



New Texas Interlocutory Appeals 2021

COVID, contractors,
and health care claims.

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In 2021, the Texas Legislature enacted three new grounds for interlocutory appeals—meaning appeals from decisions that are not final judgments. These new subsections to the central interlocutory appeals statute, Texas Civil Practice and Remedies Code section 51.014, indicate the Legislature’s continued use of the interlocutory appeals mechanism to further legal concerns and legislative priorities. In 2021, those concerns included protecting health care workers and businesses operating in the midst of the COVID-19 pandemic and striving to clarify or expand the application of two already enacted interlocutory appeal provisions, regarding health care liability claims and government contractors.

New Grounds for Interlocutory Appeal

The three new types of interlocutory orders that the Texas Legislature deemed to merit immediate appeals included:

- **COVID:** Concerning two provisions passed in 2021 to establish liability exceptions for health care providers, businesses, and schools for claims arising from the COVID-19 pandemic:
 - (1) orders overruling an objection that an expert report was insufficient in providing a basis for a plaintiff’s assertion that the defendant’s failure to act caused the plaintiff to contract a pandemic disease (CPRC Section 148.003(d)) and
 - (2) orders denying dismissal with prejudice of claims that a defendant’s failure to act caused the plaintiff to contract a pandemic disease if the plaintiff has not filed a sufficient expert report establishing the basis for the assertion (CPRC Section 148.003(f)).
- **Health Care Claims:** Making a preliminary determination that a claim is a health care liability claim under CPRC Section 74.353.
- **Contractors:** Granting or denying a motion for summary judgment filed by a contractor working on a highway or road for the Texas Department of Transportation on grounds that it is immune from liability under CPRC Section 97.002.

All three are currently labeled subsection 51.014(a)(15)—harmonization as subsections (15) to (17) presumably will occur later. As a result, they form the latest in a list of orders in Section 51.014(a) begun over a century ago that the Texas Legislature has designated as deserving interlocutory appeals.

Historical

In *Interlocutory Appeals in Texas: A History*,¹ I traced the evolution of Section 51.014 from the first interlocutory appeals statute in that section passed in 1892 allowing appeal of an interlocutory order of the district court appointing a receiver or trustee in any cause (currently section 51.014(a)(1)) to 120 years—and 13 interlocutory appeals grounds—later, section 51.014(a)(13), concerning the more limited grounds of denial of a motion for summary judgment by an electric utility company asserting limited liability. In 2019, the Legislature added one more relatively narrow ground: denial of a motion filed by a municipality of over 500,000 people in an action concerning dangerously damaged improvements or structures.²

What the New 2021 Interlocutory Provisions Indicate

The three grounds that the Texas Legislature added two years later in 2021 reflect:

- **The effect of COVID even on interlocutory appeals:** The Legislature employed the tool of interlocutory appeals to buttress one of its priorities: to shield health care workers, businesses, and schools from pandemic-related claims. The pandemic legislation³—which passed with little opposition—included provisions for the interlocutory appeals of orders ruling against defendants seeking protection from claims that their failure to act caused another to contract a pandemic disease. Notably, the Legislature employed the model that it used to protect defendants in health care liability claims under chapter 74 and Section 51.014(a)(9) by

requiring expert reports to establish the basis for a pandemic-related claim.

- **Two of the three new provisions do not strike new ground but rather are clarifications or build upon previous bases for interlocutory order. The other two new interlocutory appeals grounds:**

- (1) clarify the statutory definition of “health care liability claim” under chapter 74. Legislative reports reflect that the legislators were concerned this definition was previously imprecise and confusing, leading claimants to question whether they needed to file an expert report. As a result, the new ground complements and provides clarity to Section 51.014(a)(9) and (10) concerning interlocutory appeals of orders concerning health care liability claims.
- (2) expands the right to interlocutory appeal of summary judgment orders possessed by the Texas Department of Transportation to contractors who work on TxDOT projects, as long as they are in the midst of working on TxDOT projects and are in compliance with contract documents. During a subsequent continuing legal education panel discussion, Sen. Bryan Hughes—who carried this bill in the Senate—stated that this expansion of the right to interlocutory appeals to contractors made sense given that the contractors possess some degree of sovereign immunity through their working relationship with TxDOT and should have the same right to interlocutory appeals as TxDOT does under Section 51.014(a)(8). This bill received unanimous support in both chambers.⁴

Conclusion

The 2021 Texas Legislature’s actions concerning interlocutory appeals encompassed two primary aspects: using the tool of interlocutory appeals to protect medical providers who delivered vital services and businesses who had relied upon government orders during the COVID-19 pandemic, and to clear up unclear legal definitions and the scope of immunity related to previously enacted interlocutory appeals. Accordingly, the Legislature employed the tool of interlocutory appeal to not only further its legislative priorities but also to fine-tune the interlocutory appeal provisions that it had prioritized in prior sessions.

This 2021 expansion of the grounds for interlocutory appeal will almost certainly not be the last. Proposed bills (that did not pass) during the 2021 Texas legislative session included an attempt to add another interlocutory appeal ground to section 51.014(a)—concerning orders affecting the rights and duties of a parent in suits⁵ filed by the Department of Family and Protective Services. Yet other bills proposed interlocutory appeal of any order challenging the constitutionality of proposed statutes (concerning tax credits for contributions to educational assistance organizations and establishing a family educational relief program). Where the Texas Legislature next employs this go-to tool of right protection and fast-track appellate review will become clear at the next biennial session in 2023. **TBJ**

NOTES

1. Elizabeth Lee Thompson, *Interlocutory Appeals in Texas: A History*, 48 St. Mary’s L.J. 65 (2016), <https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1082&context=thestmaryslawjournal>.
2. Tex. Civ. Prac. & Rem. Code Ann §51.014(a)(14); see Tex. Civ. Prac. & Rem. Code Ann. §54.012(6); Tex. Loc. Gov’t Code Ann. §214.0012.
3. Act of May 28, 2021, 87th Leg., R.S., ch. 528, 2021 Tex. Sess. Law Serv. ch. 528 (S.B. 6) (West).
4. Act of May 28, 2021, 87th Leg., R.S., ch. 813, 2021 Tex. Sess. Law Serv. ch. 813 (H.B. 2086) (West); see also A Texas Legislative Postmortem—Jerry Bullard, Texas Appellate Law Podcast (Oct. 14, 2021), <https://www.butlersnow.com/2021/10/a-texas-legislative-postmortem-jerry-bullard/>.
5. Tex. H.B.2200, 87th Leg., R.S. (2021).

Note: The views expressed in this article are solely those of the author and do not reflect the views of Thompson, Coe, Cousins & Irons, LLP or its attorneys. The author is thankful to Jerry Bullard for his valuable insights and review of this article.



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APPOINTMENT OF FULL-TIME UNITED STATES MAGISTRATE JUDGE

The United States District Court for the Southern District of Texas is soliciting qualified applicants in order to appoint a full-time United States Magistrate Judge for its Brownsville Division. The current annual salary of the position is \$205,528. The term of office is 8 years.

A full public notice for the position, which includes information concerning background and IRS tax checks as well as financial disclosure requirements and the application form are available in the office of the United States District Clerk at Brownsville, Corpus Christi, Galveston, Houston, Laredo, McAllen and Victoria. The notice is also available on the Court’s website at: www.txs.uscourts.gov.

Instructions for submitting your application for this position either online or in paper form are on the Court’s website at: www.txs.uscourts.gov. Applications must be submitted by 5:00 pm, September 20, 2022.

Applications will be kept confidential, unless the applicant consents to disclosure, and will be examined only by members of the merit selection panel and judges of the district court. The panel’s deliberations are confidential.