

STATE COURT INTERLOCUTORY APPEALS

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Virtually all state court systems provide some mechanism for review of interlocutory orders. The scope and availability of such review varies considerably. The primary vehicles for interlocutory appeal are appeals as of right, discretionary certified appeals, and the collateral order doctrine. In those states where interlocutory review is most restrictive, appeals are often limited to a certification process or as narrowly authorized by statute. In a more liberal environment, orders amenable to interlocutory review may be identified by statute or court rule.

Alternatively, many nonfinal orders may be reviewed by an extraordinary writ of certiorari, mandamus, or prohibition. Most notably, Florida permits petitions for writ of certiorari to address discovery rulings that depart from the essential requirements of law and cause irreparable harm that cannot be remedied on final appeal. Other states permit similar review by writ of mandamus to compel performance of a clear legal duty for which there is no adequate remedy on final appeal. Writ relief may be available to review orders concerning privileged materials, trade secrets, confidential information, or damaging “cat out of the bag” discovery disclosures, depending on the jurisdiction.

By comparison, federal courts strictly limit interlocutory appeals as of right to orders granting, denying, or modifying injunctions, as well as certain receivership and admiralty orders pursuant to 28 U.S.C. §1292(a). Otherwise, federal nonfinal appeals are discretionary and provide review through certification by the district court and acceptance by the court of appeals under §1292(b), or through Rule 23(f), which permits review of class certification orders. Additionally, federal courts utilize the collateral order doctrine, which is a judicially created exception to the final judgment rule and provides for review of interlocutory orders that conclusively determine an important issue separate from the merits and effectively unreviewable after final judgment. Finally, federal courts may also entertain writ of mandamus review under the All Writs Act in rare and exceptional circumstances to challenge discovery orders implicating privilege or similarly irreparable harms.

Where interlocutory review is available, it can serve as an effective litigation tool, not merely by slowing the pace of the proceedings, but by shaping the trajectory of a case, facilitating early resolution of significant legal issues, and potentially curbing litigation costs. In states such as Florida, New York and, in more limited categories, Texas, a broad range of interlocutory orders are appealable as of right by statute or court rule.

Florida provides a particularly instructive example through Florida Rule of Appellate Procedure 9.130, which delineates specific categories of nonfinal orders subject to interlocutory appeal as of right. The rule reflects a deliberate effort to balance the competing interests of judicial efficiency and the need for immediate review of consequential rulings, including categories such as jurisdictional determinations, injunctions, and certain orders affecting property, arbitration, and immunity. Notably, many of these categories evolved from areas Florida courts historically

reviewed through certiorari, illustrating a transition from discretionary, case-by-case intervention to a more predictable and rule-based framework. Florida's approach demonstrates the value of clearly defined appellate pathways in promoting uniformity, reducing reliance on extraordinary writs, and providing litigants with greater certainty in evaluating whether and when to seek interlocutory review.

Florida's Rule 9.130 provides:

**RULE 9.130. PROCEEDINGS TO REVIEW NONFINAL ORDERS
AND SPECIFIED FINAL ORDERS**

(a) Applicability.

(1) This rule applies to appeals to the district courts of appeal of the nonfinal orders authorized herein and to appeals to the circuit court of nonfinal orders when provided by general law. Review of other nonfinal orders in such courts and nonfinal administrative action is by the method prescribed by rule 9.100.

(2) Appeals of nonfinal orders in criminal cases are prescribed by rule 9.140.

(3) Appeals to the district courts of appeal of nonfinal orders are limited to those that:

- (A) concern venue;
- (B) grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions;
- (C) determine:
 - (i) the jurisdiction of the person;
 - (ii) the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve, or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment;
 - (iii) in family law matters:
 - a. the right to immediate monetary relief;
 - b. the rights or obligations of a party regarding child custody or time-sharing under a parenting plan; or
 - c. that a marital agreement is invalid in its entirety;
 - (iv) the entitlement of a party to an appraisal under an insurance policy;
 - (v) that, as a matter of law, a party is not entitled to workers' compensation immunity;
 - (vi) whether to certify a class;
 - (vii) that a governmental entity has taken action that has inordinately burdened real property within the meaning of section 70.001(6)(a), Florida Statutes;
 - (viii) the issue of forum non conveniens;

- (ix) that, as a matter of law, a settlement agreement is unenforceable, is set aside, or never existed; or
- (x) that a permanent guardianship is established for a dependent child under section 39.6221, Florida Statutes;
- (D) grant or deny the appointment of a receiver, or terminate or refuse to terminate a receivership;
- (E) grant or deny a motion to disqualify counsel;
- (F) deny a motion that:
 - (i) asserts entitlement to absolute or qualified immunity in a civil rights claim arising under federal law;
 - (ii) asserts entitlement to immunity under section 768.28(9), Florida Statutes;
 - (iii) asserts entitlement to sovereign immunity; or
 - (iv) asserts entitlement to immunity under section 776.032, Florida Statutes;
- (G) grant or deny a motion for leave to amend to assert a claim for punitive damages;
- (H) deny a motion to dismiss on the basis of the qualifications of a corroborating expert witness under subsections 766.102(5)–(9), and (12), Florida Statutes;
- (I) determine the entitlement of a party to arbitration, confirm or deny confirmation of an arbitration award or partial arbitration award, or modify, correct, or vacate an arbitration award; or
- (J) deny a motion under section 718.1224(5), 720.304(4)(c), or 768.295(4), Florida Statutes.

(4) Orders disposing of motions for rehearing or motions that suspend rendition are not reviewable separately from a review of the final order; provided that orders granting motions for new trial in jury and nonjury cases are reviewable by the method prescribed in rule 9.110.

(5) Orders entered on an authorized and timely motion for relief from judgment are reviewable by the method prescribed by this rule. Motions for rehearing directed to these orders are not authorized under these rules and will not toll the time for filing a notice of appeal.

(b) Commencement. Jurisdiction of the court under subdivisions (a)(3)–(a)(5) of this rule is invoked by filing a notice with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed.

(c) Notice. The notice, designated as a notice of appeal of nonfinal order, must be substantially in the form prescribed by rule 9.900(c). Except in criminal cases, a conformed copy of the order or orders designated in the notice of appeal must be attached to the notice. The notice must be accompanied by any required filing fee except as provided in rule 9.430 for proceedings by indigents.

(d) Record. A record will not be transmitted to the court unless ordered.

(e) Briefs. The appellant's initial brief, accompanied by an appendix as prescribed by rule 9.220, must be served within 20 days of filing the notice. Additional briefs must be served as prescribed by rule 9.210.

(f) Stay of Proceedings. In the absence of a stay, during the pendency of a review of a nonfinal order, the lower tribunal may proceed with all matters, including trial or final hearing, except that the lower tribunal may not render a final order disposing of the cause pending such review absent leave of the court.

(g) Cross-Appeal. An appellee may cross-appeal the order or orders designated by the appellant, to review any ruling described in subdivisions (a)(3)–(a)(5), by serving a notice within 15 days of service of the appellant's timely filed notice of appeal or within the time prescribed for filing a notice of appeal, whichever is later. A notice of cross-appeal must be filed either before service or immediately thereafter in the same manner as the notice of appeal. The notice of cross-appeal must be accompanied by any required filing fee except as provided in rule 9.430 for proceedings by indigents.

(h) Review on Full Appeal. This rule will not preclude initial review of a nonfinal order on appeal from the final order in the cause.

(i) Scope of Review. Multiple nonfinal orders that are listed in rule 9.130(a)(3) may be reviewed by a single notice if the notice is timely filed as to each such order.

Ultimately, the decision to seek interlocutory review is fundamentally a strategic assessment of timing, irreparability, and doctrinal fit within the governing jurisdiction. In this context, practitioners should carefully consider the applicable standards for review, the likelihood of obtaining appellate jurisdiction, and the potential impact—both immediate and downstream—on the course of the litigation.

AS OMINOUS AS IT SOUNDS? – THE U.S. SUPREME COURT’S “SHADOW DOCKET”

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I. What we mean by the “shadow docket”

The phrase “shadow docket,” coined by Will Baude, is not in the Rules of the Court. What we’re really talking about are:

- Applications for stays and injunctions under Supreme Court Rules 22 and 23.
- Applications to vacate stays or injunctions entered by lower courts.
- Summary orders that grant or deny that relief, often on an expedited basis, sometimes with no explanation beyond “The application is granted” or “denied.”

The traditional standard for this kind of relief, which the Court often recites, is familiar: a strong showing of likelihood of success on the merits, irreparable harm, the balance of equities, and the public interest. See, for example, the per curiam stay decision in *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Historically, that emergency work was relatively low-visibility: capital cases, especially last-minute execution-date litigation; some election disputes; and urgent statutory deadlines. It was important but seen as ancillary to the argued merits docket.

Over roughly the last twenty years, that has changed. The emergency docket is now where some of the most important national controversies first get decided — or effectively decided — including:

- Immigration and border policy.
- COVID-19 public-health restrictions.
- Religious-liberty challenges.
- Election law and redistricting.
- Abortion legislation.
- Nationwide injunctions in major administrative-law disputes.

These are frequently reported: a challenged policy goes into effect or is halted overnight, with a one- or two-paragraph order from the Supreme Court that may or may not be accompanied by a concurrence or dissent.

II. Examples: how emergency orders are shaping doctrine

Many of the most widely reported Supreme Court cases over the last decade or so have emanated from this Shadow Docket.

A. COVID-19 and religious-liberty cases

Consider *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S. Ct. 63 (2020). This was an application for injunctive relief against New York’s COVID capacity limits on houses of worship. In a late-night *per curiam* order, the Supreme Court granted an injunction, concluding that the applicants were likely to succeed on their Free Exercise challenge. 141 S. Ct. at 66–67.

Justice Kavanaugh wrote separately to articulate what he saw as the appropriate emergency posture. He framed the question this way: whether the state’s scheme “treats religious organizations worse than comparable secular organizations” and emphasized that “the Court’s precedents make clear that the First Amendment requires that” they not be treated worse. *Id.* at 75 (Kavanaugh, J., concurring). That is an emergency order, but it contains substantive reasoning that lower courts promptly treated as precedential guidance on COVID and religion.

On the other side, Justice Sotomayor, joined by Justice Kagan, dissented. She criticized the Court for what she saw as second-guessing state public-health judgments on an incomplete record and stressed that the Court was intervening “in the middle of a deadly pandemic” without the normal merits process. *Id.* at 80–81 (Sotomayor, J., dissenting).

B. Immigration and nationwide injunctions

Immigration policy has produced a series of high-stakes stay applications. One example is *Barr v. East Bay Sanctuary Covenant*, 588 U.S. ___, 140 S. Ct. 3 (2019), involving an asylum rule that limited eligibility for migrants who transited through a third country.

The Supreme Court, in a summary order, stayed a nationwide injunction that had been entered by a district court and partially narrowed by the Ninth Circuit. The majority gave no explanation. Justice Sotomayor, joined by Justice Ginsburg, dissented. She argued that the Court was increasingly using the emergency docket to alter the status quo in complex policy disputes, warning that “granting a stay pending appeal should be an ‘extraordinary’ act,” and that the Government had not met that burden. *Id.* at 5 (Sotomayor, J., dissenting) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)).

She added a broader institutional concern: that the Court was “departing from [its] usual practice” by routinely granting the Government’s emergency stay requests in politically charged cases. *Id.* at 5–6. That is one of the more explicit internal critiques of what people call the shadow docket.

C. Election law and the Purcell principle

Election-law emergencies have also become common. In *Merrill v. Milligan*, 595 U.S. ___, 142 S. Ct. 879 (2022), the Court, by a 5–4 vote, stayed a district court decision that had required Alabama to redraw its congressional map under the Voting Rights Act.

The majority’s one-paragraph order invoked the need for prompt review and noted probable jurisdiction. Justice Kagan dissented, joined by Justices Breyer and Sotomayor. She accused the majority of “doing a disservice to Black Alabamians who under that precedent have had their electoral power diminished” and argued that the Court was invoking the so-called *Purcell* principle to justify intervention where it did not belong. **Id.** at 880–81 (Kagan, J., dissenting); see *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

Her dissent is important for two reasons: first, it frames the stay as a substantive voting-rights decision rendered on an emergency basis, and second, it explicitly ties the emergency docket to the Court’s public legitimacy, warning that “this Court goes badly astray” when it “uses its shadow-docket orders to change the law” without adequate explanation. *Merrill*, 142 S. Ct. at 881 (Kagan, J., dissenting).

D. Administrative law and nationwide mandates

Another major example is *National Federation of Independent Business v. OSHA*, 595 U.S. ___, 142 S. Ct. 661 (2022). That case came to the Court as an application to stay OSHA’s emergency temporary standard requiring large employers to ensure workers were vaccinated or tested weekly.

In a per curiam opinion granting the stay, the Court essentially resolved the merits: it concluded that the applicants were likely to succeed on their claim that OSHA lacked statutory authority to impose such a broad public-health measure, and it stressed the “major questions” implications. *Id.* at 666–67.

Justice Gorsuch, joined by Justices Thomas and Alito, concurred, spelling out the major-questions doctrine explicitly. *Id.* at 668–72 (Gorsuch, J., concurring). Again, this is an emergency posture — a stay pending review — but it functioned as a definitive merits ruling on a central question of administrative law.

III. How individual justices have framed the emergency docket

These cases have provoked sustained commentary from within the Court itself.

A. Justice Sotomayor: procedural shortcuts and substantive consequences

Justice Sotomayor has been the most consistent critic of the Court’s emergency practice.

- In *Barr v. East Bay Sanctuary Covenant*, she described the Court’s pattern of stays as “upend[ing] the normal appellate process” and warned that such orders “may well erode public confidence in the Court’s impartiality.” 140 S. Ct. at 5–6 (Sotomayor, J., dissenting).

- In the Texas “SB 8” abortion case, *Whole Woman’s Health v. Jackson*, 594 U.S. ___, 141 S. Ct. 2494 (2021), the Supreme Court, in a late-night order, declined to block Texas’s six-week abortion ban from taking effect, emphasizing procedural complexities. Justice Sotomayor’s dissent accused the majority of “bury[ing] their heads in the sand” and allowing a law that was “a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights” to remain in force, all through an emergency order. *Id.* at 2495–96 (Sotomayor, J., dissenting).

Her through-line is that the Court is using emergency orders to make decisions with enormous real-world stakes, without full briefing, argument, or reasoned opinions that can guide lower courts.

B. Justice Kagan: legitimacy and consistency

Justice Kagan’s dissents focus on institutional concerns.

- In *Merrill v. Milligan*, she argued that the majority’s use of an emergency stay “does a disservice to this Court’s own legitimacy.” 142 S. Ct. at 881 (Kagan, J., dissenting).

- In other election-related emergencies, she has emphasized that the Court appears to be relaxing its own standards for stays, especially when those stays benefit certain governmental defendants, and that such inconsistency feeds public skepticism about the Court’s neutrality.

Her theme is that emergency orders should not be vehicles for major doctrinal shifts, and that when they are, the Court owes the public a more transparent and stable process.

C. Justice Alito: defending the emergency docket

Justice Alito has, by contrast, often defended the Court’s emergency work and criticized the “shadow docket” label.

In public speeches and in separate writings, he has argued that:

- The term “shadow docket” is a “catchy” but misleading phrase that suggests something secretive or improper, when in fact emergency relief has always been part of appellate practice.

- The apparent increase in emergency activity is, in his view, largely a response to lower courts issuing nationwide injunctions and aggressive structural remedies. From that perspective, the Court’s emergency interventions are correcting or cabining lower-court overreach rather than creating new problems.

This position implicitly pushes back on the idea that the Court has changed; instead, it suggests the docket has become more visible because of the kinds of cases and remedies being brought to it.

D. Justice Kavanaugh: standards and the Purcell principle

Justice Kavanaugh has repeatedly written to articulate, or re-articulate, the standards governing emergency relief.

- In election cases, he has stressed the *Purcell* principle: federal courts should avoid changing election rules close to an election because such changes can themselves confuse voters and election officials. See, e.g., *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ___, 140 S. Ct. 1205, 1207 (2020) (Kavanaugh, J., concurring in the grant of stay).

- In other emergency opinions, he has laid out factor-based tests for stays, emphasizing continuity with *Nken* and traditional equitable principles, and he has portrayed emergency relief as a way to preserve stability, not to rewrite law.

E. Justice Barrett: public remarks

Justice Barrett, in public remarks, has suggested that the term “shadow docket” unfairly implies that the Court is acting in secret or unlawfully. She has emphasized that emergency applications are handled under established rules and standards, even if the orders are short, and that the justices are not casually making policy from the shadows.

Together, these perspectives show a deep internal divide: some justices see emergency practice as dangerously transformative, others as routine and necessary.

IV. Certiorari before judgment and its interaction with the emergency docket

Let me turn briefly to certiorari before judgment, which often overlaps with emergency practice.

A. Doctrine

Under 28 U.S.C. § 1254(1) and Supreme Court Rule 11, the Court can grant certiorari “before judgment” in the court of appeals in cases of “imperative public importance.” Traditionally, this has been used sparingly — classic examples include:

- *Ex parte Quirin*, 317 U.S. 1 (1942) (Nazi saboteurs during World War II).
- *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the Steel Seizure Case).
- *United States v. Nixon*, 418 U.S. 683 (1974) (Watergate tapes).

In modern practice, the Court has used cert before judgment in:

- High-stakes separation-of-powers disputes.
- Cases involving major federal policies subject to nationwide injunctions.
- Situations where multiple appeals are pending and the Court wants to resolve an issue quickly and uniformly.

A recent example is *United States v. Texas*, 599 U.S. 670 (2023), a challenge to the Biden Administration’s immigration enforcement guidelines. The Court granted certiorari before judgment from the Fifth Circuit, bypassing the usual appellate process to resolve questions about state standing and executive-branch discretion.

B. Interaction with the emergency docket

Often the sequence looks like this:

1. A district court issues or denies a nationwide injunction.
2. The losing party seeks a stay or injunction from the Court as an emergency matter.
3. The Court either grants or denies interim relief, and sometimes simultaneously or shortly thereafter grants certiorari before judgment and sets an expedited merits schedule.

In those cases, the emergency order — whether a stay or an injunction pending appeal — may effectively govern the real-world status quo for months, while the case is briefed and argued on the accelerated merits docket.

So certiorari before judgment and the emergency docket can work together to pull a dispute rapidly to the Supreme Court and to allow the Court to both set the interim rules and provide the final word.

It is useful to think of these as complementary tools: emergency relief to manage the short-term stakes, and cert before judgment to secure an early, authoritative resolution when the Court is willing to take a case out of the ordinary pipeline.

V. Practical implications for litigators

1. Front-load your record and arguments.

Because big questions are increasingly being addressed first on emergency applications, the record and briefing you build in the district court may be what the Supreme Court is working off of, even if the case never goes through a full appellate cycle before an important interim order.

2. Be realistic but strategic about emergency relief.

The Court continues to state that stays and injunctions are “extraordinary” remedies, but it is granting them with some frequency in high-salience cases. For both government and private litigants, that makes Supreme Court emergency practice a real option — but one that must be carefully justified under the traditional factors.

3. Read the separate writings.

The short unsigned orders often say very little. The real guidance is in concurrences and dissents by justices like Sotomayor, Kagan, Alito, Kavanaugh, and others. Those opinions are where you see their views on nationwide injunctions – such as J. Kavanaugh’s recent suggestions that, rather than issue nationwide injunctions, perhaps district courts should look at Rule 23(b)(2) class certification as a method of binding parties who are not before the court as parties. The written opinions often also flesh out the justices major-questions doctrines concerns – did Congress delegate such authority to the executive branch? The justices also frequently discuss the emergency docket relationship to their own institutional legitimacy – really, should the Supreme Court even be issuing “decisions” without full briefing and oral argument in matters of broad national importance. These concurrences and dissents are increasingly important sources for predicting how the Court will react to emergency requests – and it is one of Justice Kagan’s biggest critiques of shadow docket litigation as she feels these decisions on limited records, regarding preliminary relief applications, telegraph to the lower courts how the Supreme Court will rule when a merits appeal reaches them years later.

4. Be aware of legitimacy narratives.

However you view the debate, several justices are explicitly talking about the Court’s legitimacy in the context of emergency orders. That means how you frame your application — as preserving the *status quo*, avoiding voter confusion, respecting separation of powers, or protecting constitutional rights — can resonate with those institutional concerns.

Conclusion

To sum up: the Supreme Court’s emergency docket is no longer a quiet corner of capital and election cases. It is now one of the main ways the Court interacts with high-stakes national controversies. Emergency orders, sometimes coupled with certiorari before judgment, can effectively decide major issues long before a conventional “merits” opinion appears in the U.S. Reports.

For those of us who litigate in federal courts, that means we have to treat interim relief at the Supreme Court as a central part of the legal landscape, not a peripheral one.

The Best Things Don't Always Come to Those Who Wait: A Strategic Approach to Interlocutory Civil Appeals¹

My law partner and appellate guru John Jacobs used to raise eyebrows and blow minds when, after an adverse jury verdict or judgment had been issued, he would say “don't worry, it's only halftime.” This confident expression in the power of the appellate system to correct a disastrous trial result was met with skepticism and viewed as controversial. But now, involvement of the appellate team at “halftime” may, itself, be too late if recent appellate trends are any guide.

Supreme Court Review of Civil Jury Trials Is Becoming Far Less Frequent

For many years, most notably in the early 2000's, Michigan appellate courts did not hesitate to reverse monetary judgments following full-blown civil jury trials.² And at times, the reversal of a significant jury verdict would be issued in a peremptory order of the Supreme Court based on the application briefs alone, without the benefit of oral argument or plenary briefing.

Understandably, for the litigant on the “losing end” of a reversal in a short court order instead of a full-fledged opinion, the peremptory process was an even tougher pill to swallow than a reversal following the traditional process of application briefing, followed by plenary briefing, oral argument and a full conference by the justices of the Court. This practice of peremptory reversal orders was controversial and even caused consternation among the justices, themselves.³

Likely owing at least in part to the negative feelings engendered by the reversal of jury verdicts particularly in peremptory orders, the Michigan Supreme Court has exhibited a preference for issuing major decisions in cases that do not arise out of a civil jury verdict and instead, the overwhelming majority of significant opinions recently issued by the Michigan Supreme Court in civil cases arose out of Summary Disposition Orders,⁴ *In Limine* rulings⁵ and a host of other non-jury trial proceedings.⁶ One has to go all the way back to 2017 to find a civil opinion from the Michigan Supreme Court arising out of a jury trial, but even in that case, the issue on appeal decided was whether a jury or judge should decide the amount of attorney's fees contemplated under a contract.⁷ Since that time, the Michigan Supreme Court has not granted full calendar review over a civil jury trial.

This trend away from appellate decisions stemming from civil jury trials is nowhere near as prevalent in the Michigan Court of Appeals given the different roles of this state's appellate courts. True to their intended design, the Court of Appeals serves as the error correcting Court and the Supreme Court serves as the policy making Court.⁸ To this end, litigants are provided with an appeal as of right to the Court of Appeals, which must decide a case, no matter how it found its way into the appellate system.⁹ The Michigan Supreme Court, however, is a policy making court and gets to pick and choose which cases to take.

Waiting to Appeal from a Final Judgment is Not Always an Option

If this trend in the Michigan Supreme Court continues, pursuing appellate remedies in advance of trial presents an opportunity to raise a potentially dispositive legal defense without the baggage of a jury verdict attached to it, presenting a strategic advantage to the more proactive litigant. Indeed, many of the Supreme Court's most significant decisions arose out of appeals that were interlocutory when originally filed,¹⁰ and in some of these cases, the Supreme Court Granted Leave to Appeal after the Court of Appeals refused to do so.¹¹

The preference for appeals from final orders is still found in Michigan's appellate court rules.¹² This approach that prefers one omnibus appeal from a single final order or judgment is codified in the Court Rules which provide an appeal as of right from a final order or judgment¹³ but designate appeals from non-final orders as discretionary, on leave granted.¹⁴

The federal system's requirement of a "final judgment" is virtually iron-clad. In the federal appellate system, there needs to either be a statute or court rule authorizing an interlocutory appeal,¹⁵ such as qualified immunity appeals under the "collateral order doctrine"¹⁶ appeals from class certification orders,¹⁷ or where the district court's order specifically allows an appeal by permission.¹⁸ With very rare exception, when a client or lawyer calls about an interlocutory appeal in the federal system, I strongly recommend against it.¹⁹

But Michigan's preference for one appeal from a final order is not nearly as strong as the "final judgment rule" governing the federal system. Under MCR 7.205(B)(1), to satisfy the requirement for interlocutory an appellant must establish an error was committed set forth facts "showing how the appellant suffer substantial harm by awaiting final judgment before taking an appeal". Individual judges of the Michigan Court of Appeals have different perspectives on when both prongs for interlocutory review are met.

Experience and anecdotal statements from judges and justices of the appellate courts offer clues as to how the standards for interlocutory review are implemented. Every 3 years the appellate lawyers and judges of the state convene for the Michigan Appellate Bench Bar Conference where practitioners and members of the court present on best practices and also discuss ways in which the appellate system could better function. The range of answers from the judges on when interlocutory review is warranted is striking. Some judges tend to align with the federal view that piecemeal appeals are warranted only in the most extreme circumstances such as when a lower court orders the disclosure of a sensitive document or some instance where effective appellate relief would not exist after a final order. Others have stated that the substantial harm factor hardly weighs in the analysis at all and if the appellant can show an error, that judge will vote in favor of granting the appeal.

Conclusion

These comments from the members of the bench indicate that it is a mistake to assume that Michigan follows the federal view that interlocutory appeals are rarely appropriate. The objective data contained in the cases where the Supreme Court granted interlocutory review refutes this notion.

There has not been a change to the Court Rule²⁰ governing when it is appropriate for the Michigan Supreme Court to Grant Leave to Appeal that explains this change. Instead, the basis of this change, purely in this author's opinion, is that there is a judicial hesitation to be viewed, rightly or wrongly, as a tort reform warrior. The previous Supreme Court approach where civil jury verdicts were overturned with regularity caused discord between lawyers, as well as between lawyers and the judges and justices in the appellate system. This discord spilled over into disputes between judges and justice themselves.²¹

These structural forces lead me to believe that getting your legal issue in front of the Court of Appeals before there is a substantial dollar amount attached to the case is the best method to adapt to the reigning appellate trends that do not appear to be transitory. Awaiting final judgment may be too late.

1. Authored by Timothy A. Diemer, Jacobs and Diemer, P.C.

2. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004) (reversal of \$21 million jury verdict); *Pellegrino v AMPCO Sys Parking*, 486 Mich 330; 785 NW2d 45 (2010) (reversal of \$15 million jury verdict); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278; 602 NW2d 854 (1999) (same).

3. See, for example, the Dissenting Statement of Justice Levin who would have agreed to grant leave in the case but disapproved of the use of a peremptory order to decide the case. *Boyce v Wayne-Westland Sch Dist*, 453 Mich 866; 552 NW2d 913 (1996) (“Today’s peremptory order reflects an increasingly common method of deciding cases, a method that does not provide safeguards against hasty and ill-considered decisions, a method that is unsafe.”) In response to the frequent disagreements about the use of peremptory reversal orders, the Supreme Court amended the Court Rules to create a procedure where oral argument and supplemental briefs are allowed on the question of whether to grant leave to appeal or take peremptory action. MCR 7.305(H)(1). This procedure, often referred to as Mini Oral Argument on the Application or “MOAA”), at least partially satisfies the concerns raised by Justice Levin about peremptory orders being issued “without plenary consideration, full briefing, oral argument, and an opportunity for the profession to file briefs as amici curiae”. *Id.*

4. *Bowman v St John Hosp & Med Ctr*, — Mich —; — NW2d — (2021) (appeal from denial of summary disposition ruling regarding statute of limitations in a medical malpractice case); *Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan*, 507 Mich 498; — NW2d --- (2021).

5. *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016).

6. *Omer v Steel Techs, Inc*, 507 Mich 492; — NW2d --- (2021) (appeal from an award issued by a Magistrate Judge of the Workers’ Disability Compensation Bureau); *Lichon v Morse*, 507 Mich 424; — NW2d --- (2021) (enforceability of an arbitration clause in an employment agreement).

7. *Barton-Spencer v Farm Bureau Life Ins Co of Michigan*, 500 Mich 32; 892 NW2d 794 (2017).

8. See *Burns v Detroit (On Remand)*, 253 Mich App 608, 615, 660 NW2d 85 (2002) (“the Michigan Court of Appeals ‘functions as a court of review that is principally charged with the duty of correcting errors’”); the grounds for a Grant of Leave to Appeal in the Michigan Supreme Court includes an appeal presenting an issue of “significant public interest” or “the issue involves a legal principle of major significance to the state’s jurisprudence”. MCR 7.305(B)(3).

9. *Goodwin v Nw Michigan Fair Assn*, 325 Mich App 129; 923 NW2d 894 (2018) (reversal of \$1 million jury verdict); *Silas v Secura Ins Companies*, unpublished opinion of the Court of Appeals, issued October 10, 2017 (reversal of \$7 million jury verdict).

10. E.g., *Dye v Esurance Prop & Cas Ins Co*, 504 Mich 167; 934 NW2d 674 (2019) (interlocutory appeal from denial of summary disposition); *Wigfall v City of Detroit*, 504 Mich 330; 934 NW2d 760 (2019) (same).

11. E.g., *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018).

12. See, for example, *McCarthy & Assoc, Inc v Washburn*, 194 Mich App 676, 680; 488 NW2d 785 (1992) (referring to piecemeal appeals as “an unnecessary waste of judicial resources.”)

13. MCR 7.203(A)(1).

14. MCR 7.203(B).

15. FRAP 5(a)(2) (requiring the petition for permission to appeal to be filed within the time line called for by the court rule or statute authorizing the interlocutory appeal).

16. *Mitchell v Forsyth*, 472 US 511; 105 S Ct 2806; 86 L Ed 2d 411 (1985).

17. FRCP 23(f).

18. FRAP 5(a)(3); see also, 28 U.S.C. § 1292 which lists a limited number of interlocutory appeals that can be immediately appealed, e.g., orders appointing a receiver, denial of an injunctions, or where the district court certifies the order for immediate appeal and even then, the appellate court still has to be persuaded to accept discretionary review.

19. The federal court rules are virtually silent on logistical issues regarding the ordering of transcripts, the paying of filing fees, etc after interlocutory review is granted because it is such a rare occurrence.

20. MCR 7.305(B)(3).

21. The verbal sparring between the majority and dissenting opinions in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005) is but one example of this discord.