

INTERLOCUTORY APPEALS
IN THE 21st CENTURY

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INTERLOCUTORY APPEALS IN THE 21st CENTURY

INTRODUCTION

As a rule, interlocutory orders cannot be appealed until after a final judgment. Traditionally, interlocutory appeals represent a narrow exception to this general rule of finality. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001). But the right to pursue an interlocutory appeal has expanded significantly in the last decade, and the past year has witnessed important developments in this area.

In 2001, the Legislature amended the general interlocutory appeal statute, Section 51.014 of the Civil Practice and Remedies Code, in two ways. First, the Legislature enacted a new provision for “agreed interlocutory appeals,” permitting an immediate appeal of orders that would otherwise be unappealable. Second, the Legislature amended the statute to narrow the automatic stay provision, providing that trial is automatically stayed while an interlocutory appeal is pending only if certain requirements have been satisfied.

Part I of this paper addresses the text and the initial judicial interpretations of these amendments. In addition, it offers practical commentary on the use and interpretation of the new provisions.

Part II addresses recent developments in state interlocutory appeal practice, focusing on decisions construing the “new” appellate rules and discussing the unique characteristics of the interlocutory orders that are immediately appealable.

I. RECENT AMENDMENTS TO THE INTERLOCUTORY APPEAL STATUTE

A. Agreed Interlocutory Appeals

1. The statutory text

Even if an interlocutory order would not otherwise be appealable, Section 51.014(d) of the Civil Practice and Remedies Code now permits an immediate appeal under certain circumstances. The new statute provides:

- (d) A district court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:

(1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for a 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.

(e) An appeal under Subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings;

(f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

TEX. CIV. PRAC. & REM. CODE § 51.014(d)-(f).

2. Legislative history and federal origins

This new alternative for interlocutory appeal is based on a federal statute. *See* 28 U.S.C. § 1292(b). Under the federal practice, a district judge may certify an unappealable order for immediate appeal by stating in writing that the order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” *Id.* The court of appeals has discretion to accept or decline an immediate appeal of the order. *Id.*

The new Texas statute was originally drafted as a duplicate of the federal statute. *See* Tex. H.B. 978, 77th Leg., R.S. (2001). The purpose of the statute was to provide an efficient means of deciding issues that are central to a case, but that are not

appealable. *Hearings on Tex. H.B. 978 Before the House Comm. on Civil Practices*, 77th Leg., R.S. (Feb. 21, 2001) (statement of Rep. Eiland) (“*Hearings*”).¹

However, the Texas statute adds a requirement not found in federal practice: the parties must agree. TEX. CIV. PRAC. & REM. CODE § 51.014(d)(1)-(3). The bill’s author added this consent requirement to eliminate the possibility of trial judges abusing the new procedure by certifying multiple orders to clear their dockets and delay cases. *See Hearings* (statement of Rep. Eiland); *see also* HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Comm. Substitute for H.B. 978, 77th Leg., R.S. (2001).

Because of this unusual requirement, I refer to this new device as an “agreed interlocutory appeal.” As I will explain, this consent requirement poses unusual challenges for both courts and practitioners, and it is the defining feature of the procedure. Thus, it seems proper to call the new procedure what it is: an agreed interlocutory appeal.

3. Effective date

The new amendments became effective on September 1, 2001, and apply only to a suit that is commenced on or after that date. Suits commenced before that date are governed by the previous law. *See* Acts 2001, 77th Leg., ch. 1389 § 3.

4. Early judicial interpretations

Only one opinion has been issued construing the agreed interlocutory appeal. *See In re D.B.*, 2002 WL 1371228 (Tex. App.—Dallas June 26, 2002, no pet. h.) (publication pending). *In re D.B.* follows the tradition of construing interlocutory appeals narrowly and requiring strict compliance with the statute.

In re D.B. dismissed the appeal for want of jurisdiction, relying on three jurisdictional defects: (1) absence of evidence that the appellee consented

to appeal; (2) absence of an “application” to appeal; and (3) untimely filing of the notice of appeal. Because this is the first interpretation of the statute, all three of these holdings deserve examination.

First, *In re D.B.* held that the consent of the parties to an immediate appeal must affirmatively appear in the record. Even though the appellee evidently did not contest its agreement, the court of appeals raised this issue *sua sponte* and found no evidence of the appellee’s consent. *See In re D.B.*, 2002 WL 1371228 at *2.

Second, *In re D.B.* took a mechanical view of the requirement that an “application” for the right to appeal must be made to the court of appeals. Neither the statute nor the appellate rules provide any guidance about the form of such an application, so courts will be forced to fashion their own rules. The Dallas court held that a docketing statement, a “notice of accelerated appeal,” and a brief—none of which cited the agreed appeal statute—did not constitute an “application.” *See In re D.B.*, 2002 WL 1371228 at *1. Until the rules for perfecting an agreed interlocutory appeal are definitively resolved, it also would be wise to file a formal “application” with the court of appeals. *See* Part I.A.7, *infra*.

Third, *In re D.B.* held that the application for an agreed interlocutory appeal must be filed in the court of appeals within ten days after the order is signed—and that deadline *cannot* be extended. Unlike the other species of interlocutory appeals, which are subject to the 20-day deadline provided in TEX. R. APP. P. 26.1(b), the agreed interlocutory appeal statute provides a shorter period to appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(f) (application must be filed in the court of appeals “not later than the 10th day” after order is signed). Because this deadline is provided by the statute, the Dallas court held it cannot be extended under the ordinary extension rule of TEX. R. APP. P. 26.3. “When a statute provides the deadline for perfecting an appeal, compliance with that statutory deadline, not the deadline in the rules of appellate procedure, is necessary to give the appellate court jurisdiction.” *In re D.B.*, 2002 WL 1371228 at *3.

In re D.B. is characteristic of the strict approach Texas courts have taken to interlocutory appeals. But one might fairly ask whether the strict approach exemplified by *In re D.B.* best accomplishes the purposes of the agreed

¹ The author is indebted to Dana Livingston Cobb for sharing legislative research on this new statute. The legislative history summarized here is recounted in greater detail in her fine paper, *Permissive Interlocutory Appeals in State Court*, 12TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS (Univ. of Texas 2002). Anyone handling an agreed interlocutory appeal should obtain a copy of this excellent paper, which includes a comparison to federal practice and extensive practice tips.

interlocutory appeal statute. As courts (and practitioners) confront their first agreed interlocutory appeals under the new statute, perhaps we should rethink our usual approach.

5. Toward a functional interpretation of the agreed interlocutory appeal statute

As noted above, the strict approach illustrated by *In re D.B.* is consistent with the traditional view that interlocutory appeals are a narrow exception to the finality requirement. See *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001). That traditional hostility to interlocutory appeals flows from the policy against piecemeal litigation, which is designed to preserve judicial economy. Consistent with that policy, interlocutory appeals are allowed only when they promote judicial economy. *Id.* at 358. Mindful of this policy, the courts might wish to construe the new statute more generously.

As a practical matter, because the Texas statute requires that the parties agree to a permissive appeal, this statute will be most useful as a device to assist parties who wish to settle their case but are unable to agree about its value. Thus, courts should regard agreed interlocutory appeals as settlement aids and should construe the statute to serve that purpose.

Although the statute provides that an agreed interlocutory appeal may raise only a “controlling question of law as to which there is a substantial ground for difference of opinion,” that rule must be construed in harmony with the consent requirement. Unlike the federal practice, in which a federal district court can force an immediate appeal of a dispositive issue, the Texas version of this procedure is available only with the consent of the parties. Courts should be very reluctant to reject the parties’ agreement that an issue is a “controlling question.” Simply put, if the parties think that an issue is “controlling,” then it probably is (for purposes of a particular case)—even if it does not appear to be “controlling” in the technical sense.

The greatest value of the agreed interlocutory appeal is the opportunity to resolve hotly disputed questions that will significantly influence the value of the case and that could go either way on appeal. If the parties agree to an immediate appeal to resolve those issues, it is much more likely that they will be able to settle their case once the issue is

decided. For this reason, when the parties agree, trial courts should be very generous in granting permission to appeal and appellate courts should be very generous in accepting such appeals. This practice will further the interests of judicial economy by reducing the need for full litigation of the case before the issue can be decided after final judgment, and it will foster the public policy favoring settlements.

In this sense, the agreed interlocutory appeal shares some of the hallmarks of arbitration, and it should be construed similarly. Because it furthers the socially favored objective of resolving disputes efficiently and with minimal judicial intervention, arbitration is strongly favored by the Texas courts. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992). As a result, contrary to their usual hostility to interlocutory appeals, Texas courts are receptive to appeals (and mandamus proceedings) involving arbitration, even going so far as to resolve any doubts in favor of compelling arbitration. *E.g.*, *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996).

As with arbitration, an agreed interlocutory appeal can take place only with the parties’ consent. As with arbitration, an agreed interlocutory appeal will serve the policy in favor of efficient resolution of legal disputes and will promote judicial economy. Thus, the generous rules favoring arbitration should provide a model for judicial construction of the new agreed interlocutory appeal.

6. Strategies for overcoming the veto problem and maximizing the value of the agreed appeal

The conventional wisdom among practitioners has been that the consent requirement makes the new agreed interlocutory appeal toothless, because the prevailing party in the trial court will rarely consent to an immediate appeal—especially one that might deprive it of valuable settlement leverage. See, *e.g.*, *Cobb, supra*, at 6 (“many times the party who has prevailed on a ‘controlling issue’ in the trial court is not highly motivated to give up such a valuable bargaining chip—especially when the ruling tangibly affects settlement value—by agreeing to immediate appellate court review”). Based on this assumption, some commentators already have called for the consent requirement to be eliminated. *Id.*

Until the Legislature acts on these proposals, practitioners must choose between ignoring the new agreed interlocutory appeal or learning how to make the most of it. Contrary to the conventional wisdom, there is reason to believe that the veto problem can be overcome and the agreed interlocutory appeal can be a valuable weapon in the arsenal of a creative appellate lawyer.

The challenge posed by giving one party a “veto” over the preferences of another is not new; other areas of law have devised a variety of strategies for dealing with “hold-out” problems. These lessons are useful in suggesting ways to overcome the veto problem posed by the new agreed interlocutory appeal. But in order for these lessons to be most effective, courts will need to construe the statutory phrase “the parties” to require the consent only of the parties to the particular order on appeal, not all the parties to the entire case.

(a) *Buying the veto and bargaining for issues*

First, in the field of property, parties seeking to assemble a large parcel of land routinely encounter “hold-outs” who refuse to sell. Potential buyers must develop solutions to overcome that veto problem. See Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473 (1976); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 81-82 (1986). Some of those strategies might be effective here.

First, a party wishing to appeal immediately might “purchase” the veto rights of another party, giving something in exchange for a promise not to exercise the veto. In multi-party litigation in which one party holds out, this strategy might be as simple as settling with the hold-out to “buy” the veto power. This would create an obvious incentive to hold out, with consequences that I discuss below.

More interesting is the possibility of “trading” for appealable issues in one interlocutory appeal. The conventional wisdom holds that parties will not agree to interlocutory appeals because one party has nothing to gain from the appeal. That obstacle could be overcome if a party desiring to appeal one issue offered to “trade” for an appeal of another issue. Alternatively, the appellee might bargain for other consideration that would be unrelated to the appeal (e.g., stay of discovery, extension of deadlines). Obviously, the “price” of an agreement will vary depending on the value associated with the

appeal. Because it gives both parties an incentive to agree, this tactic could overcome the veto problem.

This possibility illustrates one way in which the consent requirement could define issues that would “materially advance the ultimate termination of the litigation,” and underscores the point made above: if the parties believe an immediate appeal would materially advance the termination of the litigation, the courts ought to agree—even if the issues do not look that way from the ivory tower.

(b) *High-low settlements*

Another promising strategy to overcome the veto problem is the use of a “high-low” settlement. The high-low settlement is a device by which parties define the limits of a defendant’s ultimate liability, conditioned upon the outcome of pending litigation. E.g., *ASI Technologies, Inc. v. Johnson Equip. Co.*, 75 S.W.3d 545, 549 (Tex. App.—San Antonio 2002, pet. filed) (discussing a conventional high-low deal in which a plaintiff was guaranteed a maximum recovery of \$900,000 and a minimum recovery of \$300,000, depending on the jury verdict).

Because high-low agreements eliminate the risk of extreme outcomes for all parties (by contract) while permitting room for intermediate outcomes (by litigation), they are especially useful in cases where a close question generates uncertainty and prevents the parties from being able to evaluate the settlement value of the case with confidence. Thus, high-low agreements are often useful in the appeal of novel or questionable legal theories, enabling parties to obtain a decision on the issue (and agree on the value of the case under different scenarios) while protecting each party from the risk of a catastrophic result.

This scenario is precisely what the new statute was designed to address. It arises when there is a “controlling question of law as to which there is a substantial ground for difference of opinion,” and an immediate appeal would “materially advance the ultimate termination of the litigation.” Therefore, the high-low device might be an ideal “carrot” to overcome the veto problem.

Here’s how it would work: Imagine a plaintiff sues a defendant on a cause of action for negligence. The liability facts are compelling and the damages are significant—precisely the type of case in which a fair settlement should usually be possible—but the defendant believes it owed no duty to the plaintiff.

If the motion for summary judgment on that ground is denied, then both parties have a tiger by the tail. The plaintiff has no incentive to agree to an appeal, preferring to maximize its leverage after judgment—but it is risking a take-nothing judgment on appeal. If the defendant wants to preserve its right to appeal in order to assert its no-duty argument, it must run the gauntlet of trial and risk a catastrophic judgment. Based on their different views of the duty argument, the parties may have wildly different views about the value of the case, which dooms any settlement. But by agreeing to a high-low settlement and an immediate appeal, the parties can resolve the case without incurring the costs of litigating the case, burdening the trial courts, and risking a catastrophic result for either side. Under these circumstances, both parties would have an incentive to agree to the immediate appeal, overcoming the veto problem. Thus, high-low settlements are a perfect device to maximize the value of the new statute.

(c) The prisoner's dilemma and agreed appeals in multi-party litigation

These suggestions have assumed, for the sake of simplicity, a conventional two-party lawsuit. Obviously, in modern multi-party litigation the veto problem becomes exponentially more complicated. In particular, requiring the consent of every party to an interlocutory appeal in a multi-party lawsuit creates incentives for individual parties to “hold out” and refuse their consent unless they receive special concessions from the others. Even in a case in which a plaintiff and defendant wished to appeal, therefore, a “hold-out” might be able to block the appeal and extract valuable concessions.

This raises an interesting interpretive question: what does the law mean by the phrase “the parties”? See TEX. CIV. PRAC. & REM. CODE § 51.014(d)(3) (requiring that “the parties” agree to the appeal). Does that mean “the parties” to the case, or simply “the parties” affected by the order to be appealed? In multi-party litigation, it is not unusual for parties to assert a motion against one party, but not others. In that circumstance, must the parties who are not affected by the order agree to the appeal? And if so, given that they have nothing to gain from the appeal, do they not have a significant incentive to hold out and demand concessions from the other parties?

Courts should take these incentives into account in construing the phrase “the parties.”

Consider a case in which a plaintiff sues several defendants, who then cross-claim against each other. Suppose that one of the defendants files a summary judgment motion against the other defendant on the cross-claim, raising arguments that do not affect the plaintiff’s right to recover. If that motion is denied, and the defendants wish to take an immediate appeal to definitively resolve their respective liabilities, must the plaintiff consent to the appeal? And if so, why should the plaintiff not demand a concession (perhaps a favorable settlement from the defendant that stands to gain the most on appeal) in return for its consent?

Or consider the situation in which one party asserts identical motions against multiple parties. For example, imagine that a defendant files motions for summary judgment on the basis of limitations against multiple plaintiffs in a mass tort lawsuit. Because an interlocutory appeal from the denial of the summary judgment motions could be dispositive, the plaintiffs will have no incentive to agree to it. Thus, the conventional wisdom holds that the new agreed appeal statute will be useless in this case.

But what if the defendant takes a page out of the prosecutor’s handbook and divides the plaintiffs, offering a substantial benefit (perhaps a generous settlement with terms that would not moot the claim, such as a high-low deal) to the *first* plaintiff who agrees to an appeal? Assuming the grounds for the motion would apply equally to every other plaintiff, all the plaintiffs would face the same risk of having their claims extinguished in the interlocutory appeal. On the other hand, the plaintiff who agreed to appeal would be guaranteed the benefits of the settlement. Therefore, each plaintiff would have an individual incentive to agree to the appeal.

This scenario is basically a prisoner’s dilemma, a classic device in which independent parties whose common interests would be served by cooperation can be divided when they are confronted with a choice that gives each of them the opportunity for an individual benefit and the risk of an individual loss. By using the prisoner’s dilemma, a party desiring to appeal could create incentives for another party to agree to the appeal when it otherwise would not. Any lawyer who has been a criminal prosecutor can attest to the value of a divide-and-conquer strategy. Thus, creative use of the prisoner’s dilemma could

overcome the veto problem and create opportunities to pursue an agreed interlocutory appeal.

(d) *Construing “the parties”*

These hypotheticals suggest that parties might be most likely to “agree” to an immediate appeal in multi-party litigation, in which parties can be forced to bargain against others, instead of two-party cases. The conventional two-party lawsuit gives rise to what economists refer to as a “bilateral monopoly,” in which parties who are locked into bargaining with each other face no competitive pressure from others, and thus are free to demand unrealistic concessions from the other side—resulting in a failure to agree. See *Richard A. Posner*, *ECONOMIC ANALYSIS OF LAW* 62 (4th ed. 1992). As the hypotheticals above illustrate, multi-party bargaining creates an incentive to bargain more realistically because of competition from others.

Thus, the agreed interlocutory appeal procedure is most likely to be useful in multi-party litigation. But in order to be effective in multi-party litigation, courts must construe the reference to “the parties” to refer only to the parties to the order being appealed, not all parties to the litigation. Otherwise, there is no way to overcome the veto problem.

Obviously, there are many considerations that may inform the statutory construction of the phrase “the parties,” but the court’s “primary goal is to ascertain and give effect to the Legislature’s intent.” *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001). Courts should consider the statute’s purposes, legislative history, and the consequences of a particular construction. *Id.* Construing “the parties” to mean only the parties to the order being appealed would best accomplish the legislative purpose.

As explained above, the overriding reason for the new statute was to permit parties to obtain an immediate resolution of critical issues. In addition, the purpose of the interlocutory appeal statute is to foster judicial economy by resolving cases earlier. Those purposes would be served by a construction that makes it easier for parties to take advantage of the right to appeal when they have agreed an appeal would materially advance the end of the litigation; by contrast, no useful purpose would be served by a construction that allows one party to “veto” the preferences of two other parties who wish to avail themselves of this new procedure. For this reason, courts should hold the new statute requires only the

consent of “the parties” to the order being appealed, not “the parties” to the litigation.

7. Nuts and bolts of agreed interlocutory appeals

The new statute makes no provision for the procedures governing agreed interlocutory appeals. Until definitive procedures have been established, courts and practitioners will be forced to innovate. Practitioners should follow the appellate rules that govern interlocutory appeals as much as possible, and should seek guidance from the federal rule that governs permissive appeals. See FED. R. APP. P. 5 (establishing the procedures for permissive appeals). In addition, practitioners would be well advised to file a motion for a scheduling order when filing an agreed interlocutory appeal to clarify any doubts about the appropriate procedure.

One respected commentator has already urged the supreme court to adopt a new rule governing this new type of appeal. See Dana Livingston Cobb, *Permissive Interlocutory Appeals in State Court*, 12TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS at 7-8 (Univ. of Texas 2002). Until the Court does so, Ms. Cobb’s paper provides a series of excellent practice tips for navigating the potentially treacherous waters of this new procedure, and it is highly recommended.

Based on the first interpretation of the statute, counsel should be advised to (1) make certain that the agreement of “the parties” appears in the record; (2) file an “application” for permission to appeal in addition to a notice of appeal; and (3) file the application within 10 days after the order is signed, without attempting to obtain an extension of time. See *In re D.B.*, 2002 WL 1371228 (Tex. App.—Dallas June 26, 2002, no pet. h.). Future decisions will develop the contours of this procedure further, and counsel should carefully follow the rules applied by the court of appeals that will have jurisdiction because there is likely to be substantial variation among the courts for the foreseeable future.

Most of the procedural questions posed by the new statute can be resolved with a little cooperation between counsel and the court. Counsel should respect the institutional demands facing the courts and attempt to clarify procedural issues in advance. Likewise, mindful of the rule that a court of appeals “must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in

appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities,” TEX. R. APP. P. 44.3, courts should be generous in assisting counsel to comply with whatever procedures the court deems appropriate. To accomplish these goals, counsel should request (and courts should enter) a scheduling order to dictate procedure in an agreed interlocutory appeal. Courts have the power to suspend the rules and order different procedures whenever appropriate, and they should exercise that power to clarify any ambiguities in the procedures for this new appeal. See TEX. R. APP. P. 2. In this manner, counsel and the courts may work together to handle these cases in an expeditious manner that fulfills the purposes of the statute.

But this suggestion assumes that an appellant has properly invoked the jurisdiction of the court. The one thing that a court of appeals cannot do is suspend the rules governing perfection of an appeal. See TEX. R. APP. P. 2. In other words, until you get through the courthouse door, you are on your own. Consequently, I will briefly address the procedure for perfecting an agreed interlocutory appeal.

There is some tension between the statute, which says that an “application” for permission to appeal must be filed within 10 days after the order is signed, TEX. CIV. PRAC. & REM. CODE § 51.014(f), and Rule 26.1, which states that a “notice of appeal” must be filed in accelerated appeals within 20 days after the order is signed. TEX. R. APP. P. 26.1(b). Although it would be tempting to ignore the rule and proceed solely under the statute, that is dangerous because filing a notice of appeal may be necessary to invoke the jurisdiction of the court of appeals. See TEX. R. APP. P. 25.1(b). On the other hand, simply filing the “notice of appeal” is not sufficient, as the unfortunate appellant learned in *In re D.B.* Therefore, every commentator to discuss this statute recommends filing an application for permission to appeal *as well as* a notice of appeal within 10 days after the order is signed. See Cobb, *supra*, at 10; Warren W. Harris & Lynne Liberato, *State Court Jurisdiction Expanded to Allow for Permissive Appeals*, 65 TEX. B.J. 31 (2002). This is sage advice and it should be followed until a precise procedure is prescribed by rule or decision.

The notice of appeal should comply with the ordinary rules for perfecting an interlocutory appeal.

See TEX. R. APP. P. 25.1(d). Although there is no form prescribed for the “application for permission to appeal,” counsel might refer to the federal rule. See FED. R. APP. P. 5(b)(1). Because the court of appeals has discretion to accept or reject the appeal, the application should explain how the case satisfies the terms of the statute and why it should be granted. This document might resemble a petition for review to the Texas Supreme Court, with a particular focus on the fact that “immediate appeal from the order may materially advance the ultimate termination of the litigation.” See Harris & Liberato, *supra*, at 31; Cobb, *supra*, at 15-16. As discussed previously, courts should be generous in granting permission to appeal when the parties agree that immediate appeal will materially advance the end of the case.

B. Automatic Stay of Trial

1. The statutory text

Until last year, all interlocutory appeals had the effect of automatically staying the trial. In 2001, however, the Legislature imposed conditions upon the stay in certain classes of interlocutory appeals. See TEX. CIV. PRAC. & REM. CODE § 51.014(b)-(c). The statute now provides as follows:

- (b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal.
- (c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay of the commencement of trial under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:
 - (1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or

- (2) the 180th day after the date the defendant files: (a) the original answer; (b) the first other responsive pleading to the plaintiff's petition; or (c) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.

TEX. CIV. PRAC. & REM. CODE § 51.014(b)-(c).

Here is what that riddle means in English: First, interlocutory appeals of temporary injunctions do *not* stay the trial anymore. This amendment restores the traditional view that the best remedy for a temporary injunction is a speedy trial and a decision on the merits. *See Coalition of Cities for Affordable Utility Rates v. Third Court of Appeals*, 787 S.W.2d 946, 947 (Tex. 1990).

Second, the stay provision remains unchanged for interlocutory appeals involving receivers and trustees, class certification orders, defamation cases, and arbitration orders. In those categories of cases, the interlocutory appeal automatically stays the trial, regardless of when the motion is filed.

Third, interlocutory appeals involving motions for summary judgment on the basis of immunity, special appearances, and pleas to the jurisdiction automatically stay the trial only if the motion is filed within the time limits specified in the statute.

2. Legislative history

Under the prior version of Section 51.014(b), every interlocutory appeal resulted in a stay of trial. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(b) (Vernon Supp. 2001) (superseded). Under that rule, defendants could wait until the last minute to raise certain affirmative defenses and pursue an appeal, using the interlocutory appeal statute as a device to delay the trial. The amendment sought to eliminate the opportunity for such dilatory pleas:

What this bill does is essentially it makes a defendant (or anybody that is going to raise a sovereign immunity or other type of qualified immunity) to raise it within a

specified time frame. And this was brought to my attention last session by the Harris County judges who are having problems with managing their cases by people waiting until the eve of trial.

Hearings on Tex. H.B. 978 Before the House Comm. on Civil Practices, 77th Leg., R.S. (Feb. 21, 2001) (statement of Rep. Eiland) (“*Hearings*”); *see also id.* (statement of Judge Lindsay) (describing docket control problems posed by dilatory pleas).

The complicated deadlines in the new statute are an effort to accomplish the legislative objective of deterring dilatory pleas without prejudicing any defendant's right to assert an affirmative defense whenever an amended petition makes it appropriate, and without interfering with the right of trial judges to manage their dockets by using scheduling orders. *See Hearings* (statement of Rep. Eiland); *id.* (statement of Judge Lindsay).

3. Effective date of new amendments

The new amendments became effective on September 1, 2001, and apply only to a suit that is commenced on or after that date. Suits commenced before that date are governed by the prior version of the statute. *See* Acts 2001, 77th Leg., ch. 1389 § 3.

4. Mandatory nature of stay

The statute states that an interlocutory appeal “shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal.” TEX. CIV. PRAC. & REM. CODE § 51.014(b). Provided the conditions of the statute are satisfied, the stay statute is mandatory and leaves no room for discretion. *See Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

On the other hand, at least one court has held (in an unpublished opinion) that the stay is waivable. *See Siebenmorgen v. Hertz Corp.*, 1999 WL 21299 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (finding waiver because party seeking to rely on stay failed to object at the beginning of trial).

If a trial court proceeds to trial in violation of the stay (and the appellant properly objects), mandamus will issue. *See Waite*, 76 S.W.3d 222-23. In that situation, the trial must begin anew after the stay has been lifted; it cannot resume at the point it was interrupted. *Id.*

5. Scope of stay

There is very little law concerning the scope of the automatic stay. At least one court has suggested that the stay provision extends only to any claim that might be affected by the pending interlocutory appeal. *See Tarrant Regional Water Dist. v. Gragg*, 962 S.W.2d 717, 718-19 (Tex. App.—Waco 1998, no pet.). In *Gragg*, the defendant raised a sovereign immunity defense against some causes of action but not others. After the trial court set the case for trial, the defendant requested emergency relief from the court of appeals. The court of appeals allowed the trial to proceed on claims that were not affected by the sovereign immunity defense, holding the stay applied to “any part of the proceeding that may be affected by our decision in the interlocutory appeal.” *Id.* at 719.

In most cases, the *Gragg* rule is not relevant. Most of the grounds for interlocutory appeal are not claim-specific, but apply to all claims asserted in the litigation. In these cases, parties may not defeat the automatic stay provision by “severing” an interlocutory order from the rest of the case and proceeding to trial on claims that would otherwise be affected by the order. That strategy was tried in *Sheinfeld, Maley & Kay, P.C. v. Bellush*, 61 S.W.3d 437 (Tex. App.—San Antonio 2001, no pet.), where the trial court entered a temporary injunction, “severed” it, and set the rest of the case for trial. The court of appeals granted emergency relief and stayed the trial, holding the “severance” improper:

The severance cannot isolate the claims that would be affected by the temporary injunction or the intent of the legislature could be circumvented in every case in which an interlocutory appeal is pending by simply severing the order on appeal from the remainder of the cause. Although the appellees seek to rely on the decision in *Gragg* to claim that such a severance is proper, the severance mentioned in *Gragg* was a severance of the actual claims that would be affected by the appellate court’s decision on the interlocutory appeal, not a severance of the trial court’s order

Id. at 438.

To put it another way, the *Gragg* rule applies only to claims that satisfy the test for a severance,

TEX. R. CIV. P. 41, and which would not be affected by the decision in the pending interlocutory appeal. This is a very narrow category of cases.

6. Application of stay to summary judgments

In some circumstances, a summary judgment proceeding is considered a “trial.” *See Goswami v. Metropolitan Sav. and Loan Ass’n*, 751 S.W.2d 487, 490 (Tex. 1988). No court has considered whether a summary judgment hearing is a “trial” for purposes of the interlocutory appeal statute. *See Save Our Springs Alliance, Inc. v. Austin Indep. Sch. Dist.*, 973 S.W.2d 378, 380 (Tex. App.—Austin 1998, no pet.) (identifying this issue but failing to decide it because it was not raised by the parties). Therefore, the application of the stay to summary judgment proceedings remains an open question.

7. Expiration of stay

Similarly, no court has decided whether the stay created by § 51.014(b) expires once the appeal is decided by the court of appeals or continues in effect while a petition for review is pending in the Texas Supreme Court. The supreme court noted this question in *Perry v. Del Rio*, 66 S.W.3d 239, 256-57 (Tex. 2001), but did not reach it.

Whether or not the automatic stay would apply, the supreme court could certainly grant a temporary stay under Rule 29.6 to protect its jurisdiction while it considers the petition. *See* Part II.A.8, *infra*.

II. RECENT DEVELOPMENTS IN STATE INTERLOCUTORY APPEAL PRACTICE

A. Procedure in the Court of Appeals

The “new” Texas Rules of Appellate Procedure were adopted in 1997. This section reviews all the significant decisions that have applied the new rules to interlocutory appeals.

1. Perfection of interlocutory appeal

(a) Deadline for notice of appeal

In all but one category of interlocutory appeals, the notice of appeal must be filed within 20 days after the order is signed. TEX. R. APP. P. 26.1(b); *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 964 S.W.2d 762, 763 (Tex. App.—Amarillo 1998, no pet.).

The exception is agreed interlocutory appeals; in those cases, an “application” for permission to appeal must be filed within 10 days after the order.

See TEX. CIV. PRAC. & REM. CODE § 51.014(f). And at least one court has held that this deadline cannot be extended. *In re D.B.*, 2002 WL 1371228 (Tex. App.—Dallas June 26, 2002, no pet. h.) (publication pending). In addition to the application, it may also be necessary to file a notice of appeal. Cautious practitioners will do both until this rule is clarified.

(b) *Post-trial motions*

Motions for new trial do not extend the time to file an interlocutory appeal. TEX. R. APP. P. 28.1; *Denton County v. Huther*, 43 S.W.3d 665, 666-67 (Tex. App.—Fort Worth 2001, no pet.); *Dayco Prods., Inc. v. Ebrahim*, 10 S.W.3d 80, 83 (Tex. App.—Tyler 1999, no pet.). The rule does not expressly address whether other motions (such as a request for findings of fact and conclusions of law), will extend the deadline, and no published case has addressed the issue under the new appellate rules. Given the plain language of Rule 26, however, it is unlikely that any motion will extend the deadline. See *William J. Hone And Falk & Fish, L.L.P. v. Hanafin*, 2002 WL 393131 (Tex. App.—Dallas 2002, pet. filed) (request for findings and conclusions does not extend deadline for interlocutory appeal).

(c) *Motions for extension of time*

The deadline to file the notice of appeal may be extended if, within fifteen days after the deadline, the appellant files both the notice of appeal and a motion for extension of time. TEX. R. APP. P. 26.3; TEX. R. APP. P. 10.5(b). But recall that *In re D.B.* holds this rule does not apply to agreed appeals.

A motion for extension is automatically implied when the appellant files its notice of appeal within the 15-day period for filing a motion for extension. See *Verburgt v. Dorner*, 959 S.W.2d 615, 617-19 (1997). This rule applies to interlocutory appeals. See, e.g., *Ace Ins. Co. v. Zurich Am. Ins. Co.*, 59 S.W.3d 424, 426 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (implying a motion for extension of time to perfect an interlocutory appeal).

To obtain an implied extension under *Verburgt*, the appellant must show a “reasonable explanation” for failing to file a timely notice of appeal. Courts have recognized several grounds that meet this test, and in the specific context of interlocutory appeals,

even the failure to know that an interlocutory appeal is accelerated has been considered a reasonable explanation. See, e.g., *In re B.G.*, 2002 WL 1339502, *1-2 (Tex. App.—Waco 2002, no pet. h.) (publication pending). However, a mistaken belief that an appellant timely filed a notice of appeal based on a misreading of the rules governing interlocutory appeals has been held insufficient to warrant an extension—a ruling which is now being appealed to the Texas Supreme Court. See *William J. Hone And Falk & Fish, L.L.P. v. Hanafin*, 2002 WL 393131 (Tex. App.—Dallas 2002, pet. filed) (dismissing appeal because appellants’ mistaken belief that they had timely filed a notice of appeal was not a reasonable explanation).

(d) *Restarting deadlines with new motions*

Arguably, an appellant could always restart the appellate timetables by filing another motion asserting the same ground for relief and obtaining a new order to appeal. But this strategy may not work if the arguments in the second motion are identical. In *Denton County v. Huther*, 43 S.W.3d 665, 666-67 (Tex. App.—Fort Worth 2001, no pet.), the court dismissed an interlocutory appeal from a “renewed” motion based on its conclusion that there was no “substantive difference” between the new motion and the first motion, which was not timely appealed. *Id.* at 667; see also *Cameron County v. Carillo*, 7 S.W.3d 706, 708-09 (Tex. App.—Corpus Christi 1999, no pet.) (holding orders on renewed motions that raise new grounds for relief are appealable). These decisions suggest a motion cannot be renewed simply for purposes of restarting the clock.

The Amarillo court rejects that conclusion, explaining that the trial court may always reconsider its interlocutory rulings, and each interlocutory order is appealable on its own terms:

The mere fact that the statute does permit the appeal of a summary judgment motion such as the one before us, does not mean that the absence of an appeal from an earlier motion deprives the later ruling of its interlocutory nature or of the right to appeal a later ruling.

McCartney v. May, 50 S.W.3d 599, 604 (Tex. App.—Amarillo 2001, no pet.). Thus, there appears to be a division brewing over the appealability of

“renewed” motions for purposes of restarting the appellate deadlines.

2. Findings of fact

The trial court need not file findings of fact and conclusions of law, but may do so within 30 days after the order is signed. TEX. R. APP. P. 28.1. “Findings and conclusions filed in an interlocutory matter are ‘helpful’ in determining if the trial court exercised its discretion in a reasonable and principled fashion. When findings and conclusions are merely helpful but not required, they do not carry the same weight on appeal as findings made under rule 296, and are not binding if unchallenged.” *Mueller v. Beamalloy, Inc.*, 994 S.W.2d 855, 858-59 (Tex. App.—Houston [1 Dist.] 1999, no pet.) (citations omitted); *Entex v. City of Pearland*, 990 S.W.2d 904, 910 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (same).

3. Acceleration of the appeal

Because interlocutory appeals are accelerated, TEX. R. APP. P. 28.1, they are placed on a fast track. The record is supposed to be filed within 10 days of the notice of appeal. See TEX. R. APP. P. 35.1(b). The appellant’s brief is due 20 days after the record is filed, and the appellee’s brief is due 20 days later. TEX. R. APP. P. 38.6. Accelerated interlocutory appeals are placed near the front of the appellate court’s docket for decision. TEX. R. APP. P. 40.1(b). To assist the court in managing its docket, appellants should indicate in their notice of appeal and their docketing statement that the appeal is accelerated. See TEX. R. APP. P. 25.1(d)(6), 32.1(g).

4. Suspending the order on appeal

Perfecting an interlocutory appeal does not suspend the order appealed from unless the order is superseded or the appellant is entitled to suspend the order without security by filing a notice of appeal. TEX. R. APP. P. 29.1.

Thus, government defendants who are entitled to suspend the enforcement of judgments without providing security may suspend any interlocutory orders simply by filing a notice of appeal. See, e.g., *In re Long*, 984 S.W.2d 623, 625-26 (Tex. 1999); *City of Dallas v. North by West Entertainment, Ltd.*, 24 S.W.3d 917 (Tex. App.—Dallas 2000, no pet.).

The trial court may allow an interlocutory order to be superseded, in accordance with the usual rules,

while the interlocutory appeal is pending. If the trial court refuses a request to supersede an interlocutory order while the appeal is pending, the appellant may move the court of appeals to review that decision for abuse of discretion. TEX. R. APP. P. 29.2.

This rule implies that the appellant must first ask the trial court for relief, but at least one court has held a request for temporary relief under Rule 29.3 that would have the effect of suspending the order appealed may be addressed directly to the court of appeals if necessary to preserve the parties’ rights. See *Maples v. Muscletech, Inc.*, 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.) (entertaining, but rejecting, motion to stay temporary injunction because the bond was allegedly deficient). Whether or not it is technically correct, that ruling recognizes the reality that decisions about temporary relief in interlocutory appeals often require expediency.

5. Temporary orders of appellate courts

When an interlocutory appeal is perfected and the jurisdiction of the court of appeals has attached, the court of appeals may make any temporary orders necessary to preserve the parties’ rights until the appeal is decided, and may require proper security. TEX. R. APP. P. 29.3. But the appellate court cannot suspend the trial court’s order if the appellant’s rights would be adequately protected by supersedeas or other relief authorized by Rule 24. *Id.*

Appellate courts should grant temporary relief when necessary “to prevent a portion of the appeal from becoming moot.” *H & R Block, Inc. v. Haese*, 992 S.W.2d 437, 439 (Tex. 1999). If the court of appeals refuses to grant temporary relief necessary to protect its own jurisdiction, a party may ask the supreme court for relief. *Id.* The supreme court may grant temporary relief to protect the jurisdiction of the court of appeals without taking jurisdiction over the merits itself. *Id.*

An appellate court may also find it necessary to issue temporary orders staying orders issued by the trial court while the appeal is pending until it can determine whether those orders interfere with its jurisdiction over the interlocutory appeal. See, e.g., *McAllen Med. Ctr. v. Cortez*, 66 S.W.3d 227, 238 (Tex. 2001). If they do, the court may then suspend the orders under Rule 29.6. *Id.*

Temporary relief may take a variety of forms. Because an interlocutory appeal is often available to

protect a defendant from the burdens of litigation (e.g., arbitration, immunity, special appearance, class actions, libel suits against media defendants), some appellate courts may be willing to stay all proceedings in the trial court pending disposition of the appeal. *See Lacefield v. Electronic Fin. Group*, 21 S.W.3d 799, 800 (Tex. App.—Waco 2000, no pet.) (staying proceedings pending disposition of special appearance appeal). But other courts may be less inclined to suspend proceedings in a trial court. *See Compaq Computer Corp. v. Lepray*, 52 S.W.3d 908 (Tex. App.—Beaumont 2001, no pet.) (denying motion to stay merits discovery and class notice while appeal of class certification was pending).

At least one court has held that the power to issue temporary orders under Rule 29.3 expires once the appeal has been decided; appellate courts cannot fashion their own temporary injunctions to maintain the status quo after they remand the case for further proceedings. *See Gibson v. Waco Indep. Sch. Dist.*, 971 S.W.2d 179, 204 (Tex. App.—Waco 1998), *vacated on different grounds*, 22 S.W.3d 849 (2000).

6. Enforcement of interlocutory order

While an interlocutory appeal is pending, only the appellate court in which the appeal is pending may enforce the order. TEX. R. APP. P. 29.4.

The appellate court may refer any enforcement proceeding to the trial court with instructions to hear evidence and grant relief, or to make findings and forward its recommendations to the appellate court. TEX. R. APP. P. 29.4; *see also Ex parte Boniface*, 650 S.W.2d 776, 778 (Tex. 1983).

7. Further proceedings in the trial court

(a) *Jurisdiction to dissolve order on appeal*

While an interlocutory appeal is pending, the trial court retains jurisdiction of the case and may make additional orders, including one dissolving the order appealed. TEX. R. APP. P. 29.5.

When the order being appealed is dissolved, the interlocutory appeal is moot and should be dismissed. *E.g., Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, no pet. h.) (dismissing appeal after order appointing receiver was dissolved). This is a very common occurrence in appeals involving temporary injunctions, which are discussed in more detail at Part II.B.3, *infra*.

(b) *Orders that interfere with the jurisdiction of the appellate court or impair the effectiveness of appellate relief*

There is one limit on the trial court's continuing jurisdiction over the case while an appeal is pending: It may not make any order that is inconsistent with any temporary order of the appellate court, or which would interfere with the jurisdiction of the appellate court or the effectiveness of any appellate relief. TEX. R. APP. P. 29.5.

A good illustration of this rule is found in *McAllen Medical Ctr., Inc. v. Cortez*, 66 S.W.3d 227 (Tex. 2001), which is also discussed in Part II.B.2. For these purposes, it is enough to know that when McAllen Medical Center filed its petition for review in this interlocutory appeal from a class certification, the trial court certified a new class action against it and severed the new class action allegations from the claims that were subject to the pending appeal (thereby eliminating McAllen Medical Center from the case in which the petition for review was filed). The supreme court vacated the severance order on the ground that the severance would interfere with its jurisdiction to grant appellate relief. *Id.* at 238.

As discussed above, a court of appeals may be willing to issue temporary orders staying all action in certain types of interlocutory appeals—namely, appeals that are permitted to protect a defendant from the burden of litigation. *See* Part II.A.5, *supra*. Because part of the relief requested on appeal is to be protected from the burden of litigation—including merits discovery—an appellant might fairly argue that a trial order compelling merits discovery while one of these appeals is pending violates Rule 29.5. *Compaq Computer Corp. v. Lepray*, 52 S.W.3d 908 (Tex. App.—Beaumont 2001, no pet.) (Gaultney, J., dissenting from order denying temporary relief). Even though the argument did not prevail in *Lepray*, it might well succeed in another case.

(b) *Orders granting substantially the same relief*

The old rules prohibited trial courts from entering an order “granting substantially the same relief as that granted by the order appealed from.” *Former* TEX. R. APP. P. 43(d). That prohibition was omitted when the new rules were adopted in 1997, because its prohibition was considered “too broad.”

See *In re M.M.O.*, 981 S.W.2d 72, 77-78 & n.2 (Tex. App.—San Antonio 1998, no pet.) (discussing this issue and the leading cases under Rule 43(d)). Indeed, current Rule 27.3 assumes that a trial court may modify an order that already has been appealed, in which case the appellate court “must” treat the appeal as from the new order. TEX. R. APP. P. 27.3.

Thus, under the new rules, it does not appear that trial courts are prohibited from entering further orders granting substantially the same relief as the order being appealed. This question often arises when a trial court amends its order while the order is on appeal. See, e.g., *Peters v. Blockbuster, Inc.*, 65 S.W.3d 295, 304 (Tex. App.—Beaumont 2001, no pet.) (“The trial court retained jurisdiction to amend the order during the interlocutory appeal.”). Under old Rule 43(d), such orders could be vacated because they granted substantially the same relief as the order on appeal. Under the new rules, however, trial courts are free to make—and appellate courts are free to review—amended orders granting the same relief. See *Peters*, 65 S.W.3d at 304-05.

One opinion under the new rules holds that a trial court could not enter an amended order while the appeal of the original order was pending, but its rationale is debatable. In *Reeves v. City of Dallas*, 68 S.W.3d 58 (Tex. App.—Dallas 2001, pet. denied), the trial court granted a temporary injunction, which was appealed. It then issued an order dissolving the first temporary injunction and granting a new one. Later, the trial court issued another order modifying the injunction. The court of appeals dismissed the appeal of the first temporary injunction on the ground that the order had been dissolved, but it then proceeded to vacate the subsequent orders as void. *Id.* at 60-61.

The *Reeves* decision is based on two grounds: a jurisdictional ruling (which is discussed in more detail at Part II.B.3, *infra*), and the prohibition stated in Rule 29.5(b) against trial court orders that impair the jurisdiction of the court of appeals or interfere with the effectiveness of appellate relief. *Id.* at 60. But it is not self-evident that the order modifying the injunction in *Reeves* interfered with the court’s jurisdiction or impaired any relief it might grant. Once the first temporary injunction had been dissolved and the original appeal had become moot (which the court of appeals agreed was correct) there was no longer any jurisdiction to interfere with or any relief to grant—unless it was based on the

very orders that the court of appeals was striking. Consequently, *Reeves* stands for the odd proposition that a trial court may dissolve a temporary injunction and then enter a new order granting a temporary injunction in separate orders, but it may not do both acts in the same order.

Rather than vacating those subsequent orders, it might have been better to take jurisdiction over the orders modifying the injunction under Rule 29.6, which authorizes the court to review “a further appealable interlocutory order concerning the same subject matter.” In that way, the merits of the case could have been decided without the need for an inefficient procedural detour.

Support for this approach may also be found in TEX. R. APP. P. 27.3, which provides that if a trial court modifies an order after it has been appealed or vacates an order that has been appealed and replaces it with another appealable order, the appellate court “must” treat the appeal as from the subsequent order and “may” treat actions relating to the appeal of the first order as relating to the appeal of the subsequent order. TEX. R. APP. P. 27.3. Furthermore, Rule 27.3 provides that “[a]ny party may nonetheless appeal from the subsequent order or judgment.” *Id.* Thus, the court of appeals should not dismiss the appeal of the original order, but should review the new order. See, e.g., *Peters*, 65 S.W.3d at 301-02 (reviewing both original and amended class certification orders together under Rule 27.3).

It remains to be seen what the definitive answer will be about the propriety of amended orders that grant substantially the same relief as the first order. If the purpose of the rule is simply “to prevent the trial court from interfering with a party’s right to appellate review or the appellate court’s power to grant relief in interlocutory appeals,” *In re M.M.O.*, 981 S.W.2d at 78-79 (citing cases), that purpose would best be served by allowing subsequent or amended orders to be appealed under Rule 27.3 and Rule 29.6 and to be considered on their merits.

(c) Orders clarifying the basis for decision

When a court of appeals remands a case to the trial court for “clarification” of the grounds for its decision, the trial court’s clarification order does not violate Rule 29.5—even if it negates the basis for the appeal. *American Home Products Corp. v. Clark*, 38 S.W.3d 92, 96-97 (Tex. 2000).

(d) Conflict with statutory stay

Rule 29.5 states that trial may proceed during an interlocutory appeal. *See* TEX. R. APP. P. 29.5. But that rule conflicts with the stay provisions of the interlocutory appeal statute, which preempt the rule. *Johnstone v. State*, 22 S.W.3d 408, 409 (Tex. 2000); *see also* Part I.B, *supra*.

8. Review of further orders

On a party's motion or on the appellate court's own initiative, an appellate court with jurisdiction over an interlocutory appeal may also review a further appealable interlocutory order concerning the same subject matter and any interlocutory order that would interfere with or impair the effectiveness of appellate relief. TEX. R. APP. P. 29.6.

As noted above, this rule permits the court of appeals to take jurisdiction over an amended order in the appeal from the original order. *See, e.g., Peters v. Blockbuster, Inc.*, 65 S.W.3d 295, 301-02 (Tex. App.—Beaumont 2001, no pet.) (holding amended class certification order was proper and reviewing original and amended orders together); *Brittingham v. Ayala*, 995 S.W.2d 199, 201 (Tex. App.—San Antonio 1999, pet. denied) (granting motion to challenge order modifying temporary injunction).

This rule also provides the jurisdictional basis for an appellate court's power to vacate a trial court order that interferes with its jurisdiction or impairs the relief that might be granted on appeal. *E.g., McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 238 (Tex. 2001); *H & R Block, Inc. v. Haese*, 992 S.W.2d 437, 439 (Tex. 1999).

9. Joining appealable and unappealable orders

Litigants cannot create interlocutory appellate jurisdiction by bootstrapping an unappealable order to an appealable interlocutory order. When a litigant challenges both appealable and unappealable orders, the court of appeals will "review the portion of an order which is appealable and refuse to consider the portion which is non-appealable." *Markel v. World Flight, Inc.*, 938 S.W.2d 74, 78 (Tex. App.—San Antonio 1996, no writ). This rule is often applied. *See, e.g., Kaplan v. Tiffany Development Corp.*, 69 S.W.3d 212, 217 (Tex. App.—Corpus Christi 2001, no pet.) (applying rule); *Waite v. Waite*, 64 S.W.3d 217, 224 n.6 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)

(same); *Hays County v. Hays County Water Planning Partnership*, 69 S.W.3d 253, 260-61 (Tex. App.—Austin 2002, no pet.) (same).

Despite this rule, a court may also review any subsidiary issues that are necessary to a decision on the merits of the appealable order. *Letson v. Barnes*, 979 S.W.2d 414, 417 (Tex. App.—Amarillo 1998, pet. denied) (holding "to the extent that the subject matter of a the non-appealable interlocutory order may affect the validity of the appealable order, the non-appealable order may be considered").

If the parties agree to appeal the unappealable aspects of the order, however, litigants may be able to manufacture immediate appellate jurisdiction by using the new "agreed interlocutory appeal" statute. *See* Part I.A, *supra*.

B. Appealable Interlocutory Orders

The Civil Practice and Remedies Code lists several interlocutory orders that are appealable. This section reviews recent developments affecting interlocutory appeals of those orders (with limited references to older cases that establish basic rules). The paper does not address the substantive standards that govern these orders, except as those standards relate to issues that may arise on appeal.²

1. Receivers and trustees*(a) Appealable orders*

An order that appoints a receiver or trustee is immediately appealable. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(1). The basic statute empowering courts to appoint receivers is Section 64.001 of the Civil Practice and Remedies Code, but several other statutes provide specific authority for receivers and trustees under certain circumstances.

The right to interlocutory appeal applies only to the initial appointment of a receiver or trustee; orders that merely appoint successor receivers or trustees are not appealable. *See Swate v. Johnston*, 981 S.W.2d 923, 925 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing cases).

² In addition to the appealable orders in the Civil Practice and Remedies Code, the Legislature enacted a new statute in 2001 permitting accelerated appeals of orders terminating a parent-child relationship. *See* TEX. FAM. CODE § 263.405 (Vernon Supp. 2002). This paper does not address that statute.

In addition, an order that overrules a motion to vacate an order that appointed a receiver or trustee is also appealable. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(2). This provision has been construed very narrowly to forbid parties from relitigating the correctness of the initial order appointing a receiver. See *Sclafani v. Sclafani*, 870 S.W.2d 608, 612-13 (Tex. App.—Houston [1st Dist.] 1993, writ denied). This rule is consistent with the rule applied to orders denying a motion to dissolve a temporary injunction, where the courts hold that an appeal is proper only on the basis that “changed circumstances” require that the injunction be dissolved; the original order cannot be relitigated. See Part II.B.3, *infra*.

Sclafani appears to go even further, however, suggesting that any motion to vacate must be filed within 20 days after the receivership is created. *Id.* That rule would foreclose the parties from raising valid objections based on events that occurred after appointment of the receiver, and it would render Sections 51.014(a)(1)-(2) redundant. In addition, that approach is inconsistent with the rule applied to motions to dissolve an injunction, which holds that “changed circumstances” are a legitimate basis for a motion to dissolve and a proper basis for an appeal. The same rule that governs motions to dissolve a temporary injunction should apply to motions to vacate a receivership: parties should be entitled to move to vacate the order at any time based on “changed circumstances.”

An order that dissolves a receivership is not appealable. See *Waite v. Waite*, 76 S.W.3d 222 (Tex. App.—Houston [14th Dist.] 2002, no pet.). In that case, the trial court dissolved the receivership and ordered the assets placed into the court registry. The appellant urged the court of appeals to treat that decision as a “de facto receivership,” but the court of appeals disagreed and dismissed the appeal. Because the order that had been the subject of the appeal had been dissolved and the statute did not permit an appeal from an order disposing of the receivership assets, the court found no basis for an interlocutory appeal. See *Waite*, 76 S.W.3d at 223. The *Waite* decision is consistent with a long line of Texas cases holding that orders requiring that funds be paid into the registry of the court are not appealable as temporary injunctions. See, e.g., *Diana Rivera & Assocs., P.C. v. Calvillo*, 986 S.W.2d 795, 796-98 (Tex. App.—Corpus Christi 1999, pet. denied) (citing cases).

Although the interlocutory appeal statute does not authorize an appeal to challenge the actions of the receiver, certain actions by the receiver may be appealed immediately under a special version of the finality rule. See *Huston v. Federal Dep. Ins. Corp.*, 800 S.W.2d 845 (Tex. 1990). Under this doctrine, an order that “resolves a discrete issue in connection with any receivership has the same force and effect as any other final adjudication of a court, and thus, is appealable.” *Id.* at 847; see also *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871, 878 (Tex. App.—Waco 2001, no pet.) (applying the *Huston* doctrine to permit review of disposition of receivership assets and receiver’s legal fees).

(b) *Standard of review*

The appointment of a receiver or trustee is reviewable solely for abuse of discretion. E.g., *Mueller v. Beamalloy, Inc.*, 994 S.W.2d 855, 858 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

(c) *Scope of review*

When reviewing whether a trial court abused its discretion in appointing a receiver or a trustee, one court of appeals has held it is not limited to the record before the trial court at the time of its ruling, but may consider evidence developed during trial. See *Dayton Reavis Corp. v. Rampart Capital Corp.*, 968 S.W.2d 529, 532-33 (Tex. App.—Waco 1998, pet. dismissed w.o.j.).

(d) *Receivers appointed in final judgments*

Orders appointing receivers are not necessarily interlocutory; a receiver may also be appointed at the end of the litigation as part of a final judgment. In that case, the rules governing final judgment appeals control—not the interlocutory appeal rules. E.g., *Wilkins v. State Farm Mutual Auto. Ins. Co.*, 58 S.W.3d 176, 179 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

2. Class actions

(a) *Appealable orders*

An order that certifies or refuses to certify a class is appealable. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3).

There is some doubt whether this statute also includes orders on motions to “decertify” a class. The supreme court recently held an order *refusing* to decertify is not appealable. See *Bally Total Fitness*

Corp. v. Jackson, 53 S.W.3d 352, 358 (Tex. 2001). On the other hand, two lower courts hold that orders granting motions to decertify a class are appealable. *Wood v. Victoria Bank & Trust Co.*, 69 S.W.3d 235, 237-38 (Tex. App.—Corpus Christi 2001, no pet.); *Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 368-69 (Tex. App.—Houston [14th Dist.] 1987, no writ).

Although these two decisions appear to be inconsistent with the plain language of the statute, the supreme court did not disavow them in *Bally*. Instead, the Court distinguished between orders decertifying a class and orders refusing to decertify, observing that an order decertifying a class alters the original certification decision (and is appealable), whereas an order refusing to decertify does not change the status quo (and is not appealable). *Bally*, 53 S.W.3d at 358. Thus, the Corpus Christi court cited *Bally* as support for its decision in *Wood*.

The result of these cases is probably correct. Because an order decertifying a class is functionally the same thing as an order refusing to certify a class (and could easily be turned into a “refusal” simply by filing a motion to reconsider decertification), there is no reason to elevate form over substance. However, it might have been better if the decisions had been based on this reasoning, rather than on an abstract inquiry about whether the order “changes the status quo”—an ambiguous test that is bound to invite needless litigation.

The risk of confusion arises from the supreme court’s answer to another appealability question: After a class certification order has been upheld in an interlocutory appeal, may the defendant appeal a subsequent order that modifies the class definition? In general, the answer is “no.” Orders that simply enlarge the class or modify its definition are not appealable. *Bally*, 53 S.W.3d at 355 (citing cases). However, there is one exception that threatens to swallow the rule. In *De Los Santos v. Occidental Chemical Corp.*, 933 S.W.2d 493, 495 (Tex. 1996), the supreme court held that an order which changes the “fundamental nature” of the class is appealable. This test invites litigation because whether an order alters the “fundamental nature” of the class is in the eye of the beholder. It might be preferable to hold that any order certifying a class action is appealable, in accordance with the plain language of the statute,

and weed out de minimis modifications of the class by holding they are not an abuse of discretion.

The *De Los Santos* issue arises when an order already has been upheld in an interlocutory appeal (or was never even appealed), but the trial court later modifies the class definition. On the other hand, when the order is modified while the initial appeal is still pending, the court of appeals has jurisdiction to review it under Rules 27.3 and 29.6. *See, e.g., Peters v. Blockbuster, Inc.*, 65 S.W.3d 295, 301-02 (Tex. App.—Beaumont 2001, no pet.) (reviewing both initial and amended class certification orders). But it appears that *De Los Santos* may lead courts into unnecessarily limiting the scope of those rules. In *Union Pacific Resources Group, Inc. v. Hankins*, 41 S.W.3d 286 (Tex. App.—El Paso 2001, no pet.), the court of appeals abated an interlocutory appeal and ordered the trial court to prepare a trial plan to permit meaningful review of the certification order. After the trial court issued a supplemental class certification order and a trial plan, the defendants requested leave to amend their notice of appeal in order specifically to appeal the supplemental orders. The court of appeals denied leave to amend because these orders were not orders “certifying” or “refusing to certify” a class action, within the scope of TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3), and did not fit within the *De Los Santos* exception. *See Union Pac. Resources Group, Inc. v. Hankins*, 51 S.W.3d 738 (Tex. App.—El Paso 2001, no pet.). But that did not mean the court of appeals refused to consider the trial plan in evaluating the merits of the class certification order; in its opinion after remand, the court of appeals considered the trial plan in its decision upholding the class certification order. *See Union Pac. Resources Group, Inc. v. Hankins*, 51 S.W.3d 741, 754-55 (Tex. App.—El Paso 2001, pet. filed). It might have been easier simply to review the additional order under Rule 29.6.

(b) *Standing to appeal*

Three recent cases address standing to appeal. In *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227 (Tex. 2001), plaintiffs sued multiple defendants but asked that a class action be certified against only one of the defendants. Despite the limited certification, the class definition included charges of misconduct by another defendant, and the notice sent to putative class members referred to the claims

against the other defendant. The court of appeals held that a defendant against whom a class action has not been certified has no standing to appeal the certification, but the supreme court disagreed, holding that any defendant whose interests are prejudiced by the order has standing to appeal. *Id.* at 236.

The Corpus Christi Court of Appeals recently adopted a similar rule for unnamed class plaintiffs in settlement classes. The general rule is that an unnamed class member must formally intervene in the lawsuit in order to acquire standing to appeal. *E.g., San Juan 1990-A, L.P. v. Meridian Oil Inc.*, 951 S.W.2d 159 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). But the Corpus Christi court adopted a different rule for settlement classes, holding that unnamed members of a settlement class need not intervene to appeal the final settlement; they have standing to appeal as a result of the due process concerns associated with settlement classes. *See Northrup v. Southwestern Bell Tele. Co.*, 72 S.W.3d 1 (Tex. App.—Corpus Christi 2001), *op. after reinstatement*, 72 S.W.3d 16 (Tex. App.—Corpus Christi 2002, pet. filed).

Last, in *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704 (Tex. 2001), the supreme court held that an individual who lacks personal standing to sue also lacks standing to sue as a class representative, and the class action lawsuit should be dismissed for want of subject-matter jurisdiction.

(c) Standard of review

The rules governing class actions are provided in Rule 42 of the Texas Rules of Civil Procedure. The decision whether to certify a class is reviewed for abuse of discretion. *See Intratex Gas v. Beeson*, 22 S.W.3d 398, 406 (Tex. 2000); *see also Wood v. Victoria Bank & Trust Co.*, 69 S.W.3d 235, 238-40 (Tex. App.—Corpus Christi 2001, no pet.) (applying this standard to an order decertifying a class action). But that discretion has been narrowed recently by a rule called “rigorous analysis.”

(d) The rise of “rigorous analysis”

In 2000, the Texas Supreme Court issued a trilogy of important decisions on class action law. *See Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000); *Intratex Gas v. Beeson*, 22 S.W.3d 398 (Tex. 2000). A thorough review of

those decisions is beyond the scope of this paper, but their major holdings have altered the landscape of class action litigation and significantly influenced the issues that may arise on appeal.

First, the 2000 trilogy significantly redefined the standard of review for a class certification order. In the past, Texas appellate courts had indulged every presumption in favor of a certification ruling, even going so far as to state that courts should err in favor of certification. Consistent with that approach, many Texas courts had adopted a philosophy the supreme court called “certify now and worry later,” in which difficult issues calling into question the validity of class certification were put off until the later stages of litigation—if the case did not settle. *See Bernal*, 22 S.W.3d at 434-35 (discussing cases). The supreme court emphatically rejected this view, demanding that courts “perform a ‘rigorous analysis’ before ruling on class certification to determine whether all prerequisites to certification have been met.” *Id.* at 435. As a result, appellate review of class certification orders should be more “rigorous” in the aftermath of the 2000 trilogy.

One example is the requirement of a trial plan. Class certification orders must include a trial plan that explains how the case will be litigated and how any remaining individualized issues will be resolved after the class-wide issues are decided. In this way, the supreme court created the opportunity for more meaningful review of the class certification decision. *See Bernal*, 22 S.W.3d at 435-36. The absence of a trial plan is error *per se* in a class certification case. *E.g., Union Pac. Resources Group, Inc. v. Hankins*, 41 S.W.3d 286 (Tex. App.—El Paso 2001, no pet.) (abating and remanding for creation of a trial plan); *Reynolds Metals Co. v. Mumphord*, 47 S.W.3d 141 (Tex. App.—Corpus Christi 2001, no pet.) (reversing and remanding for creation of a trial plan); *Charlie Thomas Courtesy Leasing, Inc. v. Taylor*, 44 S.W.3d 684, 689-90 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Nissan Motor Co. v. Fry*, 27 S.W.3d 573, 592 (Tex. App.—Corpus Christi 2000, pet. denied). This new requirement signals the “rigorous analysis” that appellate courts are now expected to conduct in class action appeals.

Another example is the rejection of a device known as a “settlement class.” A settlement class is a class in which the trial court delays certifying the

class until a final settlement, effectively collapsing the certification decision and the final judgment into one proceeding. *Northrup v. Southwestern Bell Tele. Co.* 72 S.W.3d 1, 8 (Tex. App.—Corpus Christi 2001), *op. after reinstatement*, 72 S.W.3d 16 (Tex. App.—Corpus Christi 2002, pet. filed).

Both the United States Supreme Court and the Texas Supreme Court have emphasized that settlement classes are subject to heightened scrutiny because of the potential conflicts of interest that may arise between unnamed class members and class counsel who stand to benefit from the settlement, and who thus have an incentive to collude with defendants rather than negotiating aggressively. *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 619-20 (1997); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954-55 (Tex. 1996).

The supreme court has effectively eliminated the use of settlement classes by applying its *Bernal* requirement of “rigorous analysis” to such classes. In *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227 (Tex. 2001), the trial court had “preliminarily” certified a settlement class without first deciding whether the requirements of Rule 42 were satisfied. Following the usual practice for settlement classes, the court put off considering the Rule 42 elements until the fairness hearing, at which it would decide whether or not to approve the proposed settlement. When the defendant appealed, the court of appeals dismissed the appeal as unripe because the trial court had not ruled on the Rule 42 requirements. The supreme court repudiated the trial court’s “certify now and worry later” approach, holding that a “rigorous analysis” of the Rule 42 requirements must be conducted *before* certification, and could not be put off until a fairness hearing. *Id.* at 232-34. By requiring that the certification order (and appeal) precede the fairness hearing, that ruling effectively eliminates the use of “settlement” classes to evade the class certification inquiry.

(e) *Class definitions*

The supreme court has also tightened the rules governing class definitions, holding that a class must be defined in terms that are “clearly ascertainable.” As the supreme court explained this test:

For a class to be sufficiently defined, it must be precise: the class members must

be presently ascertainable by reference to objective criteria. This means that the class should not be defined by criteria that are subjective or that require an analysis of the merits of the case.

Intratex, 22 S.W.3d at 403-04 (citations omitted); *see also Sheldon*, 22 S.W.3d at 453-55 (applying this standard).

Under this test, “fail-safe” classes are improper. A “fail-safe” class is one in which the definition of the class depends on the ultimate liability decision, making it impossible to identify class members until liability is decided. *Intratex*, 22 S.W.3d at 403-04. After *Intratex* and *Sheldon*, attacking the specificity of the class definition is potentially a fruitful issue for interlocutory appeal of a certification order.

Finally, if a class certification order is reversed, the supreme court has made it clear that an appellate court ordinarily should not try to cure any defects by redefining the class itself, but should leave that task to the trial court. *See Intratex*, 22 S.W.3d at 406-08. This procedure recognizes that the trial judge is in the best position to determine whether certification is still appropriate and, if so, to define a class. *Id.* It also respects the trial court’s broad discretion to manage future developments in the case. *Id.* Thus, in most cases, appellate courts should not attempt to redefine a class on appeal.

3. Temporary injunctions

(a) *Appealable orders*

An order that grants or refuses either a request for a temporary injunction, or a motion to dissolve an existing temporary injunction, is appealable. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4). This may include an appeal from an anti-suit injunction. *See, e.g., American Int’l Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d 337 (Tex. App.—Dallas 2001, pet. dism’d w.o.j.).

An appeal of an order overruling a motion to dissolve a temporary injunction is not a second bite at the initial order imposing the injunction. Instead, it is a chance to show that the injunction should be dissolved as a result of “changed circumstances.” *Smith v. O’Neill*, 813 S.W.2d 501, 502 (Tex. 1991). “Changed circumstances” are “conditions that altered the status quo existing after the temporary injunction was granted or that made the temporary injunction unnecessary or improper.” *Henke v.*

Peoples State Bank, 6 S.W.3d 717, 721 (Tex. App.—Corpus Christi 1999, pet. dismiss. w.o.j.); see also *Murphy v. McDaniel*, 20 S.W.3d 873, 878 (Tex. App.—Dallas 2000, no pet.).

Thus, a motion to dissolve does not give the movant a right to relitigate the original basis for the injunction. See *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871, 878-879 (Tex. App.—Waco 2001, no pet.). That would be poor policy:

Otherwise, a litigant might file numerous motions to dissolve until the resistance of the trial court was worn down or perhaps a hearing before a different judge was obtained. “Such actions needlessly add to the judicial caseload, both at the trial and appellate level.”

Id. at 879 (citation omitted); see also *Universal Health Serv., Inc. v. Thompson*, 24 S.W.3d 570, 580 (Tex. App.—Austin 2000, no pet.).

It is not always apparent whether an order is a temporary injunction, or another unappealable order. The supreme court has “rejected the notion that ‘matters of form control the nature of the order itself—it is the character and function of an order that determine its classification.’” *Qwest Comm. Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000) (quoting *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809-10 (Tex. 1992)). Therefore, the test is whether the “character and function” of a particular order grants temporary injunctive relief. If it compels a party to act or to refrain from acting, and takes effect while the lawsuit is pending, it is probably an injunction. See *Universal Health Serv.*, 24 S.W.3d at 576 (discussing types of injunctions); *Swanson v. Comm. State Bank*, 12 S.W.3d 163, 165 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (discussing the characteristics of an injunction).

Because the test is imprecise, a party may be able to create jurisdiction for an interlocutory appeal where it would not otherwise exist by characterizing a motion as a request for a temporary injunction. See, e.g., *Waite v. Waite*, 64 S.W.2d 217, 224 n.6 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (entertaining interlocutory appeal raising constitutional challenges to statutes because they were framed as requests to enjoin enforcement of the statutes). But if the court of appeals decides the character and function of the order is not injunctive,

it may decline jurisdiction. See, e.g., *Kaplan v. Tiffany Development Corp.*, 69 S.W.3d 212, 217 (Tex. App.—Corpus Christi 2001, no pet.); *Swanson v. Community State Bank*, 12 S.W.3d 163, 165 (Tex. App.—Houston [1st Dist.] 2000, no pet.); see also *Letson v. Barnes*, 979 S.W.2d 414, 417 (Tex. App.—Amarillo 1998, pet. denied) (“an appeal of a temporary injunction is not a vehicle which imbues the court with jurisdiction to address interlocutory matters outside the scope of section 51.014 of the Texas Civil Practice and Remedies Code”).

(b) Standard of review

The decision to grant or refuse a temporary injunction is reviewed solely for abuse of discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Davis v. Huey*, 571 S.W.2d 859, 861 (Tex. 1978). The decision to grant or deny a motion to dissolve an injunction is reviewed under the same standard. *Chase Manhattan Bank*, 52 S.W.3d at 879.

The applicant for a temporary injunction must establish: (1) a cause of action against the defendant; (2) a probable right to the relief sought in the suit, and (3) a probability of imminent and irreparable injury that cannot be remedied by any legal remedy. E.g., *Blackthorne v. Bellush*, 61 S.W.3d 439, 442-44 (Tex. App.—San Antonio 2001, no pet.); *Harbor Perfusion, Inc. v. Floyd*, 45 S.W.3d 713, 716 (Tex. App.—Corpus Christi 2001, no pet.).

An applicant for a temporary injunction need not prove it will ultimately prevail on the merits. The applicant’s burden is simply to demonstrate a probable right of recovery after a trial on the merits and a probable injury in the interim, warranting preservation of the status quo while trial is pending. *Walling*, 863 S.W.2d at 57. But these three elements must be proved with evidence, not merely pleaded. If there is no evidence to prove one of the elements, it is an abuse of discretion to grant the injunction. E.g., *Harbor Perfusion*, 45 S.W.3d at 717.

(c) Requirements for temporary injunction order

The requirements for a temporary injunction are set forth in Texas Rule of Civil Procedure 683. A temporary injunction order must:

- (1) state the reasons for the injunction by defining the injury and describing why it is irreparable;
- (2) define the acts to be enjoined in clear, specific and unambiguous terms so that the party to be enjoined will readily know exactly what duties or obligations are imposed upon it; and
- (3) set the cause for trial on the merits and fix the amount of the bond.

See TEX. R. CIV. P. 683-684.

Strict adherence to these elements is required, and any deviation from the rules is fatal on appeal. “These procedural requirements are mandatory, and an order granting a temporary injunction that does not meet them is subject to being declared void and dissolved.” *Qwest Comm. Corp. v. AT&T Corp.*, 24 S.W.3d 334, 337 (Tex. 2000); accord *Lamar County Elec. Co-op Ass’n v. Risinger*, 51 S.W.3d 801, 805 (Tex. App.—Texarkana 2001, pet. denied).

But failure to comply with these requirements does *not* mean that the order is not a temporary injunction; it simply means the order is erroneous. *Qwest Communications*, 24 S.W.3d at 336. Otherwise, “a burdensome interlocutory order that has the same effect as a temporary injunction could be shielded from appellate review by the very defect that makes it erroneous.” *Id.* at 337.

(d) Overbreadth

Temporary injunctions are often challenged on appeal as overbroad. “[A] trial court abuses its discretion by entering an ‘overly-broad’ injunction which grants ‘more relief’ than a plaintiff is entitled to by enjoining a defendant from conducting lawful activities or from exercising legal rights.” *Harbor Perfusion, Inc. v. Floyd* 45 S.W.3d 713, 718 (Tex. App.—Corpus Christi 2001, no pet.) (citing cases); see also *Universal Health Serv.*, 24 S.W.3d at 579 (discussing the test for overbreadth).

The court of appeals may modify an overbroad temporary injunction to cure the overbreadth. *E.g.*, *Stone v. Griffin Communications & Security Sys.*, 53 S.W.3d 687, 695 (Tex. App.—Tyler 2001, no pet.). But if the trial court offers to modify an allegedly overbroad injunction and the complaining party fails to give the trial court a chance, the court of appeals

may hold the trial court did not abuse its discretion. *E.g.*, *Blackthorne v. Bellush*, 61 S.W.3d 439, 445 (Tex. App.—San Antonio 2001, no pet.).

(e) Mootness

By their nature, temporary injunctions involve dynamic situations that are susceptible to change. Indeed, the sole purpose for a temporary injunction is to preserve the status quo until trial on the merits. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). Thus, they are especially susceptible to mootness and the need for modifications. See *General Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569 (Tex. 1990) (discussing mootness and its exceptions).

A temporary injunction becomes moot when it becomes inoperative due to changed circumstances, or the passage of time, or because it has expired. “When a temporary injunction becomes inoperative due to a change in status of the parties or the passage of time, the issue of its validity is also moot. An appellate court decision about a temporary injunction’s validity under such circumstances would constitute an impermissible advisory opinion.” *National Collegiate Ath. Ass’n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999) (citations omitted); accord *Faddoul, Glasheen & Valles, P.C. v. Oaxaca*, 52 S.W.3d 209, 212 (Tex. App.—El Paso 2001, no pet.).

The classic case of mootness occurs when the trial court renders a final judgment while an appeal from the temporary injunction order is still pending. When that occurs, the interlocutory appeal is moot and it should be dismissed. *Isuani v. Manske-Sheffield Radiology Group*, 802 S.W.2d 235, 236 (Tex. 1991). The temporary injunction survives only until the final judgment, when the injunction is either dissolved or becomes a permanent injunction. With the 2001 amendments to Section 51.014(b), which restore the traditional rule that an appeal of a temporary injunction order does not stay the trial, this issue will arise with greater frequency.

When the temporary injunction becomes moot while the appeal is pending, it should be dissolved. *E.g.*, *City of Austin v. L.S. Ranch, Ltd.*, 970 S.W.2d 750, 755 n.3 (Tex. App.—Austin 1998, no pet.); *Reagan Nat’l Advertising v. Vanderhoof Family Trust*, 2002 WL 246412 (Tex. App.—Austin Feb. 2, 2002, no pet.) (pub. pending) (dissolving temporary injunction and dismissing appeal as moot after both

parties conceded at oral argument that the purpose for the injunction had been satisfied).

(f) *Modifications*

Although the trial court can plainly dissolve an injunction while an interlocutory appeal is pending, one recent case suggests that the trial court cannot modify an injunction while the appeal is pending. *See Reeves v. City of Dallas*, 68 S.W.3d 58, 60 (Tex. App.—Dallas 2001, pet. denied) (“An amended temporary injunction entered after an appeal has been perfected will be stricken.”).

Reeves is doubtful authority because it rests on the premise that appealing a temporary injunction deprives the trial court of jurisdiction over the merits of the injunction. *Id.* That rule was once the law, but it was changed in 1983 with an amendment to TEX. R. CIV. P. 385b. Regrettably, *Reeves* relies on a decision predating the amendment of Rule 385b. *Id.* (quoting *Parsons v. Galveston County Emp. Credit Union*, 576 S.W.2d 99, 100 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ)).

Rule 29.5 is now the descendant of Rule 385b. The current rule expressly states that the trial court “retains jurisdiction of the case” during an appeal. Thus, the rule followed in *Reeves* no longer exists. Indeed, the Dallas court had reached this conclusion in an unpublished case, *Nexus Fuels, Inc. v. Hall*, 1999 WL 993929 (Tex. App.—Dallas 1999, no pet.) (holding the trial court retained jurisdiction to enter an amended temporary injunction), but the court evidently did not have the benefit of *Nexus Fuels* when it decided *Reeves*. In sum, *Reeves* is doubtful precedent and it should be reconsidered.

Reeves also based its decision on the provisions of Rule 29.5(b) which prohibit the trial court from taking any action that would impair the effectiveness of the relief sought on appeal or interfering with the jurisdiction of the court of appeals. Rule 29.5 is discussed in more detail in Part II.A.7, *supra*.

(g) *Bond*

An order granting a temporary injunction must fix the amount of the bond. *See* TEX. R. CIV. P. 684. The sufficiency of the bond is reviewed on appeal under the same rules that govern supersedeas bonds. *E.g., Lamar County Elec. Co-op Ass’n v. Risinger*, 51 S.W.3d 801, 803 (Tex. App.—Texarkana 2001, pet. denied). Because the sufficiency of the bond may be reviewed on appeal, trial courts must permit the party opposing the injunction to put on evidence

challenging the sufficiency of the bond—including examining the sureties, if necessary. *See id.* at 806. Denial of that opportunity is an abuse of discretion, and the injunction will be dissolved. *Id.*

If a party fails to complain about the bond in the trial court, it waives any complaint on appeal. *E.g., Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 398 (Tex. App.—Austin 2000, no pet.); *but see Maples v. Muscletech, Inc.*, 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.) (entertaining motion to stay temporary injunction because the bond was allegedly deficient without first requiring presentation to trial court).

4. Official immunity

(a) *Appealable orders*

An order that denies a motion for summary judgment based on an assertion of immunity by a person who is an officer or employee of the state or a political subdivision of the state is appealable. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5).

As with other types of interlocutory appeals, defects in the form of the summary judgment motion or the order may constitute reversible error, but they do not deprive the court of appeals of jurisdiction. *See University of Texas Southwestern Med. Ctr. of Dallas v. Margulis*, 11 S.W.3d 186, 188 (Tex. 2000) (holding the court of appeals had jurisdiction over appeal from denial of an official immunity motion regardless of whether the motion properly asserted an immunity defense).

(b) *Sources of immunity*

Official immunity is an affirmative defense that protects government officials from personal liability. *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994). Under this rule, government officials are immune from individual liability for any discretionary acts within the scope of their authority that they perform in good faith. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994); *University of Houston v. Clark*, 38 S.W.3d 578, 581 (Tex. 2000); *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 (Tex. 1997). Official immunity is the most common basis for interlocutory appeals under this section.

Other common-law immunity defenses may also be raised in a summary judgment motion and appealed under this section. *E.g., See University of Texas Southwestern Med. Ctr. of Dallas v. Margulis*, 11 S.W.3d 186 (Tex. 2000) (qualified immunity); *Associated Press v. Cook*, 17 S.W.3d

447, 459-60 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (legislative immunity).

Most immunity appeals involve claims against government officials in their individual capacity (permitting recovery of damages from the official). But officials can also be sued in an official capacity, in which case the suit is really directed against the government itself, not the individual. Officials do not enjoy official immunity from these allegations, but most courts hold that they can assert sovereign immunity if the government itself could do so. *E.g.*, *McCartney v. May*, 50 S.W.3d 599, 606 (Tex. App.—Amarillo 2001, no pet.); *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 738 (Tex. App.—Austin 1994, writ denied); *Gonzalez v. Avalos*, 866 S.W.2d 346, 352 (Tex. App.—El Paso 1993, writ dismissed w.o.j.); *but see Smith v. Davis*, 999 S.W.2d 409, 416-17 (Tex. App.—Dallas 1999, no pet.). Under this view, government officials may appeal a denial of summary judgment based on the defense of sovereign immunity under this section.

In addition to common-law immunity defenses, certain statutes provide specific immunity defenses. *E.g.*, *Newman v. Obersteller*, 920 S.W.2d 621, 622 (Tex. 1997) (statute that protects government officials from any liability after disposition of a claim against the government based on the same facts is an immunity defense); *Enriquez v. Khoury*, 13 S.W.3d 458 (Tex. App.—El Paso 2000, no pet.) (immunity defense under the Education Code). These statutory immunity defenses may also provide the basis for an interlocutory appeal.

(c) *Derivative standing of government defendants*

Because the waiver of sovereign immunity contained in the Texas Tort Claims Act is based on respondeat superior, the supreme court has held that a governmental entity cannot be held liable under the Tort Claims Act if its individual officer would be entitled to immunity. *See DeWitt v. Harris County*, 904 S.W.2d 650, 652 (Tex. 1995). Under that rule, the supreme court has also held that a governmental entity may use an employee's official immunity defense as a basis for interlocutory appeal in a case arising under the Tort Claims Act. *City of Beverly Hills v. Guevara*, 904 S.W.2d 655, 656 (Tex. 1995); *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 (Tex. 1993).

There is a split of authority concerning whether a government defendant may rely on the immunity defense of an individual employee in cases that do not arise under the Tort Claims Act. Citing *DeWitt*, some courts have held that government defendants

may assert their employees' immunity defenses to other claims. *See, e.g., Harris County v. Louvier*, 956 S.W.2d 106, 110 n.8 (Tex. App.—Houston [14th Dist.] 1997, no pet.). Other courts reject this view, limiting the rule to cases under the Tort Claims Act. *See, e.g., San Antonio State Hosp. v. Lopez*, 2002 WL 984194, *2 (Tex. App.—San Antonio 2002, no pet. h.) (pub. pending); *Battin v. Samaniego*, 23 S.W.3d 183 (Tex. App.—El Paso 2000, pet. denied); *Denton County v. Johnson*, 17 S.W.3d 46 (Tex. App.—Fort Worth 2000, pet. denied).

(d) *No application to private defendants*

Individuals who are not "officers or employees" of the state or a political subdivision have no right to an interlocutory appeal under Section 51.014(a)(5), even if they are entitled to an immunity defense. *See Xeller v. Locke*, 37 S.W.3d 95, 98-100 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (strictly construing the interlocutory appeal statute and dismissing an appeal of doctors from denial of summary judgment motion on the basis of immunity conferred by the Texas Labor Code).

Likewise, private defendants cannot assert a derivative immunity defense based on the individual immunity of their employees. *Bridges v. Robinson*, 20 S.W.3d 104, 117 (Tex. App.—Houston [14th Dist.] 2000, no pet.), *disapproved on other grounds*, *Telthorster v. Tennell*, 45 TEX. SUP. CT. J. 948, 951 (June 27, 2002) (holding that a private employer may not take a derivative interlocutory appeal based on the immunity defense of its employee).

(e) *Successive motions for summary judgment*

Defendants are free to take a second bite at the apple by filing a second summary judgment motion on the basis of official immunity, even after denial of an earlier motion for summary judgment has been affirmed. In this way, defendants have the chance to cure any defects in their summary judgment proof and obtain immediate relief. *E.g., Hayes v. Patrick*, 71 S.W.3d 516, 523-24 (Tex. App.—Fort Worth 2002, no pet. h.) (reversing denial of summary judgment on second appeal after upholding denial in first appeal, because supplemental summary judgment evidence conclusively established good faith).

Even if the defendant fails to appeal the denial of its first motion (or fails to perfect a timely appeal) it may simply renew the motion, obtain a new ruling, and restart the timetables for an

interlocutory appeal. *See, e.g., McCartney v. May*, 50 S.W.3d 599, 604 (Tex. App.—Amarillo 2001, no pet.); *Cameron County v. Carrillo*, 7 S.W.3d 706, 708-09 (Tex. App.—Corpus Christi 1999, no pet.); *but see Bridges v. Robinson*, 20 S.W.3d 104, 118 n.9 (Tex. App.—Houston [14th Dist.] 2000, no pet.), *disapproved on other grounds, Telthorster v. Tennell*, 45 TEX. SUP. CT. J. 948 (June 27, 2002) (discouraging multiple interlocutory appeals in the interest of judicial economy).

(f) *Standard of review*

An order denying summary judgment on the basis of an immunity defense is reviewed under the ordinary summary judgment standard. *See City of San Antonio v. Hernandez*, 53 S.W.3d 404, 407 (Tex. App.—San Antonio 2001, pet. denied); *Deaver v. Bridges*, 47 S.W.3d 549, 551 (Tex. App.—San Antonio 2000, no pet.); *El Paso County v. Ontiveros*, 36 S.W.3d 711, 715 (Tex. App.—El Paso 2001, no pet.).

(g) *Joining unappealable issues*

An appeal from denial of a summary judgment motion on the basis of immunity is limited to the immunity issue; the court may not consider other defenses raised by the summary judgment motion. *City of San Antonio v. Hernandez*, 53 S.W.3d 404, 407 (Tex. App.—San Antonio 2001, pet. denied); *Associated Press v. Cook*, 17 S.W.3d 447, 459 n.13 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *City of Robstown v. Ramirez*, 17 S.W.3d 268, 272-76 (Tex. App.—Corpus Christi 2000, pet. dismissed w.o.j.); *Cameron County v. Carrillo*, 7 S.W.3d 706, 709 (Tex. App.—Corpus Christi 1999, no pet.).

5. Media defendants

(a) *Appealable orders*

An order that denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the U.S. Constitution, or Article I, Section 8 of the Texas Constitution, or Chapter 73 of the Texas Civil Practice and Remedies Code (statutory defenses to defamation) is appealable. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6).

(b) *Constitutionality*

It is now well-established that this statute only grants an interlocutory appeal to a media defendant (as defined in the statute) not to a plaintiff. *See, e.g., KTRK Tele., Inc. v. Fowkes*, 981 S.W.2d 779, 786 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), *disapproved on other grounds by Turner v. KTRK Tele., Inc.*, 38 S.W.3d 103 (Tex. 2000); *TSM AM-FM TV v. Meca Homes, Inc.*, 969 S.W.2d 448, 450 (Tex. App.—El Paso 1998, pet. denied). A series of constitutional challenges to this distinction have been rejected. *See Fowkes*, 981 S.W.2d at 783-86 (rejecting equal protection, open courts, and special laws challenges).

(c) *Scope of appeal*

Unlike most other types of interlocutory appeal, where the court of appeals may review only those parts of the trial court's order that fall within the scope of the interlocutory appeal statute, this statute expressly permits a defendant to appeal a denial of a summary judgment motion that is based "in part" on certain claims or defenses. As a result, an appeal under this section may include other grounds for summary judgment that were raised in the motion, even if those grounds would not be appealable if asserted alone. *See K-Six Tele., Inc. v. Santiago*, 75 S.W.3d 91, 96 (Tex. App.—San Antonio 2002, no pet. h.); *Cox Texas Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 720-21 (Tex. App.—Austin 2001, pet. denied); *American Broadcasting Co. v. Gill*, 6 S.W.3d 19, 26 (Tex. App.—San Antonio 1999, pet. denied), *disapproved on other grounds by Turner v. KTRK Tele., Inc.*, 38 S.W.3d 103 (Tex. 2000); *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422, 425, 429 (Tex. App.—Waco 1997, writ denied).

Although this statute is commonly associated with libel lawsuits, it is not limited to that context.

On the contrary, it may be invoked in any case in which a defendant asserts one of the free-speech or free-press defenses enumerated in the statute. Coupled with the power to address any ground in the summary judgment motion, this broad application can countenance unusual results that do not appear to serve the objectives of the statute. For example, in *A.H. Belo Corp. v. Corcoran*, 52 S.W.3d 375 (Tex. App.—Houston [1st Dist.] 2001, pet. denied), a journalist conducted an interview with a woman who had kidnaped her daughter and hidden her from the child's father. The father sued the journalist, alleging various tort claims based on a theory that he had assisted in depriving the father of his daughter. The journalist filed a motion for summary judgment on several grounds, including the First Amendment. On that basis, the court of appeals took jurisdiction over an appeal from denial of summary judgment. The court of appeals then proceeded to reverse the denial of summary judgment based on defects in the plaintiff's causes of action, without even addressing the First Amendment defense. *Id.* at 379-84. Thus, although this statute was enacted to permit appeals of free-speech and free-press defenses in libel cases, it was used in this case to obtain immediate relief from non-libel claims on grounds that had nothing to do with the free-speech and free-press defenses. That is not to say the decision was wrong; it simply illustrates the potential of this statute in the hands of a creative appellate lawyer.

(d) *Standard of review*

The ordinary summary judgment standard of review applies to appeals under this section. *E.g.*, *A.H. Belo Corp. v. Corcoran*, 52 S.W.3d 375, 378 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Dolcefino v. Randolph*, 19 S.W.3d 906 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

(e) *Supreme Court jurisdiction*

Unlike the other types of interlocutory appeals, the supreme court has jurisdiction over interlocutory appeals in libel cases without the need for a dissent or a conflict. *See* TEX. GOV'T CODE § 22.225(d); *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 420 (Tex. 2000); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

(f) *Attorneys' fees and costs*

This section of the interlocutory appeal statute provides a special fee-shifting and cost-shifting rule. If the denial of summary judgment in a libel case is

affirmed, the court of appeals is required to assess court costs and attorneys' fees against the appellant; otherwise, each party must bear its own court costs. *See* TEX. CIV. PRAC. & REM. CODE § 51.015; *Gaylor Broadcasting Co. v. Francis*, 7 S.W.3d 279, 286 (Tex. App.—Dallas 1999, pet. denied) (holding this rule is mandatory).

This provision has generated some confusion. In *Harris County Flood Control District v. PG&E*, 35 S.W.3d 772, 774 (Tex. App.—Houston [1st Dist.] 2001, pet. dismissed w.o.j.), the court cited this section to justify its award of costs in an interlocutory appeal under another section of Section 51.014(a). But the court overruled itself in *City of Houston v. Northwood Mun. Utility Dist.*, 74 S.W.3d 183, 184 (Tex. App.—Houston [1st Dist.] 2002, pet. filed), recognizing Section 51.015 applies only to cases appealed under Section 51.014(a)(6).

6. Special appearance

(a) *Appealable orders*

As a general rule, an order that grants or denies a special appearance is appealable. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7). But this section does not apply to suits under the Family Code. *Id.*

If an order granting a special appearance dismisses all remaining defendants, it is a final judgment and may be appealed under the final judgment procedures. *E.g.*, *TeleVentures, Inc. v. International Gaming Tech.*, 12 S.W. 900, 904 n.1 (Tex. App.—Austin 2000, pet. denied). This may be more attractive because of the different procedures (and deadlines) that govern final judgment appeals.

(b) *Review of evidentiary rulings*

Because special appearances are fact-intensive, they often involve the resolution of factual disputes. *See* TEX. R. CIV. P. 120a(3) (providing evidentiary procedures for special appearances). Consequently, appellate courts construe their jurisdiction to include the power to review any evidentiary rulings that are necessary to disposition of the special appearance. *E.g.*, *S.P.A. Giacomini v. Lamping*, 42 S.W.3d 265, 269-71 (Tex. App.—Corpus Christi 2001, no pet.); *see also* Part II.A.9, *supra*.

(c) *Standard of review*

Until this year, there was a split of authority concerning the standard of review in special appearance cases. Because the ultimate due process determination involves a mixed question of law and fact, courts had approached their review differently.

The conflict ran the gamut from abuse of discretion, to factual and legal sufficiency, to de novo review. See *Michel v. Rocket Eng. Corp.*, 45 S.W.3d 658, 680 n.2 (Tex. App.—Fort Worth 2001, no pet.) (summarizing the conflict); *Case v. Grammar*, 31 S.W.3d 304, 307-08 nn.1-2 (Tex. App.—San Antonio 2000, no pet.) (same).

The supreme court finally resolved the conflict in *BMC Software Belgium v. Marchand*, 45 TEX. SUP. CT. J. 930 (June 27, 2002). *BMC Software* holds that a trial court's factual findings may be reviewed for both legal and factual sufficiency and the ultimate legal conclusion whether Texas may exercise personal jurisdiction over the defendant is reviewed de novo. *Id.* at 931; see also *Michel*, 45 S.W.3d at 672 (explaining the relationship between these two steps in the personal jurisdiction analysis).

(d) *Fact-specific decisionmaking*

These cases tend to be formulaic and highly fact-specific. Every opinion recites the same rules, but the decisions turn on fact-specific considerations and comparisons to cases with similar facts. *E.g.*, *American Type Culture Collection, Inc. v. Coleman*, 45 TEX. SUP. CT. J. 1008, 1012-1013 (July 3, 2002). Thus, what was said a generation ago remains true today: "Narrow factual distinctions will often suffice to swing the due process pendulum." *U-Anchor Adver., Inc. v. Burt*, 553 S.W.2d 760, 764 (Tex. 1977), quoted in *PVF, Inc. v. Pro Metals, Inc.*, 60 S.W.3d 320, 325 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). As a result, the opinions in this area rarely plow new legal ground.

What may be more interesting are the numbers. Since 2000, there have been 32 interlocutory appeals from orders granting or denying special appearances that were decided on the merits. Of those 32 cases, 19 found no basis for personal jurisdiction in Texas, while 14 found a valid basis for personal jurisdiction (one case upheld jurisdiction over one defendant and dismissed another). Specific jurisdiction theories were found proper 11 times and rejected 19 times. General jurisdiction theories were found proper 6 times and rejected 13 times. These statistics reflect the unusually fact-specific nature of this issue.

(e) *Stay pending appeal*

An interlocutory appeal does not automatically deprive the trial court of jurisdiction to make further orders in the case. See TEX. R. APP. P. 29.5. Thus, nonresident defendants may wish to move for a stay of all proceedings (*e.g.*, discovery) in the trial court

while the appeal is pending. Appellate courts may be willing to grant such motions in order to protect foreign defendants from the burdens of litigation until they have decided whether the defendant is subject to personal jurisdiction in Texas. *E.g.*, *Lacefield v. Electronic Fin. Group, Inc.*, 21 S.W.3d 799, 800 (Tex. App.—Waco 2000, no pet.); but see *Compaq Computer Corp. v. Lepray*, 52 S.W.3d 908 (Tex. App.—Beaumont 2001, no pet.) (denying stay of trial court proceedings pending appeal).

(f) *Internet contacts*

One of the few due process factors that is still evolving is the weight to be given Internet contacts. Since the seminal decision on this issue in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D Pa. 1997), several Texas courts have adopted the "interactivity" test that was developed in *Zippo*. See *Experimental Aircraft Ass'n, Inc. v. Doctor*, 76 S.W.3d 496, 507 (Tex. App.—Houston [14 Dist.] 2002, no pet. h.) (citing cases). The wisdom of the *Zippo* test has been a subject of great debate among courts and academic commentators nationwide. Because the *Zippo* test has not yet been considered by the Texas Supreme Court, it may prove a fertile area for future development.

7. Plea to the jurisdiction

(a) *Appealable orders*

An order that grants or denies a plea to the jurisdiction by a governmental unit is appealable. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

A plea to the jurisdiction may be used to assert any defect in the court's subject-matter jurisdiction. *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999). This section is most commonly used to raise the issue of sovereign immunity. Nonetheless, the right to an appeal extends to a plea to the jurisdiction by a government defendant on any basis. See *City of Austin v. L.S. Ranch, Ltd.*, 970 S.W.2d 750, 752-53 (Tex. App.—Austin 1998, no pet.); see also *Perry v. Del Rio*, 66 S.W.3d 239 (Tex. 2001) (ripeness); *Brown v. Todd*, 53 S.W.2d 297 (Tex. 2001) (standing).

On the other hand, even though the purpose of Section 51.014(a)(8) was to provide a vehicle for interlocutory appeal of challenges to the jurisdiction, it limits that right strictly to a plea to the jurisdiction. A motion for summary judgment is no substitute, even if it challenges subject-matter jurisdiction. *E.g.*, *Brazos Transit Dist. v. Lozano*, 72 S.W.3d 442, 444-45 (Tex. App.—Beaumont 2002, no pet. h.). The supreme court evidently

shares this same view. *See Texas Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 586 n.2 (Tex. 2001).

(b) *Derivative standing of individual defendants*

There is a split of authority concerning whether individual officers may file pleas to the jurisdiction and take advantage of this interlocutory appeal. Some courts hold that government officials acting in their official capacity are “governmental units,” because an official capacity suit is effectively a suit against the government. *See, e.g., Perry v. Del Rio*, 53 S.W.3d 818, 821-23 (Tex. App.—Austin 2001), *pet. dismiss'd*, 66 S.W.3d 239, 256 (Tex. 2001); *Friona Indep. Sch. Dist. v. King*, 15 S.W.3d 653, 657 n.3 (Tex. App.—Amarillo 2000, no *pet.*). Others strictly construe the statute and hold that individual officials are not “governmental units” under the statute. *E.g., Castleberry Indep. Sch. Dist. v. Doe*, 35 S.W.3d 777, 780 (Tex. App.—Fort Worth 2001, *pet. dismiss'd w.o.j.*); *University of Houston v. Elthon*, 9 S.W.3d 351, 354 (Tex. App.—Houston [14th Dist.] 1999, *pet. dismiss'd w.o.j.*); *Johnson v. Resendez*, 993 S.W.2d 723, 728 (Tex. App.—Dallas 1999), *pet. dismiss'd as improvidently granted*, 52 S.W.3d 689 (Tex. 2001); *Dallas County Comm. Coll. Dist. v. Bolton*, 990 S.W.2d 465, 467 (Tex. App.—Dallas 1999, no *pet.*).

(c) *Standard of review*

Subject-matter jurisdiction is a question of law subject to *de novo* review. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *accord Texas Natural Resource Conservation Com'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

In deciding a plea to the jurisdiction, the court is not limited to examining the pleadings, but may consider evidence relevant to the jurisdictional issue. When necessary to resolve the jurisdictional issue, the court *must* consider evidence. *See Bland Ind. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). But the court should confine itself to the evidence relevant to the jurisdictional issue. *Id.*; *see also County of Cameron v. Brown*, 45 TEX. SUP. CT. J. 680, 682 n.3 (May 23, 2002) (citing these rules).

(d) *Sovereign immunity*

Sovereign immunity protects the State of Texas from claims for damages, absent legislative consent. *General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). The doctrine encompasses two principles—immunity from suit and immunity from liability. *Federal Sign v. Tex. S.*

Univ., 951 S.W.2d 401, 405 (Tex. 1997). Immunity from liability does not affect a court’s subject matter jurisdiction. *See Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). On the other hand, immunity from suit deprives a trial court of subject matter jurisdiction, even if liability is undisputed. *Travis Co. v. Pelzel & Assocs., Inc.*, 45 TEX. SUP. CT. J. 623, 627 (May 9, 2002).

These cases have become popular with the Texas Supreme Court recently. Notwithstanding its limited jurisdiction over interlocutory appeals, the supreme court has accepted several of these cases in the past two years—usually on the basis of a conflict with a prior decision.

8. Arbitration

(a) *Appealable orders*

An order that denies an application to compel arbitration, grants an application to stay arbitration, confirms or refuses to confirm an arbitration award, modifies or corrects an arbitration award, or vacates an arbitration award is appealable. TEX. CIV. PRAC. & REM. CODE § 171.098(a).

Appeals under the Texas Arbitration Act may be taken “in the manner and to the same extent as an appeal from an order or judgment in a civil action.” TEX. CIV. PRAC. & REM. CODE § 171.098(b). Because appeals under this section are interlocutory, they are governed by the ordinary rules that govern interlocutory appeals. *See Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, 988 S.W.2d 731, 732-33 (Tex. 1998) (holding that the statute limiting supreme court jurisdiction in interlocutory appeals applies to appeals under this statute).

(b) *Texas Arbitration Act*

The Texas General Arbitration Act does not technically permit an interlocutory appeal from an order *compelling* or *refusing to stay* arbitration. Nonetheless, the Texas Supreme Court has stated in dictum that an interlocutory appeal may be available from an order compelling arbitration under the Texas Arbitration Act. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (stating in dictum that the Texas Arbitration Act “permit[s] a party to appeal from an interlocutory order granting or denying a request to compel arbitration”). Thus, there is an open question about the scope of the right to an interlocutory appeal.

Most courts decline to follow the *Anglin* dictum and hold that orders compelling arbitration are not appealable. *See, e.g., Trico Marine Serv., Inc. v. Stewart & Stevenson Technical Serv., Inc.*, 73

S.W.3d 545, 548 n.3 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding) (citing cases); *see also Lipshy Motorcars, Inc. v. Sovereign Assocs., Inc.*, 944 S.W.2d 68 (Tex. App.—Dallas 1997, no writ); *but see Teal Constr. Co. v. Darren Casey Interests, Inc.*, 46 S.W.3d 417, 418-20 (Tex. App.—Austin 2001, pet. denied) (entertaining cross-appeal of interlocutory order compelling arbitration without addressing jurisdiction over that portion of the case).

Until the Texas Supreme Court resolves this ambiguity, practitioners who wish to appeal an order compelling arbitration must seek parallel remedies: interlocutory appeals and petitions for mandamus. *See Anglin*, 842 S.W.2d at 272 (discussing strategy); *Freis v. Canales*, 877 S.W.2d 283, 283 (Tex. 1994) (mandamus available to attack order compelling arbitration).

(c) Federal Arbitration Act

By contrast, this ambiguity does not exist for arbitration cases under the Federal Arbitration Act. In that context, it is well-settled there is no right to an interlocutory appeal. *Anglin*, 842 S.W.2d at 272. The appropriate course is a petition for mandamus. *See In re American Homestar of Lancaster*, 50 S.W.3d 480, 483 (Tex. 2001); *Freis v. Canales*, 877 S.W.2d 283, 283 (Tex. 1994) (mandamus available to attack order compelling arbitration under FAA); *Anglin*, 842 S.W.2d at 272 (mandamus available to attack order denying arbitration under the FAA).

The FAA applies to all arbitration agreements made in transactions involving interstate commerce. *See* 9 U.S.C. § 2 (2001); *In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 127 (Tex. 1999). Agreements often stipulate that the FAA governs. When an arbitration agreement does not specify that it is governed by the FAA, whether the transaction involves interstate commerce is a question of fact. *In re Profanchik*, 31 S.W.3d 381, 384-85 (Tex. App.—Corpus Christi 2000, orig. proceeding); *In re Valle Redondo, S.A.*, 47 S.W.3d 655, 661-62 (Tex. App.—Corpus Christi 2001, orig. proceeding). Because this evidentiary burden is light and the presumption favoring arbitration is strong, courts generally find sufficient evidence to apply the FAA. *See, e.g., In re Nasr*, 50 S.W.3d 23, 25-26 (Tex. App.—Beaumont 2001, orig. proceeding).

If it is not clear whether the agreement will be governed by the Texas statute or the Federal statute, parties seeking to compel arbitration must pursue the parallel proceedings outlined above. *E.g., Anglin*, 842 S.W.2d at 272; *J.M. Davidson, Inc. v.*

Webster, 49 S.W.3d 507, 510-11 (Tex. App.—Corpus Christi 2001, pet. filed). The parallel proceedings should be decided simultaneously. *In re Valero Energy Corp.*, 968 S.W.2d 916, 916-17 (Tex. 1998).

(d) Standard of review

The decision to compel arbitration is reviewed for abuse of discretion. *Anglin*, 842 S.W.2d at 271; *Trico*, 73 S.W.3d at 548. Under this procedure, factual findings underlying the trial court's decision are reviewed for sufficiency of the evidence, and the legal conclusion whether an enforceable arbitration agreement exists is reviewed de novo. *E.g., Labor Ready Cent. III, L.P. v. Gonzalez*, 64 S.W.3d 519, 520 (Tex. App.—Corpus Christi 2001, no pet.); *In re Conseco Fin. Serv. Corp.*, 19 S.W.3d 562, 568 (Tex. App.—Waco 2000, orig. proceeding); *J.M. Davidson, Inc. v. Webster*, 49 S.W.3d 507, 511-12 (Tex. App.—Corpus Christi 2001, pet. filed).

(e) Split of authority on conditions precedent

There is a split in the appellate courts over whether a failure to satisfy a condition precedent under the arbitration agreement should be decided by the trial court in the motion to compel arbitration (because it is a condition of arbitration) or should be submitted to the arbitrator. *See Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 583-84 (Tex. App.—Houston [14th Dist.] 1999, pet. filed) (describing the split). Because this split is relevant to the determination whether to compel arbitration, it is a potential issue for interlocutory appeal.

9. Venue rulings

(a) Appealable orders

Most venue rulings are not appealable orders. TEX. CIV. PRAC. & REM. CODE § 15.064(a) (venue rulings are not a ground for interlocutory appeal); *see also id.* § 15.002(c) (orders granting or denying motion to transfer venue are not grounds for appeal or mandamus). But there is one narrow exception: an interlocutory appeal is allowed from an order granting or denying the joinder or intervention of a plaintiff who could not otherwise maintain proper venue. TEX. CIV. PRAC. & REM. CODE § 15.003(c); *Surgitek v. Abel*, 997 S.W.2d 598 (Tex. 1999).

Either a plaintiff seeking to join or intervene under this section or a defendant opposing it may take an interlocutory appeal from the trial court's order. TEX. CIV. PRAC. & REM. CODE § 15.003(c). The trial court need not expressly decide the joinder issue in its order; if the trial court's order

necessarily decides the question of joinder, then it is appealable. *See Surgitek*, 997 S.W.2d at 602 (holding that order transferring venue necessarily decided joinder issue, and was thus appealable).

Only the joinder determination is reviewable; the court of appeals cannot review a decision that a plaintiff independently established proper venue. *American Home Prods. Corp. v. Clark*, 38 S.W.3d 92, 95-96 (Tex. 2000). “The statute allows an interlocutory appeal for one specific purpose: to contest the trial court’s decision allowing or denying intervention or joinder. . . . if the trial court, even erroneously, decides that venue is proper under section 15.002, an interlocutory appeal under section 15.003(c) is unavailable.” *Id.* at 96.

If the trial court determines both that a plaintiff established venue independently and that joinder was proper, the order is unreviewable on appeal. This conclusion follows because a decision that venue is proper is not appealable, and thus one basis for the trial court’s decision would be unreviewable. *E.g., Electronic Data Sys. Corp. v. Pioneer Elec. (USA) Inc.*, 68 S.W.3d 254, 257-60 (Tex. App.—Fort Worth 2002, no pet.); *American Home Prods. Corp. v. Clark*, 999 S.W.2d 908, 910 (Tex. App.—Waco 1999, *aff’d*, 38 S.W.3d 92 (Tex. 2000)); *but see O’Quinn v. Hall*, 2002 WL 1023096 (Tex. App.—Corpus Christi May 17, 2002, no pet. h.) (publication pending) (reviewing the trial court’s decision that venue was independently proper before considering the joinder decision).

This limitation on review can be hard to honor, because plaintiffs invariably assert both that they can independently establish venue and, alternatively, that joinder is proper. If a trial court denies a venue challenge without specifying the basis for its ruling, it will be unclear whether its decision is reviewable. Under those circumstances, the court of appeals may abate the appeal and remand to the trial court for an order specifying the basis of its ruling. *See, e.g., American Home Prods. Corp. v. Clark*, 3 S.W.3d 57 (Tex. App.—Waco 1999), *opinion after remand*, 999 S.W.2d 908, 909-10, *aff’d*, 38 S.W.3d 92, 96-97 (Tex. 2000); *Electronic Data Sys. Corp. v. Pioneer Elec. (USA) Inc.*, 68 S.W.3d 254, 256 (Tex. App.—Fort Worth 2002, no pet.). The result of that remand may be a foregone conclusion, since “a trial court, actually addressing joinder, can insulate its order from appellate scrutiny simply by holding that each plaintiff has independently established venue, even though such a holding on the record presented is clearly wrong.” *American Home*, 38 S.W.3d at 97

(Enoch, J., concurring). But that risk is endemic to the statutory scheme, and cannot be avoided.

(b) *Requirements for joinder or intervention*

Every plaintiff must establish proper venue. *See* TEX. CIV. PRAC. & REM. CODE § 15.003(a). A plaintiff who cannot personally establish proper venue in a county may join or intervene in a lawsuit pending in that county only if the following conditions are met:

- (1) joinder is proper under the rules of civil procedure;
- (2) an essential need exists to have the suit tried in the county where it is pending;
- (3) the county of suit is a fair and convenient venue for the joining plaintiff and the defendants; and
- (4) joinder will not unfairly prejudice another party.

TEX. CIV. PRAC. & REM. CODE § 15.003(c); *Surgitek*, 997 S.W.2d at 602-603.

The trial court may receive evidence and make factual determinations concerning the four elements. The plaintiff has the burden of proof. *See Surgitek*, 997 S.W.2d at 602-03.

(c) *Standard of review*

Even though the trial court may make factual determinations in connection with the venue issue, the court of appeals reviews its decision *de novo*. *See* TEX. CIV. PRAC. & REM. CODE § 15.003(c)(1) (the appellate court must make an “independent determination from the record”); *see also Surgitek*, 997 S.W.2d at 603 (discussing this standard).

(d) *Essential need*

The “essential need” element is usually the key issue in Section 15.003(c) appeals. “Essential need” is demonstrated only if a plaintiff proves that it is “indispensably necessary” to try its claims in the particular county in which suit is pending. *Surgitek*, 997 S.W.2d at 604. Financial need to pool resources against common experts and common issues is not sufficient to meet the test. *Id.* The test is very strict, and is rarely satisfied. *See, e.g., O’Quinn v. Hall*, 2002 WL 1023096 (Tex. App.—Corpus Christi May 17, 2002, no pet. h.) (publication pending) (finding insufficient evidence

to establish “essential need”); *Am. Home Prods. Corp. v. Bernal*, 5 S.W.3d 344, 347-48 (Tex. App.—Corpus Christi 1999, no pet.) (same); *Blalock Prescription Ctr., Inc. v. Lopez-Guerra*, 986 S.W.2d 658, 665 (Tex. App.—Corpus Christi 1998, no pet.) (same); *but see Teco-Westinghouse Motor Co. v. Gonzalez*, 54 S.W.3d 910, 916-17 (Tex. App.—Corpus Christi 2001, no pet.) (finding “essential need” tied to the county of suit because an indispensable witness was located in that county and would be unable to attend trial in another county).

(e) *Time for disposition*

The court of appeals is supposed to render its decision by 120 days after the appeal is perfected. TEX. CIV. PRAC. & REM. CODE § 15.003(c). However, at least one court of appeals has held that the deadline may be extended for 60 days because during that period the court of appeals retains plenary power over the case. *See O’Quinn v. Hall*, 2002 WL 1023096 n.1 (Tex. App.—Corpus Christi May 17, 2002, no pet. h.) (publication pending).

(f) *Mandatory venue*

Although there is technically no right to take an interlocutory appeal from an order denying a motion to transfer venue, the denial of a motion based on the mandatory venue provisions of the Civil Practice and Remedies Code may be attacked by mandamus. *See* TEX. CIV. PRAC. & REM. CODE § 15.0642.

Because the statute does not require a relator to satisfy the usual mandamus requirement of showing the absence of an adequate appellate remedy, the only question in these cases is whether the trial court abused its discretion. *In re Missouri Pac. R. Co.*, 998 S.W.2d 212, 215 (Tex. 1999); *In re Continental Airlines, Inc.*, 988 S.W.2d 733, 735 (Tex. 1998). Thus, a mandamus under this section is functionally indistinguishable from an interlocutory appeal.

A mandamus under this section must be filed at least 90 days before trial or within 10 days after the party is advised of the trial date, whichever is later. TEX. CIV. PRAC. & REM. CODE § 15.0642.

This section extends only to mandatory venue rules provided in Chapter 15 of the Civil Practice and Remedies Code; it does not permit mandamus on the basis of other mandatory venue provisions. *See In re Colonial Gas Ins. Co.*, 33 S.W.3d 399, 400 (Tex. App.—Texarkana, orig. proceeding).

10. Orders sealing court records

(a) *Appealable orders*

Any order (or portion of an order or judgment) relating to sealing or unsealing court records is deemed to be severed from the underlying case and is treated as a final judgment for purposes of appeal. TEX. R. CIV. P. 76a(8). Any party or intervenor who participated in the hearing preceding issuance of the order may appeal. *Id.*

The supreme court has construed this statute broadly to include any decision on the merits of the sealing issue. *E.g., Chandler v. Hyundai Motor Co.*, 829 S.W.2d 774, 775 (Tex. 1992); *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992). Nevertheless, the Court has indicated that the right to appeal does not extend to preliminary decisions, but is available only after the final decision on the Rule 76a motion. *See In re Dallas Morning News*, 10 S.W.3d 298, 305-06 (Tex. 1999) (Gonzales, J., joined by Phillips, C.J., Hecht and Owen, JJ.) (holding the right to appeal may “only be exercised after a trial court has issued an order finally adjudicating a rule 76a motion”); *id.* at 300 n.1 (Abbott, J., joined by Enoch, Hankinson and O’Neill, JJ.) (same); *but see id.* at 307-08 (Baker, J.) (arguing “any order” relating to a Rule 76a motion is appealable).

(b) *Standard of review*

An order under Rule 76a is reviewed only for abuse of discretion. *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 525-26 (Tex. 1998). If necessary, the court of appeals may abate the appeal and order the trial court to conduct further proceedings as required by Rule 76a. TEX. R. CIV. P. 76a(8).

C. **Supreme Court Jurisdiction**

Interlocutory appeals are generally final in the court of appeals. TEX. GOV’T CODE § 22.225(b)(3). However, the supreme court has jurisdiction over an interlocutory appeal if the court of appeals’ opinion conflicts with a prior decision of the supreme court or another court of appeals, or if one member of the court of appeals disagrees on a material question. TEX. GOV’T CODE § 22.225(c). This section will provide a very brief overview of the rules governing supreme court jurisdiction in interlocutory appeals; it does not attempt to cover this rapidly evolving area in detail.

1. Conflicts jurisdiction

The supreme court has conflicts jurisdiction over any 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), § 22.225(c).

(a) *Supreme Court trends*

Historically, the supreme court has been very reluctant to exercise its conflicts jurisdiction over interlocutory appeals. See *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 349 (Tex. 2001) (Hecht, J., dissenting from denial of rehearing of petition for review). But that may be changing. In recent years, the scope of conflicts jurisdiction has been a subject of disagreement among the supreme court justices; one bloc of justices favors a technical approach to conflicts jurisdiction, while another favors a more functional approach. See *Collins v. Ison-Newsome*, 73 S.W.3d 178 (Tex. 2001) (fractured supreme court debating proper rules for conflicts jurisdiction).

This debate is relevant primarily to determining the Court's jurisdiction over interlocutory appeals, since its "importance" jurisdiction over appeals from final judgments makes the conflicts test irrelevant in that context. See TEX. GOV'T CODE § 22.001(a)(6). As a result, the practical significance of applying the conflicts test broadly is to expand interlocutory jurisdiction; the practical significance of applying it narrowly is to contract interlocutory jurisdiction.

Because this debate has relevance only in the context of interlocutory appeals, its emergence over the last few years may simply be a natural byproduct of the dramatic expansion in interlocutory appeals over the last decade. Because the courts of appeals are deciding more interlocutory appeals than before, there are more occasions when the supreme court must examine the scope of its conflicts jurisdiction—and more opportunities for appellate lawyers to find their way to the supreme court.

(b) *The traditional approach*

Under the classic statement of the conflicts test, conflicts jurisdiction is proper only if the rulings in two cases are "so far upon the same state of facts that the decision of one case is necessarily conclusive of the other." *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998). The conflict must be upon the question of law actually decided. *Id.* Although the facts of the cases need not be identical, cases do not conflict if a material factual difference legitimately distinguishes their holdings. *Id.*; see also *Texas A&M Univ.—Kingsville v. Lawson*, 45 TEX. SUP. CT. J. 857 (June 20, 2002) (applying this test); *Department of Transp. v. Garza*, 70 S.W.3d 802, 805-06 (Tex. 2002) (same).

A bare majority of the supreme court holds that conflicts with unpublished decisions cannot support jurisdiction. Compare *Collins v. Ison-Newsome*, 73 S.W.3d 178, 183-84 (Tex. 2001) with *id.* at 184-85 (Jefferson and Rodriguez, JJ., concurring) (arguing that conflicts may be based on unpublished opinions but finding no conflict in this case) and *id.* at 191-93 (Hecht and Owen, JJ., dissenting) (arguing that conflicts may be based on unpublished opinions and finding a conflict).

Similarly, conflicts with subsequent decisions cannot support jurisdiction; the plain language of the statute requires a conflict with a "prior" decision. See *Collins*, 73 S.W.3d at 180.

Finally, there appears to be general agreement (unheard of in this area) that conflicts within a single court of appeals do not support conflicts jurisdiction. See *Collins*, 73 S.W.3d at 185 (Jefferson, J., concurring); *id.* at 188-89 (Hecht, J., dissenting); *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 459 (Tex. 2000) (Baker, J., dissenting).

(c) *The functional approach*

The functional test for conflicts jurisdiction looks to whether the analytical approach illustrated by the opinion under review is inconsistent with a prior decision of the supreme court or another court, or fails to properly apply a rule of decision. Thus, the functional approach focuses less on language, and more on application.

The high-water mark of the functional approach is *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547 (Tex. 2000). Under the traditional test for conflicts, a conflict must appear on the face of the opinions. E.g., *Department of Transp. v. Garza*, 70 S.W.3d 802, 805-06 (Tex. 2002). But *Bland* broadened the focus beyond the "face" of the opinions to inquire whether "a rule of decision" in one case would require a different result if applied in another case:

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.

Id. at 553.

Justice Hecht has carried the flag for this view, and it has attracted support—albeit not every time. See, e.g., *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347 (Tex. 2001) (Hecht, J., dissenting from denial of rehearing of petition for review); see also

Collins, 73 S.W.3d at 185-93 (Hecht, J., dissenting). But the functional test has been used in some cases. *See, e.g., Texas Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 586 (Tex. 2001) (finding a conflict because the court of appeals failed to perform analysis required by prior supreme court precedent). Although the functional test may not consistently command a majority of the Court, it is safe to say a solid plurality of the justices are receptive to it, under the right circumstances.

(d) *Extended jurisdiction*

If the supreme court has conflicts jurisdiction, it has jurisdiction over all issues in the case under the doctrine of “extended jurisdiction.” *See, e.g., Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 432 (Tex. 2000).

2. Dissent jurisdiction

The supreme court also has jurisdiction over an interlocutory appeal when the justices of the court of appeals disagree about a material question of law. TEX. GOV'T CODE § 22.001(a)(1), § 22.225(c).

Although this rule is commonly referred to as “dissent” jurisdiction, that term is a misnomer. Technically, the statute requires a “disagreement” (not a “dissent”) about a material question of law. Therefore, in *Travis County v. Pelzel & Associates*, 77 S.W.3d 246 (Tex. 2002), the supreme court had jurisdiction because one member of the court of appeals disagreed with one ground for its decision, although he agreed with its decision on another issue and “concurred” in its judgment. *Id.* at 248 n.2.

Given that all three justices concurred in one ground for the decision, one might ask whether the disagreement was really “material” to their decision. *Cf. Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001) (discussing traditional rule that a party relying on dissent jurisdiction must be requesting review of the same issue that was the basis for the dissent) (citing *Harry Eldridge Co. v. T.S. Lankford & Sons, Inc.*, 371 S.W.2d 878, 879 (Tex. 1963)). The Court’s willingness to exercise jurisdiction is consistent with the functional view of its interlocutory jurisdiction, focusing less on technical reasons to deny review and more on the resolution of issues.

(a) *Dissent from denial of en banc rehearing*

The supreme court recently held that a dissent by a member of the panel that decided the case is not required; a dissent from denial of en banc rehearing by a judge who did not sit on the panel will suffice if there is a “direct clash between the justice and the court on the appropriate analysis for the case.” *American Type Culture Collection, Inc. v. Coleman*, 45 TEX. SUP. CT. J. 1008, 1010 (July 3, 2002).

(b) *Disagreement among panels of a court*

Although conflicts jurisdiction cannot be raised based on a conflict among two cases decided by the same court of appeals, Justice Hecht has proposed the provocative idea that such inter-panel conflicts are “disagreements” for purposes of this section. *Collins*, 73 S.W.3d at 189-91 (Hecht, J., dissenting). The Court rejected that idea because it would make the separate provisions for “conflicts” and “dissent” jurisdiction redundant. *Id.* at 183.

(c) *Extended jurisdiction*

A dissent on one question gives the supreme court jurisdiction over the entire case under the doctrine of “extended jurisdiction.” *Brown v. Todd*, 53 S.W.3d 297, 301-02 (Tex. 2001).

3. Other grounds for Supreme Court jurisdiction

Although dissent and conflicts jurisdiction are the classic grounds for supreme court jurisdiction over interlocutory appeals, there are also a few more exotic ways to reach the supreme court.

(a) *Jurisdiction to determine jurisdiction*

As a matter of common law, the supreme court has long held that it has jurisdiction to determine whether a court of appeals correctly determined its jurisdiction over an interlocutory appeal. *See, e.g., Perry v. Del Rio*, 66 S.W.3d 239, 261 (Tex. 2001); *Qwest Communications Corp. v. AT & T Corp.*, 24 S.W.3d 334, 335-36 (Tex. 2000).

(b) *Direct appeal of constitutionality of a statute*

The supreme court has direct jurisdiction over an appeal from an order that grants or denies an injunction on the ground of the constitutionality of a state statute. *See* TEX. GOV'T CODE § 22.001(c); *Perry v. Del Rio*, 67 S.W.3d 85, 89 (Tex. 2001); *Owens Corning v. Carter*, 997 S.W.2d 560, 567-68 (Tex. 1999); *see also Perry*, 67 S.W.3d at 98-100

(Phillips, C.J., dissenting) (discussing the history and scope of the direct appeal). The procedure for a direct appeal is set forth in TEX. R. APP. P. 57.

(c) *Mandamus from interlocutory appeals*

In rare cases with “exceptional circumstances,” the supreme court may use its mandamus power to exercise jurisdiction over an interlocutory appeal it would not otherwise have jurisdiction to review. See *Deloitte & Touche, L.L.P. v. The Fourteenth Court of Appeals*, 951 S.W.2d 394, 396 (Tex. 1997) (discussing the relationship between the Court’s appellate jurisdiction and mandamus jurisdiction). But the mere fact that the supreme court does not have appellate jurisdiction is not enough. *Id.* at 397. That would eradicate the limitations on the Court’s appellate jurisdiction.

Instead, the Court has reserved this remedy for a procedural breakdown so fundamental that it would constitute a failure of the rule of law:

We do not preclude the possibility that in an interlocutory appeal context we might issue mandamus against a court of appeals for procedural irregularities or for actions taken by a court of appeals so devoid of any basis in law as to be beyond its power. But in such cases, we would not be reviewing questions of law over which the court of appeals has final authority; instead, we would be reviewing extraordinary circumstances causing irreparable harm and precluding an adequate remedy by appeal.

Deloitte & Touche, 951 S.W.2d at 398. The Court has not actually issued a writ of mandamus on the basis of such an overriding “procedural irregularity” in an interlocutory appeal.

On the other hand, the Court has granted relief on rare occasions when “exceptional circumstances” rendered an ordinary appellate remedy inadequate. These cases share a common denominator. In each, the order in question did not simply harm the parties, but it harmed the integrity of the State’s institutions and imposed burdens on the entire State. See, e.g., *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (granting mandamus to decide dominant jurisdiction over redistricting litigation in time for compliance with the deadlines to redraw

congressional districts); *In re Masonite*, 997 S.W.2d 194, 198 (Tex. 1999) (granting mandamus to set aside venue ruling that would impose burdens on the Texas legal system); *CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996) (granting mandamus to set aside denial of special appearance in mass tort case that would impose significant burdens on the Texas legal system); *Republican Party v. Dietz*, 940 S.W.2d 86, 93-94 (Tex. 1997) (granting mandamus to set aside order granting a temporary injunction that invaded the rights of political party in the political process).

III. CONCLUSION

The right to interlocutory appeal has expanded dramatically in the last decade, and the modern trend is to continue expanding the availability of appeal. Although interlocutory appeals impose initial costs on the legal system, they facilitate judicial economy in the long run by resolving some cases earlier and by assisting parties in settling other cases without the burden and expense of litigation. Accordingly, both courts and appellate practitioners should favor careful and creative uses of interlocutory appeals to resolve cases with a minimum of expense for the parties and burden for the legal system.

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