Appellate Review of Interlocutory Orders (Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.)

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FEDERAL JURISDICTION AND PRACTICE

APPELLATE REVIEW OF INTERLOCUTORY ORDERS

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.

The determination of interlocutory orders by a federal district court may hinge upon the resolution of substantial legal issues which, while independent from the principal matters in controversy, affect important substantive rights.1 As crucial to the conduct of the proceedings as these orders might be, litigants seeking immediate appellate relief from adverse intermediary decrees must first surmount the imposing barrier of the final judgment rule.2 This rule, one of the dominant factors in modern federal appellate practice,3 limits the jurisdiction of the courts of appeals to review of final decisions emanating from the district courts.4 Despite its apparent clarity, the finality requirement has resulted in confusion, particularly with respect to the appealability

2 28 U.S.C. § 1291 (1970). The final judgment rule first emerged in the Judiciary Act of 1789, which established the federal court system. Act of Sept. 24, 1789, ch. 20, §§ 21-25, 1 Stat. 73, 83-85. It provided that appeals could be had “from final decrees in a district court in causes of action of admiralty and maritime jurisdiction... to the next circuit court...” 1 Stat. at 83. Furthermore, “final decrees and judgments in civil actions in a district court” were allowed to be “re-examined, and reversed or affirmed in a circuit court.” Id. at 84. The difference between the two appeals procedures centered upon the monetary requirement of each action at the district level, the former being $300 and the latter only $50. This provision was carried forward when the courts of appeals were established. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1133.
3 DiBella v. United States, 369 U.S. 121, 126 (1962); 9 J. MOORE, FEDERAL PRACTICE ¶ 110.06, at 105 (2d ed. 1970) [hereinafter cited as Moore].
5 28 U.S.C. § 1291 (1970) provides:

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.

of a trial court's refusal to disqualify opposing counsel. In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, the Second Circuit, sitting en banc, overturned prior circuit precedent and held that orders denying disqualification, as well as those excluding counsel from further participation, are final decisions and therefore appealable.

In *Silver Chrysler*, defendants' attorneys, Kelley, Drye, Warren, Clark, Carr & Ellis, moved to disqualify Hammond & Schreiber as counsel for the plaintiff. Dale Schreiber, when associated with Kelley Drye, had represented Chrysler in other litigation. Upon leaving Kelley Drye, Schreiber formed his own firm, specializing in the representation of automobile dealers in actions against manufacturers, including Chrysler. In support of their motion, defendants argued that Schreiber may have possessed access to confidential information and that his further participation in the case would create an appearance of impropriety.

District Judge Jack B. Weinstein found to the contrary and denied the motion. Subsequently, Chrysler Motors sought appellate review of the district court determination by direct appeal to the Second Circuit. In addition, defendants petitioned for an extraor-
Generally, to be final, a decision must be "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Inevitably, however, both Congress and the courts have engrafted exceptions onto the final judgment rule in question, there is authority for the proposition that the congressional policy behind § 1292(b) can be used to support the jurisdiction of a circuit court to hear an appeal if the issues presented are "fundamental to the further conduct of the case" and the case is one of at least "marginal" finality. Gillespie v. United States Steel Corp., 379 U.S. 148, 154 (1964); see 9 Moore, supra note 3, ¶ 110.22[3], at 293. See also S. Rep. No. 2434, 85th Cong., 2d Sess. 2-4 (1958). Nevertheless, the Second Circuit denied the defendants' motion. 496 F.2d at 802.

Thirdly, the defendants attempted to obtain a direct appeal by filing a notice of appeal. The plaintiffs, in turn, moved to dismiss the appeal for want of jurisdiction. Id. at 802. Finally, Chrysler Motors sought to present the case to the court by requesting a writ of mandamus. See note 15 and accompanying text infra. The court consolidated the petition for mandamus with the motion to dismiss the appeal. 496 F.2d at 802. In sum, the Second Circuit was inundated with paperwork as a result of the efforts of the tenacious putative appellants. See note 46 infra.

A number of Supreme Court decisions indicate the difficulty a litigant will encounter when seeking mandamus as an alternative to appeal. See, e.g., Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953) (party seeking relief must establish "clear and indisputable" right to issuance of the writ); Ex parte Fahey, 332 U.S. 258, 260 (1947) (writs are "reserved for really extraordinary causes"). See also Will v. United States, 389 U.S. 90, 98 n.6 (1967) (courts are to exercise caution in considering petitions for peremptory writs). It should be noted that an order can be final without being the last order in the case. Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964).

In deciding whether a particular order is a final order, the most important of the competing factors to be considered by the courts are the "inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Id. at 152-53, quoting Dickinson v. Petroleum Conversion Corp., 383 U.S. 507, 511 (1965).


The first significant judicial inroad on the federal policy against interlocutory appeals came in Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848). In Forgay the Supreme Court asserted its jurisdiction to review, under the finality rule, a decree from the circuit court which, if unreviewed, would have exposed the appellants to "irreparable injury." The order appealed from directed immediate transfer of title and possession of property from appellants to respondents and additionally remanded the case for an accounting.

Forgay set the stage for a line of decisions recognizing that an appeal would lie from orders directing the transfer of physical property, notwithstanding the fact that the orders also provided for an accounting and therefore were not technically final. See, e.g., Radio Station WOW v. Johnson, 326 U.S. 120 (1945); Carondelet Canal and Navigation
order to alleviate the harshness of strict application. Since the order in Silver Chrysler clearly was not final in the general sense of the term, an appeal could not be taken from it unless the order came within one of the exceptions.

The Second Circuit, in a unanimous en banc opinion authored by Judge Moore, found that the order was appealable under the exception announced by the Supreme Court in Cohen v. Beneficial Industrial Loan Corp. In Cohen, the Court exempted from the strictures of the rule a small class [of less than final orders] which 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.

In recognizing the order denying disqualification as being a member of this “small class” and thus finding it to be appealable, the Silver Chrysler court specifically overruled the Second Circuit precedent of Fleischer v. Phillips. The court rejected the distinction drawn in Fleischer which permitted appeals to be taken from orders granting the motion to disqualify, but not from orders denying that motion.

In reaching its conclusion, the court embarked upon an analysis of the precedents, with Cohen serving as the “cornerstone” of the discussion. The Second Circuit viewed Cohen as having enunciated three “prerequisites” which an order must meet in order to be final. Although Judge Moore failed to expressly set forth these factors, a reading of Cohen suggests that to be appealable an order must: (1) definitively...
resolve a claim of right collateral to the main cause of action; (2) be "too important to be denied review"; and (3) result in irreparable harm should review be postponed.26

The *Silver Chrysler* court noted that from the time *Cohen* was handed down in 1949 until *Fleischer* was decided in 1959, the Second Circuit had found orders both granting and denying disqualification of counsel to be appealable under *Cohen*.27 The *Fleischer* court, however, though conceding the collateral nature of the claim, nevertheless held the order denying disqualification to be deficient in the second and third requirements of the *Cohen* rule.28 Although the court did not

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26 See 337 U.S. at 546.

Decisions subsequent to *Cohen* have placed varying degrees of emphasis on each of the three requirements. For example, the Supreme Court initially stressed the element of irreparable harm. In *Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684 (1950), the Court held that an order vacating an attachment of a ship was final. Justice Frankfurter noted that

[appen] appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible.

*Id.* at 689. In subsequent cases, however, the Court demonstrated less concern for the irreparable harm rationale and instead focused upon the importance of the rights involved. *See Frank, Requiem for the Final Judgment Rule*, 45 Texas L. Rev. 292, 301-02 (1966), *citing* Stock v. Boyle, 342 U.S. 1 (1951) (appeal permitted from order denying motion to reduce bail); *Roberts v. United States Dist. Ct.*, 339 U.S. 844 (1950) (per curiam) (appeal permitted from order denying leave to appeal in forma pauperis).

An example of a finding that a putatively final order under *Cohen* was insufficiently collateral is the decision in *DiBella v. United States*, 359 U.S. 121 (1952). There, the Court overturned a Second Circuit determination, 284 F.2d 897 (2d Cir. 1960), that a pre-indictment motion to suppress evidence made under Fed. R. Crim. P. 44(e) was directly appealable under § 1291. The Second Circuit had taken the position that where the motion to suppress was made prior to indictment its denial was a final disposition of an independent claim and therefore appealable. 284 F.2d at 898. The Supreme Court expressly rejected this analysis and held

that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for the purposes of appealability.

369 U.S. at 131. Rather, the Court was persuaded that the determination was simply another step in the "federal prosecutorial system leading to a criminal trial." *Id.*

In recent years, the Supreme Court has been less circumspect in looking for the three prerequisites of *Cohen*. The Court has emphasized the language in *Cohen* which suggested that § 1291 be given a "practical rather than a technical construction." 337 U.S. at 546. The most notable example of this relaxation is *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). There, the Court ruled that where the order is one of "marginal" finality the courts can hear the appeal if the order determines issues "fundamental to the further conduct of the case." *Id.* at 154.

It has also been suggested that review under the *Cohen* rule should be reserved for the resolution of issues of general importance beyond the interests of the parties involved. *Donlon Indus., Inc. v. Forte*, 402 F.2d 935, 937 (2d Cir. 1968).

27 496 F.2d at 802-03, *citing* Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 239 F.2d 555 (2d Cir. 1956), wherein the Second Circuit stated: "[W]ith respect to appealability no distinction exists between orders granting disqualification and those refusing to do so." *Id.* at 556.

28 264 F.2d at 517. *See* text accompanying note 26 supra. The *Fleischer* decision was cited with approval in *Marco v. Dulles*, 268 F.2d 192 (2d Cir. 1959), wherein the Second
speak in terms of specific requirements, Judge Clark stated that the ordering of a disqualification seriously impedes the conduct of the action and impairs the attorney's reputation. On the other hand, he concluded that the order denying disqualification has no permanent effect in that it merely permits the case to proceed. Consequently, the denial was viewed as insufficient to warrant immediate appellate review.

In Silver Chrysler, the Second Circuit elected to "return to the wisdom" of its former position and rejected the Fleischer distinction as having "no sufficient basis." In so holding, the court reevaluated the nature of the impact of a district court's erroneous denial of disqualification. It was felt that further participation by the plaintiff's counsel in contravention of an attorney's ethical responsibility might well taint the entire trial and result in an irretrievable loss of rights. Moreover, the court indicated that review after final judgment would be especially inadequate in this context.

The Second Circuit's examination of the order in terms of its importance and potential for an irreparable loss of rights enjoys the support of at least four other circuits. The District of Columbia indicated that immediate appeal of an order denying disqualification could be had only pursuant to certification under 28 U.S.C. § 1292(b) (1970). The Ninth Circuit, in Cord v. Smith, 338 F.2d 516 (9th Cir. 1964), agreed with this reasoning but nonetheless granted mandamus and reviewed the question. See text accompanying notes 39-40 infra.

The court relied upon the Ninth Circuit's observation that "continued participation as an attorney, by one who is disqualified by conflict of interest from so doing, will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal based upon such participation cannot undo the damage that will have been done as a result of such participation." Id. at 804, quoting Cord v. Smith, 338 F.2d 516, 521-22 (9th Cir. 1964). Judge Moore believed it "fatuous to suppose that review of the final judgment will provide adequate relief." 496 F.2d at 805.

In Yablonski v. United Mine Workers, 448 F.2d 1175 (D.C. Cir. 1971), a group of union members brought suit against the United Mine Workers of America (UMWA) and its officials, seeking both an accounting of union funds and the restitution of allegedly misappropriated funds. Plaintiffs moved in the district court for an order disqualifying the regular UMWA outside counsel. Plaintiffs supported this motion with claims that said counsel would be compensated from the UMWA treasury and that a conflict of interest existed between the officers and the union. 448 F.2d at 1177. The district court issued an order denying disqualification. The court of appeals considered the merits without disputing the appealability of the order. The district court's order was vacated and the case remanded.

Thereafter, outside counsel withdrew and was replaced by UMWA's general counsel. Plaintiffs again moved in the district court to disqualify and again were rebuffed. In lieu of seeking a direct appeal, plaintiffs petitioned the court of appeals for further relief,
Third, and Fifth Circuits have allowed direct appeals from orders denying disqualification. The Fourth Circuit intimated that it would rely upon the court's prior opinion, which had declared that representation of the defendants by regular UMWA outside counsel was improper. Yablonski v. United Mine Workers, 454 F.2d 1036 (D.C. Cir. 1971), cert. denied, 406 U.S. 906 (1972) [hereinafter Yablonski II]. Petitioners alleged that the denial of the second motion to disqualify failed to give full effect to the court of appeals' prior mandate. The court agreed and granted the petition.

While the court in Yablonski II was not faced with a direct appeal, it set forth its policy with respect to the appealability of orders denying disqualification of counsel. The court distinguished between disqualification orders based solely on ethical considerations and those based on impingement on a specific legislative policy, only the latter being appealable. Id. at 1038 n.9; accord, 9 Moore, supra note 3, ¶ 110.13[10], at 190. In addition, in determining that it had the power under the circumstances to grant the peculiar relief sought in the nature of mandamus, the court indicated an acceptance of the reasoning of the Ninth (and now Second) Circuit with respect to the irreparable harm which an unreviewed erroneous decision would entail. 454 F.2d at 1039, quoting Cord v. Smith, 338 F.2d 516, 521-22 (9th Cir. 1964).

This rationale was particularly forceful in light of the facts in the case. The court cited the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 (1970), as favoring the "representation of a labor union by counsel free of possibly conflicting obligations to adverse parties." 454 F.2d at 1039. The court felt that representation of the union and its officials by the UMWA general counsel would be just as offensive to this legislative policy as would representation by the UMWA's regular outside counsel. The court was persuaded that an appeal after final judgment could not rectify the frustration of the legislative will that would result from the district court's order. It was concluded that the potential frustration of public policy would render the order denying disqualification not only directly appealable but also, on the facts presented, sufficient grounds for issuance of a special writ. Id. However, the court refrained from issuing a writ of mandamus in hope that the district court would be sufficiently impressed with its decision to rectify its own error. Id. at 1042.

Greene v. Singer Co., Civil No. 71-1835 (3d Cir., Nov. 2, 1971). Greene involved an action based on unfair competition, antitrust violations, and patent infringement. Defendant, The Singer Company, moved in the district court for an order disqualifying one of plaintiff's attorneys from further participation in the case. This motion was supported with allegations that the attorney in question was previously employed as a patent attorney for a firm which had been acquired by the defendant, and that while in the employ of the acquired company he "represented [that] company in the matter which [was] the subject of [the instant] law suit." Id. at 2. Like Silver Chrysler, the Greene court expressed concern regarding the possibility of irreparable harm. Indeed, in recognizing the order as final and appealable under Cohen, the court conceded:

To require appellant to await a final judgment on the merits before testing the legality of the order denying the disqualification may, for practical purposes, deny it the reality of appellate processes.

Id. at 3.

It should be noted, however, that the court added a caveat against excessive extrapolation from its decision, saying: "We do not hold that every ruling relating to conflict of interest by an attorney should activate the Cohen rule." Id. Apparently, it was the allegation that plaintiff's counsel had had a prior connection with the defendant, involving the subject matter of the ongoing litigation, which convinced the court to depart from its generally restrictive approach to the collateral order rule. See, e.g., Hackett v. General Host Corp., 455 F.2d 618, 621 (3d Cir. 1972), cert. denied, 407 U.S. 925 (1973) (Greene cited as an exception to general policy).

Tomlinson v. Florida Iron and Metal, Inc., 291 F.2d 333 (5th Cir. 1961). Tomlinson involved an action to recover taxes which were alleged to have been collected illegally. Tomlinson, District Director of Internal Revenue, moved in the district court for an order disqualifying plaintiff's counsel based on a federal statute, 5 U.S.C. § 99 (1958), as amended, 18 U.S.C. § 207 (1970). This section made it unlawful for a former government
treat an order denying disqualification as final. On the other hand, the Ninth Circuit refuses to regard a denial as appealable. Nonetheless, giving recognition to the loss of rights that a failure to review might entail, the Ninth Circuit would take cognizance of the order if presented with a petition for a special writ. In the alternative, the court might, in its discretion, accept an appeal certified by the district court.

employee to act as counsel with respect to any claim against the United States which was pending while he was employed by the agency against which the claim was made.

In Tomlinson, the Fifth Circuit, like the District of Columbia Circuit (see note 35 supra), was concerned with the possible irreparable "frustration of a public policy." Since plaintiff's counsel fell within the statutory prohibition, a refusal by the court to review the order denying his disqualification would have resulted in a direct contravention of an express legislative policy which could not "be avoided or mitigated by any appeal taken after trial." Id.

Significantly, however, in a later case in which disqualification was sought solely on ethical grounds, the Fifth Circuit found the underlying rationale of Tomlinson broad enough to support treatment of an order denying disqualification as final. Uniweld Prods., Inc. v. Union Carbide Corp., 385 F.2d 992, 994 (5th Cir. 1967), cert. denied, 390 U.S. 921 (1968).

38 United States v. Hankish, 462 F.2d 316, 318 (4th Cir. 1972) (per curiam). In this criminal prosecution, the government moved to disqualify defendant's counsel on the ground that he had previously represented an individual who was expected to be called as a material witness for the prosecution. The district court granted the motion, but defendant neglected to seek an appeal. Instead, the defendant made an application to the court of appeals seeking review of the district court's order. The Fourth Circuit indicated that if the defendant had sought a direct appeal of the order it would have treated the order as final and appealable under Cohen. Notwithstanding the fact that the court faced an order granting disqualification, it supported its conclusion by citing the Second Circuit's original position in Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 239 F.2d 555 (2d Cir. 1956), wherein orders denying as well as granting disqualification were treated as final under Cohen, 462 F.2d at 318. See note 27 supra.

In light of its determination that the order was previously appealable as final, the court concluded that it would not treat the defendant's application as a petition for a special writ, nor would it grant such a writ. Reliance was placed on the Supreme Court's pronouncement in Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30-32 (1943), wherein it was held that the special writ should not be used as a substitute for an appeal.

9 Moore, supra note 3, § 110.13[10], at 190.

The Tenth Circuit takes an equally restrictive approach. It refuses all review of a denial of disqualification except in extreme circumstances. See Waters v. Western Co. of N. America, 436 F.2d 1072 (10th Cir. 1971), wherein an appeal from an order denying disqualification certified and permitted under section 1292(b) was dismissed as improvidently granted.

41 338 F.2d at 521, discussing 28 U.S.C. § 1292(b) (1970). See note 14 supra. The court also rejected the argument that a refusal to disqualify counsel should be treated as a denial of injunctive relief under 28 U.S.C. § 1292(a) (1970). See note 17 supra. The court concluded that the refusal was more in the nature of an exercise of "the supervisory power of the federal courts over attorneys appearing before them..." 338 F.2d at 521.
Although representing a restrictive viewpoint, the Ninth Circuit's position finds support in the general policy against piecemeal litigation which underlies the final judgment rule. Moreover, it evidences the reluctance of courts and commentators to add yet another class of appealable orders to the ever-increasing volume which the appellate courts are now being called upon to review.

Despite this concern for the burden upon courts of appeals, the Second Circuit's position appears consonant with the Supreme Court's ruling in Cohen. Since an order denying disqualification of counsel satisfies the three requirements of Cohen, courts should not attempt to avoid applying Cohen for the sake of limiting their case load. Furthermore, the Ninth Circuit's approach results in a contorted review procedure, relegating such significant orders to a state of quasi-appealability and creating an inordinate amount of uncertainty.


43 See, e.g., Weight Watchers v. Weight Watchers Int'l, 455 F.2d 770, 773 (2d Cir. 1972) (Friendly, C. J.) ("Cohen must be kept within narrow bounds, lest the exception swallow the salutary 'final judgment rule'"); Frank, Requiem for the Final Judgment Rule, 45 TEXAS L. REV. 292, 317-20 (1966) (noting there are so many exceptions to Cohen that the rule may no longer be viable). See also 9 MOORE, supra note 3, ¶ 110.13[10], at 190.


44 See text accompanying notes 26 & 31-34 supra.


46 The alternatives of certification and mandamus are both productive of uncertainty. In order to obtain certification, the putative appellant must establish the applicability of § 1292(b) to the satisfaction of the district court. A refusal to certify would cut off the appeal in the formative stages. Moreover, even if certification is obtained, the appellate court has discretion to refuse to accept the case. See note 14 supra. A writ of mandamus is issued only in rare instances and an even greater burden must be satisfied by the party seeking relief. See note 15 supra. Questions will undoubtedly arise as to what situations are sufficiently exigent to justify the use of this extraordinary power.

The burden upon the judiciary is compounded by the fact that a diligent attorney, in order to protect his client, will attempt both approaches. This is precisely what occurred in Silver Chrysler. See note 14 supra. In Silver Chrysler, the court noted that the "procedural uncertainties" resulted in the court's having to consider a notice of appeal, a motion for permission to appeal and a petition for a special writ. In addition, the
appeal offers a uniform and expeditious\(^4\) vehicle for consideration of orders deemed "too important to be denied review"\(^4\) by an impressive number of circuit courts of appeals.\(^4\)

*Silver Chrysler* represents an example of the Second Circuit's willingness to apply *Cohen* in a proper setting. The court's decision, however, is predicated on the substantial effect the denial of disqualification of counsel may have on the litigation. Thus, the case offers no indication that the Second Circuit is prepared to depart from its generally restrictive treatment of the collateral order rule.\(^6\)

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**INTERLOCUTORY APPEAL OF CLASS ACTION DESIGNATION**

*Herbst v. International Telephone & Telegraph Corp.*

Interlocutory appeals are not viewed favorably by most courts.\(^1\) Fearing that piecemeal appeals would result in a waste of judicial energy, Congress early established the final judgment rule\(^2\) and has con-
district court was requested to certify an appeal. Each of these attempts to perfect an appeal, with the exception of the notice of appeal, "included the same repetitious statements of fact and law and each required time-consuming considerations by the courts." 496 F.2d at 802. On balance, the disposition of these matters could result in a greater waste of time and expense than would result if the arguably appealable order were directly reviewed.

\(^4\) The interest in conservation and careful allocation of judicial resources underlying the final judgment rule can, in some cases, militate in favor of permitting a direct appeal. As the *Silver Chrysler* court noted:

> By holding such an order [denying disqualification] directly appealable, we eliminate the uncertainties (and the paperwork) attendant to resorting to § 1292(b) and/or § 1651. Since the ultimate objective is to bring before an appellate court an important question which, if unresolved, might well taint a trial, why should not this question be presented before judicial and attorney time may have been needlessly expended? 496 F.2d at 806.


\(^4\) See notes 35-38 and accompanying text supra.


\(^2\) The concept of finality can be traced to the first Judiciary Act. Act of Sept. 24, 1789, ch. 20, §§ 21, 22, 25, 1 Stat. 73, 83-85. Congress has forbidden piecemeal appeals from a single controversy in the interests of judicial economy and efficiency. The underlying rationale is that appeals of interlocutory orders cause an unjustifiable and intolerable delay since such orders merge into the final judgment and will be ultimately