Red Light, Green Light

A Primer on Interlocutory Appeals

By Kirsten E. Small

Although the final judgment rule is the most direct road to an appellate court, the law has installed green lights and yellow lights along other routes.

The final judgment rule has been aptly described as "[a] cornerstone of the federal judicial system." *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 146 (E.D.N.Y. 1999). Presently codified at 28 U.S.C. §1291, the rule generally requires that all claims of error during the course of litigation be raised "in a single appeal following final judgment on the merits." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1984). By creating a single route for appellate review of all trial-level errors, the final judgment rule promotes the efficient use of judicial resources and preserves a district court's authority to manage litigation based on its greater familiarity with the parties and the issues.

The road to final judgment can be long, however, and only rarely will a litigant avoid speedbumps and potholes, in the form of adverse rulings, along the way. By channeling review of all interlocutory rulings into a single, post-judgment appeal, the final judgment rule operates to control the flow of appellate traffic and to ensure that appellate courts are not overrun with piecemeal appeals.

However, while the final judgment rule is the most direct road to an appellate court, it is not the only one. Just as a veteran commuter knows which side streets to take when there is a traffic jam, a savvy litigator is familiar with the avenues available for obtaining appellate review of interlocutory orders. The goal of this article is to provide a broad overview of the "rules of the road" for interlocutory appeals using a well-known traffic control device—the stoplight—as a metaphor for the relative difficulty of obtaining certain forms of review.

Green Light: Interlocutory Orders Appealable as of Right

Practitioners can think of 28 U.S.C. §1292 and the collateral order doctrines as "green lights" to immediate review.

28 U.S.C. §1292

For some types of interlocutory orders, Congress has enacted an express lane to immediate review. The U.S. Code, in 28 U.S.C. §1292, authorizes immediate appeal

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of orders pertaining to injunctive relief, §1292(a)(1); orders regarding receivers or receiverships, §1292(a)(2); interlocutory decrees in admiralty cases (§1292(a)(3)); and judgments in patent infringement cases that are final but for an accounting, §1292(c)(2). Of these, §1292(a)(1)'s authorization of appeals from injunctive orders is the most relevant to the aver-

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age litigator, and therefore, it warrants closer consideration.

Section 1292(a)(1) confers appellate jurisdiction over interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." While this language would appear to allow an immediate appeal from virtually any order related to a request for injunctive relief, the Supreme Court has cautioned that §1292(a)(1) should be approached "somewhat gingerly lest a floodgate be opened." *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966). To avoid opening these floodgates, the federal courts have limited the reach of §1292(a)(1) by carefully defining injunctive orders to include only those that (1) are directed to a party; (2) are enforceable by contempt; and (3) grant or deny part or all of the ultimate relief sought in the litigation. *See, e.g.*, *Chronicle Publ'g Co. v. Hantzis*, 902 F.2d 1028, 1030 (1st Cir. 1990) (per curiam). Thus, for example, in *Chronicle Publishing* the First Circuit concluded that §1292(a)(1) did not apply to an order prohibiting a law firm from transferring work product to a plaintiff's new lawyer because the order was directed to counsel, not to a party.

On the other hand, an order need not be labeled "injunction" to be covered by §1292(a)(1). Review is authorized under §1292(a)(1) "[w]hen an order, although not expressly denying or granting an injunction, has the practical effect of doing so." *Tri–State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989). For example, in *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992), the court concluded that an order refusing to vacate an *ex parte* seizure warrant was appealable under §1292(a)(1), even though it was not labeled as an injunction, because it had the practical effect of enjoining the business from operating.

Unlike orders that explicitly grant or deny injunctive relief, orders that have the practical effect of granting or denying injunctive relief are appealable under §1292(a)(1) only if a would-be appellant can show that an order "might have a serious, perhaps irreparable consequence, and that the order can be effectually challenged only by immediate appeal." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (internal quotation marks omitted). This additional restriction "ensure[s] that appeal as of right under §1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of 'permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.'" *Id.* (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). As an example of an order not meeting these additional criteria, the *Carson* Court pointed to *Switzerland Cheese Association*, mentioned above. 385 U.S. at 23, 24 (1966), In that case, the Court recognized that that the denial of plaintiffs' motion for summary judgment, where the only remedy sought was entry of a permanent injunction, could have the practical effect of denying injunctive relief. *Id.* at 25. But in the *Carson* case, the denial of summary judgment did not warrant immediate review because the denial was not irreparable; given that the plaintiffs had not sought a preliminary injunction, there was no other indication that the plaintiffs would suffer irreparable harm while the litigation was ongoing, and the district court's summary judgment order did not preclude an award of a permanent injunction after additional proceedings. *See Carson*, 450 U.S. at 84–85.

Collateral Order Doctrine

The collateral order doctrine, first recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), provides another green light for immediate review of certain interlocutory orders. The collateral order doctrine authorizes immediate appeal of "a small class of rulings, not concluding the litigation, but conclusively resolving claims of right separable from, and collateral to, the rights asserted in the action." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (internal quotation marks omitted). Such orders are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546.

As explained elsewhere, "The collateral order doctrine is best understood not as an exception to the final decision rule laid down by Congress in §1291, but as a practical construction of it." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (internal quotation marks omitted). In other words, collateral orders are appealable not by virtue of an exception to the final judgment rule, but rather because they are "final" in the sense intended by 28 U.S.C. §1291.

The on-ramp to collateral order review is a narrow one, however. To be appealable as a collateral order, a ruling must meet three requirements: "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

First, an order must conclusively determine the matter at issue. A ruling conclusively determines an issue when it is "made with the expectation that [it] will be the final word on the subject." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460

U.S. 1, 12 n.14 (1983). An order that is "tentative, informal or incomplete" is not subject to review under the collateral order doctrine. *Cohen*, 337 U.S. at 546.

Second, an order must resolve an important issue that is distinct from the merits of the litigation. This separateness requirement is not met when a challenged order is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963). On the other hand, separateness does not require a complete disconnect between a challenged order and the merits of the litigation. For example, a number of federal appellate courts have held that the denial of a motion to dismiss under a state anti-SLAPP statute is separate from the merits of the claim, even though most such statutes require a determination of whether or not a plaintiff's suit has a possibility of success. *See, e.g.*, *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 174–77 (5th Cir. 2009).

In addition to being separate from the merits, the issue resolved must be an important one. This requirement "boils down to a judgment about the value of the interests that would be lost through rigorous application of the final judgment requirement." *Will*, 546 U.S. at 351–52 (internal quotation marks omitted). An issue is important, in the sense required for application of the collateral order doctrine, when what is at stake is not simply the right asserted, but also the public policies underlying and supporting that right. Thus, as the Court explained in *Will*, interlocutory orders refusing to recognize immunity from suit are immediately appealable not simply because of the harm stemming from the loss of immunity, but also because of the important public policies underlying various forms of immunity from suit. *See id.* at 352–53.

Third, an order must be effectively unreviewable on appeal from a final judgment. The paradigmatic example of an effectively unreviewable order is a ruling denying an entitlement to immunity from suit. Because immunity from suit is not merely a defense to liability, but rather is a right not to be *tried*, an improper denial of the entitlement cannot be remedied after a final judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

Yellow Light: Interlocutory Orders Appealable by Permission

Some interlocutory orders are appealable only with the permission of a district court, and possibly, of the court of appeals.

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

When litigation involves some combination of multiple plaintiffs, multiple defendants, and multiple claims, it is not unusual for one or more parties or claims to be dropped from the case by dismissal or summary judgment while the litigation continues based on other parties or claims. Such orders are not appealable as final orders under §1291 even though the litigation is over as far as the dropped party or claim is concerned. Enter Federal Rule 54(b), which allows a district court to "direct the entry of final judgment as to one or more but fewer than all of the claims or parties," thereby clearing the way for an appeal under §1291.

Federal Rule 54(b) requires the active participation of a district court, which cannot direct entry of a final judgment unless it first certifies that there is no just reason for delaying the entry of final judgment. Certification, in turn, requires a two-step analysis. First, a district court must determine that the order to be certified would be final were it not for the presence of other claims or other parties. In other words, the order to be certified must be "a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). Second, a district court must determine, "tak[ing] into account judicial administrative interests as well as the equities involved," that there is no just reason to delay entry of final judgment pertaining to that party or claim. *Id.* at 8.

The Supreme Court has refused to establish bright-line rules governing Federal Rule 54(b) certification. *See id.* at 10–11. The Supreme Court has reasoned that "the task of weighing and balancing competing factors is peculiarly one for the trial judge, who can explore all facets of the case." *Id.* at 12. At least one federal court, however, has articulated several factors to guide a district court in conducting this balancing:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Braswell Shipyards Inc. v. Beazer East, Inc., 2 F.3d 1331, 1335–36 (4th Cir. 1993) (internal quotation marks omitted). However, a "district court should feel free to consider any factor that seems relevant to a particular action." 10 Charles Alan Wright *et al.*, *Federal Practice & Procedure* §2659 (Wright & Miller). If a district court determines that Federal Rule 54(b) certification is appropriate, the court should explain the basis for its conclusion "on the record or in its order." *Braswell Shipyards*, 2 F.3d at 1336.

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28 U.S.C. §1292(b)

Enacted in 1958, §1292(b) meets "the recognized need for prompt review of certain nonfinal orders," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978), by establishing a mechanism for interlocutory review of difficult, potentially dispositive questions of law. In the words of the statute, §1292(b) permits interlocutory appeal of an order that "involves a controlling question of law as to which there is a substantial ground for difference of opinion," but only

if "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Although the legislative history notes Congress's expectation that review under §1292(b) will occur only in "exceptional" cases, this admonition does not appear in the text of the statute. *See* Wright & Miller §3929 (noting this fact). The absence of a specific exceptionality requirement in §1292(b) suggests that rather than being an independent test of appealability, as some courts have concluded, Congress intended that orders that satisfy the requirements explicitly stated in §1292(b) are "exceptional" orders warranting immediate appellate review.

Some categories of interlocutory orders, by their nature, are almost never appealable prior to final judgment.

As with Federal Rule 54(b), the first step to an appeal under §1292(b) is certification by a district court that the order in question meets the statutory criteria of §1292(b). Section 1292(b) requires that the certification appear in the order to be appealed, but this does not mean that a request for certification must be made before the order is entered by a district court. Most often, a request for certification is made after entry of the order to be appealed, and it is frequently presented in conjunction with a motion for reconsideration. Provided that there is no undue delay between entry of an order and the request for certification, as explained in *Weir v. Propst*, 915 F.2d 283, 285 (7th Cir. 1990), it is entirely proper for a district court to enter an amended order that includes the required certification. *See* Fed. R. App. P. 5(a)(3) (recognizing the district court's authority to amend an order to include language permitting an interlocutory appeal).

Consistent with the extraordinary nature of an appeal under §1292(b), the showing that is required for certification is not an easy one to make. First, the order to be certified must involve "a controlling question of law." This criterion clearly is satisfied when reversal of the order will end the litigation. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 22 (2d Cir. 1990). But a question of law is properly deemed "controlling" when it is "serious to the conduct of the litigation, either practically or legally." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974).

Second, the question of law must be one about "which there is substantial ground for difference of opinion." An existing circuit split about a particular question is one clear indicator that this requirement is met, but it is not the only one; "[a] substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). Thus, this requirement may be satisfied by a showing that the issue is one of first impression or that existing decisions do not provide meaningful guidance for the resolution of the issue as presented in the particular case.

Third, the circumstances must be such "that an immediate appeal may materially advance the ultimate termination of the litigation." This requirement is related to the requirement of a controlling question of law, but it is not hard to imagine circumstances in which the "controlling question" requirement is satisfied but the "ultimate termination" requirement is not. For example, if an order involving a controlling question of law is entered on the eve of trial, it is likely that certification for interlocutory appeal would delay, rather than advance, the ultimate termination of the litigation.

Even if all of the statutory conditions for certification are satisfied, certification is still within a district court's discretion. *See Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 162–645 (E.D.N.Y. 1999). A district court's refusal to certify an order under §1292(b) is not subject to appellate review, and "[m]ost courts have held that mandamus is not appropriate to compel a district court to certify under §1292(b)." *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002) (citing cases).

If all of the conditions for certification are satisfied *and* a district court exercises its discretion in favor of certification, the battle is only half over. Next, a would-be appellant must, within 10 days, file a petition for permission to appeal with the appropriate court of appeals. *See* 28 U.S.C. §1292(b); Fed. R. App. P. 5. Permission to appeal lies entirely within the court of appeals' discretion and may be denied "for any reason, including docket congestion." *Coopers & Lybrand*, 437 U.S. at 475.

In view of the substantial obstacles to achieving appellate review under §1292(b), it bears noting that if leave to appeal is granted, review is not limited to the question certified by a district court. With interlocutory review under §1292(b), "it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996). Thus, while a court of appeals "may not reach beyond the certified order to address other orders made in the case… the appellate court may address any issue fairly included within the certified order." *Id.*

Fed. R. Civ. P. 23(f)

Rule 23(f) grants the courts of appeals authority to allow interlocutory appeals from orders granting or denying class certification. A related provision, 28 U.S.C. §1453(c), authorizes appellate review of orders granting or denying remand of class actions removed from state courts. The Advisory Committee's notes from Rule 23(f)'s adoption in 1998 describe the rule as giving appellate courts "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." The 1998 Advisory Committee also pointed out that Rule 23(f) does not contain §1292(b)'s "potentially limiting" requirement of a controlling question of law for which there is substantial ground for difference of opinion, nor does it require certification by a district court. On the other hand, the 1998 Advisory Committee cautioned that the rule was not intended to result in interlocutory appeals of "familiar and almost routine" issues in class certification decisions.

The federal appellate courts have expressed differing views on the scope of discretion granted in Rule 23(f). Some courts, taking a somewhat restrictive view, have identified three categories of class

certification orders likely to warrant interlocutory review under Rule 23(f): (1) a denial of class certification that would sound the "death knell" of the litigation because the named plaintiff's individual claim is too small for the plaintiff to pursue individually; (2) a grant of class certification that would likely place substantial pressure on the defendant to settle; and (3) a grant or denial of class certification that would provide an opportunity for development of the law of class actions. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002). Other courts have adopted a more expansive view, concluding that courts should assess five "guideposts" before exercising their discretion:

> (1) whether the certification ruling is likely dispositive of the litigation; (2) whether the district court's certification decision contains a substantial weakness; (3) whether the appeal will permit the resolution of an unsettled legal question of general importance; (4) the nature and status of the litigation before the district court (such as the presence of outstanding dispositive motions and the status of discovery); and (5) the likelihood that future events will make appellate review more or less appropriate.

Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 144 (4th Cir. 2001) (citing *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000).

Regardless of the standard, it does not appear that the courts have treated Rule 23(f) as a broad avenue for interlocutory appeal. One study of Rule 23(f) filings between October 31, 2006, and December 31, 2013, revealed that fewer than 25 percent of such petitions were granted. *See* John H. Beisner, *et al.*, *Study Reveals U.S. Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings*, Apr. 29, 2014, https://www.skadden.com/insights/study-reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings. The study also showed, however, that most courts were much more likely to grant petitions filed by defendants.

Red Light: Orders Not Subject to Interlocutory Review

Some categories of interlocutory orders, by their nature, are almost never appealable prior to final judgment. Most rulings concerning the admissibility of evidence are in this category. Such orders are inseparable from the merits of litigation, precluding appeal under the collateral order doctrine, and in all but the most unusual case they do not involve controlling or disputed questions of law, precluding appeal under §1292(b). Nor are evidentiary rulings appealable as partial judgments or as injunctive orders. In short, for these orders final judgment is the only road that leads to an appellate court.

Similarly, discovery orders are rarely subject to interlocutory review. This is true even of discovery orders that threaten to undermine core principles such as the attorney-client privilege. The Supreme Court made this clear in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), in which the Court considered the appealability of a district court order compelling disclosure of attorney-client communications based on the grounds that the privilege had been waived. The party on the receiving end of this order, Mohawk Industries, asked the district court to certify its order under §1292(b), but the court refused. Undaunted, Mohawk Industries simultaneously petitioned for a writ of mandamus and noted an appeal under §1291 and the collateral order doctrine. The court of appeals denied mandamus because the district court's ruling was not a "clear usurpation of power or abuse of discretion." *Id.* at 105 (internal quotation marks omitted). Further, the appellate court concluded that it did not have jurisdiction under the collateral order doctrine because the district court's discovery order was not effectively unreviewable on appeal from a final judgment.

This ruling was the focus of the Supreme Court's opinion. Mohawk Industries argued that the district court's order was unreviewable on appeal from a final judgment because "the right to maintain attorney-client confidences—the *sine qua non* of a meaningful attorney-client relationship—is irreparably destroyed absent immediate appeal of adverse privilege rulings." *Id.* at 108 (internal quotation marks omitted). The Supreme Court acknowledged the importance of the attorney-client privilege but admonished that "[t]he crucial question… is not whether an interest is important in the abstract; it is 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." *Id.* Noting that "[w]e routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system," the Court held that "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." *Id.* at 108–09. Outlier cases—those involving truly novel questions of privilege law or judicial usurpation of power—could be dealt with through §1292(b) or mandamus.

If there is any alternate means of obtaining review of a challenged ruling, mandamus is unavailable.

"Where We're Going, We Don't Need Roads": Mandamus

No discussion of interlocutory appeals is complete without some consideration of the role of mandamus petitions to securing relief from orders that are not final. Strictly speaking, a petition for writ of mandamus is an original proceeding, not an appeal, even though a mandamus petition asks an appellate court to review a district court's action—or its failure to act—and even though the source of an appellate court's authority to grant mandamus, the All Writs Act, explicitly limits an court's authority to issuing orders in aid of its jurisdiction. *See* 28 U.S.C. §1651(a).

The Supreme Court has emphasized that mandamus is an extraordinary remedy, "not to be used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). To establish entitlement to a writ of mandamus, a petitioner must show that (1) there is no other adequate remedy; (2) the petitioner has a "clear and indisputable" right to the relief sought; and (3) issu-

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ance of the writ is an appropriate response to the situation. *See Cheney v. United States District Court*, 542 U.S. 367, 380–81 (2004).

The limitation of mandamus to cases in which there is no other means to attain relief recognizes that mandamus is a remedy of last resort. If there is any alternate means of obtaining review of a challenged ruling, mandamus is unavailable. *See, e.g.*, *Allied Chemical*, 449 U.S. at 36 (holding that mandamus is not available to review the district court's grant of a new trial, even though the first trial lasted four weeks and resulted in a substantial damages award to the plaintiff, because the order granting a new trial could be appealed upon entry of final judgment following retrial).

But lacking an alternate remedy is not enough; a petitioner must also show that the right to the relief sought is "clear and indisputable." *Allied Chemical*, 449 U.S. at 35. Meeting this high standard requires more than showing that the lower court erred. *See In re Ford Motor Co.*, 344 F.3d at 651 ("Because mandamus is not a substitute for appeal, the terms 'clear abuse of discretion' or 'patent error' are not synonymous with the type of ordinary error that would justify reversal on appeal."). To warrant mandamus relief, "the petitioner must demonstrate that the error is so serious that it amounts to an abuse of the trial judge's *authority*." *Id*. (emphasis added).

Even when both of these criteria are met, mandamus remains discretionary with the court of appeals. *See Kerr v. United States District Court*, 426 U.S. 394, 403 (1976). The exercise of this discretion may be informed by "the practical circumstances" of the case. *In re Nwanze*, 242 F.3d 521, 527 (3d Cir. 2001). Or it simply may rest in the more general principle that mandamus relief should be limited to truly extraordinary circumstances.

Although there are multiple roads to immediate appellate review of interlocutory orders, none of them is entirely straight, and all of them are uphill—though some of the hills are steeper than others. Moreover, when an immediate appeal is possible only if a district court—and possibly an appellate court—grants permission, the detour off the road to final judgment may be time-consuming, expensive, and ultimately fruitless. As important as it is to know the "rules of the road" for appeals of interlocutory orders, it is just as vital to understand that the best route to appellate review of an interlocutory order may be the road that you are already on.