

**MANDAMUS REVIEW OF INCIDENTAL RULINGS:
DOES B > D = IR?**

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MANDAMUS REVIEW OF INCIDENTAL RULINGS: DOES B > D = IR?

Mandamus relief, of course, requires both an abuse of discretion (or the violation of a legal duty imposed by law) and an inadequate remedy by appeal.¹ But when is a remedy by appeal inadequate for review of a trial court's incidental rulings? Never? That historically has been the general answer. Sometimes? That in recent years has been the answer under an "exceptional or compelling circumstances" test. Always? NO, but the question exists whether the new balancing test for inadequate remedy by appeal adopted by the supreme court in the last several years provides a broader standard that will allow review of more incidental trial court rulings. That balancing test asks the following question:

Do the benefits ("B") of mandamus review outweigh (>) the detriments ("D") of mandamus review and render (=) an appeal an inadequate remedy ("IR")?

It is not entirely clear that this test differs substantially or practically from the exceptional circumstances test of the past. Thus, as with the exceptional circumstances test, the answer under the balancing test is not always easy to predict. As a result, this paper explores the contours of inadequate remedy by appeal (1) to provide specific examples of when an appeal has been found inadequate to review incidental trial court rulings and (2) to develop general categories of circumstances that may meet the inadequate remedy by appeal standard for such rulings.

I. OVERVIEW OF INADEQUATE REMEDY BY APPEAL STANDARDS.

The supreme court has (as have intermediate courts) repeatedly held that an inadequate remedy by appeal is not shown by (1) incidental trial rulings in the routine course of proceedings, or (2) "mere" delay and expense of enduring a trial.² Courts define incidental

rulings to include "(1) pleas to the jurisdiction, (2) pleas of privilege, (3) pleas in abatement, (4) motions for summary judgment, (5) motions for instructed verdict, (6) motions for judgment non obstante verdicto, (7) motions for new trial, and [8] a myriad of interlocutory orders [including discovery orders]." *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985, orig. proceeding); see also *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969, orig. proceeding).

The supreme has "consistently held that [it] we lack[s] jurisdiction to issue writs of mandamus to supervise or correct incidental rulings of a trial judge when there is an adequate remedy by appeal....[even if] it might logically be argued that the petitioner for the writ was entitled, as a matter of law, to the action sought to be compelled." *Bell Helicopter*, 787 S.W.2d at 955. Nevertheless, the supreme court has long-recognized that, at least, "exceptional circumstances" can sometimes overcome both the mere delay or expense and incidental ruling bars to mandamus review.

A. Exceptional circumstances test.

Mandamus relief, as an extraordinary writ, has always required an inadequate remedy by appeal. Although not clear for a time whether that prong applied to discovery orders, the supreme court clarified its applicability in 1992. *Walker*, 827 S.W.2d at 840. The court adopted a three-prong test for discovery orders that has been used in broader contexts. *Id.* But with other types of rulings the courts used an exceptional circumstances test. Most recently, the supreme court adopted a balancing test that either changed or refined those tests (depending upon your view). *In re Prudential Ins. Co. of America*, 148 S.W.3d 124 (Tex. 2004, orig. proceeding).

1. Walker (discovery) categories of extraordinary circumstances.

In the discovery context, the supreme court recognized at least three categories of circumstances that sufficiently "extraordinary" to justify mandamus relief:

- (1) inability to cure discovery error (e.g., order to disclose privileged material or order to produce patently irrelevant or duplicative documents that clearly constitutes harassment or imposes a burden on the

¹ See, e.g., *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992, orig. proceeding).

² See, e.g., *Walker*, 827 S.W.2d at 840 ("appellate remedy not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ"); *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990, orig. proceeding) ("Generally, the cost and delay of pursuing an appeal will not, in themselves, render appeal an inadequate alternative to mandamus review.");

Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 306 (Tex. 1994) ("This requirement is met only when parties are in danger of permanently losing substantial rights. It is not satisfied by a mere showing that appeal would involve more expense or delay than obtaining a writ of mandamus."); *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648, 652 (1958) (same).

- producing party far out of proportion to benefit to requesting party);
- (2) vitiates or severely compromises a party's ability to present a viable claim or defense (e.g., denial of a reasonable opportunity to develop the merits of his or her case, so that the trial could be a waste of judicial resources as with death penalty sanctions);
 - (3) disallowed discovery and the missing discovery cannot be made part of the appellate record (e.g., protective order precluding deposition in which case evidence will not become part of the record). *Walker*, 827 S.W.2d at 840.

Other courts have analogized to these categories of circumstances in nondiscovery contexts to determine if an ordinary appeal would be an adequate remedy. *See, e.g., In re Allstate*, 85 S.W.3d 193 (Tex. 2002, orig. proceeding) (lack of contractual right to appraisal vitiates insurers defense to contract claim); *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 141 (Tex. 2004, orig. proceeding) (Phillips, C.J., dissenting) (appellate remedy is inadequate if it comes too late and permanently deprives a party of substantial rights).

2. Other exceptional circumstances.

The supreme court has allowed review of other incidental rulings in what have been deemed exceptional, unique or compelling circumstances.

For example, in the context of incidental rulings on personal jurisdiction, the supreme court has found an appeal inadequate in such circumstances as voluminous claims being improperly tried to create undue pressure to settle or comity concerns with foreign defendants. *See, e.g., CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996, orig. proceeding) (granting mandamus relief on overruling objection to jurisdiction when “[m]ass tort litigation...place[s] significant strain on a defendant’s resources and create[d] considerable pressure to settle the case, regardless of the underlying merits...[and] large number of lawsuits to which [defendant] could potentially be exposed [was] significant to [the] determination that appeal [was] not an adequate remedy” in that case); *Nat’l Indus. Sand Ass’n v. Gibson*, 897 S.W.2d 769, 776 (Tex. 1995, orig. proceeding) (mandamus granted for denial of special appearance when “erroneous assertion of jurisdiction was so arbitrary and without reference to guiding principles” that “the harm to the defendant [was] irreparable” by ordinary appeal; thus, the “total and inarguable absence of jurisdiction” justified extraordinary relief); *KDF v. Rex*, 878 S.W.2d 589, 593 (Tex. 1994) (comity and risk of harm to international relations for erroneous exercise of

personal jurisdiction over another sovereign justified mandamus review).

When there was a permanent deprivation of rights – similar to the first *Walker* category – the court also found a compelling reason for review. *See, e.g., Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996, orig. proceeding) (patently irrelevant and highly sensitive and personal documents ordered produced, an irretrievable loss of personal privacy). Conversely, when there was no permanent deprivation of a substantial right, the court refused to find compelling circumstances that warranted mandamus relief. *Polaris Inv. Management Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex. 1995, orig. proceeding) (venue subject to reversal and retrial on ordinary appeal).

There are a broad range of circumstances that could be compelling – often unique to the facts of a case – but some general categories (such as public policy) have always recurred. *See* Appendix A (attached hereto).

B. Balancing test (benefits > detriments).

More recently, the Texas Supreme Court adopted an arguably broader standard for inadequate remedy by appeal. According to the majority, “[t]he operative word, ‘adequate’ has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts....An appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.” *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 136-37 (Tex. 2004, orig. proceeding). There is no longer a bright-line rule barring review of incidental rulings, and the mere delay or expense bar is perhaps more easily trumped by an “utter waste of resources” analysis. While there is no longer a seemingly simple “exceptional circumstances” test, exceptional circumstances no doubt still play a role in the balancing of benefits and detriments. The question then is where is the line at which the detriments outweigh the benefits of awaiting an ordinary appeal?

The detriments of mandamus review weigh against disrupting trial proceedings with interlocutory appellate intervention. Mandamus review (1) interferes with trial court proceedings, (2) distracts appellate court attention to issues that may be unimportant both to ultimate disposition of the case at hand and to the uniform development of law, and (3) adds unproductively to expense and delay of civil litigation. *Id.*; *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969, orig. proceeding). Traditionally those detriments have been presumed to carry more weight in the analysis unless a showing of exceptional

circumstances tips the balance in favor of mandamus review and relief. *See, e.g., Pope*, 445 S.W.2d at 954. The current test does not clearly appear to begin from that point of deference, looking instead more heavily at the “utter” waste of resources caused by an unnecessary trial.

The benefits of mandamus vary. Although indicating that the balancing of the benefits and the detriments of an ordinary appeal “resists categorization,” the supreme court noted that “mandamus review of *significant rulings* in *exceptional cases* may be essential to [1] preserve important substantive and procedural rights from impairment or loss, [2] allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and [3] spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” *In re Prudential*, 148 S.W.3d at 136-37 (emphasis added).³ Looking at the “utter waste of resources” is a trend that began before *Prudential*. *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1998, orig. proceeding) (irreversible waste of resources by trying hundreds of cases in improper forum). With the focus on rights shifting from permanent deprivation to a broader “preservation” analysis, the “utter waste of resources” grows in significance.

“Effectively unreviewable” is a concept that federal courts have reviewed regularly in cases relying on the collateral order doctrine to seek an interlocutory appeal. Recently, the United States Supreme Court revisited the “effectively unreviewable” requirement, which mirrors to some extent the elusive issue or preservation of rights categories noted above in *Prudential*. *See Will v. Hallock*, 126 S.Ct. 952 (2006). The Court noted that the final order requirement is “meant to further: judicial efficiency and the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.” *Id.* The Court noted that effectively unreviewable requires some “compelling public ends” or “some particular value of a high order that would imperil a public interest is necessary.” *Id.* The Court concluded that a litigant’s right to an early end to litigation is insufficient to meet the compelling public end requirement to support appeal of an interlocutory order. *Id.* Texas law is not dissimilar: it seeks to protect public interests but will not do so merely to avoid or delay trial. On the other hand, Texas does not

restrict compelling circumstances to only those involving public interests.

In the mandamus context, the Fifth Circuit has held that a party must show not only clear and indisputable error but also that such error is “irremediable on appeal.” *In re Occidental Pet. Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). That court has noted: “Because it interposes an appellate court in a matter pending before a lower court, that is presumed to be more familiar with the circumstances of the case, a petitioner’s right must be clear and undisputable. Although it may obviate the need for improper or unwarranted proceedings, it cannot be used as a substitute for appeal, even when hardship may result from delay or an unnecessary trial.” *In re Ramu*, 903 F.3d 312 (5th Cir. 1990) (holding indefinite stay that deprived party of property including residence in matter not yet heard by court the circumstances were sufficiently extraordinary to warrant review). The Fifth Circuit also termed the “irremediable” prong as “effectively unreviewable.” *In re Avantel, S.A.*, 343 F.3d 311 (5th Cir. 2003). Such a standard again suggests a permanent loss of rights. The Fifth Circuit’s approach appears similar to what Texas traditionally has followed.

The effect of the new balancing test is not entirely clear. Does it encompass more cases than the “exceptional circumstances” test? Or is a different way of saying the same thing? What is clear is that (a) jurisdictional and general mandamus principles may affect the analysis and (2) there are certain categories of facts or circumstances that have and most likely will continue to tip the balance in favor of mandamus review.

II. SOURCE OF JURISDICTION MAY, IN PART, RELATE TO INADEQUACY OF REMEDY.

The sources of jurisdiction most often used to support a writ of mandamus to the supreme court or to a court of appeals appear in the Government Code. Other statutory bases also confer jurisdiction on the supreme court, the courts of appeals, and (sometimes) trial courts to grant writs of mandamus. Those statutory sources generally apply to very narrow circumstances, but when faced with a need to enforce certain statutory provisions or rights, a party should check the applicable statute for possible mandamus jurisdiction. Some of the statutory sources are listed in Section B below. As will be apparent from a review of the cases discussed in Section V below, where mandamus jurisdiction is specifically conferred, the likelihood of mandamus relief increases either because the inadequate remedy prong is statutorily eliminated or the public policy underlying the statute is a circumstance supporting an inadequate remedy by appeal.

³ The court also noted that mandamus review is preferable to enlargement of categories of interlocutory appeal. *Id.* at 137.

A. The Government Code.1. Supreme Court.

The supreme court may issue writs of mandamus against a district judge, court of appeals, a justice of a court of appeals, officers of the state government (except the governor), the court of criminal appeals, and a justice of the court of criminal appeals. TEX. GOV'T CODE § 22.002(a). That list does not include court or county officials other than judges. *See HCA Health Servs. of Texas, Inc. v. Salinas*, 838 S.W.2d 246, 248 (Tex. 1992) (orig. proceeding) (granting leave to file against judge but denying leave to file against district clerk). But the court may issue writs against such officers to protect the court's jurisdiction. TEX. CONST. Art. V, § 3. The court may also compel a district judge to proceed to trial and judgment. TEX. GOV'T CODE § 22.002(b). And the court has exclusive jurisdiction to mandamus a member of the executive branch to compel the performance of certain judicial, ministerial, or discretionary acts or duties. *Id.* § 22.002(c). These provisions together grant the supreme court broad powers to issue writs of mandamus.

2. Courts of Appeals

Courts of appeals may issue writs (1) against a county or district court judge or (2) to enforce the jurisdiction of the court. TEX. GOV'T CODE § 22.221(a), (b). As a result, a court of appeals may not issue a writ of mandamus against the court officials who are not judges (such as a district clerk, court reporter, or master) unless necessary to enforce the court's jurisdiction. *See, e.g., In re Strickhausen*, 994 S.W.2d 936 (Tex. App.–Houston [1st Dist.] 1999, orig. proceeding) (denying leave to file petition against court reporter when not necessary to protect court's jurisdiction); *Click v. Tyra*, 867 S.W.2d 406 (Tex. App.–Houston [14th Dist.] 1993, orig. proceeding) (granting leave to file petition against district clerk to preclude clerk from interfering with court's jurisdiction).

3. Trial Courts

A district or county court has jurisdiction to grant writs necessary to the enforcement of its jurisdiction. TEX. GOV'T CODE §§ 24.011, 25.0004, 26.051. Moreover, a party's statutory right to mandamus relief may begin with the trial court. *See, e.g., TEX. GOV'T CODE § 551.142(a)* (interested person, including member of media, can seek mandamus or injunction to stop or prevent violation or threatened violation of Open Meetings Act); § 552.321 (requestor or attorney general may seek mandamus to compel governmental body to make information available under Public Information Act); § 802.003 (party seeking to require governing body of public retirement system to comply with certain statutory requirements may seek

mandamus relief in district court); § 2306.452 (interested party may seek mandamus relief to enforce public housing bond obligations); TEX. INS. CODE § 823.013 (person aggrieved by failure of commissioner to act may seek mandamus relief in Travis County district court). The attorney general may seek mandamus relief in additional circumstances. *See, e.g., TEX. HEALTH & SAFETY CODE § 433.086* (food and drug regulatory requirements).

B. Other Statutory Bases of Jurisdiction.

Various statutory provisions confer mandamus jurisdiction on the supreme court or the courts of appeals. These express jurisdictional grounds often expressly or implicitly play a role in the inadequate remedy analysis. Some of the more common provisions include the following:

1. Venue.

The supreme court and courts of appeals may enforce mandatory venue provisions. TEX. CIV. PRAC. & REM. CODE § 15.0642. The "application for the writ of mandamus must be filed before the later of: (1) the 90th day before the date the trial starts; or (2) the 10th day after the date the party receives notice of the trial setting." *Id.* Review of mandatory venue by mandamus under section 15.0642 (1995) dispenses with the inadequate remedy requirement. *In re Missouri Pac. RR Co.*, 998 S.W.2d 212 (Tex. 1999, orig. proceeding). Otherwise, the statutory right to mandamus would be largely illusory or undermine the purpose of the immediate review. *Id.* On the other hand, "[a] court's ruling or decision to grant or deny a transfer [for the convenience of the parties or the witnesses] is not grounds for appeal or mandamus and is not reversible error." TEX. CIV. PRAC. & REM. CODE § 15.002.

2. Elections.

The supreme court and courts of appeals have jurisdiction to compel any duty imposed by law in connection with holding an election or a political party convention (even if the person responsible is not a public officer). TEX. ELEC. CODE § 273.061. The attorney general may seek a writ of mandamus to compel the filing of an annual voting system report. *Id.* § 123.065.

3. Open Meetings and Records/Public Information Act.

The supreme court and courts of appeals may enforce certain requirements of the statutory provisions governing open meetings and open records. TEX. GOV'T CODE §§ 551.142, 552.321.

4. Governing boards.

The supreme court and courts of appeals may enforce duties of certain governing boards, e.g., the housing authority, certain veteran assistance programs, the insurance commissioner. TEX. LOC. GOV'T CODE 392.101; TEX. INS. CODE § 823.013; TEX. NAT. RES. CODE § 164.019.

5. State bonds.

The supreme court and courts of appeal may issue writs against officials not satisfying state bond obligations. TEX. AGRIC. CODE §§ 58.036; TEX. LOC. GOV'T CODE § 325.089; TEX. TRANSP. CODE § 441.177; TEX. WATER CODE §§ 20.117, 65.513.

6. Injunctive Relief under Natural Resources Code.

The courts of appeals have jurisdiction to issue writs of mandamus to prevent enforcement of injunctive relief granted without notice or hearing. TEX. NAT. RES. CODE §§ 85.258, 85.259.

7. Attorney Discipline.

The supreme court may enforce orders in disciplinary proceedings. TEX. R. DISC. P. 3.09.

8. Concurrent Jurisdiction.

As is evident from a review of the above jurisdictional bases, the supreme court and the courts of appeals often have concurrent jurisdiction, including original jurisdiction over district and statutory county judges. Texas Rule of Appellate Procedure 52.3(e), however, provides that “the petition must be presented first to the court of appeals unless there is a compelling reason not to do so. If the petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals.” Tex. R. App. P. 52.3(e). Failure to do so would implicitly weigh in the balance of whether the supreme court would or should take a matter on extraordinary writ.

Election issues (usually in statewide elections) requiring immediate resolution represent the most common “compelling” context in which the supreme court will exercise its original jurisdiction prior to a court of appeals considering the issue. *See, e.g., In re Texas Senate*, 36 S.W.3d 119, 121 (Tex. 2000) (orig. proceeding) (Texas legislature scheduled to vote the day of the mandamus decision to select a lieutenant governor); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 94 (Tex. 1997) (orig. proceeding) (statewide application and short time frame of constitutional controversy regarding refusal of convention space to particular group supported mandamus review by supreme court prior to review by court of appeals); *Sears v. Bayoud*, 786 S.W.2d 248, 249-50 (Tex. 1990) (orig. proceeding) (state-wide

candidate’s eligibility for office). Usually, however, presentment first to a court of appeals is necessary to convince the supreme court to exercise its jurisdiction.

III. OTHER GENERAL MANDAMUS PRINCIPLES MAY WEIGH IN THE INADEQUATE REMEDY BALANCE.

In addition to jurisdiction principles, several general mandamus principles may play some role in the analysis of the adequacy of a remedy by appeal.

A. Mandamus does not act as a substitute for an ordinary (or interlocutory) appeal.

A writ of mandamus and an interlocutory appeal are not interchangeable. If you seek a writ of mandamus when an interlocutory appeal would have been the appropriate remedy by which to challenge a ruling, you may lose your opportunity for pre-trial appellate review. *See Raymond Overseas Holding, Ltd. v. Curry*, 955 S.W.2d 470, 471-72 (Tex. App.—Fort Worth 1997, no pet.) (interlocutory appeal provided adequate remedy by which to challenge special appearance and made mandamus relief inappropriate).⁴ In other words, an adequate appellate remedy existed.

If it is unclear which route to take (i.e., does the court have jurisdiction over the interlocutory appeal?) or different types or orders at issue, a party may want (or need) to take both routes. *See In re Tarrant Co. Hosp. Dist.*, 52 S.W.3d 434 (Tex. App.—Fort Worth 2001, orig. proceeding) (party perfected interlocutory appeal of an order on a plea to the jurisdiction and petitioned for mandamus relief as to orders on discovery sanctions). The supreme court recently confirmed that such dual track approaches may be necessary. *See In re D. Wilson Constr. Co.*, 2006 WL 1792021 (Tex. 2006) (unclear whether Texas or Federal Arbitration Act applied requiring dual approach).

⁴ Similarly, a court will not generally construe an ordinary appeal as a petition for writ of mandamus. *See Pinnacle Gas Treating, Inc. v. Read*, 13 S.W.3d 126, 127 (Tex. App.—Waco 2000, no pet.) (mandamus relief governed by Rule 52 could not be sought as alternative relief to save improper interlocutory appeal from dismissal for want of jurisdiction); *Thomas v. Texas Dept. of Crim. Justice*, 3 S.W.3d 665, 667 (Tex. App.—Fort Worth 1999, no pet.) (finding pleading did not satisfy requirements of Rule 52 and did not save a case from dismissal for late-filed notice of appeal). Justice Brister recently expressed his disfavor with a dual track practice, instead preferring in the face of uncertainty that party could file either and an appellate court treat is as appropriate. *See In re D. Wilson Constr. Co.*, 2006 WL 1792021 (Tex. 2006) (unclear whether Texas or Federal Arbitration Act applied requiring dual approach).

An agreed interlocutory appeal may, in limited circumstances, be available as an alternative to a mandamus, even if the subject of the order is not listed in Section 51.014(a) of the Texas Civil Practice & Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d). However, such an appeal allows a court to enter an “order for interlocutory appeal” that requires (1) “the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order.” *Id.* In the face of its limited scope and difficult procedural hurdles, the agreed interlocutory appeal does not appear to play a role in the inadequate remedy by appeal analysis (although a showing that one was denied or refused might in some circumstances carry some weight).

B. Lack of mandamus review does not waive error or later review.

Although the issue may sometimes become moot if the request for relief is delayed until the ordinary appeal, the decision not to seek mandamus review of a discovery ruling does not alone waive a right to raise the issue on appeal after trial. *See National Union Fire Ins. Co. v. Ninth Court of Appeals*, 864 S.W.2d 58, 62 (Tex. 1993) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 856 n.9 (Tex. 1992) (orig. proceeding); *Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex. 1990) (per curiam); *Forward v. Housing Auth. of City of Grapeland*, 864 S.W.2d 167, 170 (Tex. App.-Tyler 1993, no pet.). As a result, refusing review because an appeal is inadequate does not automatically result in a loss of rights or affect a party’s right to ultimate review.

C. Importance to jurisprudence of state may overlap or support showing of inadequate remedy by appeal.

Although not expressly or uniformly followed, the supreme court has noted it will not “grant mandamus relief unless [it] determine[s] that the error is of such importance to the jurisprudence of the state. *Walker*, 827 S.W.2d at 839 n.7. Rule 56.1 (although not specifically addressing petitions for writs of mandamus) sets out factors the supreme court considers in deciding whether an issue is important to the jurisprudence of the state. The listed factors include the following:

- (1) whether the justices of the court of appeals disagree on an important point of law;
- (2) whether there is a conflict between the courts of appeals on an important point of law;
- (3) whether a case involves the construction or validity of a statute;

- (4) whether a case involves constitutional issues;
- (5) whether the court of appeals appears to have committed an error of law of such importance to the state’s jurisprudence that it should be corrected; and
- (6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

TEX. R. APP. P. 56.1(a).

Also, for an analysis of opinions from the supreme court on this point, see Elizabeth V. Rodd, “What is Important to the Jurisprudence of the State,” 11th Annual Conference on State and Federal Appeals, University of Texas School of Law (2001). As the article points out, the court frequently determines statutory construction issues (an area which is often the basis for mandamus review of public policy issues) to be important to the jurisprudence of the state. *Id.* As a result, the two propositions overlap and may support each other in the inadequate remedy by appeal analysis.

D. Fact issues or insufficient record could preclude review by mandamus.

Several considerations limit an appellate court’s review for abuse of discretion. For example, the appellate court focuses on the record that was before the trial court. *In re Bristol-Myers Squibb Co.*, 975 S.W.2d 601, 605 (Tex. 1998) (orig. proceeding). Thus, an insufficient record in the trial court or appellate court can defeat mandamus review.

Additionally, “[w]ith respect to resolution of factual issues or matters committed to a trial court’s discretion, for example, the reviewing court may not substitute its judgment for that of the trial court.” *Walker*, 827 S.W.2d at 840. Indeed, appellate courts do not resolve factual issues, so the existence of any factual disputes not resolved by the trial court can defeat a request for mandamus relief. *See, e.g., West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding). Thus, the trial court’s resolution of (or failure to resolve) fact issues rarely supports mandamus relief.

“On the other hand, review of a trial court’s determination of the legal principles controlling its ruling is much less deferential. A trial court has no ‘discretion’ in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion” *Walker*, 827 S.W.2d at 840.

Even in the context of an election case in which inadequate remedy by appeal is a fairly low hurdle, fact issues will preclude review by mandamus. *See In*

re Angelini, 186 S.W.3d 558 (Tex. 2006, orig. proceeding).

IV. SPECIFIC CIRCUMSTANCES WHERE APPEAL HELD INADEQUATE REMEDY.

The charts attached hereto, Appendix A for inadequate remedy and Appendix B for adequate remedy by appeal, provide specific examples of the reasons relief has been allowed or disallowed. The charts are designed as a reference guide for specific reasons for specific rulings. From those specific reasons, the following sections then provide broad categories that may support relief under the “exceptional circumstances” or “benefits greater than detriments” balancing test. This categorical analysis is intended to provide a means of showing (or not) inadequate remedy when the order at issue is not in the charts or other unusual circumstances exist.

CAVEAT: Innumerable mandamus opinions exist from the last decades of petitions. The attached charts and categories below do not attempt to catalog every case, particularly the voluminous opinions on discovery disputes. Instead, the charts focus on opinions from the supreme court, opinions discussing incidental rulings, and opinions applying the new *Prudential* test. Those opinions are then synthesized into a series of fairly consistent themes and categories of circumstances when remedy by appeal may be inadequate.

V. GENERAL CATEGORIES WHERE APPEAL MAY BE INADEQUATE REMEDY.

From a review of primarily supreme court, incidental-ruling and *Prudential*-citing cases, the following general categories seem to recur commonly as circumstances in which appeal is an inadequate remedy. One should note that most cases involve more than one category, and indeed, the more of these fundamental propositions that are applicable to a case, the more likely that relief might be granted. Rarely is there one circumstance that tips the balance from the detriments of disrupting trial court proceedings.

A. Public interest or policy.

As in federal court, public interests or policy provide the largest, overarching category. The supreme court has noted that “[t]hese considerations [of balancing jurisprudential considerations] implicate both public and private interests.” *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 136-37 (Tex. 2004, orig. proceeding). “[T]he consideration whether to grant mandamus review [is not] confined to private concerns.” *Id.*; see also *In re Ford Motor Co.*, 2005 WL 1252290 (Tex. 2005) (citing *Prudential* and noting “we have explained that determining whether a party has an adequate remedy by appeal requires a ‘careful balance of jurisprudential considerations’ that

‘implicate both public and private interests’”). Thus, “[g]ranting mandamus relief ... is entirely consistent with the decisions of [the supreme court] that hold irreversible harm to the public’s interest makes a remedy by appeal inadequate.” *In re Woman’s Hosp. of Texas, Inc.*, 141 S.W.3d 144, 149 (Tex. 2004) (Owen, J., dissenting from denial of writs). A broad range of public policies or interests can be implicated as shown below.

1. Public interest set out in legislatively mandated scheme.

Showing inadequate remedy by appeal may be made easier if the legislature has already agreed that the circumstance at hand should be addressed in a certain manner as a matter of public policy or to protect public interests. The following examples describe legislatively mandated schemes (along with other reasons in some instances) that supported mandamus relief:

- ◆ Hardship of forcing party to endure full blown trial and enduring postponed appellate review despite **administrative agency’s exclusive jurisdiction** combined with fact “permitting a trial to go forward would interfere with the important **legislatively mandated function and purpose of the PUC**” justified mandamus review. *In re Entergy Corporation, et al.*, 142 S.W.3d 316 (Tex. 2004, orig. proceeding) (emphasis added). In essence, a disruption of **orderly processes of government**. *Id.* see also *Tex. Water Comm’n v. Dellana*, 849 S.W.2d 808, 810 (Tex. 1993, orig. proceeding) (failure to exhaust administrative remedies); *In re Tex. Mut. Ins. Co.*, 2005 WL 1763562 (Tex. App.—Dallas 2005, orig. proceeding) (interference with Workforce Commission’s exclusive jurisdiction).
- ◆ **Statutory/legislative policy provides condemns substantial right to expedited hearing** and possession of easement immediately after commissioners file findings such that refusal to grant 60 day continuance review by appeal inadequate. *In re Gulf Energy Pipeline Co.*, 884 S.W.2d 821 (Tex. App.—San Antonio 1994, orig. proceeding). Failure to stay **vitiating and rendered illusory right to a rapid, inexpensive alternative to traditional litigation**. *Id.*
- ◆ **Injunction barring grievance proceedings** that **interfered** with State Bar Act and disturbing “the **orderly processes of government**” justified mandamus review. *State v. Sewell*, 487 S.W.2d 716, 719 (Tex. 1972, orig. proceeding, emphasis added); see also *State Bar of Texas v. Jefferson*, 942 S.W.2d 575, 575-76 (Tex. 1997, orig. proceeding) (granting mandamus relief when

court had no jurisdiction to enter temporary restraining order to interfere with and stay administrative grievance proceedings).

- ◆ Refusing to review unpreserved charge error in family law case, in part, because the **legislature has established a public policy of speedy resolution of matters affecting the child's best interest**. *In re B.L.D.*, 113 S.W.3d 340, 353 (Tex. 2003) (emphasizing that the Texas Family Code requires dismissal of parental-termination proceedings within one year subject to a single 180-day extension and therefore concluding that "judicial economy is not just a policy – it is a statutory mandate").
- ◆ Dissenting justice argued mandamus appropriate when "injury to public that cannot be remedied by appeal [for failure to dismiss as legislatively mandated under article 4590i when expert report requirements not met] is the adverse impact on the cost and availability of health care to patients in Texas...When suits continue to proceed through the system...the **costs of those proceedings unalterably add to the overall cost of defending health care claims. This is precisely the evil that the Legislature sought to eliminate** when it mandated dismissal..." *In re Woman's Hosp. of Texas, Inc.*, 141 S.W.3d 144, 149 (Tex. 2004, orig. proceeding) (Owen, J., dissenting from denial of writs) (emphasis added).
- ◆ **"Considering the legislative intent evident in the statutes sanctioning and encouraging the professional-review process and the public interest served by an efficient and expeditious determination of whether [the defendant doctor's] professional conduct negatively affects the quality of medical care at the hospital—a question that lies within the peculiar expertise of those participating in the process, the court clearly abused its discretion when it...interfer[ed] in the professional-review proceedings prior to their exhaustion under the bylaws. ... Governmental policy not only favors but promotes the professional-review process as a means of advancing the public interest in quality health care....Without mandamus relief, Relators and the public will be deprived of the benefits of the professional-review process and, most importantly, the public interest served by an efficient and expeditious review process will be defeated."** *Walls Regional Hosp. v. Altaras*, 903 S.W.2d 36, 43-44 (Tex. App.—Waco 1994, orig. proceeding) (citations omitted and emphasis added).
- ◆ Public policy embodied in rules and statutes that **practice of law reserved to those of good moral character** and giving **continuing jurisdiction to**

BODA supporting mandamus relief. *In re State Bar of Tex.* 113 S.W.3d 730 (Tex. 2003, orig. proceeding); *State Bar of Texas v. Heard*, 603 S.W.2d 829 (Tex. 1980, orig. proceeding).

- ◆ **Interference with appraisal district and appraisal review board functions**, combined with unnecessary burden of **expense and delay** from trial supported mandamus relief. *In re ExxonMobil Corp.*, 153 S.W.3d 605 (Tex. App.—Amarillo 2004, orig. proceeding). **Number of other cases** involving common questions (36 similar questions in other district courts) further justified resolution by mandamus. *Id.*

2. Public interest in best interests of child.

The best interests of a child is another public interest routinely protected through mandamus relief. *See, e.g., Powell v. Stover*, 168 S.W.3d 322 (Tex. 2005, orig. proceeding) (proper remedy to resolve jurisdiction under UCCJEA); *In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006, orig. proceeding) (parties agreed best interests of child in grandparent visitation case made ordinary appeal inadequate); *In re Gray Law*, 2006 WL 1030206 (Tex. App.—Fort Worth, 2006, orig. proceeding) (citing *Prudential*) (funds deposited in registry of court deprived father of funds used in generating support for child); *Geary v. Peavy*, 878 S.W.2d 602, 603 (Tex. 1994) (public interest in best interest in child often justifies mandamus relief); *In re Oliver*, 2005 WL 1531712 (citing *Prudential*) (Tex. App.—Waco 2005, orig. proceeding) (best interests of child one factor in deciding inadequate remedy by appeal).

3. Public interest of comity and international relations.

Risk of harm to international relations may justify mandamus relief in context of erroneous exercise of personal jurisdiction over another sovereign. *KDF v. Rex*, 878 S.W.2d 589, 593 (Tex. 1994, orig. proceeding).

4. Public policy of encouraging service as legislator through legislative continuance.

The supreme court summarized the purpose and importance of a legislative continuance and why mandamus relief is appropriate as follows:

As our sister court summarized, a mandatory legislative continuance usually serves a dual purpose of encouraging good men and women to sacrifice their time in the interest of good government and of protecting a party to a law suit whose attorney may be serving in the Legislature. Without such a device, a lawyer-legislator could be forced to decide

between fulfilling the duty owed to a client and the duty owed to constituents to participate in a legislative session. The consequences of that decision--possibly nonparticipation in a legislative session--could not be remedied on appeal. **To give full effect to the Legislature's policy decision regarding legislative continuances**, we conclude that a party has no adequate remedy by appeal when a trial court abuses its discretion by denying a motion for legislative continuance.

In re Ford Motor Co., 2005 WL 1252290 (Tex. 2005, orig. proceeding) (quotation marks and citations omitted).

5. Fundamental public interest of confidence in the administration of justice.

"[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done." See *In re Chavez*, 130 S.W.3d 107, 115 (Tex. App.-El Paso 2003, orig. proceeding) (citations omitted). As such, mandamus relief was appropriate to review the ruling and preserve public trust in justice system.

6. Public interest in orderly administration of justice and comity.

The following are examples of when mandamus relief may preserve the orderly administration of justice:

- ◆ **One court interfering with the jurisdiction of another court by transfer or otherwise.** See, e.g., *In re Reliant Energy, Inc.*, 159 S.W.3d 624 (Tex. 2005, orig. proceeding); *In re U.S. Silica* 157 S.W.2d 434 (Tex. 2005, orig. proceeding); *In re The John G. & Marie Stella Kenedy Mem. Found.*, 159 S.W.3d 133 (Tex. App.—Corpus Christi 2004, orig. proceeding) (citing *In re Swepi*, 85 S.W.3d 800 (Tex. 2002, orig. proceeding).
- ◆ Denial of **statutory right to assignment of statutory probate court judge.** *In re Lewis*, 185 S.W.3d 615 (Tex. App.—Waco 2006, orig. proceeding) (citing *Prudential*).
- ◆ Refusal to stay **dominant proceeding in another state.** *In re State Farm Mut. Auto. Ins. Co.*, 2006 WL 1459985 (Tex. App.—Tyler 2006, orig. proceeding) (citing *Prudential*).
- ◆ **Indefinite abatements**/arbitrary suspension of trial court proceedings. *In re Sims*, 88 S.W.3d 297 (Tex. App.—San Antonio 2002, orig. proceeding).
- ◆ **Refusal of continuances for designation of experts or cure late jury fee** provides judicial economy favors jury trials and fair proceedings.

See, e.g., *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469 (Tex. 1997, orig. proceeding); *In re Oliver*, 2005 WL 1531712 (Tex. App.—Waco 2005, orig. proceeding) (citing *Prudential*).

7. Public interest in conserving judicial resources.

As noted above, the "utter waste of private and public" resources has grown as a theme for inadequate remedies by appeal. Initially, the sheer magnitude of cases involved would tip the balance; later cases look to absolute error particularly combined with loss or curtailment of statutory or contractual rights. The following are examples of cases where the waste of resources heavily weighed in favor of mandamus:

- ◆ "[A] trial in a forum other than that contractually agreed upon will be a **meaningless waste of judicial resources**" and justified review by mandamus. *In re AIU Ins. Co.*, 148 S.W.3d 109, 118 (Tex. 2004, orig. proceeding) (citing *Prudential*) (emphasis added) (contractual **forum selection clause**); see also *In re Automated Collection Tech., Inc.*, 156 S.W.3d 557 (Tex. 2004, orig. proceeding); *re Talent Tree Crystal*, 2006 WL 305015 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding) (vitiates and renders illusory any subsequent appeal).
- ◆ Appeal of denial of special appearance not adequate when defending the claims of more than **8,000 plaintiffs** in litigation that would last for years was *not mere* expense and delay. *In re E.I. duPont de Nemours & Co.*, 92 S.W.3d 517, 523-24 (Tex. 2002, orig. proceeding).
- ◆ Sua sponte improper transfer of venue of **hundreds of cases to sixteen counties** rather than county requested by defendant, although an incidental pretrial ruling, done with complete lack of authority justified mandamus where appeal after trial would be "an irreversible waste of judicial and public resources." *In re Masonite*, 997 S.W.2d 194, 199 (Tex. 1999, orig. proceeding) (emphasis added).
- ◆ "Concerns of judicial efficiency in **mass tort litigation** combined with the magnitude of the potential risk for mass tort actions against the defendant make ordinary appeal inadequate." *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996, orig. proceeding) ("[m]ass tort litigation ... place[d] significant strain on a defendant's resources and create[d] **considerable pressure to settle** the case, regardless of the underlying merits").
- ◆ "[E]rroneous assertion of jurisdiction was so arbitrary and without reference to guiding principles' that 'the harm to the defendant [was] irreparable' by ordinary appeal; thus, the **'total**

and inarguable absence of jurisdiction” justified extraordinary relief. *Nat’l Indus. Sand Ass’n v. Gibson*, 897 S.W.2d 769, 776 (Tex. 1995, orig. proceeding) (**mass tort litigation**).

- ◆ Party “lacks an *adequate* remedy by appeal of the trial court’s denial of her motion for continuance ... [because] [o]n a practical and prudential level, a trial of [the mother’s] claim for increased child support without a necessary expert, given the facts alleged, would be an **irreversible waste of private and public resources**. No sound principle or practicality that we can fathom would be served by requiring [the mother] to try her **claim for increased child support** now without a necessary expert and thus likely not prevail, and then appeal and try the case a second time on remand—when the child whose support is at issue will probably have reached majority—because the trial court should have granted her motion for continuance before the first trial.” *In re Oliver*, 2005 WL 1531712, *3 (Tex. App.-Waco, 2005 orig. proceeding) (relying on *Prudential*).
- ◆ “[R]equiring a defendant to go to trial without having his recusal motion ruled upon in compliance with Rule 18a is **patently unfair, as well as inefficient and wasteful of judicial resources**. ... Sometimes a remedy at law that exists may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate.’ ... [S]uch circumstances will also needlessly burden our state prosecutorial resources and will cause defendants and crime victims to endure yet another trip through the criminal justice system, which all parties could have avoided through the availability of appropriate mandamus relief.” *In re Chavez*, 130 S.W.3d 107, 115 (Tex. App.-El Paso 2003, orig. proceeding) (citations omitted).
- ◆ **Not allowing mandamus relief from refusal to allow designation of responsible third party.** Court held as follows: “In conducting our balance of jurisprudential considerations, we note that it is true that relators, under chapter 33 of the Civil Practice and Remedies Code, have a right to have one jury apportion liability among all responsible parties. It is also true that, in certain circumstances, a regular appeal of a trial court’s order denying a defendant its rights afforded under chapter 33 may be inadequate and that mandamus relief may be appropriate. We recognize that if relators eventually have to appeal the trial court’s ultimate judgment, conducting a second trial may result in a waste of judicial resources, compounded by the fact that the only available remedy will likely be to order a new trial, *as to all parties and all issues*, so that the

jury may apportion responsibility among all persons who should have been designated under the rules. However, we also have to recognize that, in spite of any error committed by the trial court, it is entirely possible that relators, and not the plaintiffs and intervenors, may ultimately prevail at trial. Moreover, it is entirely possible that other errors presented on appeal may necessitate the order of a new trial. Thus, **while we may consider the additional expense and effort of preparing for and participating in another subsequent trial, this factor does not, standing alone, justify mandamus relief if there is an adequate remedy by appeal.** As instructed by the supreme court in *In re Prudential*, we are mindful that mandamus relief should be used selectively and that the benefits of mandamus review are easily lost by overuse. Although the trial court’s order denying relators their right to designate responsible third parties is not a mere ‘incidental’ ruling, the instant case, a relatively straightforward personal injury action, is not ‘exceptional.’ We conclude that granting mandamus relief in this case would encourage litigants to seek mandamus review of all trial court rulings under chapter 33, even in cases, like here, that do not present extraordinary circumstances like those presented in *In re Arthur Andersen*. This would have the effect of adding unproductively to the expense and delay of civil litigation by enabling parties to seek extraordinary relief from appellate courts on rulings related to a trial court’s management of all kinds of cases, whether exceptional or not. ...As emphasized by the supreme court, whether mandamus relief is appropriate ‘depends heavily on the circumstances presented.’ Here, any benefits to mandamus review are outweighed by the detriments.” *In re Unitec Elevator Services Co.*, 2005 WL 1309049, *10 -11 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding) (citations omitted, emphasis added, and relying on *Prudential*).

B. Substantial procedural or substantive rights of parties.

1. Integrity of the judicial system/procedural rights.

In the following cases, the overarching theme is to protect the integrity of the system (although arguably a public interest as well) while ensuring a party’s procedural and due process right to a fair trial.

- ◆ **Consolidation.** “Whatever advantage may be gained in judicial economy or avoidance of repetitive costs [by consolidating twenty plaintiffs’ claims] is **overwhelmed by the greater danger an unfair trial would pose to the**

integrity of the judicial process.” *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 210-12 (Tex. 2004, orig. proceeding) (“Given the totally unrelated claims of plaintiffs exposed to entirely different chemicals produced by different defendants, consolidation risks the jury finding against a defendant based on sheer numbers, on evidence regarding a different plaintiff, or out of reluctance to find against a defendant with regard to one plaintiff and not another. The defensive theories as too many of these plaintiffs may also differ given the varying sources of exposure. The confusion created by multiple defensive theories is augmented in this case because there are fifty-five original defendants and at least nine remaining defendants. Similarly, confusion and prejudice could subsume the valid claim of a plaintiff based on an unrelated flaw or defense applicable to a different plaintiff’s claim. **Juror confusion and prejudice**, under these facts, is almost certain, and it would be impossible for an appellate court to untangle the confusion or prejudice on appeal.”).

- ◆ **Fee order.** Mandamus review allowed of order requiring a insurer to pay the plaintiff’s attorney fees as incurred in a compensation case because the order not only cost the carrier money but “**radically skew[ed] the procedural dynamics** of the case.” *Travelers Indemnity Co. v. Mayfield*, 923 S.W.2d 590, 595 (Tex.1996).
- ◆ **Preservation of appellate rights** (via doctrine of virtual representation). *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006, orig. proceeding) (citing *Prudential*).

2. Loss of procedural rights contractually agreed to.

One category (that includes the following several subsections as well) that appears to be growing after *Prudential* is a loss of procedural or substantive rights, including those acquired by contract.

- ◆ Lack of mandamus relief for refusal to **enforce arbitration agreement falling under Federal Arbitration Act** would deprive the party “of the **benefits of the arbitration clause** contracted for, and the purposes of providing a rapid, inexpensive alternative to traditional litigation would be defeated.” *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992, orig. proceeding); *see also In re Peterbilt, Ltd.*, 2006 WL 1651694 (Tex. 2006); *In re Dillard Dept. Stores*, 186 S.W.3d 514 (Tex. 2006); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005); *In re McKinney*, 167 S.W.3d 833 (Tex. 2005); *In re Wood*, 140 S.W.3d 367 (Tex. 2004); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87 (Tex. 1996); *In re Autotainment Partners Ltd. P’ship*, 183 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *In re Heritage Bldg. Sys., Inc.*, 185 S.W.3d 539 (Tex. App.—Beaumont 2006, orig. proceeding); *In re People’s Choice Home Loan, Inc.*, 2005 WL 2012769 (Tex. App.—El Paso 2005, orig. proceeding) (citing *Prudential*).
- ◆ **Denial of arbitration for nonsignatory.** *In re Vesta Ins. Group, Inc.*, 2006 WL 662335 (Tex. 2006, orig. proceeding); *In re Palm Harbor Homes, Inc.*, 2006 WL 1562546 (Tex. 2006, orig. proceeding); *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005, orig. proceeding); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732 (Tex. 2005, orig. proceeding).
- ◆ **Award of fees or costs in violation of arbitration clause.** *In re Kelley Bros., Inc.*, 2004 WL 2750236 (Tex. App.—Beaumont 2004, orig. proceeding).
- ◆ **Denial of benefit of jury waiver right contracted for – analogized to arbitration clause.** If win, no appeal. Loss of right harmless only if no material fact issues to submit to jury. A separate lawsuit for breach is inadequate remedy; a party could not collaterally attack any adverse judgment. *Prudential*, 148 S.W.3d at 136 (Tex. 2004, orig. proceeding) (additional reasons provided in “evades review” section below, see Appendix A); *see also In re Wells Fargo Bank Minn. N.A.*, 115 S.W.3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).
- ◆ **Denial of forum contractually agreed to analogized to arbitration clause.** *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1998, orig. proceeding).
- ◆ **Denial of abatement despite Examination Under Oath (EUO) clause in insurance policy** denied important procedural right. *In re Foremost County Mut. Ins. Co.*, 172 S.W.3d 128 (Tex. App.—Beaumont 2005, orig. proceeding) (quoting *Prudential*). “Spare the private parties and the public the **time and money utterly wasted** enduring eventual reversal of improperly conducted proceedings.” *Id.* (emphasis added).
- ◆ **Denial of statutory right under Residential Construction Liability Act** to inspect homes, make reasonable settlement offers and present defense to damages. *In re Kimball Homes Texas, Inc.*, 969 S.W.2d 522 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding). **Defense of suit compromised or vitiated.** *Id.*

3. Loss of substantive rights contractually agreed to.

- ◆ Employer **denied rights established in workers' compensation statute** if forced to try suit (rather than stay) prior to resolution of course and scope issue in carrier's suit. *In re Tyler Asphalt & Gravel Co.*, 107 S.W.3d 832 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).
- ◆ Lack of appraisal (which would determine whether breach occurred) **vitiates insurer's defense** and trying without stay **denied contractual right of appraisal**. *In re Allstate*, 85 S.W.3d 193 (Tex. 2002, orig. proceeding). Again **equated to arbitration clause**. *Id.*

4. Loss of other substantive rights/attorney of choice.

- ◆ **Deprived of counsel of choice/motion to disqualify**. *In re Hilliard*, 2006 WL 1113512 (Tex. App.—Corpus Christi 2006, orig. proceeding); *In re Harrell* 2000 WL 1140262 (Tex. App.—Amarillo 2000, orig. proceeding) (n.d.p.); *see also In re Cerberus Capital Mgt., L.P.*, 164 S.W.3d 379 (Tex. 2005) (disqualification); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (nondisqualification).
- ◆ **Deprived of counsel of choice/local counsel rule**. *In re El Paso Healthcare Sys., Ltd.*, 2005 WL 2241024 (Tex. App.—El Paso 2005, orig. proceeding) (citing *Prudential*).
- ◆ Denial of attorney access to documents not remediable on appeal when attorney of choice unable to perform duties for client at trial. *In re Norris*, 2004 WL 1535180 (Tex. App.—Fort Worth 2004, orig. proceeding).

5. Loss of property rights/enforcement issues.

Orders that deny funds necessary for personal or business or governmental operations – through a variety of mechanisms including premature enforcement, deposits into the registry of the court, garnishment, or the like – often qualify as orders for which an appeal is not an adequate remedy. It comes too late, and the deprivation often skews the trial process, affects another interest (such as those of a child), or implicates some right recognized by statute or rule. *See, e.g., In re Smith*, 2006 WL 1195327 (Tex. 2006, orig. proceeding); *In re Burlington Coat Factory*, 167 S.W.3d 827 (Tex. 2005); *Traveler's Indem. Co. v. Mayfield*, 923 S.W.2d 590 (Tex. 1996, orig. proceeding); *In re Gray Law*, 2006 WL 1030206 (Tex. App.—Fort Worth, 2006, orig. proceeding) (citing *Prudential*); *In re State*, 175 S.W.3d 532 (Tex. App.—Tyler 2005, orig. proceeding) (citing *Prudential*); *In re Deponte Investments, Inc.*, 2005 WL

248664 (Tex. App.—Dallas 2005, orig. proceeding); *In re Kroupa-Williams*, 2005 WL 1367950 (Tex. App.—Dallas 2005, orig. proceeding) (citing *Prudential*); *In re Tex. Am. Express, Inc.*, 190 S.W.3d 720 (Tex. App.—Dallas 2005, orig. proceeding).

6. Loss of election rights of voters or candidates.

Election cases – whether it is an issue of a stay, redistricting, place on the ballot or free speech in campaigning – frequently present the circumstances that require mandamus relief – an impending election with potential loss of voter or candidate rights. *See, e.g., In re Barnett*, 2006 WL 1042838 (Tex. 2006, orig. proceeding); *In re Carlisle*, 2006 WL 120292 (Tex. 2006); *In re Sharp*, 186 S.W.3d 556 (Tex. 2006, orig. proceeding); *In re Holcomb*, 186 S.W.3d 553 (Tex. 2006, orig. proceeding); *In re Francis*, 186 S.W.3d 534 (Tex. 2006, orig. proceeding) (citing *Prudential*); *In re Perry*, 66 S.W.3d 239 (Tex. 2001, orig. proceeding).

C. **Review of recurring legal issue that would otherwise evade review.**1. Refusal to quash jury waived by contract.

“The issue before us in the present case—whether a pre-suit waiver of trial by jury is enforceable—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur (it has already arisen in another case in the court of appeals, also on petition for mandamus). It eludes answer by appeal. In no real sense can the trial court's denial of [defendant's] contractual right to have the [plaintiff's] waive a jury ever be rectified on appeal. If [defendant] were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. If [defendant] suffered judgment on an unfavorable verdict, [defendant] could not obtain reversal for the incorrect denial of its contractual right ‘unless the court of appeals concludes that the error complained of ... probably caused the rendition of an improper judgment’. Even if [defendant] could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.” *Prudential*, 148 S.W.3d at 136-37.

2. Local procedural rules affecting large quantities of cases and counties.

“The issue—whether the local rules allowing transfer of cases from district courts to statutory county courts—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is **an issue of law, one of first impression** for this Court, but likely to recur. All cases pending in Dallas County are governed by the local rules and potentially affected by this decision. In

addition, other Texas counties may have the same or similar local rules and may face a similar issue. Because the trial court's erroneous ruling has a **far-reaching and imminent impact on the operation of courts in Dallas County and beyond**, we conclude mandamus relief is appropriate." *In re Siemens Corp.*, 153 S.W.3d 694, 699 (Tex. App.—Dallas 2005, orig. proceeding) (citations omitted; relying on *Prudential*).

D. Void orders.

Void orders, such as those entered **after expiration of plenary power** or those entered without subject matter or personal jurisdiction in family law matters, are reviewable by mandamus. *See, e.g., In re Canales*, 52 S.W.3d 698 (Tex. 2001, orig. proceeding); *In re S.W. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000); *In re Dickason*, 987 S.W.2d 570 (Tex. 1998). Not only is the court devoid of authority or jurisdiction, but it would waste everyone's time if forced to needlessly relitigate issues and add nothing that could change the result on subsequent appeal. *See In re Dallas Morning News*, 10 S.W.3d 298, 304 (Tex. 1999, orig. proceeding) (Gonzales, J., concurring).

E. Certain discovery errors.

As noted above, Walker, 827 S.W.2d at 843-44, established three categories of discovery rulings that fall within the purview of mandamus review.

First, a party will not have an adequate remedy by appeal when the appellate court would **not be able to cure the trial court's discovery** error. ...

Second, an appeal will not be an adequate remedy where 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. ...

Finally, the remedy by appeal may be inadequate where the trial 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**, and the reviewing court is unable to evaluate the effect of the trial court's error on the record before it."

For a sample listing for each type of error supporting mandamus review, see Appendix A, Discovery (1)-(3).

VI. SUMMARY

No matter the test used, some expansion of the scope of mandamus review appears to have occurred – partially to preserve scarce judicial resources, partially to reach issues important for resolution, and partially due to changing court compositions. The “utter waste of judicial resources” appears to trump the “mere delay or expense” bar of the past on a fairly regular basis, and the permanent deprivation of rights appears to have changed to a somewhat broader preservation of rights combined with an unnecessary trial – the rights

are not necessarily permanently lost in the event of a retrial.

On the other hand, the floodgate argument always hovers over any request to review an incidental pre-trial ruling – if mandamus were used to review every such ruling, it would consume vast appellate court judicial resources under the guise of conserving trial court judicial resources. Further, not even litigants would truly want *every* incidental ruling reviewable in the midst of trial proceedings.

If a party decides to seek mandamus review, the challenge is to understand the tension between the detriments and the benefits of a mandamus proceeding. With that understanding, one must demonstrate both a clear abuse of discretion and as many of the above inadequate-remedy-by-appeal themes or categories as possible to show the ruling at hand is truly one worthy of extraordinary relief.

APPENDIX A

RULINGS WITH INADEQUATE REMEDY BY APPEAL/MANDAMUS ALLOWED		
Category	Ruling	Reason(s) Appeal Inadequate
GENERAL RULE		If benefits outweigh detriments of mandamus, remedy by appeal inadequate. <ul style="list-style-type: none"> ■ Essential to preserve important substantive and procedural rights from impairment or loss. ■ Appellate courts give needed and helpful direction to that law that would otherwise prove elusive in ordinary appeals. ■ Spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.⁵
Abatement/ Stay	Denial of stay/abate/ratepayers action against electric utility.	<ul style="list-style-type: none"> ■ PUC exclusive jurisdiction. Trial court exercise of jurisdiction clear disruption of orderly processes of government. ■ Full-blown trial in court lacking jurisdiction.⁶
	Denial of stay in parallel actions (dominant jurisdiction)/ Congressional redistricting.	<ul style="list-style-type: none"> ■ Potential loss of substantial rights: very real threat that parties will not obtain final decisions in state courts before deadline set by federal courts. ■ Dual proceedings with two appeals and supreme court appeal posed intolerable risk that process would be incomplete in time remaining. ■ Right of Texas citizens to have districts drawn by state institutions so substantial that federal reasonably accommodates and defers to state solution. ■ Limits disruption of impending election cycle.⁷
	Grant of stay/dominant jurisdiction.	<ul style="list-style-type: none"> ■ No method to challenge abatement for indefinite period of time. ■ No arbitrary suspension of trial court proceedings.⁸
	Denial of stay in parallel actions/ negligence suit pending resolution of workers' compensation suit.	<ul style="list-style-type: none"> ■ Employer denied rights established in workers' compensation statute if forced to try suit prior to resolution of course and scope issue in carrier's suit.⁹
	Denial of stay in parallel actions/ pending resolution of Louisiana proceedings.	<ul style="list-style-type: none"> ■ "If the later action proceeds to trial and [insurer] prevails, it will not appeal and its right to stay is lost forever." ■ Comity overlay.¹⁰
	Denial abatement/insurer's motion to invoke appraisal.	<ul style="list-style-type: none"> ■ Equated to arbitration clause. ■ Lack of appraisal (which would determine whether breach occurred) vitiates insurer's defense.¹¹

⁵ *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004, orig. proceeding).

⁶ *In re Entergy Corp.*, 142 S.W.3d 316 (Tex. 2004, orig. proceeding); *see also Tex. Water Comm'n v. Dellana*, 849 S.W.2d 808, 810 (Tex. 1993, orig. proceeding) (failure to exhaust administrative remedies).

⁷ *In re Perry*, 66 S.W.3d 239 (Tex. 2001, orig. proceeding).

⁸ *In re Sims*, 88 S.W.3d 297 (Tex. App.—San Antonio 2002, orig. proceeding).

⁹ *In re Tyler Asphalt & Gravel Co.*, 107 S.W.3d 832 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

¹⁰ *In re State Farm Mut. Auto. Ins. Co.*, 2006 WL 1459985 (Tex. App.—Tyler 2006, orig. proceeding).

RULINGS WITH INADEQUATE REMEDY BY APPEAL/MANDAMUS ALLOWED		
Category	Ruling	Reason(s) Appeal Inadequate
	Denial of abatement despite Examination Under Oath (EUO) clause in insurance policy.	<ul style="list-style-type: none"> ■ Preserve important procedural right – EUO condition precedent to suit. ■ “Spare the private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.”¹²
	Denial abatement/no statutory notice on Residential Construction Liability Act.	<ul style="list-style-type: none"> ■ Denies statutory right to inspect homes, make reasonable settlement offer and present defense to damages. ■ Defense of suit compromised.¹³
	Denial of abatement (in child custody proceeding)	<ul style="list-style-type: none"> ■ Proper mechanism to require trial court to comply with UCCJEA. ■ Proper remedy to resolve jurisdiction under UCCJEA.¹⁴
Arbitration	Denial motion to compel (FAA).	<ul style="list-style-type: none"> ■ No interlocutory appeal under FAA (unlike TAA). ■ Denied bargained-for right to arbitration without mandamus relief.¹⁵
	Denial motion to compel nonsignatory.	<ul style="list-style-type: none"> ■ Same.¹⁶
	Ordering party to pay fees and expenses of arbitration.	<ul style="list-style-type: none"> ■ Outside proper boundaries of judicial intervention in proceeding subject to arbitration.¹⁷
Attorneys	Grant of disqualification motion.	<ul style="list-style-type: none"> ■ Deprive party of right to have counsel of choice. ■ Immediate and palpable harm. ■ Disrupt trial proceedings.¹⁸
	Grant of order declaring revocation license void.	<ul style="list-style-type: none"> ■ Interferes with BODA continuing jurisdiction. ■ Allowing attorney to practice law contradicts express provisions in Texas Rules of Disciplinary Procedure.¹⁹
	Denial of motion to suspend attorney license pending appeal	<ul style="list-style-type: none"> ■ Statutory mandate of suspension. ■ Interlocutory order from which appeal not allowed.

¹¹ *In re Allstate*, 85 S.W.3d 193 (Tex. 2002, orig. proceeding).

¹² *In re Foremost County Mut. Ins. Co.*, 172 S.W.3d 128 (Tex. App.—Beaumont 2005, orig. proceeding).

¹³ *In re Kimball Homes Texas, Inc.*, 969 S.W.2d 522 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding).

¹⁴ *Powell v. Stover*, 168 S.W.3d 322 (Tex. 2005, orig. proceeding).

¹⁵ *In re Peterbilt, Ltd.*, 2006 WL 1651694 (Tex. 2006); *In re Dillard Dept. Stores*, 186 S.W.3d 514 (Tex. 2006); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005); *In re McKinney*, 167 S.W.3d 833 (Tex. 2005); *In re Wood*, 140 S.W.3d 367 (Tex. 2004); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87 (Tex. 1996); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992); *In re Autotainment Partners Ltd. P’ship*, 183 S.W.3d 532 (Tex. App.—Houston [14 Dist.] 2006, orig. proceeding); *In re Heritage Bldg. Sys., Inc.*, 185 S.W.3d 539 (Tex. App.—Beaumont 2006, orig. proceeding); *In re People’s Choice Home Loan, Inc.*, 2005 WL 2012769 (Tex. App.—El Paso 2005, orig. proceeding).

¹⁶ *In re Vesta Ins. Group, Inc.*, 2006 WL 662335 (Tex. 2006, orig. proceeding); *In re Palm Harbor Homes, Inc.*, 2006 WL 1562546 (Tex. 2006, orig. proceeding); *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005, orig. proceeding); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732 (Tex. 2005, orig. proceeding).

¹⁷ *In re Kelley Bros., Inc.*, 2004 WL 2750236 (Tex. App.—Beaumont 2004, orig. proceeding).

¹⁸ *In re Hilliard*, 2006 WL 1113512 (Tex. App.—Corpus Christi 2006, orig. proceeding); *In re Harrell* 2000 WL 1140262 (Tex. App.—Amarillo 2000, orig. proceeding) (n.d.p.); *see also In re Cerberus Capital Mgt., L.P.*, 164 S.W.3d 379 (Tex. 2005) (disqualification); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (nondisqualification).

¹⁹ *In re State Bar of Tex.* 113 S.W.3d 730 (Tex. 2003, orig. proceeding).

RULINGS WITH INADEQUATE REMEDY BY APPEAL/MANDAMUS ALLOWED		
Category	Ruling	Reason(s) Appeal Inadequate
	of criminal conviction.	<ul style="list-style-type: none"> ■ Delay until all federal appeals final would render need for order moot. ■ Public policy embodied in rules and statutes that practice of law reserved to those persons of good moral character and fitness.²⁰
	Requiring local counsel.	<ul style="list-style-type: none"> ■ Litigant has right to counsel of choice and should be deprived of choice only for a compelling reason ■ No authority to require local counsel. ■ Significant economic burden to retain dual counsel. ■ Out-of-town attorney had not disrupted proceedings. ■ Attorney has right to practice law without undue restrictions. ■ Unnecessary waste and expense.²¹
	Interfering with attorney's representation.	<ul style="list-style-type: none"> ■ Denial of attorney access to documents not remediable on appeal when attorney unable to perform duties for client at trial.²²
Continuance	Denial of continuance to cure late jury fee.	<ul style="list-style-type: none"> ■ Special circumstances: error/mandamus relief regarding order regarding consulting/testifying expert resulted in judicial economy justifying mandamus relief to allow jury trial.²³
	Denial legislative continuance.	<ul style="list-style-type: none"> ■ Public policy to encourage good people to sacrifice time to serve in legislative positions. ■ Public policy of protecting litigant whose attorney serves in legislature. Could not fulfill both duties. ■ Consequences of disallowing mandatory continuance could not be remedied on appeal. ■ No due process exception to mandatory continuance shown.²⁴
	Denial continuance to obtain expert.	<ul style="list-style-type: none"> ■ Unopposed. ■ Expert necessary to try issue of increased child support. ■ Expert withdrew two weeks before trial. ■ Child's best interests at issue. ■ Trial without expert waste of private and public resources. ■ Proceedings to be little more than a fiction.²⁵
	Granting of 60 day continuance	<ul style="list-style-type: none"> ■ Statutory/legislative policy provides condemns substantial right to expedited hearing and possession of easement immediately after commissioners file findings. ■ Vitiating and rendered illusory right to a rapid, inexpensive alternative to traditional litigation.²⁶

²⁰ *State Bar of Texas v. Heard*, 603 S.W.2d 829 (Tex. 1980, orig. proceeding).

²¹ *In re El Paso Healthcare Sys., Ltd.*, 2005 WL 2241024 (Tex. App.—El Paso 2005, orig. proceeding).

²² *In re Norris*, 2004 WL 1535180 (Tex. App.—Fort Worth 2004, orig. proceeding).

²³ *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469 (Tex. 1997, orig. proceeding).

²⁴ *In re Ford Motor Co.*, 165 S.W.3d 315 (Tex. 2005, orig. proceeding).

²⁵ *In re Oliver*, 2005 WL 1531712 (Tex. App.—Waco 2005, orig. proceeding); *see also In re Posadas USA, Inc.*, 100 S.W.3d 254, 258 (Tex. App.—San Antonio 2001, orig. proceeding) (counsel withdrew five days before trial).

RULINGS WITH INADEQUATE REMEDY BY APPEAL/MANDAMUS ALLOWED		
Category	Ruling	Reason(s) Appeal Inadequate
Discovery (1)	Inability to cure discovery error. ²⁷	<ul style="list-style-type: none"> ■ Disclosure of privileged material.²⁸ ■ Production patently irrelevant or duplicative documents constituting harassment or burden on producing party far out of proportion to benefit to requesting party.²⁹ ■ Improper apex depositions.³⁰ ■ Physical exams not supported by rules.³¹
Discovery (2)	Severely compromises claim or defense. ³²	<ul style="list-style-type: none"> ■ Denial of reasonable opportunity to develop merits of case so that trial could be a waste of judicial resources.³³ ■ Death penalty sanctions.³⁴ ■ Withholding documents critical to case.³⁵ ■ Deemed admission of element of case.³⁶ ■ Monetary sanctions that preclude ability to proceed to trial.³⁷

²⁶ *In re Gulf Energy Pipeline Co.*, 884 S.W.2d 821 (Tex. App.—San Antonio 1994, orig. proceeding).

²⁷ *Walker v. Packer*, 827 S.W.2d 833, 843-44 (Tex. 1992, orig. proceeding).

²⁸ See, e.g., *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253 (Tex. 2005, orig. proceeding) (privileged documents); *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469 (Tex. 1997, orig. proceeding); *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218 (Tex. 2004); *In re Hewlett Packard*, 2006 WL 1295502 (Tex. App.—Austin 2006, orig. proceeding); *In re George*, 28 S.W.3d 511, 518-20 (Tex. 2000, orig. proceeding); *In re American Home Prods. Corp.*, 985 S.W.2d 68 (Tex. 1998, orig. proceeding); *In re Continental Gen. Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998), orig. proceeding); *In re Fort Worth Children's Hosp.*, 100 S.W.3d 582 (Tex. App.—Fort Worth 2003, orig. proceeding) (privileged documents).

²⁹ See, e.g., *In re Dana Corp.*, 138 S.W.2d 298 (Tex. 2004) (overbroad burdensome discovery); *In re CSX Corp.*, 124 S.W.3d 149 (Tex. 2003) (overbroad, irrelevant discovery); *In re American Optical Corp.*, 988 S.W.2d 711, 712-13 (Tex. 1998, orig. proceeding) (discovery demand to turn over “virtually every document ever generated” related to defendant’s products too broad and denounced as improper fishing expedition); *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996, orig. proceeding) (patently irrelevant and highly sensitive and personal); *In re Weir*, 166 S.W.3d 861 (Tex. App.—Beaumont 2005, orig. proceeding) (order requiring expert to reveal all accounting and financial records solely for impeachment overbroad and harassing); *In re Shipmon*, 68 S.W.3d 815 (Tex. App.—Amarillo 2001, orig. proceeding) (request for production not limited in time overbroad); *In re Energas Co.*, 63 S.W.3d 50 (Tex. App.—Amarillo 2001, orig. proceeding) (request for production without any limitation as to time to be overbroad but request covering city’s entire pipeline system not overbroad).

³⁰ See, e.g., *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 656-57 (Tex. 2000) (orig. proceeding) (citing *Crown Central Pet. Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995)); *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 177 (Tex. 1999) (orig. proceeding) (same).

³¹ *In re Cabelloro*, 36 S.W.3d 143, 145 (Tex. App.—Corpus Christi 2000, orig. proceeding) (citing *Coates v. Whittington*, 758 S.W.2d 749, 751 (Tex. 1988)).

³² *Walker*, 827 S.W.2d at 843-44.

³³ See, e.g., *In re Van Waters & Rogers, Inc.*, 62 S.W.3d 197, 200 (Tex. 2001, orig. proceeding) (blanket abatement of discovery in place after seven years of litigation); *In re R.R.*, 26 S.W.3d 569 (Tex. App.—Dallas 2000, orig. proceeding) (“blanket stoppage” of all discovery in a child custody modification hearing pending resolution of parallel criminal proceeding).

³⁴ See, e.g., *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917-20 (Tex. 1991, orig. proceeding); *In re Carnival Corp.*, 2000 WL 870929 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding).

³⁵ See, e.g., One court held that an order. *In re Family Hospice, Ltd.*, 62 S.W.3d 313 (Tex. App.—El Paso 2001, orig. proceeding) (citing Rule 192.3 and holding denying a motion to compel production of documents that are the product of

RULINGS WITH INADEQUATE REMEDY BY APPEAL/MANDAMUS ALLOWED		
Category	Ruling	Reason(s) Appeal Inadequate
Discovery (3)	Disallowed discovery/evades appellate review. ³⁸	■ Protective order precludes discovery. ³⁹
Elections	Denied place on ballot as candidate.	■ Impending election. ⁴⁰ ■ Expedited appeal inadequate if cannot be completed before issue mooted. ⁴¹
Enforcement/Prejudgment	Payment of plaintiff's attorneys' fees incurred in compensation case.	■ Skewed the procedural dynamics of the case by requiring defendant to fund plaintiff's prosecution of claims. ⁴²
	Deposit registry of court of receiver property sale proceeds pending divorce proceedings.	■ Funds necessary to operate law firm unavailable. ■ Value of partnership/community asset diminished. ■ Support of minor child impacted. ⁴³
	Deposit into registry of court disputed tax funds.	■ No evidence funds in danger of being depleted or lost. ⁴⁴
	Deposit of funds forfeited to state pending bill of review.	■ Three law enforcement agencies would have to disgorge operating funds after having relied on final order. ■ State's statutory right to immediate forfeiture of gambling property lost if deposit required State to participate in bill of review of final order on which state relied. ⁴⁵

or documentation of the mental impressions of a testifying expert compromised the defense of the case and vitiated the defense's ability to prepare for trial).

³⁶ *In re Kellogg-Brown & Root, Inc.*, 45 S.W.3d 772, 775 (Tex. App.—Tyler 2001, orig. proceeding) (citing *Wal-Mart Stores, Inc. v. Deggs*, 968 S.W.2d 354, 356 (Tex. 1998)).

³⁷ *Braden v. Downey*, 811 S.W.2d 922, 927 (Tex. 1991) (orig. proceeding).

³⁸ *Walker*, 827 S.W.2d at 843-44.

³⁹ See, e.g., *In re Allan*, 2006 WL 110270 (Tex. App.—Tyler 2006, orig. proceeding) (presuit deposition under Rule 202 denied); *In re Mason & Co. Prop. Mgt.*, 172 S.W.3d 308 (Tex. App.—Corpus Christi 2005, orig. proceeding) (deposition of witnesses material to defense of claims quashed); *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d 871 (Tex. App.—Corpus Christi 2000, orig. proceeding) (settlement agreement not produced to determine one satisfaction rule).

⁴⁰ See, e.g., *In re Barnett*, 2006 WL 1042838 (Tex. 2006, orig. proceeding); *In re Carlisle*, 2006 WL 120292 (Tex. 2006, orig. proceeding); *In re Sharp*, 186 S.W.3d 556 (Tex. 2006, orig. proceeding); *In re Holcomb*, 186 S.W.3d 553 (Tex. 2006, orig. proceeding).

⁴¹ See, e.g., *In re Francis*, 186 S.W.3d 534 (Tex. 2006, orig. proceeding) (citing *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86 (Tex. 1997), *In re Newton*, 146 S.W.3d 648 (Tex. 2004, orig. proceeding) (TRO not appealable and awaiting appealable order [regarding free speech issues] would not conclude before election); *Davis v. Taylor*, 930 S.W.2d 581 (Tex. 1996), and *Sears v. Bayoud*, 786 S.W.2d 248 (Tex. 1990)).

⁴² *Traveler's Indem. Co. v. Mayfield*, 923 S.W.2d 590 (Tex. 1996, orig. proceeding).

⁴³ *In re Gray Law*, 2006 WL 1030206 (Tex. App.—Fort Worth 2006, orig. proceeding).

⁴⁴ *In re Deporte Investments, Inc.*, 2005 WL 248664 (Tex. App.—Dallas 2005, orig. proceeding).

⁴⁵ *In re State*, 175 S.W.3d 532 (Tex. App.—Tyler 2005, orig. proceeding).

RULINGS WITH INADEQUATE REMEDY BY APPEAL/MANDAMUS ALLOWED		
Category	Ruling	Reason(s) Appeal Inadequate
	Dissolution of lis pendens during pending sale of property.	<ul style="list-style-type: none"> ■ Dissolution without complying with Property Code did not protect pending interests in suit.⁴⁶
	Execution ordered on interlocutory default judgment; “canceling” of new trial order by docket entry ineffective.	<ul style="list-style-type: none"> ■ Right to supersede upon final judgment lost if execution allowed before final judgment.⁴⁷ ■ Failure to abide by order granting new trial deprives party benefit of order.⁴⁸
	Writ of garnishment issued/motion to dissolve or increase bond denied.	<ul style="list-style-type: none"> ■ Personal savings account unavailable to alleged alter ego of corporate defendant. ■ Substitution of proper inadequate remedy when reply not required. ■ Counterclaim for wrongful garnishment does not return property, only claim for damages.⁴⁹
Enforcement/ Postjudgment	Review of net worth affidavits in proceedings to set supersedeas bond.	<ul style="list-style-type: none"> ■ Treating Appellate Rule 24.4 motion as mandamus and citing <i>Isern v. Ninth Court of Appeals</i>, 925 S.W.2d 604 (Tex. 1966), in allowing mandamus relief.⁵⁰
	Postjudgment deposition in aid of enforcement.	<ul style="list-style-type: none"> ■ Same procedures as pre-trial discovery applied to post-judgment discovery.⁵¹
Family Law Orders	Grandparent visitation allowed.	<ul style="list-style-type: none"> ■ Parties agreed mandamus relief appropriate if discretion abused. Note: Best interests of child at issue.⁵²
Intervention	Court of appeals denial of intervention by insurer.	<ul style="list-style-type: none"> ■ Not against public policy by opening door to routine intervention interfering with appellate strategy or issues. ■ Without discussion appears to be preservation of appellate rights (via doctrine of virtual representation).⁵³
Jurisdiction	Transfer of suit.	<ul style="list-style-type: none"> ■ No other means of review between courts. ■ One court interfering with jurisdiction of another court.⁵⁴
	Denial special appearance.	<ul style="list-style-type: none"> ■ Total and inarguable absence of jurisdiction. ■ Defendant faced potentially thousands of similar claims. ■ “Mass tort litigation ... place[s] significant strain on a defendant’s resources...” ■ Mass tort litigation creates considerable pressure to

⁴⁶ *In re Kroupa-Williams*, 2005 WL 1367950 (Tex. App.—Dallas 2005, orig. proceeding).

⁴⁷ *In re Burlington Coat Factory*, 167 S.W.3d 827 (Tex. 2005) (citing *In re Tarrant County*, 16 S.W.3d 914 (Tex. App.—Fort Worth 2000, orig. proceeding), and *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656 (Tex. 1996)).

⁴⁸ *Id.* (citing *In re Barber*, 982 S.W.2d 364 (Tex. 1998)).

⁴⁹ *In re Tex. Am. Express, Inc.*, 190 S.W.3d 720 (Tex. App.—Dallas 2005, orig. proceeding).

⁵⁰ *In re Smith*, 192 S.W.3d 564 (Tex. 2006, orig. proceeding).

⁵¹ *See, e.g., In re Amaya*, 34 S.W.3d 354 (Tex. App.—Waco 2001, orig. proceeding) (inappropriately quashed deposition of non-party in aid of enforcement of judgment left judgment debtor without adequate remedy by appeal).

⁵² *In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006, orig. proceeding).

⁵³ *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006, orig. proceeding).

⁵⁴ *See, e.g., In re Reliant Energy, Inc.*, 159 S.W.3d 624 (Tex. 2005, orig. proceeding); *In re U.S. Silica* 157 S.W.2d 434 (Tex. 2005, orig. proceeding); *In re The John G. & Marie Stella Kenedy Mem. Found.*, 159 S.W.3d 133 (Tex. App.—Corpus Christi 2004, orig. proceeding) (citing *In re Swepi*, 85 S.W.3d 800 (Tex. 2002, orig. proceeding)).

RULINGS WITH INADEQUATE REMEDY BY APPEAL/MANDAMUS ALLOWED		
Category	Ruling	Reason(s) Appeal Inadequate
		settle the case, regardless of the underlying merits. ⁵⁵
	Transfer from probate to district court.	<ul style="list-style-type: none"> ■ Denied statutory right to assignment of statutory probate court judge.⁵⁶
	Denial of plea to jurisdiction (in ad valorem tax case).	<ul style="list-style-type: none"> ■ Interference with appraisal district and appraisal review board functions. ■ Burden of expense and delay from trial. ■ Number of other cases involving common questions (36 similar questions in other district courts).⁵⁷
	Denial of plea to jurisdiction (in workers' compensation case).	<ul style="list-style-type: none"> ■ Interference with Workforce Commission's exclusive jurisdiction. ■ Interference with orderly processes of government.⁵⁸
	Holding invalid local rule regarding transfer from district to statutory county court.	<ul style="list-style-type: none"> ■ Issue of law likely to recur. ■ Other Texas counties have similar rules. ■ Far-reaching impact. ■ Precludes trial in forum other than that required/allowed local rule.⁵⁹
Jury Trial	Denial motion to quash jury demand (contractual waiver of right to jury trial).	<ul style="list-style-type: none"> ■ Issue of law, first impression, likely to recur. ■ Eludes answer by appeal. ■ Denies benefit of right contracted for. If win, no appeal. If lose, must show harm in form of "probable cause of improper judgment. [Harmless only if no material fact issues to submit to jury.] ■ Separate lawsuit for breach is inadequate remedy. Could not collaterally attack adverse judgment. ■ Whether public policy reason to encourage/discourage jury waivers is not part of equation of determining how to deal with already entered waivers.⁶⁰
Procedural	Setting of Rule 76a hearing to determine "court records."	<ul style="list-style-type: none"> ■ Either trial court had jurisdiction (and thus mandamus improper) or jurisdiction could be determined on ordinary appeal of Rule 76(a) order.⁶¹
	Denial motion to strike testimony of retired/visiting judge in malpractice action.	<ul style="list-style-type: none"> ■ Injury to counsel's relationship to judge/witness not curable by appeal. ■ Appearance of impropriety and partiality underlying reasons testimony improper.⁶²

⁵⁵ *In re E.I. DuPont de Nemours & Co.*, 92 S.W.3d 517, 523-24 (Tex. 2002, orig. proceeding); *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996, orig. proceeding); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769 (Tex. 1995, orig. proceeding).

⁵⁶ *In re Lewis*, 185 S.W.3d 615 (Tex. App.—Waco 2006, orig. proceeding).

⁵⁷ *In re ExxonMobil Corp.*, 153 S.W.3d 605 (Tex. App.—Amarillo 2004, orig. proceeding).

⁵⁸ *In re Tex. Mut. Ins. Co.*, 2005 WL 1763562 (Tex. App.—Dallas 2005, orig. proceeding).

⁵⁹ *In re Siemens Corp.*, 153 S.W.3d 694 (Tex. App.—Dallas 2005, orig. proceeding).

⁶⁰ *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004, orig. proceeding); see also *In re Wells Fargo Bank Minn. N.A.*, 115 S.W.3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

⁶¹ See *In re Dallas Morning News*, 10 S.W.3d 298 (Tex. 1999, orig. proceeding).

⁶² *Joachim v. Chambers*, 815 S.W.2d 234 (Tex. 1991, orig. proceeding).

RULINGS WITH INADEQUATE REMEDY BY APPEAL/MANDAMUS ALLOWED		
Category	Ruling	Reason(s) Appeal Inadequate
Venue/Forum Selection Clause	Denial of motion to transfer to county of mandatory venue.	<ul style="list-style-type: none"> ■ Section 15.0642 (1995) review of mandatory venue by mandamus dispenses with inadequate remedy requirement. Otherwise statutory right to mandamus largely illusory or undermine the purpose. ■ Inadequate remedy presumed under § 15.0642.⁶³
	Denial of motion to dismiss/forum selection clause.	<ul style="list-style-type: none"> ■ Analogous to arbitration clause. ■ Requiring appeal to vindicate rights granted in forum selection clause clear harassment. ■ Breaching party could use to leverage settlement from nonbreaching party. No incentive to reduce costs or adjudicate efficiently. ■ Automatic reversal if to be tried in another state or county. Trial would be utter waste of judicial resources.⁶⁴
	Granting motion to sever/transfer venue (by plaintiffs).	<ul style="list-style-type: none"> ■ Sixteen trials of hundreds of plaintiffs in improper forum with automatic reversible error for improper venue. ■ Involves more than resources of errant trial court and parties that remain (as in usual venue ruling). ■ Trials amount to little more than a fiction. ■ Irreversible waste of judicial and public resources. ■ Exceptional circumstances warrant mandamus relief.⁶⁵
	Denial of motion to transfer venue.	<ul style="list-style-type: none"> ■ Violation of procedure for venue determination. ■ Refusal to enforce venue order of another court. ■ Filing of multiple suits and selective nonsuits to avoid legislatively and procedurally adopted statutes and rules.⁶⁶
	Denial of opportunity to party seeking to transfer venue of reasonable opportunity to supplement venue record with affidavits and discovery products/denial of continuance.	<ul style="list-style-type: none"> ■ Rules require reasonable discovery, which was denied by rulings. ■ Trial court mislead party about type of proof that would be accepted at hearing. ■ Effectively denied party of fundamental due process right to notice and hearing.⁶⁷
	Denial of motion to dismiss based on contractual forum selection clause.	<ul style="list-style-type: none"> ■ Refusal to comply with mandatory duty to dismiss with valid forum selection clause “vitiates and renders illusory” any subsequent appeal.⁶⁸
Void	Grant of new trial after expiration of plenary power.	<ul style="list-style-type: none"> ■ “Because the trial court had no power to grant the new trial, any subsequent retrial would be a nullity.”⁶⁹ ■ Waste everyone’s time. ■ Forced to needlessly relitigate issues. ■ Adds nothing that could change the result on appeal.⁷⁰

⁶³ *In re Missouri Pac. RR Co.*, 998 S.W.2d 212 (Tex. 1999, orig. proceeding).

⁶⁴ *In re Automated Collection Tech., Inc.*, 156 S.W.3d 557 (Tex. 2004, orig. proceeding); *In re AIU*, 148 S.W.3d 109 (Tex. 2004, orig. proceeding).

⁶⁵ *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1998, orig. proceeding).

⁶⁶ *In re Shell Oil Co*, 128 S.W.3d 694 (Tex. App.—Beaumont 2004, orig. proceeding); *see also In re Columbia/St David’s Healthcare Sys., L.P.*, 178 S.W.3d 781 (Tex. 2005, orig. proceeding) (per curiam order regarding venue in wrongful death taking precedence over probate code venue provisions).

⁶⁷ *Union Carbide v. Moye*, 798 S.W.2d 792 (Tex. 1999, orig. proceeding).

⁶⁸ *In re Talent Tree Crystal*, 2006 WL 305015 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding).

RULINGS WITH INADEQUATE REMEDY BY APPEAL/MANDAMUS ALLOWED		
Category	Ruling	Reason(s) Appeal Inadequate
	Spousal maintenance order vacated as void.	<ul style="list-style-type: none"> ■ Statutory violation is voidable, not void. ■ Implicit finding of incapacity or disability. ■ Maintenance of spouse denied during proceeding.⁷¹

⁶⁹ *In re Canales*, 52 S.W.3d 698 (Tex. 2001, orig. proceeding) (void orders by assigned judge timely objected to); *In re S.W. Bell Tel. Co.*, 35 S.W.3d 602 (Tex. 2000, orig. proceeding) (void order entered after automatic bankruptcy stay); *In re Dickason*, 987 S.W.2d 570 (Tex. 1998, orig. proceeding) (void orders entered after expiration of plenary power).

⁷⁰ *See In re Dallas Morning News*, 10 S.W.3d at 304 (Gonzales, J., concurring).

⁷¹ *In re Brunin*, 2005 WL 839531 (Tex. App.—San Antonio 2005, orig. proceeding).

APPENDIX B

RULINGS WITH ADEQUATE REMEDY BY APPEAL/NO MANDAMUS		
Category	Ruling	Reason(s) Appeal Adequate
General Rule		If detriments outweigh benefits of mandamus, remedy by appeal adequate. <ul style="list-style-type: none"> ■ Interferes with trial court proceedings. ■ Distracts appellate court attention to issues that are unimportant both to ultimate disposition of case at hand and to uniform development of law. ■ Adds unproductively to expense and delay of civil litigation.⁷²
Abatement/Stay	Denial of plea in abatement of declaratory judgment action seeking declaration of non-liability.	<ul style="list-style-type: none"> ■ Adequate remedy by appeal. ■ No conflict of jurisdiction.⁷³
	Imposition of stay on remaining claims pending arbitration of related claims.	<ul style="list-style-type: none"> ■ Relator failed to demonstrate sufficient grounds for reviewing trial court's incidental ruling as an extraordinary ruling.⁷⁴
Arbitration	Order granting motion to compel arbitration.	<ul style="list-style-type: none"> ■ An order denying arbitration is reviewable by mandamus but an order granting arbitration is not. ■ Mandamus review would not precluded if a party can meet a "particularly heavy" burden to show "clearly and indisputably" that the district court did not have discretion to stay the underlying case.⁷⁵
Attorneys	Denial of declaration that attorney occupation tax was unconstitutional.	<ul style="list-style-type: none"> ■ Original petition in Supreme Court challenging attorney occupation tax could have been brought in district court. ■ Any adverse ruling could have been appealed through ordinary appellate process.⁷⁶
Continuance	Denial of continuance to obtain expert.	<ul style="list-style-type: none"> ■ No explanation why one of other experts could not opine. ■ Need for expert not learned on eve of trial.⁷⁷
Discovery	Order imposing monetary sanctions for failure to provide discovery.	<ul style="list-style-type: none"> ■ Orders of sanction are reviewable on appeal pursuant to Tex. R. Civ. P. 215.3.⁷⁸
	Severely compromises claim or defense. ⁷⁹	<ul style="list-style-type: none"> ■ Not impossible for relators to defend underlying personal injury lawsuit. ■ No showing that exclusion of testimony prevents relators from defending lawsuit. ■ Relators can present other evidence or testimony. ■ No permanent loss of substantial rights.⁸⁰

⁷² *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004, orig. proceeding); *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969, orig. proceeding) (disrupts orderly trial proceeding and better to refuse to review incidental rulings than enter thicket of what should be reviewable).

⁷³ *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985, orig. proceeding).

⁷⁴ *In re Kelley Brothers, Inc.*, 2004 WL 2750236 (Tex. App.—Beaumont 2004, orig. proceeding).

⁷⁵ *In re Palacios*, 2006 WL 1791683, (Tex. 2006, orig. proceeding).

⁷⁶ *Chenault v. Phillips*, 914 S.W.2d 140 (Tex. 1996).

⁷⁷ *In re Toyota Motor Corp.*, 191 S.W.3d 498 (Tex. App.—Waco 2006, orig. proceeding).

⁷⁸ *In re TIG Insur. Co.*, 172 S.W.3d 160 (Tex. App.—Beaumont 2005, orig. proceeding).

RULINGS WITH ADEQUATE REMEDY BY APPEAL/NO MANDAMUS		
Category	Ruling	Reason(s) Appeal Adequate
Elections	Appellate court justice sought mandamus relief ordering chairman of political party to disqualify opposing candidate's application to be placed on ballot.	<ul style="list-style-type: none"> ■ Mandamus petition that presented factual disputes could not be determined without a hearing on the merits. ■ Appellate court may not deal with disputed areas of fact in an original mandamus.⁸¹
Enforcement	Denial of motion to return unpaid settlement proceeds.	<ul style="list-style-type: none"> ■ Deprivation of valuable use of relator's money is simply complaint that normal appellate remedy is too slow; not the permanent loss of substantial rights.⁸²
Family Law Orders	Denial of motion to dismiss for lack of jurisdiction and plea in abatement contending that respondent has not been a resident for 90 days prior to filing suit.	<ul style="list-style-type: none"> ■ Venue decisions in two-party suits, except for suits affecting parent-child relationship, are incidental trial rulings correctable by appeal. ■ Only mandatory venue provisions are afforded mandamus review.⁸³
	Order increasing child support obligations.	<ul style="list-style-type: none"> ■ Relator could refuse to pay the ordered child support, and if held in contempt, file a petition for habeas corpus.⁸⁴
Jurisdiction	Denial of plea to jurisdiction in class action case.	<ul style="list-style-type: none"> ■ Standing of class representatives to represent class reviewable by interlocutory appeal.⁸⁵
	Denial of plea to jurisdiction in SAPCR case.	<ul style="list-style-type: none"> ■ Adequate remedy by ordinary appeal.⁸⁶
Jury Trial	Order requiring separate trials of three plaintiffs from group of 108.	<ul style="list-style-type: none"> ■ No showing that joint trial "would result in such a high level of prejudice and confusion that an appellate court would have much difficulty sorting through evidence attributable to each plaintiff on appeal."⁸⁷
Procedural	Denial of motion to strike supplemental petition.	<ul style="list-style-type: none"> ■ Decision to accept or reject amended pleading is an inherently discretionary function of trial court. ■ Adequate remedy through appeal to seek review of trial court's denial of motion to strike.⁸⁸
	Denial of motion for leave to	<ul style="list-style-type: none"> ■ Injury on which contribution claim against third party might

⁷⁹ See, e.g., *Walker v. Packer*, 827 S.W.2d 833, 843-44 (Tex. 1992, orig. proceeding).

⁸⁰ *In re Pena*, 2005 WL 1120127 (Tex. App.—Corpus Christi 2005, orig. proceeding).

⁸¹ *In re Angelini*, 186 S.W.3d 558 (Tex. 2006, orig. proceeding)

⁸² *In re Kansas City Southern Indus., Inc.*, 139 S.W.3d 669 (Tex. 2004, orig. proceeding).

⁸³ *In re Rowe*, 182 S.W.3d 424 (Tex. App.—Eastland 2005, orig. proceeding).

⁸⁴ *In re Elliot*, 2004 WL 586835 (Tex. App.—Houston [1st Dist.], orig. proceeding).

⁸⁵ *In re Christus Health*, 2005 WL 2450146 (Tex. App.—Beaumont 2005, orig. proceeding).

⁸⁶ *In re Hobbs*, 2004 WL 2677455 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding).

⁸⁷ *In re Wal-Mart Stores, Inc.*, 2005 WL 2076644 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding) (distinguishing *Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612 (Tex. App.—El Paso 1992, orig. proceeding) (noting class certification request previously denied).

⁸⁸ *In re Western Star Trucks US, Inc.*, 112 S.W.3d 756 (Tex. App.—Eastland 2003, orig. proceeding).

RULINGS WITH ADEQUATE REMEDY BY APPEAL/NO MANDAMUS		
Category	Ruling	Reason(s) Appeal Adequate
	designate responsible third parties	be based will not arise unless and until liability is established against relators. <ul style="list-style-type: none"> ■ No contribution claim may be necessary and if it is, the error may be raised on appeal and a new trial requested.⁸⁹
	Denial of motion for leave to designate responsible third parties.	<ul style="list-style-type: none"> ■ Separate lawsuit against third parties still available. ■ Relatively straightforward personal injury case, which can be corrected through normal appeal. ■ Additional expense and effort of preparing for and participating in another subsequent trial, standing alone, does not justify mandamus relief.⁹⁰
	Denial of class certification.	<ul style="list-style-type: none"> ■ Tex. Civ. Prac. & Rem. Code § 51.014(3) provides an interlocutory appeal. ■ Appeal is available after a trial on the merits.⁹¹
	Denial of summary judgment on res judicata grounds.	<ul style="list-style-type: none"> ■ Appeal is the appropriate remedy for the trial court's failure to recognize the preclusive effect of a prior judgment.⁹²
Venue/Forum Selection Clause	Decision establishing venue.	<ul style="list-style-type: none"> ■ Venue determinations not reviewable by mandamus. ■ Legislature has spoken on subject of venue and its determination is binding on the courts unless Legislature has exceeded its constitutional authority.⁹³
	Order vacating grant of motion to transfer venue.	<ul style="list-style-type: none"> ■ Relators were afforded adequate time for discovery prior to venue hearing. ■ Venue determinations are correctable by appeal unless motion to transfer venue for fair and impartial trial and movant not afforded discovery.⁹⁴
	Order vacating order setting abbreviated schedule for hearing on motion to transfer venue.	<ul style="list-style-type: none"> ■ Relators did not argue that limitation on discovery or abbreviated schedule for hearing on venue motion deprived them of any ability to develop evidence pertinent to the venue issue.⁹⁵
Void	Dismissal for want of jurisdiction.	<ul style="list-style-type: none"> ■ Trial court no ruling on existence of plenary power. ■ Decision that it retained plenary power reviewable on appeal.⁹⁶
	Order vacating grant of motion for new trial.	<ul style="list-style-type: none"> ■ Trial court had plenary power to grant motion for new trial and thus adequate remedy on ultimate appeal.⁹⁷

⁸⁹ *In re Martin*, 147 S.W.3d 453 (Tex. App.—Beaumont 2004, orig. proceeding).

⁹⁰ *In re Unitec Elevator Serv. Co.*, 178 S.W.3d 53 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding).

⁹¹ *Deloitte & Touche LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394 (Tex. 1997, orig. proceeding).

⁹² *In re Rogers*, 2006 WL 1512781 (Tex. App.—Beaumont 2006, orig. proceeding) (citing *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989, orig. proceeding)).

⁹³ *Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860 (Tex. 1995); see also *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954 (Tex. 1990).

⁹⁴ *Bridgestone/Firestone, Inc. v. The Thirteenth Court of Appeals*, 929 S.W.2d 440 (Tex. 1996).

⁹⁵ *The Honorable Frank Montalvo v. Fourth Court of Appeals*, 917 S.W.2d 1 (Tex. 1995)

⁹⁶ *In re Sunshine Homes, Inc.*, 2006 WL 1428907 (Tex. App.—Beaumont 2006, orig. proceeding).

⁹⁷ *In re The Lynd Co.*, 2006 WL 1565033 (Tex. 2006, orig. proceeding).