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When is a Case Big and Expensive Enough? The "Exceptional Circumstances" Prong of a Motion for an Interlocutory Appeal Under 28 U.S.C. § 1292(b)

As experienced New York appellate practitioners, we are often struck by the federal and state courts near opposite approaches to interlocutory appeals (i.e., appeals from an interim trial court decision as opposed to a final judgment). Whereas New York state courts permit an interlocutory appeal of the majority of trial court decisions, the New York federal courts prohibit almost all absent an order from the trial court certifying such an appeal under 28 U.S.C. § 1292(b).

For any hope of success under Section 1292(b), the movant must demonstrate "exceptional circumstances" that justify this exceptional relief. Interestingly, while that phrase may suggest a focus on significant or groundbreaking legal precedent, it often refers to large matters that are expensive to litigate. But how big and costly must a case be to satisfy this statute? A recent case in the Southern District of New York analyzes a motion under Section 1292(b) in the context of a putative class action and demonstrates how challenging it can be to establish exceptional circumstances that support an interlocutory appeal.

The Case: *Manrique v. State Farm Mutual Automobile Insurance Company*

In *Manrique v. State Farm Mutual Automobile Insurance Company*, Index No. 21-cv-224 (S.D.N.Y. July 1, 2022), the plaintiff brought a putative class action lawsuit against the defendant insurer alleging violations of the New York General Business Law and breach of contract. Following the partial denial of its motion to dismiss, the defendant moved, pursuant to 28 U.S.C. 1292(b), for certification of an interlocutory appeal. The plaintiff opposed the motion, stating the defendant failed to show a "substantial ground for a difference of opinion" and the existence of "exceptional circumstances" to warrant certification.

To determine whether a normally non-appealable interlocutory order can be appealed, Judge Kenneth Karas applied the three-factor test articulated by the Second Circuit in *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*: 1) whether an order involves a controlling question of law: 2) whether there is a substantial ground for a difference of opinion; and 3) whether the immediate appeal materially advances the ultimate termination of the litigation. Here, the plaintiff conceded the first and third prongs, and so the Court focused its analysis on whether the order presented a "substantial ground for a difference of opinion." The defendant claimed (as it had in its motion to dismiss) that a conflict existed between New York federal district courts, on the one hand, and New York state appellate and trial courts, on the other, and, therefore, because federal courts are bound to apply state law, a "substantial ground for a difference of opinion exist[ed]."

Unpersuaded by the defendant's line of reasoning, the Court found no conflict had been identified, "only frustration with the

Court's reading of the case law and statutory text."

The Court then turned to whether "exceptional circumstances" existed to support an interlocutory appeal. Notably, the Court stated that such circumstances exist where a case is "big and expensive," as opposed to one that has "far-reaching ripple effects" on public policy. As an example of such a case, Judge Karas referenced a large antitrust action, which involved 400 depositions, 21 expert depositions and more than 5 million pages of documents over seven years of litigation. While the Court acknowledged that class actions such as the instant matter can be costly, Judge Karas concluded it did not rise to the level of a big and expensive antitrust action.

Given the demonstrated lack of conflict, a rehash of prior arguments and absence of "exceptional circumstances," the Court determined certification inappropriate and denied the motion.

Takeaway

Certification of an interlocutory appeal under 28 U.S.C. 1292(b) is rare and in direct contrast with the federal courts' overarching policy against "piecemeal litigation." As such, a case must be truly "exceptional" for a court to grant certification.