

March 10, 2009

TLR Supports SB 1384, Allowing Permissive Interlocutory Appeals

Texas Civil Practice and Remedies Code §51.014 currently allows an immediate appeal of certain trial court orders entered while the litigation is on-going, such as an order appointing a receiver for a company. It also allows an appeal of an order “not otherwise appealable under this section” if: (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the appeal. The requirement for an agreement of the parties severely limits the utility of the statute. SB 1384 will update Texas law to allow an appeal without requiring the agreement of all parties.

PERMISSIVE APPEALS HELP THE TRIAL COURT

- This permissive appeal statute helps avoid forcing the parties, the court, and a jury to go through a trial based on a trial court’s possibly mistaken conclusion about the law applicable to the case.
- The procedure will be used only when the trial court believes that an appellate court’s guidance is necessary to his or her understanding of the law and will “materially advance the ultimate termination of the litigation.”
- A trial court that does not need guidance from an appellate court does not have to allow a permissive appeal.

REQUIRING THE PARTIES’ AGREEMENT LIMITS THE USEFULNESS OF THE STATUTE

- Texas’s permissive appeal statute is based on a similar federal statute that has been in use in federal courts for more than 50 years. Importantly, however, the Federal statute does not require that the parties agree to the appeal.
- Texas’s statute has limited utility because the party who has just obtained a favorable trial court ruling on an important question of law seldom agrees to an appeal.
- Consequently, even if the trial court believes that immediate appellate court guidance would be helpful, the trial judge cannot get that guidance without the parties’ permission.

THE CURRENT LAW IS ONE-SIDED

- Current law, which requires the agreement of the parties, almost always benefits plaintiffs, not defendants.
- A plaintiff has an immediate appeal from a decision on a controlling question of law if the trial judge's decision ends the case, such as a decision granting summary judgment to a defendant. Consequently, plaintiff lawyers oppose a change in law.
- If a trial judge's decision on a controlling question is in the plaintiff's favor, however, it may effectively be dispositive against the defendant because the defendant cannot afford the cost and risk of continuing the litigation through judgment and post-judgment appeal.
- Consequently, in most instances, it is the defendant who is unfairly punished by current Texas law.

SB 1384 WOULD AMEND SECTION 51.014 AS FOLLOWS, TO REMOVE THE PROVISION REQUIRING THE PARTIES' AGREEMENT AS A PREREQUISITE TO AN APPEAL FROM AN INTERLOCUTORY ORDER ON A CONTROLLING QUESTION OF LAW.

By: Huffman

S.B. No. 1384

A BILL TO BE ENTITLED AN ACT

relating to permissive interlocutory appeals in civil actions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (d), Sections 51.014, Civil Practice and Remedies Code, is amended to read as follows:

(d) A district court, statutory county court ~~[at law]~~, statutory probate court, or county court may in a civil action by [issue a] written order permit an appeal from an [for] interlocutory order that is [appeal in a civil action] not otherwise appealable ~~[under this section]~~ if:

(1) ~~[the parties agree that]~~ the interlocutory order involves a controlling question of law as to which there is a substantial ground for difference of opinion; and

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation~~[-and~~

~~(3) the parties agree to the order].~~

SECTION 2. Subsection (e), Sections 51.014, Civil Practice and Remedies Code, is repealed.

SECTION 3. The change in law made by this Act applies only to a civil action pending or commenced on or after the effective date of this Act.

SECTION 4. This Act takes effect September 1, 2009.