

A plaintiff sued a defendant in a federal district court for allegedly violating a recently enacted federal statute. The defendant moved to dismiss the plaintiff's complaint for failure to state a claim. The district court denied the defendant's motion, basing the ruling on a provision of the statute that has been interpreted differently by several district courts. In the written order denying the motion, the district court stated that "there is a substantial difference of opinion on the controlling question of law and an immediate appeal may materially advance the ultimate termination of this litigation."

Forty days after the district court entered this order, the defendant applied to the federal appellate court to hear the appeal of the order.

May the appellate court consider this appeal?

- A. No, because only a final judgment can be appealed.
- B. No, because the application for appeal was untimely.
- C. Yes, because an appellate court must consider an appeal if it is certified by the lower court.
- D. Yes, because an immediate appeal is required to avoid protracted and expensive litigation.

### Explanation:

Appellate courts may only hear appeals from a **final judgment**—ie, a decision that fully resolves a dispute on the merits and leaves nothing for the court to do but enforce the judgment—absent limited **exceptions**. One exception to this final-judgment rule arises when the **district court certifies** an interlocutory appeal by stating in a **written order** that:

- there is a **substantial difference of opinion** on the **controlling question of law** and
- an appeal may **materially advance** the **ultimate termination** of the litigation.

The party seeking an appeal must then **apply** to the appellate court **within 10 days** after the district court enters the order, and the appellate court will decide whether to hear the appeal (**Choices A & C**).<sup>\*</sup> Since the defendant here did not file an application for appeal until 40 days after the district court entered its order certifying the interlocutory appeal, the application was untimely. Therefore, the appellate court cannot hear this appeal.

<sup>\*</sup>An application for such an appeal will stay (ie, halt) the proceedings in the district court if the district or appellate court so orders.

**(Choice D)** The fact that an immediate appeal may avoid protracted and expensive litigation is not a basis for an interlocutory appeal. In fact, allowing interlocutory appeals may increase the cost of litigation if the litigants pursue repeated appeals instead of filing one appeal after final judgment is entered.

### Educational objective:

A district court may certify an order for appeal if it states in writing that (1) there is a substantial difference of opinion on the controlling question of law and (2) an appeal may materially advance the ultimate termination of the litigation. The application to the appellate court must be made within 10 days after the entry of the order.

### References

- 28 U.S.C. § 1291 (final-judgment rule).
- 28 U.S.C. § 1292(b) (district court certification).
- *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 745 (1976) (explaining that an application for appeal based on a district court's certification must be made within 10 days after the entry of the order).

## Final-judgment rule

