

# **RECENT CHANGES IN SUPREME COURT JURISDICTION**

**FRANK GILSTRAP**  
Hill Gilstrap, PC  
1400 West Abram Street  
Arlington, Texas 76013  
(817) 261-2222  
[fgilstrap@hillgilstrap.com](mailto:fgilstrap@hillgilstrap.com)

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**CHAPTER 1**



**FRANK GILSTRAP**  
Hill Gilstrap, PC  
1400 West Abram St.  
Arlington, Texas 76013  
(817) 261-2222  
[fgilstrap@hillgilstrap.com](mailto:fgilstrap@hillgilstrap.com)

- BA, University of Texas at Austin
- LLB, University of Texas School of Law
- Board certified: Civil Appellate Law, Texas Board of Legal Specialization
- Admitted: Supreme Court of Texas; United States Supreme Court; United States Courts of Appeals for the Fifth, Seventh, Eighth, and Eleventh Circuits; United States District Courts for Northern, Southern, and Eastern Districts of Texas.
- Member: Supreme Court Advisory Committee

Advisory Committee to the Second Court of Appeals (Fort Worth)

- Recent publications:

Memorandum to Supreme Court Advisory Committee: "Will the 8th Circuit's *Anastasoff* decision affect the Texas rule concerning unpublished opinions?" (October 6, 2000)\*

Memorandum to Supreme Court Advisory Committee: "Composition of En Banc Court" (September 20, 2001)\*

- Recent CLE papers:

Rules Committee Update For 2002, Evidence and Discovery: 15th Annual Advanced Evidence & Discovery Course, 2002.

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2003 Legislative Update: 26th Annual Advanced Civil Trial Course, 2000

2003 Legislative Update: 17th Annual Advanced Civil Appellate Practice Course

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## RECENT CHANGES IN SUPREME COURT JURISDICTION

The 78th Legislature made four changes in the jurisdiction of the Texas Supreme Court. All are found in House Bill 4, which the Governor signed on June 11, 2003. In House Bill 4, the Legislature gave the Supreme Court the power to review decisions of the newly created multidistrict litigation panel. *See infra*, part 1. It also expanded Supreme Court jurisdiction over interlocutory appeals (i) by expressly giving the Court jurisdiction over interlocutory appeals of certification rulings in class actions and (ii) by redefining the standard for “conflict jurisdiction.” *See infra*, part 2. In redefining that standard, the Legislature also expanded Supreme Court jurisdiction over appeals from final judgments. *See infra*, part 3. This new standard appears to broaden the Court’s jurisdiction over all appeals. It may also change the way that petitions for review are drawn. *See infra*, part 4.

### I. MULTIDISTRICT TRANSFERS

Under Rule 11 of the Rules of Judicial Administration, the presiding judge of an Administrative Judicial Region has the power to assign a judge to hear pretrial matters in a number of related cases.<sup>1</sup> While this power is broad,<sup>2</sup> a presiding judge can only assign judges to cases filed within his particular Administrative Region.<sup>3</sup> As a result, Rule 11 has been used only for related cases filed within the same Administrative Judicial Region.<sup>4</sup>

Now, in House Bill 4, the 78th Legislature has created a new “multidistrict” procedure to allow a single trial court to hear pretrial matters in cases filed in different Administrative Judicial Regions. To accomplish this, the Legislature has enacted a new Subchapter H of Chapter 74 of the Government Code.<sup>5</sup> It has also given the Supreme Court rule-making power over such “multidistrict” proceedings.<sup>6</sup> In response the Court has promulgated Rule 13 of the Rules of Judicial

Administration,<sup>7</sup> which applies to cases filed on or after September 1, 2003.<sup>8</sup>

The new Rule 13 differs from Rule 11 in an important way. Under Rule 11, judges were assigned to the courts where the cases are filed.<sup>9</sup> Thus, a single judge would preside simultaneously over related cases in different courts. But under Rule 13, the related cases are actually transferred to a single court.<sup>10</sup>

Under Rule 13, these transfers will be made by a newly created “judicial panel on multi-district litigation,”<sup>11</sup> which is also called the “MDL panel.”<sup>12</sup> It consists of five “active court of appeals justices or administrative judges.”<sup>13</sup> The MDL panel has broad power to transfer cases.<sup>14</sup> But unlike a presiding judge, the MDL panel can transfer cases between courts located in different Administrative Judicial Regions.<sup>15</sup> For example, a single court can now hear pretrial matters in related suits filed in both Galveston and Dallas

<sup>7</sup> See Miscellaneous Docket No. 03-9145 (entered August 29, 2003) (available at <http://www.supreme.courts.state.tx.us/rules/03-9145.pdf>).

<sup>8</sup> See *Id.*, ¶ 1 (e). Rule 11 remains applicable to cases filed prior to that date. See *Id.*, Rule ¶ 1(b).

<sup>9</sup> See Rule 11.3(a) (“[A] presiding judge may assign an acting district judge . . . to a case . . .”).

<sup>10</sup> Rule 13.3(L) (The MDL panel must find “that transfer to a specified district court will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the relating cases.”).

<sup>11</sup> See TEX.GOV’T CODE § 74.161.

<sup>12</sup> Rule 13.2(a).

<sup>13</sup> TEX.GOV’T CODE § 74.161. On July 1, 2003, Chief Justice Thomas R. Phillip appointed five judges to this panel, as follows:

Chief Justice Scott Brister, 14th Court of Appeals, Houston  
Justice Errlinda Castillo, 13th Court of Appeals, Corpus Christi and Edinburg  
Justice Mack Kidd, 3d Court of Appeals, Austin  
Justice Douglas S. Lang, 5th District Court of Appeals, Dallas

Judge David Peeples, presiding judge, 4th Administrative Region, San Antonio

Supreme Court Misc. Docket No. 03-9096. Justice Brister was appointed to the Supreme Court on November 21, 2003, and Justice George C. Hanks, Jr., of the First Court of Appeals was appointed to replace him on the MDL panel.

<sup>14</sup> Under the statute and the rule the MDL panel may transfer cases based on the following factors: the cases involves one or more common questions of fact; the transfer will “be for the convenience of the parties and witnesses;” and the transfer will “promote the just and efficient conduct of the actions.”

TEX.GOV’T CODE § 74.162; Rule 13.2(f).

<sup>15</sup> TEX. GOV’T CODE § 74.162.

<sup>1</sup> Rule 11.3 (a) & (b), TEX.R.JUD.ADMIN., reprinted in TEX.GOV’T CODE, title 2, subtitle F app. (1998).

<sup>2</sup> See Rule 11.1 (“This rule applies to any case that involves material question of fact and law in common with another case pending in another court in another county.”).

<sup>3</sup> See TEX.GOV’T CODE § 74.056(a) (“A presiding judge . . . shall assign the judges of the administrative region to hold . . . court in any county of the administrative region to try cases and dispose of accumulated business.”).

<sup>4</sup> Rule 11.3(d), allows the Chief Justice of the Texas Supreme Court to assign a pretrial judge to handle cases in more than one administrative region, but that provision has not been used.

<sup>5</sup> See HB4, § 3.02, pp.12-13.

<sup>6</sup> TEX. GOV’T CODE § 74.163.

counties, even though those counties are in different Administrative Judicial Regions.<sup>16</sup>

Under Rule 11, a presiding judge's order granting or denying appointment of a pretrial judge "may be reviewed only by the Supreme Court in an original mandamus proceeding."<sup>17</sup> Similarly, an order of the MDL panel "may be reviewed only by the Supreme Court in an original proceeding."<sup>18</sup>

## II. INTERLOCUTORY APPEALS

In general, the Texas Supreme Court does not have jurisdiction over interlocutory appeals.<sup>19</sup> There are four exceptions to this general rule, as follows:

- Dissenting opinion: The Supreme Court has jurisdiction over an interlocutory appeal "in which the justices in the courts of appeals disagree on a question of law material to the decision."<sup>20</sup>
- Conflict jurisdiction: The Court also has jurisdiction when "one of the courts of appeals holds differently from a prior decision of another court of appeals or the supreme court."<sup>21</sup>
- Specific grants: In a few kinds of cases the Legislature has expressly given the Supreme Court jurisdiction over interlocutory appeals by statute. Prior to HB4, this category was limited to interlocutory appeals in certain kinds of cases involving appeals by media defendants<sup>22</sup> and by licensed car dealers.<sup>23</sup>
- Jurisdiction to determine jurisdiction: The Supreme Court also has jurisdiction to decide if a court of appeals has correctly decided whether it has jurisdiction over an interlocutory appeal.<sup>24</sup>

<sup>16</sup> See *Union Carbide v. Adams*, No. 03-0895 (Multidistrict Litigation Panel, Dec. 30, 2003).

<sup>17</sup> Rule 11.5.

<sup>18</sup> Rule 13.9(a). See also TEX.GOV'T CODE § 74.163(4) (Rules adopted by Supreme Court must "provide for appellate review of certain or all panel orders by extraordinary writ.").

<sup>19</sup> TEX. GOV'T CODE § 22.225(b)(3) & (4) (In an interlocutory appeal the judgment of a court of appeals is "conclusive on the law and facts."). See also, *Id.* § 22.001(a)(6) (Supreme Court has jurisdiction over appeal of final judgment when the error is of "importance to the jurisprudence of the state . . . but excluding those cases in which the jurisdiction of the court of appeals is made final by the statute.") (emphasis added).

<sup>20</sup> *Id.* § 22.225(c).

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *Id.* § 22.225(d).

<sup>23</sup> TEX.REV.CIV.STAT. art. 4413(36) § 606(g).

<sup>24</sup> See *Qwest Communications Corp. v. AT&T Corp.*, 24 S.W.3d 334, 335-336 (Tex.2000).

Of these four categories, conflict jurisdiction has generated the most controversy. Conflict jurisdiction is based on language from the Court's jurisdictional statute. It provides that the Supreme Court can hear an interlocutory appeal when "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court."<sup>25</sup> For many years the Supreme Court limited the scope of conflict jurisdiction by narrowly construing the phrase "holds differently," as follows:

For [the Supreme] Court to have jurisdiction on the ground of conflict it must appear that the rulings in the two cases are so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other. Or, in other words, the decisions must be based practically upon the same state of facts, and announce antagonistic conclusions. An apparent inconsistency in the principles announced, or in the application of recognized principles, is not sufficient.

*Christy v. Williams*, 156 Tex. 555, 298 S.W.2d 565, 567 (1957).<sup>26</sup> This is a strict standard, and the Court has gone to great lengths to avoid finding conflict.<sup>27</sup> As a result, during the ten-year period ending in 2003, the Court heard only a dozen or so interlocutory appeals on the basis of conflict jurisdiction.<sup>28</sup>

<sup>25</sup> TEX. GOV'T CODE § 22.225(c) (emphasis added).

<sup>26</sup> (emphasis added, citations and quotation marks omitted) (quoting *Dockum v. Mercury Ins. Co.*, 134 Tex. 437, 135 S.W.2d 700, 701 (1940); *Sun Mut. Ins. Co. v. Roberts, Willis & Taylor Co.*, 90 Tex. 78, 37 S.W. 311, 312 (1896); *Garitty v. Rainey*, 112 Tex. 369, 247 S.W. 825, 827 (1923)). *Accord Gonzalez v. Avalos*, 907 S.W.2d 443, 444 (Tex.1995). See generally *Coastal Corp. v. Garza*, 979 S.W.2d 318 (Tex.1998).

<sup>27</sup> See generally Pamela S. Baron, *Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies*, in STATE BAR OF TEX. PROF. DEV. PROGRAM, 26TH ANNUAL ADVANCED CIVIL TRIAL COURSE, pp.17-18 (2003); *Montes v. City of Houston*, 66 S.W.3d 267, (Tex.2001) (Hecht, J., concurring in denial of motion for rehearing of petition for review) ("To one of its oldest and most beneficent functions—resolving conflicts of law among the courts of appeals—this Court has an inexplicably mulish aversion, preferring instead the resulting confusion in the law, the unfairness to litigants in having the law depend on what court they happen to be in, and the waste of time and money, public and private, in pointless litigation over issues that could readily be resolved.").

<sup>28</sup> See Alex Wilson Albright, *Supreme Court Jurisdiction*, in STATE BAR OF TEX. PROF. DEV. PROGRAM, PRACTICE BEFORE THE TEXAS SUPREME COURT, p.5 (2003); Baron, *supra* n. 27. Note also *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 350 (Tex.2001) (Hecht, J., dis-

Though few in number, these cases reveal two things. First, the Court has been divided on whether to maintain the strict *Christy* standard.<sup>29</sup> Second, the Court has relaxed that standard to hear interlocutory appeals of certification decisions in class actions. Thus, under *Christy* the conflicting cases must “be based practically upon the same set of facts.” 298 S.W.2d at 567. But in *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 431 (Tex.2000), a certification appeal, the Court held that “conflict jurisdiction does not require that two cases be identical either on the facts underlying the causes of action nor on the procedural facts.” Similarly, in *Christy* the Court required the conflicting decisions to “announce antagonistic conclusions.” But in *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 689 (Tex.2003), another certification appeal, the Court held that “[o]utspoken disagreement is not necessary to invoke our conflicts jurisdiction.”<sup>30</sup>

In House Bill 4, the 78th Legislature has altered this statutory scheme in two important ways.<sup>31</sup> First, it has amended the court’s jurisdictional statute to give the Court jurisdiction over interlocutory appeals from class action certification decisions.<sup>32</sup>

Second, the Legislature has promulgated a new statutory standard for conflict jurisdiction. Again, the concept of conflict jurisdiction is premised on statutory language giving the Supreme Court jurisdiction when “one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court.”<sup>33</sup> As we have seen, all of the cases in this area have involved the Supreme Court’s construction of the words “holds differently.” Now, in House Bill 4, the Legislature has provided a statutory defini-

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senting from denial of motion for rehearing of petition for review) (Interlocutory appeals to the Supreme Court are “more rare than a blue moon.”).

<sup>29</sup> Russel S. Post, *Interlocutory Appeals in the 21st Century*, in STATE BAR OF TEXAS, ADVANCED CIVIL APPELLATE PRACTICE COURSE, pp.30-31 (2003).

<sup>30</sup> See also *Union Pacific Resources Group, Inc. v. Hankins*, 111 S.W.3d 69, 72 (Tex.2003) (“[T]he court of appeals ignored applicable substantive law crucial to understanding the claims and defenses in this case.”); *Bland Indep. School Dist. v. Blue*, 34 S.W.3d 547, 553 (Tex.2000) (“If a rule of decision in one case would require a different result were it applied in another case, the conflict between the two cases is sufficient to invoke our jurisdiction over an interlocutory appeal.”).

<sup>31</sup> See HB4 § 1.02, pp.3-4 (amending TEX.GOV’T CODE § 22.225(d) & (e)). Although these provisions are found in Article 1 of HB4, which is entitled “Class Actions,” they are not limited to class actions.

<sup>32</sup> HB4 § 1.02, p.3 (amending TEX.GOV’T CODE § 22.225(d) to add appeals under TEX.CIV.PRAC. & REM CODE § 51.014(a)(3) (class action certification)).

<sup>33</sup> TEX.GOV’T CODE § 22.225(c) (emphasis added).

tion of “holds differently.” It has done this by adding a new subsection to Section 22.225, as follows:

For purposes of Subsection (c) one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to the litigants.

HB4 §1.02, p.4 (emphasis added).<sup>34</sup>

Beginning with petitions for review filed on or after September 1, 2003,<sup>35</sup> the Court must decide whether it has conflict jurisdiction based on this statutory language. *Christy* and the other decisions defining conflict jurisdiction will no longer control. This is a significant change, and before analyzing it, we must first consider the identical change made as to appeals from final judgments.

### III. APPEALS FROM FINAL JUDGMENTS

The jurisdiction of the Supreme Court over final judgments is set forth in Section 22.001 of the Government Code. Under this provision, the court has jurisdiction over the following categories of cases:

- (1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;
- (2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
- (3) a case involving the construction or validity of a statute necessary to a determination of the case;
- (4) a case involving state revenue;
- (5) a case in which the railroad commission is a party; and
- (6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

TEX. GOV’T CODE § 22.001(a).

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<sup>34</sup> (adding *Id.* § 22.225(e)).

<sup>35</sup> HB4 § 1.05(a), p.6.

Subdivision 6 is the most commonly used basis for Supreme Court jurisdiction.<sup>36</sup> By contrast, conflict jurisdiction (subdivision 2) is almost never invoked in appeals from final judgments. This is because its language (“holds differently”) is identical to the language of Subsection 22.225(c), and as noted in part 2 above, the Court has narrowly construed that language to limit its conflict jurisdiction.

But as we have seen, the Legislature has now provided a statutory definition of “holds differently” in cases involving interlocutory appeals. And in House Bill 4 the Legislature has also applied that same definition to appeals from final judgments. To accomplish this, it added a new subsection (e) to Section 22.001, as follows:

For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

TEX. GOV'T CODE §22.001(e).<sup>37</sup> This language is identical to the language of new Subsection 22.225(e), discussed above. This same statutory language will, therefore, govern “conflict jurisdiction” in appeals both from interlocutory orders and from final judgments.

#### IV. TOWARD A NEW STANDARD

Under the new statutory definition of “holds differently,” the Supreme Court will have conflict jurisdiction when the case before it is (i) “inconsistent” with a decision of another court of appeals and when the inconsistency “should be clarified to remove [ii] unnecessary uncertainty in the law and [iii] unfairness to litigants.”<sup>38</sup>

Obviously the general terms “inconsistency,” “unnecessary uncertainty,” and “unfairness” are quite broad. But until they are interpreted by the Supreme Court, they can provide little guidance as to the contours of a new standard. Certainly, the new standard will be less strict than *Christy*. Under *Christy*, an “apparent inconsistency” was “not sufficient.” 298 S.W.2d at 567. But now “inconsistency” is the standard. The second requirement--the need to clarify “unnecessary uncertainty in the law”--is not helpful. Any material “uncertainty” obviously needs to be “clarified,” and it is difficult to imagine what a “necessary” uncertainty might be. Finally, there will always be “unfairness to

the litigants in having the law depend on what court they happen to be in.”<sup>39</sup>

In fashioning a new standard for conflict jurisdiction, the Texas Supreme Court could turn to the law of other jurisdictions, which have developed their own “conflict jurisdiction” standards. For example, when the United States Supreme Court decides to grant a petition for writ of certiorari, a primary factor is whether a decision of one court is “in conflict with a decision of another.” Supreme Court Rule 10(a).<sup>40</sup> Similarly, several states have their own versions of conflict jurisdiction,<sup>41</sup> as does the Texas Court of Criminal Appeals.<sup>42</sup>

These courts have not developed the same kind of restricted standard for conflict jurisdiction as the Texas Supreme Court developed under *Christy*. Rather, their approach is straightforward: conflict is simply one factor--often the most important factor--to be considered in granting discretionary review. Moreover, if cases are inconsistent, there is a conflict. The decision to grant discretionary review depends ultimately on the degree of conflict and the importance of the case.

Finally, the new standard for conflict jurisdiction may change the way petitions for review are written. Rather than seeking review under the vague “importance to the jurisprudence to the state” standard, petitioners may emphasize “inconsistency” as a factor to be considered in granting discretionary review.<sup>43</sup>

<sup>39</sup> *Montes*, 66 S.W.3d at 267 (Hecht, J. concurring).

<sup>40</sup> See generally William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983); Charles G. Cole, *Petitioning for Certiorari in the Big Case*, 12 NO. 3 LITIGATION 33, 33-35 (Spring 1986).

<sup>41</sup> See generally, Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLORIDA L. REV. 21, 53-58 (January 1993).

<sup>42</sup> See Rule 66.3 (a), TEX.R.APP.P. (“whether a court of appeals’ decision conflicts with another court of appeals’ decision on the same issue.”). See also George E. Dick and Robert O. Doss, TEXAS PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 44.42.

<sup>43</sup> In applying the former “conflict” standard, the court has promulgated a number of rules that further restrict the scope of conflict jurisdiction. Thus, the conflicting cases can not come from the same court of appeals. *Collins v. Ison-Newsome*, 73 S.W.3d 178, 181-183 (Tex.2001) (Jefferson, J., concurring). Moreover, the subject case must conflict with a prior decision, not a subsequent one. *Id.* at 183-184. Finally, the prior case has to be published; unpublished decisions would not trigger conflict jurisdiction. *Id.* House Bill 4 will not expressly change any of this, but these old rules will become less important since a “conflict” will be so much easier to establish under the new standard.

<sup>36</sup> See generally Elizabeth V. Rodd, *What is Important to the State's Jurisprudence?* in STATE BAR OF TEXAS, PRACTICE BEFORE THE TEXAS SUPREME COURT (2003).

<sup>37</sup> added by HB4 § 1.04, p.6.

<sup>38</sup> TEX. GOV'T CODE § 22.001(e) & 22.225(e) (bracketed numerals added).