

# Appellate Practice

American Bar Association Litigation Section

---

## Pushing Pause: Interlocutory Appeals under 28 U.S.C. § 1292(b)

[Katayoun A Donnelly](#) and [Blain D Myhre](#)

Jun 03, 2019

Most trial attorneys at some point find themselves facing a potentially outcome-determinative legal question that, because of the potential of multiple appeals and trials, has substantial financial or other consequences for their clients. The question becomes, “Can we pause, resolve the issue now, and then continue the proceedings to avoid the substantial costs of possibly unnecessary proceedings?”

The default answer is no—due mainly to the strong presumption against piecemeal appeals. However, in rare cases, the possibility for an interlocutory appeal does exist. This note focuses on one avenue: 28 U.S.C. § 1292(b).

### Interlocutory Appeals: Overview

Interlocutory appeals generally are not permitted because of the “basic tenet of federal law to delay appellate review until a final judgment has been entered.” *Koehler v. Bank of Bermuda*, 101 F.3d 863, 865 (2d Cir. 1996) (citation omitted). In enacting 28 U.S.C. § 1292(b), however, Congress created one narrow exception to the final judgment rule. Section 1292(b) applies to orders not otherwise appealable under section 1292 that involve (1) a controlling question of law (2) about which there is substantial ground for difference of opinion and (3) for which an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

The district court must certify satisfaction of these three requirements in its order. Counsel must then convince the court of appeals to, “in its discretion, permit an appeal to be taken from such order.” 28 U.S.C. § 1292(b); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1708 (2017); *see also Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 906 (2015). Importantly, counsel have only 10 days after the entry of the district court’s order to file the petition with the court of appeals. 28 U.S.C. § 1292(b).

# Appellate Practice

American Bar Association Litigation Section

---

## Interlocutory Appeals: An Exception to the General Rule of Finality

“Permitting piecemeal, prejudgment appeals . . . undermines efficient judicial administration and encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation.” *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009) (internal quotation marks and citations omitted). Thus, case law repeatedly recognizes that section 1292(b) “is a rare exception to the final judgment rule that generally prohibits piecemeal appeals,” and “is reserved for those cases where an intermediate appeal may avoid protracted litigation.” *Koehler*, 101 F.3d at 865–66 (citation omitted); *see also Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (“Routine resort to § 1292(b) requests would hardly comport with Congress’ design to reserve interlocutory review for ‘exceptional’ cases while generally retaining for the federal courts a firm final judgment rule.”).

Whether to permit an interlocutory appeal involves determining not whether an interest is important in the abstract but instead “whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders. We routinely require litigants to await until after final judgment to vindicate valuable rights, including rights central to our adversarial system.” *Mohawk Indus.*, 558 U.S. at 108–09 (in the context of a collateral order doctrine appeal).

Discretionary review mechanisms such as section 1292(b) serve as useful safety valves for promptly correcting serious errors. *Id.* at 111 (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994)). But Congress has limited the availability of such review, initially by choosing “to confer on district courts first line discretion to allow interlocutory appeals.” *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 46–47 (1995).

Section 1292(b) appeals are appropriate “only in exceptional cases where an immediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.” *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 690 F. Supp. 170, 172 (S.D.N.Y. 1987) (citations omitted). The institutional efficiency of the federal court system is among the chief concerns underlying section 1292(b). The efficiency of both the district court and appellate court are relevant, and the benefit to the district court of avoiding unnecessary trials must be weighed against the inefficiency of having the appellate court hear multiple appeals in the same case. *SEC v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 226–27 (S.D.N.Y. 2000).

# Appellate Practice

## American Bar Association Litigation Section

---

### Certification: District Court

A litigant wishing to use section 1292(b) to bring an interlocutory appeal must first convince the district court to issue the required certification. To obtain district court certification, the moving party must persuade the court to certify satisfaction of the three statutory criteria: “(1) a controlling question of law, (2) that involves a substantial ground for difference of opinion, (3) the resolution of which by the court of appeals will materially advance the termination of the dispute.” *Nat’l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 145 (E.D.N.Y. 1999).

What makes a question of law “controlling”? “Although the resolution of an issue need not necessarily terminate an action in order to be ‘controlling,’ it is clear that a question of law is ‘controlling’ if reversal of the district court’s order would terminate the action.” *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990) (citations omitted). Further, a controlling question of law need not affect a wide range of pending cases. *Id.* What “the framers of § 1292(b) had in mind is more of an abstract legal issue or what might be called one of ‘pure’ law, matters the court of appeals ‘can decide quickly and cleanly without having to study the record.’” *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1258 (11th Cir. 2004) (quoting *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000)). Thus, questions of fact or mixed questions of fact and law are not likely to satisfy the controlling question of law requirement.

“[C]losely tied” to the controlling question of law requirement is the requirement that the “appeal materially advance the ultimate termination of the litigation.” *Telectronics Proprietary*, 690 F. Supp. at 176 (quoting 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 3930 (1977 & Supp. 1986)); *Credit Bancorp*, 103 F. Supp. 2d at 227 (“Although technically the question of whether there is a controlling issue of law is distinct from the question of whether certification would materially advance the ultimate termination of the litigation, in practice the two questions are closely connected.”).

To address this requirement, district courts seem to look at whether an immediate appeal would narrow or simplify the scope of the litigation. For example, in *District of Columbia v. Trump*, the court denied certification of President Trump’s request for an interlocutory appeal in a case alleging violations of the Emoluments Clause, noting that an immediate appeal on the question of the court’s interpretation of the term “emolument” would not “materially advance the ultimate termination of the proceedings or otherwise streamline the proceedings in any material respect.” 344 F. Supp. 3d 828, 837 (D. Md. 2018) (emphasis added). Conversely, in *Scott v. Ruston Louisiana Hospital Co.*, the district court granted certification where an interlocutory appeal might promote settlement by addressing the

# Appellate Practice

## American Bar Association Litigation Section

---

range of damages available under a state law setting limits on medical-malpractice damages. No. CV 16-0376, 2017 WL 1364219, at \*5 (W.D. La. Apr. 12, 2017); *see also Telectronics Proprietary*, 690 F. Supp. at 176 (granting certification over denial of attorney disqualification, noting that an immediate appeal may avoid a great deal of pretrial effort that would have to be duplicated in the event counsel were disqualified after final judgment). *But cf. Credit Bancorp*, 103 F. Supp. 2d at 227 (denying the Securities and Exchange Commission’s request for certification of order granting permissive intervention under Federal Rule of Civil Procedure 24(b), noting that although reversal of the court’s order would affect the way the litigation would be conducted, it was “not at all clear that it would simplify matters so as to materially advance termination of the litigation and thus warrant certification”); *Westwood Pharms., Inc. v. Nat’l Fuel Gas Distribution Corp.*, 964 F.2d 85, 88–89 (2d Cir. 1992) (addressing merits of an interlocutory appeal of interpretation of CERCLA provisions, but expressing misgivings of the propriety of certification under section 1292(b), noting that it was not clear that disposition of the appeal would materially advance the ultimate determination of the case).

The requirement that the controlling question of law involve a substantial ground for difference of opinion often requires the district court to assess how much other courts within the circuit have disagreed over the same issue. For example, in *EEOC v. Maggie’s Paratransit Corp.*, the court denied certification in part because the defendant overstated the extent to which trial courts in the Second Circuit viewed the standards for sustaining a pattern or practice discrimination claim differently. 351 F. Supp. 2d 51, 54 (E.D.N.Y. 2005). In contrast, the court in *Ruston Louisiana* recognized “that the fact that another district court within the Fifth Circuit has decided the same question differently means that there is at least some disagreement on this legal question.” 2017 WL 1364219, at \*5. The court concluded that reasonable minds could differ as to the merits of its conclusion and that a substantial ground for a difference of opinion existed.

Courts have denied certification on the difference of opinion requirement where the court did not perceive a substantial likelihood that its legal ruling would be reversed. *See Favell v. United States*, 22 Ct. Cl. 132, 144–45 (Cl. Ct. 1990) (income allocation question in tax case). A party’s own disagreement with a district court’s conclusion does not constitute substantial grounds for difference of opinion. *Trump*, 344 F. Supp. 3d at 837 (quoting *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009)). In *Trump*, the court declined certification, concluding that no substantial disagreement existed “over the meaning of the term ‘emolument’ in the sense that reasonable jurists, much less courts, would disagree. . . .” *Id.* Thus, it appears that to satisfy this element, the appellant must show that reasonable minds could differ on the legal issue. *See id.*

Even if the three criteria are met, however, district courts still have “independent and ‘unreviewable’ authority to deny certification.” *Nat’l Asbestos Workers*, 71 F. Supp. 2d at

# Appellate Practice

## American Bar Association Litigation Section

---

146, 166–67 (denying certification of RICO cases against tobacco companies, concluding that “unique factual and legal issues,” including highly fact-specific issues of RICO causation, counseled against certification); *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007) (district court has unfettered discretion to deny certification of an order for interlocutory appeal even when a party has demonstrated that the criteria of section 1292(b) are met). A district court’s decision not to certify an appeal is final and unreviewable because a lack of certification ordinarily precludes appellate jurisdiction. *Trump*, 344 F. Supp. 3d at 833; *see also Pisgah Contractors v. Rosen*, 117 F.3d 133, 137 (4th Cir. 1997) (section 1292(b) does not provide appellate court with subject matter jurisdiction where district court expressly declines to certify an order).

## Certification: Court of Appeals

Even if a party successfully obtains district court certification, it still must convince the court of appeals to exercise its discretion to hear the appeal. The court of appeals’ discretion is unfettered, and the court can deny certification for any reason, including docket considerations. *See Microsoft*, 137 S. Ct. at 1709; *Kennedy v. Bowser*, 843 F.3d 529, 536 (D.C. Cir. 2016). Under the statute, counsel must file the request for leave with the court of appeals within 10 days after the district court enters its certifying order. 28 U.S.C. § 1292(b). Thus, counsel must be prepared to immediately file in the court of appeals, lest it miss the narrow window for seeking leave. In seeking leave to appeal from the circuit court, the appellant must demonstrate “exceptional circumstances” in which “the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.” *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005) (internal quotation marks and citations omitted).

But even district court certification and the appeals court’s grant of leave for the interlocutory appeal does not guarantee that the court of appeals will decide the merits of the appeal. An appeals court’s order granting permission for an interlocutory appeal is not irrevocable. *McFarlin*, 381 F.3d at 1253. An initial order by a motions panel granting an interlocutory appeal is subject to being vacated by the merits panel as improvidently granted. *Id.*; *see also Koehler*, 101 F.3d at 866 (noting that certification comes before a motions panel, but its grant of leave to appeal is provisional because the merits panel that hears the appeal is free to review that subject again).

For example, in *Koehler*, the district court denied a motion to dismiss for lack of personal jurisdiction and certified the issue for interlocutory appeal. A motions panel of the Second Circuit granted leave to appeal. But the merits panel declined to address the merits of the personal jurisdiction issue and remanded to the district court to conduct further proceedings to determine personal jurisdiction. In so doing, the court said that

# Appellate Practice

## American Bar Association Litigation Section

---

“certification of the personal jurisdiction question at this initial stage of the proceeding in the absence of discovery and a district court hearing to determine the jurisdictional question by a preponderance of the evidence was improvidently granted.” 101 F.3d at 867. The court was “reluctant to rely on what may turn out to be an incomplete record to clarify legal doctrine for the district court’s guidance.” *Id.* at 866; *see also Caraballo-Seda*, 395 F.3d at 8–9 (vacating as improvidently granted leave for interlocutory appeal, finding that requirements of section 1292(b) were not met).

## No Automatic Stay

Litigants should also be aware that section 1292(b) does not provide for an automatic stay of the district court proceedings, but instead leaves that to the district judge or circuit court judge. Thus, an appellant wanting a stay should request and justify entry of a stay when requesting certification from the district court. While it is likely that stays would be granted in most cases, the statute requires litigants to affirmatively request them.

## Conclusion

Section 1292(b) is an exceptional remedy applied relatively sparingly and in exceptional cases. Although an interlocutory appeal is difficult to obtain, it can be a useful, albeit narrow, tool for trial and appellate advocates.