

CONFLICT JURISDICTION: PAST, PRESENT, AND FUTURE

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Introduction

By constitution, the Texas Supreme Court’s jurisdiction is “co-extensive with the limits of the State.” Its appellate jurisdiction is final and extends to “all cases except in criminal law matters and as otherwise provided in this Constitution or by law.”¹ The Constitution does not provide for what is commonly called “conflict jurisdiction”—that comes from the statutes delineating the Supreme Court’s jurisdiction.

Texas Government Code § 22.001 provides that the Texas Supreme Court has “appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgments of the trial courts[.]”²

¹ The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution. Its jurisdiction shall be co-extensive with the limits of the State and its determinations shall be final except in criminal law matters. Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

TEX. CONST. Art. V, § 3(a) (1876) (as amended Aug. 11, 1891, Nov. 4, 1930, Nov. 4, 1980, and Nov. 6, 2001).

² (a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgments of the trial courts:

(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

TEX. GOV'T CODE § 22.001(a). The list of cases of which the Supreme Court has jurisdiction includes “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[.]” TEX. GOV'T CODE § 22.001(a)(2). This statutory grant of jurisdiction has come to be known as “conflict jurisdiction”.

Because the Texas Supreme Court’s jurisdiction in an appeal from a final judgment of the trial court is largely discretionary, the question of whether there is a conflict of decisions, as a practical matter, is merely *a* consideration in whether the Court will exercise its discretion to take a case. *See* TEX. R. APP. P. 56.1(a) (listing factors to be considered by the Supreme Court in granting review). But in appeals from those interlocutory trial court orders that are appealable by law³, the question of whether there is a conflict of decisions can determine whether the Court has jurisdiction of the case. This is so because a courts of appeals’ decision is “conclusive on the law and facts, and a writ of error is not allowed from the supreme court” in an appeal from most interlocutory trial court orders *unless* there was a dissent in the court of appeals or there is a conflict of decisions. TEX. GOV'T CODE § 22.225(b), (c).⁴

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.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

TEX. GOV'T CODE § 22.001.

³ *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 51.014(a) (listing eight interlocutory trial court orders from which an appeal may be taken); TEX. CIV. PRAC. & REM. CODE § 15.003(c) (allowing an appeal from an interlocutory trial court order denying or allowing intervention or joinder in a multi-party case); TEX. CIV. PRAC. & REM. CODE § 171.098 (allowing appeal from a trial court order denying arbitration).

⁴ (a) A judgment of a court of appeals is conclusive on the facts of the case in all civil cases.

(b) Except as provided by Subsection (c) or (d), a judgment of a court of appeals is conclusive on the law and facts, and a writ of error is not allowed from the supreme court, in the following civil cases:

(1) a case appealed from a county court or from a district court when, under the constitution, a county court would have had original or appellate jurisdiction of the case,

Thus, in an appeal from a trial court order appointing or refusing to vacate the appointment of a receiver, certifying or refusing to certify a class action, granting or refusing to grant a temporary injunction, denying a motion for summary judgment based on an assertion of immunity, granting or denying a special appearance, or granting or denying a governmental unit's plea to the jurisdiction, (among others) the court of appeals' decision is final unless there is a dissent in the court of appeals or a conflict of decisions—which makes the question of whether there is a conflict of decisions of great importance in a number of cases appealed to the Texas Supreme Court each year.

Part I: The Past

A. *The Far-Distant Past*

From the late 1890s to the mid-1900s, conflict jurisdiction in the Texas Supreme Court arose in two ways. *First*, a jurisdictional conflict could arise in an appeal from a final judgment of a district court. In other words, a conflict of decisions was one basis for Supreme Court jurisdiction in such a case. These cases were presented to the Court by application for writ of error. *Second*, a court of appeals could certify a conflict of decisions to the Supreme Court in a case that was not otherwise appealable to the Supreme Court (*e.g.*, an appeal from a trial court order sustaining or overruling a plea of privilege or an appeal from the judgment of a county court at law). These conflicts were

with the exception of a probate matter or a case involving state revenue laws or the validity or construction of a statute;

(2) a case of a contested election other than a contested election for a state officer, with the exception of a case where the validity of a statute is questioned by the decision;

(3) an appeal from an interlocutory order appointing a receiver or trustee or from other interlocutory appeals that are allowed by law;

(4) an appeal from an order or judgment in a suit in which a temporary injunction has been granted or refused or when a motion to dissolve has been granted or overruled; and

(5) all other cases except the cases where appellate jurisdiction is given to the supreme court and is not made final in the courts of appeals.

(c) This section does not deprive the supreme court of jurisdiction of a civil case brought to the court of appeals from an appealable judgment of a trial court in which the justices of the courts of appeals disagree on a question of law material to the decision or in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court, as provided by Subdivisions (1) and (2) of Section 22.001(a).

(d) A writ of error is allowed from the supreme court for an appeal from an interlocutory order described by Section 51.014(6), Civil Practice and Remedies Code.

TEX. GOV'T CODE § 22.225.

presented to the Court by petition for writ of mandamus because mandamus was available to compel a court of appeals to certify the conflict to the Supreme Court. See *McCurdy v. Conner*, 66 S.W.664, 667 (Tex. 1902) (explaining use of mandamus to compel trial court to certify conflict of decisions). Either way, the Court appears to have used the same standards for determining whether there was a jurisdictional conflict. See *West Disinfecting Co. v. Trustees of Crosby I.S.D.*, 143 S.W.2d 749 (Tex. 1940) (standard is the same).⁵

The early cases discussing conflict jurisdiction required that there be a “well-defined” or “irreconcilable” conflict. See *Red River, T & S. Ry Co. v. McKerley*, 86 S.W. 921, 922 (Tex. 1905) (irreconcilable conflict); *Gossett v. Citizens’ Ry Co.*, 69 S.W. 976, 977 (Tex. 1902) (well-defined conflict); *Hanway v. Galveston, H., & S.A. Ry Co.*, 58 S.W. 724, 725 (Tex. 1900) (well-defined conflict); *Assmann v. Dittman*, 53 S.W. 342 , 342 (Tex. 1899) (well-defined conflict). To be well-defined or irreconcilable, it was necessary that the decision of court in the case under consideration be such that it would overrule a prior decision of a court of appeals or the supreme court if the same court had decided both cases. See *Red River*, 86 S.W. at 922; *Gossett*, 69 S.W. at 977; *Hanway*, 58 S.W. at 725; *Assmann*, 53 S.W. at 342; *Sun Mutual Ins. Co. v. Roberts, Willis & Taylor Co.*, 37 S.W. 311, 312 (Tex. 1896). It was *not* necessary that the latter decision expressly overrule the prior decision; just that the two decisions be irreconcilable. *Red River*, 86 S.W. at 922.

The conflict had to be on the very question of law decided by the two courts and could not be a conflict with the “reasoning by which the conclusion is reached.” *McKay v. Conner*, 107 S.W. 45, 46 (Tex. 1908). It was not sufficient to give the Court jurisdiction simply because the court of appeals misapplied a principle of law announced by a decision of another court of civil appeals or of the Supreme Court. The purpose of giving the Court jurisdiction was to “settle the conflict”. *McCurdy v. Conner*, 66 S.W. 664, 667 (Tex. 1902).

B. The Somewhat-Distant Past

As time went on, the Court added verbiage to the conflict jurisdictions standard, but did not change the standard in any substantive way. In *Coultriss v. City of San Antonio*, 179 S.W. 515 (Tex. 1915) the court quoted from several prior opinions that stated the conflict standard in slightly different ways—as if they all articulated the same standard.

?? Quoting from *Bassett v. Sherrod*, 36 S.W. 400 (Tex. 1896), the Court said the conflict had to be “well defined”. *Coultriss*, 179 S.W. at 516.

?? Quoting from *Sun Mutual*, the Court said the conflict had to be such that one decision would overrule the other and that it was not sufficient that a court have misapplied a principle of law announced in another decision. *Coultriss*, 179 S.W. at 516.

⁵ Pursuant to *Texas Rule of Form 5.2.1*, all Texas Commission of Appeals decisions after 1934 are cited as though they were an opinion of the Texas Supreme Court.

?? Quoting from *McKay v. Conner*, 107 S.W. 45 (Tex. 1908), the Court said the conflict had to be on “the very question decided” and “not in the reasoning by which the conclusion is reached.” *Coultress*, 179 S.W. at 516-17.

In 1923, in *Garitty v. Rainey*, the Court synthesized the standard for a jurisdictional conflict:

The conflict in decisions of Courts of Civil Appeals which will authorize this court to issue a writ of mandamus and require certification must be upon a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court. The conflict must be well defined. An apparent inconsistency in the principles announced, or in the application of recognized principles, is not sufficient. The rulings must be so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other. In other words, the rulings alleged to be in conflict must be upon the same question, and, unless this is so, there can be no conflict.

247 S.W. 825, 827 (Tex. 1923). As a practical matter, the Court said nothing new. But this definition of a jurisdictional conflict was to be used in numerous subsequent cases. *See, e.g., Garcia v. American Nat'l Ins. Co.*, 78 S.W.2d 170 (Tex. 1935); *City of Abilene v. McMahan*, 292 S.W. 525 (Tex. Comm'n App. 1927, recommendation accepted); *Borchers v. Fly*, 262 S.W. 733 (Tex. Comm'n App. 1924, recommendation accepted).

Other limitations on a jurisdictional conflict also were present in decisions of the Supreme Court. For example, it was noted that the conflict had to be on a material question of law. Mere *dictum*, not essential to the decision of the case, could not provide the basis for a jurisdictional conflict. *Benson v. Jones*, 296 S.W. 865, 867 (Tex. Comm'n App. 1927, opinion adopted). Similarly, a jurisdictional conflict had to be with a *prior* decision, not a subsequent one. *See City Nat'l Bank v. Phillips Petro. Co.*, 78 S.W.2d 576, 578 (Tex. 1935) (decision of supreme court handed down after decision was handed down by the court below, but before oral argument, was not a prior decision). The mere misapplication of a principle of law announced by another court would not give rise to a jurisdictional conflict. *Mooers v. Hunter*, 67 S.W.2d 860, 861 (Tex. Comm'n App. 1934, recommendation accepted). And the Supreme Court stated that it would not “continue to grant writs of error to settle conflicts in decisions of Courts of Civil Appeals on points [the Supreme Court] has already necessarily determined, where the Court of Civil Appeals has not failed to follow the Supreme Court.” *Fleming v. Pellum*, 287 S.W. 492, 492 (Tex. 1926).

In 1931, the Commission of Appeals appears to suggest that there can be no jurisdictional conflict with an unpublished opinion. *See City of Wichita Falls v. Mauldin*, 39 S.W.2d 859, 862 (Tex. Comm'n App. 1931, recommendation accepted). In 1932, it noted that “[t]he Supreme Court will not go behind the recorded opinion of an appellate

court, in a prior case, for the purpose of producing a conflict of decisions.” *Thacker v. Lindahl*, 48 S.W.2d 588, 589 (Tex. Comm’n App. 1932, recommendation accepted); *but see Durst v. McCampbell*, 40 S.W. 955, 956 (Tex. 1897) (Court appears to be looking to the briefs in the prior case to determine if there is a jurisdictional conflict).

C. The Not-So-Distant Past

Through the 40s, 50s, 60s, and 70s, the verbiage used to describe a jurisdictional conflict changed very little, but the Court was not consistent in its references to which part of the standard was preeminent. For example, in some cases, the Court determined whether there was a conflict by analyzing whether one case would operate to overrule the other if decided by the same court. *See, e.g., Christy v. Williams*, 298 S.W.2d 565 (Tex. 1957); *Cantrell v. Willacy County Water Control & Improvement Dist. No. 1*, 172 S.W.2d 294 (Tex. 1943). In other cases, the Court relied on the standard that the decisions be based on practically the same state of facts and announce antagonistic conclusions. *See, e.g., Davis v. National Casualty Co.*, 175 S.W.2d 957 (Tex. 1943). In other cases, the Court asked whether the two cases were “so far upon the same state of facts that the decision in one case is necessarily conclusive of the decision in the other. *See, e.g., Rogers v. Rogers*, 561 S.W.2d 172 (Tex. 1978); *Releford v. Reserve Life Ins. Co.*, 276 S.W.2d 517 (Tex. 1955); *Dockum v. Mercury Ins. Co.*, 135 S.W.2d 700 (Tex. 1940). It appears the Court considered all of these formulations of the standard as equivalent.

In addition, many opinions in this period assert that the conflict must appear on the face of the opinions. *See, e.g., Boxwell v. Ladehoff*, 400 S.W.2d 303 (Tex. 1966); *Farrell v. Farrell*, 374 S.W.2d 870 (Tex. 1963); *Employers Casualty Co. v. National Bank of Commerce*, 166 S.W.2d 691 (Tex. 1942).

As to the question of what constitutes a *prior* decision, the Court determined that the date the matter was “final” determined which opinion was prior. In *Barber v. Intercoast Jobbers & Brokers*, 417 S.W.2d 154 (Tex. 1967), the allegedly conflicting decision was handed down a day *after* the court of appeals’ decision in the case under consideration, but the filing of a motion for rehearing in the case under consideration meant that it was “final” later than the other case in which no motion for rehearing was filed.

The court also affirmed the requirement that the question of law on which a conflict was alleged be material to the decision of the court of appeals. *See, e.g., Nesbett v. Nesbett*, 428 S.W.2d 663 (Tex. 1968); *Williams v. Williams*, 325 S.W.2d 682 (Tex. 1959) (“In order to be ‘material to a decision of the case’ the question of law must be such that ‘a decision thereof * * * will necessarily control the disposition of the case[.]’”).

D. The Recent Past

The recent past starts with *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979). The conflict alleged was not with a prior decision of a Texas appellate court, but

with a decision of the United States Supreme Court. The Texas Supreme Court's jurisdiction statute (TEX. GOV'T CODE § 22.001(a)(2)), however, does not list a conflict with a United States Supreme Court decision as one on which jurisdiction can be based. The Court found jurisdiction nonetheless.

We hold that under Article V, Sections 1 and 3, of the Constitution of Texas, the Supreme Court of Texas possesses the power, and thus the duty, to correct a decision of a Court of Civil Appeals that conflicts with the 'supreme law of the land' as established by the Congress and Supreme Court of the United States."

Eichelberger, 582 S.W.2d at 397. In asserting jurisdiction, the Court said that it was asserting its "implied" or "inherent" power derived from the separation of powers required by the Texas Constitution. See TEX. CONST. Art. II, § 1. *Eichelberger* remains good law, but the Court has not invoked its inherent jurisdiction since.

In 1980, in *Dixon v. Southwestern Bell Tele. Co.*, the Court set out its conflict jurisdiction as follows:

When a conflict of decisions is made the basis of Supreme Court jurisdiction, the conflict must be such that one decision would operate to overrule the other in case they were both decided by the same court. An apparent inconsistency in the principles announced, or in the application of recognized principles, is not sufficient. The rulings must be so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other. In other words, the rulings alleged to be in conflict must be upon the same question, and, unless this is so, there can be no conflict. It is essential, moreover, that such conflict appear on the face of the opinions themselves and that the same be specifically pointed out in the application for writ of error.

607 S.W.2d 240, 241 (Tex. 1980) (citations and internal quotations omitted). Many of the elements are unchanged from *Garitty*. The standard remained essentially unchanged for the next fifteen years, as is apparent from the Court's 1995 decision in *Gonzalez v. Avalos*.

For this 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 decision 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. We must examine the facts in the case [alleged for conflict] and in the instant case as the facts are reflected in the opinions before us, to determine whether they are so nearly the same

that the decision in one of the cases would be conclusive of the decision in the other.

907 S.W.2d 443, 444 (Tex. 1995) (citations and internal quotations omitted). The Court did not find a conflict in *Gonzalez* because the question presented was one of first impression; which, obviously, means that it cannot be in conflict with another opinion.

Then, in 1998, the Court began to reconfigure its conflict standard, if only slightly. In *Coastal Corp. v. Garza*, the Court stated that a jurisdictional conflict did not require that the cases be factually identical; immaterial factual variations, according to the Court, would not preclude a finding of a jurisdictional conflict.

While occasionally this Court has suggested that cases cannot conflict without nearly identical facts, more often we have emphasized that the decisions need only be “*so far upon the same state of facts*” that they would control one another. In short, cases do not conflict if a material factual difference legitimately distinguishes their holdings. On the other hand, immaterial factual variations do not preclude a finding of jurisdictional conflict. A conflict could arise on very different underlying facts if those facts are not important to the legal principle being announced.

979 S.W.2d 318, 320 (Tex. 1998) (citations omitted). The Court reiterated its statement that immaterial factual differences did not preclude finding a jurisdictional conflict in *Gross v. Innes*, 988 S.W.2d 727 (Tex. 1998). Also in 1998, the Court reminded that a jurisdictional conflict with a “policy” is not possible. *Certain Underwriters at Lloyd’s of London v. Celebrity, Inc.*, 988 S.W.2d 731 (Tex. 1998).

Then, in three opinions handed down in 2000, the Court appeared to rethink the application of the jurisdictional conflict standards. In *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (2000), the Court (relying on *Coastal Corp.*’s announcement that the cases need not be factually identical) found a jurisdictional conflict between two cases that were factually quite different. And, after finding a conflict sufficient to give the Court jurisdiction, the Court did not decide *Bernal* on the question of law found to give rise to jurisdictional conflict.

In *Bland I.S.D. v. Blue*, 34 S.W.3d 547 (Tex. 2000), the Court found a jurisdictional conflict even though the conflicting case had not discussed the exact point on which a conflict was alleged. The failure to address the point was immaterial because the point “was essential to our ruling on the face of the opinion.”

And in *Texas Dep’t of Crim. Justice v. Miller*, 51 S.W.3d 583 (Tex. 2000), the Court found a jurisdictional conflict even though the lower court’s opinion did not discuss the point on which the conflict was found. The Court found a conflict because the conflicting case (a prior Texas Supreme Court opinion) had held that a particular

determination was a necessary prerequisite to proceeding in that kind of case, and the lower court could not avoid review by ignoring the issue.

Part II: The Present

It is unclear whether the Texas Supreme Court's most recent conflict decisions suggest a retrenchment from *Bernal*, *Blue*, and *Miller*. At least one Justice appeared to think so. See *Montes v. City of Houston*, 66 S.W.2d 267 (Tex. 2001) (J. Hecht dissenting on denial of petition for review and accusing Court of a "mulish aversion" to resolving conflicts among the courts of appeals); *Wagner & Brown, Ltd v. Horwood*, 53 S.W.3d 347 (Tex. 2001) (J. Hecht dissenting from dismissal of petition for review for want of jurisdiction). Yet the Court has found jurisdictional conflicts in several cases since *Miller*.

In *Resendez v. Johnson*, 52 S.W.3d 689 (Tex. 2001)—a case in which the Court did not find a jurisdictional conflict—the Court stated the standard for a jurisdictional conflict in language that is very little different than that used in *Garitty* some 80 years earlier:

[A] conflict exists only if 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. Moreover, the conflict must be on the very question of law actually involved and determined, in respect of an issue in both cases, the test being whether one would operate to overrule the other in case they were both rendered by the same court.

52 S.W.3d 689, 691 (Tex. 2001) (citations and internal quotations omitted). The Court did not find a jurisdictional conflict because the cases were factually distinguishable. Additionally, the Court noted that the parties argument that the court of appeals' opinion conflicted with established precedent concerning substantive due process was not good enough to establish a jurisdictional conflict.

At the end of 2001, the Court handed down another opinion in which it failed to find a jurisdictional conflict—*Collins v. Ison-Newsome*, 73 S.W.3d 178 (Tex. 2001). In *Collins* case, the court held that a jurisdictional conflict could not be established with an unpublished opinion because unpublished opinions 'have no precedential value and must not be cited as authority by counsel or by a court'. (quoting TEX. R. APP. P. 47.7). The Court also reiterated that a jurisdictional conflict must be with a *prior* decision of an appellate court.

On the other hand, the Court has found a jurisdictional conflict in three cases so far in 2002. In all three cases, the trial court refused to grant a motion for summary judgment based on sovereign immunity. See *Texas Dep't of Transp. v. Garza*, 70 S.W.2d 802 (Tex. 2002); *Texas Nat'l Resource Conservation Comm'n v. IT-Davy*, 45 Tex. Sup. Ct. J. 558 (Tex. April 11, 2002); *Texas Dep't of Transp. v. Ramirez*, 45 Tex. Sup. Ct. J. 594 (Tex., April 25, 2002). In all three cases, the Court used the same standard: the

rulings in the allegedly conflicting cases must be so far upon the same facts that the decision of one case is necessarily conclusive of the decision in the other, and the conflict must be such that the decision in one case would operate to overrule the decision in the other case if both decisions were by the same court.

In sum, the Court's language in describing a jurisdictional conflict has changed little in at least 80 years and the following appear to be the standards for conflict jurisdiction:

1. The conflict must appear on the face of the two opinions. There may be an exception if the issue on which a conflict is alleged is a necessary prerequisite to a particular kind of lawsuit and, therefore, must be addressed by the lower court. And there may be an exception if the issue on which a conflict is alleged was essential to the decision of the case with which the conflict is alleged, even though not discussed therein.
2. The two cases must be so far on the same state of facts that the decision of one case is necessarily conclusive of the decision in the other, provided, however, that factual identity of the two decisions is not required if the factual differences are immaterial (*i.e.*, the factual differences do not change the substantive legal principle under consideration).
3. The conflict must be on the very question of law actually involved and determined (*i.e.*, the point of law must be material), in respect of an issue in both cases, the test being whether one would operate to overrule the other in case they were both rendered by the same court. There can be no conflict with the reasoning by which the conclusion is reached and no conflict with a general policy.
4. The erroneous application of a legal principle will not establish conflict jurisdiction.
5. The conflict must be with a *prior* decision, not a subsequent one.
6. A conflict cannot be established with an unpublished opinion.

Part III: The Future

Difficult to see; always in motion is the future.

Yoda, Star Wars, Episode V, *The Empire Strikes Back*

Do the benefits of restricting the Texas Supreme Court's jurisdiction of appealable interlocutory orders to cases in which there is a dissent or conflict outweigh the costs of doing so?

The legislature has seen fit to allow an appeal from a few interlocutory trial court orders that it deems sufficiently important to warrant immediate appellate review. The legislature has also seen fit to limit the Supreme Court's jurisdiction in those appeals. The legislature sought to balance two competing goals: the need for immediate review of some important orders, and the need to dispose of litigation in an expeditious manner. In balancing these competing goals, the legislature decided to allow immediate appellate review, but only to the intermediate appellate court. And, while the appeal was pending, the case would proceed in the trial court. Review by the Texas Supreme Court was to be the exception rather than the rule. In other words, the legislature had in mind a quick, but limited, appeal to review a trial court's case-altering decision.

That balance is no longer in place. In 1997, the legislature amended the Civil Practice and Remedies Code to provide that the taking of an appeal from an appealable interlocutory trial court order would stay commencement of trial on the merits pending appeal. (Act of June 20, 1997, 75th Leg., R.S., ch. 1296 Tex. Gen. Laws 4936, *now codified as* TEX. CIV. PRAC. & REM. CODE § 51.014(b). Thus, an appellant may have an incentive to keep the appeal alive for as long as possible. Lodging the case with the Texas Supreme Court keeps the appeal alive and, therefore, forestalls trial on the merits.

That is not to say that these appellants do not have legitimate reasons to appeal to the Texas Supreme Court; often they do. The decision being made by the trial court that is on appeal is almost always critical to the case, and the appellant may believe with absolute good faith that the court of appeals erred in its disposition of the appeal. Thus, the appellant is seeking Supreme Court review for the laudable purpose of trying to achieve what he or she believes is a correct legal outcome. But seeking further review has the effect of forestalling trial on the merits.

In other words, many of these cases are being appealed to the Texas Supreme Court anyway, so perpetuating an artificial barrier to Supreme Court review makes little sense.

Additionally, having to deal with that artificial barrier to Supreme Court review is expensive both for the litigants and the court system. A litigant trying to establish a conflict of decisions as the basis for Supreme Court jurisdiction, typically must research and brief the conflict issue, at a substantial cost to the client. His or her opponent must respond in kind. Then the Court has to review and decide the jurisdiction question. It is a monumental waste of resources for the parties and the Court.

Furthermore, it is a curious system that allows the courts of appeals to exercise such control over Supreme Court jurisdiction. The wording of the court of appeals' opinion can make or break the conflict analysis because the conflict must appear on the face of the opinions. Even more foreboding is the effect memorandum opinions might have on the Supreme Court's conflict jurisdiction. If the conflict must appear on the face of the opinions, memorandum opinions will be the death of conflict jurisdiction. And

given that a conflict cannot be established with an unpublished opinion, there is yet another incentive for courts of appeals to refuse to publish their opinions.

Finally, obtaining Supreme Court review through conflict jurisdiction is inconsistent. The legislature allows Supreme Court review in some cases (*e.g.*, an appeal of a trial court's refusal to grant a summary judgment motion filed by a member of the electronic or print media, *see* TEX. GOV'T CODE § 22.225(d)) but inhibits Supreme Court review in other cases (*e.g.*, an appeal from a trial court order certifying or refusing to certify a class action). Is a media defendant's desire to extricate itself from litigation really more important than a plaintiff's desire to have a class action certified?

The answer to all of this is simple: the legislature should give the Texas Supreme Court discretionary jurisdiction of all appeals from interlocutory trial court orders, just as it has discretionary jurisdiction of appeals from final judgments. Whether there is a conflict of decisions should be nothing more than a *consideration* in granting review. Will the legislature do this? Who knows. The effort is appears more controversial than it should be and an effort to change the Court jurisdiction has failed in the last two sessions. As Yoda says: "Difficult to see; always in motion is the future."

ATTACHMENT 1

to

CONFLICT JURISDICTION: PAST, PRESENT, AND FUTURE