INTERLOCUTORY APPEALS IN SUITS AGAINST A GOVERNMENT ENTITY OR OFFICIAL

ERIKA KANE
Office of the Attorney General
Austin, Texas

State Bar of Texas
25TH ANNUAL
SUING & DEFENDING GOVERNMENTAL ENTITIES COURSE
July 18-19, 2013
Austin

CHAPTER 12

TABLE OF CONTENTS

I. INTRODUCTION 1

II. INTERLOCUTORY APPEALS IN TEXAS STATE COURTS 1
A. Interlocutory appeals statute 1
B. Limited right to take interlocutory appeal to Texas Supreme Court 2
C. Procedural Matters 2
1. Notable Deadlines 2
2. Effect of Appeal on Trial Court Proceeding 2
3. Preserving Error through Notice of Appeal and Appellate Record 2
4. No appeal bond required for government appellant 3
5. Appeal stays effect of order appealed 3
6. Effect of delay by trial court on entering interlocutory order on appeal right 3
D. Typical Interlocutory Appeals Taken by Government Entities or Officials 3
1. Appeal of denial of a Plea to the Jurisdiction 3
2. Appeal of denial of immunity motion filed by government official or employee 5

III. FEDERAL COURT INTERLOCUTORY APPEALS 6
A. Collateral Order Doctrine 6
1. Appeals of motions to dismiss based on Eleventh Amendment or absolute immunity 6
2. Appeals of qualified immunity motions 6
B. Appeals under 28 USC § 1292 6
1. Appeals of Preliminary Injunctions 6
2. Certifying an order for interlocutory appeal 7

INTERLOCUTORY APPEALS IN SUITS AGAINST A GOVERNMENT ENTITY OR OFFICIAL[1]

I. INTRODUCTION

The right to take an appeal of a non-final order of the trial court is limited. In state court proceedings, the appellate courts have jurisdiction to consider immediate appeals of interlocutory orders only if a statute explicitly provides such jurisdiction. *See Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). In federal court, the "final judgment" rule precludes interlocutory appeal except in certain limited circumstances. *See Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009).

However, because principles of sovereign or governmental immunity counsel in favor of minimizing litigation burdens on government entities for claims for which government entities and officials are immune, an array of statutory provisions and jurisprudential rules permit government entities and officials to take interlocutory appeals in a number of circumstances. *See City of Austin v. L.S. Ranch, Ltd.*, 970 S.W.2d 750 (Tex. App.—Austin 1998, no pet.) (the "high cost of defending a suit against a governmental entity, borne ultimately by the public, is strong motivation for allowing *any* jurisdictional issue to be resolved before the merits of the suit are litigated") (emphasis in original). These interlocutory appeal rights can serve to bring a relatively early end to matters for which government entities and officials can demonstrate no immunity waiver exists.

This article discusses the typical types of interlocutory appeals involving government defendants and notes various hurdles and pitfalls unique to this type of appeal. This article is not a comprehensive review of interlocutory appeal procedures, but rather highlights particular issues and recent cases that may be of interest to those practicing on behalf of, or against, government entities and officials.

II. INTERLOCUTORY APPEALS IN TEXAS STATE COURTS

A. Interlocutory appeals statute

Interlocutory Appeals in Texas state courts are governed largely by the interlocutory appeal statute, Texas Civil Practice and Remedies Code § 51.014.[2] Section 51.014(a) grants a right to appeal, to the intermediate court of appeals, for the following types of interlocutory orders:

- Order appointing a receiver or trustee, or an order that overrules a motion to vacate an order appointing a receiver or trustee. §§ 51.014(a)(1)-(2).
- Order certifying or refusing to certify a class action. § 51.014(a)(3).
- Order granting or refusing a temporary injunction or granting or refusing a motion to dissolve a temporary injunction. § 51.014(a)(4).
- **Order denying a motion for summary judgment based on assertion of official immunity. § 51.014(a)(5).**
- Order denying motion for summary judgment based on assertion of right free speech by member of the media. § 51.014(a)(6).
- Order granting or denying defendant's special appearance. § 51.014(a)(7).
- **Order granting or denying plea to the jurisdiction by governmental unit. § 51.014(a)(8).**
- Orders related to medical malpractice expert report challenges. §§ 51.014(a)(9)-(10).
- Order related to asbestos/silica litigation expert report challenge. § 51.014(a)(11).

Texas courts "strictly construe Section 51.014(a) as 'a narrow exception to the general rule that only final judgments are appealable.'" *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007) (quoting *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001)).

With respect to ligation by or against government entities or officials, the most frequently invoked provisions are § 51.014(a)(5), governing appeals of orders denying a motion based on an assertion of official immunity, and § 51.014(a)(8), governing appeals of orders granting or denying a plea to the jurisdiction by governmental unit.

Tex. Civ. Prac. & Rem. Code § 51.014(d) also permits appeal (except in matters under the Family Code) of an interlocutory order not otherwise appealable if "the parties agree that the interlocutory order sought to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion" and "immediate appeal from the order may materially advance the ultimate termination of the litigation." A party may, by agreement, request appellate review under this provision for interlocutory orders for which no

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[1] By Erika Kane, Assistant Attorney General, General Litigation Division, Office of the Attorney General. J.D., University of Texas; B.A., Harvard University.

2 Other state statutes grant a right of interlocutory appeal in certain, specific circumstances. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 15.003 (right to take interlocutory appeal in multi-plaintiff suit of trial court order severing out claims of plaintiff who failed to established proper venue); TEX. INS. CODE § 102.151 (interlocutory appeal allowed of order denying motion for summary judgment based on charitable gift annuity immunity).

appellate right otherwise exists, if the trial court issued a ruling on the "controlling question of law" that is put at issue through the interlocutory appeal. *See, e.g., State v. Ledrec, Inc.*, 366 S.W.3d 305 (Tex. App.—Fort Worth 2012) (permitting agreed interlocutory appeal of order denying State's and county's partial summary judgment motion that concerned question of law regarding proper measure of damages in condemnation case); *but see Colonial County Mut. Ins. Co. v. Amaya*, 372 S.W.3d 308, 311 (Tex. App.—Dallas 2012, no pet.) (dismissing 51.014(d) appeal for lack of jurisdiction when record failed to show trial court issued ruling on the legal question presented in the agreed interlocutory appeal).

B. Limited right to take interlocutory appeal to Texas Supreme Court

With limited (but significant) exception, the Texas Supreme Court lacks jurisdiction over appeals of interlocutory orders. *See Tex. DOT v. Perches*, 388 S.W.3d 652, 654 (Tex. 2012); TEX. GOV'T CODE § 22.225(b)(3). An exception to this jurisdictional limitation exists for cases "in which the justices of the courts of appeals disagree on a question of law material to the decision [i.e., dissent jurisdiction] or in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court [i.e, "conflict jurisdiction"]." *Id.* § 22.225(c); *see also id.*§ 22.225(e) ("one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants"). Accordingly, when taking an appeal to the Texas Supreme Court of an order denying a government entity's plea to the jurisdiction or denying an official immunity motion, it is imperative that the appealing party make clear in its Statement of Jurisdiction in its Petition for Review that a conflict exists among the appellate courts or that a dissent was filed in the intermediate appellate court in the matter being appealed.

C. Procedural Matters

Although interlocutory appeals can be a valuable tool for those defending government entities and officials, such appeals are subject to a number of procedural requirements that must be abided by in order to ensure proper review by the appellate court. A party's failure to properly present and preserve its interlocutory appeal points may inadvertently waste the valuable rights conferred under Tex. Civ. Prac. & Rem. Code § 51.014.

1. Notable Deadlines

Pursuant to Tex. R. App. P. 28.1(a), appeals of interlocutory orders are accelerated. Per Tex. R. App. P. 26.1(b), a notice of appeal for an accelerated appeal must be filed within 20 days after the interlocutory order being appealed is signed.

2. Effect of Appeal on Trial Court Proceeding

An interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 51.014(a), except for an appeal of temporary injunction, stays the commencement of trial until the appeal is resolved. TEX. CIV. PRAC. & REM. CODE § 51.014(b). Further, the noticing of an interlocutory appeal of an order denying a plea to the jurisdiction, denying an official's motion to dismiss on immunity grounds, or denying a special appearance, automatically "stays *all other proceedings* in the trial court pending resolution of that appeal." TEX. CIV. PRAC. & REM. CODE § 51.014(b). Any order signed by the trial court while proceedings are automatically stayed pursuant to § 51.014(b) is a "legal nullity." *In re J.B.*, 326 S.W.3d 654, 662 (Tex. App.—Dallas 2010, pet. filed).

A defendant, however, may only take advantage of § 51.014(b)'s automatic stay of all trial court proceedings if the pleading that forms the basis of the interlocutory appeal is both filed *and requested for submission or hearing* on or before the 180th day after filing the first responsive pleading *or* by a deadline set on a court-entered scheduling order. TEX. CIV. PRAC. & REM. CODE § 51.014(c). If the interlocutory appeal is not subject to an automatic stay, the parties can request a stay by agreement or the court may order a stay. See *Id.* § 51.014(e).

3. Preserving Error through Notice of Appeal and Appellate Record

A Notice of Appeal of an interlocutory order should state, among other things: (1) the dates of the order (or orders) being appealed; (2) all parties taking the appeal; and (3) that the appeal is accelerated. TEX. R. APP. P. 25.1(d) (mandating contents of a notice of appeal). A party's failure to designate in the notice all parties and all orders that it wishes to appeal limits review by the appellate court. *See, e.g., Tex. DOT v. Perches*, 339 S.W.3d 241, 259 (Tex. App.—Corpus Christi 2011) *rev'd on other grounds by* 388 S.W.3d 652, 654 (Tex. 2012) (declining to review injunction alleged to have been issued by trial court when only order denying plea to the jurisdiction was designated in the notice of appeal); *State Office of Risk Mgmt. v. Foutz*, 279 S.W.3d 826, 829 (Tex. App.—Eastland 2009) (declining to review sanctions order issued by trial court against party's counsel, because only plaintiff was listed as an appealing party in the notice of appeal).

Further, in designating to the record on appeal, the party taking appeal should ensure that all interlocutory orders for which it seeks review, as well as any other pertinent parts of the record, are included in the record sent to the appellate court. *See, e.g., Parrish v.*

Rutherford, 159 S.W.3d 114, 117 (Tex. App.—Corpus Christi 2004, no pet.) (declining to review challenge to attorney's fees when hearing on fees not included in record and order awarding fees not designated in notice of appeal).

4. No appeal bond required for government appellant

Per Tex. Civ. Prac. & Rem. Code § 6.001, state entities and officials, as well as counties, are permitted to appeal a without a supersedeas or cost bond.[3] Tex. Civ. Prac. & Rem. Code § 6.002 provides that the same is true for cities taking appeal.

5. Appeal stays effect of order appealed

The noticing of an appeal by an entity or official that is not required to give a supersedeas bond serves to automatically supersedes the interlocutory order appealed. TEX. R. CIV. P. 29.1(b).

Although the trial court's order may be superseded by appeal, the appellate court may issue temporary relief—including injunctive relief—during the pendency of an interlocutory appeal in order to protect jurisdiction over the suit or to preserve the rights of litigants while the matter is pending on appeal. Parties seeking such temporary relief from the court of appeals may do so by filing a separate original proceeding, such as a petition for writ of injunction. *See, e.g., In re Williams*, No. 02-13-00087-CV, 2013 Tex. App. LEXIS 4575, 2013 WL 1437253 (Tex. App.—Fort Worth Apr. 8, 2013) (orig. proceeding) (after trial court denied injunction request and plaintiff took interlocutory appeal, plaintiff's request for writ of injunction granted by court of appeals pending resolution of interlocutory appeal, so as to prevent suit from becoming moot); *Board of Pardons & Paroles v. Graham*, 878 S.W.2d 684, 685 (Tex. App.—Austin 1994, writ dism'd w.o.j.) (noting court of appeals issued emergency writ of injunction during pendency of interlocutory appeal because State's notice of interlocutory appeal of trial court's grant of temporary injunction served to supersede the trial court injunction); *see also, e.g., In re Tex. Ass'n of Sports Officials*, 2011 Tex. App. LEXIS 3455 (Tex. App.—Austin May 6, 2011) (orig. proceeding) (finding that, because State's appeal of plea to the jurisdiction stayed trial court's power to issue any other relief pending appeal, court of appeals could grant plaintiff's request for writ of injunction upon finding that granting the injunctive relief was necessary to prevent the suit from being possibly rendered moot while pending on interlocutory appeal of the plea to the jurisdiction).

6. Effect of delay by trial court on entering interlocutory order on appeal right

It is not unheard of for a trial court to "carry" a plea to the jurisdiction, or to continue a hearing on a plea, until after discovery occurs or even until trial. When a trial court delays ruling on a plea to the jurisdiction that was properly submitted for decision, or when a court refuses a request to have a plea to the jurisdiction set for submission or hearing, the right to take interlocutory appeal may not be available because no order granting or denying the plea exists from which to appeal.

In the absence of a signed order denying a plea to the jurisdiction, a party may find itself unable to seek appellate review of its jurisdictional challenge through the interlocutory appeal statute. *See, e.g., City of Galveston v. Gray*, 93 S.W.3d 587, 589 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (holding that trial court's statement that it was not ruling on City's plea, while also granting plaintiff's motion to continue the plea hearing and allowing for discovery, was *not* an "implicit" denial of the plea appealable under Tex. Civ. Prac. & Rem. Code § 51.014(a)(8)); *but see Thomas v. Long*, 207 S.W.3d 334, 339 (Tex. 2006) (interlocutory appeal under § 51.014(a) permitted of "implicit denial" of jurisdictional plea when trial court issued order ruling for plaintiff on the merits of a claim without explicitly rejecting defendant's asserted jurisdictional challenge to the claim).

In such a circumstance, the party advancing the plea is not necessarily without remedy, however, as review in the appellate court of a trial court's refusal to rule on a plea may be obtained by mandamus. *See Gray*, 93 S.W.3d at 589 (agreeing with City's argument on mandamus that "a governmental unit's entitlement to be free from suit is effectively lost if the trial court erroneously assumes jurisdiction and subjects the governmental unit to pre-trial discovery and the costs incident to litigation"); *see also In re Hays County Sheriff's Dep't*, No. 03-12-00343-CV, 2012 Tex. App. LEXIS 10400, 2012 WL 6554815 (Tex. App.—Austin Dec. 12, 2012) (orig. proceeding) (finding that "trial court's failure to rule on a [plea to the jurisdiction properly submitted for decision] within a reasonable amount of time constitutes a clear abuse of discretion" subject to mandamus relief).

D. Typical Interlocutory Appeals Taken by Government Entities or Officials

1. Appeal of denial of a Plea to the Jurisdiction

Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) grants a right to take interlocutory appeal of any order granting or denying plea to the jurisdiction by governmental unit. A government entity or official

[3] In suits defended by the Attorney General, no security or bond is required to take appeal. TEX. CIV. PRAC. & REM. CODE § 104.006. The right to take appeal without supersedeas bond has been extended to county officials sued for actions taken in their official capacity. *See Enriquez v. Hooten*, 857 S.W.2d 153, 154 (Tex. App.—El Paso 1993) (orig. proceeding).

may take interlocutory appeal of *any* jurisdictional issue raised in a plea; such appeals are not limited to pleas based on sovereign immunity. *See, e.g., City of Austin v. L.S. Ranch, Ltd*., 970 S.W.2d 750 (Tex. App.—Austin 1998, no pet.). However, an affirmative defense such as statute of limitations is not a proper jurisdictional point raised through a plea to the jurisdiction, and therefore is not reviewable on interlocutory appeal. *See, e.g., Montgomery County v. Fuqua*, 22 S.W.3d 662 (Tex. App.—Beaumont 2000, pet. denied).

Appeal may be taken under § 51.014(a)(8) from any interlocutory order denying a government unit's challenge to the trial court's jurisdiction, regardless of whether the underlying pleading filed by the government unit was specifically styled as a "plea to the jurisdiction." *See Thomas*, 207 S.W.3d at 339 ("To be entitled to an interlocutory appeal, section 51.014(a)(8) requires the denial of a jurisdictional challenge," "irrespective of the procedural vehicle used" to raise that jurisdictional challenge in the trial court).

An interlocutory order that does not expressly rule on a jurisdictional challenge, but that awards a plaintiff relief *on the merits* of a claim for which a government unit raised the jurisdictional challenge, may be deemed an "implicit denial" of the government's jurisdictional plea such that the order is subject to appeal under § 51.014(a)(8). *Thomas*, 207 S.W.3d at 339 ("a trial court that rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack has implicitly denied the jurisdictional challenge"); *but see Gray*, 93 S.W.3d at 589 (interlocutory order that allowed for discovery and granted continuance of plea hearing not an "implicit denial" of plea appealable under § 51.014(a)(8)).

a. Appellate deadlines not revived by filing amended plea that raises same jurisdictional points as prior plea

As a general matter, it is not impermissible for a government defendant to file multiple pleas to the jurisdiction. However, the Texas Supreme Court recently made clear that failure to take appeal on a first denied (or "implicitly denied") plea to the jurisdiction may preclude appellate review of a subsequently filed plea that raises the same points of error.

In *City of Houston v. Estate of Jones*, 388 S.W.3d 663 (Tex. 2012), a suit alleging breach of a settlement agreement, the City filed a plea to the jurisdiction arguing that its immunity to such a claim was not waived by either provisions of the Local Government Code or the Supreme Court's holding in *Texas A & M University-Kingsville v. Lawson*, 87 S.W.3d 518, 522-23 (Tex. 2002). The trial court "implicitly denied" the plea by entering partial summary judgment as to liability in favor of the plaintiff and setting the case for trial on damages; the City did not take appeal of this order within the 20-day appellate deadline for interlocutory orders. 388 S.W.3d at 665-67. After the plaintiff died and the case transferred to probate court, the City filed another plea that raised the same arguments as to the Local Government Code and *Lawson* immunity waiver issue. *Id.* This second plea was construed as a motion to reconsider the earlier plea and was denied by the probate court. *Id.* The City then took interlocutory appeal of the probate court's order under § 51.014(a)(8), asserting the jurisdictional argument raised in the plea as well as a new jurisdictional argument presented for the first time on appeal. *Id.* The court of appeals held it lacked jurisdiction to review the jurisdictional arguments that were raised in the first plea that was not appealed, but it did consider (and reject) the argument made by the City for the first time on appeal. *Id*. The Supreme Court, however, found that it lacked jurisdiction over the entire appeal because the jurisdictional points raised by the City were in substance identical to those raised in the original "implicitly denied" plea that was not appealed. *Id.* (finding that "because the City made a new argument in its amended plea to the jurisdiction, but did not assert a new ground [for dismissal], the amended plea was substantively a motion to reconsider the denial of its 2006 plea"). The court found that "[p]ermitting appeals under circumstances such as these would effectively eliminate the requirement that appeals from interlocutory orders must be filed within twenty days after the challenged order is signed." *Id.* at 667.

The foregoing case presents a cautionary tale for those filing pleas to the jurisdiction on behalf of government entities and officials. Clearly, a party who misses the deadline to take interlocutory appeal of an order granting or denying a plea should not expect to revive that deadline by re-filing and obtaining a new trial court order on essentially the same plea, so it is imperative that a party seeking appellate review of jurisdictional points raised in a plea satisfy the 20-day deadline for filing a notice of appeal.

However, in *Estate of Jones*, there appears to have been no actual order issued by the trial court expressly denying the City's first plea to the jurisdiction. Rather, the Supreme Court found there had been an "implicit denial" of the plea, from which the City should have appealed, when the trial court granted the plaintiff's partial motion for summary judgment. 388 S.W.3d at 665; *see also Thomas*, 207 S.W.3d at 339 (a "court that rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack has implicitly denied the jurisdictional challenge"). An order granting partial motion for summary judgment, however, is typically not an appealable interlocutory order. So, it is perhaps not surprising that the City did not invoke § 51.014(a)(8) to appeal that order.

However, because the Supreme Court has now made clear that orders fitting within its definition of an "implicit denial" of a plea to the jurisdiction can serve to start the 20-day clock for filing an interlocutory appeal under § 51.014(a)(8)—and that failure to timely appeal such an order can preclude subsequent interlocutory appeals of the "implicitly denied" jurisdictional challenge—it is incumbent upon parties who have raised jurisdictional challenges in the trial court to ensure that they timely perfect appeal from the first order that may be perceived as a ruling by the trial court on the jurisdictional challenge.

b. Jurisdictional points may be raised for the first time on interlocutory appeal

In *Rusk State Hosp. v. Black*, 392 S.W.3d 88 (Tex. 2012), the Supreme Court considered whether jurisdictional challenges, such as an assertion of immunity, could be considered when not first raised in the trial court. *Rusk State Hospital* was not an appeal of a plea to the jurisdiction, but rather was an appeal from a trial court order denying the hospital's challenge to the health care liability plaintiff's expert reports. 392 S.W.3d at 88. However, on appeal on the expert report issue, the hospital, for the first time, asserted that it had immunity from the suit. *Id.* The intermediate court of appeals declined to consider the immunity argument, instead finding that it was limited on interlocutory appeal to considering only the legal issues previously raised in the trial court. *See, e.g, Austin Indep. Sch. Dist. v. Lowery*, 212 S.W.3d 827, 834 (Tex. App.—Austin 2006, pet. denied), *overruled by Rusk State Hosp.*, 392 S.W.3d at 95 n.3.

The Supreme Court reversed the court of appeals, finding instead that "if immunity is first asserted on interlocutory appeal, section 51.014(a) does not preclude the appellate court from having to consider the issue at the outset in order to determine whether it has jurisdiction to address the merits" of the case. 392 S.W.3d at 95. However, the Supreme Court went on to find that the plaintiffs had not had the opportunity to develop a record geared toward establishing jurisdiction in the case, since the immunity issue was not raised or argued in the trial court; accordingly, the case was remanded so the plaintiffs could be permitted a "full and fair" opportunity to argue that jurisdiction existed in the matter. *Id.*

2. Appeal of denial of immunity motion filed by government official or employee

Section 51.014(a)(5) of the civil practice and remedies code provides that a person may appeal from an interlocutory order of a district court, county court at law, or county court denying a motion for summary judgment "that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5).

By its plain terms, interlocutory appeal under § 51.014(a)(5) may only be taken "by an individual who is an officer or employee of the state or a political subdivision of the state." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5). Accordingly, the appellate court will lack jurisdiction over interlocutory appeals of immunity motions taken by any person who is not an officer or employee of a qualifying government entity. *See, e.g., Methodist Hosps. of Dallas v. Miller*, No. 05-11-00955-CV, 2012 Tex. App. LEXIS 5455, 2012 WL 2782820 (Tex. App.—Dallas July 10, 2012, no pet.) (§ 51.014(a)(5) appeal dismissed because appellants, officers with the Methodist Hospitals of Dallas Police Department, failed to demonstrate that they worked for a state entity entitled to assert immunity); *Cen-Tex Child Care, Inc. v Johnson*, 339 S.W.3d 734 (Tex. App. - Fort Worth 2011, no pet.) (court lacked jurisdiction under 51.014(a)(5) to consider whether private entity working under contract for state may ultimately be entitled to official immunity because the private contractor was not an "individual who is an officer or employee of the state" qualified to take appeal); *Walker v. Whatley*, 318 S.W.3d 541 (Tex. App.—Beaumont 2010, pet. denied) (private attorney sued for actions taken as court-appointed guardian of person and estate could not appeal under § 51.014(a)(5)); *but see Klein v. Hernandez*, 315 S.W.3d 1 (Tex. 2010) (resident physician working at a public hospital, through an agreement with his private medical school, could take interlocutory appeal of immunity motion under 51.014(a)(5)).

Although section 51.014(a)(5)'s language states that interlocutory appeal must be taken from a "motion for summary judgment," the provision may be invoked to take interlocutory appeal of any order denying a government employee's assertion of immunity, regardless of the vehicle used in the trial court to raise the immunity argument. *See Austin State Hosp. v. Graham*, 347 S.W.3d 298 (Tex. 2011) ("an appeal may be taken from orders denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used"). Accordingly, a trial court order denying a "motion to dismiss" filed by a government employee pursuant to Tex. Civ. Prac. & Rem. Code § 101.106—the "election of remedies" provision in the Texas Tort Claims Act—may be taken on interlocutory appeal under § 51.0154. *See Austin State Hosp. v. Graham*, 347 S.W.3d 298 (Tex. 2011) (appeal of motion to dismiss brought under Tex. Civ. Prac. & Rem. Code § 101.106(e)); *City of Webster v. Myers*, 360 S.W.3d 51, 52 (Tex. App.—Houston 1st Dist. 2011, pet. denied); *see also Franka v. Velasquez*, 332 S.W.3d 367, 372 (Tex. 2011) (court had jurisdiction over interlocutory appeal of order denying

motion to dismiss brought under Tex. Civ. Prac. & Rem. Code § 101.106(f)).

III. FEDERAL COURT INTERLOCUTORY APPEALS

As is the case with state court appeals, appeals of interlocutory orders in federal court are limited. *See* 28 U. S. C. § 1291. However, a number of routes to interlocutory appeal are available, particularly with respect to immunity issues that are implicated in suits with government entities.

A. Collateral Order Doctrine

Pursuant to the "collateral order doctrine," a government entity or official may be able to seek appellate review of interlocutory orders denying relief based on an assertion of immunity from suit.[4] *See Martin v. Halliburton*, 618 F.3d 476, 483 (5th Cir. 2010) ("forms of immunity that may be vindicated on appeal at an early stage through collateral order review are those that involve…a right not to be tried"; accordingly, the "relevant inquiry in determining whether an 'immunity' is subject to immediate appeal under the collateral order doctrine is whether the asserted immunity is from suit or merely from liability").

1. Appeals of motions to dismiss based on Eleventh Amendment or absolute immunity

The denial of a motion to dismiss filed by a state entity on the basis of Eleventh Amendment immunity may be immediately appealed pursuant to the collateral order doctrine. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 147 (1993). Further, an order denying a motion for summary judgment asserting immunity based on judicial, quasi-judicial, or legislative privilege is appealable under the collateral order doctrine. *See Shanks v. AlliedSignal, Inc*., 169 F.3d 988, 992 (5th Cir. 1999) ("Texas law regards its privilege for communications made in the context of judicial, quasi-judicial, or legislative proceedings as a complete immunity from suit"); *see also Quirk v. Mustang Engineering, Inc.*, 143 F.3d 973 (5th Cir. 1998) (court has jurisdiction "over interlocutory appeals denying summary judgment based on absolute immunity," such as a claim of judicial immunity). Interlocutory orders denying state or municipal entities' or officials' assertion of state action immunity in antitrust matters are also appealable under the collateral order doctrine. *See Martin v. Memorial Hosp*., 86 F.3d 1391, 1399 (5th Cir. 1996).

2. Appeals of qualified immunity motions

A trial court's order denying a summary judgment motion (or order denying a motion to dismiss) filed by a public official based on qualified immunity is a collateral order capable of immediate review. *Brown v. Strain*, 663 F.3d 245, 248 (5th Cir. 2011); *see also Behrens v. Pelletier*, 516 U.S. 299, 311 (1996). However, the federal appellate court has jurisdiction over such an appeal only "to the extent that the district court's order turns on an issue of law." *Kovacic v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010). Issues of disputed material fact are not within the jurisdiction of the appellate court in an appeal of qualified immunity motion. *Id.*

Accordingly, the appellate court has jurisdiction on appeal to determine the legal question of whether the constitutional rights the plaintiff alleges to have been violated were "clearly established" at the time of the alleged injury; however, the appellate court will lack jurisdiction in a qualified immunity interlocutory appeal to review whether the actions of the official were "objectively unreasonable," *if* that determination turns on disputed material facts. *See, e.g., Brown*, 663 F.3d at 250. The appellate court, however, does have jurisdiction to determine whether the alleged disputed facts are actually "material" to resolution of the legal questions put at issue in the appeal. *See Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000).

B. Appeals under 28 USC § 1292

1. Appeals of Preliminary Injunctions

28 U.S.C. § 1292(a)(1), confers jurisdiction in the federal courts of appeal over "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions." *See Tex. Midstream Gas Servs. LLC v. City of Grand Prairie*, 608 F.3d 200, 204 (5th Cir. 2010). A temporary restraining order, however, is not an appealable "injunction" under § 1292(a). *In re Lieb*, 915 F.2d 180, 183 (5th Cir. 1990).

Unlike in state court, a government entity's noticing of an appeal of a preliminary injunction issued by a federal district court does not automatically stay the injunction pending appeal. However, a motion to stay a preliminary injunction pending appeal may be filed, first in the district court and then, if denied, in the appellate court. *See* Fed. R. App. P. 8(a)(1)(C). In determining whether to stay the injunction, the court will consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

[4] The collateral order doctrine allows for interlocutory appeal of orders that "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *see also Voting for Am., Inc. v. Andrade*, 488 Fed. Appx. 890, 904 (5th Cir. 2012) (after finding state likely to succeed on the merits, granting stay of injunction that enjoined enforcement of state statute). In lieu of a stay, the appellate court may order expedited briefing, on a schedule set by the court, to quickly resolve an injunction appeal. *See, e.g., Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 573 (5th Cir. 2012).

2. Certifying an order for interlocutory appeal

When interlocutory appeal is not otherwise available, the trial court may certify an interlocutory order for discretionary interlocutory appeal pursuant to 12 U.S.C § 1292(b). For example, while orders on Rule 12(b)(6) motions to dismiss for failure to state a claim are not typically subject to interlocutory appeal, such motions may be considered for certified interlocutory appeal in certain instances.

More specifically, 12 U.S.C § 1292(b) permits the trial court to certify for interlocutory appeal an order that is not otherwise appealable, if the trial court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See id.*; *see also, e.g*., *Consol. Cos. v. Union Pac. R.R. Co*., NO. 98-1804 L-O, 2006 U.S. Dist. LEXIS 21556, 2006 WL 950198 (W.D. La. Apr. 11, 2006) (order certified under § 1292(b)) *aff'd by* 499 F.3d 382 (5th Cir. 2007); *see also id.* (certifying for interlocutory appeal order that ruled defendant's land constituted a "facility" under the RCRA because "the scope of the facility at issue is determinative of many of the substantive issues [in the case]…[was] an issue of first impression … [and the] Court's ruling on the issue fundamentally affects the quantity and quality of facts and issues in dispute as well as the potential relief available").

Taking interlocutory appeal in this manner requires meeting a strict (and short) deadline. First, the district court (either sua sponte or on a party's motion) must certify an interlocutory order for appeal by stating in the order that it "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 12 U.S.C § 1292(b). Within ten days of the trial court's issuance of such a certified order, the party seeking appeal must apply to the appellate court for review of the certified order. *Id.*; FED. R. APP. P. 5(a); *see also Cole v. Tuttle*, 540 F.2d 206, 207 (5th Cir. 1976) (failure to seek review within ten-day period deprived appellate court of jurisdiction); FED. R. APP. P. 26(b)(1) (forbidding appellate courts to enlarge time for filing such application for review of certified interlocutory order).

In requesting the appellate court take review of the certified order, the appellant "has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Parcel Tankers, Inc. v. Formosa Plastics Corp.*, 764 F.2d 1153, 1155 (5th Cir. 1985) (quotations and citations omitted). The court of appeals has complete discretion in determining whether to grant an application for a § 1292(b) appeal and may later vacate an order granting such an appeal if it determines the matter is no longer suitable for appeal. *See id.* (the "discretion afforded the courts of appeal in reviewing petitions for leave to bring § 1292(b) appeals has been likened to that of the Supreme Court in controlling its certiorari jurisdiction") (quotations and citations omitted).