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DISCRETIONARY APPELLATE REVIEW OF NON-FINAL ORDERS: IT'S TIME TO CHANGE THE RULES*

Howard B. Eisenberg** and Alan B. Morrison***

I. INTRODUCTION

On January 15, 1999, the United States Supreme Court granted a petition for writ of certiorari in *Cunningham v. Hamilton County*.[1] The case involves no constitutional issue, the amount at stake is less than $1500, and the High Court was not even asked to decide the merits. *Cunningham* is a procedural case, in which the issue is whether a lawyer, who was disqualified from the

*A version of this article was originally prepared by the authors, who are both Fellows of the American Academy of Appellate Lawyers (AAAL), as background material for the Academy's consideration of the issue of interlocutory appeals in the federal courts. A draft report was presented to the Academy at its retreat in May 1998. The discussions at the retreat led to a recommendation that was considered by the Academy at its annual meeting on August 1, 1998. On November 23, 1998, the Board of the Academy approved the final version of the recommendation, which is attached to this article.

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1. Starcher v. Correctional Med. Sys., Inc., 144 F.3d 418 (6th Cir. 1998), *cert. granted sub nom.* Cunningham v. Hamilton County, Ohio, 67 U.S.L.W. 3456 (Jan 15, 1999) (No. 98-727), *aff'd*, 67 U.S.L.W. 4458 (June 14, 1999).

proceedings below and fined for failure to comply with her opponent's discovery request, has the right to appeal that fine while the case is still underway.

The problem for the attorney in *Cunningham* is the "final decision" requirement of 28 U.S.C. § 1291 under which, with a few exceptions, a case must be concluded before any appeal can be taken. Because the case was still being litigated in the district court, the *Cunningham* attorney tried to fit her appeal into one of the exceptions, the so-called "collateral order" rule discussed below.[2] Because the parameters of that doctrine are far from clear, eleven federal courts of appeals have produced five different rules on whether and under what circumstances lawyers in the position of Ms. Cunningham can obtain interlocutory review.

The appealability of non-final orders in civil cases has long been a subject of debate. In recent years, there has developed an increasing disquietude with the present system of quite limited interlocutory appeals. There is a growing sense that there are some decisions that ought to be, but cannot be, reviewed before a case is concluded; that courts are straining existing doctrine to find a basis for reviewing them; and that courts and parties are spending significant amounts of time litigating whether a decision may be reviewed on an interlocutory basis. Although *Cunningham* crossed our radar screens after the work on this article and the attached recommendation were largely completed, the number of appellate courts that have spoken on this jurisdictional issue, the apparent frequency with which it arises, and the modest amount at issue on the merits (if anyone ever reaches it) all vividly illustrate our conclusion that the final order rule is not working very well.

The Supreme Court's decision in *Cunningham* has now clarified the narrow question of when a disqualified attorney may appeal a sanctions order. But its broader significance will remain as another example of the approach under which the Supreme Court attempts to decide, on a case-by-case basis, which "non-final" orders are immediately appealable and which can only be appealed after the entire case is concluded. In the meantime, battles over jurisdiction to hear appeals from non-final orders will continue to consume a great deal of federal judges' time, often

2. *Id.* at 422-25; *see infra* text accompanying notes 12-15.

without deciding the merits of the case, while parties and their lawyers pay dearly in both time and money.

In short, we conclude that the present system is not working and needs to be changed. We further conclude that attempting to codify or further identify non-final orders that are immediately appealable is not likely to clarify the law, expedite the disposition of litigation, or reduce collateral litigation in the courts of appeals. Moreover, in our judgment, such an approach is doomed to be either over- or under- inclusive. Instead, we recommend the adoption of a new rule that would create a right to request interlocutory review of any non-final order, but would vest the appellate courts with discretion to decide which cases it will actually hear. In our view, a discretionary review provision is not only more honest, but is less likely to result in too many or too few additional appeals. In this respect, we align ourselves with recently amended rule 23(f) of the Federal Rules of Civil Procedure that allows discretionary appeals from orders granting or denying class certification,[3] although we do not embrace all of the details in that rule.

We anticipate some resistance to this proposal, especially from circuit judges who are concerned about the potential increase in their workload. However, we believe that any increase in work from sifting petitions for review will be both modest and limited to the short run, while the savings from avoiding difficult jurisdictional issues, like the one posed in *Cunningham*, will more than offset any increase. And because review will only be by permission of the courts of appeals, the courts will have it within their total control to determine the number of appeals that they will take.

Others have documented the problems with the current state of the law defining when non-final orders are immediately appealable,[4] and so we need not restate the problems here. Instead,

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3. *See* FED. R. CIV. P. 23(f):

> (f) 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 court or court of appeals so orders.

4. *See, e.g.*, Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993); Thomas D. Rowe, Jr., *Defining Finality and Appealability by Court Rule: A Comment on Martineau's "Right*

we assume the need for a solution and provide only the minimal background information necessary, together with the outlines of various alternatives. The heart of our discussion is our recommendation that the current system should largely be replaced with one in which, in most instances, the decision on whether to allow an interlocutory appeal in a civil case is left to the sound discretion of the courts of appeals, rather than prescribed in detailed rules that attempt to decide the issue in advance. In the final section, we discuss five subsidiary issues that bear on this recommendation.[5]

II. BACKGROUND

A. Current State of the Law

1. Appeals as of Right

With certain important exceptions, appeals in the federal system may now be taken as of right only from "final decisions."[6] A final decision is ordinarily a final judgment that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[7] Congress has also expressly provided for an appeal as of right from orders granting, continuing, modifying, refusing, or dissolving injunctions (whether preliminary or otherwise);[8] from certain orders relating to receivers and receiverships;[9] from certain interlocutory decrees in admiralty cases;[10] and from certain orders in arbitration cases.[11] In addition,

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Problem, Wrong Solution," 54 U. PITT. L. REV. 795 (1993); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165 (1990); John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200 (1994).

5. We have not considered whether either the government or the defendant in a criminal case should have increased rights to interlocutory appeals.

6. *See* 28 U.S.C. § 1291 (1993).

7. Catlin v. United States, 324 U.S. 229, 233 (1945).

8. 28 U.S.C. § 1292(a)(1) (1993).

9. *Id.* § 1292(a)(2).

10. *Id.* § 1292(a)(3).

11. 9 U.S.C. § 16 (1998).

the Supreme Court, in rule 54(b) of the Federal Rules of Civil Procedure (which presumably is based on its construction of the term "final decisions" in section 1291), has allowed appeals in cases in which there are multiple claims or multiple parties, and the district court enters a separate judgment as to one or more, but less than all, of the claims and/or parties and expressly determines that "there is no just reason for delay . . . for the entry of the judgment."

In *Cohen v. Beneficial Industrial Loan Corp.*,[12] the Supreme Court construed the term "final decisions" to include those orders which, although not ending the entire case, are "practically" or "effectively" final. These "collateral orders" must: (1) be completely separate from the merits of the case; (2) not be tentative, informal or incomplete, but conclusively determine the disputed question; and (3) cause irreparable harm to the appellant if review is delayed.[13] The purpose of the "collateral order doctrine" is to provide review of an issue that would be effectively unreviewable on appeal from a final judgment. Put another way, an order is collateral, and hence appealable, if it "involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'"[14] However, even if the issue is collateral, it is not immediately appealable if resolution of a factual dispute is required for determination of the question.[15]

Because these standards are inherently subject to interpretation, many parties attempt to use the collateral order doctrine to obtain interlocutory review, and the appellate courts are forced to devote considerable resources to deciding their jurisdiction. And because there is much to gain and very little to lose from seeking to obtain interlocutory review by this route, unless other changes are made, litigants will continue to attempt to use it frequently.

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12. 337 U.S. 541, 546-47 (1949).

13. *Id. See also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

14. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498-499 (1989) (quoting Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989)).

15. Johnson v. Jones, 515 U.S. 304, 305 (1995).

2. Appeals by Permission

In addition to appeals of right, the district court may certify a question to the court of appeals for interlocutory appeal if the district judge concludes that the case involves a controlling question of law over which there is a substantial ground for a difference of opinion and the resolution of which may materially advance the ultimate termination of the litigation.[16] Significantly, this provision requires the concurrence of both the district court and court of appeals to obtain interlocutory review. If the district court refuses to certify a question, the court of appeals has no jurisdiction to review the order, and mandamus generally will not lie to compel a district court to grant certification.[17] Moreover, the court of appeals can decline to review a certified question for any or no reason.[18]

3. Interlocutory Review by Extraordinary Writ

Under limited circumstances, litigants may obtain appellate review of a non-final order through mandamus and prohibition. However, an extraordinary writ "is not to be used as a substitute for appeal,"[19] and "'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.'"[20] The petitioning party must show, among other things, that his right to the issuance of the writ is "'clear and indisputable.'"[21] A litigant does not have a clear and indisputable right to a particular result in matters committed to the discretion of the district court.[22]

In recent years, those seeking interlocutory review of orders granting class certification have successfully used mandamus when the district court declined to certify the question under section 1292(b).[23] Similarly, the Third Circuit recently issued a

16. 28 U.S.C. § 1292(b) (1993).

17. Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1338 (9th Cir. 1976).

18. *In re* Convertible Rowing Exerciser Patent Litig., 903 F.2d 822, 822 (Fed. Cir. 1990).

19. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

20. Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976) (quoting Will v. United States, 389 U.S. 90, 95 (1967)).

21. *Id.* at 403 (quoting Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953)).

22. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66 (1978) (plurality opinion).

23. *E.g.*, *In re* American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); *In re* Rhone-

writ of mandamus that overturned an otherwise not immediately appealable order rejecting claims of attorney-client and work product privileges.[24] We are hopeful that the newly amended rule 23(f) of the Federal Rules of Civil Procedure, which gives the court of appeals discretion to accept interlocutory appeals from orders granting or denying class certification, will remove the pressure to use mandamus to review class certification rulings.

B. The Problem with the Existing Law

There is widespread dissatisfaction with the present state of the law regarding appeals from non-final orders. The present scheme is freakish and inconsistent in its application; it denies review to many "non-final" orders whose immediate review would materially advance the litigation (in many instances by resolving issues standing in the way of settlement), or whose resolution would aid in the development of the law; and it leads to protracted collateral litigation on questions of "finality" and the courts of appeals' jurisdiction to review non-final orders.[25]

From a litigant's point of view, the current state of the law is problematic not only because the law is arcane and confusing, but also because the courts appear to apply the law of jurisdiction based on whether they want to hear an interlocutory appeal or avoid deciding the issue. For example, the law on mandamus as a substitute for interlocutory appeal is wildly inconsistent, contradictory, and outcome-driven.[26] While a collateral order gives

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Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

24. *In re* Ford Motor Co., 110 F.3d 954 (3d Cir. 1997).

25. The Federal Courts Study Committee explained in its 1990 report:

> The state of the law on when a district court ruling is appealable because it is "final," or is an appealable interlocutory action, strikes many observers as unsatisfactory in several respects. The area has produced much purely procedural litigation. Courts of appeals often dismiss appeals as premature. Litigants sometimes face the possibility of waiving their right to appeal when they fail to seek timely review because it is unclear when a decision is "final" and the time for appeal begins to run. Decisional doctrines—such as "practical finality" and especially the "collateral order" rule—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review.

FEDERAL COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95 (1990); *see generally* Nagel, *supra* note 4, at 200 n.4.

26. *See* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §

the party an appeal of right, a court can avoid deciding the matter by defining the question under review as other than "collateral."

Certified appeals under section 1292(b) are unsatisfactory to would-be interlocutory appellants for several related reasons. The statute includes several very vague criteria that can be invoked by a district court to deny certification. Once the district court decides that the order is not subject to certification, the court of appeals cannot hear that appeal. Even if the district court certifies an order, the court of appeals can refuse to hear the appeal because it does not believe that the statutory criteria are met. And, much as the Supreme Court does when it denies certiorari, courts of appeals are not required to state their reasons for denying a section 1292(b) appeal and rarely do so. Thus, the courts of appeals are not developing standards for certification under section 1292(b). In fact, courts of appeals decline to hear approximately two-thirds of the cases certified by district courts for interlocutory appeal.[27]

C. The Congressional Response

In 1988 Congress created the Federal Courts Study Committee ("the Committee") to recommend various changes in federal court structure and jurisdiction.[28] Although many of the Committee's ultimate recommendations were controversial and have not been acted upon, Congress did implement two recommended amendments by which it delegated to the Supreme Court authority under the Rules Enabling Act to adopt rules determining finality and the circumstances under which non-final orders would be appealable.[29] It was this authority that the Supreme Court used in creating new rule 23(f), but none of the rules committees have proposed rules under which the Court

3932.1 (2d ed. 1996 & Supp. 1999) (collecting and discussing conflicting cases).

27. *See* Solimine, *supra* note 4, at 1176.

28. *See* Federal Courts Study Act, 28 U.S.C. § 331 (1988).

29. See the Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089, creating 28 U.S.C. § 2072 (1994), which gave the Court rulemaking authority to "define when a ruling of a district court is final for the purposes of appeal under section 1291," 28 U.S.C. § 2072(c) (1994); and the Federal Courts Administration Act of 1992, Pub. L. 102-572, 106 Stat. 4506, § 101 (1992), creating 28 U.S.C. § 1292(e) (1998), which gave the Court the authority "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for."

would use this power in circumstances outside the class action context.

These statutory changes were accomplished with no congressional debate, and there is no legislative history beyond the Committee's recommendation.[30] Indeed, even within the Study Committee, there was very little discussion of this recommendation.[31]

III. ALTERNATIVES

A range of suggestions for possible changes relating to finality and appeals from non-final orders have been advanced. Some of them would require modifications of existing statutes, others can be acted on by the Court alone, and others might be acted on by the Court alone, but the result would be cleaner if Congress legislated as well. Of those recommendations that have been or might be made, there are three that do not deserve serious contention. First, the Supreme Court and Congress could do nothing and simply maintain the status quo. However, Congress, academics, and most appellate practitioners have identified significant problems with the current system.[32] The scheme for appeals from non-final orders is, indeed, "broke" and needs fixing.

Another suggestion is to eliminate *all* appeals of right—both interlocutory and final—and make all appeals discretionary. Although the Court probably could not take this step under existing statutes,[33] there has been discussion of eliminating appeals of right even from final judgments,[34] at least in some categories of cases.[35] However, we assume, like most commentators, that appeals of right from final judgments will continue to exist.

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30. *See* Martineau, *supra* note 4, at 726.

31. *Id.* at 723-26.

32. *See supra* notes 4 and 25.

33. *Compare* Martineau, *supra* note 4, at 772 *with* Rowe, *supra* note 4, at 799.

34. Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 561-564 (1932).

35. For many years, proposals have been made to remove social security cases from Article III courts or to limit judicial review of denied claims. *See* Eric Efron, *Court Idea Revived*, NAT'L L.J. Mar. 24, 1986, at 2. To date, neither Congress nor the Supreme Court has adopted these proposals, although Congress has restricted the right of prisoners to appeal from adverse district court decisions in habeas corpus cases. 28 U.S.C. § 2253 (Supp. 1997).

Also not seriously considered is a suggestion to abolish appeals from non-final orders altogether and return to a strict view of the "final judgment" rule. While this approach might remove the current ambiguity regarding appellate jurisdiction over non-final orders, it would create the type of unfairness and injustice that has led both Congress and the Court to adopt exceptions to the final judgment rule.

A. Basic Criteria for Appealability of Non-Final Orders

Assuming that appeals of right from final judgments are to remain and that some appeals from non-final orders will be allowed, the inquiry must be directed at identifying the criteria or indicia under which there might be additional appeals from non-final orders. There is a consensus about some of these criteria:

- Any rule should be easily understood and easily applied to a given factual setting.
- Any rule should be written in such a way as to minimize collateral litigation over jurisdiction and reduce the impact of "technicalities" on the availability of interlocutory review.
- Any rule should assure that interlocutory appeals are promptly taken and resolved expeditiously.
- Any rule should minimize piecemeal litigation. Thus, interlocutory appeals should be allowed only where they will expedite disposition of the case, either by deciding a dispositive issue or by making the probability of settlement much greater once the interlocutory issue is resolved.
- Any rule should not unduly burden the courts of appeals with a significant increase in either cases or adjudications (as contrasted with discretionary decisions) over whether to allow an appeal. In addition, the rule should be written to avoid "two appeal" cases, one from an interlocutory order and one from the final judgment.
- Any rule allowing appeals from non-final judgments should not cause parties to lose their right to appeal by not seeking interlocutory appeal or by having an appeal dismissed as procedurally premature.
- Use of mandamus and prohibition as substitutes for appeal should be eliminated (or sharply curtailed) once and for all.

There are, however, a series of other issues that must be resolved, and on these there is less agreement:

- Is the primary purpose of allowing interlocutory appeal to reduce the overall workload of the court of appeals, or to make things simpler (and fairer) for litigants, or to expand the number of appeals of non-final orders where such appeals appear warranted by the equities of the case?
- Should any new rule expand (or reduce) the circumstances under which appeals from non-final orders are allowed?
- Should some types of orders be presumptively non-appealable, and should this presumption be codified?
- Should a rule authorizing appeals from non-final orders create more appeals of right or more discretionary appeals, and which court(s) should exercise any such discretion?
- To what extent should the rule attempt to codify the "collateral order" doctrine, or should that doctrine be abrogated by the rule?
- Should any new rule try to list or identify criteria for interlocutory appeals, or specify the kinds of issues or orders that are appealable, or be largely discretionary, leaving to the court the power to hear any appeal from any non-final order that it deems appropriate?
- To what extent, *if any*, should the district court be the gatekeeper for interlocutory appeals? Stated another way, should the trial court be able to block an appeal from a non-final order, express an opinion on such an appeal, or say nothing about the desirability of a non-final appeal?
- Under what circumstances should an appeal from a non-final order stay proceedings in the district court?

B. Alternative Schemes for Appeals from Non-Final Orders

With these issues in mind, it is appropriate to turn to a number of proposals to provide for appeals from non-final orders by implementing the Supreme Court's rule-making authority and by providing additional statutory authority.[36] Obviously, they can be combined or modified in a number of ways, but the following

36. Professor Martineau describes in detail the various proposals for codifying interlocutory appeals by rule and/or statute. *See* Martineau, *supra* note 4, at 748-70.

are certain basic options that present the range of available choices.

1. Option One: Codify the Status Quo

(a) Collateral order doctrine. One approach would codify the collateral order doctrine in a rule, along the lines suggested by Supreme Court precedent, to permit review of lower court rulings of "substantial importance" to litigants.

(b) Codify use of mandamus. Under this approach, the Court could include within a new rule those circumstances under which mandamus and prohibition could be used to obtain interlocutory review. Under such a rule, an interlocutory appeal would be available when a district court acted beyond its jurisdiction or refused to exercise jurisdiction when that was not a lawful option. Discretionary orders, by definition, would not be reviewable unless they fell under the collateral order doctrine.

(c) Appeals by certification. Appeals by certification under section 1292(b) would remain, and/or the statute could be modified to expand the category of cases in which appeal by permission would be allowed. However, the same basic structure whereby the district court acts as a gatekeeper and criteria for appeal are limited would continue.

It is not clear that any of these three proposals would have any benefit over the present situation. In fact, there is nothing to show that a rule codifying the existing law would be any easier to apply than the current law, and such an approach would not expand the circumstances under which interlocutory appeals were possible. In all likelihood, codification would probably engender more litigation and/or shift the basis for future disputes to the meaning of the codified rules.

2. Option Two: Specify the Types of Appealable (and Non-Appealable) Interlocutory Orders

Another alternative is to delineate by rule or, if necessary, by statutory amendment those situations under which appeals of right

could be taken from non-final orders. Under the approach, the issue is appealable by right if the delineated criteria are met. Some state court systems and several commentators have tried to define when interlocutory appeals of right may be taken. Although a range of somewhat overlapping factors has been identified, commonly they involve:

- Whether interlocutory review is required to avoid an injustice or irreparable harm.
- Whether the issue will be unreviewable following the final judgment.
- Whether denying immediate review would create a hardship for one or more of the parties.
- Whether interlocutory appeal would materially advance termination of the litigation.
- Whether interlocutory appeal would clarify a legal question of importance or general interest.
- Whether the trial court's decision is clearly wrong or there is a substantial doubt concerning the legal question.
- Whether the action of the trial court upsets the status quo or limits a party's ability to litigate the case.
- Whether the appeal is necessary to protect substantial rights that could not be protected after a final judgment.

However, these and virtually any other criteria that could be devised are, of necessity, both quite broad and quite vague, and sometimes they push in opposite directions. Thus, while a rule might purport to grant an appeal of right in certain types of cases, in reality a court could decline to hear an interlocutory appeal and dismiss for lack of jurisdiction as a matter of law by finding that the case does not fit one of the general categories. In such a case, the court, by construing the jurisdictional provision narrowly, is, in effect, denying the appeal for a discretionary reason. Moreover, the Supreme Court is unlikely to review any of these jurisdictional rulings (except possibly in a case in which the appeals court found jurisdiction and decided the merits of the appeal), thereby creating a great deal of new "law," largely on a circuit-by-circuit basis.

3. Option Three: The A.B.A./Wisconsin Approach

In 1976 the voters of Wisconsin amended the state constitution to create an intermediate appellate court. Previously, the Wisconsin Supreme Court heard (literally) every appeal. The

constitutional amendment made the court of appeals the court of error and made the Wisconsin Supreme Court a certiorari court. In the statute that implemented the constitutional amendment, the Wisconsin legislature adopted the American Bar Association's *Standards Relating to Appellate Courts.*[37] The Standards, as now codified in Wisconsin, are set out below:

> Wis. Stat. § 808.03 Appeals to the court of appeals
>
> (1) Appeals as of right. A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. . . .
>
> (2) Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:
>
> (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
>
> (b) Protect the petitioner from substantial or irreparable injury; or
>
> (c) Clarify an issue of general importance in the administration of justice.[38]
>
> Wis. Stat. § 809.50 Appeal from judgment or order not appealable as of right

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37. AMERICAN BAR ASSOCIATION COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS, Section 3.12, at 25 (1977):

> Appealable Judgments and Orders.
>
> (a) Final Judgment. Appellate review ordinarily should be available only upon the rendition of final judgment in the court from which appeal or application for review is taken.
>
> (b) Interlocutory Review. Orders other than final judgments ordinarily should be subject to immediate appellate review only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will:
>
> (1) Materially advance the termination of the litigation or clarify further proceedings therein;
>
> (2) Protect a party from substantial and irreparable injury; or
>
> (3) Clarify an issue of general importance in the administration of justice.

38. Wis. Stat. § 808.03 (1994).

> (1) A person shall seek leave of the court to appeal a judgment or order not appealable as of right under § 808.03(1) by filing within 10 days of the entry of the judgment or order a petition and supporting memorandum, if any. . . . The petition shall contain:
>
> (a) A statement of the issues presented by the controversy;
>
> (b) A statement of the facts necessary to an understanding of the issues;
>
> (c) A statement showing that review of the judgment or order immediately rather than on an appeal from the final judgment in the case or proceeding will materially advance the termination of the litigation or clarify further proceedings therein, protect a party from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice; and
>
> (d) A copy of the judgment or order sought to be reviewed.
>
> (2) An opposing party in the trial court shall file a response with supporting memorandum, if any, within 10 days of the service of the petition.[39]

These rules have now been in place for two decades and generally have not caused any problems. Of course, not many interlocutory appeals are actually heard by the Wisconsin Court of Appeals. For the most recent years for which we obtained information, the number and rate of appeals in Wisconsin, as reported by the Clerk of the Wisconsin Supreme Court/Court of Appeals, are contained in Table 1 below.[40]

39. *Id.* § 809.50.

40. Data collected by the clerk of the Wisconsin Supreme Court specifically for this project, and on file with Dean Eisenberg.

Table 1

YEAR	1994	1995	1996	1997 to 9/30
Appeals from Final Judgments or Orders	2,476	2,577	2,616	2,006
Petitions for Leave to Appeal Interlocutory Orders	331	370	319	220
Number and Percent Granted	91 (27%)	126 (34%)	71 (22%)	58 (26%)
Ratio of Appeals from Final Judgments to Interlocutory Appeals Granted	27.2: 1	20.4: 1	36.8: 1	34.6: 1

The Administrative Office of Courts of the United States does not maintain similar statistics for the federal courts of appeals, even under the more limited circumstances in section 1292(b). Thus, no comparison is possible between the experience in Wisconsin and the experience of the federal courts under the present federal statutes. What is clear, however, is that interlocutory appeals are a minor part of the appellate workload in Wisconsin.

The Wisconsin statutes are notable in two important respects. First, the trial court is not the gatekeeper for interlocutory appeals. The permission of the state circuit court is not required before seeking interlocutory appeal, and such an appeal may be taken over the objection of the trial judge. Not surprisingly, seeking review of an interlocutory order does not stay all proceedings in the trial court, unless the trial or the appeals court so orders.[41]

41. Under Wisconsin procedure, the filing of a petition for leave to appeal has no impact on the proceedings in the trial court. However, the grant of leave to appeal "has the effect of the filing of [a] notice of appeal." Wis. Stat. § 809.50(3) (1994). This triggers Wisconsin statutes §§ 808.07 (1994) and 808.075 (1995), which specify the actions that a trial court may and may not take while an appeal is pending.

Additionally, the rules allow the appellate court to remand the case to the trial court for additional proceedings or for action upon specific issues.[42] The court of appeals may order a remand *sua sponte* or upon the motion of a party.[43]

Second, the Wisconsin rule vests virtually complete discretion in the appellate court to decide what it wants to hear. The three criteria stated in the rule are so general that they do not limit in any meaningful way the situations in which an interlocutory appeal would be possible. Essentially, the rule allows the appellate court to decide for itself, on whatever criteria it thinks appropriate, whether to hear an interlocutory appeal. Indeed, so long as review is discretionary (and presumably non-reviewable), that will be the effect almost no matter what words are chosen in an effort to circumscribe the discretion of the appellate court.

IV. RECOMMENDATION

A. Summary

In our view, the Wisconsin approach is the most sensible one and should be adopted for the federal courts in civil cases for three principal reasons.

First, in a significant, but by no means overwhelming, number of cases, interlocutory appeals are appropriate but not now available. In most of them, the issues will eventually reach the courts of appeals, and so the question is not whether, but when. In the short term, the proposed change would result in an increase in the workload of the courts of appeals because they will have to pass on requests for review and decide more cases on the merits. In the long term, however, as the courts become accustomed to working with the new rule, any increase will be more than offset by decreases in appeals from final judgments. Moreover, the number of interlocutory appeals actually taken will always be manageable because the appeals courts themselves have it wholly within their discretion to control the cases they accept.

42. Wis. Stat. § 808.075(6) (1994).

43. *Id.* §§ 808.075(5), (6).

Second, the burden on the courts of appeals of having to decide whether to accept an appeal should be modest on both a per case and a cumulative basis. In part, this is because there will be no law to research, and the judges (without the need for law clerk input in most cases) should be able to read the papers quite quickly and make an informed judgment about whether the case warrants an exception to the final judgment rule. Litigants and their counsel will recognize that the process is designed for the exceptional case and that seeking interlocutory review over routine rulings will generally not be a way to improve relations with the trial judge who is still handling the case. And, to the extent that there is any increased burden on the courts of appeals, it should be offset by a decrease in time spent deciding difficult jurisdictional issues (like those in *Cunningham*) because lawyers will no longer have the incentive to press the boundaries of the collateral order rule and mandamus.

Third, the approach is a frank recognition that attempts to define when an interlocutory appeal is warranted are rather like Justice Potter Stewart's description of pornography: I know it when I see it. Because so much depends on the particular facts and circumstances of the case and the precise legal question presented, any mandatory standards (as contrasted with guidelines or criteria for the exercise of discretion) are almost certain to be over-inclusive or under-inclusive, or perhaps both. And because decisions on whether to allow an interlocutory appeal under this approach are so plainly discretionary, judges will no longer worry about granting or denying an appeal because of some special factor, thereby creating a cleaner body of jurisdictional law.

B. Possible Objections

No organized constituency is likely to oppose this recommendation, but that does not mean that there will be no opposition. First, this is a change (some would say a fairly radical one), and lawyers and judges often resist any form of change.

Second, appeals court judges may resist because of a fear that they will be inundated with applications and perhaps even appeals that are accepted. As to the former, there will surely be some increase in appellate workload if this proposal is enacted, but the discretionary determinations will be relatively easy to make and

will not require any written opinions. We predict that this increase will be offset by a decrease in time spent on jurisdictional issues that abound under the current law. As for the increase in the actual number of appeals, that is wholly within the control of the courts of appeals. But even if interlocutory appeals increase, many of those cases would be appealed eventually, and others are cases for which fairness requires an exception to the final judgment rule, much like the recent amendment to rule 23(f) that will allow discretionary appeals from orders granting or denying class certification.

Those lawyers who ordinarily represent defendants will probably like this change because it will hold out the possibility that denials of motions to dismiss or for summary judgment might be immediately reviewable; plaintiffs' counsel might be concerned for that same reason, although there was no organized opposition to new rule 23(f), even though similar considerations might apply. On reflection, the change will probably be seen as essentially neutral (with some possible benefits and detriments to both plaintiffs and defendants) and unlikely to affect a significant number of cases because the courts of appeals will probably be quite stingy in accepting interlocutory appeals.

Accordingly, we recommend adoption of the Wisconsin approach under which an interlocutory appeal could be sought from any non-final order, subject to the conditions set forth in the recommendation. We considered, but ultimately rejected, using the language of new rule 23(f) and making it generally applicable. We decided against that approach because we concluded that there were sufficient differences between the limited category of class action certifications in rule 23(f) and the broad range of other orders that would be covered by the new rule as to make it desirable to create a separate rule for non-class action orders. Because the two rules would employ quite similar approaches, it might be possible at some time to fold the class action rule into the more general one, but we do not recommend that until experience is gained under both rules.[44]

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44. So far as we are aware, the decision by the authors of rule 23(f) to limit its reach to class certification issues was not a rejection of a broader rule, but simply reflects the focus of the rule on one particularly significant manifestation of a more general problem.

C. Additional Aspects of a Proposed Rule

First, because the courts of appeals will accept relatively few appeals, there should be no automatic stay of proceedings in the district court; instead, the district court should have discretion to stay proceedings while a request is pending. If permission to appeal is granted, that same discretion should continue, with the court of appeals having the power to overturn an order granting or denying a stay, in whole or in part, under an abuse of discretion standard, without the necessity of filing a separate appeal. In all likelihood, the existence of the latter power will be enough to prevent it from having to be exercised except in the most extreme cases. Indeed, this issue sometimes arises with other types of appeals under current law, and the rule should probably be made applicable to all appeals from decisions in which the case is not finally concluded in the district court.

Second, rule 23(f) and the Wisconsin law allow only 10 days to file a petition for interlocutory appeal, which seems rather short. In most cases the lawyer does not know in advance when a decision will be rendered, and vacations and other absences from work often extend for more than 10 days. The decision may take several days to arrive, the client must be consulted, and the petition, even if not overly long and not requiring new research, must still be drafted. The problem is especially difficult for governmental parties who often must proceed through several levels of bureaucracy (e.g., only the Solicitor General can authorize an appeal in a case involving the United States or one of its agencies).

On the other hand, because even requests to appeal interrupt the trial process to some degree, they should be made promptly. Notices of appeals, in contrast to petitions, are simple forms that take no time or thought to prepare, and they must be filed within 30 days (60 for the United States); that time should surely be the outside limit. In addition, if a short time like 10 days is used, the question of whether any extensions can be granted, by which court, and under what circumstances, must be decided.[45] If a longer

45. Rule 23(f) does not mention extensions, either to allow for them or to prohibit them. Nor does it explain the form for a request (if it is a motion, there is normally a page limit), nor does it state how much time the other side has for response. Some of these matters could be handled by local rules, but they might be better handled in the rule itself.

time limit is chosen, a "no exceptions" policy would be much more defensible, especially if, as is true in Wisconsin, a failure to seek interlocutory review does not result in a forfeiture of the right to seek review on that issue when there is a final judgment, although changes in circumstances may make the issue unreviewable as a practical matter.

In order to assure that an interlocutory appeal does not get caught in the regular briefing and decisional pattern of the courts of appeals (which in some places, because of workload and vacancies, can reach two years or more), the courts of appeals should promptly decide whether to accept the appeal and, if so, resolve the merits of the appeal expeditiously. However, there is no need to attempt to include any explicit language to accomplish this end because the courts of appeals generally give priority to matters involving interlocutory appeals.

Third, it will often be useful for the courts of appeals to have the views of the district court on whether an immediate appeal will help advance the final resolution of a case, but those views should not have the same gatekeeping function that they have under section 1292(b). In some cases the trial judge will express those views as part of a decision on an issue of obvious importance. At least in the commentary to any new rule, it should be made clear that district courts should feel free to express their views (as per the comments to rule 23(f)[46]) and that the court of appeals has the right to request them in a case in which it believes they would be helpful.

Fourth, the rulemakers should consider whether to extend this recommendation to bankruptcy appeals as well. In general, there is a greater ability to obtain what would be thought of as interlocutory review of bankruptcy orders than for comparable orders in other civil cases, but the problem arose recently in a case that went through a Bankruptcy Appellate Panel.[47] We have not had an opportunity to consider this issue, although there appear to be no reasons why an interlocutory appeal statute should not apply to bankruptcy cases. We believe that the rule should include admiralty as well as civil cases because, for these purposes, both

46. *See* Preliminary Draft of Proposed Amendments to Federal Rules of Appellate, Civil, and Criminal Procedure, 167 F.R.D. 523, 565 (1996).

47. *See* Lievsay v. Western Fin. Sav. Bank (*In re* Lievsay), 118 F.3d 661 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1168 (1998).

categories appear to be similar, and in some cases, admiralty and civil claims will be included in the same complaint.

The final issue relates to what should happen to the current law on interlocutory appeals as of right and under section 1292(b) if this proposal is adopted. This is an extremely complicated subject and is probably premature at this stage. Because our recommendation is that the Supreme Court should issue a rule, and because no rule can change existing statutory rights or procedures, the matter need not be decided at this time. Indeed, it might make sense to wait until any new rule is in place for several years before engaging in any "clean up" of existing laws.

V. CONCLUSION

For some time now, federal courts have experienced increased pressure to push the current boundaries of the exceptions to the final order rule and mandamus to allow more interlocutory appeals. In our view, and that of most practitioners and academics who have studied the matter, this is a problem that cannot be solved under the current statutes and rules. Creating new avenues for appeals as of right may solve a few problems, but the basic dilemma will remain: too many cases that *ought* to be heard before final judgment, and too much time spent litigating whether those cases come within any recognized exception. It is time to admit that mandatory criteria set forth in a statute or a rule cannot significantly control what are essentially discretionary decisions. For that reason we urge the Supreme Court to take the bull by the horns and do the only thing that may solve this problem: allow for discretionary appeals of non-final orders, and give the courts of appeals total discretion on which appeals to hear. A recommendation to achieve that end, adopted by the American Academy of Appellate Lawyers, of which we are members, is appended.[48]

48. On June 14, 1999, the Supreme Court unanimously held that Ms. Cunningham had no right to an interlocutory appeal. Cunningham v. Hamilton County, 67 U.S.L.W. 4458. In doing so, it did nothing to resolve the issue addressed in this article, although Justice Thomas's opinion for the Court did note the possibility of dealing with hardship situations and/or other perceived injustices by rule changes of the kind suggested above. *Id.* at 4461. In addition, Justice Kennedy's concurrence suggested that mandamus might lie to deal with a case of "exceptional hardship," which may produce further litigation of the kind that this article proposes be eliminated. *Id.*

Recommendation to Amend the
Federal Rules of Appellate Procedure

1. The Supreme Court should issue a rule, pursuant to 28 U.S.C. § 1292(e), establishing a procedure by which immediate appellate review may be sought for significant interlocutory decisions in civil cases that may not be otherwise immediately appealable. No decision that is otherwise non-appealable, even after final judgment, should become appealable because of the rule.

2. The rule should set forth in general terms the criteria that the court of appeals should consider in deciding whether to exercise its discretion to grant interlocutory review, but such criteria should be illustrative and not create legal requirements for obtaining such review.

3. The district court should not have a gatekeeper role, as it does under 28 U.S.C. § 1292(b), but it should have an opportunity to express its views on the appropriateness of interlocutory review.

4. The process of seeking interlocutory review and, if granted, of deciding the questions presented should not unduly delay the resolution of the case in the district court. To that end, the rule should

(a) require that discretionary review be sought promptly after the decision is rendered, taking into account the time required to authorize an appeal by large institutions such as the Department of Justice;

(b) consider not requiring a response to the request unless the court of appeals asks for one; and

(c) provide that proceedings in the district court are not stayed unless the appellant moves for a stay, initially in the district court and, if denied, in the court of appeals.

5. The rule should not provide a specific timetable for the court of appeals to act on requests for interlocutory appeal, or for making a decision. The comments to the rule should state that shortening the time for briefing is generally not appropriate, given the probable importance of the questions presented, but that the briefing and oral argument should take place promptly after review is granted.