Permissive Interlocutory Appeals, 2013–2019

Prepared for the Judicial Conference Advisory Committee on Civil Rules

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February 2020

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Executive Summary

This brief report summarizes the findings of Federal Judicial Center (FJC) researchers regarding the incidence and resolution of permissive interlocutory appeals pursuant to 28 U.S.C. § 1292(b) terminated in the U.S. courts of appeals from October 1, 2013, through June 30, 2019. Key findings include:

- 636 § 1292(b) applications to appeal were terminated in the courts of appeals during the study period.
- Of those decided by the courts of appeals, 52% of applications were granted.
- For granted applications, the median time from the filing of the application to appeal to the appellate mandate on the merits appeal was 542 days (17.8 months).
- A preliminary analysis found that the party initiating the appeal obtained some relief from the court of appeals about half of the time that the court of appeals reached the merits of the appeal.
- Interlocutory appeals resulting in some form of relief for the initiating party did not take any longer than interlocutory appeals resulting in no relief for the initiating party.

Background

A narrow exception to the final judgment rule, 28 U.S.C. § 1292(b) authorizes permissive interlocutory appeals of nondispositive district court orders.[1] Reform proposals currently before the Judicial Conference Advisory Committee on Civil Rules have prompted inquiries about the current use of interlocutory appeals in the federal system.[2] However, little empirical research on interlocutory appeals exists.[3] This brief report is intended to provide some basic information about the incidence and resolution of interlocutory appeals in the federal courts.

The primary reason for the dearth of research on interlocutory appeals is that data on interlocutory appeals as a separate category of appeals are not routinely reported. In the publicly available tables compiled by the Administrative Office of the U.S. Courts (AO), they are included within "Original Proceedings and Miscellaneous Applications," a much broader category of appeals.[4] Drawing from the data used to compile those tables, however, the Judiciary Data and Analysis Office at the AO was able to provide FJC researchers with information about § 1292(b) applications for permission to appeal that were resolved by the courts of appeals from October 1, 2013, through June 30, 2019. To be clear, this report does not address district court orders to certify an order for interlocutory appeal; the data presented in this report pertain only to applications to appeal that have previously been ordered by the district court.

1. *See* Thomas A. Baker, Fed. Judicial Ctr., A Primer on the Jurisdiction of the U.S. Courts of Appeals § 4.03 (2d ed. 2009).

2. Questions about the role of interlocutory appeals in the federal system are not new. In 1990, Professor Solimine argued that "interlocutory appeals can and should play a greater role in the adjudicative process in the federal courts." Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165 (1990). For a discussion of the policy trade-offs involved in the scope of interlocutory appeals, see generally Baker, *supra* note 1, at § 4.03.

3. For an early empirical examination of interlocutory appeals, see Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 Law & Contemp. Probs. 171 (1984).

4. Federal Judicial Caseload Statistics Table B-1, available at https://www.uscourts.gov/federal-judicial-caseload-statistics-2018-tables.

Findings

During the study period—October 1, 2013, to June 30, 2019—636 applications for interlocutory appeal that had been certified at the district court level were terminated in the courts of appeals. The courts of appeals either granted or denied 535 applications (with 101 procedural terminations). The courts of appeals granted 280 applications to appeal (52%) and denied 255 applications (48%). The number of applications to appeal decided by the courts of appeals and grant rates by circuit are displayed in **Table 1**. As seen in **Table 1**, during the study period there was substantial variation among circuits in terms of the frequency with which interlocutory appeals are sought and the rate at which they are granted. The reasons for these variations are beyond the scope of this report.

Circuit	Grant rate	N
D.C.	67%	9
First	20%	10
Second	65%	66
Third	62%	58
Fourth	39%	41
Fifth	64%	53
Sixth	39%	65
Seventh	39%	51
Eighth	24%	21
Ninth	67%	97
Tenth	52%	27
Eleventh	38%	37
All	52%	535

Table 1: Section 1292(b) Applications to Appeal and Grant Rates, by Circuit, 2013–2019

For the applications to appeal that were granted by the court of appeals, FJC researchers were able to locate the "merits" appeal record associated with each application-to-appeal record.[5] Of these granted applications, 172 appeals (61%) had been decided on the merits (issuance of an appellate mandate), 73 (26%) were still pending in the courts of appeals as of the time of the analysis (as of the end of October 2019), and 35 (13%) had been dismissed or procedurally terminated in the courts of appeals.

Overall, for the 172 terminated merits appeals, the median time from filing of the application to issuance of the appellate mandate was 542 days (mean, 578 days), or 17.8 months. The median time from filing of the application to appellate judgment was 475 days (mean, 508 days), or 15.6 months. It is difficult to know how these figures compare to disposition times for comparable appeals, but for roughly the same period, the *Federal Case Management Statistics* report a median time from filing notice of appeal to disposition of between 7.4 months and 9.0 months for all appeals, including procedural terminations.[6]

A complete analysis of the effects of these interlocutory appeals on the underlying litigation is beyond the scope of this report. An analysis was conducted, however, to determine whether the party moving the district court to certify an order or appeal obtained any relief from the court of appeals. For purposes of this analysis, a court of appeals order reversing, in full or in part, or vacating a district court order subject to the appeal was treated as relief for the party initiating the appeal. Based on docket text and an examination of appellate opinions, this analysis found that the merits review of an interlocutory appeal resulted in the initiating party obtaining some relief about half of the time (48%, or 82 out of 172 merits appeals decided as of the end of October 2019).

Interlocutory appeals resulting in relief for the initiating party did not take longer to resolve than appeals not resulting in relief. The median time from the filing of the application to appellate mandate was 542 days (mean, 597 days) for no-relief-granted interlocutory appeals and 539 days (mean, 557 days) for relief-granted interlocutory appeals. A t-test confirmed that the difference in means is not statistically significant.

5. This common-sense approach is more novel than it seems. Official judicial branch reports do not combine the application record with the merits record of granted appeals but treat them as separate reported cases. So, for example, the *Federal Court Case Management Statistics* tables report a median disposition time for applications for interlocutory appeals, but that figure includes a much broader grouping of appeals and provides no information about overall disposition times. For more information, see the "Explanation of Selected Terms" for the *Federal Court Case Management Statistics*, available at https://www.uscourts.gov/sites/default/files/explanation_of_selected_terms_september_2019_1.pdf.

6. These figures are provided for context only. The national totals referenced here can be accessed at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0930.2019.pdf.

The Federal Judicial Center

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