Civil Interlocutory Appeals in Federal Court

BY MARCY G. GLENN

This article discusses jurisdictional bases for federal interlocutory appeals in civil matters and procedures relevant to those appeals. It focuses on US Supreme Court and Tenth Circuit Court of Appeals case law.

The jurisdiction of federal courts of appeals is generally limited to the review of final judgments.[1] Yet various statutes, rules, and jurisprudential doctrines either require or permit those courts to hear appeals from non-final, or interlocutory, district court orders. This article presents the most significant jurisdictional bases for federal interlocutory appeals in civil cases and discusses procedures relevant to those appeals. It focuses on US Supreme Court and Tenth Circuit Court of Appeals case law applying relevant statutes, rules, and doctrines.[2]

Interlocutory Appeals as of Right

Appeals as of right are appeals that the federal courts of appeals must resolve if they are timely filed and comply with other jurisdictional requirements.

Appeals from Interlocutory Orders on Injunctions under 28 USC § 1292(a)(1)

The dominant category of federal interlocutory appeals as of right is from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," pursuant to 28 USC § 1292(a)(1). As a general rule, § 1292(a)(1) "should be narrowly construed to 'ensure that appeal as of right under § 1292(a)(1) will be available only in [limited] circumstances.'"[3] The Tenth Circuit, like other courts of appeals, looks to "the actual, practical effect of an order" before exercising jurisdiction under § 1292(a)(1), "consider[ing] the substance rather than the form of the motion and caption of the order."[4]

These general interpretive rules have generated abundant authority, often conflicting, as to whether particular appeals fall within the scope of § 1292(a)(1). With that caveat, Supreme Court and Tenth Circuit cases have held:

- Absent "extraordinary circumstances," § 1292(a)(1) does not apply to orders granting or denying temporary restraining orders (TROs).[5]
- However, TROs that remain in effect more than 10 days may be treated as preliminary injunctions.[6] And TROs will be treated as appealable injunctions where they effectively resolve the dispute.[7] Also, the Tenth Circuit will review orders denying TROs "when an appellant will suffer irreparable harm absent immediate review."[8]
- Section 1292(a)(1) applies to permanent injunctions that are not otherwise appealable as final orders.[9]
- Orders *modifying* injunctions are appealable, but orders merely *clarifying* or *interpreting* injunctions are not.[10]
- Section 1292(a)(1) has been extended to orders not expressly styled as injunctions but having the practical effect of injunctions, but only if such orders have "'serious, perhaps irreparable, consequence'" and "can be 'effectually challenged' only by immediate appeal."[11]
- Section 1292(a)(1) does not apply to orders relating to the conduct or progress of cases, even if they have injunctive effect.[12] Under this principle, for example, the Tenth Circuit has held that a stay order in a civil forfeiture proceeding "relate[d] only to the internal progress of the forfeiture litigation" and, therefore, could not be challenged in an interlocutory appeal under § 1292(a)(1).[13]
- If the court of appeals has jurisdiction over an interlocutory appeal related to an injunction order, it may—but is not required to—consider other issues interrelated with the injunction under its discretionary pendent appellate jurisdiction.[14] Relevant factors include (1) "whether the otherwise nonappealable issue is sufficiently developed, both factually and legally, for [its] review," (2) "whether review of the appealable issue involves consideration of factors closely related or relevant to the otherwise nonappealable issue," and (3) "whether judicial economy will be better served by resolving the otherwise nonappealable issue, notwithstanding the federal policy against piecemeal appeals[.]"[15]

Appeals from Interlocutory Receivership Orders under 28 USC § 1292(a)(2)

Title 28 USC § 1292(a)(2) authorizes appeals as of right from interlocutory orders related to receiverships, but "[c]ourts narrowly construe § 1292(a)(2) 'to permit appeals only from the three discrete categories of receivership orders specified in the statute, namely [1] orders appointing a receiver, [2] orders refusing to wind up a receivership, and [3] orders refusing to take steps to accomplish the purposes of winding up a receivership.'"[16] The statute permits immediate review of the conduct of appointed receivers only "when there has been a complete failure to act in furtherance of the receivership," but does not vest the court of appeals with jurisdiction to undertake "ongoing supervision of every action a receiver might be ordered to take."[17]

Appeals from Interlocutory Orders in Admiralty Cases under 28 USC § 1292(a)(3)

Given the geographic location of the Tenth Circuit,

it's unsurprising that the court has apparently issued only one published decision applying 28 USC § 1292(a)(3), which authorizes appeals as of right from interlocutory decrees "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."[18] That case, *In re Aramark Sports & Entertainment Services, LLC*,[19] however, makes clear that, in contrast to the narrow jurisdictional grants under 28 USC § 1292(a)(1) and (2), appellate jurisdiction over admiralty orders is broadly construed. "[T]o allow ship owners to seek an appeal to halt litigation at an early stage, in the hope of eliminating the need for further proceedings[,]" "all that is required is that a right or liability of a party have been determined[ ]" in an admiralty case.[20]

Appeals as of Right under Other Statutes

Various other federal statutes provide for appeals as of right from specifically defined interlocutory orders. For example, without waiting for a final judgment, a party may appeal under the Federal Arbitration Act from an order denying a motion to stay proceedings, denying a motion to compel arbitration, confirming or denying confirmation of an arbitration award, or modifying, correcting, or vacating an award;[21] the Federal Deposit Insurance Corporation may appeal from orders remanding cases removed to federal court;[22] and a party may appeal an order remanding a removed case where a federal officer or agency is sued or certain claims are made under the federal civil rights laws.[23]

A Variation on Interlocutory Appeals as of Right: The Collateral Order Doctrine

Appeals from collateral orders "feel" like interlocutory appeals, because they generally challenge a discrete order while the remainder of the case continues in the district court. In fact, they are more properly viewed as a subset of appeals from final judgments, with jurisdiction arising under 28 USC § 1291 (permitting "appeals from all final decisions of the district courts"), rather than pursuant to a statute or rule providing for interlocutory appeals.

As the Supreme Court first recognized in *Cohen v. Beneficial Industrial Loan Corp.*, collateral orders "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[24]

> "The dominant category of federal interlocutory appeals as of right is from interlocutory orders 'granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions,' pursuant to 28 USC § 1292(a)(1)."

To constitute a collateral order, a district court decision must (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."[25]

The most common immediately appealable collateral orders are those that deny motions to dismiss based on claimed immunity from suit—including based on Eleventh Amendment immunity,[26] qualified immunity,[27] absolute immunity,[28] and tribal immunity.[29] Among other collateral orders recognized by the Supreme Court or the Tenth Circuit are orders remanding a case to state court based on abstention;[30] requiring the plaintiffs to post a substantial bond, under a state statute, to proceed with a shareholder derivative action filed in federal court;[31] and imposing on the defendants 90% of the costs of providing notice to class members in a class action.[32]

Procedural Requirements

The procedural requirements for interlocutory appeals as of right, including under the collateral order doctrine, are the same as for traditional appeals from final judgments as set forth in the Federal Rules of Appellate Procedure (FRAP) and the Tenth Circuit Rules. Accordingly, the notice of appeal must be filed within the governing time period for appeals from final judgments,[33] and the rules related to briefing, appendices, and oral argument apply.[34]

Practice Tips

Practitioners filing interlocutory appeals as a matter of right should consider the following:

- Parties often have considerable leeway in how they characterize their requested relief. A litigant anticipating a potential interlocutory appeal under § 1292(a)(1) (concerning interlocutory orders on injunctions) should structure the relief sought as injunctive in nature if the facts and the law support that characterization.
- The fact that a party has a right to file an interlocutory appeal does not necessarily mean that it should do so. A party is not required to seek permission to take an interlocutory appeal to avoid waiving whatever ultimate appeal right the party may have.[35] Some cases may present good reasons to defer appealing until the case has proceeded to final judgment, including to avoid the expense and delay associated with an interlocutory appeal, or to obtain the benefit of a better developed record.

Permissive Interlocutory Appeals

Various statutory provisions, court rules, and cases authorize permissive appeals, which the courts of appeals may, but are not required to, accept.

Permissive Appeals under 28 USC § 1292(b)

Under 28 USC § 1292(b), the appellant must persuade two courts that an interlocutory appeal is appropriate. Initially, the district court must certify in writing that (1) an interlocutory order "involves a controlling question of law[,]" (2) "there is substantial ground for difference of opinion" on that legal issue, and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]"[36] A party who clears this first hurdle must then petition and convince the court of appeals to accept the appeal.[37]

Section 1292(b) does not state factors a court of appeals should consider in deciding whether to review on an interlocutory basis an order that could be challenged instead as part of an eventual appeal from a final judgment. As a result, the court of appeals has unbridled discretion under § 1292(b). Litigants generally advocate based on the three prerequisites for district court certification: (1) a novel and purely legal issue; (2) a substantial ground for difference of opinion, ideally demonstrated through conflicting conclusions reached by different district courts within the circuit; and (3) that the court of appeals' resolution of the issue will likely be dispositive of all or part of the case.

The Tenth Circuit has granted § 1292(b) petitions on diverse procedural and substantive issues in a broad range of cases, including, for example, an oil and gas royalty class action;[38] a constitutional challenge to Colorado's Taxpayer Bill of Rights;[39] and cases brought under the Employee Retirement Income Security Act of 1974,[40] the Americans With Disabilities Act,[41] and 42 USC § 1983.[42]

If the district court certifies its order as meeting the § 1292(b) standards for interlocutory appeal, a petition for review must be filed in the court of appeals within 10 days of that certification.[43] When a party wishes to file a permissive appeal from a district court order that does not include the required certification under § 1292(b), the putative appellant may ask the district court to modify its order to recite the necessary conclusions and certification, and the 10 days will run from the date of the reissued order.[44]

> "The most common immediately appealable collateral orders are those that deny motions to dismiss based on claimed immunity from suit—including based on Eleventh Amendment immunity, qualified immunity, absolute immunity, and tribal immunity."

Appeals from Orders Granting or Denying Class Certification Pursuant to Rule 23(f)

Under Federal Rule of Civil Procedure (FRCP) 23(f), "[a] court of appeals may permit an appeal from an order granting or denying class-action certification[.]"[45] Unlike § 1292(b) appeals, there is no prerequisite of district court certification. But like § 1292(b) appeals, the court of appeals has absolute discretion to accept or reject the appeal. Although the Tenth Circuit has recognized the important reason for permitting interlocutory appeals from class certification decisions—because "a class-certification determination can force a resolution of the case that is independent of the merits"[46]—it has exercised its discretion sparingly, apparently granting FRCP 23(f) petitions only four times in the past six years.[47]

"[N]o rigid test" governs the Tenth Circuit's exercise of its "unfettered" discretion, but review "is generally appropriate" in cases that "involve an unresolved issue of law relating to class actions that is likely to evade end-of-case review" and is "significant to the case at hand, as well as to class action cases generally," and in cases where the certification order "is manifestly erroneous," usually on an issue of law.[48]

Rule 23(f) sets a 14-day deadline for petitioning for review of an order granting or denying class certification; when the United States or a federal agency or officer is a party to the case, that deadline is extended to 45 days.[49] Because that time limitation appears in a procedural rule, not a statute, it is classified as a nonjurisdictional claim-processing rule that an opposing party can waive or forfeit.[50] Nevertheless, the FRAP "express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline," and, therefore, neither the district court nor the court of appeals may extend the 14-day deadline.[51]

Under limited circumstances, a motion for reconsideration may affect the timing of an appeal from a class certification order. The Tenth Circuit has assumed without deciding that a motion for reconsideration of a certification order, if filed *before the deadline* under Rule 23(f), will toll the deadline for petitioning to the Tenth Circuit until 14 days after the order on the reconsideration motion.[52] But a motion for reconsideration filed *more than 14 days* after the original certification order will not restart the clock for seeking Tenth Circuit review unless the district court issues a new certification order;

thus, an order denying a late-filed reconsideration motion will accomplish nothing.[53]

Appeals from Remand Orders in Removed Class Actions under 28 USC § 1453(c)(1)

Federal law generally provides that an order remanding a case to the state court from which it was removed is not reviewable on appeal.[54] However, under 28 USC § 1453(c)(1), part of the Class Action Fairness Act, a party may seek permission to appeal from orders granting or denying remand in most removed class actions.[55]

The appellant must apply to the court of appeals within 10 days after entry of the order granting or denying remand.[56] If the court accepts the appeal, it must decide the appeal quickly: (1) within 60 days after the appeal was "filed"[57] (which the courts of appeals have construed as the date the court accepted the appeal[58]); (2) within a longer time if agreed to by the parties[59]; or (3) if the parties cannot agree to an extension, within an extended period of up to only 10 days, upon a showing of good cause and in the interests of justice.[60] If the court does not issue a timely judgment, the appeal is deemed denied.[61]

A Variation on Permissive Interlocutory Appeals: Pendent Appellate Jurisdiction

In *Swint v. Chambers*,[62] the US Supreme Court indicated, without deciding, that if courts of appeals are permitted to consider additional issues in permissive interlocutory appeals, pendent jurisdiction would be confined to cases where the pendent issue "was inextricably intertwined with" the issue over which the court had interlocutory appellate jurisdiction.[63] The Tenth Circuit has adopted the *Swint* formulation for pendent appellate jurisdiction.[64] Only when the pendent issue "is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well[,]" will the court reach a pendent claim in a permissive interlocutory appeal.[65]

The exercise of pendent jurisdiction in interlocutory appeals is discretionary,[66] and the Tenth Circuit exercises that discretion sparingly.[67]

Procedural Requirements

Petitions for permissive appeals must comply with FRAP 5 and Tenth Circuit Rule 5, which address the required form and content of petitions, cross-petitions, responses, and replies.[68]

> "Section 1292(b) does not state factors a court of appeals should consider in deciding whether to review on an interlocutory basis an order that could be challenged instead as part of an eventual appeal from a final judgment. As a result, the court of appeals has unbridled discretion under § 1292(b)."

FRAP 5(a)(2) requires the petition to be filed within the time set by the statute authorizing the interlocutory appeal or, if the statute includes no filing deadline, within the time for filing a notice of appeal.[69] As noted above, these deadlines may not be extended.[70]

Petitions are generally submitted without oral argument.[71] If the petition is granted, no notice of appeal need be filed, the date of the order granting the petition is treated as the date of the notice of appeal, and the parties file briefs on the merits as in a traditional appeal.[72]

Practice Tips

Practitioners filing permissive interlocutory appeals may find these tips helpful:

- A district court order stating strong reasons for certification under § 1292(b) will be more persuasive to the court of appeals than one merely parroting the statutory elements, so a motion for certification in the district court should persuasively argue how each element is met.
- Even short amicus briefs may be useful in persuading the court to accept the appeal, much as amicus briefs in support of a Supreme Court petition for writ of certiorari can be helpful to a petitioner.
- A petitioner should avoid overstating the bases for a permissive appeal because the court of appeals may vacate its order granting permission to appeal and dismiss the appeal at any time before its decision.
- Advocates should always remember the distinction between the petition and the eventual appeal, if accepted. At the petition stage, the focus is on whether the court of appeals should exercise its discretion to take the appeal—which will typically turn on considerations in addition to the merits of the issues on appeal. If the court grants the petition, the focus typically shifts exclusively to the merits.

Extraordinary Writs

The All Writs Act vests all federal courts with jurisdiction to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[73] However, a writ is an extraordinary means of obtaining interlocutory review, and a court will grant it only in truly compelling circumstances:

> The Supreme Court has made it clear that mandamus is a "drastic" remedy that is "to be invoked only in extraordinary situations.

> . . . [T]he writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. . . . Petitioners must show that their right to the writ is "clear and indisputable."[74]

The criteria for issuance of an extraordinary writ are that (1) "the party seeking the writ has no other adequate means to secure the relief desired"; (2) "the petitioning party will be damaged or prejudiced in a way not correctable on appeal"; (3) "the district court's order constitutes an abuse of discretion"; (4) "the district court's order represents an often repeated error and manifests a persistent disregard of federal rules"; and (5) "the district court's order raises new and important problems or issues of law of the first impression."[75] Despite these high bars for interlocutory intervention, the Tenth Circuit has on exceedingly rare occasions granted extraordinary writs.[76]

FRAP 21 and Tenth Circuit Rule 21.1 provide procedures for the filing and disposition of extraordinary writs.[77] There is no filing deadline, but the petition should be filed as promptly as possible.[78] The rules prescribe the content and form of a petition[79] and permit the court of appeals to deny a petition without an answer or to order an answer within a set time.[80] Petitions for extraordinary writs receive preference over "ordinary civil cases."[81]

Practice Tips

Practitioners filing for extraordinary writs should keep the following points in mind:

- Given the remote chance of success, lawyers should consider all available alternatives before filing an extraordinary writ. Specifically, is there any way to change the district court judge's mind on the issue in question? Is an interlocutory appeal under § 1292(a) or (b) available? Can the party obtain adequate relief through an eventual appeal from a final judgment?
- The stringent standards for filing an extraordinary writ generally demand a fairly direct and aggressive attack on the district court—yet those rigorous criteria also generally result in writs being denied. Advocates should think hard before maligning an action or inaction of the district court judge before whom they likely will need to continue to prosecute or defend the case during and after the (likely unsuccessful) extraordinary writ proceeding.
- Note that, unlike permissive interlocutory appeals discussed above, when a writ is filed and the court of appeals exercises its discretion to decide the issue on the merits, it may do so based on the writ and answer (if ordered), instead of ordering separate merits briefing. Therefore, the writ (and answer) must address both why the court of appeals should accept (or reject) the appeal and why the court should overturn (or approve) the challenged action or inaction.

Conclusion

Despite the strong presumption that cases should proceed to final judgment before appeal, the law's strict limits on interlocutory appeals, the sundry procedural traps for the unwary, and the Tenth Circuit's historical reluctance to accept permissive appeals—despite all these hurdles, federal interlocutory appeals can be invaluable in the right case and under the right circumstances. CL

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NOTES

1. *See* 28 USC § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."); *Cobbledick v. United States*, 309 U.S. 323, 324–25 (1940) ("Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act, and has been departed from only when observance of it would practically defeat the right to any review at all.") (Footnotes omitted).

2. For a discussion of civil interlocutory appeals in the Colorado appellate courts, *see* Masciocchi and Van Bockern, "Civil Interlocutory Appeals in State Courts," 49 *Colo. Law.* 38 (Oct. 2020), https://cl.cobar.org/features/civil-interlocutory-appeals-in-colorado-state-courts.

3. *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151, 1153 (10th Cir. 2007) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)) (alteration in *Pimentel*).

4. *Id.*

5. *Caddo Nation of Okla. v. Wichita and Affiliated Tribes*, 877 F.3d 1171, 1173 n.1 (10th Cir. 2017). *See also S. Wind Women's Ctr. LLC v. Stitt*, 808 F. App'x 677, 680 (10th Cir. 2020) (unpublished); *Office of Pers. Mgmt. v. Am. Fed'n of Gov't Employees*, 473 U.S. 1301, 1304–05 (1985) (Burger, C.J. in chambers); *Populist Party v. Herschler*, 746 F.2d 656, 661 n.2 (10th Cir. 1984) (per curiam).

6. *Int'l Primate Protection League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 75–76 (1991); *Tooele Cty. v. United States*, 820 F.3d 1183, 1187 (10th Cir. 2016).

7. *See, e.g.*, *Populist Party*, 746 F.2d at 661 n.2.

8. *Duvall v. Keating*, 162 F.3d 1058, 1062 (10th Cir. 1998) (reviewing denial of TRO to block impending execution). *But see S. Wind Women's Ctr.*, 808 F. App'x at 681 (TRO prohibiting enforcement of state executive order postponing non-emergency medical procedures, including abortions, due to COVID-19 pandemic was not appealable under § 1292(a)(1), in part because, unlike Duvall, "[a]ppellants' rights will not be irretrievably lost absent immediate review").

9. *E.g.*, *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 and n.6 (10th Cir. 1989).

10. *See, e.g.*, *Pimentel*, 477 F.3d at 1154.

11. *Carson*, 450 U.S. at 84 (citations omitted). *See also, e.g.*, *Hutchinson v. Pfeil*, 105 F.3d 566, 569 (10th Cir. 1997); *Keyes v. Sch. Dist. No. 1*, 895 F.2d 659, 663 (10th Cir. 1990). *See generally Hatten-Gonzales v. Hyde*, 579 F.3d 1159, 1167 (10th Cir. 2009) ("[W]e do not foreclose the possibility that a motion may seek to dissolve or modify an injunction in effect without seeking relief in those precise terms.").

12. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988).

13. *United States v. Section 17 Twp. 23 N., Range 22 E.*, 40 F.3d 320, 322–23 (10th Cir. 1994). *See also, e.g.*, *Zou v. Linde Eng'g N. Am., Inc.*, No. 20-5099, 2020 WL 8175757 at *1 (10th Cir. Dec. 2, 2020) ("[T]he magistrate judge's order[,]

which imposes limits on discovery, prohibits further discovery requests absent leave of court, and prohibits further contempt/sanctions motions with respect to discovery, is not considered an injunction and is not appealable under § 1292(a)(1).”), *cert. denied*, No. 20-6882, 2021 WL 1072385 at *1 (U.S. Mar. 22, 2021).

14. *See, e.g.*, *Tri-State*, 874 F.2d at 1353 (exercising pendent jurisdiction over otherwise nonappealable issues connected to interlocutory appeal from denial of an injunction).

15. *Colo. v. Idarado Mining Co.*, 916 F.2d 1486, 1491 (10th Cir. 1990) (declining to exercise pendent jurisdiction in interlocutory appeal from injunctive order, where additional issues were highly factual in nature), *cert. denied*, 499 U.S. 960 (1991).

16. *United States. v. Solco I, LLC*, 962 F.3d 1244, 1250 (10th Cir. 2020) (citation omitted and bracketed numerals in original).

17. *Fed. Trade Comm'n v. Peterson*, 3 Fed. App'x 780, 782 (10th Cir. 2001) (unpublished).

18. 28 USC § 1292(a)(3).

19. *In re Aramark Sports and Entm't Servs., LLC*, 831 F.3d 1264 (10th Cir. 2016).

20. *Id.* at 1275–76.

21. 9 USC § 16(a)(1). *See also, e.g.*, *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1274, 1278 n.3 (10th Cir. 2017).

22. 12 USC § 1819(b)(2)(C).

23. 28 USC § 1447(d). *See also, e.g.*, *First Union Mortg. Corp. v. Smith*, 229 F.3d 992, 994 (10th Cir. 2000).

24. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

25. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), *superseded by statute on other grounds*.

26. *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146–47 (1993).

27. *Mitchell v. Forsyth*, 472 U.S. 511, 524–30 (1985).

28. *Nixon v. Fitzgerald*, 457 U.S. 731, 742–43 (1982).

29. *Osage Tribal Council v. United States Dep't of Labor*, 187 F.3d 1174, 1179–80 (10th Cir. 1999).

30. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–15 (1996).

31. *Cohen*, 337 U.S. at 545–47.

32. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170–72 (1974). For a more expansive discussion of the collateral order doctrine, *see* Glenn, “Appellate Review of Collateral Orders Under Federal and Colorado Law,” 43 *Colo. Law.* 69 (Dec. 2014).

33. *See* FRAP 4.

34. *See* FRAP 28 to 32, 34.

35. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996).

36. 28 USC § 1292(b).

37. *Id.*

38. *Pelt v. Utah*, 539 F.3d 1271, 1273–74 (10th Cir. 2008).

39. *Kerr v. Hickenlooper*, 744 F.3d 1156, 1162 (10th Cir. 2014), *vacated on other grounds*, 576 U.S. 1079 (2015).

40. *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1247–48 (10th Cir. 2004); *Kidneigh v. UNUM Life Ins. Co of Am.*, 345 F.3d 1182, 1184 (10th Cir. 2003).

41. *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1238 (10th Cir. 2001).

42. *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1150–51 (10th Cir. 2001).

43. 28 USC § 1292(b).

44. FRAP 5(a)(3).

45. FRCP 23(f).

46. *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1189 (10th Cir. 2006).

47. *See Rivera v. Exeter Fin. Corp.*, No. 19-704, Order (10th Cir. Jan. 29. 2020), *denial of certification aff'd*, 829 F. App'x 887 (10th Cir. 2020) (unpublished); *Chaparral Energy LLC v. Naylor Farms Inc.*, No. 17-601, Order (10th Cir. June 7, 2017); *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 913 (10th Cir. 2018); *Soseeah v. Sentry Ins.*, 808 F.3d 800, 803, 807 (10th Cir. 2015).

48. *Vallario v. Vandehey*, 554 F.3d 1259, 1263–64 (10th Cir. 2009) (citations omitted).

49. FRCP 23(f).

50. *Nutraceutical Corp. v. Lambert*, __ U.S. __, 139 S.Ct. 710, 714 (2019).

51. *Id.* at 715 (holding that court of appeals could not extend deadline as equitably tolled); FRAP 26(b)(1) (“the court [of appeals] may not extend the time to file . . . a petition for permission to appeal”). *See also Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) (district court lacked authority to extend time period and FRAP 26(b)(1) “specifically foreclose[s] appellate courts from granting an extension of time to file a petition for permission to appeal”).

52. *Carpenter*, 456 F.3d at 1191–92 (decided under FRCP's 23(f) previous 10-day deadline).

53. *Id.* at 1190–92.

54. 28 USC § 1447(d).

55. This exception does not apply to certain securities and corporate governance class actions. 28 USC § 1453(d).

56. 28 USC § 1453(c)(1).

57. 28 USC § 1453(c)(2).

58. *See Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 (10th Cir. 2005).

59. 28 USC § 1453(c)(3)(A).

60. 28 USC § 1453(c)(3)(B).

61. 28 USC § 1453(c)(4).

62. *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35 (1995).

63. *Id.* at 51.

64. *Moore v. City of Wynnewood*, 57 F.3d 924, 929–30 (10th Cir. 1995) (exercising pendent appellate jurisdiction over city's appeal from denial of summary judgment on state law claim, which was inextricably intertwined with police chief's permissible appeal (under the collateral order doctrine) from denial of qualified immunity on federal civil rights claim). *But see Estate of Ceballos v. Husk*, 919 F.3d 1204, 1221 (10th Cir. 2019) (distinguishing *Moore* and declining to exercise pendent jurisdiction where issues raised in city's appeal from denial of summary judgment on inadequate training claim “do no[t] overlap with the issue Officer Husk permissibly raised in his interlocutory appeal”).

65. *Moore*, 57 F.3d at 930.

66. *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1114 (10th Cir. 1999).

67. *Stewart v. Okla.*, 292 F.3d 1257, 1260 (10th Cir. 2002), *cert. denied sub nom.*, *Okla. Dep't of Corrs. v. Stewart*, 537 U.S. 1104 (2003).

68. FRAP 5(b), (c); 10th Cir. R. 5.1. Responses, cross-petitions, and replies are all optional—not mandatory. FRAP 5(b)(2).

69. FRAP 5(a)(2).

70. *See supra* note 51.

71. FRAP 5(b)(3).

72. FRAP 5(d)(2).

73. 28 USC § 1651(a).

74. *In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008) (citations omitted).

75. *Pacificare of Okla., Inc. v. Burrage*, 59 F.3d 151, 153 (10th Cir. 1995) (internal quotation marks and citation omitted).

76. *E.g.*, *Clyma v. Sunoco, Inc.*, 594 F.3d 777, 782–83 (10th Cir. 2010); *Sheet Metal Workers Int'l Ass'n, AFL-CIO v. Seay*, 693 F.2d 1000, 1005–06 (10th Cir. 1982), *reh'g denied and op. modified*, 696 F.2d 780 (10th Cir. 1983).

77. FRAP 21; 10th Cir. R. 21.1.

78. *See Cheney v. Dist. Ct.*, 542 U.S. 367, 378–79 (2004) (in dictum, assuming that laches may apply to a petition).

79. FRAP 21(a), (d).

80. FRAP 21(b)(1).

81. FRAP 21(b)(6).