

INTERLOCUTORY APPEALS IN THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT – ONE POSSIBLE CHECKLIST

- Does the decision at issue end the litigation on the merits and leave nothing for the court to do but execute the judgment?
 - If so, appealable as of right under 28 U.S.C. § 1291; file notice of appeal.
- In a case with multiple claims or multiple plaintiffs or multiple defendants, does the decision at issue end the litigation on the merits and leave nothing for the court to do but execute the judgment as to one of the claims or parties?
 - If so, seek Fed. R. Civ. P. 54(b) certification, and, if granted, appealable as of right under 28 U.S.C. § 1291.
- Does the decision fit within one of the following judicially-created doctrines: the collateral order doctrine, the death knell doctrine, or the practical finality doctrine?
 - If so, appealable as of right under 28 U.S.C. § 1291; file notice of appeal.

If the decision is not “final” in any of these senses, it likely can only be reviewed as an interlocutory order.

- Does it fit within any category of 28 U.S.C. § 1292(a)?
 - If so, appealable as of right; file notice of appeal.
- Is it an arbitration-related decision that fits under 9 U.S.C. § 16?
 - If so, appealable as of right; file notice of appeal.
- Is it an order denying or granting (1) class certification or (2) remand of a class action to a state court after removal to federal court?
 - If so, file a petition for permission to appeal pursuant to Fed. R. Civ. P. 23(f) or 28 U.S.C. § 1453(c), respectively.
- If the decision does not fit any of these categories, does it present a controlling and difficult or unsettled controlling question of law and would immediate appeal materially advance the ultimate termination of the case?
 - If so, seek 28 U.S.C. § 1292(b) certification from the district court, and, if granted, file a petition for permission to appeal.

If the decision or order is not otherwise appealable, consider a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651.

Appeals From Interlocutory Orders in the Fifth Circuit

(1) Orders treated as “final” for purposes of 28

U.S.C. § 1291

- Fed. R. Civ. P. 54(b)
- Practical Finality Doctrine
- Death Knell Doctrine
- Collateral Order (or *Cohen*) Doctrine

Appeals From Interlocutory Orders in the Fifth Circuit

(2) Interlocutory orders appealable under jurisdictional statutes

- As of right
 - 28 U.S.C. § 1292(a)
 - 9 U.S.C. § 16
- By permission
 - 28 U.S.C. § 1292(b)
 - Fed. R. Civ. P. 23(f) / 28 U.S.C. § 1292(e)
 - 28 U.S.C. § 1453(c)