Don't Slip on Appeal (or Before Your Trial Judge): Effectively Arguing Your Insurance Case to the Court

American College of Coverage Counsel
2023 Annual Meeting

Intercontinental Chicago
May 10-12, 2023

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The Art of the Appeal: Making Your Insurance Case Clear, Concise, and Persuasive[1]

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INTRODUCTION

Very few judges are insurance coverage experts, and almost all judges are busy people, charged with finding the right answer to a broad variety of complex cases. The judges hearing your insurance appeal will appreciate your assistance framing the facts, issues, and authority so that they can quickly grasp what has happened, what is at stake, what the heart of the dispute is, and what authority they must analyze to resolve the case. The following is a set of practical pointers about how to craft your appeal.

INSURANCE APPEAL BRIEFS

1. Resist insurance jargon. Write in plain English.

Although some appellate judges come from an insurance background, most do not. That makes it likely that some, if not all, of the judges reading your brief will be unfamiliar with technical insurance terms. So translate technical jargon—self-insured retention, primary, excess, umbrella, declarations, aggregate limits, tower, condition, exclusion, exemption, endorsement, long-tail, trigger, allocation, erosion, drop-down, non-cumulation (the list goes on)—into plain English.

[1] The authors' views are their own and not that of their firms or their clients.
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Ask one of your colleagues who does not specialize in insurance to read your brief and flag points that confuse them.

Your explanations of insurance terms should educate the court, but be careful not to patronize. In a dispute between two insurers over their respective indemnity duties to their insured, a Fifth Circuit Court of Appeals judge chastised a litigant from the bench for the condescending tone of his brief:

> Attorney: "May it please the court . . . I am proud to represent Amerisure Insurance Company. As I have said many times, if more insurance companies did business the way Amerisure did, the world would be a better place."
>
> Judge: "And if you wrote a shorter brief, our court would be a better place. I've never seen a brief that went on as long as yours did in such a condescending manner. I'll just be very blunt with you. We've dealt with insurance before and we're not in the seventh grade. I've never seen a brief like the one you wrote and I just think you ought to think about that in the future when you file briefs with this court. . . . I would think you were paid by the word or something . . . ."

Amerisure Ins. Co. v. Navigators Ins. Co., 611 F.3d 299 (5th Cir. 2010) (transcript of oral argument).

2. Block-quote policy language.

An insurance case is a contract case. The governing text is the insurance contract. Make it easy for the court to find the key policy language in your brief. Policy language, like any contractual or statutory language, is easiest to refer to when block-quoted. Block-quote the key policy language early in your brief.

When excerpting policy provisions in your fact section, give the court the whole picture. It can be the whole *relevant* picture, but avoid very short excerpts and excessive ellipses. The court will wonder what you left out, which might make the court trust you less. You may excerpt more selectively in your argument section if you have set forth the full text in the facts.

With long passages, consider adding emphasis to highlight important key clauses. This can be especially helpful when there is no dispute about which words in a lengthy passage are most critical and thus merit the court's attention. But be careful. If your opponent would quibble with your emphasis, the judge might too.

Judges can see through efforts to manipulate policy language. When in doubt, "don't mess with text." You might be better off presenting policy language exactly as it appears in the contract—no ellipses, no emphasis.

3. Make it easy to remember the parties.

Never call the parties "insurer" and "insured." Instead, use the parties' actual names, for example, AIG and Borg Warner. Or identify the parties by what they do—for example, "oil company," "auto fleet," "toy factory." You need not define the short form of a party's name. Instead, use the full name the first time—Arch Insurance Co.—and thereafter a logical short form: Arch. Unless there is more than one Arch in your case, your readers will not be confused, and you will avoid the clutter of definitional parentheticals.

Similarly, avoid turning a party's name into an acronym. As one federal judge has put it, "[r]eading a brief should not be a short-term memory test, and just because 'UMTRI' is defined on page three of a brief does not mean that a judge will remember what it means on page nine."[2] Thus, do not use FFIC for Fireman's Fund Insurance Company; use Fireman's Fund, or just Fireman's.

What if the parties have complicated corporate histories or have changed names over time? If a company was acquired and is now known by a new name, refer to the name that matters for your argument. For example, if the case turns on recent claims handling by the successor company, then use the successor company's name, *e.g.*, Allianz instead of Fireman's Fund. But if the case is about an underwriting decision that was made years ago, use the old name, Fireman's Fund—particularly if that name is reflected in documents from that time period. Either way, explain early on who and what you are talking about. Stick to one company name or risk confusing the court. (The exception is where the distinction matters, *e.g.*, OldCo did something that NewCo is allegedly responsible for.)

4. Avoid confusing synonyms.

Like interchangeable party names, synonyms do not make your writing more interesting. They make it more confusing. A reader can track the logic of a passage more easily when the writer consistently uses the same terms to refer to the same concepts.

Compare these two examples[3]:

[2] Raymond M. Kethledge, *A Judge Lays Down the Law on Writing Appellate Briefs*, GR Solo, Sept./Oct. 2015, at 25, 26.

[3] Examples adapted from Robert B. Dubose, *Appellate Brief Writing: Making a Brief Helpful and Persuasive*, State Bar College Summer School 2007, at 14.

The insurer tendered a defense with a reservation of rights. Then the defendant insisted that the defense counsel pursue discovery on an issue that would be prejudicial to the insured's argument for insurance coverage. Finally, Dominion Insurance instructed its retained counsel to stop work on the case.	Dominion Insurance tendered a defense with a reservation of rights. Then Dominion insisted that its retained defense counsel pursue discovery on an issue that would be prejudicial to the insured's argument for insurance coverage. Finally, Dominion instructed its retained defense counsel to stop work on the case.

The paragraph on the left keeps switching the words it uses to refer to the same entities. In the passage, "insurer," "defendant" and "Dominion Insurance" all refer to a single entity, as do the words "defense counsel" and "retained counsel." In contrast, the paragraph on the right repeats the important words and is, as a result, easier to follow.

5. Include the full policy in an appendix.

Always include a full copy of the policy (or policies) in the record excerpt or appendix. If your case involves multiple policies and it would be too cumbersome to include them all, include one exemplar and explain why it suffices for the purposes of your argument.

6. Properly cite every single record citation and legal authority the court needs.

Give the court everything it needs to write the opinion in your favor (and the clerk everything she needs to write the bench memo for you, too). That means making sure that all of the facts necessary to the analysis are in the record, and that you cite to the exact page in the record for each key fact. It also means providing citations to published, controlling authority for every major proposition essential to your argument—this includes relevant burdens of proof and the interpretive principles upon which you rely.

7. Pictures, charts, and graphics speak a thousand words: use them.

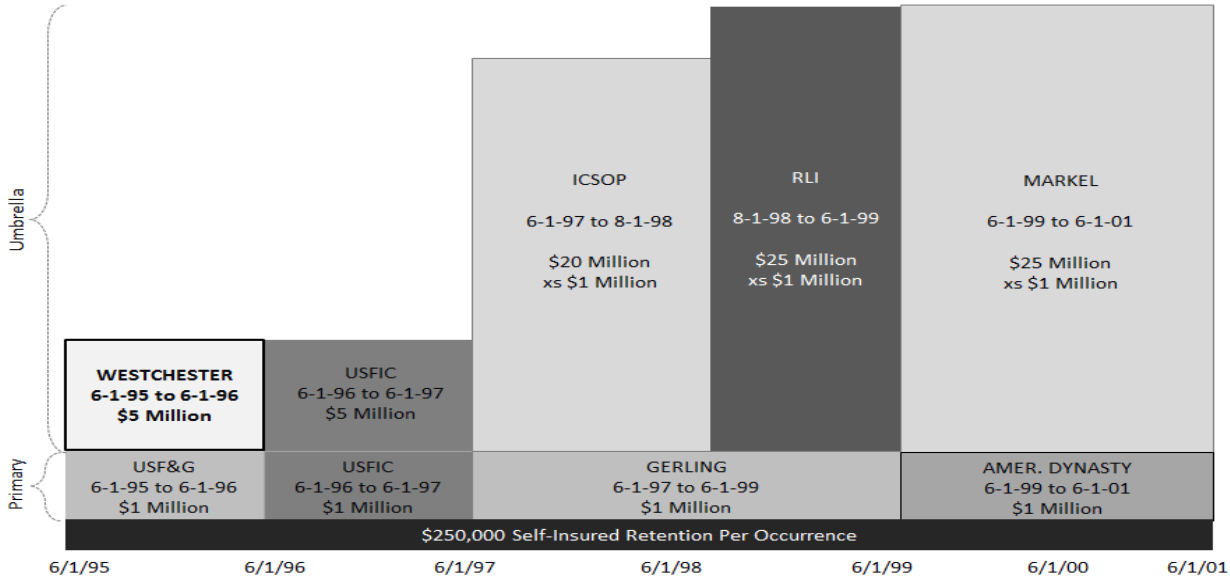
When your case involves numerous insurance policies covering multiple excess layers spanning several years, you need a coverage chart. Almost as elegant as Charles Joseph Minard's "Carte Figurative" depicting the losses suffered by Napoleon's army during the Russian campaign of 1812, a good coverage chart depicts volumes of information in a single picture: every insurance policy issued by each insurer in every time period, including each policy's attachment point and limits of liability. Further detail can be provided by color coding each "policy" to reflect policy terms or other relevant facts.

Compare the following narrative description with the chart that follows on the next page.

> RLI's policy, effective August 1, 1998 to June 1, 1999, has a policy limit of $25,000,000 per "occurrence" and is excess to the Gerling policy. ICSOP's policy, effective June 1, 1997 to August 1, 1998, has a policy limit of $20,000,000 per "occurrence" and is excess to the Gerling policy. Westchester's policy, effective June 1, 1995 to June 1, 1996, has a policy limit of $5,000,000 per "occurrence." The Westchester policy is not excess to the Gerling policy because the Westchester policy period precedes the Gerling policy period.

However, the primary policy underlying the Westchester policy also had limits of $1 million per "occurrence" and a $250,000 SIR.

Now, the coverage chart:



While the narrative explanation accurately describes the policies, the policies' relationships to each other–and the situation of the Westchester policy in particular–are more understandable when paired with the graphic coverage chart.

ANALYSIS AND AUTHORITY

8. Give the court a roadmap of the coverage analysis.

Early in your argument, orient the court by outlining the steps of the coverage analysis and identifying which steps in the analysis the parties dispute. For disputed steps, correctly identify which party bears the burden of proof. This is also a good opportunity to point out which issues the court can skip if it resolves others in your favor. For example, if you represent the insurer and your primary argument is that coverage was not triggered, then a court that sides with you on that argument need not reach your other three arguments about allocation or various policy exclusions.

9. For background, refer the court to a good treatise.

As explained earlier, appellate judges and justices have widely varying backgrounds and experience with insurance cases. Those with little background will appreciate a footnote to a good, relatively short, law review article or treatise chapter that will allow them to quickly get up to speed in the area. This approach has the added benefit of eliminating the need to waste valuable pages on background concepts. If you follow this tip, then you will be free to use the argument section of your brief for actual argument.

10. Unless the applicable law is undisputed, include a choice-of-law analysis.

In many insurance cases, the parties agree about which state's law applies. In that event, you can simply state the parties' agreement and proceed directly to substantive argument. If, however, you and your opponent do not clearly agree, a thorough choice-of-law analysis may be warranted. In some cases, it might even be the deciding factor in whether you win or lose your case.

A trickier situation is presented where two states have similar but not identical laws on a certain issue. For example, California and Colorado are both "continuous trigger" states. Or are they? Are the facts in your case more like *Globe Indemnity Co. v. Travelers Indemnity Co. of Illinois,* 98 P.3d 971 (Colo. 2004) or *Hoang v. Assurance Co. of America*, 149 P.3d 798 (Colo. 2007) (en banc)? And how closely do your facts—and the more applicable Colorado case—match up with California case law? If the factual distinctions between cases matter to the outcome of your case, be sure to address them, and be able to argue which state's law is binding and which is merely persuasive. Do not simply assume that "all relevant principles are the same" under the law of two different states. Even if your opponent appears generally indifferent to the choice-of-law issue, including a choice-of-law analysis for the court will enable you to cite the correct state's cases with confidence, and will enable the court (and the clerk) to understand any relevant nuances.

11. Keep as close to the policy language as possible.

Too often insurance lawyers begin by arguing about how a particular "type" of policy provision is supposed to work, without paying sufficient attention to what the specific provision in their policy actually says. For example, not all "your work" and "your product" exclusions are worded the same, so it follows that they will not all operate in practice to exclude exactly the same things. Unless your policy contains a standard-form policy provision about which a substantial and consistent body of law has developed, beware of generalizing about how clauses operate. It is acceptable to point the court to a treatise that explains the history or purpose of such standard-form language, but make sure to explain how your policy language fits your facts.

Similarly, be prepared to explain cases that address similar but not identical policy language, and cases that apply identical policy language to similar but not identical facts.

12. Be precise about the case law.

When a judge and her law clerks take a close look at the support you have provided for your argument, you want them to find a solid, stone foundation. If you have supported part of your argument with only an unpublished, trial-court decision, cases from other states, or a decision involving transparently distinguishable facts or policy language, the judge and her clerks will be understandably skeptical. Maximize the strength of your foundation in the following four ways.

First, know the difference between decisions that are binding authority and those that are merely persuasive. Wherever possible, cite to the binding authority. When the court has encountered the issue before, direct it to its own precedents.

Second, address how other states have resolved the issue. Is there a better-reasoned approach? Is there a majority approach? Will siding with you place the court in the mainstream or make it an outlier?

Third, if experts have opined on the subject matter, direct the court to their work, particularly if they have been cited by other courts as a persuasive authority. This goes for Restatements and well-regarded treatises as well.

Fourth, if possible, avoid relying on cases that interpret non-identical policy language. Stacks of "somewhat" analogous cases are usually not helpful to the court. If you attempt to analogize inapposite cases, you might be viewed as overreaching, and, in any event, opposing counsel is likely to call you out on it in their responsive brief. If literally no published case law exists that is directly on point, then of course some analogizing might be necessary, but it should be linked with well-reasoned analysis.[4]

13. Make friends with amici.

Keep two things in mind with respect to amicus briefs. First, consider whether you want to organize the submission of one on your client's behalf. As one federal appellate judge has observed: "Well-placed amici briefs can be helpful on appeal, particularly from organizations of lawyers who represent both sides."[5] Amicus briefs sometimes paint a broader picture than that of the specific dispute at hand. A brief that raises the possibility of affecting larger issues—especially those that could change the status quo—might not change the outcome but could prevent the court from inadvertently creating law that is more expansive than intended.

Second, if amicus briefs are filed in your case by insurance industry experts or consumer-protection groups, read them and be ready to respond to the points they make. You might not have an opportunity to respond in writing, so be especially prepared for questions about amicus briefs in oral argument.

14. Consider requesting certification.

When in federal court on a novel issue of state insurance law, consider asking for certification to the state supreme court. According to at least one report compiling information from all 50 state supreme courts, certification requests are rarely denied when the statutory requirements have been met.[6] Texas, for example, has not denied a request for certification in more than 15 years.

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[4] Where relevant published authority is nonexistent, unpublished cases can be useful to illustrate what other courts have done. Before citing them, however, make sure you are permitted to do so.

[5] Not for attribution, but reported to a clerk of that court.

[6] *See* James G. Carr, J., Y. Brown, K. D., Eiber, S. Smith, M. Stern, *Detour Ahead: Federal Court Certification of Questions of Insurance Coverage Law to State Supreme Courts*, 2015 Insurance Coverage Litigation Committee CLE Seminar, Tucson, AZ, March 4-7, 2015.

ORAL ARGUMENT

15. Give the court a roadmap of your argument.

Your brief provided a roadmap. Your oral argument needs one too. A panel of federal court of appeals judges had this advice: "At oral argument, begin by letting the judges know what issues you intend to address and in what order. Then, when you are about to begin actually addressing one of those issues, let the judges know which issue you are about to begin addressing."[7] Above all, make sure you have clearly stated the rule of law you want the court to adopt.

16. Use bench exhibits.

The judicious use of one or two handouts can be useful to support your argument. If a particular policy provision is key to your case, hand a copy of it to each judge—after making sure, of course, that it is in the record excerpt, is an appendix to your brief, and has been agreed to by the other side and the clerk. If a coverage chart or other demonstrative exhibit will help the court, again, arrange with opposing counsel and the clerk in advance to use it during argument, and then provide a hard copy to each judge. Resist the temptation to use large blowups or on-screen presentations. Large demonstrative exhibits can be awkward and often cannot be viewed clearly from the bench. Appellate courts might not be equipped to handle electronic presentations. Even when they are, attorneys are not always skilled at managing their own technology, resulting in a botched presentation that becomes an obstacle rather than an aid to understanding the case. An old-school, hard-copy handout is your best bet.

17. Answer the panel's questions.

Hopefully this is obvious, but "don't ask questions of the judges. It is their job to ask you questions, not vice versa."[8] In addition, "be sure to directly address any question posed to you."[9] Think of it as a gift when judges ask you difficult questions: they are giving you a clear window into their thinking and letting you know the parts of the case that they find important and challenging. Don't dodge!

And don't fudge. Judges (actually, almost anyone in the courtroom) can tell when you are faking it. If you do not know the answer to a question, say so. But instead of stopping at "I don't know," you might request time to look it up and answer during rebuttal (assuming you have rebuttal time). Or, if it involves a genuinely novel question that neither party has previously considered, offer to brief it.

18. Prepare, prepare, prepare.

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[7] Chad Ruback, *Five Fifth Circuit Judges Offer Pointers on Appellate Advocacy*, The Texas Lawbook, Sept. 15, 2014, at 1, 2.

[8] *Id.*

[9] *Id.*

"You can never be too prepared for oral argument. Know the record."[10] Although appeals generally involve undisputed facts and issues of law, the unique facts in your record matter, along with the trial court's application of the law to those facts. The trial court had reasons for ruling the way it did, and for not ruling the way it didn't. Whether appellant or appellee, a litigator's tendency is to focus on why her position is right. Effective preparation also must include time thinking about the flaws in your argument. Expect that the judges will focus their questions on the weaknesses in your case. A moot can be very helpful here. At the very least, have a colleague unfamiliar with your case (not another insurance lawyer!) read your brief and give you a list of five questions they have about your argument and reasoning; if they were the judge, which parts of your argument would give them pause? Then spend time thinking about how to respond to those questions. It is much better to get the toughest question for the first time from a colleague a week or two in advance, when you have time to consider how to respond, than from a judge in the middle of oral argument.

CONCLUSION

Insurance litigators are just contract lawyers with specialized language. General tactics for any successful appeal apply equally to insurance appeals: provide a clear roadmap, be intimately familiar with the record, show that your position is consistent with other authorities, and prepare thoroughly. For insurance appeals specifically, the "secret sauce" is clear communication of what otherwise sounds like a foreign language: translate insurance-speak into English, avoid jargon and unnecessary abbreviations, and direct the court to relevant and useful interpretive tools. Finally, an appropriate overall approach is essential. While your client's case is undoubtedly important, insurance appeals typically do not hold someone's life or liberty at stake. Thus, while making a case accessible and compelling, the best insurance lawyers also maintain their sense of perspective.

[10] *Id.*

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"The Other Certification": Evaluating Rule 1292(b) Certification of Interlocutory Rulings in the U.S. Circuit Courts of Appeal[1]

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INTRODUCTION

Generally, 28 U.S.C. § 1292(b) provides a mechanism by which a federal district court may certify an interlocutory ruling for immediate appeal if three requirements are met:

- The interlocutory order must involve "a controlling question of law";
- There must be "substantial ground for difference of opinion" as to application of that law; and
- An immediate appeal from the interlocutory order may "materially advance the ultimate termination of the litigation."

A district court may certify such an order *sua sponte*, or – more frequently – one or more parties may, under FRAP 5(a)(3), file a petition to amend the order to include certification language as required by § 1292(b). In either case, the party seeking appeal must acquire the approval of first the district, then the appellate court. The petition to certify must be filed within 10 days of the entry of the order, and if the federal district court certifies the order, the relevant appellate court then has 10 days to either accept or deny the application to appeal.

Parties to complex cases, including insurance coverage cases, should be mindful of the possibility for § 1292(b) certification, especially where an early ruling on a question of law might save the parties years of costly litigation, and the question of law

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is subject to diverging district court rulings or a circuit split that the relevant appellate court has yet to weigh in on.

The tripartite standard for certifying an interlocutory order for appeal is provided in the rule itself, but recent statistics and case law show disparities in how the rule is applied among the district courts, and as to whether the governing appellate court will accept the appeal even where certification is granted.

Between 2013 and 2019, Federal Circuit Courts of Appeal received 636 petitions to appeal certified orders under § 1292(b), of which 535 were either granted or denied.[2] Approximately half of the applications to appeal were granted; and, of those that were granted, the petitioning party obtained some relief – *i.e.* reversal in whole or in part – approximately half of the time.[3] Said differently, if a district court certifies an interlocutory ruling for appeal, the party seeking appeal stands about a 25% chance of obtaining some type of requested relief. The median time to resolve an interlocutory appeal, whether the appealing party obtained relief or not, was approximately 18 months.

However, the above statistics do not necessarily paint a complete picture. Looking closer at each Circuit, it becomes clear that: (1) certain Circuit Courts of Appeal are more likely to accept interlocutory appeals than others; and (2) the standards articulated by those Circuits, as applied by the district courts, can vary. Accordingly, a brief Circuit-by-Circuit analysis follows.

First Circuit

The First Circuit has made clear that it considers interlocutory appeals to be "disruptive, time-consuming and expensive."[4] Accordingly, in the First Circuit, "only rare cases will qualify for the statutory anodyne; indeed, it is apodictic in this circuit that interlocutory certification of this sort should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority."[5]

The First Circuit's reluctance to accept interlocutory appeals even when certified is apparent from statistics: between 2013 and 2019, the First Circuit granted only 10 applications to appeal, or approximately 20% of them.[6] Indeed, in at least one case, the

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2 Emery G. Lee III, et al., *Permissive Interlocutory Appeals, 2013-2019*, Federal Judicial Center (Feb. 19, 2020). 101 of the petitions were terminated procedurally. *Id.*

3 *Id.*

4 *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000).

5 *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988).

6 Lee III, et al., *Permissive Interlocutory Appeals, 2013-2019*.

lower court certified an order for interlocutory appeal, the First Circuit granted the petition to appeal, and then later vacated its own order as "improvidently granted."[7]

Second Circuit

Standing in direct contrast to the First Circuit, the Second Circuit has taken a more expansive view of permissive interlocutory appeals, both procedurally and substantively.

On the procedural front, the Second Circuit recently held that a notice of appeal was the "functional equivalent" of a Rule 1292(b) petition for purposes of invoking the court's jurisdiction even though the petitioner failed to file the actual petition until after the 10-day deadline.[8] The court interpreted the rule broadly because it "knew, within ten days of the District Court's Order, everything we needed to know in order to exercise our discretion whether to permit the interlocutory appeal," and because "acceptance of appellate jurisdiction would achieve the objective of a conscientious district court judge who has determined, after a comprehensive analysis, that an interlocutory appeal will serve the interests of efficient judicial administration."[9]

Similarly, the Second Circuit has opined that a § 1292(b) appeal is appropriate if the conditions are satisfied; and if the case "involves a new legal question or is of special consequence," then the district court "should not hesitate to certify an interlocutory appeal."[10] The court's guidance in that respect demonstrates a willingness to accept appeals on novel questions of law despite the fact that the rule itself does not so provide. This flexibility may help explain why the Second Circuit granted approximately 65% of the petitions for interlocutory appeal it received between 2013 and 2019, for a total of 66.

Third Circuit

The Third Circuit has adopted a fairly stringent standard in its case law, emphasizing that piecemeal litigation is disfavored.[11] Federal district courts within the Third Circuit note that § 1292(b) is not meant to "open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation."[12] The Third Circuit has explained – in contrast to the Second Circuit – that "[t]he standard for certification is ***not***

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7 *See Carabello-Seda v. Mun. of Hormigueros*, 395 F.3d 7, 8 (1st Cir. 2005).
8 *See Mei Xing Yu v. Hasaki Rest., Inc.*, 874 F.3d 94, 97 (2d Cir. 2017).
9 *Id.* (accepting a petition for interlocutory appeal of whether Rule 68 settlements in FLSA cases require district court review).
10 *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013).
11 *See In re White Beauty View*, 841 F.3d 524, 536 (3d Cir. 1988).
12 *See Pac. Emplrs. Ins. Co. v. Global Reinsurance Corp. of Am.*, 2010 U.S. Dist. LEXIS 56758, at *25 (E.D. Pa. Jun. 9, 2010).

whether a particular issue is novel or complex, but rather whether there is conflicting precedent as to the correct legal standard."[13]

In the insurance context, "whether [a] Policy covers the claims against the [insured] is not a controlling question of law," notwithstanding that it is "legal in nature."[14] And for purposes of certification, the absence of precedent is not the standard because the absence of precedent necessarily means there cannot be conflicting precedent.[15]

Notwithstanding the Third Circuit's seemingly narrow view on the standard for certification, the court granted approximately 62% of the petitions for appeal that it received between 2013 and 2019, for a total of 58.

Fourth Circuit

The Fourth Circuit joins the First Circuit in expressing clear reluctance to the use of Rule 1292(b) certification, noting that "the bar for obtaining interlocutory review is extraordinarily high."[16] The Fourth Circuit has cautioned the lower courts that certification under § 1292(b) should not be used "to provide early review of difficult rulings in hard cases."[17]

The Fourth Circuit has interpreted the "controlling question of law" requirement to mean "a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter whichever way it goes."[18] Said differently, "a question of law would not be controlling if the litigation would necessarily continue regardless of how that question were decided."[19] Interlocutory appeal is also improper if the question of law is one "heavily freighted with the necessity for factual assessment."[20]

Courts in the Fourth Circuit have applied a similarly strict standard to the second requirement, noting that there is not a "substantial ground for difference of opinion . . . merely because two courts may have applied the same straightforward legal standard to similar facts and reached different results."[21] Rather, there must be "genuine doubt as

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13 *Valeant Pharms. Int'l, Inc. v. AIG Ins. Co. of Can.*, 2023 U.S. Dist. LEXIS 2144, at *11 (D.N.J. Jan. 5, 2023) (emphasis added).

14 *Id.* at *11.

15 *Id.*

16 *Fitch v. State*, 2022 U.S. Dist. LEXIS 105412, at *22 (D. Md. Jun. 9, 2022).

17 *Butler v. Directsat USA, LLC*, 307 F.R.D. 445, 442 (4th Cir. 2015); *Fitch*, 2022 U.S. Dist. LEXIS 105412, at *22 (noting certification is not appropriate simply because the order is part of an "important case with serious implications").

18 *See Fannin v. CSX Transp., Inc.*, 1989 U.S. App. LEXIS 20859, at *16 (4th Cir. 1989).

19 *Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d 508, 525 (E.D.N.C. 2010).

20 *See Karanik v. Cape Fear Acad., Inc.*, 2022 U.S. Dist. LEXIS 197103, at *13 (E.D.N.C. Oct. 31, 2022).

21 *Id.* at *14.

to whether the district court applied the correct legal standard," or in some circumstances "if there is a novel and difficult issue of first impression."[22]

The Fourth Circuit's reluctance to utilize the Rule 1292(b) mechanism is evident from the fact that the court granted only 39% of applications to appeal from certified orders between 2013 and 2019, for a total of 41.

Fifth Circuit

The Fifth Circuit first emphasizes that the lower courts and the Circuit have "unfettered discretion" to decide on certification and appeal of interlocutory rulings.[23] Moreover, the Fifth Circuit has noted that "[a]fter the district court authorizes an appeal," the appellate court should again evaluate the factors in considering the petition for appeal, as a type of "second-stage screening function."[24]

The Fifth Circuit has interpreted the "controlling question of law" requirement as: (1) "a pure issue of law, *i.e.*, a question the appellate court can efficiently rule on without making an extensive inquiry into the record"; and (2) a question of law with "precedential value for a large number of cases."[25]

The Fifth Circuit recently accepted a petition for interlocutory appeal of a Texas district court's order denying an insured plaintiff's motion to remand.[26] The plaintiff had originally filed a suit in Texas state court against Allstate Texas Lloyd's, Inc., a Texas entity, for breach of contract and state statutory violations after its insurer allegedly failed to pay for covered repairs to the insured's home. Another entity, Allstate Illinois, answered the petition and removed the case to federal court on the basis of diversity jurisdiction under 28 U.S.C. §§ 1332(a) and 1441(b). The district court denied the plaintiff's motion to remand over plaintiff's argument that Allstate Illinois unilaterally changed the case caption for purposes of creating diversity jurisdiction.

The Fifth Circuit reversed the district court and remanded the case to Texas state court, concluding that Allstate Illinois lacked the authority to remove the case to federal court because it was a non-party at the time of removal, had not sought to intervene or be joined as a defendant, and the named defendant had never contended it was erroneously named.[27] Accordingly, the district court's order was reversed because the

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22 *Id.* at *13-14 (citing cases).
23 *See Wantou v. Wal-Mart Stores Texas LLC*, 2019 U.S. Dist. LEXIS 248204, at *7 (E.D. Tex. Jul. 25, 2019).
24 *Waste Mgmt. of La. v. Jefferson Parish*, 594 F. App'x 820, 821 (5th Cir. 2014) (citations omitted).
25 *See id.*
26 *See Valencia v. Allstate Tex. Lloyd's*, 976 F.3d 593, 594 (5th Cir. 2020).
27 *Id.* at 596.

court lacked subject matter jurisdiction at the time it denied the plaintiff's motion to remand.

The Fifth Circuit granted approximately 64% of petitions to appeal between 2013 and 2019, for a total of 53.

Sixth Circuit

The Sixth Circuit "treat[s] the § 1292(b) factors 'as *guiding criteria* rather than *jurisdictional requisites*," meaning the court "may also look to 'other prudential factors.'"[28] Recent Sixth Circuit opinions suggest that where a trial court's order affects political questions or the liability of the United States, the Sixth Circuit's application of the Rule 1292(b) standard is significantly more lenient.[29]

Additionally, the Sixth Circuit has imposed specific jurisdictional requirements, noting that while its jurisdiction extends to any issues in the certified order "raised in the district court,"[30] the court "lack[s] jurisdiction to review [any] distinct interlocutory orders" not raised in the district court "even though they were handed down in the same document."[31]

Recent reports show significant volatility in the Sixth Circuit as to the court's likelihood to accept § 1292(b) appeals. For example, between 2008 and 2010, the Sixth Circuit accepted approximately 70% of petitions to appeal interlocutory rulings.[32] However, another study found that the Sixth Circuit granted only 39% of petitions for interlocutory appeal between 2013 and 2019.[33] But as of 2021, the number was back up, as the Sixth Circuit apparently granted 90% of petitions.[34] The statistics above make it difficult to predict the likelihood of obtaining a § 1292(b) appeal in the Sixth Circuit, but it remains unclear whether the volatility is due to the Circuit's willingness to accept such appeals, the soundness of the district courts' decisions to certify interlocutory orders, or some combination thereof.

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28 *In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017) (emphasis in original).

29 *See In re United States*, 2022 U.S. App. LEXIS 25274, at *3 (6th Cir. Sept. 8, 2022) ("Because different interpretations of the [CERCLA] standard cold impact the United States' liability, the first § 1292(b) factor is satisfied."); *see also In re Trump*, 874 F.3d at 952 ("While an interlocutory appeal from a denial of a motion to dismiss should not be granted cavalierly, we think this case is exceptional in many ways. . . . The practical and political consequences of such a case are readily apparent.").

30 *See William Powell Co. v. Nat'l Indem. Co.*, 18 F.4th 856, 874 (6th Cir. 2021).

31 *See Little v. Louisville Gas & Elec. Co.*, 805 F.3d 695, 697 (6th Cir. 2015).

32 *See* https://www.sixthcircuitappellateblog.com/news-and-analysis/a-sea-change-for-1292b-interlocutory-appeals-in-the-sixth-circuit/.

33 Lee III, et al., *Permissive Interlocutory Appeals, 2013-2019*.

34 https://www.sixthcircuitappellateblog.com/news-and-analysis/a-sea-change-for-1292b-interlocutory-appeals-in-the-sixth-circuit/.

Seventh Circuit

In a case frequently cited even outside the Seventh Circuit, the Seventh Circuit Court of Appeals has described a successful petition under § 1292(b) as requiring that "there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation."[35] The statutory requirement that the § 1292(b) petition be filed with the appellate court within ten days of the district court's order is a firm jurisdictional deadline and cannot be extended by recertification of the district court's order.[36] Furthermore, the Seventh Circuit has articulated a non-statutory requirement that "the petition must be filed in the district court within a *reasonable time* after the order sought to be appealed."[37]

"[I]n Seventh Circuit practice, specific issues, rather than an order as a whole, are formally certified for appeal."[38] Moreover, the "controlling question of law" must be more than simply an appeal of a denial of summary judgment.[39] Rather, like other circuits, the question must be an "abstract legal issue" such as "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine" rather than a legal question on which the court must apply or evaluate issues of fact.[40]

The Seventh Circuit accepted approximately 39% of petitions for interlocutory appeal between 2013 and 2019, for a total of 51.

Eighth Circuit

Much like the First and Fourth Circuits, the Eighth Circuit has expressed reluctance to permit extensive use of interlocutory appeals.[41]

Under Eighth Circuit precedent, a question of law is "controlling" if: (1) the legal question is not a "matter for the discretion of the trial court"[42]; and (2) if reversal of the district court's order "could materially affect the outcome of the litigation."[43] The trial court's discretion on a legal question is determined by the standard of review adopted

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35 *Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000) (emphasis in original).

36 *See Groves v. United States*, 941 F.3d 315, 324-25 (7th Cir. 2019).

37 *Ahrenholz,* 219 F.3d at 676 (citing *Richardson Elecs., Ltd. v. Panache Broadcasting of Pa., Inc.*, 202 F.3d 957, 958 (7th Cir. 2000)).

38 *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.,* 212 F. Supp. 2d 903, 905 (S.D. Ind. 2002); *see also Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief & Dev.,* 291 F.3d 1000, 1007 (7th Cir. 2002).

39 *Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000).

40 *Id*. at 676-77.

41 *See Union Cty., Iowa v. Piper Jaffray & Co., Inc*., 525 F.3d 643, 646 (8th Cir. 2008) ("Permission to allow interlocutory appeals should thus be granted sparingly and with discrimination.").

42 *White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994) (quotation omitted).

43 *See Adams v. City of Kansas City, Mo.*, No. 19-CV-00093-W-WBG, 2022 WL 138102, at *2 (W.D. Mo. Jan. 14, 2022) (citing *S.B.L. By & Through T.B. v. Evans*, 80 F.3d 307, 311 (8th Cir. 1996)).

by the appellate court for that legal question.[44] Accordingly, if the trial court's decision would be reviewed under an "abuse of discretion" standard, the ruling is inappropriate for interlocutory review, whereas an issue that would be reviewed *de novo* might be.[45]

In order to find a "substantial difference of opinion," the Eight Circuit requires "a sufficient number of conflicting and contradictory opinions" on the question.[46] Where the question is one of state law, the "substantial difference of opinion" must exist as between the federal district court and other federal or state courts.[47] Finally, certification is inappropriate "[w]hen litigation will be conducted in substantially the same manner regardless of [the Circuit Court's] decision."[48]

The Eighth Circuit accepted approximately 24% of petitions for interlocutory appeal between 2013 and 2019, for a total of 21.

Ninth Circuit

The Ninth Circuit formulates the 28 U.S.C. § 1292(b) statutory scheme the same as does the Eighth.[49] And the Ninth Circuit Court of Appeals has reinforced the reluctance of other courts to permit interlocutory appeals in the seminal decision in the circuit on certification.[50] The district court's conclusion that a controlling question of law exists "while deserving of careful consideration, is not binding upon [the Ninth Circuit Court of Appeals] when [it is] called upon to exercise [its] discretion under the statute."[51]

Nevertheless, a question need not be dispositive of the entire lawsuit to qualify as "controlling" under § 1292(b).[52] The Ninth Circuit characterizes § 1292(b) primarily as "permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit."[53] The Ninth Circuit will generally find a substantial ground for difference of opinion where (1) "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point," (2) "if complicated questions arise under foreign law," or (3) "if novel and difficult questions of first impression are presented."[54]

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44 *See Nix* at 377 & n.3, 4.
45 *See id.*
46 *Id.* at 378.
47 *See Union Cnty., Iowa v. Piper Jaffray & Co*., 525 F.3d 643, 646 (8th Cir. 2008).
48 *Nix*, 43 F.3d at 378-79.
49 *See e.g., In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981).
50 *United States v. Woodbury*, 263 F.2d 784, 788 (9th Cir. 1959) ("§ 1292(b) is to be applied sparingly and only in exceptional cases."); *see also In re Cement*, 673 F.2d at 1026 ("[T]he legislative history of 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation.").
51 *United States v. Woodbury*, 263 F.2d 784, 786 (9th Cir. 1959).
52 *Id*. at 787.
53 *Id.*
54 *Couch v. Telescope Inc*., 611 F.3d 629, 633 (9th Cir. 2010) (internal quotation marks omitted).

The Ninth Circuit accepted approximately 67% of petitions for interlocutory appeal between 2013 and 2019, for a total of 97.

Tenth Circuit

The Tenth Circuit has stated that the test for whether an issue is appropriate for interlocutory review is: "(1) whether that issue was raised in the certified order; and (2) whether the issue can control the disposition of the order."[55] Like other courts, the Tenth Circuit Court of Appeals has stated that "the right to appeal should be limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action."[56] In the Tenth Circuit, the district court's entire order is certified, not just the portions which the district court deemed controlling.[57]

Federal district courts in the Tenth Circuit have also provided some clarity on certain § 1292(b) factors. First, a "question of law" must be "stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law."[58] A "question of law" is defined by a higher standard than simply the party's opposition to summary judgment.[59] For that question of law to be "controlling," a legal issue must "materially affect the outcome of the case," but need not be dispositive of the action in its entirety.[60]

To satisfy the "materially advance the termination of litigation" factor, the appeal should "(1) eliminate the need for trial, (2) eliminate complex issues so as to simplify the trial, or (3) eliminate issues to make discovery easier and less costly."[61] The court may also look to pragmatic considerations, including "the procedural and substantive status of the case with respect to the progress or completion of discovery, the disposition of pretrial motions, the extent of the parties' preparation for trial, and the nature and scope of the requested relief."[62] Moreover, certification may be appropriate where a party's defense disputes the very right to maintain the action at all, and a decision on appeal

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55 *United States v. Abouselman*, 976 F.3d 1146, 1151 (10th Cir. 2020) (citing *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.,* 428 F.3d 1285, 1291 (10th Cir. 2005)).

56 *State of Utah By & Through Utah State Dep't of Health v. Kennecott Corp.,* 14 F.3d 1489, 1495 (10th Cir. 1994).

57 *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1271 (10th Cir. 1994); *see also Paper, Allied-Indus., Chem. & Energy Workers*, 428 F.3d at 1291 (*"*An appellate court can and should address a different legal question if it controls the disposition of the certified order.").

58 *Dorato v. Smith*, 163 F. Supp. 3d 837, 879 (D.N.M. 2015) (internal quotation marks omitted).

59 *See id*. (defining "question of law" as "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine").

60 *XTO Energy, Inc. v. ATD, LLC*, 189 F. Supp. 3d 1174, 1193-94 (D.N.M. 2016).

61 *Id.* at 1195. (internal quotation marks omitted).

62 *Id*.

"could swiftly end the lawsuit."[63]

The Tenth Circuit granted approximately 52% of petitions to appeal interlocutory orders between 2013 and 2019, for a total of 27.

Eleventh Circuit

The Eleventh Circuit has further separated the typical statutory requirements for Rule 1292(b) certification into whether "(1) the issue is a pure question of law, (2) the issue is controlling of at least a substantial part of the case, (3) the issue was specified by the district court in its order, (4) there are substantial grounds for difference of opinion on the issue, and (5) resolution may well substantially reduce the amount of litigation necessary on remand."[64] Only a "pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts" qualifies as a "controlling question of law."[65]

The Eleventh Circuit will only grant review, in its discretion, if "there is substantial dispute about the correctness of any of the pure law premises the district court actually applied in its reasoning leading to the order sought to be appealed."[66] To aid in this determination, the Court considers whether the legal question is "stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law" and whether the answer to the question of law "substantially reduce(s) the amount of litigation left in the case."[67]

The Eleventh Circuit granted approximately 38% of petitions for appeal filed between 2013 and 2019, for a total of 37.

D.C. Circuit

The D.C. Circuit cautions that "certification runs counter to the general policy against piecemeal appeals, [so] this process is to be used sparingly."[68] That said, the D.C. Circuit's unique jurisdiction and unusual caseload render the district court's certification (and the D.C. Circuit Court's acceptance) of interlocutory appeals equally unique.

For example, in 2009, the federal district court in D.C. denied the U.S. Department of Defense's motion to dismiss three habeas petitions filed by detained enemy combatants on jurisdictional grounds, but its ruling represented the first federal

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63 *See id.*

64 *Mamani v. Berzain*, 825 F.3d 1304, 1312 (11th Cir. 2016) (internal quotation marks omitted).

65 *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004); *see also Mamani*, 825 F.3d at 1312 ("A question is controlling when it is 'outcome determinative."); *Rodriguez v. Procter & Gamble Co*., 499 F. Supp. 3d 1202, 1206 (S.D. Fla. 2020).

66 *McFarlin*, 381 F.3d at 1259.

67 *Id*.

68 *Sai v. Dep't of Homeland Security*, 99 F. Supp. 3d 50, 59 (D.D.C. 2015).

district court interpretation of the Supreme Court's multi-factor *Boumediene* test.[69] Although the district court "believe[d] that its conclusions are correct," it nonetheless certified its order for interlocutory appeal given the novelty of the issues presented.

The D.C. Circuit accepted the petition to appeal, and ultimately reversed the district court's ruling, finding that the *Boumediene* opinion required dismissal of the habeas petitions on jurisdictional grounds. Between 2013 and 2019, the D.C. Circuit granted 67% of petitions to appeal, for a total of 9.

Federal Circuit

In addition to appeals from federal district courts under § 1292(b), the Federal Circuit process for interlocutory appeals from district courts within its jurisdiction arises under § 1292(c)-(d). The language of 28 U.S.C. § 1292(d)(1) (pertaining to appeals from the Court of International Trade) and 28 U.S.C. § 1292(d)(2) (pertaining to appeals from the U.S. Court of Federal Claims) is virtually identical to the language of § 1292(b) setting forth the requirements for interlocutory appeals to other Circuits.[70] "Questions are 'controlling' when they materially affect issues remaining to be decided in the trial court."[71]

Similar to other appellate courts, the Federal Circuit has held that substantial grounds for difference of opinion may exist in cases involving "two different, but plausible, interpretations of a line of cases", a circuit split, an intracircuit conflict, conflict between earlier circuit precedent and later Supreme Court cases, or, "at the very least, a substantial difference of opinion among the judges of this court."[72] Interlocutory review is appropriate only to materially advance the resolution of a case, which "depends in large part on considerations of judicial economy and the need to avoid unnecessary delay and expense and piecemeal litigation."[73]

Application to Insurance Cases – Duty to Defend

Where a federal district court holds that an insurer has no duty to defend, such an order is typically dispositive and therefore immediately appealable. However, where a trial court issues an interlocutory ruling that an insurer is obligated to defend, the insurer's right to seek interlocutory appeal may depend on the jurisdiction, circuit, and factual circumstances. Uniquely, the Eleventh Circuit has held that interlocutory orders requiring insurers to begin paying defense costs are immediately appealable under 28

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69 *See Maqaleh v. Gates*, 630 F. Supp. 2d 51, 54 (D.D.C. 2009).

70 *See e.g., United Launch Servs., LLC v. United States*, 139 Fed. Cl. 721, 722 n.1 (Fed. Cir. 2018) ("Because the operative language is identical, the legislative history and case law governing the interpretation of section 1292(b) is persuasive in reviewing motions for interlocutory appeal under section 1292(d)(2).").

71 *Klamath Irr. Dist. v. United States*, 69 Fed. Cl. 160, 162 (Fed. Cir. 2005) (internal quotation marks omitted).

72 *United Launch Servs., LLC v. United States*, 139 Fed. Cl. 721, 724 (Fed. Cir. 2018) (citing *Klamath*, 69 Fed.Cl. at 163).

73 *Klamath*, 69 Fed. Cl. at 163 (internal quotation marks omitted).

U.S.C. § 1292(a)(1) – not § 1292(b) – because such orders have the effect of an injunction.[74] Other federal courts have arrived at differing conclusions as to whether such orders are certifiable.

For example, in 2010, the U.S. District Court for the Southern District of Texas held that an interlocutory order holding that an insurer owes a duty to defend an underlying lawsuit does not qualify for certification under § 1292(b).[75] The insurer petitioned for certification under § 1292(b) arguing that certification there was "substantial ground for difference of opinion" as to controlling law because the *Hiscox* decision applied by the trial court resulted in a different conclusion on duty to defend.[76] However, "the mere fact that the ultimate decisions on the duty to defend issue were different does not call the controlling law into question."[77] The Texas federal court's ruling is consistent with recent case law out of the Ninth Circuit rejecting similar petitions.[78]

A federal district court in North Carolina, on the other hand, held the opposite. In *Church Mutual Insurance Co.*, the trial court certified its order that an insurer had a duty to defend under a professional liability policy for immediate appeal because "an appellate ruling reversing this court's finding of a duty to defend would end this coverage case."[79] The Fourth Circuit took up the interlocutory appeal and affirmed the trial court's finding.[80]

Where ***both parties*** agree that certification is appropriate and efficient, however, trial courts may be more amenable to certification. For example, a federal trial court in Louisiana granted a request to certify an interlocutory order establishing an insurer's duty to defend where the parties jointly request certification and appeal.[81] In *AMA Discount*, the court was convinced that certification was appropriate because: (1) there

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74 *See Nat'l Union Fire Ins. Co. v. Sahlen*, 999 F.2d 1532, 1535 (11th Cir. 1993).

75 *See Endurance Am. Spec. Ins. Co. v. Brown*, No. H-09-2307, 2010 U.S. Dist. LEXIS 19197 (S.D. Tex. Mar. 4, 2010).

76 *Id.* (citing *Hiscox Dedicated Corporate Member Ltd. v. Partners Comm. Realty L.P.*, 2009 U.S. Dist. LEXIS 53686 (S.D. Tex. June 23, 2009)).

77 *Id.*

78 *See Sierra Foothills Pub. Util. Dist. v. Clarendon Am. Ins. Co.*, 2006 U.S. Dist. LEXIS 55863 (E.D. Cal. July 24, 2006) (rejecting an insurer's request for § 1292(b) certification of a partial summary judgment order holding that Clarendon had a duty to defend because the insurer's "bald assertion that th[e] court's interpretation of [applicable case law] is incorrect does not establish that 'there is substantial ground for difference of opinion' as to the controlling law"); *Strauss v. Sheffield Ins. Corp.*, 2006 U.S. Dist. LEXIS 98094 (S.D. Cal. Jun. 22, 2006) (declining to certify an interlocutory order granting summary judgment on insurer's duty to defend because the insurer had merely shown "that its own opinion differs from that of the Court's").

79 *Church Mut. Ins. Co. v. Lake Pointe Assisted Living, Inc.*, 2021 U.S. Dist. LEXIS 99271 (E.D.N.C. May 26, 2021).

80 *Church Mut. Ins. Co. v. Lake Point Assisted Living, Inc.*, 2022 U.S. App. LEXIS 19110 (4th Cir. July 12, 2022).

81 *See AMA Disc., Inc. v. Seneca Spec. Ins. Co.*, 2016 U.S. Dist. LEXIS 142327 (E.D. La. Oct. 17, 2016).

was a pending appeal in a separate case on largely the same issues; and (2) the parties jointly requested certification.[82] The court concluded that appellate consideration of the pending appeal and the § 1292(b) appeal together "would provide helpful guidance to lower courts regarding the duty to defend under Texas and Louisiana insurance laws," and would "conserve the resources of the Court and the parties, and avoid duplicative trials."[83]

Ultimately, the Fifth Circuit concluded that the *AMA Discount* appeal "d[id] not fulfill the criteria for granting an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)," and therefore "revoke[d] the certification and dismiss[ed] the appeal."[84] The Fifth Circuit noted that the pending appeal, on which the district court relied in part as a "conflicting decision," "ha[d] been settled in the course of appeal."[85] Moreover, the Fifth Circuit concluded that the parties "d[id] not actually challenge what law applies to the issue the district court found decisive."[86] Accordingly, the appellate court concluded § 1292(b) certification was not appropriate.

In the context of a ruling on duty to defend, certification of interlocutory appeals is a fact and jurisdiction-specific inquiry. As a general matter, however, attorneys working in the insurance industry should consider the potential for § 1292(b) certification where the statutory elements are met and the relevant circuit precedent suggests a possibility of success.

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82 *Id.* at *2.
83 *Id.* at *2-3.
84 *AMA Disc., Inc. v. Seneca Spec. Ins. Co.*, 697 F. App'x 354 (5th Cir. 2017).
85 *Id.* at 355.
86 *Id.*