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13 Interlocutory Appeals of Certified Questions

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I. [13.1] INTRODUCTION

The Supreme Court Rules provide a mechanism for a party, under certain circumstances, to request certification of a question of law to the appellate court. Illinois Supreme Court Rule 308(a) provides that when the circuit court,

> **in making an interlocutory order not otherwise appealable, finds that the order involves a 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, the court shall so state in writing, identifying the question of law involved.**

The circuit court's statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party.

The current Rule 308 was adopted in 1967, replacing "former Rule 31 and its predecessor, former section 78 of the Civil Practice Act (Ill. Rev. Stat. 1961, ch. 110, par. 78)." Committee Comments, Ill.S.Ct. Rule 308 (Revised 1979). Rule 308 is broader than its predecessors and provides a more flexible approach to interlocutory practice. Moreover, it differs from its federal counterpart, 28 U.S.C. 1292(b), on which it was based, in that Rule 308(a) does not require the legal question to be controlling. Rule 308(a) differs from Rule 306, which applies to a group of particular interlocutory orders, in that the former focuses on questions of law regardless of the nature of the motion filed.

The purpose of Rule 308 is to promote judicial economy by permitting immediate review of a significant question of law that might expedite the disposition of the litigation. Deciding a certified question early may prevent unnecessary litigation by resolving with finality a critical question. In the end, this saves money and judicial resources. According to the Illinois Supreme Court:

> **"It is the absolute duty of the circuit court to follow the decisions of the appellate court." . . . If a circuit court "entertains genuine doubt about the continued vitality of a reviewing court decision," the proper manner in which to proceed in a complex or protracted case is to rule in accordance with existing law and to enter a Rule 304(a) (155 Ill.2d R. 304(a)) finding or certify the question for interlocutory appeal under Rule 308 (155 Ill.2d R. 308). [**Citations omitted.**]** *In re R.C.*, 195 Ill.2d 291, 745 N.E.2d 1233, 1238, 253 Ill.Dec. 699 (2001).

A trial court cannot simply dismiss a ruling of a higher court on the ground that it is dicta.

Rule 308 is considered an exception to the general rule that only final orders are subject to appellate review. Interlocutory appeals involving certified questions are to be used sparingly. *Morrissey v. City of Chicago,* 334 Ill.App.3d 251, 777 N.E.2d 390, 394 – 395, 267 Ill.Dec. 587 (1st Dist. 2002); *Koch v. Spalding,* 174 Ill.App.3d 692, 529 N.E.2d 19, 23, 124 Ill.Dec. 302 (5th Dist. 1988).

As with all appellate court filings after July 1, 2017, electronic filing rules apply to Rule 308(a) applications.

A. [13.2] When Does a Substantial Ground for Difference of Opinion Exist?

The first prong of Ill.S.Ct. Rule 308(a) requires that the order involve a question of law as to which there is "substantial ground for difference of opinion." The rule offers no guidance as to what constitutes a substantial ground for difference of opinion, but Illinois caselaw suggests that two types of issues lend themselves to the certification procedure — cases of first impression and cases when there are conflicting opinions among the appellate court districts. *See Costello v. Governing Board of Lee County Special Education Ass'n*, 252 Ill.App.3d 547, 623 N.E.2d 966, 191 Ill.Dec. 376 (2d Dist. 1993) (first impression); *In re Estate of Newcomb*, 6 Ill.App.3d 1094, 287 N.E.2d 141 (3d Dist. 1972) (conflicting authority).

In *Hampton v. Metropolitan Water Reclamation District of Greater Chicago*, 2016 IL 119861, 57 N.E.3d 1229, 1233, 405 Ill.Dec. 131, the Illinois Supreme Court chose to answer the following certified question:

> **Does *Arkansas Game and Fish Commission v. U.S.*[,] --- U.S. ---, 133 S.Ct. 511, 184 L.Ed. 2d 417 (2012), overrule the Illinois Supreme Court's holding in *People ex rel. Pratt v. Rosenfield*, 399 Ill. 247, 77 N.E.2d 697 (1948)[,] that temporary flooding is not a taking?**

Justice Burke disagreed with the majority's decision to answer the question, noting there could be no "substantial ground for difference of opinion" because it is blackletter law that the U.S. Supreme Court has no authority to overrule the Illinois Supreme Court's interpretation of its own constitution. 2016 IL 119861 at ¶9. Nevertheless, in the interest of judicial economy, Justice Burke agreed with the majority's decision to address the substance of the question.

In *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill.App.3d 992, 803 N.E.2d 1020, 281 Ill.Dec. 399 (2d Dist. 2004), the appellate court held there was a substantial ground for difference of opinion as to whether a multistate class action might proceed in light of the "actual deception" requirement. Moreover, in addressing the question, the court also noted that multistate class actions place a tremendous burden on the state's court system and taxpayers, and they have significant consequences for absent class members who would be bound by an Illinois judgment.

The Illinois rule is patterned after 28 U.S.C. §1292(b), and as such, Illinois courts may consult the federal cases interpreting that rule for guidance. *Voss v. Lincoln Mall Management Co.*, 166 Ill.App.3d 442, 519 N.E.2d 1056, 116 Ill.Dec. 841 (1st Dist. 1988).

B. [13.3] What Does "Materially Advances" the Litigation Mean?

The second prong of the test asks whether an immediate appeal from the order may materially advance the ultimate termination of the litigation. Essentially, the issue must be one that will either be dispositive of the case or one for which the resolution of the issue might result in avoidance of a long trial or elimination of a portion of the overall claim.