 1292(a)(1), however, if the order has the “practical effect” of refusing an injunction and meets the two-prong test outlined in Carson v. American Brands, Inc., 450 U.S. 79 (1981): (1) the order has the potential to have serious, perhaps irreparable consequences; and (2) the order can only be effectively challenged by immediate appeal. And, when a district court fails to specifically state that it is denying injunctive relief, “there must be some additional, substantial indication—whether from the language of the order, or the grounds on which it rests, or the circumstances in which it was entered—that the district court was acting specifically to deny injunctive relief.” Software Solutions, Inc. v. New
Examples

C. Examples of Orders in Which Review Was Sought Under Section 1292(a)(1)

1. Appeal was proper under section 1292(a)(1)

- Order refusing to modify a prior consent decree because it was an order “refusing to dissolve or modify” an injunction. *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002) (finding order also reviewable under the collateral order doctrine when enforcement of the consent decree ran afoul of the State’s Eleventh Amendment Immunity), rev’d on other grounds, *Frew ex rel. Frew v. Hawkins*, 124 S. Ct. 899 (2004); accord *Ruiz v. United States*, 243 F.3d 941, 945 (5th Cir. 2001) (after asking the parties to brief the issue of appellate jurisdiction, holding that the district court’s order denying motions to terminate consent decree enforcing prisoner’s constitutional rights was appealable under section 1292(a)(1) as a refusal to dissolve an injunction).


- Orders granting and denying preliminary injunctions if the injunction is related to the substantive issues of the litigation. *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195 (5th Cir. 2003); *Women’s Med. Ctr. of Northwest Houston v. Bell*, 248 F.3d 411, 418 (5th Cir. 2001); *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991); *Justin Indus. v. Choctaw Sec., L.P.*, 920 F.2d 262 (5th Cir. 1990); see also *Granger v. Slade*, No. 03-60491, 2004 WL 287307 (5th Cir. Feb 12, 2004) (unpublished).


- Order in civil forfeiture proceeding to continue the pretrial restraining order that enjoined transfer of property. *United States v. Melrose E. Subdivision*, 357 F.3d 493, 498 & n.2 (5th Cir. 2004).

- Order refusing to grant motion to compel arbitration and stay proceedings pending arbitration. *Dahiya v. Talmidge Int’l, Ltd.*, No. 02-31068, 2004 WL 1098838, at *8-9 (5th Cir. May 18, 2004) (DeMoss, J., dissenting) (“[E]ven though here direct appealability would not otherwise be formally available under § 16(a)(1)(A) or § 16(a)(1)(C) of the FAA and the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards], the district court’s refusal to grant Appellants’ motion to compel arbitration and stay proceedings pending arbitration should be appealable as an interlocutory denial of an injunction under § 1292(a)(1) [and under the collateral order doctrine].” (emphasis added)).

- Order granting a bankruptcy trustee’s motion to un-freeze debtor’s accounts, which contained proceeds of partitioned property,
and transfer the balance to the trustee where the district court acted as a trial court in bankruptcy. *In re Hinsley (Hinsley v. Boudloche)*, 201 F.3d 638, 641 (5th Cir. 2000).

An order that required a defendant in civil rights litigation to develop a plan addressing actions that it needs to take in the future. *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1056-57 (5th Cir. 1997).

2. **Appeal was not proper under section 1292(a)(1)**


- “Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view ‘interlocutory’ within the meaning of [section] 1292(a)(1).” *Switzerland Cheese Ass’n, Inc. v. E. Horne’s Mkt., Inc.*, 385 U.S. 23 (1966); *Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169, 172 (5th Cir. 1988).

- Order compelling party to appear at a deposition by a particular date, to answer questions regarding assets, and to produce documents requested was not viewed as an injunction for purposes of section 1291(a)(2). *Piratello v. Philips Elecs. N. Am. Corp.*, 360 F.3d 506, 508 (5th Cir. 2004).

- Order refusing to grant an injunction requested by one party (but indicating that the district court might reconsider its decision concerning an injunction) cannot be used as a basis for appellate jurisdiction under 1292(a)(1) by the party not enjoined and thus not “aggrieved” by the district court’s denial of an injunction. *Id.* at 509.

- “Order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under 28 U.S.C. § 1292(a)(1).” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988) (overruling the *Enelow-Ettelson* rule and holding that order denying a motion to stay proceedings pursuant to the *Colorado River* doctrine was not appealable under section 1292(a)(1)).

- Orders that compel or restrain conduct pursuant to the court’s authority to control proceedings before it, even if the order is cast in injunctive terms. *United States v. Brown*, 218 F.3d 415, 422 n.7 (5th Cir. 2000) (“As a case management order, the gag order at issue here was indisputably crafted to control the proceedings, [and] in no way impacts the merits of the case against Brown . . . .”).

- Order denying discretionary stay pending arbitration was not appealable as an order refusing an injunction. *Adams v. Ga. Gulf Corp.*, 237 F.3d 538, 542 (5th Cir. 2001) (citing *Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169 (5th Cir. 1988)).

- Order refusing to grant a motion to compel arbitration and stay proceedings when the district court—in the same order—remanded the case to state court for lack of subject-matter jurisdiction. *Dahiya v. Talmidge Int’l., Ltd.*, No. 02-31068, 2004 WL 1098838, at *8-9 (5th Cir. May 18, 2004) (holding, in a split decision, that the case was not reviewable under section 16 of the FAA or section 1292(a)(1) “because the denials of Appellants’ motions to stay and to compel arbitration accompanied a remand for lack of subject matter jurisdiction” and because the denials did not satisfy the court’s
separatorder doctrine jurisprudence†).

× Order in which the district court did not specifically deny injunctive relief but instead deferred the issue by sending the matter to arbitration, noting that the arbitrator had authority to grant injunctive relief. Positive Software Solutions, Inc. v. New Century Mortgage Corp., No. 03-10585, 2004 WL 249595 (5th Cir. Feb 10, 2004) (unpublished)

× Clarifications of the meaning of, or merely enforcing, an earlier-entered injunction. Ingram Towing Co. v. Adnac, Inc., 59 F.3d 513, 516 (5th Cir. 1995).

× Order in which the district court fails to specifically state that it is denying injunctive relief unless there is “some additional, substantial indication—whether from the language of the order, or the grounds on which it rests, or the circumstances in which it was entered—that the district court was acting specifically to deny injunctive relief.” EEOC v. Kerrville Bus Co., 925 F.2d 129, 132 (5th Cir. 1991)


× Orders staying or refusing to stay district court’s own proceedings. Id. at 279-88 (overruling the Enelow-Ettleson doctrine).

× Order dismissing counterclaims for injunctive relief was not appealable under 1292(a)(1) because the claims were dismissed for lack of subject-matter jurisdiction, not because the claims for injunctive relief lacked merit. EEOC v. Kerrville Bus Co., 925 F.2d 129 (5th Cir. 1991).


D. Procedure for Appealing Under Section 1292(a)(1)

An appeal under section 1292(a)(1) is governed by the rules for a regular appeal “as of right.” Accordingly, within the times specified in Fed. R. App. P. 4, any party wishing to appeal must file a notice of appeal with the district court. See Jones v. Belhaven Coll., No. 03-60680, 2004 WL 759539, at *1 (5th Cir. Apr. 8, 2004) (unpublished) (dismissing one party’s appeal of an order appealable under § 1292(a)(1) for failure to timely file its notice of appeal under Fed. R. App. P. 4); supra note 2 & accompanying text.

In an appeal from a district court’s order concerning injunctive relief, the Fifth Circuit gives appeals involving injunctions calendaring priority. 5TH CIR. R. 47.7. Counsel should make sure to point out in the appropriate place on its Form for Appearance of Counsel that the case is entitled to calendaring priority.

As a practical matter, the district court might moot the desirability of pursuing an appeal from an order granting or denying a preliminary injunction by setting the trial date on the permanent injunction much sooner than any appeal, even an expedited one, could be heard.

If you are appealing under section 1292(a)(1), the aggrieved party will likely want to move for a stay of the trial court’s order. See supra pp. 10–12 for the procedures on seeking a stay. Federal Rule of Appellate Procedure 8 governs stays and supersedeas pending appeal.

E. Statistics

In the court’s 2002–03 year, 136 “motions for stay or for injunction and/or supersedeas” were filed with the Fifth Circuit. United States Court of Appeals for the Fifth Circuit, Clerk’s Annual Report, Judicial Workload Statistics app. F (2003).

VI. Section 1292(b) Certification
A. Provisions of Section 1292(b)

In an interlocutory appeal certified by the district court under 28 U.S.C. § 1292(b), a court of appeals has no jurisdiction to consider an order not otherwise appealable unless the district court states its opinion in writing that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, and the court of appeals permits an appeal from the order. Burge v. Parish of St. Tammany, 187 F.3d 452, 477 (5th Cir. 1999) (citing Swint v. Chambers County Comm’n, 514 U.S. 35, 46 (1995)).

Specifically, section 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.


Section 1292(b) applies only in civil actions. United States v. Doucet, 461 F.2d 1095, 1096 (5th Cir. 1972). It does not, however, apply to tax court judges; section 1292(b) only applies to “district judge[s].” Shapiro v. Comm’r, 632 F.2d 170 (2d Cir. 1980). It also does not apply to bankruptcy judges, but it does apply to district judges sitting in bankruptcy. Conn. Nat’l Bank v. German, 503 U.S. 249, 252-55 (1992). It appears that in the Fifth Circuit, Magistrate Judges may certify orders under section 1292(b). See Appendix D (showing that in 2003, the Fifth Circuit granted permission to appeal under section 1292(b) from at least two Magistrate Judge certifications).

B. Purpose of Section 1292(b)

The legislative history of section 1292(b) shows that it was a “judge-sought, judge-made, judge-sponsored enactment.” Hadiipateras v. Pacifica, S.A., 290 F.2d 697, 702-03 (5th Cir. 1961). Former Fifth Circuit Chief Judge John R. Brown described the purposes that animated the adoption of section 1292(b):

Federal judges from their prior professional practice, and more so from experience gained in the adjudication of today’s complex litigation, were acutely aware of two principal things. First, certainty and dispatch in the completion of judicial business makes piecemeal appeal as permitted in some states undesirable. But second, there are occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, upon which in a realistic way the whole case or defense will turn. The amendment was to give to the appellate machinery . . . a considerable flexibility operating under the immediate, sole, and broad control of Judges so that within reasonable limits[,] disadvantages of piecemeal and final judgment appeals might both be avoided.

Id.

Pursuing a discretionary appeal under section 1292(b) is not required to avoid waiving the right to raise a particular issue in an appeal upon entry of a final judgment. See Caterpillar, Inc. v. Lewis,
519 U.S. 61, 74 (1996) (reasoning that “if a party had to invoke § 1292(b) in order to preserve an objection to an interlocutory ruling, litigants would be obliged to seek § 1292(b) certifications constantly. Routine resort to § 1292(b) would hardly comport with Congress’ design to reserve interlocutory review for ‘exceptional’ cases.”)

C. Standards for Section 1292(b) Certification

The legislative history shows that section 1292(b) “was to used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation.” Report of the Judicial Conference Committee on Appeals from Interlocutory Orders (1953), reprinted in 1958 U.S.C.C.A.N. 5260-61. Under section 1292(b), “[t]he right of appeal . . . is limited . . . by the requirement of the certificate of the trial judge, who is familiar with the litigation and will not be disposed to countenance dilatory tactics . . . .” Report of the Judicial Conference Committee on Appeals from Interlocutory Orders (1953), reprinted in 1958 U.S.C.C.A.N. 5260, 5261. The requirement of consent of the trial judge “serves the dual purpose of ensuring that such review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals.” Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978).

The granting or denying of certification under section 1292(b) is discretionary in the first instance with the district court. Without district court certification under section 1292(b), the court of appeals lacks jurisdiction under that statute. And the district court’s decision to refuse to certify an issue is not reviewable by appeal, and very rarely, if at all, by mandamus. See, e.g., United States v. 687.30 Acres of Land, 451 F.2d 667, 670 (8th Cir. 1971) (no jurisdiction to review); In re Phillips Petroleum Co., 943 F.2d 63, 67 (Temp. Emer. Ct. App. 1991) (holding that the district court properly refused to certify issues under section 1292(b); thus, to grant the petition for mandamus “would improperly utilize it as a substitute in the absence of any justifying circumstances”). But see In re McClelland Eng’rs, Inc., 742 F.2d 837 (5th Cir. 1984) (concluding, on petition for writ of mandamus, that the district court abused its discretion in refusing to certify an order under section 1292(b) and vacating district court’s order refusing to certify); McClelland Eng’rs, Inc. v. Munusamy, 784 F.2d 1313, 1315-16 n.1 (5th Cir. 1986) (noting that its earlier mandamus decision had merely “invited” the district court to certify an issue under section 1292(b) that the district court had already refused to certify, although also noting that “the district court retains its discretion to refuse to certify an appeal”); Ernst & Ernst v. United States Dist. Court, 439 F.2d 1288, 1293 (5th Cir. 1971) (“Our treatment of the case at this juncture makes it unnecessary for us to decide at this time the request that we mandatorily order § 1292(b) certification.”); Ex parte Tokio Marine & Fire Ins. Co., 322 F.2d 113, 115 (5th Cir. 1963) (mandamus to compel a district court to certify under section 1292(b “would indeed be rare”).

Persuading the district court to exercise its discretion is only half the task because the appellate court must also agree that 1292(b) is appropriate. The court of appeals’ decision to grant permission to appeal is completely discretionary. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978) (court of appeals has discretion to deny petition for permission for nonmerits-related reasons, such as docket congestion); Gallimore v. Mo. Pac. R.R., 635 F.2d 1165, 1168-69 (5th Cir. Unit A Fed. 1981) (denial of 1292(b) petitions often have little or nothing to do with the merits of the case). For that reason, the petition for permission to appeal should focus on why the court of appeals should grant permission to appeal.

The discretion afforded the court of appeals in determining whether to accept an appeal under section 1292(b) “has been likened to that of the Supreme Court in controlling its certiorari jurisdiction.” Gallimore, 635 F.2d at 1168-69 n.4. Some of the following advice concerning 1292(b) appeals should sound strikingly similar to ideas for pitching a petition for review to the Supreme Court of Texas:

[J]udicial economy is the central determinant in either granting or denying the appeal. On the one hand the court is fundamentally opposed to piecemeal litigation. On the other, an interlocutory
appeal may stand a good chance of eliminating the occurrence of a full trial, an appeal, and a remand for new trial. The latter situation will usually arise when a determinative issue of law, decided by the district court on a motion for summary judgment, dismissal, or in some other preliminary manner, is an issue of law of first impression in the Fifth Circuit, is wrongly decided according to Fifth Circuit or Supreme Court precedent, or is in some other respect a close question. It will be more persuasive if the petition includes citation to authority which shows that interlocutory appeals have been granted in similar circumstances.


Although the standards the district court must consider in certifying an order for immediate appeal under section 1292(b) do not bind or apply to the court of appeals in deciding whether to exercise its discretion to permit the appeal, they do inform the court of appeals’ exercise of its discretion. Parcel Tankers, Inc. v. Formosa Plastics Corp., 764 F.2d 1153, 1156 (5th Cir. 1985). Thus, it is a good idea for a petition for permission to appeal to focus on the “controlling question of law,” the “substantial ground for difference of opinion,” and that “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b).

In persuading the court that there is a “substantial ground for difference of opinion,” the participation of amici, attention to national trends and the Restatement, and reference to debate among legal scholars may be extremely helpful in permissive appeal practice. Indeed, in reviewing the docket sheets for section 1292(b) and Rule 23(f) petitions for permission filed in the Fifth Circuit from 2002-2004, amicus sought to participate in influencing the Court to either grant or deny the petition for permission in a significant number of those cases. The federal rules are relatively restrictive concerning the participation of amici, so the high number of permissive appeals in which amici sought to participate was noteworthy.

Counsel should be cautioned, however, that some federal appellate courts have been reluctant to grant permission to appeal when the issue is too important:

This intriguing question, “certified” to us under the provisions of 28 U.S.C. § 1292(b) has been briefed not only by the opposing parties but by three amici curiae, each of which has taken a different position in response not only to the “certified” question but to related questions. The case itself has tremendous implications both for the securities industry and the investing public, as it involves questions some resolutions of which Judge Carter recognized in his Memorandum Opinion of March 18, 1974, could make it “exceedingly difficult for any (brokerage firm) to function as an investment banker for a company and at the same time function as a broker-dealer in that company’s securities.” And, too, a decision in this case might possibly even have impacts in the banking business where bank trust departments are effectuating transactions in securities of companies with which the bank has a commercial banking relationship.

Slade v. Shearson, Hammill & Co., 517 F.2d 398, 399-400 (1st Cir. 1974) (footnote omitted) (deciding to withdraw the order granting permission to appeal as having been improvidently granted). In the opinion of this author, the Slade view of the appropriate use of section 1292(b) is unnecessarily cramped.

In drafting a petition for permission to appeal, practitioners should note that review is not limited to the particular question identified and formulated by the district court, but may extend to “any issue fairly included within the certified order[s].” Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205 (1996); see Reingold v. Swiftships Inc., 210 F.3d 320, 321 (5th Cir. 2000). A recent Fifth
Circuit decision provides an example of how this rule works:

In its June 28, 2000, certification order, the district court identified the controlling question as whether Reserve had a sufficient proprietary interest in the mooring facility to sustain a claim for economic damages. . . . [W]e may review the issue of whether Reserve suffered physical damage as well as whether Reserve possessed a sufficient proprietary interest.

Reserve Mooring Inc. v. Am. Commercial Barge Line, LLC, 251 F.3d 1069, 1070 & n.4 (5th Cir. 2001). But cf. Adkinson v. Int’l Harvester Co., 975 F.2d 208, 211 n.4 (5th Cir. 1992) (while appeal was certified and accepted as to the order denying the second motion for summary judgment, jurisdiction under section 1292(b) did not extend to issue raised on first summary judgment motion or to issues not raised by either motion).

This result is supported by the fact that the language of section 1292(b) confers jurisdiction over an “order” involving a controlling question of law, and not merely over the particular question identified. Thus, while a court of appeals cannot consider matters ruled on in other orders, it may consider any question reasonably bound up with the certified order. The rationale is that “[n]either the district court nor the court of appeals can foresee, at the time the appeal is certified and accepted, the course of reasoning that the court of appeals will follow at the time of decision. If only the certified question could be decided, the court of appeals would have to choose between deciding a question that may be—or clearly is—irrelevant to the ultimate decision, or refusing to decide anything at all.” 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3929 (2d ed. 1996).

The Fifth Circuit appears to have gone back and forth on how generous its approach should be to exercising its discretion to accept section 1292(b) appeals. Shortly after section 1292(b)’s adoption, Judge Brown emphasized that “handy modifiers” to describe the standard for granting permission to appeal, such as “strictly construed” or the “big and expensive case.” Tokio Marine & Fire Ins. Co., 322 F.2d 113, 115 (5th Cir. 1963); see Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702-03 (5th Cir. 1961). Instead, Judge Brown emphasized that a flexible approach to section 1292(b) is proper. Hadjipateras, 290 F.2d at 702-03. In the years that followed, some Fifth Circuit decisions suggested that the court had been too liberal in granting permission to appeal, and the circuit’s jurisprudence began to reflect the view that section 1292(b) should be used only “sparingly.” See, e.g., Ala. Labor Council v. Alabama, 453 F.2d 922, 924 (5th Cir. 1972); Garner v. Wolfinbarger, 433 F.2d 117, 120 (5th Cir. 1970) (Brown, C.J., concurring and dissenting) (“[W]e have been too lax in allowing § 1292(b) appeals.”).

Today, the Fifth Circuit grants permission to appeal in a relatively high percentage of section 1292(b) petitions filed each year. See infra Section VI(D) (covering statistics for section 1292(b) appeals); Appendices B–D. Perhaps the high number of petitions granted is a reflection of the fact that a party petitioning the court of appeals has already convinced at least one judge (the district court) that the case involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.

D. Statistics

Fours years ago, when I wrote the first version of this paper, I noted that in the Fifth Circuit’s 1998–99 term, 27 petitions for permission to appeal under section 1292(b) were filed with the Court. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, CLERK’S ANNUAL REPORT, JUDICIAL WORKLOAD STATISTICS app. F (1999). The number of section 1292(b) petitions in recent years is consistent with the 1999 statistics. During the Fifth Circuit’s 2002–03 term, 32 petitions for permission to appeal were filed. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, CLERK’S ANNUAL REPORT, JUDICIAL WORKLOAD STATISTICS app. F (2003). On a calendar-year basis, and excluding Rule 23(f) petitions, in 2002, 23 section 1292(b) petitions were filed. See
E. Examples of Cases Reviewable Under Section 1292(b)

Because section 1292(b) permits an appeal from a “controlling question of law,” the examples of questions taken on section 1292(b) appeals are extremely diverse. Nevertheless, the following examples—and a fuller set of examples in Appendix B to this paper—should give you an idea of the type of questions considered important enough to permit a discretionary appeal:


- Whether University of Michigan’s prior practice of “protecting” or “reserving” seats for underrepresented minority applicants effectively kept nonprotected applicants from competing for those slots and operated as the functional equivalent of a quota that runs afoul of Justice Powell’s opinion in *Bakke*? *Gratz v. Bollinger*, 539 U.S. 244, 2592 (2003).


- Whether the district court properly denied remand to state court on the ground that Congress did not expressly provide that an FLSA action, once started in state court, was not removable to federal court? *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003).

- Whether service of process is a prerequisite for the running of the 30-day removal period under § 1446(b). *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 348 (1999).

- Whether the standard of care that defendants owed to a federally chartered, federally insured institution was controlled by state law, federal common law, or a special federal statute (12 U.S.C. § 1821(k)) that speaks of “gross negligence.” *Atherton v. FDIC*, 519 U.S. 213, 217 (1997).


- Whether damages for inconvenience and loss of a refreshing, memorable vacation are damages for mental injuries, which are unrecoverable under the Warsaw Convention? *Lee v. Am. Airlines, Inc.*, 355 F.3d 386, 387 (5th Cir. 2004).

- Where the district court was convinced that
party engaged in forum manipulation and denied that party’s motion to remand despite the removal statute’s requirement that all cases not initially removable be removed within a year of commencement of the action, the Fifth Circuit accepted section 1292(b) petition to determine whether equitable exception to the one-year limit on removal is allowed, and, if so, whether an exception should be applied in this case. *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 425 (5th Cir. 2003).


- What is the proper way to measure the amount in controversy, required for federal diversity jurisdiction under 28 U.S.C. § 1332, in the context of a suit seeking, *inter alia*, an equitable accounting and whether the defendants’ costs for performing the accounting may be considered in calculating the amount in controversy? *Garcia v. Koch Oil Co. of Tex., Inc.*, 351 F.3d 636, 637 (5th Cir. 2003).

- Where diversity-jurisdiction removal was based on fraudulent joinder, whether there is arguably a reasonable basis for predicting the non-diverse defendants could be liable under Mississippi law and, therefore, not fraudulently joined? *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 460 (5th Cir. 2003).

- Whether the district court’s in limine order excluding evidence of profits that one party allegedly derived from the alleged misappropriation of a trade secret was erroneous. *Reingold v. Swifships Inc.*, 210 F.3d 320, 321 (5th Cir. 2000).

- An order transferring a case pursuant to 28 U.S.C. § 1404(a) based on a finding that Alabama law will govern and that Alabama therefore has the most interest in the outcome of the litigation. *Snyder Oil Corp. v. Samedan Oil Corp.*, 208 F.3d 521, 522 (5th Cir. 2000).

- Partial summary judgment order holding that the only defense available to employer in suit under the ADA challenging employer’s policy of permanently removing employees who had undergone treatment for substance abuse from certain safety-sensitive, little-supervised positions, was to prove that employees subject to policy posed “direct threat.” *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000).

- Denial of motion to remand and dismissal of complaint in state antitrust and business tort suit on ground that defendant’s activities were protected under *Noerr-Pennington* doctrine where issues were: (1) whether the artful pleading doctrine could not be applied to allow removal, and (2) whether plaintiff waived its right to challenge federal jurisdiction by amending its complaint to state a federal claim. *Waste Control Specialists, LLC v. Envirocare of Tex., Inc.*, 199 F.3d 781 (5th Cir. 2000).

See Appendix B (chart containing a more extensive list of questions reviewed under section 1292(b)).

**F. Procedure for Appealing Under 1292(b)**

The procedure for appealing under section 1292(b) is markedly different from pursuing an appeal from a traditional final judgment, a collateral order appeal, and other appeals permitted by statute or rule. The vehicle, the timing, and the instruments are different.

1. **Obtain certification from district court**

For a section 1292(b) appeal, district court certification is jurisdictional. *In re Am. Marine Holding Co.*, 14 F.3d 276, 277 (5th Cir. 1994). To pursue an appeal under section 1292(b), a party must first obtain a written order containing the statement that the district court has resolved a controlling question of law as to which there is
substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). The district court’s order need not cite section 1292(b) however. United States v. Moats, 961 F.2d 1198, 1201 & n.3 (5th Cir. 1992). The required language may appear in the order resolving the controlling issue of law, or the district court may amend its order, either on its own or in response to a party’s motion, to include the statement required by section 1292(b). Fed. R. App. P. 5(a)(3). In that event, the time to petition runs from entry of the amended order. Fed. R. App. P. 5(a)(3).

a. District court certification can be obtained at any time.

A district court is frequently first approached about signing an order authorizing the filing of a petition for permission to appeal after the trial court has resolved a controlling question of law in some other order. The federal practice therefore expressly contemplates that a district court may amend an order to include the required authority to pursue a permissive appeal. Federal Rule of Appellate Procedure 5 used to expressly state that an amendment to include the required language may be made “at any time.” Former Fed. R. App. P. 5 (“An order may be amended to include the prescribed statement at any time . . . .”). The current version of Rule 5 no longer contains the phrase “at any time” and is silent on a time limit for amending an order to include the required statement. See Fed. R. App. P. 5(a)(3). Despite the deletion of the phrase, “at any time,” “there is no time limit in the statute or in any applicable rules for seeking the district judge’s permission to appeal under 1292(b).” Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc., 202 F.3d 957, 958-59 (7th Cir. 2000).

Although neither the federal statute nor the rules contain any time limitation on when an order may be amended to include the required statement, some courts of appeals have declined to grant a petition for permission to appeal on the basis of delay in seeking an amended order. See, e.g., id. (“A district judge should not grant an inexcusably dilatory request, as this appears to be; if he does, we’ll refuse our permission to appeal. In any event, no excuse for the defendants’ taking two months to appeal has been offered except the patently inadequate one that the case had been ‘largely dormant’ for nine years, requiring the defendants’ lawyer to refamiliarize himself with it in the face of a ‘pre-existing, conflicting commitment to meet a deadline in another case.’ In these circumstances, the delay alone was sufficient grounds for us to refuse our permission to appeal.”); Weir v. Propst, 915 F.2d 283. (7th Cir. 1990) (holding that it was an abuse of discretion to grant motion to amend interlocutory order denying immunity in civil rights action in order to certify it for appeal where the amendment was sought three months after the order was entered, and there was no showing of any reason for the delay).

b. If the 10-day period for petitioning for permission lapses, in the Fifth Circuit the 10-day period may be restarted by trial court recertification.

There is a split among the circuits as to whether an order certified for appeal may be recertified if the 10-day period to petition for appeal lapses. See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 162 (1984) (Stevens, J., dissenting) (noting circuit conflict, and, although the majority was silent on whether recertification was proper, explaining that he was “persuaded by the view, supported by the commentators, that interlocutory appeals in these circumstances should be permitted, notwithstanding the fact that this view essentially renders the 10-day time limitation, if not a nullity, essentially within the discretion of a district court to extend at will”); Aparicio v. Swan Lake, 643 F.2d 1109, 1110-13 (5th Cir. Unit A Apr. 1981) (holding that a district court may freely recertify an interlocutory order as long as the requirements for certification under section 1292(b)—a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance the ultimate termination of the litigation—continue to exist when the would-be appellant seeks recertification); 16 Charles Alan Wright et al., Federal Practice and Procedure § 3929, at 395-96 (2d ed. 1996) (describing the approach followed in the Fifth Circuit as the “better view”); id. § 3929, at 79 (Supp. 2004) (cautioning that “[t]he power to renew the certification should be used carefully to prevent misuse of interlocutory appeals for the
purpose or with the effect of harassing an adversary or fostering delay”); see also Marisol ex rel. Forbes v. Giuliani, 104 F.3d 524, 527-28 (2d Cir. 1997) (collecting cases).

Some circuits embrace a cramped view of a district court’s ability to recertify. See, e.g., Myles v. Laffitte, 881 F.2d 125, 126 n.2 (4th Cir. 1989) (to recertify, the district court must consider anew such factors as the delay caused by the untimely first petition, and prejudice, whether there was excusable neglect, and the substantive merits of the question presented). Other circuits are somewhere in the middle. See, e.g., In re City of Memphis, 293 F.2d 345, 348-50 (6th Cir. 2002) (finding that recertification is proper at least when the original time period was missed because of inadvertent acts of the district court, and when the district court “reconsidered and specifically found that certification was still proper”).

The Fifth Circuit’s reasoning for freely allowing recertification is that because the district court retains jurisdiction until final judgment, it always has the power to reconsider an interlocutory order. The Fifth Circuit, therefore, permits recertification even if the petitioner through its own inadvertence failed to take advantage of the original certification as long as the district court finds that the previous justification for interlocutory appeal continues to exist. Aparicio, 643 F.2d at 1112. To hold otherwise would preclude an interlocutory appeal when the criteria under section 1292(b) are met, and both the district court and the court of appeals have concluded that an interlocutory appeal is appropriate. Id.

Allowing a district court to restart the 10-day time period for filing a petition for permission in federal court is also arguably consistent with other parts of federal appellate practice. For instance, although Federal Rule of Appellate Procedure 5 governing permissive appeals is silent on whether a district court can extend the time for filing a petition for permission (it prohibits the court of appeals from extending the time), Rule 4(a)(5) governing appeals as of right permits a federal district court (but not the court of appeals) to extend the time for filing a notice of appeal.

c. Agreement of the parties is not required

Unlike the Texas analog to section 1292(b) enacted by the Texas Legislature a few years ago, under section 1292(b), agreement of the parties to take a section 1292(b) appeal is not required. Compare 28 U.S.C. § 1292(b) with Tex. Civ. Prac. & Rem. Code § 51.014(d)(1), (3).

2. File petition for permission in court of appeals within 10 days

Once a written order containing the required statement is entered, the party wishing to appeal has 10 days to file a petition for permission to appeal. 28 U.S.C. § 1292(b); see Fed. R. App. P. 5(a)(2). The 10-day limit is jurisdictional. Aparicio, 643 F.2d at 1112. The petition must be filed with the clerk of the court of appeals. Fed. R. App. P. 5(a)(1) (“The petition must be filed with the circuit clerk with proof of service on all other parties to the district court action.”).

There is no filing fee unless the court grants permission to appeal.

In federal court, despite the fact that the statute creating the permissive appeal mechanism refers to an “application” for permission to appeal, the Federal Rules of Appellate Procedure specify that the instrument filed in a federal court of appeals requesting permission to appeal is called a “petition for permission to appeal.” Compare Fed. R. App. P. 5 (emphasis added) with 28 U.S.C. § 1292(b) (“The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .” (emphasis added)).

A notice of appeal will not substitute for a petition for permission to appeal. Aucoin v. Matador Servs., Inc., 749 F.2d 1180 (5th Cir. 1985) (holding that it lacked jurisdiction to consider granting discretionary appeal because although the district court had entered the requisite certificate for appealability, the plaintiff timely filed notice of appeal but did not file with court of appeals a request for permissive appeal within 10 days). Indeed, the federal appellate courts do not want the parties to file notices of appeal when seeking permission to appeal because doing so triggers a district court clerk’s duty to prepare and forward the record to the court of appeals. Unless and until the federal appellate court decides to grant permission to appeal, it does not want a record on appeal prepared or forwarded by the district clerk.
Because the petition for permission to appeal is not a “brief” or an “appendix,” the mailbox rule does not apply. The petition for permission to appeal must be physically received by the clerk of the court of appeals within the 10-day period. See Fed. R. App. P. 25(a)(2)(B).

In calculating the 10-day time period, some circuits have expressly held that the computation-of-time rule in the Federal Rules of Appellate Procedure, Rule 26, governs the calculation. Coleman v. Davis, No. 01-8041, 2002 WL 126102 (7th Cir. Jan 28, 2002) (unpublished); In re Benny, 791 F.2d 712, 719 (9th Cir. 1986). Compare In re Veneman, 309 F.3d 789 (D.C. Cir. 2002) (“[Federal] Rule [of Appellate Procedure] 5(a), which governs petitions for permission to appeal, does not refer to Rule 26(a), but instead instructs litigants to file their petitions within ‘the time specified by the statute or rule authorizing the appeal.’ In this case, the rule ‘authorizing the appeal’ is Rule 23(f) of the Federal Rules of Civil Procedure. The civil rules have their own time-computation rule, which excludes Saturdays, Sundays, and legal holidays when ‘computing any period of time prescribed or allowed by [the civil] rules.’ Fed. R. Civ. P. 6(a). Because Rule 23(f) is a rule of civil procedure, Rule 6(a) governs the timing of 23(f) petitions, as every one of our sister circuits to have considered the matter has held.”).

A recent change in Fed. R. App. P. 26(a)’s computation-of-time provisions affects the timeliness of section 1292(b) petitions. Prior to December 1, 2002, Fed. R. App. P. 26(a)(2) provided that Saturdays, Sundays, and legal holidays were excluded from the computation of a time only “when the period is less than 7 days, unless stated in calendar days.” Former Fed. R. App. P. 26(a)(2) (amended effective December 1, 2002 to change “7” to “11” days). Because the time period for filing a section 1292(b) petition is 10 days, under the old rule intervening weekend days and holidays counted against the 10-day period. While the computation-of-time rule in the Federal Rules of Appellate Procedure before a recent amendment turned on whether a time period was less than 7 days, the computation-of-time rule in the Federal Rules of Civil Procedure turned on whether a time period was less than 11 days. To make the computation-of-time rule in Federal Rules of Appellate Procedure consistent with the Federal Rule of Civil Procedure, effective December 1, 2002, the appellate rule now provides that intervening Saturdays, Sundays, and legal holidays are excluded “when the period is less than 11 days, unless stated in calendar days.” Fed. R. App. P. 26(a)(2). The fact that time period for filing a section 1292(b) appeal is laid out in the statute rather than in the rule governing the procedure for permissive appeals, apparently does not change the analysis; Federal Rule of Appellate Procedure 26(a) states that it applies to “computing any period of time specified in these rules or in any local rule, court order, or applicable statute.” Fed. R. App. P. 26(a) (emphasis added).

Thus, under the current rules, it appears that intervening Saturdays, Sundays, and legal holidays do not count against your 10 days for filing a petition for permission to appeal under section 1292(b). The author is not aware of any reported decision from the Fifth Circuit definitively resolving this issue, but, from examining the docket sheets in section 1292(b) cases in which the district court certified an order after Rule 26(a)(2) was amended, the author has determined that the Fifth Circuit has granted permission in several cases in which the petition for permission would have been untimely under a straight calendar-day count of the 10-day period, but was timely under a business-day count that is consistent with application of the amended version of Rule 26(a)(2).

As in any case, if the last day is a Saturday, Sunday, or legal holiday, the petition will be due on the next day the clerk’s office is open. Fed. R. App. P. 26(a)(3).

The court of appeals may not extend the time to file a petition for permission to appeal. Fed. R. App. P. 26(b)(1).

3. Required contents and form of petition for permission to appeal under 1292(b)

A petition for permission to appeal petition must include the following:

(A) the facts necessary to understand the question presented;
(B) the question itself;
(C) the relief sought;
(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and
(E) an attached copy of:
   (i) the order, decree, or judgment
complained of and any related opinion or memorandum, and
(ii) any order stating the district court’s permission to appeal or finding that the necessary conditions are met.


Because the Fifth Circuit will permit full merits briefing if it grants permission to appeal, a petition for permission to appeal is not intended to be a brief on the merits and instead is supposed to be a shorter document attempting to persuade the Fifth Circuit that the standards for section 1292(b) certification are met and that the court should exercise its discretion to hear the appeal.

Prior to December 1, 2002, when the current amended version of Federal Rule of Appellate Procedure 5 and Fifth Circuit Rule 5 took effect, there was a gap in the rules concerning the length or the font size to be used for petitions for permission to appeal, responses, and replies. As a result of recent rule changes and clarifications, it is now clear that, except by the court’s permission, the petition for permission is limited to 20 pages, excluding the corporate disclosure statement (in the Fifth Circuit, certificate of interested persons), certificate of service, and any documents the rules require to be attached. Fed. R. App. P. 5(c); 5th Cir. R. 5. The petition must be in no smaller than 14 point, proportionally spaced typeface. See Fed. R. App. P. 5(c). An original and 3 copies must be filed.

4. Seek stay in the trial court or the court of appeals if desired

Section 1292(b) provides that “application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.” 28 U.S.C. § 1292(b). Accordingly, a party petitioning for permission to appeal under section 1292(b) will likely want to seek a stay of the trial court proceedings pending resolution of the attempted appeal. See supra pp. 10-12 for procedures on seeking a stay. My review of the docket sheets of the Fifth Circuit and district courts in section 1292(b) cases shows that the district court, which had to agree to certify the question for interlocutory appeal in the first instance, frequently granted a stay of proceedings, making it unnecessary to seek one from the Fifth Circuit. Nevertheless, over the past few years, the Fifth Circuit has been called upon to grant a stay in at least a few section 1292(b) cases.

5. Answer or response to petition

“A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.” Fed. R. App. P. 5(b)(2). The clerk’s office will send a letter to all counsel stating the due date for the response.

Prior to December 1, 2002, when the current amended version of Federal Rule of Appellate Procedure 5 and Fifth Circuit Rule 5 took effect, any answer or response to the petition was limited, in the Fifth Circuit, to 10 pages, and it was unclear what font size was required to be used. As a result of recent rule changes and clarifications, the answer is limited to 20 pages and must also be in no smaller than 14 point, proportionally spaced typeface. See Fed. R. App. P. 5(c).

When the time for filing an answer expires, the clerk will submit the petition and any answer to the court. See Appendix C for statistics concerning the percentage of permissive appeals in which an answer is filed and the grant rate when no response is filed.

6. Reply

The rules make no provisions for filing a reply. In some petition for permission proceedings, the petitioner filed a motion for leave to file a reply, and in others, the petitioner filed the reply without requesting leave. If you are the petitioner and wish to file a reply, check with the case manager for your case to determine if the Fifth Circuit is currently requiring a motion for leave. And, in determining the length of any reply, I would limit the length of the reply to 10 pages (in 14 point font), which is half the length permitted for the petition.

7. Internal processing

When a petition for permission to appeal is received by the Fifth Circuit clerk’s office, it will
be assigned a miscellaneous docket number, and then the answer and the petition will be distributed to a motions panel. “The petition is submitted without oral argument unless the court of appeals orders otherwise.” Fed. R. App. P. 5(b)(3). At times, the Fifth Circuit may offer an explanation for granting or even denying permission to appeal, but ordinarily the grant–deny decision is made by simple order and subsequently, but not always, noted in the opinion on the merits if the appeal is accepted and decided.

The grant–deny decision takes, on average, around 35 days. See Appendix C.

8. Procedure if the Fifth Circuit grants the petition

If the court of appeals grants permission to appeal, then, within 10 days after the entry of the court of appeals’ order granting permission to appeal, the appellant must pay the district clerk all required fees and file a cost bond, if required, under Rule 7. Fed. R. App. P. 5(d)(1)(A) & (B). The required fee that must be paid to the district court clerk if the court of appeals grants the petition for permission to appeal is $255 payable to the district court clerk. (If you were filing a regular appeal, the fee payable to the district court clerk upon filing a notice of appeal would be $255, $250 of which is a court of appeals’ docketing fee, and $5 of which is a district court filing fee. See Fed. R. App. P. 3(e); 5th Cir. R. 3; see 28 U.S.C. §§ 1913, 1917.)

Even upon the granting of permission to appeal and the payment of filing fees in the district court, a notice of appeal need not be filed. Fed. R. App. P. 5(d)(2). Indeed, in federal court, a notice of appeal plays no part—by design—in the permissive appeal practice. Compare Fed. R. App. P. 3(a)(1) (“An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk.”) with Fed. R. App. P. 5(a) (“To request permission to appeal when an appeal is within the court of appeals’ discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk . . . .”) and Fed. R. App. P. 5(d) (setting out the procedure if the court of appeals grants permission to appeal and specifying that “[a] notice of appeal need not be filed”). The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under the rules. Fed. R. App. P. 5(d)(2).

Once the appealing party has paid the required fees, the district clerk must notify the circuit clerk, and, upon receiving this notice, the circuit clerk will convert the petition to a regular appeal and change its miscellaneous docket number to a regular docket number for an appeal. Fed. R. App. P. 5(d)(3). And although Fed. R. App. P. 5 tersely notes that “[t]he record will be forwarded and filed in accordance with Rules 11 and 12(c).” the petitioner, who is now considered to be the appellant, will still be required to complete the Transcript Order Form, even if no proceedings need to be transcribed, in discharging its duties concerning the record.

As in regular appeals, when the Fifth Circuit receives the record from the district court, that will trigger the ordinary briefing schedule, which will permit the parties to prepare full-length, merits briefs as they would in any other appeal as of right.

Once the Fifth Circuit grants permission to appeal, the district court ordinarily cannot moot the subject of the appeal and loses authority to act on the subject of the pending appeal.

Once the petition is converted to a regular appeal, the proceeding is not accorded any sort of calendaring priority. Indeed, in examining the docket sheets of permissive appeals filed in 2002–2004, the time for disposition of the appeal is the same as other appeals. See Appendix C. What is different from ordinary appeals, however, is that oral argument is granted in an extremely high percentage of cases that originated as petitions for permission to appeal. Id.

VII. Class Action Appeals Under Rule 23(f)

A. Provisions of Rule 23(f)

Rule 23(f), which became effective on December 1, 1998, allows discretionary appeals from district court orders granting or denying class certification. Specifically, Rule 23(f) provides:

Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under
this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

**Fed. R. Civ. P. 23(f).** Rule 23(f) was enacted pursuant to 28 U.S.C. § 1292(e), “which gives the United States Supreme Court authority to prescribe rules in accordance with [the Rules Enabling Act] to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for.” 28 U.S.C. § 1292(e); see Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 973-74 (5th Cir. 2000).

**B. Purpose of Rule 23(f)**

The purpose of Rule 23(f) and its 10-day time limit were explained by the Seventh Circuit shortly after the rule’s adoption:

Interlocutory appeals are rare, because they may disrupt progress of the case. Because the decision whether a suit will proceed as a class action is so vital, and sometimes so hard to review at the end of the case, Rule 23(f) permits the court of appeals to accelerate appellate review; but to ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small.

Gary v. Sheahan, 188 F.3d 891, 892-93 (7th Cir. 1999). Additionally, from a practical standpoint, the certification decision is often dispositive, and thus review of the certification determination at the end of the case happens only infrequently. Because review of the certification decision often evaded review in practice, the Judicial Conference of the United States wanted the circuit courts to have a chance to review certification rulings so that the circuit courts could develop a robust body of law on the standards for class certification and bring about a greater uniformity in that area. Brian Anderson & Patrick McLain, A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals, 11 Andrews Class Action Litig. Rep. 21 (Apr. 14, 2004).

**C. Standards Under Rule 23(f)**

1. **Circuits weigh in on Rule 23(f) standards**

According to the advisory committee notes for Rule 23(f), courts of appeals enjoy “unfettered discretion” in deciding whether to permit an appeal under Rule 23(f) “akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.” Fed. R. Civ. P. 23(f) advisory committee note. Although the Fifth Circuit has issued several decisions on appeal from a class certification, in none of these cases has it addressed the standards for accepting Rule 23(f) appeals.

The Seventh Circuit issued the first decision dealing with the standards for Rule 23(f) appeals. Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999). There, Judge Easterbrook, writing for the court, delineated three categories of cases that customarily would warrant the exercise of discretionary appellate jurisdiction. First, an appeal ordinarily should be permitted when a denial of class status effectively ends the case (because, say, the named plaintiff’s claim is not of a sufficient magnitude to warrant the costs of stand-alone litigation). *Id.* Second, an appeal ordinarily should be permitted when the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle. *Id.* Third, an appeal ordinarily should be permitted when it will lead to clarification of a fundamental issue of law. *See id.* at 834-35; see also Richardson Elecs., Ltd. v. Panache Broad. of Pa, Inc., 202 F.3d 957, 958-59 (7th Cir. 2000) (“[The standards] are whether an immediate appeal is necessary to enable meaningful appellate review of a decision granting or denying class certification or would advance the development of the law governing class actions.”).

The *Blair* court placed a gloss on the first two categories. Mindful that some cases deserve to die and others deserve to settle, the *Blair* court wrote that an applicant who invokes either of the first two classifications must also “demonstrate that the district court’s ruling on class certification is questionable—and must do this taking into account the discretion the district judge possesses in implementing Rule 23, and the correspondingly deferential standard of appellate review.” *Blair*, 181 F.3d at 835.

As to the third category, the *Blair* court noted that the importance of the issue to be
resolved—more so than the likelihood of reversal—ought to determine whether a case falls into this grouping. See id. Moreover, even when an application touts a supposedly fundamental issue of law, a showing that an end-of-case appeal promises to be an adequate remedy will weigh heavily against granting a Rule 23(f) application. See id. Thus, the likelihood that a party will be forced to throw in the towel factors into the discretionary calculus in all three branches of the Blair formulation. Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 294-95 (1st Cir. 2000).

Following Blair, the First Circuit was the next circuit to weigh in. In Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288, 294-95 (1st Cir. 2000), the First Circuit announced that Blair’s taxonomy was “structurally sound.” But, the First Circuit restricted Blair’s third category, worrying that the Seventh Circuit’s formulation of the third category in Blair may encourage too many disappointed litigants to file fruitless Rule 23(f) applications because, after all, “creative lawyers” can always argue that an appeal will clarify some “fundamental” issue. Mowbray, 208 F.3d at 294-95. The First Circuit restricted the third category to those instances in which an appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case. Id. The Mowbray court’s point is well taken. The court of appeals’ decision to grant permission to appeal is completely discretionary. FED. R. CIV. P. 23(f). Although the First Circuit has also noted that “Rule 23(f) is designed to operate from a more accessible plateau” than mandamus and section 1292(b) appeals, “the same policy considerations counsel in favor of some restraint.” Mowbray, 208 F.3d at 294-95. “[I]nterlocutory appeals should be the exception, not the rule; after all, many (if not most) class certification decisions turn on ‘familiar and almost routine issues.’ . . . [W]e intend to exercise our discretion judiciously.” Id. at 295 (quoting FED. R. CIV. P. 23(f) advisory committee’s note).

Although the Fifth Circuit has not spoken on the standards under Rule 23(f), several other circuits have weighed in with their own variations. The themes identified in Blair, which drew heavily from the advisory committee’s notes on Rule 23(f), are echoed in the approaches outlined by other circuits. For instance, in line with Blair and Mowbray, in the Second Circuit petitioners seeking permission to appeal under Rule 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court’s decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution. Sunolitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 139 (2d Cir. 2001). The Second Circuit subsequently granted a Rule 23(f) petition that it concluded fell into the second category without addressing whether either of the considerations in the first category were present. See In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 132 n.3, 145 (2d Cir. 2001).

The Third Circuit takes a similar approach. Although it cautioned about the difficulty in predicting all of the permutations that a Rule 23(f) petition could involve, the court suggested that it would be appropriate for the court to grant permission under Rule 23(f) if such an appeal would allow the court to address “(1) the possible case-ending effect of an imprudent class certification decision (the decision is likely dispositive of the litigation); (2) an erroneous ruling; or (3) facilitate development of the law on class certification.” Newton v. Merrill Lynch, Pierce, Fenner & Smith, 259 F.3d 154, 165 (3d Cir. 2001).

The Eleventh Circuit addressed the Rule 23(f) standards in Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1273 (11th Cir. 2000), describing Blair and Mowbray as “cogent explications of the Rule 23(f) inquiry.” The Eleventh Circuit then identified a nonexhaustive list of five guideposts to be balanced in determining whether to grant a Rule 23(f) petition: (1) whether the certification is likely to be dispositive of the litigation for either the plaintiff or defendant; (2) whether the petitioner has shown a substantial weakness in the class certification decision; (3) whether the appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself; (4) consideration should be given to the litigation’s nature and status before the district court, including the status of discovery; and (5) the likelihood that future events may make
immediate appellate review more or less appropriate. *Id.* at 1274-76.

The Fourth Circuit has adopted these five guideposts as a “five-factor ‘sliding scale’ test.” *Leinhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 141 (4th Cir. 2001).

The D.C. Circuit also cautioned against formulating a rigid test for Rule 23(f) petitions. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002). Despite its view that Rule 23(f) petitions should rarely be granted and that appellate courts should not micromanage class certification rulings, the D.C. Circuit concluded that a Rule 23(f) petition will ordinarily be appropriate in three situations:

1. when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court’s discretion over class certification;
2. when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and
3. when the district court’s class certification decision is manifestly erroneous.

*Id.*; see also *P.A.C.E. v. Sch. Dist. of Kan. City*, 312 F.3d 341, 343 (8th Cir. 2002) (dismissing an appeal from an order that refused to decertify a class or to certify a subclass for lack of finality and—citing to elaborations of the Rule 23(f) standard by the D.C., First, and Seventh Circuits—observing that even if the appellants had filed a petition for permission under Rule 23(f), it was doubtful whether permission should have been granted).

“In light of an increasing number of such petitions being filed with this court,” the Sixth Circuit decided to weigh in concerning the standards for granting a Rule 23(f) petition. *In re Delta Air Lines*, 310 F.3d 953, 957-59 (6th Cir. 2002) (surveying the approaches taken in seven other circuits). The court held that its consideration of a Rule 23(f) petition for permission is guided by three factors: (1) that the court of appeals’ discretion to grant or deny a Rule 23(f) petition is broad and should be guided by a flexible approach to relevant factors; (2) that Rule 23(f) petitions should not be routinely granted; and (2) the “specific relevant factors articulated by our sister circuits.” *Id.* (emphasizing that the “sheer number of class actions and the unfortunately lengthy period necessary to complete an appeal weigh against permitting interlocutory appeals of class certification decisions in ordinary cases”).

And though the Fifth Circuit has not written on the standards that inform its decision to exercise discretion to accept a Rule 23(f) permissive appeal, the Fifth Circuit has addressed whether 28 U.S.C. § 1292(e), which is the enabling authority for Rule 23(f), is an unconstitutional delegation of Congress’s power to confer jurisdiction on the lower federal courts. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 973-74 (5th Cir. 2000). After a detailed analysis of the issue, the Fifth Circuit upheld the constitutionality of section 1292(e) and thus the validity of Rule 23(f). *Id.*

2. **Scope of issues reviewable in a Rule 23(f) appeal**

A word should be said about the scope of a Rule 23(f) appeal. As a general rule, “under Rule 23(f), a party may appeal only the issue of class certification; no other issues may be raised.” *Bertulli v. Indep. Ass’n of Cont’l Pilots*, 242 F.3d 290 (5th Cir. 2001). The reasoning is that “Rule 23(f) is narrowly drafted and is not intended to serve as an end-run around the final judgment rule.” *Smith v. Texaco, Inc.*, 263 F.3d 394, 417 (2001), vacated on settlement, 281 F.3d 477 (5th Cir. 2002).

The Fifth Circuit has concluded that “despite the limited nature of a Rule 23(f) appeal, defendants can raise the issue of standing before this court.” *Id.* at 294 & n. 11. The court observed that standing “goes to the constitutional power of a federal court to entertain an action, and this court has the duty to determine whether standing exists even if not raised by the parties.” *Id.* Compare *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002) (reaching standing issue in Rule 23(f) case) with *White v. Imperial Adjustment Corp.*, No. 02-31149, 2003 WL 22259633, at *1
(5th Cir. Oct. 2, 2003) (unpublished) (refusing to review in a Rule 23(f) appeal whether the district court erred in dismissing defendants’ counterclaim and in striking their affirmative defense) and Smith, 263 F.3d at 417 (refusing to review in a Rule 23(f) appeal whether the statute of limitations was equitably tolled).

D. Statistics

Fours years ago, when I wrote the first version of this paper, I noted that in the Fifth Circuit’s 1998–99 term, 27 petitions for permission to appeal under section 1292(b) were filed with the Court. United States Court of Appeals for the Fifth Circuit, Clerk’s Annual Report, Judicial Workload Statistics app. F (1999). The number of section 1292(b) petitions in recent years is consistent with the 1999 statistics. During the Fifth Circuit’s 2002–03 term, 32 petitions for permission to appeal were filed. United States Court of Appeals for the Fifth Circuit, Clerk’s Annual Report, Judicial Workload Statistics app. F (2003). On a calendar-year basis, in 2002, 23 were filed. See Appendices C & D. In calendar year 2003, 27 were filed. Id. And from January 1, 2004 through May 17, 2004, the number of section 1292(b) petitions filed—13—is on pace to keep up with these numbers. Id.

I also noted that with the adoption of the rule allowing permissive appeals to be pursued from orders certifying or refusing to certify a class, Fed. R. Civ. P. 23(f), which was effective December 1, 1998, the Fifth Circuit should see an increase in the total number of petitions for permission to appeal filed in civil cases. That prediction has come true. In addition to the petitions for permission to appeal under section 1292(b), which are still being filed at the same rate today as they were in 1999, 13 petitions for permission to appeal under Rule 23(f) were filed in 2002. In 2003, 12 petitions under Rule 23(f) were filed. Through May 17, 2004, only 1 Rule 23(f) petition has been filed in the Fifth Circuit.

The Fifth Circuit’s grant rate for Rule 23(f) cases is a little lower than the grant rate for 1292(b) petitions. See Appendix A. For example, in 2002 the grant rate for 1292(b) petitions was 56%, but it was only 45% for Rule 23(f) petitions. Id. In 2003, the grant rate for 1292(b) petitions was 63%, but was only 37% for Rule 23(f) petitions. Id. So far this year, the grant rate for 1292(b) petitions is 67%, but only 33% for Rule 23(f) petitions. Id.; see also Appendices C–E.

E. Procedure for Appealing Under Rule 23(f)

Like a section 1292(b) appeal, the procedure for appealing under Rule 23(f) is markedly different from pursuing an appeal from a traditional final judgment, a collateral order appeal, and other appeals permitted by statute or rule. The procedure for a Rule 23(f) petition for permission is not identical, but is similar in many respects, to the procedure for a petition for permission to appeal under 28 U.S.C. § 1292(b). In anticipation of the Rule 23(f)’s adoption, Fed. R. App. P. 5 was amended to govern all permissive appeals.

1. You do not need to obtain certification from the district court

Unlike pursuing an appeal under section 1292(b), to pursue an appeal under Rule 23(f), there is no requirement that a party first obtain a certification to appeal from the district court or any other written statement (other than the order granting or denying class certification). See Fed. R. Civ. P. 23(f).

2. File petition for permission in court of appeals within 10 days

Like a section 1292(b) appeal, an “application” or petition for permission to appeal under Rule 23(f) must be filed within 10 days after the entry of the order granting or denying class certification. Fed. R. Civ. P. 23(f).

The Seventh Circuit has held that an appeal may be filed either from the order itself or from the disposition of a request for reconsideration filed within the time for appeal. Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 837-39 (7th Cir. 1999). But, if the request for reconsideration is filed more than 10 days after the order granting or denying class action certification, then appellate review must wait until the final judgment. Gary v. Sheahan, 188 F.3d 891, 892-93 (7th Cir. 1999) (dismissing petition for permission to appeal for lack of jurisdiction when class was certified in
April 1997; motion to decertify class (which was essentially a motion to reconsider) was not filed until August 1998; motion was denied in March 1999; and a petition for leave to appeal was filed within 10 days of that order); accord White v. Imperial Adjustment Corp., No. 02-31149, 2003 WL 22259633, at *2 (5th Cir. Oct. 2, 2003) (unpublished) (following Gary) (dismissing permission to cross-appeal under Rule 23(f) as having been improvidently granted when plaintiff did not appeal from the original order denying class certification, but, far more than 10 days after that denial, plaintiff filed a motion to reconsider, which the district court denied; holding that district court’s decision to deny motion to reconsider was not “an order of a district court granting or denying class action certification” for purposes of appeal under Rule 23(f); therefore, appeal from this order was improper, and appeal from the prior order would be untimely under Rule 23(f)).

If, however, a district court materially alters the class certification order in response to a belated motion for reconsideration, the aggrieved party would then have a new 10-day period to petition for permission to appeal from the order altering the class certification order. Gary, 188 F.3d at 893.

A petition for permission to appeal is not the same as a notice of appeal, and a notice of appeal will not substitute for a petition for permission to appeal. Cf. Aucoin v. Matador Servs., Inc., 749 F.2d 1180 (5th Cir. 1985) (holding that it lacked jurisdiction to consider granting discretionary appeal under 1292(b) because although the district court had entered the requisite certificate for appealability, the plaintiff timely filed notice of appeal but did not file with court of appeals a request for permissible appeal within 10 days).

The petition for permission to appeal under Rule 23(f) must be filed with the clerk of the court of appeals. Fed. R. Civ. P. 23(f). Do not file it with the trial court clerk. No fee is required unless the court grants permission to appeal.

Because the petition for permission to appeal under Rule 23(f) is not a “brief” or an “appendix,” the mailbox rule does not apply. See Fed. R. App. P. 25(a)(2)(B). The petition for permission to appeal under Rule 23(f) must be physically received in the clerk’s office of the court of appeals within the 10-day period.

There is nothing in Rule 23(f) that tells you how to compute the 10-day time period for a Rule 23(f) petition for permission to appeal. Although the source of the 10-day time limit, Rule 23(f), is within the Federal Rules of Civil Procedure, shortly after Rule 23(f) was adopted, the Fifth Circuit Clerk’s office initially took the position that you do not look to Fed. R. Civ. P. 6’s computation-of-time rule to compute Fed. R. Civ. P. 23(f)’s 10-day period. See Fed. R. Civ. P. 6(a) (“When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded.”).

Instead, the Fifth Circuit Clerk’s office initially took the position that because the petition for permission to appeal from a Rule 23(f) order is received in the court of appeals, the computation of the 10-day period is governed by the computation-of-time rule in the Federal Rules of Appellate Procedure, which formerly provided for a straight 10 calendar-day count, not by the Federal Rules of Civil Procedure (which provide for a 10 business-day count). But see In re Veneman, 309 F.3d 789 (D.C. Cir. 2002) (“[Federal] Rule [of Appellate Procedure] 5(a), which governs petitions for permission to appeal, does not refer to Rule 26(a), but instead instructs litigants to file their petitions within ‘the time specified by the statute or rule authorizing the appeal.’ In this case, the rule ‘authorizing the appeal’ is Rule 23(f) of the Federal Rules of Civil Procedure. The civil rules have their own time-computation rule, which excludes Saturdays, Sundays, and legal holidays when ‘computing any period of time prescribed or allowed by [the civil rules].’ Fed. R. Civ. P. 6(a). Because Rule 23(f) is a rule of civil procedure, Rule 6(a) governs the timing of 23(f) petitions, as every one of our sister circuits to have considered the matter has held.”); Gary v. Sheahan, 188 F.3d 891, 892-93 (7th Cir. 1999) (observing that a petition for permission to appeal under Rule 23(f) must be filed within “[t]en rule days, not ten calendar days; under Fed. R. Civ. P. 6(a) weekends and holidays do not count when a time limit prescribed by the civil rules is ten days or fewer.”).

Now that the computation-of-time rule in the Federal Rules of Appellate Procedure, Rule 26(a)(2), has been amended to make it consistent with the computation-of-time rule in the Federal Rules of Civil Procedure, in calculating the 10-day time period for appealing from a Rule 23(f) order
in the Fifth Circuit, it does not matter whether you compute the 10-day period under the civil procedure rules or under the appellate rules: intervening Saturdays, Sundays, and legal holidays do not count against your 10 days. See Fed. R. App. P. 26(a)(2) (amended effective December 1, 2002).

As in any case, if the last day is a Saturday, Sunday, or legal holiday, the petition will be due on the next day the clerk’s office is open. See Fed. R. App. P. 26(a)(3).

The court of appeals may not extend the time to file a petition for permission to appeal. Fed. R. App. P. 26(b)(i).

If you miss the 10-day deadline to file a petition for permission under Rule 23(f), you might consider filing a (belated) motion for reconsideration in the district court. If the district court materially alters the prior class certification order, then you may be able to timely file your petition for permission to appeal in the court of appeals within 10 days from the date of that order. Gary, 188 F.3d at 893.

If you miss your 10-day deadline to file a petition for permission to appeal under Rule 23(f) in the court of appeals, can you still seek certification from the district court under section 1292(b)? The relationship between section 1292(b), which has no fixed deadline for seeking the permission of the district court to take an appeal, and Rule 23(f), which imposes a deadline of 10 days from the date of the order sought to be appealed, was addressed by the Seventh Circuit four years ago. Richardson Elecs., Ltd. v. Panache Broad. of Pa, Inc., 202 F.3d 957, 958-59 (7th Cir. 2000). In that case, the defendants exceeded by more than 6 weeks the 10-day deadline for pursuing a Rule 23(f) appeal. Nevertheless, the district court certified the class certification ruling for a section 1292(b) appeal. In rejecting the appellant’s position, the court wrote: “[W]hen a class-certification order is an arguable candidate for a Rule 23(f) appeal, the appellants may not use section 1292(b) to circumvent the 10-day limitation in Rule 23(f). . . . District judges should not, and we shall not, authorize appeal under 28 U.S.C. § 1292(b) when appeal might lie under Rule 23(f).”). The court left open the possibility that a 1292(b) appeal might be appropriate in a class action: “Should a case arise in which a class-certification order is appealable under 1292(b) but not under 23(f), perhaps because it presents an issue that while it satisfies the criteria of the statute does not involve the merits of class certification, the appellant can protect himself by seeking the district judge’s permission to take a 1292(b) appeal at the same time that the appellant asks us to entertain his appeal under 23(f).” Richardson Elecs., 202 F.3d at 958-59.

3. Required contents and form of petition for permission to appeal under Rule 23(f)

Rule 23(f) does not speak to the contents or form of a petition for permission to appeal under that rule. The historical note accompanying the 1998 amendments to Federal Rule of Appellate Procedure 5 makes clear, however, that “[t]his new Rule 5 is intended to govern all discretionary appeals from district-court orders, judgments, or decrees. . . . If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.” Fed. R. App. P. 5(a) historical note accompanying 1998 amendments. Because Rule 23(f) appeals are discretionary, they fall within the ambit of Rule 5. See Fed. R. Civ. P. 23(f) (“A court of appeals may in its discretion permit an appeal . . . if application is made to it . . . .”); Fed. R. App. P. 5(a) (“To request permission to appeal when an appeal is within the court of appeals’ discretion, a party must file a petition for permission to appeal.”).

Under Rule 5, a petition for permission to appeal petition must include the following:

(A) the facts necessary to understand the question presented;
(B) the question itself;
(C) the relief sought;
(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and
(E) an attached copy of:
   (i) the order, decree, or judgment complained of and any related opinion or memorandum, and
   (ii) any order stating the district court’s
permission to appeal [not applicable in Rule 23(f) appeals] or finding that the necessary conditions are met.


Because the Fifth Circuit will permit full merits briefing if it grants permission to appeal, a petition for permission to appeal is not intended to be a brief on the merits and instead is supposed to be a shorter document attempting to persuade the Fifth Circuit to exercise its discretion to hear the appeal.

Prior to December 1, 2002, when the current amended version of Federal Rule of Appellate Procedure 5 and Fifth Circuit Rule 5 took effect, there was a gap in the rules concerning what font size was to be used for petitions for permission to appeal, responses, and replies.

As a result of recent rule changes and clarifications, it is now clear that, except by the court’s permission, the petition for permission is limited to 20 pages, excluding the corporate disclosure statement (in the Fifth Circuit, certificate of interested persons), certificate of service, and any documents the rules require to be attached. Fed. R. App. P. 5(c); 5th Cir. R. 5. The petition must be in no smaller than 14 point, proportionally spaced typeface. See Fed. R. App. P. 5(c). An original and 3 copies must be filed.

4. Seek stay in the trial court or the court of appeals if desired

Rule 23(f) provides that “[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.” Fed. R. Civ. P. 23(f). Accordingly, a party petitioning for permission to appeal will likely want to seek a stay of the trial court proceedings pending resolution of the attempted appeal. See supra pp. 10-12 for procedures on seeking a stay. My review of the docket sheets of the Fifth Circuit and district courts in Rule 23(f) cases shows that the district court, which—unlike section 1292(b) cases—did not have to certify the question for interlocutory appeal, sometimes, but not always, granted a stay of proceedings, making it frequently necessary to seek one from the Fifth Circuit.

5. Answer or response to petition

“A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.” Fed. R. App. P. 5(b)(2). The clerk’s office will send a letter to all counsel stating the due date for the response. See Appendix C for statistics concerning the percentage of permissive appeals in which an answer is filed and the grant rate when no response is filed.

Prior to December 1, 2002, when the current amended version of Federal Rule of Appellate Procedure 5 and Fifth Circuit Rule 5 took effect, any answer or response to the petition was limited, in the Fifth Circuit, to 10 pages, and it was unclear what font size was required to be used. As a result of recent rule changes and clarifications, the answer is limited to 20 pages and must also be in no smaller than 14 point, proportionally spaced typeface. See Fed. R. App. P. 5(c).

6. Reply

The rules make no provisions for filing a reply. In some petition for permission proceedings, the petitioner filed a motion for leave to file a reply, and in others, the petitioner filed the reply without requesting leave. If you are the petitioner and wish to file a reply, check with the case manager for your case to determine if the Fifth Circuit is currently requiring a motion for leave. And, in determining the length of any reply, I would limit the length of the reply to 10 pages (in 14 point font), which is half the length permitted for the petition.

7. Internal processing

Rule 23(f) appeals are generally treated like section 1292(b) appeals, except that the Fifth Circuit does not require that a Rule 23(f) petition attach a copy of “any order stating the district court’s permission to appeal or finding that the necessary conditions are met,” since that is not required for a 23(f) appeal. Fed. R. App. P. 5(b)(1)(E)(ii).
When a petition for permission to appeal under Rule 23(f) is received by the Fifth Circuit clerk’s office, it will be assigned a miscellaneous docket number, and then the answer and the petition will be distributed to a motions panel. “The petition is submitted without oral argument unless the court of appeals orders otherwise.” Fed. R. App. P. 5(b)(3). At times, the Fifth Circuit may offer an explanation for granting or even denying permission to appeal, but ordinarily the grant–deny decision is made by simple order and subsequently, but not always, noted in the opinion on the merits if the appeal is accepted and decided.

The grant–deny decision takes, on average, around 35 days. See Appendix C.

8. Procedure if the Fifth Circuit grants the petition

If the court of appeals grants permission to appeal in a Rule 23(f) case, then, within 10 days after the entry of the court of appeals’ order granting permission to appeal, the appellant must pay the district clerk all required fees and file a cost bond, if required, under Rule 7. Fed. R. App. P. 5(d)(1)(A) & (B). The required fee that must be paid to the district court clerk if the court of appeals grants the petition for permission to appeal is $255 payable to the district court clerk. (If you were filing a regular appeal, the fee payable to the district court clerk upon filing a notice of appeal would be $255, $250 of which is a court of appeals’ docketing fee, and $5 of which is a district court filing fee. See Fed. R. App. P. 3(e); 5th Cir. R. 3; see 28 U.S.C. §§ 1913, 1917.)

Even upon the granting of permission to appeal and the payment of filing fees in the district court, a notice of appeal need not be filed. Fed. R. App. P. 5(d)(2). Indeed, in federal court, a notice of appeal plays no part—by design—in the permissive appeal practice. Compare Fed. R. App. P. 3(a)(1) (“An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk.”) with Fed. R. App. P. 5(a) (“To request permission to appeal when an appeal is within the court of appeals’ discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk . . . .”) and Fed. R. App. P. 5(d) (setting out the procedure if the court of appeals grants permission to appeal and specifying that “[a] notice of appeal need not be filed”). The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under the rules. Fed. R. App. P. 5(d)(2).

Once the appealing party has paid the required fees, the district clerk must notify the circuit clerk, and, upon receiving this notice, the circuit clerk will convert the petition to a regular appeal and change its miscellaneous docket number to a regular docket number for an appeal. Fed. R. App. P. 5(d)(3). And although Federal Rule of Appellate Procedure 5 tersely notes that “[t]he record will be forwarded and filed in accordance with Rules 11 and 12(c),” the petitioner, who is now considered to be the appellant, will still be required to complete the Transcript Order Form, even if no proceedings need to be transcribed, in discharging its duties concerning the record.

As in regular appeals, when the Fifth Circuit receives the record from the district court, that will trigger the ordinary briefing schedule, which will permit the parties to prepare full-length, merits briefs as they would in any other appeal as of right.

Once the Fifth Circuit grants permission to appeal, the district court ordinarily cannot moot the subject of the appeal and loses authority to act on the subject of the pending appeal.

Once the petition is converted to a regular appeal, the proceeding is not accorded any sort of calendaring priority. Indeed, in examining the docket sheets of permissive appeals filed in 2002–2004, the time for disposition of the appeal is the same as other appeals. See Appendix C. What is different from an ordinary appeal, however, is that oral argument is granted in an extremely high percentage of cases that originated as petitions for permission to appeal. Id.

VIII. Mandamus

A. Provisions of the All Writs Act

A federal court of appeals has the power to issue a writ of mandamus pursuant to the All Writs
Act, 28 U.S.C. § 1651, which provides in pertinent part:

§ 1651. Writs
   (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

B. Standards for Issuance of the Writ
   The requirements for issuance of a writ of mandamus are established by federal common law. The Supreme Court “repeatedly has observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations.” Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988); see Kerr v. United States Dist. Ct., 426 U.S. 394, 402 (1976); Ex Parte Fahey, 332 U.S. 258, 259 (1947); accord In re Avantel, S.A., 343 F.3d 311, 317 (5th Cir. 2003).
   “The federal courts traditionally have used the writ only ‘to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’” Gulfstream Aerospace, 485 U.S. at 289 (quoting Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 26 (1943)); see, e.g., FCC v. NextWave Pers. Comms. Inc., 537 U.S. 293, 299 (2003) (reciting that the Second Circuit granted the FCC’s petition for a writ of mandamus because a bankruptcy court order invaded the “[e]xclusive jurisdiction to review the FCC’s regulatory action[ ] which] lies in the courts of appeals” under 47 U.S.C. § 402).
   Accordingly, the Supreme Court has “held that only ‘exceptional circumstances amounting to a judicial “usurpation of power” will justify issuance of the writ.’” Id. (quoting Will v. United States, 389 U.S. 90, 95 (1967), and DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)).
   The standards for issuance of mandamus are well established. “The test contains two prongs, one procedural and one substantive.” In re Am. Airlines, Inc., 972 F.2d 605, 608-09 (5th Cir. 1992). Petitioners must show that they lack adequate alternative means to obtain the relief they seek and carry the burden of showing that their right to issuance of the writ is clear and indisputable. Mallard v. United States Dist. Ct., 490 U.S. 296, 309 (1989) (citations omitted); Gulfstream Aerospace, 485 U.S. at 289; see Avantel, 343 F.3d at 317; Kmart Corp. v. Aronds, 123 F.3d 297, 300-01 (5th Cir. 1997) (citing Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953)).
   Mandamus is extremely difficult to obtain in federal court. The writ is generally considered a “drastic” remedy. In re Grand Jury Subpoena, 190 F.3d 375, 389 n.16 (5th Cir. 1999). It is a remedy granted not as a matter of right, but in the exercise of sound judicial discretion. Avantel, 343 F.3d at 317.
   The federal courts are mindful that frequent use of the writ would “undermine[ ] the policy against piecemeal appellate review.” Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980) (per curiam), and thus courts have stressed that mandamus may not serve “as a substitute for appeal.” Avantel, 343 F.3d at 317 (quoting In re Am. Marine Holding Co., 14 F.3d 276, 277 (5th Cir. 1994)); Warren v. Bergeron, 831 F.2d 101, 103 (5th Cir. 1987). The Fifth Circuit has recognized that the standard governing the availability of mandamus is not “never,” but “hardly ever.” Allied Chem., 449 U.S. at 36; see In re Am. Airlines, 972 F.2d at 608-09.

1. No adequate means for relief
   The federal courts interpret their requirement of no other adequate means of relief similar to the Texas courts. The first consideration is whether an appeal upon entry of final judgment will be adequate. For example, it is well-established that the “mandamus is an appropriate means of review if a district court errs in ordering the discovery of privileged documents such an order would not be reviewable on appeal.” Avantel, 343 F.3d at 317 & n.5 (“If Avantel is compelled to produce documents protected by a privilege, that privilege will be lost and the district court’s order will then be effectively unreviewable after final judgment.” (citing Occidental, 217 F.3d at 295)); see In re Burlington N., Inc., 822 F.2d 518, 522 (5th Cir. 1987) (“[C]ases have recognized the importance of the asserted privilege and the absence of an
adequate alternative method of obtaining review.”).

But, if an appeal after final judgment or an interlocutory appeal as of right can remedy the district court’s action, then mandamus will not lie. Even the availability of a permissive appeal has been considered by some Fifth Circuit decisions to bar mandamus. Even though a federal permissive appeal is discretionary with both the trial court and the appellate court, the Fifth Circuit has more than once denied mandamus relief if the relator could have sought certification to take a permissive appeal under section 1292(b):

[W]e conclude that El Paso could have sought certification [under § 1292(b)] from the district court of its order denying withdrawal of the reference. Consequently, we conclude that El Paso does not lack an “adequate alternative means to obtain the relief they seek” and is therefore not entitled to the extraordinary remedy of mandamus. In re El Paso Elec. Co., 77 F.3d 793, 795 (5th Cir. 1996) (quoting Mallard, 490 U.S. at 309); see also Dayton Indep. Sch. Dist. v. U.S. Minerals Prods. Co., 906 F.2d 1059, 1061 (5th Cir. 1990) (“This Court denied the [mandamus] petition and held that National Gypsum first must seek certification from the district court in accordance with 28 U.S.C. § 1292(b).”).

Accordingly, before seeking mandamus, the complaining party should consider whether seeking section 1292(b) certification would be proper. Not only can that party show that a section 1292(b) appeal was sought, but, if the district court certifies the question, the complaining party has a better shot of obtaining relief under section 1292(b) than it does by mandamus. See Appendix C (statistics for permissive appeals). Many mandamus actions from discovery orders, however, may not involve controlling questions of law that will materially advance the ultimate termination of the litigation, so a reasoned approach to choosing the right vehicle* should be taken.

The Fifth Circuit has also considered other factors such as whether “the nature and size of litigation” “preclude effective appellate review upon final judgment.” In re Am. Airlines, 972 F.2d at 608-09 (granting mandamus). In addition, the Fifth Circuit has considered the need and benefit of the court’s “guidance on [an] issue of grave importance.” Id. (“[T]his case raises several questions pertaining to the proper interpretation and application of ethical standards in disqualification cases.”). It is also relevant that the issues presented by the mandamus “have importance beyond the immediate lawsuit.” Id. (citing Burlington N. 822 F.2d at 523, and In re EEOC, 709 F.2d 392, 394-95 (5th Cir. 1983)).

2. Clear and indisputable right to relief

“Merely showing that the district court erred is insufficient to obtain mandamus relief.” In re Avantel, S.A., 343 F.3d 311, 317 (5th Cir. 2003) (citing In re Occidental Petroleum Corp., 217 F.3d 293, 295 (5th Cir. 2000)). Instead, mandamus is appropriate “when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court.” Avantel, 343 F.3d at 317; In re Dresser Indus., Inc., 972 F.2d 540, 542-43 (5th Cir. 1992).

If the district court’s act was within its discretion, then the aggrieved party cannot show that it has a clear and indisputable right to relief. Kmart Corp. v. Aronds, 123 F.3d 297, 300-01 (5th Cir. 1997) (citing Allied Chem., 449 U.S. at 36 (“Where a matter is committed to discretion, it

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*There is, however, overlap between the types of orders reviewable by mandamus and those reviewable by permissive appeal. For instance, in Horaist v. Doctor’s Hosp. of Opelousas, 255 F.3d 261 (5th Cir. 2001), the Fifth Circuit reviewed on a permissive appeal a district court’s refusal to disqualify counsel, which is an issue the Fifth Circuit has previously reviewed by mandamus. In re Am. Airlines, Inc., 972 F.2d 605, 605 (5th Cir. 1992); In re Dresser Indus., 972 F.2d 540, 543 (5th Cir. 1992); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 338 (1981) (suggesting in dicta the availability of §1292(b), as an alternate to mandamus, to review an order denying a motion to disqualify).
cannot be said that a litigant’s right to a particular result is ‘clear and indisputable.’

In accord with these dictates, the Fifth Circuit has held that a writ of mandamus should not issue merely because we believe that “we might have exercised the discretion vested in that court differently than the district court exercised it.” In re Hester, 899 F.2d 361, 367 (5th Cir. 1990).

If, on the other hand, the district court’s act was not one of discretion, but rather involved the erroneous interpretation of law or erroneous application of law to facts, those are legal questions not subject to discretion. See, e.g., In re Am. Airlines, 972 F.2d at 608-09 (granting mandamus) (“In this circuit, however, a district court’s ruling upon a disqualification motion is not a matter of discretion.... [A] ‘district court's interpretation of the state disciplinary rules [is] an interpretation of law, subject essentially to de novo consideration.’”) (quoting In re Dresser, 972 F.2d at 543).

The fact that the law is unsettled is always a double-edged sword in seeking mandamus relief. If the law is settled, then it is easier to show a clear and indisputable right to relief. By contrast, the Fifth Circuit has recognized the use supervisory mandamus to “meet the compelling need to settle a new issue so that it can become only an ordinary issue.” In re EEOC, 709 F.2d 392, 394-95 (5th Cir. 1983); accord In re Burlington N., Inc., 822 F.2d 518, 522 (5th Cir. 1987) (“They also have relied on the seriousness and novelty of the privilege issue in the particular case.”).

3. Jurisdiction to issue a writ of mandamus

   The All Writs Act is “not an independent grant of jurisdiction.” Texas v. Real Parties in Interest, 259 F.3d 387, 392 (5th Cir. 2001). Thus, a court of appeals may issue a writ of mandamus only if the court of appeals would have jurisdiction over a final judgment in the action below under section 1291.

C. Statistics

   In the Fifth Circuit’s 1998–99 term, 76 mandamuses were filed in civil actions. United States Court of Appeals for the Fifth Circuit, Clerk’s Annual Report, Judicial Workload Statistics 4 & appx. a, f (1999).

   The court’s total filings for that same period were 8519, so the court’s mandamus docket is relatively small. Id. at 2. The same is true today. During the Fifth Circuit’s 2003–03 term, 75 mandamus petitions were filed in civil cases. United States Court of Appeals for the Fifth Circuit, Clerk’s Annual Report, Judicial Workload Statistics app. a (2003).

D. Examples of Orders in Which Review Was Sought by Mandamus

1. Mandamus was proper

   ✓ Orders compelling production of documents claimed to be privileged. In re Avantel, 343 F.3d 311, 317 (5th Cir. 2003); see In re Burlington N., Inc., 822 F.2d 518, 522 (5th Cir. 1987) (“[C]ases have recognized the importance of the asserted privilege and the absence of an adequate alternative method of obtaining review.”). Even for privilege mandamuses, however, an extraordinary showing will be required to convince the court of appeals to issue the writ. See, e.g., id. (issuing mandamus where the district court’s order directs production of several thousand documents for which attorney/client privilege and work product immunity have been asserted, the documents go to the heart of the controversy between the parties, disposition of the petition not only implicates the important policies protecting privileged documents but was likely to have a determinative impact on the course of the case, and the issues also had importance beyond the immediate lawsuit).


   ✓ Disqualification orders. In re Am. Airlines, 972 F.2d at 608-09 (granting mandamus); In re Dresser Indus., 972 F.2d at 542-43 (granting mandamus); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 378 n.13 (1981) (dicta). But see In re Ford Motor Co., 751 F.2d 274, 275 (8th Cir. 1984) (“Denial of
a motion to disqualify counsel will rarely justify the issuance of a writ of mandamus.”).

- Order remanding a case to state court explicitly based on a reason other than lack of subject-matter jurisdiction, for example, in the interest of docket congestion, the bar to review “on appeal or otherwise” in § 1447(d) does not apply, and the decision is reviewable. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53 (1976); *In re Adm'rs of Tulane Educ. Fund*, 954 F.2d 266 (5th Cir. 1992) (district court remanded to state court for determination concerning whether a particular party was indispensable); *In re Allied Signal, Inc.*, 919 F.2d 277 (5th Cir. 1990) (district court remanded on the ground that a political subdivision could only be sued in state court); *In re FDIC v. Loyd*, 955 F.2d 316 (5th Cir. 1992) (district court exceeded its statutorily defined authority by remanding a case based on nonjurisdictional defects after expiration of the 30-day remand period).


- Order denying a motion to remand to state court in a Jones Act case when it denies a plaintiff the right to choose a state court forum. *In re Dutile*, 935 F.2d 61 (5th Cir. 1991).


- “[T]he exceptional cases involving stay orders.” *Gulfstream Aerospace*, 485 U.S. at 287 n.13;

- In rare instances, denial of claims of immunity on the eve of trial. *Edwards v. Cass County*, 919 F.2d 273, 276 (5th Cir. 1990) (“[T]he defendants could have obtained review of the district court’s refusal to allow the filing of their summary judgment motion by filing a petition for writ of mandamus.”)

- Order effecting a lengthy stay that deprives claimants of property without a hearing when the district court fails to make specific findings required under the applicable civil forfeiture statute. *In re Ramu*, 903 F.2d 312 (5th Cir. 1990).

- In rare instances, refusal to certify for appeal under section 1292(b) an order denying a motion to dismiss based on forum non conveniens. *In re McClelland*, 742 F.2d 837, 839 (5th Cir. 1984).

- Pretrial orders consolidating 3,031 asbestos cases for trial. *In re Fibreboard Corp.*, 893 F.2d 706, 707 (5th Cir. 1990).

- Mandamus would not lie to interrupt administrative review of discovery dispute. If the documents are ruled undiscoverable, the order can be reviewed from final judgment. If the documents are ordered produced against a claim of privilege, review may be sought at that time. *In re Willy*, 831 F.2d 545, 549 (5th Cir. 1987), aff’d, 503 U.S. 131 (1992).

- Orders denying grand jury targets’ motions to return documents turned over to government in the process of complying with a grand jury subpoena; district court should have provided the individual who submitted the documents for in-camera review the opportunity to comply with the district court’s order or stand in contempt so that the individual had an avenue of immediate review from order of contempt. *In re Grand Jury Subpoena*, 190 F.3d 375 (5th Cir. 1999).

- Order barring prosecution of the plaintiff’s claim altogether (as opposed to merely staying the prosecution of the plaintiff’s law action, temporarily) simply to permit the equitable issue to be tried to the court first. *Smith v. Pinnell*, 597 F.2d 994, 997 (5th Cir. 1979).
“This Circuit has, in some cases, recognized the availability of mandamus as a limited means to test the district court’s discretion in issuing transfer orders.” Blessey Marine Servs. Inc. v. Houston Marine Servs. Inc., No. 03-20029, 2003 WL 22080745 (5th Cir. Sept. 9, 2003) (unpublished) (citing In re Horseshoe Ent., 337 F.3d 429 (5th Cir. 2003); and Garner v. Wolfinbarger, 433 F.2d 117, 120 (5th Cir. 1970)).

2. Mandamus was not proper

X The Supreme Court may address whether mandamus is available to review orders denying motion to compel production of documents in response to the assertion of a claim of executive privilege. In Cheney v. United States District Court (No. 03-475), one of the issues before the Supreme Court is “whether the court of appeals had mandamus or appellate jurisdiction to review the district court’s unprecedented discovery orders in this litigation,” which accepted a claim of executive privilege. Cheney v. United States Dist. Court, 124 S. Ct. 1391, (2004) (denying motion to recuse); see Cheney v. United States Dist. Court, 124 S. Ct. 958 (2003) (No. 03-475) (granting certiorari).

X Order staying discovery in civil action pending resolution of related criminal matter. Kmart Corp. v. Aronds, 123 F.3d 297, 300-01 (5th Cir. 1997)

X Order severing and transferring defendant on ground of improper venue, when the court possessed jurisdiction both over subject matter and over the person of defendant who moved for dismissal as to himself. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953) (affirming court of appeals’ refusal to issue mandamus).

X Bankruptcy court’s order shielding debtor manufacturer’s insurers and debtor’s executives from workers’ personal injury suits. In re Davis, 730 F.2d 176, 181 (5th Cir. 1984).

X Federal government sought writ of prohibition ordering dissolution of a preliminary injunction in a desegregation case and dismissal of the suit, or a writ of mandamus directing transfer of the case to the district court that was exercising continuing supervision of the desegregation injunction entered in another case. United States v. United States Dist. Court, 506 F.2d 383, 384 (5th Cir. 1974) (denying writs)

X Order of stay where stay is within the district court’s discretion. See, e.g., Kmart Corp. v. Aronds, 123 F.3d 297, 300-01 (5th Cir. 1997).

X Most discovery orders. Avantel, 343 F.3d at 317; see In re Grand Jury Subpoena, 190 F.3d 375, 379 (5th Cir. 1999) (“Pre-trial discovery orders are generally no exception to the finality requirement. Courts have ‘denied [immediate] review of . . . [such orders because,] in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling.’”’ (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377 (1981)); see also Kerr v. United States Dist. Ct., 426 U.S. 394, 402 (1976) (in-camera review of documents was alternate adequate remedy that precluded mandamus review in privilege dispute).
E. Procedure for Pursuing a Petition for Writ of Mandamus

The procedures for mandamus and other extraordinary writs are set forth in Federal Rule of Appellate Procedure 21, local rules of the various circuits, and internal procedures of each circuit.

1. **File petition in the court of appeals**
   A petition for writ of mandamus is an original proceeding in the court of appeals. The petition must be filed with the clerk of the court of appeals. **Fed. R. App. P. 21(a)(1).**

2. **Contents of petition**
   “The petition must be titled ‘In re [name of petitioner].’” **Fed. R. App. P. 21(a)(2)(A).** The petition must state:
   
   (i) the relief sought;
   (ii) the issues presented;
   (iii) the facts necessary to understand the issue presented by the petition; and
   (iv) the reasons why the writ should issue. **Fed. R. App. P. 21(a)(2)(B)(I)-(iv).** By local rule in the Fifth Circuit, the petition must also contain a certificate of interested persons as described in local rule 28.2.1. See **5th Cir. R. 21.**

   In addition, counsel may wish to consider adding other sections that would otherwise be required in an appellant’s brief, such as a statement concerning oral argument (although oral argument is rarely granted for mandamus), a statement of jurisdiction, and a summary of argument. I would also include a table of contents and table of authorities and would follow the general rules concerning which sections count against your page limitations and which do not.

   The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. **Fed. R. App. P. 21(a)(2)(C).** By local rule, the petition must also include a copy of any memorandum or briefs filed in the district court supporting the application to that court for relief and any memoranda or briefs filed in opposition, as well as a transcript of any oral reasons the district judge gave for his or her action. **5th Cir. R. 21.**

The mandamus must also contain proof of service on all parties to the proceeding in the trial court, including the trial court judge. **Fed. R. App. P. 21(a)(1).** All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes. **Fed. R. App. P. 21(a)(1).**

3. **Page limit, number of copies, Form for Appearance of Counsel, and newly instituted filing fee**
   The page limit for a petition for writ of mandamus was resolved by a recent amendment to Federal Rule of Appellate Procedure 21(d), which now sets the limit at 30 pages, exclusive of the corporate disclosure statement (the statement of interested persons in the Fifth Circuit), the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). **Fed. R. App. P. 21(d); 5th Cir. R. 21.**

   If you filed a mandamus in the Fifth Circuit before the effective date of the amendment to Rule 21 (December 1, 2002), you may have noticed a gap in the Fifth Circuit Rules and the Federal Rules of Appellate Procedure concerning the page limits for mandamus petitions. Because of the gap that existed at that time, the Fifth Circuit formerly addressed the page limit issue on its website:

   **Fed. R. App. P. 21** does not specify a page limit on mandamus petitions. Because a mandamus is not a “motion” governed by **Fed. R. App. P. 27,** we have taken the position that a mandamus petition and any response thereto are governed by the type-volume limits of **Fed. R. App. P. 32(a)(7).** That is 30 pages, or if a certificate of compliance is provided, 14,000 words or 1,300 text lines. [The size of a regular brief.] The matter is under consideration by the Appellate Rules Advisory Committee which may make clear that the limit is intended is be 20 pages.

United States Court of Appeals for the Fifth Circuit, Clerk’s Office 50 Most Frequently Asked Questions (visited June 1, 2000) <http://www.ca5.uscourts.gov/faqs.pdf>. The matter was taken up and resolved, but the limit is not 20 pages, as predicted, and is instead 30 pages.
In the Fifth Circuit, an original and 3 copies of a petition for writ of mandamus must be filed with the Fifth Circuit clerk. Fed. R. App. P. 21(d).

The Fifth Circuit has now instituted a filing fee for a petition for writ of mandamus of $250, which is paid to the Fifth Circuit clerk at the time of filing.

I would also send in—simultaneously with the petition for writ of mandamus—a Form for Appearance of Counsel. See the advice in the section below concerning completing this form.

4. Internal processing of a petition for writ of mandamus and time for response

Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court. Fed. R. App. P. 21(a)(3). A mandamus is normally treated by the clerk’s office as an emergency matter and circulated immediately to a motions panel. Fed. R. App. P. 21(b)(6) (“The proceeding must be given preference over ordinary civil cases.”). Thus, a party ordinarily need not request expedited consideration, but may wish to do so by separate motion in an appropriate case.

And because a mandamus proceeding must be given preference over ordinary civil cases, when filing a petition for writ of mandamus, counsel should point out in the appropriate place on the Form for Appearance of Counsel that, although not one of the type of cases accorded calendaring priority under 5th Cir. R. 47.7, the case is entitled to calendaring priority under Fed. R. App. P. 21(b)(6).

The clerk’s office normally calls the respondents and inquires when a response to the mandamus might be filed. The clerk’s office then conveys that information to the court. The court may deny the petition without an answer. Fed. R. App. P. 21(b)(1). Otherwise, it must order the respondent, if any, to answer within a fixed time. Fed. R. App. P. 21(b)(1). The court may make an interim order without awaiting a response.

If the court orders a response, the clerk must serve the order to respond on all persons directed to respond, including the judge or judges named as respondents and on all parties to the action in the trial court. Fed. R. App. P. 21(b)(2). All parties other than the petitioner are deemed respondents for all purposes. Any response is limited to 30 pages.

Two or more respondents may answer jointly. Fed. R. App. P. 21(b)(3). The court of appeals may also invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. Fed. R. App. P. 21(b)(4). The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals. Fed. R. App. P. 21(b)(4).

Ordinarily, the court decides the petition on its merits without further briefing or hearing, even if the court grants the petition. If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae. Fed. R. App. P. 21(b)(5). The circuit clerk must send a copy of the final disposition to the trial-court judge. Fed. R. App. P. 21(b)(7).

5. Seek stay in the trial court or the court of appeals if desired

A party seeking mandamus relief will likely want to seek a stay of the trial court proceedings pending resolution of the mandamus. See supra pp. 10–12 for procedures on seeking a stay.

F. Construing an Appeal as a Mandamus and Combining a Mandamus with an Appeal

The Supreme Court has recognized that the courts of appeals “have responded in divergent ways to requests from a party to convert a notice of appeal into a petition for writ of mandamus.” Gulfstream Aerospace, 485 U.S. at 290 n.14 (citing cases). For example, in the cases that the Supreme Court cited, one circuit treated a notice of appeal as a request for permission to file a petition for mandamus, another treated a notice of appeal as a mandamus, and a third treated a notice of appeal as a petition for writ of mandamus only upon a showing of serious hardship or prejudice. Id. The Supreme Court has expressly taken no position on how the courts of appeals choose to treat such requests. Id.

In the Fifth Circuit, the court has “discretion to treat an appeal as a petition for writ of mandamus” under the All Writs Acts. In re Grand Jury Subpoena, 190 F.3d 375, 389 n.16 (5th Cir. 1999) (citing S. Pac. Transp. Co. v. San Antonio,
748 F.2d 266, 270 (5th Cir. 1984)). Relying on the court of appeals to sua sponte exercise its discretion in this manner is risky business in the Fifth Circuit. You do not want to read the following passage at the end of an opinion dismissing your appeal: “[T]he only appellate jurisdiction over [this] order . . . would be found in a permissive appeal under § 1292(b) or a writ of mandamus. In this case the district court denied plaintiffs’ motion for 1292(b) certification, and the plaintiffs have not sought a writ of mandamus. For lack of jurisdiction, this appeal is DISMISSED.” Jolley v. Paine Webber Jackson & Curtis, Inc., 864 F.2d 402, 405 (5th Cir. 1989); accord Rauscher Pierce Refsnes, Inc. v. Birenbaum, 860 F.2d 169, 172 (5th Cir. 1988) (“The other two avenues of appeal mentioned by the Supreme Court in Gulfstream are also unavailable to the appellants. The district court has not certified this order for a permissive appeal under 28 U.S.C. § 1292(b), and the appellants have not applied for a writ of mandamus . . . . The appeal is therefore DISMISSED.”); see also Blessey Marine Servs. Inc. v. Houston Marine Servs. Inc., No. 03-20029, 2003 WL 22080745 (5th Cir. Sept. 9, 2003) (unpublished) (“This Circuit has, in some cases, recognized the availability of mandamus as a limited means to test the district court’s discretion in issuing transfer orders. See In re Horseshoe Entm’t, 337 F.3d 429 (5th Cir. 2003). However, Blessey Marine has not requested that we treat its notice of appeal as anything other than what it is. Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co., Inc., 761 F.2d 198, 203 (5th Cir. 1985). We reserve writs of mandamus only for the most egregious of discretionary abuses, and where other avenues of relief have been traversed without success.” (citations omitted)).

The safe bet is seek mandamus relief in the alternative to your principal vehicle for appealing, whether that be a collateral order appeal, a 1292(b) appeal, or an appeal under some other statute, rule, or jurisprudential exception. See EEOC v. Neches Butane Prods. Co., 704 F.2d 144, 151-52 (5th Cir. 1983) (“observing that “it is fairly common practice for an appellant to file an appeal and, in the alternative, a petition for a writ of mandamus”); see, e.g., Cook County v. United States ex rel. Chandler, 538 U.S. 119, 119 (2003) (in the alternative to an appeal, appellant also requested mandamus from a discovery order); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 n.6 (1978) (“Respondents also petitioned for a writ of mandamus directing the District Court to recertify the class. Since the Court of Appeals accepted appellate jurisdiction, it dismissed the petition for a writ of mandamus.”); Berger v. Compaq Computer Corp., 257 F.3d 475, 478 (5th Cir. 2001) (“Shortly after [class] certification, Compaq sought a writ of mandamus from this court . . . . Compaq also petitioned this court to permit an interlocutory appeal of the certification order pursuant to FED. R. CIV. P. 23(f). We denied mandamus but granted interlocutory review . . . .”);

Knapp Corp. v. Aronds, 123 F.3d 297, 300-01 (5th Cir. 1997) (considering appellant’s request that the court treat its appeal, in the alternative, as a petition for a writ of mandamus).

You may file a freestanding petition for writ of mandamus or you may include your request for mandamus relief in your appellate brief or petition for permission to appeal. If you file your mandamus petition as a freestanding document, it will be assigned a separate docket number, and it will be processed differently from your appeal or petition for permission to appeal. For instance, a mandamus is treated as an emergency matter and circulated immediately to a motions panel, whereas an appellate brief stays in the clerk’s office until the briefing is complete. Even a section 1292(b) petition for permission to appeal stays in the clerk’s office until a response is received. Most lawyers who want to request mandamus in the alternative want their mandamus request to be processed with their appeal and carried with the appeal. Accordingly, if you file a mandamus petition as a freestanding document but want it carried with your appeal, you should probably file a motion asking that it be carried with the appeal or with a petition for permission to appeal.

If, on the other hand, you file your petition for writ of mandamus in the same document as your appeal or your petition for permission to appeal, a few words of caution are in order. First, if you combine mandamus with an appeal, but be sure to follow Rule 21’s requirements, especially the requirement that you serve the district court judge.
See Neches Butane Prods. Co., 704 F.2d at 151-52 (refusing to consider alternative request for mandamus relief because, among other things, nothing “even arguably construable” as a petition for writ of mandamus was served on the district court and “without paying any attention at all to the directly applicable federal rule of appellate procedure”).

If you are not going to file an independent petition for writ of mandamus, make sure that your appellate brief or petition for permission to appeal cites Rule 21; expressly states that you are asking the court to consider issuing a mandamus in the alternative; includes a cite to the All Writs Act, 28 U.S.C. § 1651, in the statement of jurisdiction; and briefs and applies the standards for issuance of the writ. See Neches Butane Prods. Co., 704 F.2d at 151-52 (criticizing the party asking that the court treat its appeal, in the alternative, as a petition for a writ of mandamus because that party did not cite Rule 21 in its briefs); cf. Eldredge v. Martin Marietta Corp., 207 F.3d 737, 742 n.5 (5th Cir. 2000) (“In their brief, Appellants also imply that this court may have jurisdiction pursuant to 28 U.S.C. § 1292(a) & (b). They do not actually discuss those subsections but merely refer to them in the Statement of Issues portion of their brief. An appellant, however, abandons all issues not raised and argued in its initial brief on appeal. We, therefore, refrain from addressing these points.” (citations omitted)).

Second, if you plan to combine a mandamus with an appeal in the same document, you still need to be sensitive to the fact that the clerk’s office will have a little difficulty processing your case. Before you file a mandamus subsumed within some other type of appeal, you should call the clerk’s office and explain to them what you would like to do. If you are not seeking emergency relief, then you should convey to the clerk’s office that you do not want or need your mandamus to be processed the way that they would normally process a mandamus, although that may not stop them from processing it that way. If you do not need expedited consideration, but are filing a mandamus merely to cover you when the contours of appellate jurisdiction are murky, I would indicate to the court that you are filing the mandamus for that purpose, rather than for the purpose of trying to obtain automatic expedited consideration given to mandamuses. The purpose of communicating that information to the court is so that some judge screening your mandamus does not get mad at you and think that you are filing a mandamus for the sole purpose of getting expedited consideration to which you are probably not entitled. The Fifth Circuit’s docket is overburdened, and there are many categories of cases that legitimately get calendaring priority, see Fed. R. App. P. 47.7, but your case may not be one of them.

If, however, you need expedited treatment, and you are filing a mandamus subsumed within an appellate brief or a petition for permission to appeal, you should probably file a motion to expedite your appeal or petition for permission so that your mandamus, which automatically gets expedited treatment, is carried with your appeal or petition for permission to appeal. Although the Fifth Circuit in Neches Butane observed that it is “common practice” to seek mandamus relief in the alternative, the clerk’s office does not regard it as common practice. Check with them in advance and be patient.

IX. PENDENT APPELLATE JURISDICTION

In Swint v. Chambers County Commission, 514 U.S. 35, 42 (1995), the Supreme Court limited the ability to bootstrap unappealable orders into an interlocutory appeal of another order over which there is appellate jurisdiction. The Swint opinion acknowledges that the Supreme Court has “not universally required courts of appeals to confine review to the precise decision independently subject to appeal.” Id. (citing its own precedents).

For example, as the Fifth Circuit has noted, “When an order is certified by the trial court, and accepted by the appellate court for immediate review pursuant to § 1292(b), such review is limited to the certified order; issues presented by other, noncertified orders cannot be considered simultaneously.” Burge v. Parish of St. Tammany, 187 F.3d 452, 477 (5th Cir. 1999) (citing Swint, 514 U.S. at 50); cf. Black Ass’n of New Orleans Fire Fighters v. City of New Orleans, 911 F.2d 1063 (5th Cir. 1990) (fee award not specifically
included in 54(b) certification could not be reviewed when a related issue was reviewed via 54(b) certification).

On the other hand, if a district court certifies a controlling question under section 1292(b), a court of appeals may decide all questions of law necessary to the proper disposition of the appeal of that order and is not limited to the issue or question certified. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996). In Yamaha, the Court wrote that “appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court. The court of appeals may not reach beyond the certified order to address other orders made in the case.” Id.; see United States v. Stanley, 483 U.S. 669 (1987). As the Fifth Circuit explained the rule, section 1292(b) gives the appellate court jurisdiction to hear “only questions that are material to the lower court’s certified order.” Adkinson v. Int’l Harvester Co., 975 F.2d 208, 211 n.4 (5th Cir. 1992); see, e.g., PYCA Indus. v. Harrison Cnty Waste Water Mgmt. Dist., 81 F.3d 1412, 1421-22 & n.13 (5th Cir. 1996) (when district court certified for section 1292(b) appeal its order denying a motion to dismiss for lack of subject-matter jurisdiction and denying sovereign immunity, pendent appellate jurisdiction would not be extended to include appeal from orders granting summary judgment to other defendants concerning punitive damages); Adkinson v. Int’l Harvester Co., 975 F.2d 208, 211 n.4 (5th Cir. 1992) (when district court certified for section 1292(b) appeal its order denying the second motion for summary judgment, jurisdiction under section 1292(b) did not extend to issue raised on first summary judgment motion or to issues not raised by either motion). But see FDIC v. Dye, 642 F.2d 833, 834, 837 (5th Cir. Unit B Apr. 1981) (although district court entered a single order that denied a summary judgment motion as to four counterclaims advanced by one defendant, the court of appeals granted a petition for permission to appeal that raised a question presented by only one of the counterclaims and held that it lacked jurisdiction to review the other counterclaims, explaining that despite the form of order used below, the district court’s order should be construed as involving four separate orders for section 1292(b) purposes).

A similar rule applies to appealable injunctions: Once an order has been deemed appealable under section 1292(a)(1), however, the entire order—not merely the propriety of injunctive relief—comes within the appellate court’s scope of review. See In re Lease Oil Antitrust Litig. (No. II), 200 F.3d 317, 319-20 (5th Cir. 2000); In re Seabulk Offshore, Ltd., 158 F.3d 897, 899 n.2 (5th Cir. 1998); see, e.g., Casas v. Am. Airlines, Inc., 304 F.3d 517, 520 & n.3 (5th Cir. 2002) (when an injunction was appealable pursuant to section 1292(a)(1), the court exercised jurisdiction over a cross-appeal of the district court’s preemption ruling). The Fifth Circuit has recognized, however, “that this discretion should be exercised ‘only in rare and unique circumstances.’” Gates v. Cook, 234 F.3d 221, 228 n.5 (5th Cir. 2000) (quoting Gros v. City of Grand Prairie, 209 F.3d 431, 436 (5th Cir. 2000)). But see Lakedreams v. Taylor, 932 F.2d 1103, 1107 (5th Cir. 1991) (recognizing jurisdiction over order granting preliminary injunction, but not over the order denying motion to dismiss).

Although the Supreme Court in Swint did “not definitively or preemptively settle” “whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable,” the opinion suggests that pendent jurisdiction might be proper when an issue not independently appealable is “inextricably intertwined with” an appealable order or when “review of the former decision was necessary to ensure meaningful review of the latter.” Swint, 514 U.S. at 42.

It is fair to say that pendent appellate jurisdiction is limited in the wake of Swint. Gros v. City of Grand Prairie, 209 F.3d 431, 436 (5th Cir. 2000) (“Pendent appellate jurisdiction should be exercised only in ‘rare and unique’ circumstances.”). Nevertheless, the Fifth Circuit has recently exercised pendent appellate jurisdiction in the collateral-order context. Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex., 261 F.3d 567, 570-71 (5th Cir. 2001) (where some issues that were not appealable under the collateral order doctrine were intertwined with other issues over which there was appellate jurisdiction under the collateral order doctrine, the court found “rare circumstances
present” to justify exercise of pendent appellate jurisdiction).

X. CONCLUSION

By understanding the differences between the various avenues for seeking interlocutory review in federal court, counsel can ensure that the correct avenues are being pursued and increase the chances of obtaining relief from the court of appeals.
# APPENDIX A

Federal Interlocutory Appeals and Mandamus at a Glance

<table>
<thead>
<tr>
<th>Type of Review</th>
<th>Requirements</th>
<th>Procedure</th>
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<tr>
<td><strong>Appeal under Collateral Order Doctrine</strong></td>
<td>(1) Order conclusively determines a disputed question; (2) order resolves an issue that is completely separate from the merits of the action; and (3) order is effectively unreviewable on appeal from final judgment.</td>
<td>(1) Follow normal appeal procedures under FED. R. APP. P. 4 (file notice of appeal in district court); and (2) seek stay of district court proceedings, if desired, from district or appellate court.</td>
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<td><strong>Appeal through Rule 54(b) Certification</strong></td>
<td>(1) One of multiple claims is resolved, or the claims of one of multiple parties is resolved; and (2) the district court makes an express written determination that there is no just reason for delay of appellate review.</td>
<td>(1) Obtain certification order from district court (by motion or sua sponte); (2) Follow normal appeal procedures under FED. R. APP. P. 4 (file notice of appeal in district court); (3) file a motion to stay enforcement, if necessary, under FED. R. CIV. P. 62(h) under conditions prescribed by district court; and (4) seek stay of district court proceedings, if desired, from district court or appellate court.</td>
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<td><strong>Appeal under 28 U.S.C. § 1292(a)(1)</strong></td>
<td>Interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction or refusing to dissolve or modify an injunction.</td>
<td>(1) Follow normal appeal procedures under FED. R. APP. P. 4 (file notice of appeal in district court); (2) consider moving for expedited consideration; and (3) seek stay of district court proceedings, if desired, from district or appellate court.</td>
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<td><strong>Appeal under 28 U.S.C. § 1292(b)</strong></td>
<td>(1) District court enters an order resolving a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) immediate appeal may materially advance the ultimate termination of the litigation.</td>
<td>(1) Obtain certification order in district court (by motion or sua sponte); (2) file petition for permission to appeal in court of appeals within 10 days and follow procedures under FED. R. APP. P. 5; and (3) seek stay of district court proceedings, if desired, from district or appellate court.</td>
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<td><strong>Appeal under Fed. R. Civ. P. 23(f) of Order Granting or Denying Class Certification</strong></td>
<td>District court enters an order granting or denying class action certification under Rule 23(f).</td>
<td>(1) file petition for permission to appeal in appellate court within 10 days after entry of order granting or denying class certification and follow procedures under FED. R. APP. P. 5; and (2) seek stay of district court proceedings, if desired, from district or appellate court.</td>
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<td><strong>Writ of Mandamus</strong></td>
<td>(1) The district court clearly abused its discretion or usurped its judicial power; (2) there is no other adequate remedy; and (3) there is a clear and indisputable right to issuance of the writ.</td>
<td>(1) File a petition for writ of mandamus with the court of appeals; and (2) follow Fed. R. APP. P. 21 and 5TH CIR. R. 21 (including requirement that you serve the district court judge); (3) seek stay of district court proceedings, if desired, from district court or appellate court.</td>
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**APPENDIX B**

**Examples of Cases Reviewable Under Section 1292(b)**

Because section 1292(b) appeals must involve a “controlling question of law,” the examples of the type of questions taken on section 1292(b) appeals are extremely diverse. Nevertheless, the following examples show the type of questions federal courts have considered important enough to permit a discretionary appeal, as well as the procedural posture of the case.

Note the extraordinarily high number of section 1292(b) appeals that presented issues that were ultimately considered certworthy by the United States Supreme Court.

<table>
<thead>
<tr>
<th>Controlling Questions of Law</th>
<th>Procedural Posture</th>
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<tr>
<td>United States Supreme Court Cases Reviewing Circuit Court Decisions in § 1292(b) Appeals:</td>
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<td>Whether petitioners’ wrongful termination, refusal to discharge, and hostile work environment claims arose under the 1991 amendment to 42 U.S.C. § 1981, which arguably opened the door to claims of post-contract discrimination, and therefore are governed by the 4-year catchall statute of limitations in 28 U.S.C. § 1658, which applies to actions arising under federal statutes enacted after December 1, 1990?</td>
<td>Reviewing the court of appeals’ reversal of the district court’s ruling</td>
<td><em>Jones v. R.R. Donnelley &amp; Sons Co.</em>, 124 S. Ct. 1836, 1840 (2004)</td>
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<td>Whether University of Michigan’s prior practice of “protecting” or “reserving” seats for underrepresented minority applicants effectively kept nonprotected applicants from competing for those slots and operated as the functional equivalent of a quota that runs afoul of Justice Powell's opinion in <em>Bakke</em>.</td>
<td>Reviewing the court of appeals’ reversal of the district court’s ruling</td>
<td><em>Gratz v. Bollinger</em>, 539 U.S. 244, 2592 (2003)</td>
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<td>Whether the district court properly denied remand to state court on the ground that Congress did not expressly provide that an FLSA action, once started in state court, was not removable to federal court?</td>
<td>Reviewing the court of appeals’ affirmance of the district court’s denial of a motion to remand</td>
<td><em>Breuer v. Jim's Concrete of Brevard, Inc.</em>, 538 U.S. 691, 694 (2003)</td>
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<td>(1) Whether imposition of liability on media defendants under wiretapping statutes solely for broadcasting a newsworthy tape on public affairs radio programming, when tape was illegally intercepted and recorded by unknown persons not agents of defendants, violates the First Amendment; and (2) Whether imposition of liability under wiretapping statutes on one defendant solely for providing the anonymously intercepted and recorded tape to the media defendants violates the First Amendment.</td>
<td>Reviewing the court of appeals’ reversal of the district court’s denial of a motion for summary judgment</td>
<td><em>Bartnicki v. Vopper</em>, 532 U.S. 514 (2001)</td>
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<td>Whether service of process is a prerequisite for the running of the 30-day removal period under § 1446(b).</td>
<td>Reviewing the court of appeals’ reversal of the district court’s denial of a motion to remand</td>
<td><em>Murphy Bros. v. Michetti Pipe Stringing, Inc.</em>, 526 U.S. 344 (1999)</td>
</tr>
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<td>Whether a claim for damages and declaratory relief brought by a state prisoner challenging the validity of the procedures used to deprive him of good-time credits is cognizable under § 1983.</td>
<td>Reviewing the court of appeals’ reversal of the district court’s denial of a motion to remand</td>
<td><em>Edwards v. Balisok</em>, 520 U.S. 641 (1997)</td>
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<td>Whether the standard of care that defendants owed to a federally chartered, federally insured institution was controlled by state law, federal common law, or a special federal statute (12 U.S.C. § 1821(k)) that speaks of “gross negligence.”</td>
<td>Reviewing the court of appeals’ reversal of the district court’s partial denial of a motion to dismiss</td>
<td><em>Atherton v. FDIC</em>, 519 U.S. 213 (1997)</td>
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<td>Whether the federal maritime claim for wrongful death recognized in <em>Moragne</em> supplies the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters.</td>
<td>Reviewing the court of appeals’ reversal in part and affirmance in part of the district court’s denial of a motion for summary judgment</td>
<td><em>Yamaha Motor Corp. v. U.S.A. v. Calhoun</em>, 516 U.S. 199 (1996)</td>
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<td>Whether the district court’s refusal to enforce a privately negotiated settlement agreement claimed to shelter a party from suit was immediately appealable under § 1291 as depriving defendant to “immunity from suit”</td>
<td>Noting the availability of review under § 1292(b) in reviewing the court of appeals' decision to dismiss an appeal for lack of appellate jurisdiction over district court’s decision to vacate order granting voluntary dismissal</td>
<td><em>Digital Equip. Corp. v. Desktop Direct, Inc.</em>, 511 U.S. 863 (1994)</td>
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<td>Whether an owner’s lack of knowledge of the fact that her home had been purchased with the proceeds of illegal drug transactions constitutes a defense to a forfeiture proceeding under the Comprehensive Drug Abuse Prevention and Control Act of 1970.</td>
<td>Reviewing the court of appeals’ reversal of the district court’s denial of a motion for summary judgment</td>
<td><em>U.S. v. Parcel of Land, Bldgs., Appurtenances &amp; Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.</em>, 507 U.S. 111 (1993)</td>
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<td>Whether common-law claims against cigarette manufacturers were preempted by the Public Health Cigarette Smoking Act of 1969, which required a warning (that the Surgeon General has determined that cigarette smoking is dangerous to health) appear in a conspicuous place on every package of cigarettes sold in the United States, or by the Act’s 1965 predecessor, which required a less alarming label.</td>
<td>Reviewing the court of appeals’ reversal of the district court’s grant of a motion to strike preemption defense</td>
<td>Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)</td>
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<td>Whether, in a private antitrust action under 15 U.S.C. § 15 involving claims of price fixing against the producers of natural gas, a State is a proper plaintiff as parens patriae for its citizens who paid inflated prices for natural gas, when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens of the State.</td>
<td>Reviewing the court of appeals’ affirmance of the district court’s partial dismissal of claims</td>
<td>Kansas v. UtiliCorp United, Inc., 497 U.S. 199 (1990)</td>
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<td>Whether, in an ADEA action, district courts may play any role in prescribing the terms and conditions of communication from named plaintiffs to potential members of a class on whose behalf the collective action has been brought.</td>
<td>Reviewing the court of appeals’ reversal of the district court’s orders regarding discovery and further notice to potential class members</td>
<td>Hofmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989)</td>
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<td>Whether the Federal Tort Claims Act permits the exercise of pendent party jurisdiction over additional parties as to which no basis for federal jurisdiction existed.</td>
<td>Reviewing the court of appeals’ reversal of the district court’s grant of plaintiff’s motion to amend the complaint and assertion of pendent-party jurisdiction</td>
<td>Finley v. United States, 490 U.S. 545 (1989)</td>
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<td>Whether a federal court sitting in diversity should apply state or federal law in adjudicating a motion to transfer a case to a venue specified in a contractual forum-selection clause.</td>
<td>Reviewing the court of appeals’ reversal of the district court’s denial of motions to transfer venue or dismiss for improper venue</td>
<td>Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988)</td>
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<td>In holding that the court of appeals lacked jurisdiction under 28 U.S.C. § 1291, the court stated, “Section 1292(b) therefore provides an avenue for review of forum non conveniens determinations in appropriate cases.”</td>
<td>Reviewing the court of appeals’ decision to exercise appellate jurisdiction under section § 1291 and noting that review under § 1292(b) was available</td>
<td>Van Cauwenberghe v. Baird, 486 U.S. 517 (1988)</td>
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<td>Fifth Circuit Decisions in § 1292(b) Cases:</td>
<td>Reviewing order denying Rule 12(b)(6) motion to dismiss</td>
<td>Reviewing grant of partial judgment on the pleadings under Rule 12(c)</td>
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<td>Whether Title III of the Americans with Disabilities Act applies to foreign-flagged cruise ships?</td>
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<td>Whether damages for inconvenience and loss of a refreshing, memorable vacation are damages for mental injuries, which are unrecoverable under the Warsaw Convention?</td>
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<td>Where the district court was convinced that party engaged in forum manipulation and denied that party's motion to remand despite the removal statute's requirement that all cases not initially removable be removed within a year of commencement of the action, the Fifth Circuit accepted section 1292(b) petition to determine whether equitable exception to the one-year limit on removal is allowed, and, if so, whether an exception should be applied in this case?</td>
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<td>What is the proper way to measure the amount in controversy, required for federal diversity jurisdiction under 28 U.S.C. § 1332, in the context of a suit seeking, inter alia, an equitable accounting and whether the defendants' costs for performing the accounting may be considered in calculating the amount in controversy?</td>
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<td>Where diversity-jurisdiction removal was based on fraudulent joinder, whether there is arguably a reasonable basis for predicting the non-diverse defendants could be liable under Mississippi law and, therefore, not fraudulently joined?</td>
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<td>Whether the Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements regardless of the legal theory of recovery asserted.</td>
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<td>Whether an enforceable contract existed under the statute of frauds.</td>
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<td>Whether a state-law claim for wrongful termination of employment contract to prevent plaintiff from becoming eligible for pension benefits at age 65 was pre-empted by ERISA.</td>
<td>Reviewing order denying preemption</td>
<td>Bullock v. Equitable Life Assur. Soc. of U.S., 259 F.3d 395 (5th Cir. 2001)</td>
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<td>Whether the district court erred in refusing to disqualify counsel.</td>
<td>Reviewing denial of a motion to disqualify counsel</td>
<td>Horaist v. Doctor’s Hosp. of Opelousas, 255 F.3d 261 (5th Cir. 2001)</td>
</tr>
<tr>
<td>Whether the district court erred in its Rule 23(b)(2) certification of a “Race Discrimination Class” and a “Process Class” in a class action lawsuit involving alleged racially discriminatory demolition of repairable single-family homes without proper notice or judicial warrant.</td>
<td>Reviewing order certifying class action</td>
<td>James v. City of Dallas, 254 F.3d 551 (5th Cir. 2001)</td>
</tr>
<tr>
<td>Whether the plaintiff could recover purely economic losses under maritime law resulting from defendants’ negligence.</td>
<td>Reviewing denial of a motion for summary judgment</td>
<td>Reserve Mooring Inc. v. Am. Commercial Barge Line, LLC, 251 F.3d 1069 (5th Cir. 2001)</td>
</tr>
<tr>
<td>Whether removal was proper on the basis of diversity of citizenship in light of allegations that nondiverse defendants were fraudulently joined</td>
<td>Reviewing denial of a motion to remand to state court</td>
<td>Badon v. RJR Nabisco Inc., 236 F.3d 282 (5th Cir. 2000)</td>
</tr>
<tr>
<td>Whether there was standing in an interlocutory appeal from a class certification.</td>
<td>Reviewing order certifying class action</td>
<td>Wash. v. CSC Credit Servs. Inc., 199 F.3d 263 (5th Cir.), cert. denied, 530 U.S. 1261 (2000)</td>
</tr>
<tr>
<td>Whether the district court’s in limine order excluding evidence of profits that one party allegedly derived from the alleged misappropriation of a trade secret was erroneous.</td>
<td>Reviewing grant of a motion in limine excluding evidence</td>
<td>Reingold v. Swiftships Inc., 210 F.3d 320 (5th Cir. 2000)</td>
</tr>
<tr>
<td>Whether a case should be transferred under 28 U.S.C. § 1404(a) on the basis of a finding that Alabama law would govern the dispute and that Alabama therefore has the most interest in the outcome of the litigation.</td>
<td>Reviewing grant of a motion to transfer case</td>
<td>Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521 (5th Cir. 2000)</td>
</tr>
<tr>
<td>Whether the only defense available to employer in suit under the ADA challenging employer’s policy of permanently removing employees who had undergone treatment for substance abuse from certain safety-sensitive, little-supervised positions, was to prove that employees subject to policy posed “direct threat.”</td>
<td>Reviewing grant of partial summary judgment</td>
<td>EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000)</td>
</tr>
<tr>
<td>Whether defendant’s activities were protected under <em>Noerr-Pennington</em> doctrine when the issues were: (1) whether the artful pleading doctrine could not be applied to allow removal, and (2) whether plaintiff waived its right to challenge federal jurisdiction by amending its complaint to state federal claim.</td>
<td>Reviewing denial of a motion to remand and dismissal of complaint</td>
<td><em>Waste Control Specialists, LLC v. Envirocare of Tex., Inc.</em>, 199 F.3d 781, modified in part on rehearing, 207 F.3d 225 (5th Cir.), cert. denied, 531 U.S. 956 (2000)</td>
</tr>
<tr>
<td>Whether, for purposes of determining if the plaintiff has a disability under the Americans with Disabilities Act, the plaintiff’s condition should be evaluated in its unmedicated or medicated state.</td>
<td>Reviewing denial of a motion for summary judgment</td>
<td><em>Washington v. HCA Health Servs. of Tex., Inc.</em>, 199 F.3d 192 (5th Cir. 1999)</td>
</tr>
<tr>
<td>(1) Whether employee was seaman entitled to bring action under Jones Act; (2) Whether employee’s claim was nonmaritime claim arising under Outer Continental Shelf Lands Act and thus removable without regard to citizenship of any of the parties; and (3) Whether accident was subject to admiralty jurisdiction.</td>
<td>Reviewing denial of a motion to remand to state court</td>
<td><em>Hufnagel v. Omega Serv. Indus., Inc.</em>, 182 F.3d 340 (5th Cir. 1999)</td>
</tr>
<tr>
<td>Whether the LMRA or ERISA completely preempted the request for an injunction and thus gave rise to federal question jurisdiction as a basis for removal.</td>
<td>Reviewing denial of a motion to remand to state court</td>
<td><em>McClelland v. Gronwaldt</em>, 155 F.3d 507 (5th Cir. 1998)</td>
</tr>
<tr>
<td>Whether physician was an employee of the United States under the Federal Tort Claims Act operating in course and scope of her employment when treating plaintiff.</td>
<td>Reviewing denial of a motion to dismiss</td>
<td><em>Linkous v. United States</em>, 142 F.3d 271 (5th Cir. 1998)</td>
</tr>
<tr>
<td>Whether remand was proper in light of collusive assignment to defeat diversity jurisdiction?</td>
<td>Reviewing denial of a motion to remand to state court</td>
<td><em>Grassi v. Ciba-Geigy, Ltd.</em>, 894 F.2d 181 (5th Cir. 1990)</td>
</tr>
<tr>
<td>In the rare circumstance when a district court has abused its discretion in denying a claim of immunity asserted in a summary judgment motion on the eve of trial.</td>
<td>Specifically identifying certification under § 1292(b) as available to reviewing denial of summary judgment motion, on the eve of trial, based on a claim of immunity</td>
<td><em>Edwards v. Cass County</em>, 919 F.2d 273, 276 (5th Cir. 1990)</td>
</tr>
<tr>
<td>Whether foreign manufacturer defendant had sufficient minimum contacts with forum for court to exercise general personal jurisdiction?</td>
<td>Reviewing denial of motion to dismiss</td>
<td><em>Beary v. Beech Aircraft Corp.</em>, 818 F.2d 370 (5th Cir. 1987)</td>
</tr>
</tbody>
</table>
## APPENDIX C
### Statistics—Petitions for Permission to Appeal under Section 1292(b) and Rule 23(f)
(*Unless specified otherwise, each statistic is for 1292(b) and 23(f) petitions combined*)

<table>
<thead>
<tr>
<th>Description</th>
<th>2002</th>
<th>2003</th>
<th>2004 (thru 5/17)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total—§ 1292(b) and 23(f)—petitions filed</td>
<td>36</td>
<td>39</td>
<td>14</td>
</tr>
<tr>
<td>Number § 1292(b) petitions filed</td>
<td>23</td>
<td>27</td>
<td>13</td>
</tr>
<tr>
<td>Number Rule 23(f) petitions filed</td>
<td>13</td>
<td>12</td>
<td>1</td>
</tr>
<tr>
<td>Total number disposed of</td>
<td>36</td>
<td>35</td>
<td>6</td>
</tr>
<tr>
<td>Total number (rate) of petitions granted</td>
<td>19 (56%)</td>
<td>22 (63%)</td>
<td>4 (67%)</td>
</tr>
<tr>
<td>Total number (rate) of petitions denied</td>
<td>15 (44%)</td>
<td>13 (37%)</td>
<td>2 (33%)</td>
</tr>
<tr>
<td>Total number of petitions withdrawn</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Grant rate for § 1292(b) petitions</td>
<td>61%</td>
<td>72%</td>
<td>66%</td>
</tr>
<tr>
<td>Grant rate for Rule 23(f) petitions</td>
<td>45%</td>
<td>36%</td>
<td>none disposed of</td>
</tr>
<tr>
<td>Total number (% of petitions in which no response is filed)</td>
<td>10 (28%)</td>
<td>12 (31%)</td>
<td>7 (50%)</td>
</tr>
<tr>
<td>Grant rate when no response is filed</td>
<td>40%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>Total number (% of petitions in which a response is filed)</td>
<td>26 (72%)</td>
<td>27 (69%)</td>
<td>7 (50%)</td>
</tr>
<tr>
<td>Grant rate when a response is filed</td>
<td>62.5%</td>
<td>46%</td>
<td>33%</td>
</tr>
<tr>
<td>Average number of days between filing of a petition and disposition (grant/denial)</td>
<td>39.9 days</td>
<td>34.6 days</td>
<td>28.2 days</td>
</tr>
<tr>
<td>Range of number of days a petition is pending</td>
<td>1 to 75 days</td>
<td>12 to 71 days</td>
<td>12 to 36</td>
</tr>
<tr>
<td>Of petitions granted and ripe for oral argument calendaring, number (%) in which oral argument was calendared for the appeal</td>
<td>17 (90%)</td>
<td>12 (66%)</td>
<td>no cases ripe for calendaring decision</td>
</tr>
<tr>
<td>Of petitions granted, number (%) in which case settled or petition withdrawn before oral argument calendaring</td>
<td>1 (5%)</td>
<td>5 (27.7%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Of petitions granted, number (%) in which the appeal was disposed of on the summary calendar or without oral argument</td>
<td>1 (5%)</td>
<td>1 (5%)</td>
<td>no cases ripe for merits disposition</td>
</tr>
<tr>
<td>Average number of days between granting of petition and tentative calendaring for oral argument</td>
<td>234 days</td>
<td>210 days</td>
<td>not enough complete data to compute</td>
</tr>
<tr>
<td>Average number of days between tentative calendaring for oral argument and the oral argument</td>
<td>59.5 days</td>
<td>70.9 days</td>
<td>not enough complete data to compute</td>
</tr>
<tr>
<td>Average number of days between oral argument and the decision/judgment</td>
<td>90.8 days</td>
<td>not enough complete data to compute</td>
<td>not enough complete data to compute</td>
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</tbody>
</table>
### APPENDIX D

**1292(b) Appeals**

*Taken in the Fifth Circuit by District Judge & the Fifth Circuit’s Disposition of the Resulting Petitions for Permission to Appeal: 2002–2004*

(page 1 of 2)

#### 2002

<table>
<thead>
<tr>
<th>Texas</th>
<th></th>
<th>Louisiana</th>
<th></th>
<th>Mississippi</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dist. Judge</td>
<td>5th Cir. Disposition</td>
<td>Dist. Judge</td>
<td>5th Cir. Disposition</td>
<td>Dist. Judge</td>
</tr>
<tr>
<td>Atlas</td>
<td>Granted</td>
<td>James</td>
<td>Denied</td>
<td>Barbour</td>
</tr>
<tr>
<td>Biery</td>
<td>Granted</td>
<td>Livaudais</td>
<td>Denied</td>
<td>Barbour (companion case)</td>
</tr>
<tr>
<td>Buchmeyer</td>
<td>Granted</td>
<td>McNamara</td>
<td>Granted</td>
<td>Barbour</td>
</tr>
<tr>
<td>Cummings</td>
<td>Granted</td>
<td>Polozola</td>
<td>Granted</td>
<td>Pickering</td>
</tr>
<tr>
<td>Froeschner (*M.J.)</td>
<td>Denied</td>
<td>Tyson</td>
<td>Denied</td>
<td>Pickering</td>
</tr>
<tr>
<td>Hoyt</td>
<td>Granted</td>
<td>Zainey</td>
<td>Denied</td>
<td></td>
</tr>
<tr>
<td>Kent</td>
<td>Granted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kent</td>
<td>Denied</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Martinez</td>
<td>Denied</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prado</td>
<td>Granted</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Rainey</td>
<td>Granted</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Rainey</td>
<td>Granted</td>
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</table>

| 75% Grant Rate | | 33.33% Grant Rate | | 60% Grant Rate |

60
(APPENDIX D continued . . . page 2 of 2)

1292(b) Appeals by District Judge & Fifth Circuit Disposition

### 2003

<table>
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<td>Cummings</td>
<td>Granted</td>
<td>Barbier</td>
</tr>
<tr>
<td>Fish</td>
<td>Granted</td>
<td>Englehart</td>
</tr>
<tr>
<td>Kent</td>
<td>Granted</td>
<td>Fallon</td>
</tr>
<tr>
<td>Nowak (*M.J.)</td>
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<td>James</td>
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<td>Rodriguez, X.</td>
<td>Denied</td>
<td>Lemmon</td>
</tr>
<tr>
<td>Rodriguez, X. (companion case)</td>
<td>Denied</td>
<td>McNamara</td>
</tr>
<tr>
<td>Solis</td>
<td>Granted</td>
<td>Minaldi</td>
</tr>
<tr>
<td>Solis</td>
<td>Granted</td>
<td>Trimble</td>
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<tr>
<td>Solis</td>
<td>Pending</td>
<td>Walter</td>
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<tr>
<td>Sparks</td>
<td>Granted</td>
<td></td>
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<tr>
<td>Sparks</td>
<td>Pending</td>
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</tr>
<tr>
<td>Stickney (*M.J.)</td>
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<tr>
<td><strong>80% Grant Rate</strong></td>
<td><strong>55% Grant Rate</strong></td>
<td><strong>83% Grant Rate</strong></td>
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### 2004 (through 5/17/04)

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<td>Dist. Judge</td>
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<tr>
<td>Little</td>
<td>Denied</td>
<td>Davis (*M.J.)</td>
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<tr>
<td>Minaldi</td>
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<td>Pepper</td>
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<tr>
<td>Zainey</td>
<td>Granted</td>
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<tr>
<td><strong>(pending)</strong></td>
<td><strong>75% Grant Rate</strong></td>
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### APPENDIX E

**Rule 23(f) Appeals**

*Taken in the Fifth Circuit by District Judge & the Fifth Circuit's Disposition of the Resulting Petitions for Permission to Appeal: 2002–2004*  
(page 1 of 1)

#### 2002

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<tr>
<td>Buchmeyer</td>
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<tr>
<td>Folsom</td>
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<td>Englehart</td>
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<td>Gilmore</td>
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<td>Englehart</td>
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<tr>
<td>Hughes</td>
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<td>Feldman</td>
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<tr>
<td>75% Grant Rate</td>
<td>50% Grant Rate</td>
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#### 2003

<table>
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<tr>
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<tbody>
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#### 2004 (through 5/17/04)

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</tr>
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<tr>
<td>Gilmore</td>
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*pending*