RECOMMENDATION REGARDING INTERLOCUTORY APPEALS

Approved November 23, 1998

It is a basic principle of federal jurisdiction that appeals lie only from final judgments, with certain specific and limited exceptions. In recent years, litigants in civil cases in the federal courts have increasingly attempted to obtain review of non-final orders under a variety of such exceptions. Some have been successful, but many have not.

As a result of these attempts, the courts of appeals (and in a number of cases the Supreme Court) have expended significant amounts of time deciding whether the court of appeals had jurisdiction under one of the exceptions to the final judgment rule. Especially when courts are called on to exercise mandamus jurisdiction, there is a growing sense that the jurisdictional issue is often significantly affected by the court's view of the merits, thereby making the law regarding appellate jurisdiction less coherent and encouraging other litigants to try to obtain interlocutory review. The tendency for litigants to stretch to obtain interlocutory review is especially great for a defendant when reversal will mean the end of the litigation, and for a plaintiff when a favorable ruling will advance the claim in a significant way.

Among those cases in which review is not allowed, there are a number of district court rulings that would, viewed objectively, warrant an exception to the final judgment rule in some instances. Some of those rulings will become reviewable under the recent amendment to Rule 23(f), allowing discretionary review of grants or denials of class certification. But there will still remain other rulings -- that documents are not entitled to the attorney-client privilege, that an attorney for a party should (or should not) be disqualified, or that a forum selection clause does not require a case to be heard elsewhere -- that will remain unreviewable as of right under the current state of the law, although some courts have used mandamus to circumvent the final judgment rule.

Part of the problem is that 28 U.S.C. § 1292(b), which allows interlocutory review on a discretionary basis, contains substantive limitations that stand in the way of review in a number of cases. More significantly, under section 1292(b), a district court performs a "gatekeeper" function: it must agree that its decision is appropriate for interlocutory review; if it does not, that creates an absolute bar to further review.

The American Academy of Appellate Lawyers is a membership organization composed of more than 200 lawyers throughout the United States who specialize in appellate practice in both federal and state courts. Based on its study of the issue of interlocutory appeals in the federal courts, the Academy has concluded that the opportunity for interlocutory appeals should be expanded, but that efforts to set forth those orders that are eligible for interlocutory review in a statute or a rule is unlikely to succeed because the factors bearing on whether to allow an interlocutory appeal are inevitably tied to the facts of the case and posture of the litigation, as well as the purity of the legal issue presented. Thus, in the Academy's view, any attempt to describe the category of cases in which interlocutory review would be appropriate would be both under as well as over-inclusive.

Accordingly, the Academy recommends the approach adopted by the American Bar Association (Standards Relating to Appellate Courts § 3.12 (1977)) and in use in Wisconsin (Wis. Stat. 808.03), under which the decision on whether an interlocutory appeal should be allowed is left to the informed discretion of the court of appeals that is being asked to hear the appeal. To achieve that end, the Academy recommends that the Supreme Court issue such a rule, pursuant to 28 U.S.C. § 1292(e), which was enacted by Congress in 1992 to give the Court the authority "to provide for an appeal of an interlocutory order that is not otherwise" appealable. This provision was recently used by the Supreme Court in issuing Rule 23(f), which permits discretionary appeals from grants or denials of class certification.

The Academy recognizes that the courts of appeals are already overburdened and that this recommendation may, in the short run, increase the work of the courts of appeals by adding additional cases on the merits, plus the burden of having to deal with petitions for discretionary review. However, as the Wisconsin experience indicates and is implicit in Congress's adoption of §1292(b), once the courts become accustomed to working with the new rule, any such increase should be largely, if not entirely, offset by two factors: (a) in at least some cases, a decision on an interlocutory appeal will be a replacement for, not in addition to, a decision on the same issue at the conclusion of the case, and (b) if discretionary review is granted, the courts will not have to decide jurisdictional issues in cases where previously litigants sought to obtain interlocutory review as of right by claiming an exception to the final judgment rule. In addition, because the number of cases that would be accepted as interlocutory appeals under this rule would lie solely in the discretion of the courts of appeals, any long term increase in caseload would be fully within their control.

Although some judicial time will have to be spent in deciding whether to grant interlocutory appeals, the number of requests, at least after the initial period of adjustment, should not be great. Moreover, in deciding whether to accept an interlocutory appeal, there will be little law to research, and the courts will be not be required to write opinions, and thus deciding whether to accept a case should not consume a significant amount of the judges' time.

This recommendation applies only to appeals in civil cases, including admiralty matters. However, the Academy has not considered whether the proposed rule should also be applicable to bankruptcy cases. Nothing in our investigation of civil appeals indicated that there were similar problems for criminal cases. We also recommend that existing opportunities for interlocutory appeals (both discretionary and as of right) be maintained, in part because we assume that, in cases where jurisdiction is doubtful under 28 U.S.C. §§ 1291 or 1292, the appellant will both file a notice of appeal and seek discretionary review, and the court of appeals will be able to sort out the issues with relative ease.

<u>Recommended Amendment to Federal Rules of Appellate Procedure</u>

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.

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.
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, nor 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.

A discussion of the background for this recommendation is also available.