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Survey

Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review

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The interlocutory appeal is the rare exception and is generally disdained by a system rooted to the final judgment rule.¹ Like all

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1. 28 U.S.C. § 1291 (2012) (“the courts of appeal . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States”). Federal judicial policy against piecemeal jurisdiction dates back to the First Judiciary Act of 1791. See Judiciary Act of 1789, ch. 20, 21, 22, 25, 1 Stat. 83–86; Alexandra Hess, Stephanie Parker & Tala Tounian, *Permissive Interlocutory Appeals at The Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995–2010)*, 60 AM. U. L. REV. 757, 758 n.1 (2011); see also Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 726–29 (1993) (tracing the development of the final-judgment rule); Darr v. Muratore, 8 F.3d 854, 862 (1st Cir. 1993) (discussing the circuit’s usual prohibition against piecemeal appellate review in context of Rule 54(b)); Cummins v. EG&G Sealol Inc., 697 F. Supp. 64, 67 (D.R.I. 1988) (explaining that federal law “abhors piecemeal disputing interlocutory district court orders”); Sierra Club v. March, 907 F.2d 210, 212 (1st Cir. 1990) (as a general rule, “it has been a marked characteristic of the federal judicial system not to

exceptions to the finality rule, it is intended to solve instances where too rigid an adherence to the finality requirement would cause a severe hardship and injustice with a particular litigant. It reflects a value judgment as to where to draw the line between the competing policy choices of systemic efficiency, inconvenience and cost of piecemeal litigation, and the inefficiencies and hardship of denying justice through delay.²

The general interlocutory appeal exception is codified in 28 U.S.C. § 1292(b). Purely discretionary, it has been described as “[t]he most explicitly flexible provision for interlocutory appeals.”³ This bifurcated discretionary approach, requiring permission of both the district court and court of appeals through application of specific statutory criteria, is unique in that it grants appellate gatekeeper status upon the trial court.⁴ The discretionary approach provides a flexible,⁵ individualized approach and balancing of interests on a case-by-case basis.⁶ It allows for the selection of those cases worthy of immediate review in order to correct errors in the lower court or develop law, while allowing

permit an appeal until a litigation has been concluded in the court of first instance” (quoting *Director, O.W.C.P. v. Bath Iron Works Corp.*, 853 F.2d 11, 13 (1st Cir. 1988)).

2. Andrew Pollis, *The Need For Non-Discretionary Interlocutory Appellate Review in Multi-District Litigation*, 70 *FORDHAM L. REV.* 1643, 1649 (2011) (noting that all of the exceptions to the final judgment rule reflect value judgment as to where to draw the line between “the interests of an aggrieved party in the prompt resolution of particular claims of error [and] the systemic interest that militate in favor of requiring the party to wait until the end of the case to seek appellate vindication.”); *see also* *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152–53 (1964) (explaining that finality rule requires the balancing of the competing considerations of “the inconvenience and costs of piecemeal appeal review on the one hand and the danger of denying justice by delay on the other” (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950))).

3. 16 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE*, §3929, 430 (2d. ed. 1996) [hereinafter *WRIGHT ET AL.*].

4. *See Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 47 (1995) (“Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals.”).

5. *See Cummins*, 697 F. Supp. at 68 (stating that “the purpose of 1292(b) is to give the judiciary flexibility in ameliorating the sometimes harsh effects of the final judgment rule.”).

6. Martineau, *supra* note 1, at 777 (explaining that the discretionary approach provides for “an individualized balancing of interests made on a case by case basis.”).

the court system to control the amount its of workload.⁷ The approach has its critics. They complain that the discretionary approach results in “procedural unpredictability and substantive uncertainty”⁸ and fosters a regime that “is too vulnerable to the whims and prejudices of individual judges who deny discretionary appeals in cases they wish to avoid.”⁹ There is a concern that the statute is under-utilized,¹⁰ unduly limited to “exceptional case[s]”¹¹ or to large complex cases, and otherwise hobbled by allowing trial judges, with unreviewable discretion and “vested interests,” to serve as gatekeepers of appellate review.¹²

7. Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 230–31.

8. Pollis, *supra* note 2, at 1663. For discussion of the debate between having exceptions to the finality rule for purposes of interlocutory appeal based on narrowly defined categories and discretion, see Pollis *supra* note 2, at 1651 (discussing the category vs. discretionary approaches to permissible interlocutory appeals); Glynn, *supra* note 7 at 259–62 (advocating for categorical approach). See also James E. Pfander & David R. Pekarrek Krohn, *Interlocutory Review By Agreement of the Parties: A Preliminary Analysis* (Nw. U. Sch. of L. Scholarly Commons Faculty Working Papers, Paper No. 101, 2010), available at <http://cholarlycommons.law.northwestern.edu/facultyworkingpapers/101/> (advocating approach to interlocutory appeal that combines the discretionary and categorical approaches and empowers court to certify for interlocutory appeal when the parties to the litigation so agree).

9. Pollis, *supra* note 2, at 1662.

10. Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1193 (1990).

11. See *Heddendorf v. Goldfine*, 263 F.2d 887, 888 (1st Cir. 1959); H.R. Rep. No. 85-1667, at 3 (1958), reprinted in 1958 U.S.C.A.N.N. 5255, 5260 (“Your Committee is of the view that the appeal from interlocutory orders thus provided should and will be used only in exceptional cases. . .”); see also *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 340–41 (1959) [hereinafter *Discretionary Appeals*] (“While the use of the phrase ‘exceptional cases’ in the legislative history suggests the statute applies only to the ‘big’ case, emphasis was also given to 1292(b)’s ameliorating effect on district court backlogs, a result obtainable only if the new section is more liberally employed.”).

12. MacKenzie Horton, *Mandamus, Stop in The Name of Discretion: The Judicial “Myth” of The District Court’s Absolute and Unreviewable Discretion in Section 1292(b) Certification*, 64 BAYLOR L. REV. 976, 982 (2013) (explaining that “Section 1292(b)’s initial gatekeeper wields considerable power with little institutionalized constraint.”); Pollis, *supra* note 2, at 1661 (noting district courts’ vested interest in preventing reversal); see also Glynn, *supra* note 7 at 245 (explaining that under Section 1292(b) district court decisions are “subjective and unchecked by formal or informal constraints in

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This survey sets forth the governing substantive and procedural principles applicable to Section 1292(b), with a particular focus on the decisions and the precedents of the First Circuit since the statute's adoption in 1958. It sets out a review of available First Circuit appellate and district court decisions during the last fifty-five years. It attempts to explore the judicial application of the statutory discretion by both the district courts and the First Circuit Court of Appeals. It attempts to explore what conclusions, if any, that can be drawn as to the frequency, usefulness and practical applications of the dual discretion system both under the statute and the competing interests of efficiency and justice.

I. INTERLOCUTORY REVIEW UNDER 28 U.S.C. § 1292

Section 1292 constitutes the gradual codification of various exceptions to the final judgment rule that evolved and were adopted by Congress between 1891 and 1992.¹³ In 1891, Congress enacted the Judiciary Act of 1891 (known as the “Evarts Act”) which included a provision providing for review of orders granting or continuing injunctions even if there was no final judgment.¹⁴

a pure discretionary regime.”); Pollis, *supra* note 2, at 179–80 (contending that discretionary review “will not result in dramatic increases in the correction of errors that threaten to inflict irreparable harm nor enhance significantly the development of legal standards to areas that have traditionally evaded appellate review.”); *see also* Horton, *supra* at 981–82 (explaining that § 1292(b)'s discretion “protects the district court's understandable reluctance to undergo early appellate review” and “vastly reduces its effectiveness as a safety valve from the rigors of final judgment rule” (quoting Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 108–09 (1975)).

13. Hess et al., *supra* note 1 at 760. *See* Tidewater Oil Co. v. U.S., 409 U.S. 151, 162–63 (1972) (explaining that Section 1292(b) is “a consolidation of a number of previously separate code provision including the general interlocutory appeal provision”); *see also* Solimine, *supra* note 10, at 1172 (discussing the legislative compromise behind Section 1292(b) that resulted in the “dual certification” requirement). There are four primary avenues for appellate review of interlocutory orders in federal court: (1) certification of judgment under Rule 54(b) of the Federal Rules of Civil Procedure; (2) the collateral order doctrine; (3) discretionary certification under 28 U.S.C. § 1292; and (4) a writ of mandamus under the All Writs Act, *codified as* 28 U.S.C. § 1651 (2012). *Id.*

14. Hess et al., *supra* note 1, at 769 (citing Evarts Act of 1891, ch. 517, §7, 26 Stat. 826, 828); *United States v. Cities Service Co.*, 410 F.2d 662, 666 (1st Cir. 1969) (noting that Section 7 of the Evarts Act provided for review of

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This was expanded four years later when orders refusing injunctions were added.¹⁵ This is a prolific source of appeals and likely accounts for the largest number of interlocutory appeals. Interlocutory review of orders pertaining to receivers, admiralty, and patent cases followed in 1900, 1926, and 1927 respectively.¹⁶ The Supreme Court has remarked that these exceptions to the final judgment rule arose from the belief that litigants should be able to “effectively challenge interlocutory orders of serious, perhaps irreparable, consequence.”¹⁷

In 1958, The Interlocutory Appeals Act was adopted with the majority of the previously recognized exceptions set forth in Subsection 1292(a) of the act. Subsection 1292(b) was added to set out “non-enumerated appeals of interlocutory orders.”¹⁸ Later, in 1982 and 1992 respectively, the most recent additions to the statute were made. Specifically, as a result of the 1982 Federal Courts Improvement Act,¹⁹ Subsections (c) and (d) were added,

interlocutory orders pertaining to injunctions).

15. See Act of Feb. 18, 1895, ch. 96, 28 Stat. 666, 666–67 codified at 28 U.S.C. § 1292(a)(1) (2012) (applying to orders “granting, continuing, modifying or refusing or dissolving injunctions or refusing to dissolve or modify injunctions.”).

16. Orders appointing receivers or refusing to wind up receiverships is set forth in Section 1292(a)(2). This section applies to orders “appointing receivers or refusing orders to wind up receiverships or to take steps to accomplish this purpose such as directing sales or other disposals of property. 28 U.S.C. § 1292(a)(1) (2012). Orders or decrees in admiralty cases are set forth in Section 1292(a)(3), which provides for interlocutory appeal of decrees “determining the rights and liability of the parties to admiralty cases in which appeals from final decrees are allowed.” 28 U.S.C. § 1292(a)(3). See also *Tidewater Oil Co.*, 409 U.S. at 151 (“[Subsection (b) of this section] was intended to establish jurisdiction in the courts of appeals to review interlocutory orders, other than those specified in [subsection (a) of this section], in civil cases in which they would have jurisdiction were the judgments final.”).

17. *Baltimore Contractors Inc. v. Bodinger*, 348 U.S. 176, 181 (1955) (stating that “[w]hen the pressure rises to a point that influences Congress, legislative remedies are enacted.”).

18. Hess et al., *supra* note 1, at 761. The most recent addition to Section 1292 is Section 1292(e), adopted in 1992. At that time and at the suggestion of the Federal Courts Study Committee, Congress enacted Section 1292(e), authorizing the Supreme Court to issue rules that expand the set of allowable interlocutory appeals. In 1998, the Supreme Court promulgated Fed. R. Civ. P. 23(f) pursuant to this authority. *Asher v. Baxter Intern., Inc.*, 505 F.3d 736, 741 (7th Cir. 2007).

19. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127,

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establishing that the Federal Circuit had exclusive interlocutory jurisdiction over certain specialized courts such as the United States Court of Claims and the United States Court of International Trade.²⁰ In 1992, Subsection (e) was added as a part of the Federal Courts Administration Act,²¹ permitting the Supreme Court to allow interlocutory appeals in other instances not provided for elsewhere in Section 1292. In effect, Rule 23(f) of the Federal Rules of Civil Procedure, addressing orders pertaining to certification of class actions, is the only interlocutory appeal provision that has resulted since the enactment of Subsection (e).²²

Section 1292(b) has been described as the “greatest legislative compromise . . . on the policy of finality that has marked the history of the court of appeals.”²³ It was “a judge-sought, judge made, judicial sponsored enactment”²⁴ as it was devised and introduced by the Judicial Conference of the United States,²⁵ which was comprised of federal judges.²⁶ The original proposal,

96 Stat. 25, 37–39 (codified in 28 U.S.C. § 1292(c)–(d) (2012)).

20. The Federal Circuit court was provided the same dual discretionary approach set out in sub-section (b).

21. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (codified as amended at 28 U.S.C. § 1292(e)).

22. Rule 23(f) provides that the court of appeals “may permit” interlocutory review of an order granting or denying class-action certification. FED. R. CIV. P. 23(f). Notably, the discretion is described in the Committee Notes as “unfettered” and does not require “certification” by the district court. Other exceptions to the final judgment rule permitting interlocutory appeal include: the right to appeal from orders that refuse to enforce contractual arbitration clauses enacted in 1988, 9 U.S.C. 16(a) (2012), the collateral order doctrine, writs of mandamus pursuant to 28 U.S.C. § 1651(a) (2012), and bankruptcy orders enacted in 1984. 28 U.S.C. §158(a)(3) (2012).

23. THOMAS BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 57 (2d. ed 2009), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/primjur2.pdf/\\$file/primjur2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/primjur2.pdf/$file/primjur2.pdf).

24. *Hadjipateras v. Pacifica S.A.*, 290 F.2d 697, 702 (5th Cir. 1961).

25. The Judicial Conference of the United States dates back to 1922. Originally called “The Conference of Senior Circuit Judges,” it was created to serve as the principal policy making body concerned with the administration of the U.S. Courts. District Court judges were formally added to the Conference in 1957. *See* 28 U.S.C. § 331 (2012).

26. The Senate Report on the bill that became Section 1292(b) stated:

This legislation results from a considerable study by committee of the Judicial Conference. The legislation itself was introduced at the request of the Administrative Office of the United States pursuant to the direction of the Judicial Conference of the United States....The

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which was rejected, would have left the right to appeal an interlocutory order at the discretion of the appellate courts.²⁷ However, legislators believed it was indispensable to have the district courts involved given its superior familiarity with the litigation. According to the House Report accompanying the proposed legislation:

Only the Trial Court can be fully informed of the nature of the case and the peculiarities which make it appropriate to interlocutory review at the time desirability of the appeal must be determined; and he is probably the only person able to forecast the future course of the litigation with any degree of accuracy.²⁸

The Supreme Court has since stated that the requirement of the consent of the district court judge “serves the dual purpose of ensuring that such review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals.”²⁹

Section 1292(b) presently remains almost identical to its wording when originally adopted. Unlike interlocutory appeals sought under Section 1292(a) pertaining to injunctions, receivers and receiverships, and admiralty decrees, which can be taken as matter of right, Section 1292(b) is discretionary.³⁰ Section 1292(b)

bill results from a growing awareness of the need for expedition of cases pending before the district court . . . The committee believes that this legislation constitutes a desirable addition to existing authority to appeal from interlocutory orders of the district courts..Any legislation, therefore, appropriately safeguarded, which might aid in the disposition of case before the district courts..by saving useless expenditure of court time as to require the approbation of all those directly concerned with the administration of justice in the United States.

S. Rep. No. 85-2434, at 4 (1958), *reprinted in* 3 U.S.C.C.A.N. 5256-57).

27. *WRIGHT ET AL.*, *supra* note 3, § 3929, at 438–39; *see also* *Swint v. Chambers Cnty. Com’n*, 514 U.S. 35, 47 (1995).

28. H.R. Rep. No. 85-1667, at 5–6 (1958), *reprinted in* 1958 U.S.C.A.N.N. 5255, 5262.

29. *Coopers & Lyband v. Livesay*, 437 U.S. 463, 474 (1978); *see also Swint*, 514 U.S. at 47 (explaining that “[c]ongress thus chose to confer on district courts first line discretion to allow interlocutory appeals.”).

30. *Heddendorf v. Goldfine*, 263 F.2d 887, 888 (1st Cir. 1959); *see also Armstrong v. Wilson*, 124 F.3d 1019, 1021 (9th Cir. 1997) (noting that interlocutory appeal under Section 1292(b) is by permission while

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provides:

When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.³¹

The First Circuit stated early on that “[b]ecause of the general policy against piecemeal appeals, statutes [like Section 1292] permitting interlocutory appeals are to be construed with some strictness”³² as well as that “Section 1292 presents a Congressional judgment that some interlocutory orders are of such significance that appellate review is necessary in order to prevent irreparable harm to an unsuccessful litigant.”³³ It has otherwise proceeded to describe 1292(b) appeals as “hen’s teeth rare.”³⁴

Section 1292(b), by its very terms, does not apply to all types of cases. For example the statute does not apply to appeals of

interlocutory appeal under Section 1292(a) is by right).

31. 28 U.S.C. § 1292(b) (2012) (emphasis added).

32. *Switz. Cheese Ass’n, Inc. v. E. Horne’s Mkt., Inc.*, 351 F.2d 552, 553 (1st Cir. 1965).

33. *United States v. Cities Service Co.*, 410 F.2d 662, 664 (1st Cir. 1969); *see also Hess, supra* note 1, at 762 (noting that Section 1292(b) was intended to strike a balance between the perceived need to “promote judicial efficiency and the concern about ‘opening the door to frivolous, dilatory, or harassing interlocutory appeals.’” (quoting *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 610 n.15 (1975)).

34. *Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004); *see also Lawson v. FMR LLC*, 724 F. Supp. 2d 167 (D. Mass. 2010) (citing *Camacho’s* “hen’s teeth rare” admonition and stating that “after twenty-four years as a District Judge within this Circuit, I cannot recall an occasion in which I have been willing to make a § 1292(b) certification.”).

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orders in criminal cases.³⁵ However, the statute does apply to grand jury proceedings³⁶ as they are a “hybrid” matter³⁷ with true criminal proceedings not otherwise formally arising “until a formal charge is openly made against the accused.”³⁸ Section 1292(b) includes any orders relative to grand jury proceedings including orders as to the adequacy of the evidence submitted in support of an indictment.³⁹ Section 1292(b) can also reach any order in a criminal action that is essentially civil in nature such as an order pertaining to the return of monies deposited in a court registry.⁴⁰ In a recent case, the issue arose as to whether an order under 28 U.S.C. § 2255 granting a defendant a new sentencing hearing was “civil” for purposes of § 1292(b).⁴¹ The court noted that whether a Section 2255 proceeding is a civil action for purposes of Section 1292(b) was “a challenging question.”⁴² It proceeded to avoid the issue finding the Section 1292(b) criteria to have been met but leaving it to the First Circuit to decide the issue of whether Section 2255 was a civil proceeding for purposes of Section 1292(b).⁴³

Section 1292(b) does not apply to orders that would otherwise

35. *United States v. Pace*, 201 F.3d 1116, 1119 (9th Cir. 2000); *United States v. Selby*, 476 F.2d 965, 967 (2d Cir. 1973).

36. *In re Grand Jury Proceedings*, 580 F.2d 13, 17 (1st Cir. 1978); *see also In re Grand Jury Subpoenas*, 573 F.3d 936, 940 (6th Cir. 1978) (subpoena upon witness to testify in grand jury does not involve a witness in a criminal proceeding and § 1292(b) applies).

37. *Bonnell v. United States*, 483 F. Supp. 1091, 1092–93 (D. Minn. 1979) (holding that grand jury proceedings are “hybrid” civil and criminal proceedings and fall within “civil action” intention of § 1292(b)).

38. *Post v. United States*, 161 U.S. 583, 587 (1896).

39. *United States v. Rivera-Mercado*, 683 F. Supp. 2d 168, 170–71 (D.P.R. 2010).

40. *United States v. Beach*, 113 F.3d 188, 189 n.3 (11th Cir. 1987).

41. *United States v. Sampson*, No. 01-10384-MLW, 2012 WL 1633296, at *1 (D. Mass. May 10, 2012).

42. *Id.* at *10; *see also Rogers v. United States*, 180 F.3d 349, 352 n.3 (1st Cir. 1999) (explaining that “motions under § 2255 have often been construed as civil actions much like habeas corpus proceedings.”); *Wall v. Kholi*, 131 S. Ct. 1278, 1289 n.7 (2011) (explaining that “there has been some confusion whether § 2255 proceedings are civil or criminal”).

43. *Sampson*, 2012 WL 1633296 at *11. For cases allowing § 1292(b) appeals in § 2255 proceedings see *United States v. Pelullo*, 399 F.3d 197, 202 (3d Cir. 2005); *United States v. Barron*, 127 F.3d 890, 893 (9th Cir. 1997), *rev’d on other grounds in rehearing en banc*, 172 F.3d 1153 (9th Cir. 1999) (*en banc*).

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qualify for interlocutory review such as an injunction or a final but partial judgment under Rule 54(b) of the Federal Rules of Civil Procedure. It likewise applies only to “district court” judges and has thus been held inapplicable to tax⁴⁴ and bankruptcy⁴⁵ courts although available if the district court acts on a bankruptcy matter.⁴⁶ Additionally, it has been held applicable to habeas corpus petitions.⁴⁷

As to magistrates, courts draw a distinction to determine whether Section 1292 applies to their decisions depending on how the case was referenced. The application of Section 1292 depends on whether: (1) the reference to the magistrate is by agreement and resulting plenary jurisdiction with the magistrate (28 U.S.C. § 636(c)(1)); (2) the more limited reference for purposes of non-dispositive pre-trial matters; or (3) recommendations on dispositive motions (28 U.S.C. §636(b)).⁴⁸ Where the parties have consented for the magistrate to conduct all proceedings under Section 636(c), certification under Section 1292 is permissible; otherwise, the magistrate has no jurisdictional power to do so.⁴⁹

44. The Tax Court has its own interlocutory appeals provision codified at 26 U.S.C. § 7482(a)(2) (2012).

45. See *Shapiro v. Comm’r of Internal Revenue*, 632 F.2d 170, 171 (2d Cir. 1980) (explaining that Section 1292(b) applies only to district court judges); see also *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 252–55 (1992) (explaining that § 1292(b) applies to district court judges sitting in bankruptcy proceedings). In 1984, 28 U.S.C. § 158(a) was enacted providing for interlocutory appeal for bankruptcy orders. 28 U.S.C. § 158 (a)(3) (2012). There are no governing criteria set out in the statute with the majority of the courts the criteria set out in Section 1292(b). See e.g., *Ne. Sav., F.A. v. Geremia*, 191 B.R. 275, 278–79 (D.R.I. 1996); *Fleet Data Processing Corp. v. Branch*, 218 B.R. 643, 654 n.21 (1st Cir. 1998).

46. *Chorney v. Eastland Bank*, No. 92-1782, 1993 WL 29088, at *2 (1st Cir. 1993) (per curiam) (noting that district court found bankruptcy order at issue “simple and easily disposed of on the merits” thus defeating any appellate jurisdiction under § 1292(b)).

47. See *Rogers*, 180 F.3d at 352 n.3.

48. *Cent. Soya Co. Inc. v. Voktas, Inc.*, 661 F.2d 78, 80 (7th Cir. 1981) (holding that the Federal Magistrates Act of 1979 was sufficiently broad to include Section 1292(b) certification); see also *Vitols v. Citizens Banking Co.*, 984 F.2d 168, 169–70 (6th Cir. 1993) (explaining that a “magistrate judge, acting pursuant to a reference under § 636(b)(1) or (3), has no authority to issue a dispositive ruling on a motion to certify a district court order for interlocutory appeal under § 1292(b).”); *Le Vick v. Skaggs Co., Inc.*, 701 F.2d 777, 778 n.1 (9th Cir. 1983) (same).

49. *Cent. Soya Co., Inc.*, 661 F.2d at 78; *Le Vick*, 701 F.2d at 778 n.1.

II. PROCEDURAL REQUIREMENTS

The discerning feature of the discretionary provision of Section 1292(b) is that it requires dual review.⁵⁰ Both the appellate court and the trial court must approve an order for interlocutory review. A party seeking review of an interlocutory order must first obtain a certification from the district court and then obtain leave from the appeals court to pursue the review of the certified interlocutory order.

District Court. The request to certify before the district court is either made at the time of the initial decision or made through a motion to certify and amend the order. There is no prescribed time limit to seek certification from the district court. Some courts note that a delay in doing so mitigates against certification. Indeed, at least two district court decisions within the First Circuit have denied a motion for certification where it was filed several months after the order was issued.⁵¹ However, others note the need for “flexibility” because “[t]he wisdom of certification may extend in unexpected directions and that what is most important

50. *Heddendorf*, 263 F.2d at 888 (explaining that “It is to be seen that this amendment requires judicial action both by the district court and by the court of appeals before a prospective appellant will be allowed to proceed with an appeal from an interlocutory decision not otherwise appealable under § 1292”). The American Bar Association has previously endorsed an approach to interlocutory appeals that give on the appellate court discretion to hear non-final orders. The ABA approach would allow for such an appeal if it would “(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation; (b) Protect the petitioner from substantial or irreparable injury; or (c) Clarify an issue of general importance in the administration of justice.” James E. Pfander & David R. Pekarrek Krohn, *Interlocutory Review By Agreement of the Parties: A Preliminary Analysis* 9 n.23 (Nw. U. Sch. of L. Scholarly Commons Faculty Working Papers, Paper No. 101, 2010), available at <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/101/> (citing ABA STANDARDS RELATING TO APPELLATE COURTS (1994)). The ABA approach differs from Section 1292(b) in three ways. First, it sets forth disjunctive requirements; that is, interlocutory review can be granted if any individual factor is satisfied. Second, it includes a broad factor relating to “irreparable harm.” Third, it does not require the district court to certify the appeal, granting all discretion with the appellate court. *Id.*

51. *Scanlon v. M.V. Super Servant* 3, 429 F.3d 6, 8 (1st Cir. 2005) (district court denied as untimely motion to amend to certify an interlocutory appeal filed more than four months after order issued); *Hypertherm, Inc. v. Am. Torch Tip Co.*, No. 05-373, 2008 WL 1767062, at *1 (D.N.H. Apr. 15, 2008) (denied as five months after order issued).

is the soundness of the certification at the time it is made, not an inquest into the comparative desirability of a vanished opportunity for earlier appeal.”⁵²

While the district court must certify an order for immediate appeal before the court of appeals has discretion to accept jurisdiction under Subsection 1292(b),⁵³ Appellate Rule 5(a)(3) provides that the district court can amend the underlying order to include the certifying statement.⁵⁴ If the district court does amend the order, the time to petition for appeal runs from the entry of the amended order.⁵⁵ This allows the district court some flexibility in assessing the certification criteria and deferring a ruling until there is needed record development or the resolution of other issues.

The failure to take an authorized interlocutory appeal does not preclude including the issue in any subsequent appeal from the final judgment.⁵⁶ Some care is required as there is authority that the failure to include a crucial or central issue in the Section 1292(b) certification will bar its review on final judgment appeal.⁵⁷ Moreover, a certification denial under Section 1292(b) does not preclude use or reliance on the collateral order doctrine⁵⁸ or, at

52. *WRIGHT ET AL.*, *supra* note 3, § 3929, at 464–65. The statute originally included that certification could be sought at “anytime” but this was removed by amendment. For courts finding an unreasonable delay in seeking certification as a basis for denial, see *Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc.*, 202 F.3d 957, 958–59 (7th Cir. 2000) (stating that “a district judge should not grant an inexcusable dilatory request”). *See also Weir v. Propst*, 915 F.2d 283, 287 (7th Cir. 1990) (finding abuse of discretion when district court allowed motion to amend interlocutory order three months after the order was entered and no showing of any reason for delay).

53. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978); *Pride Shipping Corp. v. Tafu Lumber Co.*, 898 F.2d 1404, 1406 (9th Cir. 1990) (finding no appellate jurisdiction under § 1292(b) where district court refused to certify order); *Rivera-Jimenez v. Pierluisi*, 362 F.3d 87, 92 (1st Cir. 2004). *But see Hewitt v. Joyce Beverages of Wis., Inc.*, 721 F.2d 625, 627 n.1 (7th Cir. 1983) (noting that in rare instances the appeals court may treat a case as interlocutory appeal even though district court never entered certification).

54. FED. R. APP. PROC. 5(a)(3) (2009).

55. *Id.*

56. *Drayer v. Krasner*, 572 F.2d 348, 353 (2d Cir. 1978).

57. *Sheeran v. Gen. Elec. Co.*, 593 F.2d 93, 97–98 (9th Cir. 1979).

58. *Rodriguez v. Banco Cent.*, 790 F.2d 172, 176 n.8 (1st Cir. 1986). *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (creating the collateral loan doctrine by establishing that orders, which “finally determine

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least potentially, a writ of mandamus. Indeed, a potential interesting use of Section 1292(b) is to expand a collateral order appeal such as seeking to add a precise issue with a ruling on qualified immunity entitled to interlocutory appeal as of right.

As to mandamus, the First Circuit has made clear on at least two occasions that there is “a heavy burden on one who seeks mandamus on matters that come within the possible ambit of [Section 1292(b)].”⁵⁹ According to the court, mandamus “is not a substitute for interlocutory appeal for parties attacking the court’s jurisdiction; it is appropriate only when the lower court is clearly without jurisdiction and the party seeking the writ has no adequate remedy to appeal.”⁶⁰ Since Section 1292(b) is a potential appellate remedy, a prerequisite for review by mandamus is not met. Indeed, a number of courts have held that the denial of certification by the district court is not reviewable.⁶¹ The rationale is that to allow mandamus as to Section 1292(b) certification denials would result in an end around the dual gatekeeper structure of Section 1292(b).⁶² Even in a case where a party seeking a writ of mandamus did not request certification under Section 1292(b), the First Circuit still denied such use, as

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” are appealable).

59. *In re GAF Corp.*, 416 F.2d 1252, 1252 (1st Cir. 1969) (per curiam); *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 21 (1st Cir. 1983).

60. *Boreri*, 763 F.2d at 26 (quoting *United States v. Sorren*, 605 F.2d 1211, 1215 (1st Cir. 1979)).

61. *United States v. 687.30 Acres of Land*, 451 F.2d 667, 670 (8th Cir. 1971) (finding no jurisdiction to review). *See also* discussion *infra*. Compare *Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686, 698 (9th Cir. 1977) (holding that issuing a writ of “mandamus to direct the district judge to exercise his discretion to certify [a] question is not an appropriate remedy”); and *In re Phillips Petroleum Co.*, 943 F.2d 63, 67 (1991) (holding the Section 1292(b) petition was properly denied and to allow petition for mandamus “would improperly utilize it as a substitute in the absence of any justifying circumstances”) with *In re McClelland Eng’rs, Inc.*, 742 F.2d 837, 837 (5th Cir. 1984) (holding on petition for writ of mandamus that there was abuse of discretion in refusing to certify order under § 1292(b)); *Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963) (explaining that mandamus to compel a district court to certify under Section 1292(b) “would indeed be rare”).

62. *See In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002).

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Section 1292(b) represents an alternative vehicle for review.⁶³

Some courts will allow the use of mandamus not to compel Subsection 1292(b) certification but to seek appeal of the underlying order being challenged.⁶⁴ While a writ of mandamus has a substantially more strenuous standard of review,⁶⁵ it can be pursued where the order is beyond the purview of Section 1292(b). For example, 1292(b) does not apply where the issue does not involve any substantial grounds for difference of opinion as to controlling law⁶⁶ or it would not materially advance termination of the litigation.⁶⁷ Another instance would include where seeking Section 1292(b) certification would be deemed futile, such as when a judge refuses to recuse herself.⁶⁸

However, Section 1292(b) is distinct from Rule 54(b) providing for final and separate judgment which triggers the right of appeal. For instance,

Rule 54(b) cannot be used to enter judgment on deciding claims closely related to claims that remain, in an effort to curtail the scope of appellate discretion as to interlocutory appealability, [n]or should § 1292(b) be used on final disposition of a separate matter when there is no substantial ground for difference of opinion as to a controlling question whose present disposition will materially advance ultimate disposition of the case.⁶⁹

The First Circuit has agreed, noting the distinction between Rule 54(b) and 1292(b) and stating that its discretion under 1292(b) should not be “evaded” by an inappropriate entry of judgment under Rule 54(b) by the district court.⁷⁰

63. See *In re GAF Corp.*, 416 F.2d at 1252.

64. *Ford Motor Co.*, 344 F.3d at 654; *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005); see also Aaron S. Baayer, *How Mandamus and Interlocutory Appeals Interact*, NAT'L L. J. (July 30, 2012).

65. *Ford Motor Co.*, 344 F.3d at 654.

66. See, e.g., *Ohio Envtl. Council v. U.S. Dist. Ct.*, 565 F.2d 393, 398 (6th Cir. 1977).

67. See, e.g., *In re City of N.Y.*, 607 F.3d 923, 933 (2d Cir. 2010).

68. *In re Sch. Asbestos Litig.*, 977 F.2d 764, 776 (3d Cir. 1992).

69. WRIGHT ET AL., *supra* note 3, § 3929, at 477–78.

70. *Spiegel v. Trs. of Tufts Coll.*, 843 F.2d 38, 46 (1st Cir. 1988) (holding that interrelationship between an adjudicated and un-adjudicated claim established that the district erred in entering judgment under Rule 54(b) and noting that discretion of the appeals court to determine under 1292(b) cannot

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If the district court agrees to certify the order, the party has ten days to file a petition with the appeals court.⁷¹ The ten day limit is jurisdictional and runs from the date the order is certified or amended by the trial court⁷² and cannot be extended by either the district court or the court of appeals.⁷³ An appellant who misses the ten-day certification period might consider applying for recertification. However, the First Circuit has not squarely addressed the issue of whether a district court may recertify an order when it was initially dismissed as untimely following certification.⁷⁴

The Supreme Court, in the dissenting opinion of *Baldwin County Welcome Center v. Brown*,⁷⁵ addressed the merits of an appeal involving a ruling on a 1292(b) certification where the district court had recertified the issue nine months after the ten-day period expired. Justice Stevens, in writing for the dissent, noted a conflict among the courts and sided with the view permitting such re-certifications.⁷⁶ However, there are debates for and against recertification. Those against recertification show concern that permitting recertification effectively renders the ten-day statutory period a nullity or may give the district court too much discretionary power. Those for recertification argue for the long-standing jurisdictional power of the district court to reconsider any order.⁷⁷

The individual Circuits vary on recertification practices. For example, the First Circuit has, more than once, implied that

be so evaded).

71. See also FED. R. APP. P. 5(a)(3) (stating that if the district court amends its order “to include the required permission or statement . . . the time to petition runs from entry of the amended order”).

72. *Rodriquez v. Banco Central*, 917 F.2d 664, 668 (1st Cir. 1990) (“[T]he statute’s ten-day limit is jurisdictional, which is to say that the law does not permit us to forgive a party’s failure to comply.”); *In re Casal*, 998 F.2d 28, 33 (1st Cir. 1993) (same).

73. *In re Memphis*, 293 F.3d 345, 348 (6th Cir. 2002).

74. See *Bush v. Eagle-Picher Indus., Inc. (In re All Asbestos Cases)*, 849 F.2d 452, 453 (9th Cir. 1988) (dismissing initial appeal without prejudice to re-filing following recertification).

75. 466 U.S. 147 (1984).

76. *Id.* at 162 (Stevens, J. dissenting).

77. Allowing recertification is consistent with the district court’s power to enlarge the time to appeal as of right under Federal Rule of Appellate Procedure 4(a)(5).

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recertification would be permissible.⁷⁸ The Fifth Circuit has adopted a lenient view that such recertification is freely permissible, so long as the statutory criteria are still met at the time of recertification.⁷⁹ The Sixth Circuit, however, follows the rule that recertification only “extend[s] the jurisdictional period of time which the petitioner had permitted to elapse” and cannot bestow the appeals court with jurisdiction.⁸⁰ Similarly, the Fourth Circuit, while recognizing the general right to recertify, requires the showing of excusable neglect and absence of prejudice.⁸¹

Other circuits, most notably the Second, Seventh, and Ninth, take a middle road in that they allow appellate jurisdiction over the recertified 1292(b) order if “jurisdiction over the appeal would serve judicial efficiency” and thus, “advance the purposes of section 1292(b).”⁸² This includes consideration of the time between the initial certification and the recertification, the reason for the delay, and any prejudice.⁸³ According to the Second Circuit, the focus of this inquiry “should be on ensuring that the goal of Section 1292(b)—resolution of a controlling legal question that could advance the ultimate termination of the litigation—will still be satisfied by allowing an interlocutory appeal.”⁸⁴ The Third Circuit has a similar but slightly different rule in that it permits recertification when the appellant’s failure to timely file was caused by a mistake of the court, rather than the party’s own negligence.⁸⁵

78. *Rodriguez v. Banco*, 917 F.2d 664, 669 (1st Cir. 1990); *In re La Providencia Dev. Corp.*, 515 F.2d 94, 95–96 (1st Cir. 1975) (same).

79. *Aparicio v. Swan Lake*, 643 F.2d 1109, 1113 (5th Cir. 1981).

80. *Woods v. Baltimore & Ohio R.R.*, 441 F.2d 407, 408 (7th Cir. 1971) (recertification six months after original certification did not give appellate court jurisdiction).

81. *Safety-Kleen, Inc v. Wyche*, 274 F.3d 846, 866–67 (4th Cir. 2001).

82. *In re Benny*, 812 F.2d 1133, 1137 (9th Cir.1987) (citing *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 247 (7th Cir. 1981)); *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990) (describing in *dicta* the Ninth and Seventh Circuits' approach as "controversial"); *Marisol v. Giuliani*, 104 F.3d 524, 528 (2d Cir. 1997) (noting that the issue was a “close” one but that the Sixth Circuit’s approach was “unnecessarily rigid” and adopting approach of the Seventh and Ninth circuits.).

83. *Marisol*, 104 F.3d at 528.

84. *Id.*

85. *Braden v. Univ. of Pittsburgh*, 552 F.2d 948, 955 (3d Cir. 1977) (en

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Circuit Court. Although Section 1292(b) refers to an “application,” the submission to the circuit court for permission to appeal is deemed a “petition.”⁸⁶ A notice of appeal cannot substitute for the petition or otherwise confer appellate jurisdiction.⁸⁷

The petition must comply with Rule 32(c)(2) of the Federal Rules of Appellate Procedure, which governs the form of “other papers.” Other rules that govern the petition are Rules 5(b) and 5(c) of the Federal Rules of Appellate Procedure. Pursuant to Rules 5(b) and 5(c), the petition cannot exceed twenty pages⁸⁸ and must contain the following:

- (a) the facts necessary to understand the question presented;
- (b) the specific question presented;
- (c) the relief sought;
- (d) the reasons why the appeal should be allowed and is authorized by statute or rule; and
- (e) the copies of the underling order and district court certification.

banc). Even among those courts that have found re-certification permissible, there is a measure of disagreement over the governing standard. *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 162 (1984) (Stevens, J. dissenting) (noting conflict among the circuits). *Compare Myles v. Laffitte*, 881 F.2d 125, 126 n.2 (4th Cir. 1989) (recertification requires district court to revisit such factors as delay caused by the untimely petition as well as prejudice, excusable neglect and the statutory criteria) *with In re City of Memphis*, 293 F.2d 345, 348–50 (5th Cir. 2002) (recertification appropriate where mis-timing was due to inadvertent acts by the district court and court reconsidered statutory criteria). *See also* WRIGHT ET AL., *supra* note 3, § 3929, at 467 (“[T]he power to renew the certification should be used carefully to prevent misuse of interlocutory appeals for the purpose of the effect of harassing an adversary or fostering delay”); *Marisol ex. rel. Forbes v. Giuliani*, 104 F.3d 524, 527–28 (2d Cir. 1996) (collecting cases).

86. *Compare* 28 U.S.C. § 1292(b) (“ . . . if application is made to [Court of Appeals] within ten days after the entry of the order . . .”) *with* FED. R. APP. P. 5 (“petition for permission to appeal”).

87. *See Aucoin v. Matador Servs., Inc.*, 749 F.2d 1180 (5th Cir. 1985) (holding that circuit lacked jurisdiction over Section 1292(b) appeal even though party had filed a notice of appeal within ten days of certification).

88. The twenty-page limitation is exclusive of the certificate of interested person or corporate disclosure statement, certificate of service and attached district court order. FED. R. APP. P. 5(c).

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Any response or cross appeal is due within 10 days after service of the petition.⁸⁹

There is also a filing fee associated with the petition, but it is not due until the circuit court grants permission to appeal.⁹⁰ The appeal will be formally docketed after the fees are paid to the district court clerk.⁹¹ A notice of appeal is not required and, once docketed, the appeal is handled and processed as an ordinary appeal.⁹²

If permission is granted, the review is not limited to the issues specifically certified by the district court. The appellate court can review “any question that is included within the order that contains the controlling question of law identified by the district court.”⁹³ “It is the order that is appealable, and not the controlling question identified by the district court.”⁹⁴ It cannot, however, otherwise go beyond the certified order⁹⁵ with some authority finding exception, so long as there is substantial intertwinement.⁹⁶

III. SUBSTANTIVE CERTIFICATION REQUIREMENTS

In addition to the procedural requirements, a petitioner must satisfy a stringent and difficult substantive basis for an interlocutory appeal under Section 1292(b). According to the First Circuit, “the instances where Section 1292(b) may appropriately be utilized will, realistically, be few and far between”⁹⁷ and is

89. FED. R. APP. P. 5(b)(2). Section 1292(b) specifically states that there is no automatic stay of the trial court proceedings. 28 U.S.C. § 1292(b) (an application for permissive appeal “shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.”). A stay must be specifically requested, allowed, and entered by the trial court.

90. FED. R. APP. P. 5(d).

91. FED. R. APP. P. 5(d)(3).

92. *Id.*

93. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204–05 (1996).

94. J. MOORE & B. WARD, *MOORE’S FEDERAL PRACTICE* 300, ¶110.25[1] (2d ed. 1996).

95. *Yamaha*, 516 U.S. at 205.

96. *WRIGHT ET AL.*, *supra* note 3, § 3929, at 456 n.66 (citing *Murray v. Metropolitan Life Ins. Co.*, 583 F.3d 173, 176–77 (2d Cir. 2009)).

97. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988) (quoting *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984)).

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“hen’s teeth rare.”⁹⁸ The admonition is often repeated that Section 1292(b) should be sparingly used “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.”⁹⁹ Indeed some courts have stated that it should not be used in “ordinary litigation” but only in protracted or long drawn out cases “such as anti-trust and conspiracy cases.”¹⁰⁰ Nevertheless, it remains that both the district courts and courts of appeals have separate discretion in allowing interlocutory appeals.

IV. DISTRICT COURT DISCRETION

Section 1292(b) “confers upon district courts first line discretion to allow interlocutory appeals.”¹⁰¹ This grant was stated to have been “deliberately suggested and deliberately adopted to secure an initial judgment on the desirability of appeal by the trial judge as the person most familiar with the litigation.”¹⁰²

Three criteria must be met in order for the district court to certify an interlocutory order under Section 1292(b). The order or

98. *Camacho v. Puerto Rico Port Auth.*, 369 F.3d 570, 573 (1st Cir. 2004).

99. *See Heddendorf v. Goldfine*, 263 F.2d 887, 888 (1st Cir. 1959) (quoting *Kroch v. Texas Co.*, 167 F. Supp. 947, 949 (D.C.S.D.N.Y. 1958)) (Section 1292(b) “should be used sparingly and only in exceptional cases”); *see also McGillicuddy*, 746 F.2d at 76 n.1; *In re San Juan Dupont Plaza*, 859 F.2d at 1010 n.1 (“[a]lthough the call is close, we believe the work product issue in this matter to be sufficiently novel and important, and the circumstances sufficiently out of the ordinary, as to fulfill the statutory requisites. But we warn the parties and the district court that, in this case and any others, we will hew carefully to the *McGillicuddy* line—for we continue to believe that the instances where Section 1292(b) may appropriately be utilized will, realistically, be few and far between”); *Pacamor Bearings, Inc. et al. v. Mineba Co. Ltd. et al.*, 918 F. Supp. 491, 514 (D.N.H. 1996) (explaining the same); *Faigin v. Kelley*, 923 F. Supp. 298, 299–300 (D.N.H. 1996) (explaining the same); *and Camacho*, 369 F.3d at 579 (explaining the same).

100. *Cummins v. EG & G Sealol, Inc.*, 697 F. Supp. 64 (D.R.I. 1988) (citing *Fisons Limited v. United States*, 458 F.2d 1241, 1245 n.7 (7th Cir. 1972)); *Milbert v. Bison Laboratories*, 260 F.2d 431, 433–35 (3d Cir. 1958) (citing House Report No. 1667, 85 Cong. 2d Sess., pp. 1, 2).

101. *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 47 (1995).

102. *WRIGHT ET AL.*, *supra* note 3, § 3929, at 439.

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ruling at issue must present: (1) a “controlling question of law,” (2) over which there is a “substantial ground for difference of opinion,” and (3) an immediate appeal will “materially advance the ultimate termination of the litigation” Moreover, the First Circuit has indicated that “[i]n applying these standards, the court must weigh the asserted need for the proposed interlocutory appeal with the policy in the ordinary case of discouraging ‘piecemeal appeals.’”¹⁰³ According to the Court:

Perhaps there is always some hardship caused by the application of the ‘final decision’ rule. Yet the rule is beneficial in most applications, because piecemeal appeals would result in even greater hardships and tremendous additional burdens on the courts and litigants which would follow from allowing appeals from interlocutory orders on issues that might later become moot. The ‘discretion’ of the appellate court should be exercised in the light of this fundamental consideration.¹⁰⁴

A. *Controlling Question of Law*

To be a “controlling” question of law, the legislative history suggests that the issue on appeal must be “serious to the conduct of the litigation either practically or legally.”¹⁰⁵ This factor is closely tied to the consideration of whether the grant of certification may materially advance the termination of a case.¹⁰⁶ The courts consider the saving of time and expense in determining the “practical” component.¹⁰⁷ The First Circuit has likewise

103. *Heddendorf*, 263 F.2d at 889; WRIGHT ET AL., *supra* note 3, § 3930, at 488 (“The three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal.”).

104. *Heddendorf*, 263 F.2d at 889.

105. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (citing *Hearing on H.R. 6238, before Subcomm. No. 3 of the H. Comm. On the Judiciary*, 85th Cong., 2d Sess. 2 (1958), reprinted in 3 U.S.C.C.A.N. 5256 (1958)).

106. *See Bank of New York v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I. 1985) (“[A] legal question cannot be controlling if litigation would be conducted in much the same manner regardless of the disposition of the question upon appeal.”).

107. *Id.* at 188–89; *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*,

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referenced the terms “pivotal” and “important” as meeting the “controlling” requirement and thus favoring certification and permission to appeal.¹⁰⁸ The notion of “importance” would seem to be viewed in terms of the litigation and the general substantive area, the Circuit, and/or the public or potential future litigants.¹⁰⁹ Similarly, the standard implicates the need for coherence, uniformity, and predictability of the applicable law.¹¹⁰

The “controlling question of law” element has two sub-parts: the presentment of a pure question of law and that the legal question be “controlling.” Courts have noted that a legal issue suitable for interlocutory review under Section 1292(b) must pose a “pure question of law” rather than “merely . . . an issue that might be free from a factual contest.”¹¹¹ A question is deemed one

855 F. Supp. 438, 440 (D. Me. 1994) (holding that the controlling issue of law element is met if interlocutory reversal might save time for the district court and time and expense for the litigants).

108. See *Marquis v. FDIC*, 965 F.2d 1148, 1151 (1st Cir. 1992) (noting the “importance of the jurisdictional question and its unsettled nature”); *Springfield School Committee v. Banksdale*, 348 F.2d 261, 262 (1st Cir. 1965) (noting importance of the jurisdictional question); *Lawson v. FMR LLC.*, 670 F.3d 61, 62 (1st Cir. 2010) (noting certified order “raised important questions of first impression”); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 821 (1st Cir. 1992) (holding that “in light of the pivotal importance and broad commercial consequences of the question, we accepted certification”); *Torres v. Secretary of Health & Human Services*, 677 F.2d 167, 168 (1st Cir. 1982) (granting the 1292(b) certification due to the “importance of the issue.”); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1010 (1st Cir. 1988) (holding that the work product issue was “sufficiently novel and important and the circumstances sufficiently out of the ordinary to justify review under 1292(b)”); *Lane v. First Nat. Bank of Bos.*, 871 F.2d 166, 167 (1st Cir. 1989) (holding that “because we agree that the issue was ‘sufficiently novel and important’ we allowed the intermediate appeal to proceed”); and *S.G. v. American Red Cross*, 938 F.2d 1494, 1495 (1st Cir. 1991) (noting the importance of jurisdiction issue).

109. See, e.g., *Donahue v. R.I. Dep’t. of Mental health*, 632 F. Supp. 1456, 1480–81 (D.R.I. 1986) (explaining that “when one considers the critical importance of the statute, interlocutory review would surely redound to the benefit of not only the parties but also citizenry”); *Greenwood*, 971 F. 2d at 821 (noting the “broad commercial consequences of the question”).

110. See *Miara v. First Allmerica Fin. Life Co.*, 379 F. Supp. 2d 68, 68 (D. Mass. 2005) (explaining “this court awaits, as do members of the bar practicing in this area, a definitive decision from the First Circuit to put to rest any confusion in this area once and for all”).

111. *United Airline Inc. v. Gregory*, 716 F. Supp. 2d 79, 91 (D. Mass. 2010) (quoting *Ahrenholtz v. Bd. of Tr. of Univ. of Illinois*, 219 F.3d 674, 676–77 (8th Cir. 2000)).

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of law where it is “something the court of appeals [can] decide quickly and cleanly, without reviewing the record.”¹¹² Accordingly, to any extent the issue requires reference or resort to disputed facts or the record, it will likely doom the request for interlocutory appeal.

Moreover, a distinction is needed between a case that presents a question as to the legal significance of the facts and a case that presents a factual dispute.¹¹³ For example, as set forth in one recent case, the question of law found to be proper for certification concerned the scope of Section 1292(b) itself, namely whether a Section 2255 proceeding was a “civil action” for purposes of Section 1292(b).¹¹⁴ Further, the demarcation between law and fact is not always easily determined. For instance, federal preemption has been noted to constitute “the archetypal example of an abstract legal issue” for purposes of Section 1292(b).¹¹⁵ However, preemption often turns on factual issues.¹¹⁶

It has been held that a legal question “usually does not include matters within the jurisdiction of the trial court” such as ruling on evidentiary matters.¹¹⁷ Matters of discretion with the

112. *Ahrenholtz*, 219 F.3d at 676–77.

113. See *In re Text Messaging Anti-Trust Litig.*, 630 F.3d 622, 624 (7th Cir. 2010) (explaining the certification and permission to appeal concerning uncertainty of *Twombly* pleading standard).

114. *United States v. Sampson*, Cr. No. 01–10384–MLW, 2012 WL 1633296, at *10 (D. Mass. May 10, 2012).

115. See *Ahrenholz*, 219 F.3d at 677; see also *Philip Morris, Inc., v. Harshbarger*, 957 F. Supp. 327, 330 (holding that “preemption is an issue naturally appropriate for interlocutory appeal”).

116. In *United Airlines v. Gregory* it was argued that the issue of federal preemption under the Airline Deregulation Act did not pose a pure question of law as it turned on whether or not the action or state law at issue refers to an airline price or has a significant effect upon those prices which required more facts and evidence. 716 F. Supp. 2d at 91. Judge Gorton rejected the argument stating that “it cannot be the case that every ADA ruling is inappropriate for interlocutory review simply because it involves the ‘significant effects’ test.” *Id.* See also *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 383 (5th Cir. 2004) (state regulation of leg room has significant effect on airline prices); *United Airlines v. Mesa*, No. 97 C 4455, 1999 WL 1144962, at *2 (N.D. Ill. Oct. 5, 1999) (certifying for interlocutory review order regarding whether regional airline’s were preempted by ADA as related to routes of air carrier).

117. *In re City of Memphis*, 293 F.2d 345, 351 (5th Cir. 2002); see also *Lovejoy v. Town of Foxborough*, No. Civ.A.00–11470–GAO, 2001 WL 1756750, at *1 (D. Mass. Aug. 2, 2001) (holding that “the determination to

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district court are also disfavored as to interlocutory review.¹¹⁸ This stems from the view that there is a minimal likelihood of reversal and that appellate courts are loath to meddle with a trial court's discretionary province. Nonetheless, courts have otherwise noted that "the key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeal."¹¹⁹

Certainly, a reversal of the district court's ruling that would either terminate the action or, at least, significantly alter or lessen the scope of the case would be sufficient.¹²⁰ Section 1292(b) would encompass issues whose resolution would "likely" have an effect on the outcome. For instance, the First Circuit in *Rodriguez v. Banco Central* deemed the accrual of a cause of action for statute of limitations purposes to constitute a "controlling question of law" even though other causes of action remained for trial.¹²¹ Thus, inherent to the controlling question of law criterion is timing in that an issue may be controlling at one point of the litigation but not another.¹²²

B. *Substantial Grounds For Difference of Opinion*

Substantial grounds for difference of opinion arise when an issue involves "one or more difficult and pivotal questions of law not settled by controlling authority."¹²³ When the difference of opinion is substantial, there is usually significant uncertainty and

require submission of the answer for in camera inspection does not involve 'a controlling question of law' as the statute provides, but rather a decision about what weight to accord to the legitimate interests on both sides in order to strike an appropriate balance under all circumstances").

118. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1096 (5th Cir. 1970).

119. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir. 1974)

120. *See Philip Morris, Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997) (citing *Klinghoffer v. S.N.C. Achille Lauaro*, 921 F.2d 21, 24 (2d Cir. 1990)) and *Arizona v. Ideal Basic Indus.*, 673 F. 2d 1020, 1026 (9th Cir. 1982) (stating that all that must be shown in order for a question to be controlling is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court); *Bank of New York v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I. 1995) (defining "controlling" to mean "serious to the conduct of the litigation, either practically or legally").

121. 917 F.2d 664, 664 (1st Cir. 1990).

122. *Discretionary Appeals*, *supra* note 11, at 619.

123. *Phillip Morris*, 957 F. Supp. at 330.

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conflict presented in the case law,¹²⁴ “marked room for varying opinion,”¹²⁵ confusion,¹²⁶ or a question of first impression.¹²⁷ Some courts have noted that the “touchstone” of the substantial ground prong is the likelihood of success on appeal.¹²⁸ This has been tempered by some courts to the extent that “the purpose of the appeal is not to review the correctness of an interim ruling, but rather to avoid harm to litigants or to avoid unnecessary or repeated protracted proceedings.”¹²⁹ On the other hand, it has also been observed that “the level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case” and that, as such, “in certain circumstances ‘certification may be justified at a relatively low threshold of doubt.’”¹³⁰

124. *Natale v. Pfizer, Inc.*, 379 F. Supp. 161, 182 (D. Mass. 2005) (explaining that “case law to date demonstrates marked litigant confusion and disagreement”); *Canty v. Old Rochester Reg’l Sch. Dist.*, 54 F. Supp. 2d 66, 77 (D. Mass. 1999) (explaining that “the stark division among the six circuits to consider Title IX preclusion of Section 1983 actions certainly demonstrates sufficient difference of opinion”); *Booten v. United States*, 233 F. Supp. 2d 227, 228 (D. Mass. 2002) (explaining that statute did “not speak clearly on the question [and] there is no binding precedent squarely on point”); *Rodriquez v. Banco*, 917 F.2d 664, 665 (1st Cir. 1990) (explaining that “[b]ecause the circuits are divided about the proper answer to this question, and because the district court has followed the minority view, we agreed to answer this question”).

125. *Stark v. Advanced Magnetics, Inc.*, 894 F. Supp. 555, 560 (D. Mass. 1995), *rev’d on other grounds*, 119 F.3d 1551 (Fed. Cir. 1997); *see Barreras Ruiz v. Am. Tobacco Co.*, 977 F. Supp. 545, 549 (D.P.R. 1997) (explaining that “far from dubious, we view the preliminary retention of jurisdiction over the Tobacco Institute as the only possible just action at this stage”).

126. *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 182, *aff’d*, 424 F.3d 43 (1st Cir. 2005) (explaining that “case law to date demonstrates marked litigant confusion and disagreement”).

127. *See Lawson v. FMR LLC.*, 670 F.3d 61, 62 (1st Cir. 2010) (stating that the case “raised [an] important question of first impression”); *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 6 (1st Cir. 1980) (same); *Indian Head Nat. Bank of Nashua v. Brunelle*, 689 F.2d 245, 246 (1st Cir. 1982) (stating that “this precise issue has never been determined by the First Circuit Court of Appeals”); *United States v. Approximately 2,475,840 lbs of Roasted Coffee Beans*, 608 F. Supp. 288, 292 (D.P.R. 1985) (explaining that the question is one of first impression).

128. *United States ex rel. LaValley v. First Nat. Bank of Bos.*, No. 86-236-WF, 1990 WL 112285, at *5 (D. Mass. 1990) (citing *Berger v. United States*, 170 F. Supp. 795, 796–97 (D.C.N.Y. 1959)).

129. *Lipsett v. Univ. of Puerto Rico*, 740 F. Supp. 921, 923 (D.P.R. 1990).

130. *United States v. Sampson, Cr. No. 01-10384-MLW*, 2012 WL

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Lack of circuit decisional law,¹³¹ together with “confusion” in other decisions in other cases or circuits, has been found to provide the necessary “substantial grounds for difference of opinion.”¹³² Notably, however, in one case, the First Circuit denied permission to appeal a certified order on the grounds that there was an absence of a substantial grounds for difference of opinion where there was no First Circuit decision on point. The First Circuit based its denial on two other district court decisions that had ruled similarly on the issue.¹³³ In another decision, certification was denied as there was no “blazing split” among the circuits as to the issue involving the scope of the attorney-client privilege, and as the sole supporting case was twenty-five years old, and it contained only “a paragraph of analysis.”¹³⁴ Moreover, certification has been rejected where the aim or intent is to seek reversal or modification of an existing First Circuit holding.¹³⁵

“The parties’ vociferous disagreement with [the district court’s decision on the merits] will not satisfy” the requirement for

1633296, at *12 (D. Mass. May 10, 2012). (quoting *WRIGHT ET AL.*, *supra* note 3, § 3930, at 494–95); see *Discretionary Appeals*, *supra* note 11, at 624 (“degree of legal doubt escapes precise quantification”).

131. *Philip Morris, Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997) (explaining that “[S]ection 807B is a new enactment, and the question of its preemption has not been resolved by any directly controlling legal authority nor is there any precedent involving a similar or analogous statute”). *Cabral v. Sullivan*, 757 F. Supp. 107, 111 (D. Mass. 1991) (noting issue was matter of first impression in circuit); *Compare Kenney v. State Street Corp.*, 694 F. Supp. 2d 67, 70 (D. Mass. 2011) (declining to certify order granting in part and denying in part leave to file amended complaint as issue of whether presumption of prudence applies in ERISA dispute had been generally addressed by First Circuit and as such certification would not materially advance the ultimate termination of the action).

132. *Cabral*, 757 F. Supp. at 112; see also *Miara v. First Allmerica Fin. Life Co.*, 379 F. Supp. 2d 68, 68 (D. Mass. 2005) (noting that while its determination on the underlying merits was based on legal precedent and other circuits and was “apparent,” the “rationale of this court was only persuasive authority” with a determination by the First Circuit able to put the matter to rest).

133. *Carabello-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005); see also *Kehoe v. Smolar*, No. 73-1506-MA, 1982 WL 1574 (D. Mass. Mar. 3, 1982). (explaining that “[t]his is not a case where other Circuits are badly split and the First Circuit Court of Appeals has yet to reach a decision that would provide some guidance.”).

134. *In re Lupron Mktg. and Sales Practices Litig.*, 313 F. Supp. 2d 8, 12 (D. Mass. 2004).

135. See *Kehoe*, 1982 WL 1574, at *2.

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substantial grounds for a difference of opinion.¹³⁶ Additionally, a number of courts have noted that “novelty” is not enough and that “the issue must relate to the actual legal principle itself, not the application of that principle to a particular set of facts.”¹³⁷ As such, Section 1292(b) certification does not necessarily arise when “a court is called upon to apply a particular legal principle to a novel fact pattern.”¹³⁸ Similarly, certification has been rejected where the argument for certification is reduced to the contention that the court misapplied settled law.¹³⁹

C. *Materially Advance the Termination of Litigation*

Whether the appeal may materially advance the ultimate termination of the litigation “is closely tied to the requirement

136. Diane B. Bratvold, *How to Get Heard: Practical Advice on Interlocutory Appeals*, FOR THE DEFENSE, Nov. 2010, at 35.

137. *United Airline Inc. v. Gregory*, 716 F. Supp. 2d 79, 92 (D. Mass. 2010) (“Although this Court’s ruling may be the first instance in which a court has applied the ADA preemption test to a tort claim by an airline against a customer, the defendants over-state the novelty of the holding”). *See also* *Flor v. BOT Fin. Corp.*, 79 F.3d 281, 284 (2d Cir. 1996) (noting “that the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.”); *Fed. Deposit Ins. Corp. v. First Nat’l Bank*, 604 F. Supp. 616, 620 (E.D. Wis. 1985) (stating that “the mere fact that there is a lack of authority on a disputed issue does not necessarily establish some substantial ground for a difference of opinion under the statute”); *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983) (stating that “the mere fact that the appeal would present a question of first impression is not, of itself, sufficient to show that the question is one on which there is a substantial ground for difference of opinion”; adding that “[t]he mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no substantial ground for difference of opinion” and that “[i]t is the duty of the district judge faced with a motion for certification to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a *substantial* ground for dispute”). *Compare with* *Donatelli v. Nat’l Hockey League*, 893 F.2d 459, 461 (1st Cir. 1990) (“impressed by the issue’s novelty and importance . . . we allowed an interlocutory appeal”); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988) (stating that the work product issue sufficiently novel and important and “out of the ordinary” to justify review); *Abtox Inc. v. Exitron Corp.*, 888 F. Supp. 6, 7 (D. Mass. 1995) (noting novelty of question as supporting certification).

138. *Gregory*, 716 F. Supp. 2d at 92.

139. *See* *Jackson Brook Inst., Inc., v. Dirs. & Officers of JBI (In re Jackson Brook Inst., Inc.)*, 280 B.R. 1, 8, (D. Me. 2002).

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that the order involve a controlling question of law.”¹⁴⁰ “[A] legal question cannot be termed ‘controlling’ if litigation would be conducted in much the same manner regardless of the disposition of the question upon appeal.”¹⁴¹ Notably, the statutory criteria is worded in terms of “may,” in that even if there is a measure of doubt whether appellate resolution will facilitate advance termination of the litigation, certification *may* still be appropriate.¹⁴² For example, threshold controlling legal issues such as subject matter jurisdiction, personal jurisdiction, capacity to be sued, and standing meet this requirement.¹⁴³

Advance termination of litigation has been noted by some courts as not being limited to outright dispositive judicial determination, but also includes where a decision may lead to possible settlements.¹⁴⁴ It has been generally accepted that where the appellate determination would result in either litigation or similar actions “benefit[ing] from prompt resolution of th[e] question,” certification is favored.¹⁴⁵ The “materially advance

140. Philip Morris, Inc. v. Harshbarger, 957 F. Supp. 327, 330 (D. Mass. 1997) (quoting WRIGHT ET AL., *supra* note 3, § 3930, at 505; U.S. *ex rel.* La Valley v. First Nat’l Bank of Bos., No. 86-236-WF, 1990 WL 112285, at *3 (D. Mass. July 30, 1990).

141. Bank of N.Y. v. Hoyt, 108 F.R.D. 184, 188 (D.R.I. 1985).

142. See, e.g., United States v. Sampson, Cr. No. 01-10384-MLW, 2012 WL 1633296, at *13 (D. Mass. May 10, 2012) (stating that “while inherently uncertain, the conclusion of this § 2255 proceeding before this court ‘may’ be facilitated by an interlocutory appeal.”); Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 688 (9th Cir. 2011) (holding that “neither 1292(b)’s literal text nor controlling precedent requires that the interlocutory appeal have a final, dispositive effect on the litigation, only that it ‘may materially advance’ the litigation.”); Kagan v. Dress (*In re* Clark-Franklin-Kingston Press, Inc.), No. 90-11231, 1993 WL 160580, at *3 (stating that “interlocutory appeals should be granted where resolution of the issue s on appeal might lead to settlement”).

143. See, e.g., Moodie v. Fed. Reserve Bank of N.Y., 58 F.3d 879, 881 (2d Cir. 1995) (explaining that subject matter jurisdiction was a threshold issue); Harris v. Evans, 20 F.3d 1118, 1120 (11th Cir. 1994) (explaining that standing was another threshold issue).

144. See *Clark-Kingston-Franklin*, 1993 WL 160580, at *3.

145. Natale v. Pfizer, Inc., 379 F. Supp. 2d 161, 182 (quoting Camacho v. P.R. Port Auth., 369 F.3d 570, 573 (1st Cir. 2004)); see also Lawson v. FMR LLC., 724 F. Supp. 2d 167, 169 (D. Mass. 2010) (stating that “the fundamental legal issue is likely to shape both discovery initiatives and settlement strategies in a fashion which should expedite resolution of the case overall.”).

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termination of the litigation” criteria can be met by showing that there is high possibility that any trial will be eliminated; that significant issues or questions impacting the case will be eliminated and will greatly narrow the remaining disputes; and where the review would otherwise significantly narrow the scope and cost of discovery.¹⁴⁶

The First Circuit has observed, however, that “[t]he fact that appreciable trial time may be saved is not determinative, for such would often be true.”¹⁴⁷ Courts have also noted the advanced stage of the litigation as well as proximity to trial to justify denials of certification.¹⁴⁸ Moreover, where any advance termination of the litigation is conjectural, it will be insufficient to justify the appeal. Such conjecture has been found where there is a likelihood of other issues arising regardless of the resolution of the order sought to be certified.¹⁴⁹ This, in turn, also includes

146. *U.S. ex rel. Lavalley v. First Nat’l Bank of Bos.*, No. 86-236-WF, 1990 WL 112285, at *5 (D. Mass. July 30, 1990) (rejecting certification request as issue would not “influence the scope or the presentation of evidence on the substantive merits at trial”); *see also Philip Morris Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997) (stating that “there is some possibility that a finding of less than total preemption would leave something of the case, but even in that event the scope of the case would be so significantly altered that it would still be appropriate to call the question controlling”); *Stark v. Advance Magnetics, Inc.*, 894 F. Supp. 555, 560 (D. Mass. 1995) (reasoning that “faced by an impending series of extraordinary complex and costly expert depositions; all parties urge this court to certify the accuracy of the its [ruling].”).

147. *Palandjian v. Pahlavi*, 782 F.2d 313, 314 (1st Cir. 1985); *see also Perdomo-Rosa v. Corning Cable Sys.*, No. Civ. 02-2114(DRD), 2006 WL 695818, at *2 (D.P.R. Mar. 15, 2006) (stating that “the fact that appreciable trial time may be saved is not determinative.”); *Johnson v. Watts Regulator Co.*, No. Civ. 92-508-D, 1994 WL 421112, at *2 (D.N.H. Aug. 11, 1994) (stating that “the fact that trial time may be saved does not provide sufficient reason for certification under 1292(b).”).

148. *Zane S. Blanchard & Co., Inc. v. PSPT, Ltd.*, No. Civ. 92-660-SD, 1995 WL 17211933, at *1 (D.N.H. Sept. 20, 1995); *LaValley*, 1990 WL 112285, at *4; *Bank of N.Y. v. Hoyt*, 108 F.R.D. 184, 189 (D.R.I. 1985) (stating that “where cases are close to trial, courts are understandably reticent to grant interlocutory certification.”).

149. *See, e.g., Johnson*, 1994 WL 421112, at *2; *Cummins v. EG&G Sealol, Inc.*, 697 F. Supp. 64, 72 (E.D. Pa. 1979) (quoting *Wolgin v. Magic Marker Corp.*, 472 F. Supp. 436, 438-39 (E.D. Pa. 1979)) (“[C]onjecture cannot support a conclusion that the desired interlocutory appeal might materially advance the termination of this litigation.”); *see also Hoyt*, 108 F.R.D. at 189 (quoting *Magic Marker Corp.*, 472 F. Supp. at 439) (“[T]he moving party

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concerns that the issue sought to be certified could well become moot.¹⁵⁰

The court is unlikely to find that termination of litigation would be materially advanced where the same facts as to the claim or issue subject to interlocutory appeal underlie separate claims that have otherwise proceeded or will need to proceed in the underlying litigation.¹⁵¹ This can arise as to an order denying a motion to dismiss in that an interlocutory appeal would be appropriate “only where inclusion of that claim significantly increases the complexity and duration of trial or pretrial proceedings [and] [s]uch an increase is most likely where the claim in question has no issues in common with the other claims.”¹⁵² If an appellate ruling on an issue would only dispose of some but not all of the defendants or if little remains to do to reach a final judgment, then most courts would consider an appeal of a final judgment a better course than an immediate appeal of an order.¹⁵³ Where the issue sought to be appealed is deemed

should come forward with something more than mere conjecture in support of his claim that certification may save the court and the parties substantial time and expense”); *see also* *Barreras Ruiz v. American Tobacco Co.*, 977 F. Supp. 545, 549 (D.P.R. 1997) (stating that “given the indisputably indistinguishable nature of the evidence for jurisdiction and that for the ultimate case, we see no possibility that the Court of Appeals would better resolve this issue than well-deserved further discovery and reassessment would. Because this matter cannot be resolved with any greater nitidity, appellate review would actually delay the ultimate termination of the litigation.”).

150. *See Cummins*, 697 F. Supp. at 69 (noting the “number of ways” the retaliation issue, seeking to be certified, could become moot).

151. *See, e.g.*, *Carabello-Seda v. Mun. of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005); *Beltran v. O’Mara*, No. Civ. 04-CV-071-JD, 2006 WL 1240558, at *4 (D.N.H. Jan. 31, 2006). In *Standard Quimica De Venezuela v. Central Hispanic, Intern Inc.*, the court remarked that the closer the issue is to the merits the more it suggested that an interlocutory appeal should not be granted. 189 F.R.D. 202, 208 (D.P.R. 1999); *see also Barreras Ruiz*, 977 F. Supp. at 545 (“Given the indisputably indistinguishable nature of the evidence for jurisdiction and that for the ultimate case, we see no possibility that the Court of Appeals would better resolve this issue than well deserved further discovery and reassessment would.”).

152. *Cummins*, 697 F. Supp. at 72 (quoting *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 621–22 (1975)).

153. *See, e.g.*, *Pacamor Bearings Inc. v. Minebea Co., Ltd.*, 892 F. Supp. 347, 362 (D.N.H. 1995) (finding the issue of standing not dispositive as such would not affect additional plaintiff); *Ashmore v. Ne. Petroleum Div. of*

“straightforward” and the litigation not one subjected to being prolonged¹⁵⁴ or where the only issue remaining is damages, the element is not met.¹⁵⁵

The First Circuit has not directly addressed the propriety of certifying state law issues but at least one district court case within the district has held that such certification was inappropriate.¹⁵⁶ Indeed, the court expressed concern that “Section 1292(b) must not be used to transmogrify a legitimate cause of action into a legal pinball bouncing from court to court in the federal and state judicial systems.”¹⁵⁷ There, the *Cummins* court granted a motion to amend a complaint in an age discrimination suit to allow former employer to assert a state tort law claim of retaliatory discharge.¹⁵⁸ Finding little case law on the propriety of certifying a purely state law issue under 1292(b), it held such certification inappropriate as: (a) it was likely it would certify the issue to state court following a full trial if necessary; (b) delaying certification to state court after trial would afford state supreme court benefit of evaluating issue upon full record; and (c) that if certified the First Circuit would likely feel compelled to certify the issue to state court causing further

Cargill, Inc., 855 F. Supp. 438, 440 (D. Me. 1994) (noting that even if standing ruling was in error “no factual issue or litigant would be removed from the case”); *LaValley*, 1990 WL 112285, at *4 (showing that “denial of certification is further supported by the advanced stage of the litigation”); *Thompson Trading Ltd. v. Allied Lyons PLC.*, 124 F.R.D. 534, 538 (D.R.I. 1989) (stating that the ruling on the motion to dismiss only concerns two of the five defendants); *Cummins*, 697 F. Supp. at 69 (quoting *Hoyt*, 108 F.R.D. at 189) (“[W]here cases are close to trial, courts are understandably reticent to grant interlocutory certification.”).

154. See, e.g., *Blue Cross & Blue Shield of R.I. v. Koshen*, 746 F. Supp. 2d 375, 389 (D.R.I. 2010) (citing *Thompson*, 124 F.R.D. at 538) (noting that the case was not the “rare case of ‘prolonged litigation in which a piecemeal appeal is justified’” and that issues in the case are straightforward”); *Lipsett v. Univ. of P.R.*, 740 F. Supp. 921, 923 (D.P.R. 1990) (citing *Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 648 F. Supp. 988, 991 (S.D.N.Y. 1986)).

155. See, e.g., *Matamoros v. Starbucks Corp.*, 789 F. Supp. 2d 251, 252 (D. Mass. 2011).

156. See *Cummins*, 697 F. Supp. at 70.

157. *Id.* at 71. Cf. *Stevens Linen Assocs., Inc. v. Crawford*, Civ. A. No. 93-40159-GN, 1993 WL 483146, at *1 (D. Mass. Nov. 12, 1993) (applying the standards under 1292(b) to determine whether to certify state issue to state supreme court).

158. *Id.* at 65.

delay.¹⁵⁹

The penultimate consideration for both the controlling question of law and materially advance termination of litigation elements is the elimination or minimization of the burdens of litigation on the parties and judicial system. “The difficulty and general importance of the question presented, the probability of reversal, the significance of the gains from reversal, and the hardship on the parties in their particular circumstances, [should] all be considered.”¹⁶⁰

D. *Discretionary Residue*

It remains unclear whether the district court has the discretion to deny a certification request even when all three of the statutory criteria have been met. While the plain statutory language provides for no such additional discretion,¹⁶¹ Judge Weinstein of the Eastern District of New York has held to the

159. *Id.* at 70.

160. WRIGHT ET. AL., *supra* note 3, § 3930, at 514. In *Lipsett v. Univ. of P.R.*, the court stated that “advantages and disadvantages of immediate appeal in light of the guidelines provided in the statute” should be considered. 740 F. Supp. 921, 923 (D.P.R. 1990). It also stated that:

The disadvantages of immediate appeal increase with probabilities that a long appellate consideration will be required, the order will be affirmed, the continued district court proceedings without appeal might moot the issue, reversal would not substantially alter the course of the district court proceedings, and the parties will not be relieved of any significant burden by reversal.

Id. The court in *Miller v. New America High Income Fund* certified an order denying a motion to dismiss involving a claim of security law violations, stating in part:

Given New America’s questionable pedigree, the vigor with which legal battles such as these are usually fought, the amount of money at stake, and the time and expense likely to be involved—combined with the likelihood of eventual appeal and the present need to fix the Plaintiff Class with some certainty— I further find, pursuant to [1292(b)], that immediate appeal from this order would materially advance the ultimate termination of this litigation.

755 F. Supp. 1099, 1110 (D. Mass. 1991).

161. See Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 780 (2006) (“[T]he text of [§ 1292(b)] simply does not give the district court unlimited discretion [to deny certification when the statutory factors are present].”).

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contrary.¹⁶² Under his view in *National Asbestos*, Section 1292(b) was based on a trial judge's peculiar knowledge of the case and any beneficial effect any interlocutory appeal would have as to the litigation, thus conferring the power to consider factors beyond the statutory criteria.¹⁶³

The certification requirement was adopted to grant to the district court authority to consider the multitude of factors peculiar to any given case [and that] in order to effectively make these ad hoc calculations, the district court must necessarily have the power to consider factors beyond the minimum criteria established in [S]ection 1292(b).¹⁶⁴

Under this view, a district court judge is free to weigh such factors as: (1) the amount of time an appeal would take; (2) the need and effect of a stay on the litigation including discovery; the probability of reversal on appeal; (3) the effect of reversal on the remaining claims; (4) the benefit of further factual development and a complete record on appeal, particularly in rapidly developing or unsettled areas of the law; and (5) the probability that other issues may moot the need for the interlocutory appeal.¹⁶⁵ The First Circuit has not directly addressed the issue; to date, only one district court within the First Circuit specifically cited to Judge Weinstein's decision and the proposition that the district court's discretion is not confined to the statutory criteria.¹⁶⁶

162. See *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 146 (E.D.N.Y. 1999) (per curiam) ("district courts...have independent and 'unreviewable' authority to deny certification even where the three statutory criteria are met."); see also *Chevron v. Donziger*, NO. 11 Civ. 0691 (LAK), 2013 WL 98013 (S.D.N.Y. Jan. 7, 2013)(citing *Nat'l Asbestos*, 71 F. Supp. 2d at 161-66 and stating that not every order that satisfies the standard of § 1292(b) should be satisfied and there may be other non-statutory criteria).

163. *Nat'l Asbestos*, 71 F. Supp. 2d at 163.

164. *Id.*

165. *Id.*; see also *United States v. Sampson*, No. 01-10384, 2012 WL 1633296, at *9 (D. Mass. May 10, 2010) (Mem.) (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995) ("Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals.")).

166. See *Sampson*, 2012 WL 1633296, at *9. The court in *Sampson* is the only district court outside of New York to cite and rely upon *National Asbestos*.

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Additionally, terminology that continues to permeate the First Circuit, as well as other circuits' law, is the use of the phrases "extraordinary" or "exceptional" in describing circumstances where Section 1292(b) should be used.¹⁶⁷ In *In re Heddendorf*¹⁶⁸ and later in *McGillicuddy*¹⁶⁹ and *Camacho*,¹⁷⁰ the First Circuit emphasized the point that the Court would "hew carefully to the *McGillicuddy* line—for we continue to believe that the instances where [S]ection 1292(b) may appropriately be utilized will, realistically, be few and far between."¹⁷¹ The notion of "extraordinary" or "exceptional" stems from an early Third Circuit decision and can seemingly take on a life of its own as a separate, independent standard for both certification and

167. See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1010, n.1 (1st Cir. 1988); *Palandjian v. Pahlavi*, 782 F.2d 313, 314 (1st Cir. 1986); *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984); *Oskoian v. Canuel*, 264 F.2d 591, 594 (1st Cir. 1959); *Heddendorf v. Goldfine (In re Heddendorf)*, 263 F.2d 887, 888 (1st Cir. 1959); *Widi v. U.S. Dep't of Justice*, No. 1:11-cv-02011-JAW, 2011 WL 5877543, at *5 (D. Me. Nov. 23, 2011); *Matamoros v. Starbucks Corp.*, 789 F. Supp. 2d 251, 252 (D. Mass. 2011); *Southwire Co. v. Ramallo Bros. Printing, Inc.*, Civil No. 03-1100 (GAG/CVR), 2010 WL 446593, at *3 (D.P.R. Feb. 1, 2010); *Faigin v. Kelly*, 923 F. Supp. 298, 299 (D.N.H. 1996); *Zane S. Blanchard & Co., Inc. v. PSPT, Ltd.*, No. Civ. 92-660-SD, 1995 WL 17211933, at *1 (D.N.H. Sept. 20, 1995); *Veale v. Marlborough*, No. CIV. 92-355-SD, 1995 WL 136902, at *1 (D.N.H. Mar. 22, 1995); *Johnson v. Watts Regulator Co.*, No. CIV. 92-508-JD, 1994 WL 421112, at *1 (D.N.H. Aug. 11, 1994); *McCarthy v. Azure*, No. CIV. 92-523-SD, 1994 WL 258316, at *1 (D.N.H. Jan. 24, 1994); *Thompson Trading Ltd. v. Allied Lyons PLC.*, 124 F.R.D. 534, 537 (D.R.I. 1989); *Cummins v. EG & G Sealol, Inc.*, 697 F. Supp. 64, 68 (D.R.I. 1988); *United States v. Arkwright, Inc.*, 697 F. Supp. 1231, 1233 (D.N.H. 1988); *Donahue v. R.I. Dep't of Mental Health, Retardation and Hosps.*, 632 F. Supp. 1456, 1481 n.14 (D.R.I. 1986); *Bank of N.Y. v. Hoyt*, 108 F.R.D. 184, 187–88 (D.R.I. 1985). *Accord* *Estates of Ungar v. Palestinian Auth.*, 228 F. Supp. 2d 40, 49–50 (D.R.I. 2002) (noting that *Heddendorf's* admonition that 1292(b) should be used sparingly and only in exceptional cases is "widely shared across the circuits").

168. *Heddendorf*, 263 F.2d at 888 (quoting *Milbert v. Bison Lab, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958)) (stating that 1292(b) should be used "sparingly" and only in "exceptional cases").

169. *McGillicuddy*, 746 F.2d at 76 n.1 (admonishing that interlocutory certification "should be used sparingly and only in exceptional circumstances").

170. *Camacho v. P.R. Port Auth.*, 369 F.3d 570, 573 (1st Cir. 2004) ("Section 1292(b) is meant to be used sparingly and appeal under it are accordingly hen's-teeth rare").

171. *San Juan*, 859 F.2d at 1010 n.1.

permission to appeal.¹⁷² Indeed, as formulated by the First Circuit in *McGillicuddy*, “exceptional circumstances” must be shown in addition to meeting the statutory criteria.¹⁷³ Other courts have declared the concept of “extraordinary” or “exceptional” as unhelpful and a “shibboleth.”¹⁷⁴

V. COURT OF APPEALS DISCRETION

Once the district court has certified an order under Section 1292(b), the court of appeals provides its own review. Pursuant to the statutory terms, the court of appeals may “permit” the appeal

172. See *Milbert*, 260 F.2d at 433 (3d Cir. 1958); see also *United States v. Sampson*, No. 01-10384-MLW, 2012 WL 1633296, at *11 (D. Mass. May 10, 2012) (explaining that a party bears ‘heavy burden’ of showing “exceptional circumstances”); *Widi*, 2011 WL 587754, at *5 (quoting *San Juan*, 859 F.2d at 1010 n.1.) (stating that “only rare cases” will qualify for certification and “only in exceptional circumstances”); *Matamoros*, 789 F. Supp. 2d at 252 (noting that “dire circumstances” must exist for interlocutory review); *Colon v. Blades*, No. 07-1380, 2009 WL 3347627, at *5 (D.P.R. Oct. 14, 2009) (citing *Palandjian* and *In re Heddendorf* and stating interlocutory appeal only proper in “exceptional circumstances” and where statutory criteria met); *Standard Quimica De Venez. v. Central Hispano Int’l, Inc.*, 189 F.R.D. 202, 208 (D.P.R. 1999) (quoting *In re San Juan*, 859 F.2d at 1010 n.1.) (“Pursuant to the statute, interlocutory review is appropriate only in ‘rare cases’ involving ‘exceptional circumstances’ and ‘novel and important’ issues.”); *MacFarlane v. McKean*, No. 92-614-SD, 1994 WL 255311, at *1 (D.N.H. June 8, 1994) (denying certification stating that ruling at issue “fails to present either exceptional circumstances or any difficult and pivotal questions of law not settled by controlling authority”); *Smith v. Morbark Indus., Inc.*, 733 F. Supp. 484, 490 (D.N.H. 1990) (denying request to certify stating in part that “[c]onsiderably more by way of exceptional circumstances is required”).

173. *McGillicuddy*, 746 F.2d at 76 n.1 (Section 1292(b) “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.”) (emphasis added); see also *Estate of Stone v. Frontier Airlines, Inc.*, 256 F. Supp. 2d 28, 47 (D. Mass. 2002) (quoting *McGillicuddy*, 746 F.2d at 76 n.1).

174. See, e.g., *Hadjpateras v. Pacifica S. A.*, 290 F. 2d 697, 703 n.13 (5th Cir. 1961). There is also reference, at times, to Section 1292(b) being available only in complex or drawn-out litigation such as “anti-trust” or “conspiracy” cases. See *Cummins*, 697 F. Supp. 64, 68–69 (D.R.I. 1988) (quoting *Fisons Ltd. v. United States*, 458 F.2d 1241, 1245 n.7 (7th Cir. 1972), cert. denied, 405 U.S. 1041 (1972); *Milbert*, 260 F.2d at 433). There are also cases noting need for the litigation to be “prolonged.” *Blue Cross & Blue Shield of R.I. v. Koshen*, 746 F. Supp. 2d 375, 389 (D.R.I. 2010); *Lipsett v. Univ. of P.R.*, 740 F. Supp. 921, 923 (D.P.R. 1990) (citing *Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 648 F. Supp. 988, 991 (S.D.N.Y. 1986)).

“in its discretion.”¹⁷⁵ Other than this cursory reference to permissive discretion, the section provides no other guidance or criteria. The statute is unclear as to whether the listed criteria that apply to district court discretion are applicable to appellate discretion, or whether, if it is applicable, such discretion is or is not limited to such criteria. Further exacerbating the matter is the fact that the decisions by the court of appeals permitting or denying any Section 1292(b) appeal are generally not reported or contain little analysis. The appellate courts usually issue a simple order and subsequently note in the appellate decision on the merits if permission is granted.¹⁷⁶

Both the legislative history and the United States Supreme Court have compared the appellate courts’ discretion in permitting or denying Section 1292(b) appeals with the Supreme Court’s discretion as to writs of certiorari, and both have stated that the request can be denied “for any reason, including docket congestion.”¹⁷⁷ According to one authority, “[t]he discretion of the court of appeals is so broad that it is difficult to imagine any controlling limit—the prospect that the Supreme Court might reverse a refusal to permit appeal is vanishingly small.”¹⁷⁸

Specifically, the First Circuit has expressly noted that its discretion is separate from the district court’s discretion.¹⁷⁹ In its first reported decision regarding Section 1292(b), the First Circuit recognized that the statute did not lay out any standards or

175. 28 U.S.C. § 1292(b) (2012).

176. See, e.g., *Rodriquez v. Banco Cent.*, 917 F.2d 664, 665 (1st Cir. 1990) (“Because the circuits are divided about the proper answer to this question and because the district court has followed the minority view, we agreed to answer this question” in a 1292(b) appeal.); *Sandler v. Eastern Airlines, Inc.*, 649 F.2d 19, 20 (1st Cir. 1981) (dismissed appeal on grounds it had become unclear what question would control disposition of action).

177. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978); *Digital Equipment Corp. v. Desktop Direct, Inc.*, 98 S. Ct. 2454, 2461 (1978); S. REP. NO. 2434, at 3–4 (1958), reprinted in 1958 U.S.C.C.A.N. 5355, 5257.

178. WRIGHT ET AL., *supra* note 3, § 3929, at 446; see also *Spiegel v. Trs. of Tufts College*, 843 F.2d 38, 46 n.7 (1st Cir. 1988) (quoting *Morrison-Knudsen Co., Inc. v. J. D. Archer*, 655 F.2d 962, 966 (9th Cir. 1981)) (“[T]he mechanism permits the Court of Appeals to protect its docket by determining for itself whether to accept the issue for review.”).

179. See *Stark v. Advanced Magnetics, Inc.*, 79 F.3d 1165 (Fed. Cir. 1996) (unpublished table decision) (“This court must make its own determination whether it will accept an interlocutory appeal pursuant to 1292(b).”).

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criteria to guide the court of appeals in its exercise of discretion following certification by the district court.¹⁸⁰ The court stated, however, that the “appellate court *should at least concur* with the district court in the opinion that the proposed appeal presents a difficult central question of law which is not settled by controlling authority, and that a prompt decision by the appellate court at this advanced stage would serve the cause of justice by accelerating ‘the ultimate termination of the litigation.’”¹⁸¹ It then went on to identify a penultimate consideration: the need to weigh the asserted need for the appeal against the policy of discouraging piecemeal appeals.¹⁸² One commentator agrees with the appellate courts and has stated that a purpose behind Section 1292(b) was to reduce the screening burden at the appellate level.¹⁸³ As such, they contend that “[s]o long as the trial court has considered all relevant and no improper factors in making its determination, the court of appeals should not reconsider whether certification was appropriate.”¹⁸⁴

The discretion of the court of appeals would encompass the right to change its mind and dismiss the appeal at anytime.¹⁸⁵

180. See *Heddendorf v. Goldfine (In re Heddendorf)*, 263 F.2d 887, 889 (1st Cir. 1959) (Magruder, C.J.). It has been noted that Judge Magruder, who wrote the majority opinion in *Heddendorf*, dissented from the Judicial Conference recommendation of the legislation.

181. *Id.* (emphasis added).

182. *Id.* According to the court in *Heddendorf*:

[T]he court must weigh the asserted need for the proposed interlocutory appeal with the policy in the ordinary case of discouraging ‘piecemeal appeals.’ Perhaps there is always some hardship caused by application of the ‘final decision’ rule. Yet the rule is beneficial in most applications, because piecemeal appeals would result in even greater hardships and tremendous additional burdens on the courts and litigants which would follow from allowing appeals from interlocutory orders on issues that might later become moot. The ‘discretion’ of the appellate court should be exercised in the light of this fundamental consideration.

Id.

183. *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 617 (1975) [hereinafter *Interlocutory Appeals*].

184. *Id.*

185. See, e.g., *Caraballo-Seda v. Mun. of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005); *Crow Tribe of Indians v. Mont.*, 969 F.2d 848, 848–49 (9th Cir. 1992) (dismissing appeal after permission granted because sole issue raised on appeal had been addressed by court in prior decision); *Bush v. Eagle-Picher Indus., Inc. (In re All Asbestos Cases)*, 849 F.2d 452, 453–54 (9th Cir.

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The rationale for allowing this discretion is that “[n]either the district court nor the court of appeals can foresee, at the time the appeal is certified and accepted, the course of reasoning that the court of appeals will follow at the time of decision. Alternatively, if only the certified question could be decided, the court of appeals would have to choose between deciding a question that may be—or clearly is—irrelevant to the ultimate decision, or refusing to decide anything at all.”¹⁸⁶

The First Circuit has used this discretionary power on a number of occasions and retracted its previous permission to appeal.¹⁸⁷ For instance, the First Circuit, after considering the briefs and oral argument on the merits, opted to dismiss the appeal on the ground that it had become unclear what question would control the outcome of the litigation.¹⁸⁸ More recently, the First Circuit more directly stated that its prior permission was in error given that: (a) courts generally do not permit interlocutory appeal from denial of motions to dismiss; (b) two other district court decisions in the same district answered the question; and (c) other claims arising from the same facts remained pending thus resulting in the lack of a substantial grounds for difference of opinion or that the appeal would materially advance the termination of the litigation.¹⁸⁹

It remains that the First Circuit, both in its initial decision under Section 1292(b) and in more recent times, continues to stress that it will exercise its discretion “judiciously.”¹⁹⁰ In its view, “interlocutory appeals [remain] disruptive, time-consuming

1988) (dismissing appeal after permission granted because intervening Supreme Court decision clarified that appellate jurisdiction rested in the Federal Circuit).

186. WRIGHT ET AL., *supra* note 3, at § 3929, at 461.

187. See, e.g., *Sandler v. Eastern Airlines, Inc.*, 649 F.2d 19, 20 (1st Cir. 1981); *United States v. Salter*, 421 F.2d 1393, 1394 (1st Cir. 1970). *Accord* *Slade v. Shearson, Hammil & Co., Inc.*, 517 F.2d 398, 399–00 (2d Cir. 1974).

188. See *Sandler*, 649 F.2d at 20; *Salter*, 421 F.2d. at 1394 (vacating order allowing interlocutory appeal after reconsideration, concluding that the pre-trial discovery order did not “involve an ultimate question of law *in the case*”).

189. See *Carabello-Seda v. Mun. of Homigueros*, 395 F.3d 7, 9 (1st Cir. 2005).

190. See, e.g., *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984). *Accord* *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000).

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and expensive.”¹⁹¹

VI. STATISTICAL REVIEW

The Administrative Office of the United States Courts tracks and publishes extensive statistics on the filings, disposition and caseloads of all federal courts.¹⁹² Despite the array of reports and statistics made available, they do not separately identify or publish district court certifications under 1292(b), nor do they report appellate court orders granting or denying permission to appeal.¹⁹³ Out of all the circuits, including the First Circuit, it appears only the Fifth Circuit and Federal Circuit actually publish statistics pertaining to section 1292(b) petitions.¹⁹⁴

Through the use of the Westlaw database, this article has compiled a review of all First Circuit and district court cases in New Hampshire, Maine, Massachusetts, Puerto Rico and Rhode Island in which Section 1292(b) was mentioned or referenced. The following survey of cases since 1958 is, however, likely incomplete insofar as many district court decisions on 1292(b) certifications, particularly denials, are not reported or will otherwise not make their way into the Westlaw database. Similarly, most court of appeals decisions as to whether to permit the 1292(b) appeal once certified by the district court are also not reported. While grants of 1292(b) appeals can be sometimes found in a note or brief reference in many of the ultimate appellate decisions on the merits, there are relatively few published decisions where there is reference or discussion of denials of 1292(b) appeals. Accordingly, the statistical review set forth below will be skewed toward grants of certifications and allowances of appeal. Nonetheless, the review from the resulting sampling may be potentially informative. A summary of the findings follows.

191. *Waste Mgmt.*, 208 F.2d at 294 (“Thus, we have elevated the threshold for discretionary review. . .”).

192. *See generally, Statistics*, UNITED STATES COURTS, <http://uscourts.gov/Statistics> (Jan. 6, 2014).

193. *See Interlocutory Appeals*, *supra* note 182, at 607 n.5.

194. *See generally* U.S.C.A. 5TH CIR., CLERK ANNUAL REPORT: MONTHLY REPORT OF ADMINISTRATIVE-MOTIONS SUBMITTED TO JUDGES 31 (2012); *see also* Hess et al., *supra* note 1, at 759 (reviewing fifteen years of discretionary interlocutory appeals in the Federal Circuit between 1995 and 2010).

1959–1970

- Sixteen cases involving 1292(b) interlocutory appeal issues;
- Three cases district court denied certification request;
- Thirteen cases district court granted certification request;
- Four cases court of appeals denied permission to appeal;
- Nine cases court of appeals granted permission to appeal.

Out of the sixteen cases involving 1292(b) interlocutory appeal issues, there were eight unreported decisions. Six of the district court decisions simply recited the statutory criteria with no disclosed application, while two decisions disclosed a measure of application of the criteria to the particular issue and circumstances. Of the thirteen certifications that were granted by the district court, the court of appeals granted permission to appeal in nine cases and denied permission in four cases.

Of the three district court denials of certification, one found no likelihood of litigation termination even if the issue was certified; one found no controlling issue of law; and the other did not have an available decision. In the four cases where certification was granted by the district court, but permission to appeal was denied by the First Circuit, two of the rulings had no published opinions. The other two involved a published opinion reconsidering its earlier grant of permission. These two cases held that the pretrial disclosure issue did not present a “controlling issue of law” and a determination, upon a full published decision, that the fee order at issue if reviewed would not advance termination of the litigation.

There were two court of appeals decisions as to 1292(b) permission that were reported and nine that were unreported. As to the two that were reported, one reconsidered its prior ruling permitting the appeal while the other set out its decision to deny a

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request to permit appeal as to a discovery order involving an internal revenue subpoena.¹⁹⁵ Of the nine reported cases where both certification and permission to appeal were granted, five were reversed and four affirmed as to the underlying merits.

The very first decision of the First Circuit under Section 1292(b) remains a notable one.¹⁹⁶ There, Judge Magruder denied permission to appeal, stating that the fundamental consideration under the statute was “weigh[ing] the asserted need for the proposed interlocutory appeal with the policy . . . discouraging ‘piecemeal appeals.’”¹⁹⁷ The court noted the “scant” reference by the district court to the statute and the failure to specifically identify and apply the statutory criteria.¹⁹⁸ Nonetheless, it refused to deny permission to appeal based on the cursory certification stating that it “might perhaps be treated as a ‘shorthand form’ of the required findings.”¹⁹⁹ It proceeded to deny permission on the basis that the order for fees at issue was not clearly an “interlocutory order” but a final collateral order appealable as a final judgment. The court explained that even if a proper order under Section 1292(b), permission would not be justified as the resolution of the fee issue would not lead to advance termination of the underlying litigation given its removal on the merits.²⁰⁰ Judge Magruder stated that the starting point for the circuit court’s discretion is the statutory criteria. Otherwise, she reaffirmed the compelling interests behind the final judgment rule and explained that “[t]he discretion of the appellate court [under Section 1292(b)] should be exercised in the light of this fundamental consideration.”

In a second case decided that same year (1959), the First Circuit granted permission to appeal in an action involving a question of “capacity” to be sued and the interpretation and interaction of then Rules 17(b) and 23(a) of the Federal Rules of Civil Procedure.²⁰¹ It found that there was only one other decision

195. See *Fornaris v. Ridge Tool Co.*, 423 F.2d 563, 564 (1st Cir. 1970).

196. See generally *Heddendorf v. Goldfine (In re Heddendorf)*, 263 F.2d 887 (1st Cir. 1959) (Magruder, C.J.).

197. *Id.* at 889.

198. *Id.*

199. *Id.* at 888–90.

200. *Id.* at 889–91.

201. *Oskoian v. Canuel*, 264 F.2d 591, 593–94 (1st Cir. 1959).

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addressing the issue and the decision was contrary to the conclusion reached by the district court. It also found that a ruling by the First Circuit that the district court had erred in failing to dismiss the complaint would “forestall what might well be a long and expensive trial.”²⁰²

The types of cases and orders varied. Three of the sixteen were anti-trust related with the remainder running the gamut including a shareholder dispute, securities litigation, an action under the Jones Act, and a discrimination action. The types of orders varied greatly as well with only two of the sixteen cases similar (statute of limitations). A listing of the orders and actions taken between 1959 and 1970 are as follows:

TYPES OF ACTIONS AND ORDERS: 1959–1970

-The following key accompanies the table below with regard to the disposition of the corresponding cases in the table-

CD	<i>Cert. Denied</i>
CG	<i>Cert. Granted</i>
AP	<i>Appeal Permitted</i>
AD	<i>Appeal Denied</i>
MA	<i>Merits Affirmed</i>
MR	<i>Merits Reversed</i>

Order	CD	CG	AP	AD	MA	MR
Striking affirmative defenses under Jones Act, pertaining to the issue of whether plaintiff could bring action for negligence and unseaworthiness under maritime law where plaintiff had obtained award or remedy under Puerto Rico’s Workers’ Compensation Act. ²⁰³		x		x		

202. *Id.* at 594.

203. *Flores v. Prann*, 178 F. Supp. 845, 845 (D.P.R. 1959), *aff’d*, 282 F.2d 153 (1st Cir. 1960) (noting district court’s earlier grant of certification under 1292(b) as well as subsequent denial by First Circuit).

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Injunctive relief as to anti-trust issue. ²⁰⁴		× ²⁰⁵	×		×	
Award of certain fees in minority shareholder suit. ²⁰⁶		×		×		
Denial of motion to dismiss relating to capacity to be sued in action by members of one union against members of another union. ²⁰⁷		×	×		×	
Statute of Limitations and whether the Federal Trade Commission proceedings tolled the statute of limitations under Clayton Act; partial summary judgment. ²⁰⁸		×	×			×
Order denying remand in insurance coverage action involving multiple parties ²⁰⁹		×	×			×
Order to quash summons. ²¹⁰	×					

204. *Union Leader Corp. v. Newspapers of New England Inc.*, 180 F. Supp. 125 (D. Mass. 1959), *aff'd*, 284 F.2d 582 (1st Cir. 1960).

205. The issue was certified in “the alternative” to certification under 1292(a)(1). *In re Donald F. Heger*, 180 F. Supp. 147, 147 (D. Minn. 1959)

206. *In re Heffedendorf*, 263 F.2d 887, 890 (1st Cir. 1959) (finding that it would not advance the termination of litigation).

207. *Oskoian v. Canuel*, 264 F.2d 591, 594 (1st Cir.1959) (finding that there was only one case on point; that it was distinguishable; that an appellate ruling reversing the denial of the dismissal would “forestall what might well be a long and expensive trial.”). The district court’s certification in *Oskoian* was unpublished. *See also Oskoian v. Canuel*, 269 F.2d 311, 312 (1st Cir. 1959) (granting leave “in order to resolve a basic and difficult problem of practice.”).

208. *United Shoe Mach. Corp v. Int’l Shoe Mach. Corp.*, 275 F.2d 459, 459 (1st Cir. 1960).

209. *Charles Dowd Box Co. v. Fireman’s Fund Ins. Co.*, 303 F.2d 57, 58 (1st Cir. 1962). Notably, Congress has enacted a statutory prohibition to any type of appeal as to *grants* of motions to remand. 28 U.S.C. § 1447(d) (2006). This provision provides: “An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .” *But see Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 340–41 (1976), *abrogated in part by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–12 (1996) (reviewing a remand order when a district court judge remanded on grounds his docket was too full).

210. *Martinez v. Karageorgis*, 235 F. Supp. 1012, 1013 (D.P.R. 1963).

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Statute of limitations tolling under Clayton Act. ²¹¹		×		×		
Order to prepare plan to address racial segregation in schools. ²¹²		×	×			×
Obligation to pay taxes. ²¹³		×	×		×	
Ruling that Federal Employers Compensation Act did not bar contribution claim under FTCA. ²¹⁴		×	×			×
Denial of motion to dismiss P.R. Dealer Contract Law. ²¹⁵		×	×			×
Discovery order as to internal revenue subpoena. ²¹⁶		×		×		
Federal jurisdiction over abuse of process claim involving FAA. ²¹⁸	×					
Diversity jurisdiction under 1333(c) in declaratory judgment action pertaining to insurance. ²¹⁹		×	×		×	
Denial of motion to dismiss complaint in action by SEC for violation of security laws. ²²⁰	×					

211. Farmington Dowel Prods. Co v. Forster Mfg. Co., 223 F. Supp. 967, 968 (D. Me. 1963), *aff'd on merits*, 436 F.2d 699 n.2 (1st Cir. 1970).

212. Barksdale v. Springfield Sch. Comm., 237 F. Supp. 543, 544 (D. Mass. 1965). Springfield Sch. Comm. v. Banksdale, 348 F.2d 261, 262 (1st Cir. 1965) (noting the importance of the question).

213. Benitez Rexach v. United States, 390 F.2d 631 (1st Cir. 1968).

214. Newport Air Park, Inc v. United States, 293 F. Supp. 809, 812 (D.R.I. 1968), *rev'd* 419 F.2d 342 (1st Cir. 1969).

215. Fornaris v. Ridge Tool Co., 423 F.2d 563, 568–69 (1st Cir. 1970).

216. United States v. Salter, 421 F.2d 1393, 1394 (1st Cir. 1970) (not controlling issue of law and noting that “pretrial disclosure[s] may indeed involve an ultimate question of law in the case but it may not.”).

217. The Court in *Salter* reconsidered its earlier grant of permission. *Id.*

218. Nationwide Charters & Conventions, Inc. v. Garber, 254 F. Supp. 85, 86 (D. Mass. 1966).

219. White v. U.S. Fidelity & Guaranty Co., 356 F.2d 746, 747 (1st Cir. 1966).

220. SEC v. Wong, 254 F. Supp. 66, 69 (D.P.R. 1966) (noting that proffered interpretation of applicable security law was not in accord with pertinent authority and even if defendant was correct, a full trial was still

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*DENIALS OF CERTIFICATION OR PERMISSION TO APPEAL: 1959–1970*²²¹

Number of Cases	7
No Available Opinion or Discussion	3
Meaningful Explanation	3
Rote Recitation of Criteria	1
No Controlling Question of Law	1
No Difference of Opinion	1
No Likelihood of Early Termination	2
Need More Facts	-
Other	-

FRANTS OF CERTIFICATION AND APPEAL: RESULTS ON MERITS-1959–1970

Number of Cases Granting Certification and Permission to Appeal	9
Reversed	4
Affirmed	5
Reversed in Part Affirmed in Part	-

1971–1985

→Fifty-one reported cases in where 1292(b) certification was addressed;

→Seven cases where district court denied certification request;

needed as to other defendants and not the type of question “as can’t charge congress with absurdity”).

221. The chart includes decisions where more than one reasons for the denial or permission to appeal were identified.

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- Forty-four cases where district court granted certification request;
- Twenty-eight cases where court of appeals granted permission to appeal;
- Four reported cases where court of appeals specifically denied permission to appeal;
- Twelve cases where no appeal was taken or unpublished denial of permission to appeal

Out of the fifty-one reported cases in which 1292(b) certification was addressed between 1971 and 1985, thirty-one decisions denied or permitted certification with a rote recitation of the statutory criteria; four cases revealed a measure of application to the facts and circumstances; and the remaining sixteen were unreported/unavailable.

There were a total of eleven decisions composed of seven cases where certification was denied by the district court and four cases where permission to appeal was denied by the First Circuit. Five of the district court denials were either a summary recitation of the statutory criteria or no reported decision at all. As to the two remaining denials of certification, one found no controlling question of law while the other found both the lack of a controlling question of law and no likelihood of advance termination of the litigation. Two of the four denials for permission to appeal by the First Circuit were reconsiderations of earlier grants of permission. Out of the four total denials of permission to appeal; one was due to lack of properly certified question below; two based on the lack of a controlling question of law where there was a viable difference of opinion; and one presented the possibility that the certified question was a hypothetical and, even if it was not a hypothetical, there was a need for further factual development. Out of the twenty-five reported decisions where the court of appeals permitted the appeal and addressed the underlying merits, fourteen were affirmed and eleven reversed as to the underlying merits.

Out of the thirty-two reported and known cases in which the First Circuit either granted or denied permission to appeal (with an additional eighteen unknown), there were only four reported

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decisions with some measure of analysis; three denying permission to appeal and the other reversing the district court on the merits but noting in a footnote that it believed it had erred in granting permission to appeal. In one case, the First Circuit found the interlocutory appeal under both a notice of appeal or mandamus to be improper. In this case, one of the defendants had failed to seek permission to appeal with the First Circuit, first, after the initial certification and then again after recertification.²²² In another, the First Circuit addressed an appeal premised on a writ of mandamus seeking to compel the district court to certify its order dismissing the complaint for lack of subject matter jurisdiction.²²³ Denying the writ of mandamus, the First Circuit noted that such a writ requires that the right to the issuance of the writ be “clear and indisputable,” which takes away its discretion underlying Section 1292(b).²²⁴

The First Circuit issued two published opinions in which it reconsidered an earlier permission to pursue the interlocutory appeal.²²⁵ In one, it stated that it was “no longer satisfied that the question certified” met the Section 1292(b) criteria.²²⁶ The question certified was an order denying a motion to dismiss for a complaint that alleged employment discrimination. The plaintiff claimed he was not hired as a flight attendant due to being a married man and/or having children.²²⁷ The court found that the complaint may well not state a viable claim thus rendering the certified question a “hypothetical” and that, even if it did state a proper claim, that additional facts needed to be developed before a legal determination could be made.²²⁸

In the second case, the First Circuit proceeded to address the interlocutory appeal on the merits, and reversed the district court order denying a motion to dismiss as to a Section 1983 claim.²²⁹ It noted in a footnote that it had erred in granting permission to

222. *In re La Providencia Dev. Corp.*, 515 F.2d 94, 95 (1st Cir. 1975).

223. *In re Maritime Service Corp.*, 515 F.2d 91, 92 (1st Cir. 1976).

224. *Id.*

225. *Sandler v. E. Airlines, Inc.*, 649 F.2d 19, 20 (1st Cir. 1981); *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984).

226. *Sandler*, 649 F.2d at 20.

227. *Id.* at 19.

228. *Id.* at 20.

229. *McGillicuddy*, 746 F.2d at 77.

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appeal and stated that it would “not normally allow an appeal from a denial of a motion to dismiss” and that certification under Section 1292(b) “should be used sparingly and only in exceptional circumstances.”²³⁰

Of the fifty-one cases, five concerned statute of limitations issues; at least fifteen involved, in some fashion, statutory construction issues; and two addressed personal jurisdiction. The specific orders and action taken as to certification between 1971 and 1985 are as follows:

TYPE OF ACTIONS AND ORDERS: 1971–1985

-The following key accompanies the table below with regard to the disposition of the corresponding cases in the table-

CD	<i>Cert. Denied</i>
CG	<i>Cert. Granted</i>
AP	<i>Appeal Permitted</i>
AD	<i>Appeal Denied</i>
MA	<i>Merits Affirmed</i>
MR	<i>Merits Reversed</i>

Order	CD	CG	AP	AD	MA	MR
Order consolidating 32 cases for liability but not for damages ²³¹	× ²³²					
Orders under Securities and Exchange Act re: statute’s exemption from registration requirements; statute of limitations; implied private right remedy; and standing. ²³³		×				
Order denying summary judgment and partially denying motion to		×				

230. *Id.* at 76 n.1.

231. *In re* Multidistrict Civil Actions Involving the Air Crash Disaster Near Hanover, N.H., on Oct. 25, 1968, 342 F. Supp. 907, 907–08 (D.N.H. 1971).

232. *Id.* at 911 (Summarily denying the request for certification stating only that the Court is “of the opinion that interlocutory appeal is not the proper mode of review of this order.”).

233. *Dyer v. E. Trust & Banking Co.*, 336 F. Supp. 890, 900 (D. Me. 1971).

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dismiss as to viability of Securities claim based on material misstatement or omission. ²³⁴						
Order denying motion for summary judgment based on defendant's waiver of statute of limitations under Carriage of Goods by Sea Act. ²³⁵		×	×		×	
Order as to pendent jurisdiction in labor dispute. ²³⁶		×		×		
Order holding Section 13 of the Rivers and Harbors Act of 1899 applicable to log-driving activities. ²³⁸		×	×		×	
Orders pertaining to venue and whether importer or distributor is "automobile manufacturer" under 15 U.S.C. 1221(a). ²³⁹		×				
Order dismissing complaint for lack of subject matter jurisdiction rejecting applicability of the Shipping Act, 46 U.S.C. 801-842. ²⁴⁰	×			×		
Order vacating consent decree in		×	×		×	

234. *Emmi v. First-Manufacturers Nat'l Bank of Lewiston and Auburn*, 336 F. Supp 629, 633-34 (D. Me. 1971).

235. *United States v. Gulf P.R. Lines, Inc.*, 492 F.2d 1249, 1251 (1st Cir. 1974).

236. *In re La Providencia Dev. Corp.*, 515 F.2d 94, 95 (1st Cir. 1975).

237. *Id.* The appeal was denied as the court found that the defendants who were the subject of the pendent jurisdiction order failed to apply to the First Circuit after initial certification and later recertification. *Id.* Court held defendants had lost opportunity to take an interlocutory appeal and were not entitled to writ of mandamus to compel transmission of record by clerk of district court. *Id.* at 96.

238. *United States v. Kennebec Log-Driving Co.*, 399 F. Supp. 754, 760 (D. Me. 1975), *aff'd*, 530 F.2d 446 (1st Cir. 1975).

239. *Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123, 138 (D.N.H. 1975).

240. *In re Maritime Service Corp.*, 515 F.2d 91, 93 (1st Cir. 1976).

241. *Id.* The appeal was sought under a writ of mandamus and was denied. *Id.* at 92. The Court noted that "[s]ince 1292(b) permits certification only when the district court is 'of the opinion' that an otherwise nonappealable order involves 'a controlling question of law as to which there is substantial ground for difference of opinion . . . ' we would have, absent more, little difficulty denying the petition as wholly inappropriate." *Id.*

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dispute as to right to certain public benefits. ²⁴²						
Order that Jones Act and general maritime law provided for cause of action despite coverage under the Puerto Rico Workmen's Accident Compensation Act. ²⁴³		x	x		x	
Order finding lack of jurisdiction pertaining to alleged breaches of fiduciary duty of employer trustees of union trust fund. ²⁴⁴		x	x		x	
Order dismissing complaint made under Warsaw Convention to extent claimed jurisdiction or liability without fault. ²⁴⁵		x	x		x	
Order that resolution was unconstitutional as to taking of land related to resort development project near Puerto Rico's unique thermal springs. ²⁴⁶		x				
Order requiring nonresident bonds to secure costs, expenses and attorney's fees in action for personal injuries. ²⁴⁷		x	x		x	
Order certifying class of potential woman academic employees in sex discrimination suit. ²⁴⁸	x ²⁴⁹					
Order denying motion to dismiss		x	x			x

242. Theriault v. Smith, 523 F.2d 601, 602 (1st Cir. 1975).

243. Manual Caceres v. San Juan Barge Co., 520 F.2d 305, 306 (1st Cir. 1975).

244. Bowers v. Moreno, 520 F.2d 843, 846-47 (1st Cir. 1975).

245. *In re Tel Aviv*, 405 F. Supp. 154, 158 (D.P.R. 1975), *aff'd*, Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976).

246. Hotel Coamo Springs, Inc. v. Hernandez-Colon, 426 F. Supp. 664, 675 (D.P.R. 1976).

247. Hawes v. Club Ecuestre El Comandante, 535 F.2d 140, 142-43 (1st Cir. 1976).

248. Lamphere v. Brown Univ., 553 F.2d 714, 715 (1st Cir. 1977).

249. *Id.* The *Lamphere* Court also noted that previous attempt to seek review of class certifying order by writ of mandamus was denied. *Id.*

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based on <i>res judicata</i> in aviation matter. ²⁵⁰						
Order denying motion to dismiss and to certify class involving claims against federal officers who purported conspired to intercept and read first class letters. ²⁵¹		×	×			×
Order in FTCA action denying motion to dismiss for lack of personal jurisdiction. ²⁵³		×				
Order striking portion of complaint seeking damages for physical and mental suffering under ADEA. ²⁵⁴		×	×			×
Order requiring fishing vessel owner to post bond under Limitation of Vessel Owner's Liability Act. ²⁵⁵		×	×			×
Order denying request to amend complaint to add nonfederal tort claim against third party. ²⁵⁶		×	×			×
Order regarding pension termination insurance under ERISA. ²⁵⁷		×	×		×	
Order denying motion to dismiss for	×					

250. *Sangiovanni Hernandez v. Dominicana de Aviacion, C. Por A.*, 556 F.2d 611, 612 (1st Cir. 1977).

251. *Driver v. Helms*, 74 F.R.D. 382, 387 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978).

252. The ruling of the District Court was *affirmed in part and reversed in part* on the merits. *Driver v. Helms*, 577 F.2d at 150–51, 154.

253. *Centronics Data Computer Corp. v. Mannesmann*, 432 F. Supp. 659, 668 (D.N.H. 1977) (noting that “ruling may be at odds with the traditional concepts of jurisdiction and find that the final resolution of this issue will ‘materially advance the ultimate termination of this litigation.’”).

254. *Vazquez v. E. Air Lines, Inc.*, No. 74-1042, 1997 WL 58 (D.P.R. Nov. 21, 1977), *rev'd*, 579 F.2d 107 (1st Cir. 1978).

255. *In re Boat Camden Inc.*, 569 F.2d 1072, 1074 (1st Cir. 1978).

256. *Ortiz v. U.S. Gov't*, 595 F.2d 65, 73 (1st Cir. 1979).

257. *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 6 (1st Cir. 1980).

258. *Id.* The court noted that “the issue is one of first impression involving the interpretation of the [ERISA].” *Id.*

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failure to pay costs in maritime action. ²⁵⁹						
Order compelling disclosure of confidential sources and information derived from sources in defamation action. ²⁶⁰		x	x			x ²⁶¹
Order finding lack of jurisdiction pertaining to Tort Claims Act and Tucker Act. ²⁶²		x	x		x	
Order on motion to dismiss as to Sherman Act challenge to statute governing issuance of liquor license and issue of state action immunity. ²⁶³		x	x			x
Order denying motion to dismiss sex discrimination claim for failure to state claim as allegations of discrimination and as policy applied equally to all. ²⁶⁴		x		x ²⁶⁵		

259. *Span E. Airlines, Inc. v. Digital Equip., Corp.*, 486 F. Supp. 831, 834 (D. Mass. 1980).

260. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 584 (1st Cir. 1980).

261. *Id.* The order was vacated in part and remanded. *Id.* at 599.

262. *Armor Elevator Co., Inc. v. Phoenix Urban Corp.*, 493 F. Supp 876, 889 (D. Mass. 1980), *aff'd*, 655 F.2d 19 (1st Cir. 1981).

263. *Grendel's Den v. Goodwin*, 495 F. Supp. 761, 762 (D. Mass. 1980), *rev'd*, 662 F.2d 88 (1st Cir. 1981).

264. *Sandler v. E. Airlines, Inc.*, No. 77-3897-MA, 1980 WL 262, at *1 (D. Mass. Oct. 16, 1980), *remanded by*, 649 F.2d 19 (1st Cir. 1981).

265. In *Sandler*, First Circuit initially permitted appeal and then reconsidered. 649 F.2d at 20 (1st Cir. 1981). According to the Court, “[h]aving reviewed the parties’ briefs and heard oral arguments, we are no longer satisfied that the question certified ‘involves a controlling question of law’ and that an immediate appeal ‘may materially advance the ultimate termination of the litigation’ a required by Section 1292(b).” *Id.* The Court gave “four considerations” as to its holding: (1) that it was “disinclined to address a certified question which may only be hypothetical”; (2) issue certified would be controlling only if denial of employment was due to policy against hiring married person of both sexes, but if the complaint claimed to allege policy was pretext, and if correct, the certified question would neither arise or control; (3) further development of facts would be necessary before there could be proper question of law; and (4) certification from the EEOC was based on theory that policies discriminated against women not men, and as such, the “anti-male theory” has neither been argued or decided below. *Id.* at 20–21.

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Order denying motion to dismiss second amended complaint asserting claims under 301(a) of Labor Management Relations Act of 1947 with issue including whether Union had standing and conflict of interest. ²⁶⁶		×				
Order denying motion to dismiss based on contention of lack of state action in civil rights claim. ²⁶⁷		×	×		×	× ²⁶⁸
Order allowing United States to intervene in suit involving claim that juveniles confined in industrial school and camp were being denied constitutional rights. ²⁶⁹		× ²⁷⁰				
Order striking affirmative defenses inconsistent with ruling that Congress acted within authority to extend coverage of Fair Labor Standards Act to domestic employees. ²⁷¹		× ²⁷²				
Order in denying motion to dismiss as to viability of cause of action under section 36(b) of the Investment Company. ²⁷³	× ²⁷⁴					

266. *Locals 2222 Int'l Bhd. of Elec. Workers v. New England Tel. & Tel. Co.*, No. 77-1912-MA, 1980 WL 268 (D. Mass. Oct. 31, 1980).

267. *Rendell-Baker v. Kuhn*, 641 F.2d 14, 28 (1st Cir. 1981) *aff'd* 102 S. Ct. 2764 (1982).

268. *See id.* (consolidating the appeal of two cases involving the same issue. First Circuit held that claims that First Amendment rights were violated when former school staff members were discharged failed due to lack of state action. The result was one case affirmed and one reversed.)

269. *Santana v. Collazo*, 89 F.R.D. 369, 373 (D.P.R. 1981).

270. *Id.* at 374. (suggesting that “should any of the parties wish to appeal this Order, such appeal shall be certified by this Court pursuant to § 1292(b); however no stay of the Court’s proceeding will be granted.”)

271. *Marshall v. Cordero*, 508 F. Supp. 324, 326 (D.P.R. 1981).

272. *Id.* at 326 n.4 (referencing that “[s]hould Defendant wish to appeal this decision an Order, such appeal shall be certified by this Court pursuant to [1292(b)].”).

273. *Kehoe v. Smolar*, No. 73-1506-MA, 1982 WL 1574 (D. Mass. Mar. 3, 1982).

274. *Id.* at *2 (finding that the applicable law to the issue was “settled” in the Circuit and that is was not “a case where other Circuits are badly split

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Order denying motion to dismiss holding that Federal Water Pollution Act did not provide exception to general rule granting jurisdiction. ²⁷⁵		x	x		x	
Order pertaining to decision of Secretary of Health and Human Services denying disability benefits. ²⁷⁶		x	x			x
Order in commercial contract as to goods litigation taking jurisdiction and granting relief from default judgment entered by another court. ²⁷⁷		x	x			x
Order denying motion to remand and concerning jurisdiction. ²⁷⁸		x	x		x	
Order disqualifying counsel. ²⁷⁹		x	x		x	
Order denying cross-motions for summary judgment on grounds that plaintiff had not established acquisitive prescription with plaintiffs' rights subject to tax liens. ²⁸⁰		x	x		x	
Order on motion to dismiss ruling that claim under Age Discrimination in Employment Act could proceed where discrimination charges file with EEOC more than		x				

and the First Circuit Court of Appeals has yet to reach a decision that would provide some guidance.”). The court also stated that “what would hasten the termination of this case would be concerted efforts by the parties to prepare for trial or some other accommodation rather than preparing and continuing flood of motions.” *Id.*

275. *United States v. Puerto Rico*, 551 F. Supp. 864, 869 (D.P.R. 1982), *aff'd*, 721 F.2d 832 (1st Cir. 1983).

276. *Torres v. Sec’y of Health & Human Servs.*, 677 F.2d 167, 170 (1st Cir. 1982).

277. *Indian Head Nat’l Bank of Nashua v. Brunelle*, 689 F.2d 245, 252 (1st Cir. 1982).

278. *Pueblo Int’l, Inc. v. De Cardona*, 562 F. Supp. 843, 847 (D.P.R. 1983), *aff'd*, 725 F.2d 823 (1st Cir. 1984).

279. *Kevlik v. Goldstein*, 724 F.2d 844, 851 (1st Cir. 1984).

280. *Rodriguez v. Escambron Dev. Corp.*, 556 F. Supp. 703, 712 (D.P.R. 1983), *aff'd* 740 F.2d 92 (1st Cir. 1984).

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60 days prior to suit; they cited employer to state agency in timely fashion; and they complied in good faith with all pre-litigation procedural requirements of act even assuming statute transferring enforcement authority was unconstitutional. ²⁸¹						
Order denying request to vacate attachment and holding that exercise of jurisdiction over corporation based on maritime attachment of corporation's credits in Puerto Rico did not violate due process. ²⁸²		x	x		x	
Order denying motion to dismiss based on failure to state a claim in action by private accounting firm against state officials seeking damages for defamation, interference with contract and violation of process and First Amendment rights. ²⁸³		x	x ²⁸⁴			x
Order in cases under Securities Acts of 1933 and 1934 refusing to adopt "sale of business doctrine." ²⁸⁵		x				
Order in maritime in <i>in rem</i> action seeking to compel U.S. Marshal's to proceed against vessel for unpaid		x	x		x	

281. *Lopez v. Bulova Watch Co.*, 582 F. Supp. 755, 765–66 (D.R.I. 1984).

282. *Trans-Asiatic v. Apex Oil Co.*, 743 F.2d 956, 963 (1st Cir. 1984).

283. *McGillicuddy v. Clements*, 746 F.2d 76, 78 (1st Cir. 1984).

284. *Id.* at 76 n.1 (noting error in granting permission to appeal the Court pointed out that they "would not normally allow an appeal from a denial of a motion to dismiss, and, with the benefit of hindsight, [they] admit [their] error in doing so in this case. [They] continue to adhere to the view that interlocutory certification under 28 U.S.C. § 1292(b) should be used sparingly and only in exceptional circumstances, and where the proposed immediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority").

285. *Crownair Systems Inc. v. Wolf*, 598 F. Supp. 1478, 1481 (D.P.R. 1984).

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wages without prepayment of custodial and insurance expenses. ²⁸⁶						
Order pertaining to Hague Convention. ²⁸⁷	×					
Order invalidating six month spend-down period in Medicaid dispute. ²⁸⁸		×	×			×
Order denying motion for summary judgment based on dispute over which statute of limitations period applied in racial discrimination claim under Title VII. ²⁸⁹		×				
Finding following trial that university discriminated against women on class wide basis in rank placement, at hire, salary, at hire, and annual compensation but not as to promotion of tenure. ²⁹⁰		×	×			

286. P.R. Drydock & Marine Terminals, Inc. v. Motor Vessel Lisa Del Caribe, 746 F.2d 93, 94 (1st Cir. 1983).

287. Boreri v. Fiat S.P.A., 763 F.2d 17, 25–26 (1st Cir. 1985) (noting district court’s denial of certification under § 1292(b) and rejecting effort to have issue reviewed by mandamus).

288. Hogan v. Heckler, 597 F. Supp. 1106, 1107 (D. Mass. 1984), *rev’d*, 769 F.2d 886 (1st Cir. 1985).

289. Hester v. City of Lawrence, 602 F. Supp. 1420, 1422 (D. Mass. 1985).

290. Chang v. Univ. of R.I., 606 F. Supp. 1161, 1279 (D.R.I. 1985).

291. According to the court in *Chang*:

This litigation has symptomatology which fairly cries out for the balm of the statute: it presents an interleaved series of difficult and pivotal questions of law as to which there is a dearth of controlling precedent and as to which there is appreciable room for differences of opinion. An immediate appeal from the class wide orders contemplated hereby would have the salutary effect of resolving some of these critical questions with a greater degree of finality. And, such a process would in this court’s judgment both materially advance, and reduce the costs of, the ultimate termination of the legal battle. To permit the second and third stage proceedings to run their course, at enormous expense to the parties and to the judicial system, with the grey eminence of appellate review lurking in the wings, would run a thoroughly unacceptable risk of prodigal wastefulness.

Id. at 1279–80.

292. *Chang* noted that First Circuit accepted interlocutory appeal but did not make a decision on merits. 107 F.R.D. 343, 344 (D.R.I. 1985).

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Order denying motion to dismiss pertaining to statute governing forfeiture. ²⁹³		× ²⁹⁴				
Order in breach of contract action denying motion for summary judgment which motion based on statute of limitations and statute of frauds, and in particular finding that duress exception to statute of limitations applied, and involving sister to Shah of Iran. ²⁹⁵		×		× ²⁹⁶		
Orders pertaining to jurisdiction of National Joint Adjustment Board ²⁹⁷		×				
Order in contract action striking affirmative defenses of usury and dismissing usury based counter-claims. ²⁹⁸	×					

293. *United States v. Approximately 2,475,840 of Clean Unroasted Coffee Beans*, 608 F. Supp. 288, 291 (D.P.R. 1985).

294. Court stated that the question was one of “first impression” in circuit and thus would “be willing to amend this order to certify this matter to the United States Court of Appeals for the First Circuit pursuant to [Section 1292(b)] if claimant so requests.” *Id.* at 292.

295. *Plandjian v. Pahlavi*, 614 F. Supp. 1569, 1576 (D. Mass. 1985). In its certification, the district court expressed the view that it did not think the duress exception applied to statute of limitations but deferred to another district court judge that so held. *Id.*

296. The First Circuit initially gave permission to appeal then later vacated the order and dismissed the appeal. *Palandin v. Pahlavi*, 782 F.2d 313, 313–14 (1st Cir. 1985). In so holding, it doubted that a substantial ground for difference of opinion existed as to the recognition that duress could toll the statute of limitations under Massachusetts law. Also, the Court found that the certified issue of the “extent” of the duress exception “is a classic example as to what is not to be raised by intermediate appeals.” According to the Court, “it resembles a ‘sufficiency of the evidence’ claim—the kind of claim which an appellate court can better decide after the facts are fully developed. The fact that appreciable trial time may be saved is not determinative, for such would often be true of interlocutory appeals.” *Id.* at 314.

297. *Sheet Metal & Air Conditioning Contractors Ass’n of Bldg. Trades Emp’rs Ass’n v. Sheet Metal Workers Int’l Ass’n, Local Union 17*, 619 F. Supp. 1073, 1084 (D. Mass. 1985).

298. *Bank of N.Y.v. Hoyt*, 108 F.R.D. 184, 189 (D. Mass. 1984).

299. *Id.* at 189. The Court issued a detailed opinion setting out its analysis in denying certification. It stated in part:

Common sense teaches that, if employed in a casual or desultory

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*KNOWN DENIALS OF CERTIFICATION OR PERMISSION TO APPEAL: 1971–1985*³⁰⁰

Number of Cases	11
No Available Opinion	3
No Discussion	1
Rote Recitation of Criteria	1
Meaningful Measurable Decision	7
No Controlling Question of Law	5
No Difference of Opinion	1
No Likelihood of Early Termination	2
Need More Facts	1
Other	2 ³⁰¹

KNOWN GRANTS OF CERTIFICATION: 1971–1985

Number of Cases	43
No Available Opinion	17
No Discussion	1
Rote or Cursory Discussion	21
Meaningful or Measurable Discussion	3

fashion, interlocutory appeal may not only fail materially to advance the termination of a case but may prolong it. The cure prescribed by an overeager petitioner may well produce symptomatology far more virulent than any which would otherwise infect the record. The case law recognizes such hazards, and counsels toward restraint where (as here) such auxetic and/or deleterious results are in prospect.

Id.

300. The chart includes decisions where more than one reasons for the denial or permission to appeal were identified.

301. One decision relied in part that the question certified was potentially only a hypothetical. *Sandler v. E. Airlines, Inc.*, No. 77-3897-MA, 1980 WL 262 *1 (D. Mass. Oct. 16, 1980), *remanded by*, 649 F.2d 19 (1st Cir. 1981). The other noted that appellant had failed to take timely appeal from certification and recertification. *In re La Providencia Dev. Corp.*, 515 F.2d 94, 95 (1st Cir. 1975).

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*GRANTS OF CERTIFICATION AND APPEAL: RESULTS
ON MERITS-1971-1985*

Number of Cases Granting Certification and Permission to Appeal	28
Revered	9
Affirmed	16
Reversed in Part Affirmed in Part	2
Merits Unknown	1

1986-2000

→ Fifty cases where district court addressed certification request;

→Twenty-one cases where district court decisions denied certification;

→Twenty-nine cases where district court decisions granted certification;

→Twenty-one First Circuit decisions where permission to appeal granted;

→Eight cases where permission to appeal was either denied, not pursued, or not known.

Of the fifty cases identified, the most common issues were preemption (seven cases) and personal jurisdiction (five cases) followed by statute of limitations or accrual (four cases) and immunity (two cases). Of the twenty-one cases where the First Circuit permitted the appeal, nine were affirmed on the merits, nine reversed on the merits, one was both affirmed and reversed in part and two were unknown. As to the twenty-one cases where the district court denied certification, the most common basis for the denial was failure to demonstrate that interlocutory appeal would materially advance an earlier termination of the litigation (i.e., eight cases), followed by lack of controlling question of law (five cases) and the lack of a substantial difference of opinion (five cases). One district decision made reference to the concern of

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overburdening the appellate court³⁰² and another to the concern that the issue would become moot.³⁰³ Two decisions made reference to age/advanced stage of the litigation,³⁰⁴ three decisions generally referenced the lack of “exceptional circumstances,”³⁰⁵ Section 1292(b)’s “circumscribed authority,”³⁰⁶ and the lack of any reason to depart from the final judgment rule.

The only First Circuit decision to address Section 1292(b) in any detail during this period was *Plandjian v. Pahlavi*.³⁰⁷ There, the First Circuit held that its earlier grant of permission to appeal was “improvident.”³⁰⁸ The issue in the case concerned the extent to which there was a duress exception to statutes of limitations under Massachusetts law. The First Circuit held that it “doubt[ed]” there were substantial grounds for a difference of opinion as to whether duress could constitute an exception “in some conceivable circumstances.”³⁰⁹ It likewise held that while the issue of whether Massachusetts would recognize the principle of duress as tolling the statute constitutes a “controlling question of law,” the issue of such an exception’s “extent” was deemed “a classic example of what is not to be raised by intermediate appeals.”³¹⁰ The court explained that such an issue was deemed to require a fully developed factual record and emphasized that whether appreciable trial time would be saved was not determinative as to the propriety of an interlocutory appeal.

Of the twenty-one cases where both the district court and the First Circuit permitted the appeal, five orders pertained to jurisdictional questions; four pertained to preemption rulings; four involved statutory interpretation issues; three rulings involved patent cases; two involved questions of standing; two involved constitutional challenges to a statute; two involved

302. *Johnson v. Watts Regulator Co.*, No. CIV. 92-508-JD, 1994 WL 421112, at *2 (D.N.H. Aug. 11, 1994).

303. *Cummins v. EG&G Sealol, Inc.*, 697 F. Supp. 64, 69 (D.R.I. 1988).

304. *Zane S. Blanchard & Co. v. PSPT, Ltd.*, No. Civ. 92-660-SD, 1995 WL 17211933, at *1 (D.N.H. Sept. 20, 1995).

305. *McCarthy v. Azure*, No. CIV. 92-523-SD, 1994 WL 258316, at *1 (D.N.H. Jan. 24, 1994).

306. *Zane*, 1995 WL 17211933 at *1.

307. 782 F.2d 313, 314 (1st Cir. 1986).

308. *Id.* at 314.

309. *Id.*

310. *Id.*

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statute of limitations issues; and the remainder were significantly diverse and involved the attorney-client privilege, Eleventh Amendment immunity, entitlement under the AFDC, and the applicability and enforceability of an arbitration clause. As to certification denials, the matters were equally diverse including orders pertaining to a forum selection clause, *forum non conveniens*, statute of limitations, standing under the Clayton Act, ERISA coverage, including ERISA preemption as well as an order pertaining to a bond.

The specific orders and action taken between 1986 and 2000 are as follows:

TYPE OF ACTIONS AND ORDERS: 1986–2000

-The following key accompanies the table below with regard to the disposition of the corresponding cases in the table-

CD	<i>Cert. Denied</i>
CG	<i>Cert. Granted</i>
AP	<i>Appeal Permitted</i>
AD	<i>Appeal Denied</i>
MA	<i>Merits Affirmed</i>
MR	<i>Merits Reversed</i>

Order	CD	CG	AP	AD	MA	MR
Order dismissing complaint seeking declaratory judgment that statute governing emergency commitment of alcoholics was unconstitutionally vague. ³¹¹		× ³¹²				
Order providing that section of Securities Act did not preclude assertion of liability based on the		×	×		×	

311. *Id.* at 1480–81.

312. The Court in *Donahue* stated that “when one considers the critical importance of the statute interlocutory review would surely redound to the benefit of not only the parties but also the citizenry.” Thus, it likewise left the decision of whether or not to pursue the appeal to the discretion of the plaintiff. *Donahue v. R.I. Dep’t of Mental Health*, 632 F. Supp. 1456, 1481 (D.R.I. 1986).

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common law notions of apparent authority. ³¹³						
Order denying motion to dismiss rejecting argument that claim against cigarette manufacturer was preempted by Cigarette Labeling and Advertising Act. ³¹⁴		x	x			x
Order in breach of contract/termination action denying motion to dismiss and pertaining to issue of diversity jurisdiction and “principal place of business.” ³¹⁵		x	x			x
Order denying motion to dismiss based on abstention in action requesting declaration that Puerto Rico legislation authorizing creation of medical malpractice insurance syndicate unconstitutional. ³¹⁶		x ³¹⁷		x		
Order holding that Environmental Protection Agency was not barred from imposing sanctions under Clean Air Act although EPA failed to act on proposed revisions to state implementation plan within four months of submission of revision. ³¹⁸		x				
Order granting motion to amend complaint to permit former	x					

313. *In re Atl. Fin. Mgmt, Inc.*, 784 F.2d 29, 35 (1st Cir. 1986).

314. *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171, 1179–80 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987).

315. *Topp v. CompAir, Inc.*, 814 F.2d 830, 839 (1st Cir. 1987).

316. *Corporacion Insular de Seguros v. Garcia*, 680 F. Supp. 476, 477 (D.P.R. 1988).

317. Court found in a conclusory fashion that the criteria of Section 1292(b) was met and stated that it was up to the parties to take immediate appeal “if such is desired.” *Id.* at 486.

318. *United States v. Arkwright, Inc.*, 697 F. Supp. 1231, 1232–33 (D.N.H. 1988).

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employer to assert state tort claim of retaliatory discharge. ³¹⁹						
Order pertaining to discovery in which any party in multi-party litigation was required to provide list of exhibits five days before deposition implicating work product rule. ³²⁰		×	×		×	
Order denying motion for summary judgment premised on defense that motor vehicle product liability action based on lack of air bags or other “passive restraint” was preempted by National Traffic and Motor Vehicle Safety Act and Federal Motor Vehicle Safety Standards. ³²²		×	×			×
Order in tortious interference action denying motion to dismiss premised on lack of personal jurisdiction. ³²³	×					

319. *Cummins v. EG & G Sealol, Inc.*, 697 F. Supp. 64, 70–71, 73 (D.R.I. 1988). The Court in *Cummins* issued a detailed decision as to the reasons denying certification. It also noted that the motion to certify was “unusual” because it sought to have certified “a purely state law issue.” *Id.* at 70. The Court felt certification was unnecessary as it was “likely” to certify the retaliatory discharge issue to state court, if necessary, after trial. *Id.* It was likewise concerned that the First Circuit, upon certification, may well opt to certify the issue back to state court causing only further delay. *Id.* at 71. According to the Court: “Section 1292(b) must not be used to transmogrify a legitimate cause of action into a legal pinball bouncing from court to court in the federal and state judicial systems.” *Id.* at 71.

320. *In re San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1021 (1st Cir. 1988).

321. *Id.* at 1010 (noting that “although the call is close” the work product issue was “sufficiently novel and important, and the circumstances sufficiently out of the ordinary” to justify review under Section 1292(b)).

322. *Wood v. Gen. Motors Corp.*, 865 F.2d 395, 419 (1st Cir. 1988).

323. *Thompson Trading Ltd. v. Allied Lyons PLC.*, 124 F.R.D. 534, 538 (D.R.I. 1989).

324. *Id.* (noting that since motion to dismiss “concerns only 2 of 5 defendants, an interlocutory appeal could not ‘materially advance the ultimate termination of the litigation.’”)

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Order denying motion to remand where defendants had removed action based on assertion it was preempted by ERISA and 301 of the Labor Management Relations Act. ³²⁵		x				
Order limiting penalties for permit violations under Clean Water Act to violations taking place after complaint was filed. ³²⁶		x		x		
Order dismissing copyright infringement action against state based on Eleventh Amendment Immunity. ³²⁷		x	x		x	
Order in civil rights action denying motion to dismiss in part based on rejection of qualified immunity defense. ³²⁸	x					
Order pertaining to summary judgment ruling pertaining to accrual of civil RICO action. ³²⁹		x	x		x ³³⁰	
Order in breach of contract and tortious interference action denying motion to dismiss based on lack of personal jurisdiction. ³³¹		x	x			x

325. Dowd v. N.E. Tel. & Tel. Co., CIV. A. No. 89-705, 1989 WL 118795, at *3 (D. Mass. Aug. 3, 1989).

326. Natural Res. Def. Council, Inc. v. Gould, Inc., 725 F. Supp. 634, 648 (D. Mass. 1989).

327. Lane v. First Nat. Bank of Bos., 687 F. Supp. 11, 17 (D. Mass. 1989), *aff'd*, 871 F.2d 166 (1st Cir. 1989) (noting that the issue was “sufficiently novel and important”).

328. Fisichelli v. City Known As Town of Methuen, 884 F.2d 17, 18 (1st Cir. 1989).

329. Rodriguez v. Banco Cent., 917 F.2d 664, 669 (1st Cir. 1990).

330. Court refused to address certified questions beyond the civil RICO statute of limitations accrual issue which it affirmed. It stated review was proper under Section 1292(b) “because the circuits are divided about the proper answer to this question and because the district court has followed the minority view.” *Id.* at 655. The other “certified” questions could not be reviewed as the application to the First Circuit was not made within 10 days after entry of the order. *Id.* at 668–69.

331. Donatelli v. Nat'l Hockey League, 708 F. Supp. 31 (D. Mass. 1989), *rev'd*, 893 F.2d 459, 461 (1st Cir. 1990) (deciding on the merits that, they

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Order in product liability action from denial of motion to reconsider denial of motion to dismiss and summary judgment which had been based on statute of limitations and issue of release and effect on joint tort-feasor. ³³²	×					
Order in discrimination action denying reconsideration of evidentiary ruling denying motion to qualify witnesses as experts. ³³³	×					
Order denying motion to dismiss which held that False Act amendments of October 27, 1986 applied retroactively to relator's suit in qui tam action. ³³⁴	×					
Order in securities litigation on motion to dismiss which was allowed in part and denied in part, concerning whether complaint stated claim for securities fraud or racketeering and misrepresentation in prospectus. ³³⁵		×	×		×	×
Order denying motion to remand state action against American Red Cross and concerning issue of original federal jurisdiction over suit involving transmission of the		×	×			×

were “[i]mpressed by the issue’s novelty and importance; and by the district court’s concern, [they] allowed an interlocutory appeal”).

332. *Smith v. Morback Indus., Inc.*, 733 F. Supp. 484, 490 (D.N.H. 1990).

333. *Lipsett v. Univ. of P.R.*, 740 F. Supp. 921, 923 (D.P.R. 1990) (reasoning that the “district court must consider the relative advantages and disadvantages of immediate appeal in light of the guidelines provided in the statute”).

334. *See United States ex rel. La Valley v. First Nat’l Bank of Bos.*, No. 86-236-WF, 1990 WL 112285, at *1, *6 (D. Mass. July 30, 1990) (providing a detailed analysis of applicable criteria).

335. *Miller v. New Am. High Income Fund.*, 755 F. Supp. 1099, 1110 (D. Mass. 1991), *rev’d in part and aff’d in part*, *Lucia v. Prospect St. High Income Portfolio*, 36 F.3d 170, 177 (1st Cir. 1994).

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HIV virus through the transfusion of tainted blood. ³³⁶						
Order denying motion to dismiss based on the assertion of preemption under the Longshore and Harbor Worker's Compensation Act. ³³⁷		x	x			x
Order on cross motions for summary judgment holding that state statute prohibiting imposition of late fee on credit card customers could be enforced despite claim of preemption under Depository Institutions Deregulation and Monetary Control Act of 1980. ³³⁸		x	x ³³⁹			x
Order that section of Financial Institutions Reform, Recovery and Enforcement Act limiting judicial review of actions of FDIC as receiver did not preclude jurisdiction over suit brought prior to FDIC's appointment as receiver. ³⁴⁰		x	x		x	
Order on cross motions for summary judgment holding that the Commonwealth of Massachusetts was not in		x				

336. See *S.G. v. Am.Nat'l Red Cross*, 938 F.2d 1494, 1495 (1st Cir. 1991) *overruled by* *Am. Nat'l Red Cross v. S.G.*, 506 U.S. 247 (1992)(granting the permission to appeal “[b]ecause of the importance of the jurisdictional issue presented, especially in light of the increasing litigation concerning the transmission of HIV virus through the transfusion of tainted blood”).

337. *Barnard v. Zapata Haynie Corp.*, 975 F.2d 919, 921 (1st Cir. 1992).

338. *Greenwood Trust Co. v. Comm. of Mass.*, 971 F.2d 818, 831 (1st Cir. 1992).

339. *Id.* at 821 (noting that certification was accepted “in light of the pivotal importance and broad commercial consequence of the questions presented” and that its belief in the importance of the questions presented was “validated to some degree by the outpouring of amicus briefs, some favoring appellant’s position and some opposing it.”).

340. *Marquis v. FDIC*, 965 F.2d 1148, 1155 (1st Cir. 1992) (explaining that “because of the importance of the jurisdictional question, and its unsettled nature, we accepted appellate jurisdiction” under Section 1292(b)).

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compliance with section 302(c) of the Medicare Catastrophic Coverage Act. ³⁴¹						
Order on motion to dismiss finding claim under Individuals with Disabilities Education Act untimely. ³⁴²	×					
Order in civil rights action on motion for new trial granting new trial based on violation of local rule occurring when court permitted alternates to deliberate with jurors without consent of the parties. ³⁴³		×	×			×
Order providing that ERISA provision authorizing Secretary to bring civil action to enjoin violations or to obtain other appropriate relief did not create cause of action against non-fiduciaries. ³⁴⁴		×		×		
Order on motion to compel arbitration holding that arbitration clause in bill of lading enforceable despite provision of Carriage of Goods by Sea Act prohibiting lessening of carrier's obligation. ³⁴⁶		×	×		×	
Order denying motion to dismiss tort suit and ruling that National		×	×		×	

341. See *Avanzato v. Sec'y of Health & Human Servs.*, No. 91-30205-F, 1992 WL 88008, at *1, *8 (D. Mass. Feb. 14, 1992)(granting Commissioner the option to seek Section 1292(b) certification but such certification was never sought).

342. *I.D. by E.D. v. Westmoreland Sch. Dist.*, 788 F. Supp. 634, 640 (D.N.H. 1992).

343. *Cabral v. Sullivan*, 757 F. Supp. 107, 112 (D. Mass. 1991), *rev'd in part and aff'd in part*, *Cabral v. Sullican*, 961 F.2d 998, 1003 (1st Cir. 1992) (noting provisions of Section 1292(b) are flexible).

344. *Martin v. Johnson*, 813 F. Supp. 122, 126 (D.N.H. 1992).

345. *Id.* at 122.

346. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 516, 532 (1995).

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Childhood Vaccine Injury Act bars the family of person who accepted award under act from bringing tort suit. ³⁴⁷						
Order denying motion for reconsideration as to ruling exempting accidental death and dismemberment policy from ERISA coverage because policy was not endorsed. ³⁴⁸	×	³⁴⁹				
Order finding that employees had standing to sue for treble damages under Clayton Act. ³⁵⁰	×	³⁵¹				
Order denying application for judgment by default. ³⁵²	×					
Order in tortious interference action denying motion to dismiss for lack of personal jurisdiction. ³⁵³	×					
Declaratory order as to rate applicability being within primary jurisdiction of the Interstate Commerce Commission. ³⁵⁴		×	×	³⁵⁵		

347. Schafer v. Am. Cyanamid Co., 20 F.3d 1, 7 (1st Cir. 1994).

348. Johnson v. Watts Regulator Co., No. 92-508-JD, 1994 WL 421112, at *1 (D.N.H. Aug. 11, 1994).

349. *Id.* at *2 (declining to certify “the real difference of opinion is between defendants’ and the court’s application of the law to the particular facts of this case”).

350. Ashmore v. Ne. Petroleum Div. of Cargill, Inc., 855 F. Supp. 438, 439 (D. Me. 1994).

351. *Id.* at 440 (holding that “an interlocutory appeal would cause a delay of at least several months in the pretrial development of this case and, even if the issue of standing under the Clayton Act were resolved in full, no factual issue or litigants would be removed from the case.”).

352. MacFarlane v. McKean, No. 92-614-SD, 1994 WL 255311, at *1 (D.N.H. June 8, 1994).

353. McCarthy v. Azure, No. 92-523-SD, 1994 WL 263682, at *1–2 (D.N.H. Jan. 25, 1994).

354. United Parcel Serv. Inc. v. Chadwick’s of Bos. Ltd., 900 F. Supp. 557, 560 (D. Mass. 1995).

355. *Id.* at 567 (stating that “[b]ecause of the complicated issues of jurisdictional law implicated by the doctrine of primary jurisdiction and because of the possibility of conflicting decisions in this case by two different United States Courts of Appeals, the findings and orders contained herein

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Order denying motion to dismiss on <i>forum non conveniens</i> . ³⁵⁶	× ³⁵⁷					
Order on summary judgment denying assignee of inventor amendment of patent. ³⁵⁸		×	×			×
Order in tort suit as to manufacturer denying motion to dismiss premised on lack of standing. ³⁵⁹	×					
Order pertaining to issue of whether disability policy procured though fraud and misrepresentation. ³⁶⁰	×					
Order on motion for partial summary judgment granting motion on grounds that alleged activities were non-infringing of patent. ³⁶¹		× ³⁶²	×		×	
Order in civil rights action dismissing amended complaint for failure to comply with limitations imposed by court. ³⁶³	×					
Order in libel action denying motion to dismiss seeking	×					

are particularly appropriate for” interlocutory review).

356. *Zane S. Blanchard & Co. v. PSPT Ltd.*, No. 92-660-SD, 1995 WL 17211933, at *1–2 (D.N.H. Sept. 20, 1995).

357. *Id.* at *1 (rejecting a request to certify due to the “clearly discretionary nature of the challenged ruling, the age of the litigation, and the circumscribed authority vested in” the court under § 1292(b)).

358. *Stark v. Advanced Magnetics, Inc.*, 29 F.3d 1570, 1572 (Fed. Cir. 1994) (noting conclusively that “order meets the statutory criteria” and that “district court and parties which for the court to address the relevant issues”).

359. *Pacamor Bearing, Inc. v. Minebea Co., Inc.*, 892 F. Supp. 347, 361 (D.N.H. 1995) (noting that while standing is generally a controlling question of law, certification is not appropriate in this case as it is not dispositive).

360. *Protective Life Ins. Co. v. Sullivan*, 892 F. Supp. 299, 300 (D. Mass. 1995).

361. *Abtox, Inc. v. Exitron Corp.*, 888 F. Supp. 6, 7 (D. Mass. 1995), *aff’d*, 122 F.3d 1019, 1030 (1st Cir. 1997).

362. *Id.* at 9 (granting certification due to “novelty and complexity” of pertinent statutory provision).

363. *Veale v. Town of Marlborough*, No. 92-355-SD, 1995 WL 136902, at *1 (D.N.H. Mar. 22, 1995).

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dismissal based on lack of personal jurisdiction. ³⁶⁴						
Order on motion for partial summary judgment dismissing discrimination claims as time barred. ³⁶⁵	×					
Order in fraud action against cigarette manufacturers denying motion to dismiss asserting lack of personal jurisdiction. ³⁶⁶	×					
Order denying cigarette manufacturers action to enjoin enforcement of Massachusetts tobacco ingredient and nicotine yield reporting law based on preemption under Federal Cigarette Labeling and Advertising Act. ³⁶⁷		×	×		×	

364. *Faigin v. Kelly*, 923 F. Supp. 298, 299 (D.N.H. 1996) (showing California residents who brought libel action against New York residents who co-authored book that contained allegedly defamatory statements with thirty-six copies sold in N.H.).

365. *Iglesias v. Mutual Life Ins. Co. of N.Y.*, 918 F. Supp. 31, 33 (D.P.R. 1996).

366. *Barreras Ruiz v. Am. Tobacco Co.*, 977 F. Supp. 545, 549 (D.P.R. 1997) (denying the request for certification). The *Barreras Ruiz* Court stated:

[W]e find there is no substantial ground for difference of opinion: Far from dubious, we view the preliminary retention of jurisdiction over the Tobacco Institute as the only possible just action at this stage. Given the indisputably indistinguishable nature of the evidence for jurisdiction and that for the ultimate case, we see no possibility that the Court of Appeals would better resolve this issue than well-deserved further discovery and reassessment would. Because this matter cannot be resolved with any greater delay, appellate review would actually delay the ultimate termination of this litigation.

Id.

367. *Philip Morris, Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997) (stating that preemption “is an issue naturally appropriate for interlocutory [review]” and “that it would be going too far to say there is no substantial grounds for any difference of opinion on such a case of first impression”), *aff’d*, 122 F.3d 58 (1st Cir. 1997) (stating that Massachusetts statute not expressly or impliedly preempted by either Federal Cigarette Labeling and Advertising Act or Comprehensive Smokeless Tobacco Health Education Act of 1986).

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Order denying motion to dismiss and ruling that patent infringer's antitrust claim was not a compulsory counterclaim. ³⁶⁸		×		×		
Order in banking action denying motion to dismiss seeking dismissal under <i>forum non conveniens</i> . ³⁷⁰	×					
Order granting a motion to dismiss in part holding that district was not immune from punitive damages under Title IX. ³⁷¹		×	×			
Order dismissing federal copyright and trade dress infringement claims but not state law claim for tortious interference with contractual relations. ³⁷⁴	×					
Order in franchise termination action as to jurisdiction. ³⁷⁵	×			×		

368. *Longwood Mfg. Corp. v. Wheelabrator Clean Water Systems, Inc.*, 954 F. Supp. 17, 19 (D. Me. 1997).

369. *Id.*

370. *Standard Quimica De Venez. v. Cent. Hispano Int'l, Inc.*, 189 F.R.D. 202, 208 (D.P.R. 1999) (stating that "it is true that unsettled jurisdictional questions are often appropriate for interlocutory review. Yet it is doubtful whether the issue here should be viewed in jurisdictional terms, given the degree to which it is intertwined with the merits.").

371. *Canty v. Old Rochester Reg'l Sch. Dist.*, 54 F. Supp. 2d 66, 68 (D. Mass. 1999).

372. *Id.* at 75 (granting certification and noting that "the stark division among the six circuits to consider Title IX's preclusion of Section 1983 actions certainly demonstrates a sufficient difference of opinion").

373. *Id.* at 74.

374. *Yankee Candle Co., Inc. v. Bridgewater Candle Co.*, 107 F. Supp. 2d 82, 89 (D. Mass. 2000) (Ruling involves "no more than application of well-established law, recently clarified by a unanimous Supreme Court opinion. Though a mistake is always possible, nothing in the rulings makes them especially debatable.").

375. *Seahorse Marine Supplies, Inc. v. P.R. Sun Oil*, 295 F.3d 68, 83 (1st Cir. 2002).

2014] *DISCRETIONARY INTERLOCUTORY APPEALS* 253*KNOWN DENIALS OF CERTIFICATION: 1986–2000*³⁷⁶

Number of Cases	21
No Controlling Questioned of Law	5
No Difference of Opinion	5
No Likelihood of Early Termination	8
Age of Litigation	2
Other	5

GRANTS OF CERTIFICATION AND APPEAL: RESULTS ON MERITS-1986–2000

Number of Cases Granting Certification and Permission to Appeal	21
Reversed	9
Affirmed	9
Reversed in Part Affirmed in Part	1
Merits Unknown	2

2001–2012

- Forty-seven cases where district court addressed certification request;
- Twenty-six cases where district court denied certification request;
- Twenty-one cases where district court granted certification request;
- Eleven First Circuit decisions where appeals were granted;
- Seven cases where First Circuit denied request to appeal;
- Three cases either were not pursued or not known.

376. The chart includes decisions where more than one reasons for the denial or permission to appeal were identified.

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Slightly less than half of the total petitions were granted (twenty-one of forty-seven or 44%) with the First Circuit only agreeing, at best, with the district court slightly more than half the time to permit the appeal (i.e. eleven times out of twenty-one (52%)). Of the eleven known grants of appeals by the First Circuit, seven were reversed on the merits (with two additional not known and two affirmed). The petitions for certification, as in the past, continued to vary with statutory interpretation or construction, a leading general category among the petitions that were granted.

As to district court denials of interlocutory petitions, six of the twenty-five denials were rote reference to the statute or its criteria with no discussion or application to the facts; eleven based on no substantial difference of opinion; six were based on a determination of no controlling question of law; seven relied on the lack of material advance termination of the litigation with two found to be untimely and one lacking any meaningful argument by counsel. The First Circuit denied one request to appeal, despite certification by the district court, holding that there was no grounds for difference of opinion as two other district court decisions had made similar holdings. It was reasoned that there was no evidence that granting the appeal would materially advance termination of the litigation since the remaining claims would otherwise continue based on the same underlying facts.

The specific cases and orders between 2001 and 2012 are summarized on the following page.

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TYPES OF ACTIONS AND ORDERS: 2001–2012

-The following key accompanies the table below with regard to the disposition of the corresponding cases in the table-

CD	<i>Cert. Denied</i>
CG	<i>Cert. Granted</i>
AP	<i>Appeal Permitted</i>
AD	<i>Appeal Denied</i>
MA	<i>Merits Affirmed</i>
MR	<i>Merits Reversed</i>

Order	CD	CG	A P	AD	MA	MR
Order requiring witness to submit to in camera inspection for purposes of disclosure of tip. ³⁷⁷	×					
Order on Motion for Protective Order holding that the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act) precludes a complainant from contesting United States Attorney's refusal to certify that a defendant employee of the federal government was acting within the scope of his office or employment. ³⁷⁸		×		× ³⁷⁹		
Order finding no preemption under Airline Deregulation Act of state law tort claims. ³⁸⁰	×					

377. *Lovejoy v. Town of Foxborough*, No. Civ. A.00-11470-GAO, 2001 WL 1756750, at *1 (D. Mass. Aug. 2, 2001) (denying certification as not involving a controlling question of law “but rather a decision about what weight to accord to the legitimate interests on both sides in order to strike an appropriate balance under all the circumstances”).

378. *Booten v. United States*, 233 F. Supp. 2d 227, 228 (D. Mass. 2002) (noting that “the question of whether a tort plaintiff may contest the government’s refusal to certify is a difficult one”).

379. *Id.*

380. *Stone ex rel Estate of Stone v. Frontier Airlines, Inc.*, 256 F. Supp. 2d

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Order in wrongful death action denying dismissal of claim against Palestinian Authority based on asserted immunity. ³⁸¹	×					
Order holding that Clayton Act permits worldwide service of process on alien corporate defendants in antitrust case. ³⁸²		×				
Order in civil RICO action that party's voluntary disclosure of privileged material to the government resulted in waiver of protections of privilege to third party. ³⁸³	×					
Order denying summary judgment motion made based the expiration of the statute of limitations. ³⁸⁴		×		×		
Order on summary judgment on issue of whether plaintiff harbor pilot was employee of Puerto Rico Ports Authority. ³⁸⁶		×	×			×

28, 47 (D. Mass. 2002).

381. *Estates of Ungar v. Palestinian Auth.*, 228 F. Supp. 2d 40, 50 (D.R.I. 2002) (stating that “certification should be reserved for unsettled questions of law” and that denials of motions to dismiss are not the proper subject for Section 1292(b) review).

382. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, No. MDL 1532, 2004 WL 1571617, at *1 (D. Me. Apr. 20, 2004) (noting that court’s agreement to certify issue based on defendants’ commitment that if their appeal is unsuccessful they will accept the outcome of any rulings litigated in this matter).

383. *In re Lupron Mktg. & Sales Practices Litig.*, 313 F. Supp. 2d 8, 9 (D. Mass. 2004) (although waiver of privilege ruling was “serious to the conduct of the litigation” there was no ground for difference of opinion as every Circuit but the Eight has ruled that voluntary disclosures to the government destroys attorney-client privilege).

384. *In re Mut. Life Ins. Co. v. N.Y. Premium Litig.*, 299 F. Supp. 2d 4, 5 (D. Mass. 2004).

385. One line ruling by First Circuit. First Circuit Judgment Dated April 22, 2004.

386. *Camacho v. P.R. Ports Auth.*, 267 F. Supp. 174, 177 (D.P.R. 2003) (presenting the issue of whether PRPA was a licensing board rather than plaintiff’s employer and noting that while other circuits have decided that a licensing body is not an employer under the ADEA., the question had not been addressed by First Circuit), *rev’d*, 369 F.3d 579 (1st Cir. 2004).

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Order on motion for judgment on the pleadings or in alternative summary judgment as where it was asserted that the Medicare Act and associated procedures were exclusive avenue of recovery by the United States of Medicare overpayments. ³⁸⁷		x	x		x	
Order pertaining to whether Workforce Investment Act precluded claim. ³⁸⁸		x		x ³⁸⁹		
Order denying summary judgment on issue of whether a regional diagnostic and treatment center which treats only ambulatory patients and has an emergency room independent of a hospital is subject to Emergency Medical Treatment and Active Labor Act. ³⁹⁰		x	x			x
Order denying motion to dismiss claim seeking overtime and other work related relief determining that piers area was not part of a federal enclave. ³⁹¹		x	x			x
Order pertaining to accrual of action under Class Action Fairness Act. ³⁹²		x	x		x	

387. U.S. v. Lahey Clinic Hosp. Inc., No. 03-10194-RWZ, 2004 WL 950448, at *1 (D. Mass. April 30, 2004), *aff'd*, 399 F.3d 1 (1st Cir. 2005)

388. Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7 (1st Cir. 2005).

389. *Id.* (determining that while the issue of whether the Workforce Investment Act precluded a Section 1983 suit was a controlling question of law, there were no grounds for a substantial difference of opinion of material advance of termination of litigation and two other district court decisions that had made similar holdings; the rest of the claims would otherwise continue based on the same underlying facts).

390. Rodriguez v. Am. Int'l Ins. Co. of P.R., 263 F. Supp. 2d 297, 298 (D.P.R. 2004), *rev'd*, 402 F.3d 45 (1st Cir. 2005).

391. Torrens v. Lockheed Martin Servs. Inc., 396 F.3d 468, 469 (1st Cir. 2005).

392. Natale v. Pfizer, Inc., 379 F. Supp. 2d 161, 182 (D. Mass. 2005) (noting that "case law to date demonstrates marked litigant confusion and disagreement."), *aff'd*, 424 F.3d 43 (1st Cir. 2005).

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Order that BOP regulations delaying plaintiff inmates transfer to a CCC were contrary to the BOP's statutory mandate and thus invalid. ³⁹³		×	×			×
Order pertaining to whether ERISA preempted state law claims against insurer, insurance agency and insurance agent stemming misrepresentations. ³⁹⁴		×		×		
Order concluding that “defendant had met the first prong of the <i>Faragher/ Ellerth</i> defense inasmuch as defendant had provided employees anti-discrimination policy which includes grievance procedure known to plaintiff.” ³⁹⁶	×					

393. *Muniz v. Winn*, 462 F. Supp. 2d 175, 183–84 (D. Mass. 2006), *rev'd*, *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008). The District Court stated that the “issue cries out for authoritative, prompt, precedential resolution in the First Circuit.” According to the court:

The judges in this District are divided; the inmates at FMC-Devens are apparently all apprised of this issue and form pleadings circulate freely among them, producing repetitive, time consuming, and only marginally productive litigation. What is more, habeas litigation is unfortunately slow and certain of these inmates stand to lose individual rights while these cases wend their ways through the courts. In this case, moreover, the relevant administrative agency, the BOP, has a legitimate and important role in interpreting and enforcing its organic statutory framework. It is clear that there exists a tangible, and presumably good faith, disagreement between certain of the district judges and the BOP, both branches have coequal powers of statutory interpretation, absent precedential guidance.

Id. at 183–84.

394. *Miara v. First Allmerica Fin. Life Ins. Co.*, 379 F. Supp. 2d 68, 70 (D. Mass. 2005).

395. Court in *Miara* noted that its ruling on the merits was “based on legal precedents in this circuit and on other circuits and “seems apparent to this Court,” but that “[n]evertheless, the rationale of this court serves as persuasive authority only, and, as [counsel] indicated binding direction from the First Circuit would clarify and put to rest the existing and abiding confusion in this circuit in this area of law.” *Id.* at 68.

396. *Perdomo-Rosa v. Corning Cable Sys.*, No. 02-2114(DRD), 2006 WL 695818, at *1 (D.P.R. Mar. 15, 2006).

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Order denying motion to dismiss action brought by Securities and Exchange Commission that was based on misappropriation theory of insider trading. ³⁹⁷		x	x		x	
Order denying request to dismiss complaint which request based on exhaustion requirements under Prison Litigation Reform Act. ³⁹⁸	x ³⁹⁹					
Order denying motion to dismiss asserting lack of jurisdiction and particularly “whether health care providers have enforceable rights under [] section 1983.” ⁴⁰⁰		x		x		
Order denying in part and granting in part motion for summary judgment in class action suit under section 1983. ⁴⁰¹	x					
Order in product liability action granting motion to dismiss based on lack of personal jurisdiction. ⁴⁰²	x					
Order denying motion to dismiss in qui tam claim for fraudulent payment and conspiracy to defraud under False Claim Act. ⁴⁰³	x ⁴⁰⁴					
“Order pertaining to requirements necessary for food producer to execute bond posted by distributors	x					

397. SEC v. Rocklage, 470 F.3d 1 (1st Cir. 2006).

398. Beltran v. O’Mara, No. Civ. 04-CV-071-JD, 2006 WL 240558 (D.N.H. Jan. 31, 2006).

399. *Id.* at *4 (finding that certification would not materially advance termination of litigation as remaining would proceed based on the same underlying facts).

400. National Medical Care, Inc. v. Rullan, No. Civ. 04-1812(HL), 2006 WL 130766, at *1 (D.P.R. Jan 13, 2006).

401. Tardiff v. Knox Cnty., 451 F. Supp. 2d 253, 256 (D. Me. 2006).

402. Amburgey v. Atomic Ski USA, Inc., No. 2:06-CV-149-GZS, 2007 WL 2028954, at *1 (D. Me. July 10, 2007).

403. United States *ex rel* McDermott v. Genentech, Inc., 518 F. Supp. 2d 289, 290 (D. Me. 2007).

404. *Id.* at 291–92 (noting that while the issue was subject to conflicting opinions in other circuits, existing First Circuit precedent left no grounds for difference of opinion).

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in relation to distributors previous action against food producer which had been dismissed for jurisdictional issue.” ⁴⁰⁵						
Orders pertaining to trustee process and particularly “whether property alleged to belong to Iran sought to be attached under” Terrorism Risk Insurance Act; whether foreign sovereign immunity applied under Foreign Sovereign Immunities Act; and whether “commercial use” exception of the Foreign Sovereign Immunities Act applied. ⁴⁰⁶		×		×		
Order in labor dispute denying request for conditional certification. ⁴⁰⁸	×					
Order denying motion to dismiss which motion was made on grounds of lack of subject matter jurisdiction under the first-to-file bar of the False Claims Act. ⁴⁰⁹	×					
Order denying in part motion to dismiss and for summary judgment on counterclaims in anti-trust and patent infringement action including tying counterclaim. ⁴¹⁰	×					

405. *Kellogg USA, Inc. v. B. Fernandez Hermanos, Inc.*, 553 F. Supp. 2d 56, 57–58 (D.P.R. 2007).

406. *Rubin v. Islamic Republic of Iran*, 541 F. Supp. 2d 416, 421 (D. Mass. 2008).

407. The First Circuit ruled that legal question of immunity was “bound up with factual question of ownership” and that “we prefer to resolve the legal question (if necessary) after ownership has been ascertained.” *Rubin v. Islamic Republic of Iran*, No. 08-8020 (1st Cir. August 11, 2008).

408. *O’Donnell v. Robert Half Int’l Inc.*, 534 F. Supp. 2d 173, 181 (D. Mass. 2008).

409. *In re Pharm. Indus. Average Wholesale Price Litig.*, No. 07-11618-PBS, 2008 WL 2778808, at *1 (D. Mass. July 15, 2008).

410. *Hypertherm, Inc. v. Am. Torch Tip Co.*, No. 05-cv-373-JD, 2008 WL 1767062, at *1 (D.N.H. Apr. 15, 2008).

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Order in contract based action denying motion for summary judgment where motion was based on alleged failure of plaintiff to satisfy the amount in controversy requirement for subject matter jurisdiction. ⁴¹¹	x					
Order pertaining to whether anti-trust claims preempted by federal securities laws. ⁴¹²	x					
Order in declaratory judgment action involving insurance coverage dispute granting partial summary judgment but denying insurer's request for repayment of amounts advanced to insured newspaper in libel lawsuit. ⁴¹³		x	x			x
Orders on summary judgment in action brought by inmates challenging validity of amendment to Massachusetts constitution disqualifying currently incarcerated inmates from voting in all Massachusetts elections with order denying judgment on the pleadings on inmate's Voting Rights Act claim but granting judgment on Ex Post Facto claim. ⁴¹⁴		x	x			x ⁴¹⁵
Order in declaratory judgment as to state regulation action pertaining to issue preclusion. ⁴¹⁶		x				

411. *Colon v. Blades*, No. 07-1380, 2009 WL 3347627, at *1 (D.P.R. Oct. 14, 2009).

412. *Dahl v. Bain Capital Partners*, 597 F. Supp. 2d 211, 213 (D. Mass. 2009).

413. *Emp'r's Reinsurance Corp. v. Globe Newspapers Co.*, No. 03-10388, 2006 WL 1738342, at *1, *6 (D. Mass. June 20, 2006), *vacated*, 560 F.3d 93 (1st Cir. 2009).

414. *Simmons v. Galvin*, 575 F.3d 24, 26 (1st Cir. 2009).

415. *Id.* at 45 (affirming and reversing in part).

416. *Lincoln-Dodge, Inc. v. Sullivan*, Nos. 06-07 S, 06-69 S, 2009 WL 578541, at *1 (D.R.I. Mar 4, 2009) (stating that "the issue transcends 'garden

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Order denying motion for judgment on the pleadings as to issue of whether Title II excluded employment discrimination claims. ⁴¹⁷	× ⁴¹⁸					
Order pertaining to issue of whether airline action for fraud against ticket purchasers was preempted under Airline Deregulation Act. ⁴¹⁹	×					
Order denying motion to remand and issue of ERISA preemption ⁴²⁰	×					
Order in environmental pollution action denying request to disqualify counsel. ⁴²¹	×					
Order denying motion to dismiss grand jury indictment. ⁴²²	×					
Order pertaining to issue of whether whistleblower provision of Sarbanes-Oxley Act extends protection to non-public affiliated in mutual fund industry. ⁴²³		×	×			×

variety legal argument' . . . [and] would materially advance the ultimate resolution of the case, limit piecemeal adjudication of issues and conserved judicial resources").

417. *Skinner v. Salem Sch. Dist.*, 418 F. Supp. 2d 186, 188 (D.N.H. 2010).

418. Court stated in denying certification:

"[Q]uestion [was] not so difficult and unsettled as to warrant the exceptional use of an interlocutory appeal. [While the issue] has divided federal courts of appeal[, First Circuit] has discussed issue at length in dicta and its analysis all but compel the conclusion the court reached which is the clear majority view. . . ."

Id. at 194 (internal citation omitted).

419. *United Air Lines, Inc. v. Gregory*, 716 F. Supp. 2d 79, 90–91 (D. Mass. 2010).

420. *Blue Cross & Blue Shield of R.I. v. Kossen*, 746 F. Supp. 2d 375, 385 (D.R.I. 2010).

421. *Southwire Co. v. Ramallo Bros. Printing, Inc.*, No. 03-1100, 2010 WL 446593, at *1 (D.P.R. Feb. 1, 2010).

422. *United States v. Rivera-Mercado*, 683 F. Supp. 2d 168, 171 (D.P.R. 2010).

423. *Lawson v. FMR LLC.*, 724 F. Supp. 2d 167, 168 (D. Mass. 2010), *rev'd*, 670 F.3d 61 (2012).

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Order finding violation of Massachusetts Tips Law. ⁴²⁴	× ⁴²⁵					
Order pertaining to issue of whether “presumption of prudence” applied to ERISA plan management claim. ⁴²⁶	× ⁴²⁷					
Order finding the first-to-file bar inapplicable to kickback claims. ⁴²⁸	× ⁴²⁹					
Order under criminal sentencing statute (2255) as to (a) ruling addressing whether under <i>McDonough</i> proof of actual or implied bias in jury and (b) whether the ruling and order under section 2255 is “civil” for purposes of 1292(b). ⁴³⁰		×				
Order in securities litigation denying motion to dismiss with issue being whether a class action filing by plaintiff union which lacked standing to sue as to the offering had an effect of tolling applicable statute of limitations. ⁴³¹		× ⁴³²		× ⁴³³		

424. *Matamoros v. Starbucks Corp.*, 789 F. Supp. 251, 251 (D. Mass. 2011).

425. Court, in denying certification, relied upon the fact that “the only remaining issue to be decided was damages” and that certification is “hen’s teeth rare.” *Id.* at 252 (internal citation omitted).

426. *Kenney v. State Street Corp.*, No. 09-10750, 2011 WL 4344452, at *6 (D. Mass. Sept. 15, 2011).

427. Court, in denying certification, noted that First Circuit has preferred awaiting record development to adopting the “presumption of prudence” rule and that certification would not “materially advance termination of litigation.” *Id.* at *5–6.

428. *United States ex rel. Banigan v. Organon USA, Inc.*, No. 07-12153, 2012 WL 3929822, at *2 (D. Mass. Sept. 7, 2012).

429. *See id.* (denying certification, court stated issue did not raise a controlling question of law).

430. *United States v. Sampson*, No. 01-10384, 2012 WL 1633296, at *1 (D. Mass. May 10, 2012).

431. *Plumbers’ Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 894 F. Supp. 2d 144, 150, 156–57 (D. Mass. 2012).

432. *See id.* at 158 (noting that neither the First Circuit nor the Supreme Court had addressed the issue and that “resolution of the certified question will conserve court, party, and non-party time and resources by clarifying

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Order dismissing federal prosecutors as defendants in section 1983 suit on grounds of absolute or qualified immunity and certain state defendants rejecting theory of duty to intervene. ⁴³⁴	×					
Order denying motion to dismiss as to issue of sham litigation exception to anti-trust immunity for those engage in protected activity. ⁴³⁵	× ⁴³⁶					
Order in misrepresentation and conspiracy/nuisance action denying request to remand which motion had been premised on lack of complete diversity. ⁴³⁷		×	×			
Order in FTCA action denying application of judgment bar under to section 2676 to companion <i>Bivens</i> claims. ⁴³⁹	×					

proper scope of action”).

433. *Plumbers’ Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 894 F. Supp. 2d 144 (D. Mass. 2013), *reconsideration denied Nov. 29, 2012*.

434. *Widi v. U.S. Dept. of Justice*, No. 1:11-cv-00113, 2011 WL 5877543, at *3–4 (D. Me. Nov. 23, 2011).

435. *P.R. Tel. Co. v. San Juan Cable, LLC.*, No. 11-2135, 2012 WL 4052018, at *4 (D.P.R. Sept. 13, 2012).

436. *See id.* (denying certification and noting that although First Circuit had yet to address the issue, “the Second and Ninth Circuits noted to share similar position and no [real] disagreement between the circuit courts of appeals exists.”).

437. *Fayard v. Ne. Vehicle Servs., Inc.*, 533 F.3d 42, 45 (1st Cir. 2008).

438. Court noted that district court had certified denial of remand order but that its (First Circuit) review would be based on jurisdiction resulting from accompanying denial of preliminary injunction with the review of the denial of the request for remand properly reviewable “as an ancillary matter.” *Id.*

439. *Donahue v. Connolly*, 890 F. Supp. 2d 173, 188 (D. Mass. 2012).

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GRANTS OF CERTIFICATION AND APPEAL: RESULTS ON MERITS-2001-2012

Number of Cases Granting Certification and Permission to Appeal	11
Reversed	6
Affirmed	3
Reversed in Part Affirmed in Part	1
Merits Unknown	1

VII. DISCRETIONARY PAUSE AND OBSERVATION

A. *Lack of Publicly Available Data As To Treatment*

One of the most striking observations of the review is the lack of publicly assessable data as to judicial treatment. There is no repository where with the number of petitions or their treatment are publicly available. Given both the discretion underlying the statute and the lack of review of any denials, disclosure is needed in regards to publication of both the substantive decisions and the statistics as to frequency and dispositions. The lack of openness or availability only thwarts public understanding, judicial accountability, and prevents any meaningful evaluation of this aspect of appellate adjudication.

B. *Potential Underutilization*

The lack of published or accessible data as to certification and requests for permissions to appeal under Section 1292(b) is surprising.⁴⁴⁰ The U.S. Administrative Office of the United States Courts keeps very detailed statistics as to all decisions of every federal court and as to individual caseloads, including the nature

440. It would appear that this data was once officially tracked and published. See Martin Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 109 n.106 (1975) (citing J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE: CASES & MATERIALS 872 (1968)).

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and types of cases filed and disposed of in any given year. This tracking and data has been eased and readily assimilated through the electronic filing and docketing. Similarly, each district court and circuit court departments publish and provide annual reports that also set forth substantial statistics as to the caseload and work of the courts for any given year. It would not seem difficult to include the Section 1292(b) certification requests to the district courts and petitions to the circuit courts as well as their dispositions in the yearly statistical publications. The survey reveals 164 total petitions under Section 1292(b) since the statute's inception. As mentioned, this is likely measurably lower than the actual number given because many petitions and appellate rulings are not reported or did not make their way into the Westlaw database. Even so, the true number of petitions is still likely relatively small compared to the number of cases, courts and pending appeals. Indeed, related statistics seem to bear this out. For instance, in a study of the Court of Appeals for the Federal Circuit there were a total of 117 Section 1292(b) petitions between October 1995 and 2010.⁴⁴¹ Another commentator estimated that only about 100 appeals under Section 1292(b) take place in a year. In 1999, Judge Weinstein indicated that in the ten years between 1989 and 1999, there were only 138 certified interlocutory orders under Section 1292(b) in the Second Circuit out of the more than 40,000 total appeals.⁴⁴² Using the First Circuit survey above there were approximately fifty-seven 1292(b) certification orders for the same period, which shows the circuit as substantially less busy than the Second Circuit in terms certification orders.

While there is no central repository for certification requests under Section 1292(b) made to the district court or upon presentation to the circuit courts, certain statistics are kept in the circuit courts as part of the Federal Court Management Statistics. For instance, the Federal Court Management tracks the number of "applications for interlocutory appeals which were terminated." The reported figures (which exclude the Federal Circuit) ranged

441. Hess et al., *supra* note 1, at 764.

442. Nat'l Asbestos Workers Med. Fund v. Philip Morris, 71 F. Supp. 2d 139, 161 (E.D.N.Y. 1999).

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between 217 to 347 per year between 1995 and 2010.⁴⁴³ Although not specifically explained in the table, the “applications for interlocutory appeals” would appear not to be limited to Section 1292(b) but include any basis for the interlocutory appeal including under Section 1291(a), bankruptcy orders, collateral orders, class action related orders and orders pertaining to refusal to enforce arbitration clauses to list a few. According to the same statistics, between 1992 and 2012, the First Circuit disposed of approximately 132 “applications for interlocutory review.”⁴⁴⁴ In yet another ad hoc statistical compilation, between 1985 and 1989 (fiscal years), there were fifty 1292(b) appeals filed in the First Circuit with only eleven transmitted onto the regular appellate docket.⁴⁴⁵

The small number of Section 1292(b) appeals may be due to the long-standing admonition that the statutory exception to the final judgment rule is to be used “sparingly” and “only in exceptional cases,” despite the absence of any such language in the statute itself.⁴⁴⁶ It has likewise been thought to be a result of the perception that district judges are reluctant to certify issues as it “increases the opportunities for reversal and ‘invites delay and

443. See *Judicial Facts and Figures Archive*, UNITED STATES COURTS (Jan. 5, 2014), available at http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures_Archive.aspx. The number of “applications for interlocutory appeals terminated” for the years 2000–2010 were as follows (excludes Federal Circuit): 2000=280; 2001=252; 2002=250; 2003=356; 2004=295; 2005=198; 2006=309; 2007=347; 2008=292; 2009=334; 210=346. *Id.*

444. The Management Statistics did not have interlocutory review statistics for the First Circuit for the years 2001, 2002, 2004 or 2005. Federal Court Management Statistics: Courts of Appeals (2005), UNITED STATES COURTS (Jan. 5, 2014), available at <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa2005.pl> (select “First Circuit” from drop-down menu, then on page two). They were also provided based on an average as a “per judgeship” estimated basis. See also Horton, *supra* note 12, at 980 (citing Diane B. Bratvold, How to Get Heard: Practical Advice on Interlocutory Appeals, FOR THE DEFENSE, Nov. 2010, at 35 (noting based on the Management Statistics that “in 2009 the federal court system received approximately 334 [certification requests] which represented two (2) certified request for each of the 167 circuit judges in contrast to the 50,564 pending appeals nationwide.”).

445. Solimine, *supra* note 10, at 1175, Table 1a.

446. Horton, *supra* note 12, at 980–81

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circuit interference.”⁴⁴⁷ In fact, a number of commentators have asserted that 1292(b) interlocutory review is under-utilized⁴⁴⁸ and criticized allowing district courts to certify as opposed to just the circuit courts to play the gate-keeping role.

C. *No Apparent District Court Predisposition*

Although the above survey likely under-reports the total number of petitions, it does provide a measurable sampling of what is published and accessible. This sampling, in turn, reveals a 65% allowance rate of interlocutory petitions by the district court (107 of 164 total petitions) and a 64% allowance by the First Circuit as to district court permissions (69 of 107). The relatively high percentage rate of district court grants of Section 1292(b) certifications is supported by, at least, one circuit study. Specifically, it has been noted that between 2008 and 2010, the reported grant rate of Section 1292(b) petitions was 72% in the Sixth Circuit.⁴⁴⁹ In a sampling of a ten-year period in the Second Circuit, it was noted that out of the 138 total district court certifications the Second Circuit granted 93 of them (i.e. 67%).⁴⁵⁰ The relatively high percentage rate of grants cuts against the reported view that district courts are reluctant to grant such

447. Robertson, *supra* note 161, at 762; see also Horton, *supra* note 12, at 981 (“The district judge has ‘strong incentive to refuse certification; when the judge chooses to certify, the judge is conceding that the questions is a troubling one, and thus, worthy of appellate attention and possible reversal.’”) (quoting Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 266 (2001)).

448. Horton, *supra* note 12, at 979–82 (discussing and noting commentators who have stated that Section 1292(b) is underutilized). At least one judge in a district court within the First Circuit has openly cited his reluctance under *Camacho*’s “hen’s teeth rare” admonition to grant 1292(b) certification requests stating “after 24 years as a judge in this circuit I cannot recall another occasion which I willing to make a 1292(b) certification.” *Lawson*, 724 F. Supp. 2d at 168.

449. See Bruce A Khula, *Can We Appeal That Now? Discretionary Interlocutory Appeal At the Sixth Circuit*, LEXOLOGY (May 4, 2012), <http://www.lexology.com/library/detail.aspx?g=72cdaade-7ef0-45b6-ac3b-637055f0fb84>. Cf. Solimine, *supra* note 10, at 1174 (stating that acceptance rate of certified orders under 1292(b) in the 1960s was approximately 50% and for certain years in the 1980’s 35%).

450. Nat’l Asbestos Workers Med. Fund v. Philip Morris, 71 F. Supp. 2d 139, 161 (E.D.N.Y. 1999).

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petitions due to concern of inviting reversal or unwarranted interference.⁴⁵¹

Further, the above statistics, skewed as they may be as to the actual number of petitions and denials, do demonstrate that a substantial percentage of the certifications and permitted appeals have resulted in a reversal (including at least in part) as to the merits of the underlying order. Particularly, between 1959 and 2012, out of a total of sixty-nine reported cases where both certification and permission to appeal were granted twenty-eight resulted in reversals, thirty-three in affirmances, four affirmed/reversed in part, and four merits unknown. This amounts to a 46% reversal or reversal in part (thirty-three out of sixty-nine) rate as to interlocutory appeals, a fairly hefty figure and is above the reversal rates for civil cases appealed after a final judgment. The reversal rate may be a reflection of the fact that many such issues are of first impression. Another theory is that the discretionary system of review influences circuit courts to limit acceptances to those case or issues “presenting obvious and un-burdensome errors and intolerable probable errors.”⁴⁵² Nonetheless, it remains that one of the purposes of Section 1292(b) interlocutory appeals is to alleviate costs and hardship of litigation through earlier resolution of a controlling question of law. Thus, a reversal of the substantive ruling, even in part,

451. The Federal Circuit statistics reveal a 34% grant rate by the Federal Circuit of 1292(b) certifications for the years 1995–2010. For the fiscal years 1966 through 1968, the number of petitions and allowances by the circuit courts were as follows: 68/36 (1966), 80/41 (1967), and 128/58 (1968). Redish, *supra* note 442, at 109 n.106 (citation omitted).

452. Glynn, *supra* note 7, at 251–52. Also, “the courts are likely to grant review of obvious and unburdensome errors because such errors, by definition, will be easy to spot and easy to correct.” Professor Glynn also argues that the converse is true:

[C]ourts are less likely to grant review when determining whether there is probable error is difficult or where correcting such error will be burdensome. In such circumstances, the court will have to invest more time to determine whether the order contains probable errors and then would have to expend significant time and resources correcting any such error. Such discentives are troubling because district courts are more likely to make errors when legal issues or application of legal principles are difficult and they need greater guidance in such areas.

Id. at 242

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before expenditure of resources on the entire litigation cannot be downplayed and is the very purpose behind the exception to the final judgment rule. Even where the merits are affirmed, there is finality in that the controlling legal question has been resolved, providing firm guidance to the parties.

D. *Not Limited to "Big-Complex" Cases*

The review of the types of actions and orders also demonstrates that it is difficult to specifically pigeon-hole or categorize for purposes of identifying those that are more likely to be certified and those that are not. As to the general types of actions, there was no discerning pattern. The types of actions constituting three (3) percent or more of the total certified are as follows:

Nature of Action	%
Anti-trust	5%
Civil Rights	5%
Constitution	4%
Contract	4%
Discrimination	7%
ERISA	7%
Labor	6%
Maritime	8%
Personal Injury/Wrongful Death	3%
Securities	6%

The remaining types of action were also diverse involving aviation, environmental, employment, banking, and civil RICO and prisoner disputes among others. Another type of issue is statutory construction, which, while prevalent, were diverse with over twenty-six different federal statutes subject to a certification request.⁴⁵³

453. The referenced acts include the Clayton Act, ERISA, False Claim Act, Clean Water Act, Airline Deregulation Act, Foreign Sovereign Immunities Act, Prison Litigation Reform Act, Class Fairness Act, Emergency Medical Treatment and Active Labor Act, Workforce Enforcement Act, Federal Employees Liability Reform Act, Title IX, Title VII, Federal Cigarette Labeling and Advertising Act, Medicare Catastrophic Coverage Act, Securities Acts, Financial Institutions Reform, Recovery and Enforcement

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As to the types of orders, they are also varied although there are certainly some general categories that were prevalent. For instance, jurisdiction, preemption, immunity and statutory construction rulings and issues are the more common subjects of certification requests and grants. For the most part, however, the circumstances are diverse and case specific. This is in keeping with the flexibility and trial judge focus of Section 1292(b) in which the particular circumstances of the case, its posture, and particularities are considered as to the determination of the advantages and disadvantages of interlocutory certification.⁴⁵⁴ It also debunks the position that only large or complex cases are, or should be, considered for interlocutory review. The statute makes no such distinction and the fundamental balancing between hardship and efficiency underlying the tension between the finality requirement and interlocutory appeal should be applicable to all cases.

Act, Depository Institutions Deregulation and Monetary Control Act, Labor Management Relations Act, National Traffic and Motor Vehicle Safety Act, EPA, Federal Water Pollution Act, Sherman Act, Rivers and Harbors Act, and FCTA. *See supra* Chart: Types of Actions and Orders 2001–2012.

454. Indeed, it supports the Fifth Circuit's early view of the statute:

Federal Judges from their prior professional practice, and more so from experience gained in the adjudication of today's complex litigation, were acutely aware of two principal things. First, certainty and dispatch in the completion of judicial business makes piecemeal appeal as permitted in some states undesirable. But second, there are occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, upon which in a realistic way the whole case or defense will turn. The amendment was to give the appellate machinery a considerable flexibility operating under the immediate, sole and broad control of Judges so that within reasonable time limits disadvantages of piecemeal final judgment appeals might both be avoided. It is that general approach rather than the use of handy modifiers which may turn out to be Shibboleths that should guide us in its application and in determining whether the procedure specified as been substantially satisfied.

Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702–03 (5th Cir. 1961).

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E. *No Dominating Statutory Factor With Over Reliance on “Rare and Exceptional”*

Out of the three statutory criteria for granting interlocutory review (question of law, substantial difference of opinion, and materially advance termination of the litigation), there was no dominating factor as to the sixty-nine district court denials of certification. The percentage breakdown between the statutory factors in the district court denials is as follows:

Statutory Criteria	%
Controlling Question of Law	25%
Substantial Grounds for Difference of Opinion	28%
Materially Advance Termination of Litigation	30%

Seventeen percent of the district court decision denying certification relied upon other reasons (in addition to or separate from the express statutory criteria) which reasons included: potential the requested issue would or could become moot, age of litigation, concern of overburdening appeals court, need for additional facts, and un-timeliness among others.

As set forth above, there is support that factors beyond those in the statute, such as those suggested by Judge Weinstein, may be considered.⁴⁵⁵ However, the First Circuit has not adopted such a view with only one district court decision within the First Circuit referencing the Weinstein factors. Notably, most of these factors seem to further inform the statutory criteria and thus may well enhance meaningful decision-making. For instance, the time an appeal would take, the age of the litigation, the potential for mootness, and the effect of reversal on remaining claims all seem to further elucidate and drill down as to the application of the “may materially advance termination of the litigation” factor. Moreover, whether there needs to be further factual development and/or a more sufficient record would inform the controlling question of law prerequisite.

Concern arises when considerations under the plume of “discretion” creeps and strays from the statutory language and intent. Given the myriad of possible considerations or factors and

455. *Nat’l Asbestos*, 71 F. Supp 2d at 161.

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no method or means to weigh one against the other, it gives a court the potential to justify any result. For instance, to the extent resort is made to only allowing such appeals in large, “complex” cases,⁴⁵⁶ denying certification due to concern for burdening the appeals court,⁴⁵⁷ or evaluating under the generic heading of “exceptional circumstances,” would not meaningfully inform the statutory criteria and application to the particular case. The result is a potential wayward looseness as well as an unwarranted restrictive application of the statute.

The use and reference to “rarity” or “exceptional circumstances” permeates a significant number of decisions in and within the First Circuit.⁴⁵⁸ Congress fully understood that any exception to the finality rule should be rare and used this understanding as the back-drop against which it debated whether to carve out a statutory exception. It proceeded to do so premising the exception on the three specific criteria set forth in the statute, which criteria represents the necessary justification for exception to the final judgment rule. The “discretion” under the statute is in the leeway given to judges to apply the criteria to a particular case or facts—not to further declare and decide the question under the general auspices of “exceptional circumstances” or other considerations not subsumed within the statutory factors. This expansive discretion, when coupled with no review, results in absolute, unfettered discretion with no limitations for principled decision-making.

F. *Cursory Analysis*

A related concern is that a number of district court certification decisions give only rote or cursory attention to the statutory criteria. The survey revealed that more than half of the district courts either lacked any written decision, merely made a rote recitation of the statute and its criteria, or were otherwise highly cursory in applying the statutory criteria to the facts and circumstances. This practice is contrary to both the specificity of

456. See, e.g. *Cummins v. Eg & G Sealol, Inc.*, 697 F. Supp. 64, 69 (D.R.I. 1988) (stating that “present action is not the type of complex, protracted litigation for which Section 1292(b) certification is appropriate”).

457. *Cummins*, 697 F. Supp. at 67; *Hoyt*, 108 F.R.D. at 189.

458. See *supra* text accompanying note 166.

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the statute as to the governing factors and its intent to rely on the district court's specialized knowledge. Moreover, the cursory reference to the statute without explanation and application of the factors to the specific circumstances makes the court of appeals' discretionary exercise more difficult and certainly adds little to the coherent understanding of the discretionary contours.

The First Circuit has thus far not seemed too concerned about the lack of specific application. In an early decision, it stated that the "scant recital" of the statutory criteria does not require denial of permission to appeal.⁴⁵⁹ A substantial argument can be made that the First Circuit cannot fairly undertake its function under 1292(b) in determining whether to permit the appeal as that function includes a review of the district court's discretionary application. While a denial of permission to appeal would be a harsh and perhaps an unwarranted penalty upon the parties for the trial judge's action, a remand for explication of a cursory order is certainly understandable. The remand would also be in keeping with both the appellate court function as well as serve public disclosure and understanding.

Similarly, there are virtually no First Circuit reported decisions providing any detailed analysis as to its own discretion. As to grants of permission, if reference is made, it is usually in a brief reference in the decision on the merits that permission was previously granted with sometimes a rote mention that the question was of "importance" or "pivotal."⁴⁶⁰ As to First Circuit denials of permissions to appeal, the First Circuit has issued a handful of decisions. In at least three of these, it revoked its prior permission. Otherwise, there are very little to no published or accessible opinions with meaningful analysis.

459. *Heddendorf v. Goldfine*, 263 F.2d 887, 889–90 (1st Cir. 1959) (noting the "scant recital" by the district court to Section 1292(b) certification criteria but refusing to deny the application for leave and addressing whether leave should be granted on its merits). *Compare* *WRIGHT ET AL.*, *supra* note 3, § 3929, at 442 ("a district court order certifying a 1292(b) appeal should state the reasons that warrant appeal as a guide to court of appeals consideration on the petition for permission of appeal. Some generosity may be shown in accepting a reasonable effort but a thoroughly deficient attempt may be found inadequate to support appeal.").

460. *See, e.g.*, *Marquis v. FDIC*, 965 F.2d 1148, 1151 (1st Cir. 1992) ("because of the importance of the jurisdictional question, and its unsettled nature, we accepted appellate jurisdiction" under Section 1292(b)).

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Additionally, denial of permission to appeal is noteworthy insofar as the First Circuit is opting to disagree with the district court's front-line assessment. Arguably, a certification by a district court is inherently trustworthy given the trial judge's familiarity with the case and determination that it will be helpful particularly as it is relinquishing control of the litigation and subjecting its own order to reversal. The statute certainly envisioned the right of the circuit court to disagree, yet more published opinions setting forth the reasoning would serve to further inform both the statute, accountability, and public understanding. As one commentator has noted, "a circuit court armed [with unfettered/unreviewable] discretion can ignore reversible error for any reason, without comment and without downstream consequences."⁴⁶¹

G. *No Mandamus Review*

The survey revealed that the First Circuit has rejected any effort to allow mandamus review of a district court denial of a request for certification.⁴⁶² The result is that district court denials of certification are un-reviewable even by mandamus. The rationale is that to allow mandamus review is to bypass the dual gate-keeping set out by the statute. However, neither the statutory text nor its history supports the view that district court discretion is unreviewable even by mandamus. Moreover, "[a] district court with no incentive to seek review of its actions and sheltered by unreviewable discretion is wide open to conscious and unconscious abuse."⁴⁶³ If an order meets the statutory criteria yet the district court denies the request, it would seem reasonable to allow the appellate court to consider whether there was a clear abuse of discretion. Otherwise, what results would be the complete absence of any institutional restraint as well as the disruption of the dual discretionary structure of the statute as the district court effectively deprives the appellate court of consideration.

461. Glynn, *supra* note 7, at 249.

462. See, e.g., *In re La Providencia Dev. Corp.*, 515 F.2d 94, 94 (1st Cir. 1975); *In re Maritime Serv. Corp.*, 515 F.2d 91, 91 (1st Cir. 1975); *Boreri v. FIAT S.P.A.*, 763 F.2d 17, 17 (1st Cir. 1985).

463. Horton, *supra* note 12, at 984.

VIII. CONCLUSION

The absence of definitive statistics as to Section 1292(b) treatment within the First Circuit makes it difficult to draw any definitive conclusions. Based on the available data, the number of certification petitions and grants are small suggesting that the statute remains under-utilized. This under-utilization is underscored by the relatively significant percentage of the certifications and acceptances of certifications being reversed in whole or in part on appeal as to the underlying merits. The survey likewise reveals that a significant portion of interlocutory decision-making is largely unpublished or publicly unavailable and marked, in many instances, by rote recitation of the statutory criteria with no meaningful application to the circumstances.

Moreover, to the extent available, the data does not reveal any strong predisposition against allowing such appeals although the First Circuit's long-standing admonition that such appeals are only available in "extraordinary" or "exceptional circumstances" continues to pervade the case law. The available decisions, as a whole, reveal that the certifications have not been limited to only large or complex cases with certifications being granted in a diverse range of cases and orders. Additionally, the decisions show a seemingly healthy regard and application of the statutory criteria on an individual case basis.

Lastly, the tracking and publicizing of the frequency of certifications and their substantive treatment is needed in order to fairly and better evaluate and understand interlocutory appellate decision-making. Interlocutory review remains a difficult topic with Congress's statutory grant of a discretionary exception demanding openness, accountability, and principled decision-making. Fundamental to the purpose of discretionary interlocutory review under Section 1292(b) is to enhance error correction and development of the law in individual cases and based on an open, accountable, and meaningful and principled application of the governing judicial discretion.