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From deference to contempt

The illusion of appellate review of discovery abuses

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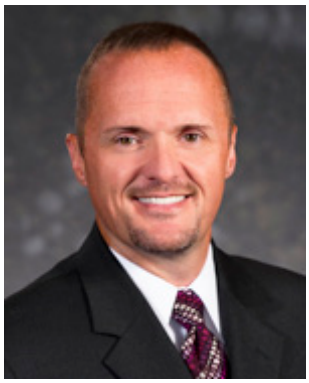

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The bulk of counsel's time in defending a lawsuit is spent navigating the discovery process, and all too often, struggling to protect the client against burdensome and oppressive discovery requests. Abusive discovery requests can result in the entry of onerous discovery orders despite well-reasoned advocacy by defense counsel. Absent a change in the jurisdiction of the federal courts of appeal, however, defense counsel's options for appellate review of discovery orders are limited.

It is commonly recognized among the courts that "[t]he liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case." *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976). The district courts have "the primary responsibility to police the prejudgment tactics of litigants." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985). Consequently, federal courts of appeals instruct district courts to be more aggressive in maintaining a tighter rein on the extent of discovery and discouraging the excessive use of discovery. See, e.g., *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1238 (10th Cir. 2000).

When the district courts fail to tighten the rein, onerous discovery orders can be entered with potentially disastrous, settlement-inducing results. [1] An order compelling discovery is an interlocutory order which is not immediately appealable under the final judgment rule. Limited procedures exist for obtaining appellate review of certain interlocutory orders—the collateral order doctrine, the certified interlocutory appeal, and writs. Appellate review of discovery orders, however, is not generally obtainable under these limited procedures absent extraordinary circumstances.

Instead, the mandated method for obtaining immediate appellate review of a discovery order in the federal courts of appeals is for the party to disobey the discovery order, be sanctioned and held in contempt of court, and then appeal the contempt order. This method only applies, however, where a contempt order is criminal in nature, or where the district court's order terminates the litigation, for example by rendering default judgment. Consequently, despite the fact that courts recognize the use of *in terrorem* litigation tactics in the discovery context, as a practical matter options for immediate appellate review of discovery orders are nonexistent except in extraordinary circumstances. Discovery abuses will continue unless Congress intervenes to broaden the jurisdiction of the federal courts of appeals.

The Final Judgment Rule Precludes Appellate Review of Interlocutory Discovery Orders

The final judgment rule generally prohibits appellate review of interlocutory discovery orders. Appeals as of right in the federal courts of appeals are limited to "final decisions of the district courts." 28 U.S.C. § 1291. A final judgment is defined as one "by which a district court disassociates itself from a case." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995). A final judgment is a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

The final judgment rule serves many important functions. As the United States Supreme Court recognizes, the final judgment rule "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1980). The final judgment rule avoids piecemeal appeals which "would undermine the independence of the district judge," avoids "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment," and promotes "efficient judicial administra tion." Id. (internal quotations omitted) (quoting *Cobbledick v. U.S.*, 309 U.S. 323, 325 (1940)).

Once a final judgment is entered, a party may then appeal that final judgment and raise all "claims of district court error at any stage of the litigation." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted).[2] As a general rule, however, a discovery order is an interlocutory order that is not immediately appealable as a final judgment. *Church of Scientology of Ca. v. United States*, 506 U.S. 9, 18 n.11 (1992).

The Collateral Order Doctrine Does not Apply to Discovery Orders

Federal courts allow an immediate appeal from a "small class" of collateral orders. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).[3] To come within the collateral order doctrine, "the order 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."*Utah ex rel. Utah State Dep't of Health v. Kennecott Corp.*, 14 F.3d 1489, 1492 (10th Cir. 1994) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

The collateral order doctrine, however, is narrowly circumscribed. Courts stress that the doctrine must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." Digital Equip. Corp., 511 U.S. at 868 (citation omitted). "The justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Mohawk Indus., Inc. v. Carpenter,* ___ *U.S.* ___, 130 S. Ct. 599, 605 (2009).

Consequently, when evaluating the appealability of an order under the Cohen collateral order doctrine, courts "do not engage in an 'individualized jurisdictional inquiry.'" *Id.* (quoting *Coopers & Lybrand*, 437 U.S. at 473). Courts instead focus on "the entire category to which a claim belongs." *Id*. (quoting *Digital Equip. Corp., 511 U.S.* at 868). If that category of claims can be adequately vindicated by other means, then the fact that the litigation might be advanced, or a particular injustice averted does not justify immediate appellate review under *Cohen's* collateral order doctrine. *Id.* (quoting *Digital Equip. Corp.*, 511 U.S. at 868). It is generally recognized, therefore, that discovery orders do not qualify as immediately appealable orders under the collateral order doctrine. *See, e.g., Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993) (and cases cited therein). Anomalies exist to that rule. [4] However, the United States Supreme Court recently reiterated that discovery orders, even those implicating the attorney-client privilege, are not immediately reviewable under *Cohen's* collateral order doctrine. *Mohawk Indus., Inc.,* ___ U.S. at ___, 130 S. Ct. at 606-07. Thus, the clear weight of the authority counsels against seeking an immediate appeal of a discovery order under *Cohen's* collateral order doctrine.

Discovery Orders Are Rarely Appropriate For Interlocutory Appeal under 28 U.S.C. § 1292

Pursuant to 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal. Certification pursuant to § 1292(b) is warranted if

1. The order involves a controlling question of law, [5]
2. For which there are substantial grounds for difference of opinion, [6] and
3. An immediate appeal may materially advance the ultimate termination of the litigation. [7]

Homeland Stores, Inc. v. Resolution Trust Corp., 17 F.3d 1269, 1271 (10th Cir. 1994); see also *Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431, 1433 (7th Cir. 1992).

Interlocutory certification is discretionary with both the district courts and the federal circuit courts of appeals and is generally reserved only for "exceptional circumstances." *Klinghoffer*

v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990); see also *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1387 (11th Cir. 1998); *Executive Software N. Am., Inc. v. Dist. Ct.,* 24 F.3d 1545, 1550 (9th Cir. 1994). Consequently, courts rarely allow an interlocutory appeal of discovery orders under § 1292. *See, e.g., Reise v. Board of Regents of Univ. of Wis. Sys.*, 957 F.2d 293, 295 (7th Cir. 1992) ("The travail and expense of discovery and trial cannot be reversed at the end of the case, yet this has never been thought sufficient to allow pre-trial appeals" of discovery orders.) (citations omitted).

Writs of Mandamus and Prohibition Are Only Available in Extraordinary Circumstances

The All Writs Act empowers federal courts of appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Generally, three conditions must be established before a writ of mandamus may issue:

1. "The party seeking issuance of the writ must have no other adequate means to attain the relief [it] desires"

2. "The issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances" and

3. The petitioner must demonstrate that the "right to issuance of the writ is clear and indisputable."

Cheney v. United States Dist. Court for Dist. of Columbia, 542 U.S. 367, 380-81 (2004) (brackets, citations, and internal quotations omitted). A writ of mandamus is not a substitute for an appeal; instead, it is a drastic remedy "to be invoked only in extraordinary circumstances." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); see also *Paramount Film Distrib. Corp. v. Civic Ctr. Theatre, Inc.*, 333 F.2d 358, 361 (10th Cir. 1964) (writ of mandamus issues only in exceptional circumstances to correct "a clear abuse of discretion, an abdication of the judicial function, or the usurpation of judicial power.").

Although the federal courts of appeals are reluctant "to issue writs of mandamus to overturn discovery rulings," "when a discovery question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment, the writ of mandamus provides an escape hatch from the finality rule." *S.E.C. v. Rajaratnam*, 622 F.3d 159, 170-71 (2d Cir. 2010) (quoting *In re City of New York*, 607 F.3d 923, 939 (2d Cir. 2010), and *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987)). Thus, "[a] writ of mandamus is 'appropriate' to review a pretrial discovery order if the petitioner demonstrates 'the presence of a novel and significant question of law ... and ... the presence of a legal issue whose resolution will aid in the administration of justice.'" *Id*. at 171 (quoting *City of New York*, 607 F.3d at 939).

Federal courts of appeals have, in some instances, "concluded that mandamus is an appropriate method of review of orders compelling discovery against a claim of privilege." *In re Burlington N., Inc.*, 822 F.2d 518, 522 (5th Cir. 1987) (citing cases). To justify the extraordinary issuance of a writ, however, the threatened disclosure of privileged must "render impossible any meaningful appellate review of the claim," and the threatened disclosure must "involve[] questions of substantial importance to the administration of justice." *Boughton*, 10 F.3d at 751 (citing *United States v. Winner*, 641 F.2d 825, 830 (10th Cir. 1981) (granting writ of mandamus to review order implicating questions of constitutional rights, secrecy of grand jury proceedings, and separation of powers)). Where the discovery dispute is between private litigants, there is generally "no question of substantial importance to the administration of justice … at issue." Id. (citing *Barclaysamerican Corp. v. Kane*, 746 F.2d 653 (10th Cir. 1984)).

Appellate review pursuant to a writ may be available in limited circumstances. If a discovery order does not implicate extraordinary considerations, then resort to a writ may not be an appropriate avenue for appellate review.

The Mandated Procedure for Obtaining Appellate Review of a Discovery Order Is to Disobey the Discovery Order and Receive a Contempt Citation

A party who wants to present an objection to a discovery order to a federal court of appeals must refuse to comply with the discovery order, be ordered in contempt of court, and then appeal the contempt order. *United States v. Ryan*, 402 U.S. 530, 531-32 (1971); see also *FTC v. Alaska Land Leasing, Inc.*, 778 F.2d 577, 578 (10th Cir. 1985); *Coleman v. American Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992) (holding that review of adverse discovery order is available by violating order, incurring contempt citation, and appealing contempt order); *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121 (4th Cir. 1994) (same) (collecting cases). [8]

This mandated method for immediate appeal of discovery orders only works, however, when the district court's sanction order either terminates the litigation, such as rendering default judgment, or when the sanction order is tantamount to a criminal contempt citation. [9]

"Sanctions, even if issued as civil contempt orders, generally are not deemed final appealable orders under 28 U.S.C. § 1291." *Law v. N.C.A.A.*, 134 F.3d 1438, 1440 (10th Cir. 1998) (citing *G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 827-29 (10th Cir. 1990) (counsel of record may not file interlocutory appeal for imposition of sanctions); *D & H Marketers, Inc. v. FreedomOil & Gas, Inc.*, 744 F.2d 1443, 1445-46 (10th Cir. 1984) (parties may not file interlocutory appeal from imposition of sanctions); *Consumers Gas & Oil, Inc., v. Farmland Indus., Inc.*, 84 F.3d 367, 370 (10th Cir. 1996) (party to a pending proceeding may appeal civil contempt order only as part of appeal from final judgment). A civil contempt order which includes a monetary fine beyond that necessary to compensate the moving party is considered a criminal contempt order which is immediately appealable. *Id*. at 1442.

The disobedience method may not be palatable to a large company that is frequently involved in defending lawsuits. A discovery contempt order presents implications beyond the litigation from which the discovery order emanates. A defendant's criminal disobedience of a district

court's discovery order gives the plaintiffs' bar fodder for arguing in motions to compel in other litigation that stonewalling in discovery and disobeying court orders is the defendant's *modus operandi*. While discovery orders in unrelated litigation are "a frail reed on which to predicate a finding of pattern or habit of improper professional conduct," **10** that will not prevent opposing counsel from attempting to poison the well in hopes of prejudicing a judge against a party fighting discovery.

Even if a litigant is willing to resort to this method, an immediate appeal will follow only if the district court's order terminates the litigation or rises to the level of a criminal contempt citation. This method for obtaining immediate appellate review of a discovery order, therefore, is not guaranteed.

Conclusion

Abuses of the liberal discovery rules under the Federal Rules of Civil Procedure exist, but a discovery order is not a final appealable order. Therefore, a party has very limited avenues for seeking immediate appellate review of an onerous discovery order. Absent exceptional circumstances, the federal courts of appeals are not likely to allow an immediate appeal of a discovery order under the narrow interlocutory appellate procedures. The mandated disobedience-contempt option, with adverse ramifications beyond the pending litigation, will be hard for many clients to accept, and may not be an option counsel will be comfortable recommending. Further, that option will not always be available as it depends on the nature of the sanction the district court orders under Rule 37.

In *Mohawk*, the United States Supreme Court cautioned courts to give "full respect" to the Rules Enabling Act, 28 U.S.C. § 2071 *et seq*., which "designat[es] rulemaking, 'not expansion by court decision' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus., Inc.,* ___ *U.S. at* ___, 130 S. Ct. at 609 (quoting Swint, 514 U.S. at 48). Although the United States Supreme Court has the authority to make rules defining "when a ruling of a district court is final for purposes of appeal," 28 U.S.C. § 2072(c), relief is not likely as the Court pronounced, "We expect that the combination of standard postjudgment appeals, § 1292(b) appeals, mandamus, and contempt appeals will continue to provide adequate protection to litigants." *Mohawk Indus., Inc.*, ___ U.S. at ___, 130 S. Ct. at 609 (quoting *Swint*, 514 U.S. at 48). Therefore, unless Congress acts, immediate appellate review of onerous discovery orders will only be available under extraordinary circumstances, and abusive discovery tactics will continue to plague litigants.

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1. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (to the extent that allowing broad discovery "permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit."); *American Standard, Inc. v. York Intern. Corp.*, 244 F. Supp. 2d 990,

997 (W.D. Wis. 2002) (court determined plaintiffs' litigation tactics and evasive discovery behavior were in bad faith in effort to force defendants into settlement); *U.S. v. Rybachek*, 643 F. Supp. 1086, 1087 (D. Alaska 1986) (government attempted to utilize oppressive litigation tactics by creating expensive litigation, requiring miners to travel hundreds of miles to attend hearings in effort to force settlement).

2. Complying with a discovery order and then seeking review of that discovery issue on appeal from the final judgment is, of course, always an option for obtaining appellate review. That method, however, does not placate the party who wants to avoid complying with the discovery order and seek immediate appellate review.

3. Although the collateral order doctrine is frequently referred to as an "exception" to the final judgment rule, the United States Supreme Court has emphasized that the doctrine is best understood as a "practical construction" of 28 U.S.C. § 1291. *Digital Equip. Corp.*, 511 U.S. at 867.

4. For example, the Tenth Circuit Court of Appeals allowed an appeal of a discovery order under the collateral order doctrine in *Sears v. Nissan Motor Co.*, Ltd., No. 90-2169, 1991 WL 80741 (10th Cir. May 16, 1991) (unpublished). There, the Court allowed an immediate appeal of a discovery order which allowed the unfettered dissemination of the defendants' trade secrets. Subsequent opinions by the Tenth Circuit Court of Appeals note, however, that that it has "repeatedly held that discovery orders are not appealable under the *Cohen* doctrine," *Boughton*, 10 F.3d at 749 (citing cases), and have noted that *Sears* is not binding precedent because it is an unpublished decision. Dutton v. General Motors Corp., No. 95-6036, 1995 WL 135663, at *1-2 (10th Cir. March 28, 1995) (unpublished) (dismissing for lack of appellate jurisdiction an appeal of district court order which denied a motion for protective order covering three categories of pretrial discovery requests which defendant claimed sought confidential information).

5. "Controlling question" for purposes of § 1292(b) can include not only those issues that will resolve the action in its entirety, but those that are dispositive in other respects, such as whether a particular claim exists. *Sterling Consulting Corp. v. United States*, 245 F.3d 1161 (10th Cir. 2001) (permission to appeal granted for question of whether government tax liability determinations for entities within receivership estate can be resolved by declaratory judgment in district court); see also *Lewis v. Intermedics Intraocular, Inc.*, 56 F.3d 703, 706 (5th Cir. 1995) (permitting interlocutory appeal of issue of whether federal law preempts state law claim); *Curtis v. Metro Ambulance Serv.*, 982 F.2d 472, 473 (11th Cir. 1993) (permitting interlocutory appeal of issue of whether Civil Rights Act of 1991 may apply retroactively). "'[C]ontrolling' means serious to the conduct of the litigation, either practically or legally." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3rd Cir. 1974).

6. A difference of opinion may be shown where the conclusion reached by a particular court is not the only reasonable conclusion an impartial arbiter could reach. *See, e.g., Chan v. City of New York*, 803 F. Supp. 710, 733 (S.D.N.Y. 1992).

7. "[R]eview of interlocutory appeals was designed not only to permit the defendant to obtain immediate relief but also in certain cases to save the parties the expense of further litigation." *Tri-State Generation & Transmission Ass'n., Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1352 (10th Cir. 1989) (citing *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 756 (1986)). Interlocutory appeals are used with an eye toward judicial economy. State of Colorado v. Idarado Mining Co., 916 F.2d 1486, 1492 (10th Cir. 1990).

8. This disobedience/contempt approach only applies to parties. Under the *Perlman* doctrine, a discovery order directed to a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance. See *Perlman v. United States*, 247 U.S. 7 (1918).

9. District courts have substantial discretion in sanctioning a party for failure to comply with a discovery order. Under Rule 37, if a party fails to comply with an order compelling discovery, a court "may issue further just orders" that "may include" orders: (i) that certain facts be taken as established; (ii) prohibiting a party from supporting or opposing claims or defenses, or from introducing certain evidence; (iii) striking pleadings; (iv) staying further proceedings until compliance is obtained; (v) dismissing the action; (vi) rendering a default judgment; or (vii) finding a party in contempt. FED. R. CIV. P. 37(b)(2)(A)(i)-(vii).

10. *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 511 (4th Cir. 1977) (reversing district court's Rule 37 sanction order which was based in part on discovery orders in three other cases involving the same defendant).

LINKS

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- Alison A. Verret's bio
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