

**INADEQUATE REMEDIES AND INTERLOCUTORY APPEALS:
THE CHANGING FACE OF NON-FINAL APPELLATE REVIEW
AND ITS IMPLICATIONS FOR APPELLATE PRACTITIONERS**

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Introduction: The Common Denominator of Non-Final Appellate Review

The classical model of appellate review limits appeals primarily to final judgments. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001); *North East Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893 (Tex.1966). But like so much of the traditional legal model, that model of appellate review is changing to accommodate modern demands for efficiency and a heightened sensitivity to the burdens of litigation. As a result, “non-final” appeals are becoming a more prominent part of appellate practice.

There are two avenues to “non-final” appellate review: interlocutory appeals and original proceedings (primarily mandamus). Those two devices are ordinarily thought of in distinct terms, and they are usually treated separately at conferences and in opinions. But I see them as two sides of the same coin, and I propose that appellate lawyers should think about them interchangeably.

There is one common denominator for all avenues to “non-final” appellate review, whether by mandamus or by interlocutory appeal: They are available when immediate appellate review is necessary to protect interests that will be lost forever if an appeal must wait until after trial.

The most familiar exposition of that principle is the “inadequate remedy” prong of mandamus review, which holds that mandamus will not lie unless the relator has no adequate remedy by an ordinary appeal. *See, e.g., Walker v. Packer*, 933 S.W.2d 833 (Tex. 1992). Devoted readers of the

TEXAS SUPREME COURT JOURNAL, and especially fans of Justice Baker’s dissenting opinions, will be very familiar with that principle.

Although there is no doctrinal element like the “inadequate remedy” requirement for interlocutory appeals, it seems to me that the same basic policy guides those appeals. Interlocutory appeals are allowed by statute when immediate review is necessary to protect interests which will be lost forever if appeal must wait until after final judgment. Interlocutory appeals and mandamus review do not differ in *kind*, but only in *degree* – the fundamental difference is in the way the “inadequate remedy” judgment is made.

For mandamus, the “inadequate remedy” determination is left to the appellate courts in the common-law tradition. The familiar categories discussed by the Supreme Court in *Walker v. Packer* identify those categories of orders that the courts have concluded, over the years, warrant immediate review. *See Walker*, 933 S.W.2d at 843-44.

On the other hand, interlocutory appeals represent situations in which the Legislature has made the “inadequate remedy” decision, deciding that prong by statute rather than leaving it to the courts. This juxtaposition is best illustrated by cases where the lines blur. For example, the Legislature has provided a statutory right to “mandamus” review of mandatory venue determinations without including the “inadequate remedy” element. TEX. CIV. PRAC. & REM. CODE § 15.0642; *In re Missouri P. Ry.*, 998 S.W.2d 212, 215 (Tex. 1999); *In re Continental Airlines*,

Inc., 988 S.W.2d 733, 735 (Tex. 1998). Although it is technically titled a right to “mandamus,” that statute is functionally tantamount to an interlocutory appeal.

In short, the thesis of this paper is that interlocutory appeals and mandamus review are the same procedure, with different bases for immediate review.

I. The Inadequate Remedy Requirement of Mandamus Doctrine

Traditionally, mandamus review was the only avenue for “non-final” review of most interlocutory orders because the right to interlocutory appeal was very limited.

Before considering the rapid explosion of interlocutory appeals over the last decade, it is helpful to recall the traditional bases for mandamus review – and the limitations on that right to “non-final” review.

As every appellate practitioner knows, the leading case on mandamus is *Walker*, which reaffirmed the “inadequate remedy” test for mandamus: “The requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a ‘fundamental tenet’ of mandamus practice.” *Walker*, 933 S.W.2d at 840.

Most pretrial rulings are not reviewable by mandamus – even if they impose a great deal of burden and expense on the parties. “An appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.” *Walker*, 827 S.W.2d at 842. Only orders that implicate special interests that will be lost forever if forced

to await final judgment are appropriate for mandamus.

The three categories of discovery orders discussed in *Walker* as appropriate subjects for mandamus review illustrate this basic common denominator. Mandamus will lie:

- (1) when a court erroneously orders disclosure of privileged materials, because the privilege cannot be restored after the materials have been disclosed;
- (2) when the party’s ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court’s discovery error, effectively denying a reasonable opportunity to develop the merits, so that the trial would be a waste of judicial resources; and
- (3) when a court disallows discovery and the missing discovery cannot be made part of the appellate record, or the trial court after proper request refuses to make it part of the record.

Walker, 827 S.W.2d at 843-44.

There are many other specific contexts that the courts have deemed appropriate for mandamus, but these familiar categories of discovery orders illustrate the basic point: Mandamus is appropriate only when the interest sought to be protected will be lost forever without immediate appellate review.

A controversial body of mandamus law, the “exceptional circumstances” doctrine,

often attracts criticism for being inconsistent with the “inadequate remedy” requirement. *E.g.*, *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (redistricting); *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1996) (venue for thousands of parties); *CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996) (special appearance in mass tort litigation with thousands of parties). But these cases are not really exceptions to the general rule – they permit mandamus when the facts are so exceptional that they pose a harm not just to the parties, but to the entire legal system. Thus, they are consistent with the basic common denominator of non-final review: They permit review of interests that will be lost forever without immediate review.

II. Evolution of Interlocutory Appeals in Texas Over the Last Decade

A. Legislative Expansion of the Right to Non-Final Appellate Review

It is interesting to compare the evolution of interlocutory appeals over the last decade to these background rules of mandamus law. In the last decade, the right to interlocutory appeal has expanded dramatically in Texas. Until 1989, the general interlocutory appeal statute in Texas was limited to three narrow categories of orders:

- (1) receivers or trustees;
- (2) class certifications; and
- (3) temporary injunctions.

See TEX. CIV. PRAC. & REM. CODE § 51.014 (Vernon Supp. 1989).

Our statute resembled the federal statute, which authorizes interlocutory appeals from: (1) orders related to injunctions; (2) orders related to receivers; and (3) certain admiralty cases. *See* 28 U.S.C. § 1292(a).¹

While the federal statute has remained fairly static over the last ten years, however, Texas has seen a dramatic expansion of the statutory right to an interlocutory appeal.

In 1989, the Legislature added a right to interlocutory appeal for orders denying a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(5) (Vernon Supp. 1990).

In 1993, the Legislature added a right to interlocutory appeal for orders denying a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73 of the Civil Practice and

¹ In addition, the Texas Arbitration Act allows interlocutory appeals from certain orders involving arbitration, in accordance with the provisions of the Uniform Arbitration Act. *See* TEX. CIV. PRAC. & REM. CODE § 171.098 (Vernon Supp. 2004). That statute is similar (but not identical) to the appellate provisions of the Federal Arbitration Act. *See* 9 U.S.C. § 16(a).

Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(6) (Vernon Supp. 1994).

In 1997, the Legislature added a right to interlocutory appeal for orders granting or denying special appearances, and for orders granting or denying a plea to the jurisdiction by a governmental unit. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.014(7)-(8) (Vernon Supp. 1997).

In 2003, the Legislature added a right to interlocutory appeal for orders relating to expert reports in a health care liability claim. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.014(9)-(10) (Vernon Supp. 2004).

Thus, the last decade has witnessed a trend of creating new interlocutory appeals. Like rings on a tree, the Texas statute has grown in virtually every legislative session. The statute now contains a list of ten orders that are immediately appealable.

In addition to these ten particular orders, in 2001 the Legislature added a provision for “agreed” interlocutory appeals modeled after the federal permissive appeal statute. TEX. CIV. PRAC. & REM. CODE § 51.014(d) (Vernon Supp. 2004). That statute differs from the federal permissive appeal statute, 28 U.S.C. § 1292(b), in that it requires the parties to consent to the appeal. Otherwise, the Texas permissive appeal statute largely mirrors the federal statute.

During this same period, the Legislature also enacted several specific statutes that provide a right of interlocutory appeal. Although this paper does not attempt to catalogue them all, a few of these special statutes have had a significant impact on the dockets of the appellate courts.

For example, in 1990 the Legislature commanded the Texas Supreme Court to promulgate rules concerning sealing court records. *See* TEX. GOV’T CODE § 22.010 (Vernon Supp. 2004). In response, the Supreme Court promulgated Rule 76a, which includes a provision for interlocutory appeals from orders sealing court records. *See* TEX. R. CIV. P. 76a(8).

In 1995, the Legislature amended the venue statute to permit interlocutory appeals from venue rulings in multi-party cases involving the joinder of plaintiffs who could not independently maintain proper venue. *See* TEX. CIV. PRAC. & REM. CODE § 15.003 (Vernon Supp. 1995). In 2003, that statute was amended to expand the scope of review, including not only the joinder determination, but also whether plaintiffs in multi-party cases independently proved proper venue. *See* TEX. CIV. PRAC. & REM. CODE § 15.003 (Vernon Supp. 2004).

In 1999, the Legislature enacted a statute permitting an immediate appeal from orders denying a minor’s request for a court order allowing the minor to consent to an abortion without parental notification. That statute provided for accelerated decisions – within two days – and required that such appeals “shall be given precedence over other pending matters to the extent necessary to assure that the court reaches a decision promptly.” TEX. FAM. CODE § 33.004 (Vernon 2002).

In 2001, the Legislature enacted special provisions for appeals from certain orders affecting the parent-child relationship, specifically prescribing certain deadlines

and ordering the appellate courts that their decisions should be rendered “with the least possible delay.” TEX. FAM. CODE § 263.405 (Vernon 2002).

Thus, the last decade has witnessed a dramatic explosion in interlocutory appeals, with the Legislature increasingly identifying interlocutory orders that it considers too important to await final judgment before appellate review.

B. The Changing Face of Non-Final Appellate Review

This explosion of interlocutory appeals should be viewed as a legislative judgment about an increasing number of situations in which the Legislature believes the interests at stake are so important that they cannot be adequately protected by a traditional appeal. It is, in essence, a legislative judgment about the “inadequate remedy” requirement for non-final appellate review, taking that issue away from the courts and determining it by a bright-line statutory rule.

Many of these recent statutes are logical extensions of the “inadequate remedy” rule. For example, it is obvious that improper denial of immunity from suit cannot be cured after an appeal from a final judgment; at that point, the benefit of the immunity has been lost forever. Thus, the provisions for interlocutory appeal of orders denying pleas of official immunity or sovereign immunity are an extension of the “inadequate remedy” doctrine from mandamus law.

Similarly, the long-established right to interlocutory appeal from an order denying arbitration fits comfortably within the “inadequate remedy” framework. Indeed,

when the arbitration agreement is covered by the Federal Arbitration Act, mandamus is the appropriate vehicle to enforce the right. *In re Valero Energy Corp.*, 968 S.W.2d 916, (Tex. 1998); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271-72 (Tex. 1992). Because the benefits of arbitration can never be enjoyed if they cannot be enforced before a final judgment, non-final appellate review is essential vindicate the right.

Likewise, permitting immediate appeals from orders denying a minor the right to an abortion without parental notification may be the classic case of an order for which there is no “adequate remedy” by appeal.

Thus, many of the interlocutory appeal statutes are consistent with the classic model of the “inadequate remedy” requirement. What is interesting about these statutes is not that non-final appellate review is proper; it is that the Legislature did not leave that determination to the courts in the context of mandamus review, preferring instead to make a bright-line rule authorizing non-final appellate review.

By contrast, some of the new statutes do not lend themselves to the classic model. Instead, they reflect the current climate in which the Legislature is very sensitive to the expense and delay associated with litigation. Many of the recent interlocutory appeals reflect an institutional desire to end litigation early and to avoid the burdens of litigation, whenever appropriate.

In this way, the new interlocutory appeal provisions extend the “inadequate remedy” principle to include the expense

and delay of the legal system – effectively overturning, for those cases, the general proposition that an appeal is not inadequate “merely because it may involve more expense or delay.” *Walker*, 827 S.W.2d at 842.

That is certainly true of the right to appeal the denial of a special appearance. That 1997 statute had its roots in a series of special appearance cases in the mid-1990s that turned on the “adequate remedy” prong. *E.g.*, *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304 (Tex. 1994); *National Indus. Sand Ass’n v. Gibson*, 897 S.W.2d 769 (Tex. 1995); *CSR Ltd. v. Link*, 925 S.W.2d 591 (Tex. 1996). The Legislature terminated this debate by providing that all special appearances would be the subject of non-final appellate review, basically ruling, as a matter of statute, that defendants whose special appearances are denied have no “adequate remedy” by an ordinary appeal.

The same policy judgment is at work in the new statute allowing immediate review of venue decisions in multi-party litigation. These statutes reflect a basic policy of alleviating the burden and delay required to litigate a case to its conclusion if, in the end, the case is barred by a procedural defect.

Notably, both statutes have antecedents in the “exceptional circumstances” doctrine, where the Supreme Court extended its mandamus jurisdiction beyond the strict “inadequate remedy” categories of *Walker*. *See CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996) (special appearance in mass tort case with thousands of potential plaintiffs); *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1996) (improper

venue determination in case involving hundreds of plaintiffs). What is interesting about these statutes, however, is that the Legislature took a rule crafted for “exceptional” circumstances and applied it to the “ordinary” circumstance. Now *every* denial of a special appearance and venue ruling in multi-party litigation is ripe for non-final appellate review. Thus, the Legislature has turned a case-by-case determination into a bright-line rule.

To be sure, there is nothing intrinsically “right” or “wrong” about these judgments. It is entirely reasonable for the Legislature to consider the expense and delay associated with litigation as a legitimate justification for non-final appellate review in some cases, particularly in circumstances where there is concern that litigation may be used to extort unjustifiable settlements and defendants will be unable to obtain effective review after a final judgment. The challenge of this rule, however, is to provide a limiting principle.

The same rationale is easily extended to a wide variety of cases, and in a climate that is very sensitive to the burdens of litigation, interested parties can be very effective at securing rights to interlocutory appeals that only benefit particular classes of litigants (*e.g.*, the right to an interlocutory appeal for media defendants in libel cases and the right to appeal orders involving expert reports in health care cases). These special statutes may be the wave of the future in Texas.

III. Comparison to the Federal Model – The Road Not Taken.

The contrast between the recent trend in Texas and the federal model of “non-final” appellate review is striking. Rather than tinker with the interlocutory appeal statute,

28 U.S.C. § 1292(a), Congress has largely entrusted the development of “non-final” appellate review to the federal courts.

First, federal courts possess a flexible common-law rule for interlocutory appeals, the “collateral order doctrine” announced by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

To qualify for appellate review under the collateral order doctrine, the order in dispute must conclusively determine an important question that is completely separate from the merits of the action, and which would be “effectively unreviewable on appeal from a final judgment.” *Johnson v. Jones*, 515 U.S. 304, 310-11 (1995).

The collateral order doctrine has proved to be a supple tool in the hands of the courts, allowing common-law development of the need for non-final appellate review in many of the circumstances now addressed by statute in Texas. *E.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (official immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (sovereign immunity).

The collateral order doctrine entrusts the question of whether an interlocutory appeal is justified to the federal appellate courts. We might wonder whether the history of interlocutory appeals in Texas would be different if the Texas courts had developed a similar collateral order doctrine.

Two other avenues to immediate appellate review in federal court entrust that decision, in large part, to the district courts.

First, a federal judge can render a partial final judgment under FED. R. CIV. P. 54(b), rendering judgment on fewer than all claims and all parties if there is no reason for delay. That determination is left to the “sound judicial discretion of the district court.” *Curtiss-Wright Corp. v. General Elec. Co.*, 44 U.S. 1, 8 (1980).

Second, a federal district court can grant permission to appeal an interlocutory order on a controlling question of law as to which there is substantial ground for difference of opinion when an immediate appeal would materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b). In such cases, the court of appeals has the discretion to accept or refuse the appeal. *Id.* The federal courts do not grant § 1292(b) certifications lightly. *See, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). But the scope of this avenue for non-final review is left to the discretion of the courts.

The important point is not the details of these federal procedures, but that the federal avenues to non-final appellate review are much less categorical than the state practice, granting greater discretion to the courts in deciding when immediate appeal is proper.

Admittedly, there are some provisions for specific categories of appealable orders. *E.g.*, FED. R. CIV. P. 23(f) (class actions). But these specific interlocutory appeal rights are less common than in state practice and, with the exception of the class action rule, they rarely arise. Thus, unlike in state court, non-final review in federal

