

*I Want An Answer Now – Can We Appeal Without a Final Judgment?*  
By Michelle May O’Neil

“Appellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pre-trial mistake. But we cannot afford to ignore them all either. Like ‘instant replay’ review now so common in major sports, some calls are so important – and so likely to change a contest’s outcome – that the inevitable delay of interim review is nevertheless worth the wait....” *In re McAllen Medical Center, Inc.*, 2008 WL 4051053, \*6 (Tex. Aug. 29, 2008).

With that statement, the Texas Supreme Court summed up recent trends in seeking review of pre-trial decisions without waiting for a trial and entry of final judgment.

*Mandamus*

Traditionally, seeking mandamus review requires a showing that (1) the trial court committed a clear abuse of discretion, (2) which could not adequately be remedied by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839-43 (Tex. 1992). The first prong of the *Walker* test remains relatively absolute: an abuse of discretion is shown when the trial court could have reached only one decision in determining what the law is or applying the law to the facts. *Id.* at 840.

After a hiatus of twelve years, the Court has recently undertaken to provide a balancing test to determine when appeal is inadequate under the *Walker* test. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136 (Tex. 2004). Under this balancing test, remedy by direct appeal is inadequate when the “benefits of mandamus review outweigh the detriments”. *Id.*

However, in defining inadequate appeals under *Prudential*, it was hard to tell when mandamus was appropriate except upon exact directive from the Texas Supreme Court. So, in August 2008, the Court clarified the *Prudential* balancing test in a way that seems to widen the availability of the remedy. *In re McAllen Medical Center, Inc.*, 2008 WL 4051053, \*6 (Tex. Aug. 29, 2008). The Court provided the following analysis of the benefit/detriment test: “The comparison requires an analysis of whether mandamus relief will safeguard important substantive and procedural rights from impairment or loss, and also whether mandamus will allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgment. *McAllen* at \*6; see also *In re Global SantaFe Corp.*, 2008 WL 5105257 \*3-4 (Tex. Dec. 5, 2008).

Note that, although the standards for mandamus review in the federal court system appears to be similar to the Texas state standards, the appellate courts have given a much more stringent interpretation to the availability of the remedy.

*Interlocutory Appeals*

In continuing the trend to provide pre-trial appellate remedies in certain situations

to curtail the rising cost of litigation, the Legislature in 2001 created a new class of pre-trial appeals called “accelerated appeal” or “interlocutory appeal”. The “accelerated” term does not necessarily refer to expedited consideration of the appeal, but indicates that the appeal is available interlocutory, before the entry of a final judgment. An interlocutory appeal is only available where a statute authorizes appeal in that particular circumstance. Thus far, the Legislature has authorized interlocutory appeals in the following situations:

- Orders appointing receivers and trustees;
- Class certification orders;
- Temporary injunctions (non-family law);
- Orders denying summary judgment based on an assertion of official immunity;
- Orders denying summary judgment based on a claim against or defense by a member of the media arising under free speech or free press;
- Orders granting or denying a special appearance under Rule 120a;
- Orders denying motion to dismiss in health care liability claim where the plaintiff failed to timely file the required expert report;
- Orders regarding venue in multiple plaintiff cases;
- Certain orders regarding plea to the jurisdiction in class certification cases;
- Order relating to sealing or unsealing court records;
- Certain orders regarding management of persons with communicable diseases;
- Certain orders regarding court-ordered mental health services;
- Certain juvenile court orders.
- Certain orders regarding arbitration under the Texas Arbitration Act (but *not* the Federal Arbitration Act).

In addition to the laundry list of permissible interlocutory appeals, some orders may be appealed interlocutorily *by agreement of the parties*, where the order involves a controlling question of law upon which there is substantial grounds for difference and an immediate appeal may materially advance the ultimate termination of the litigation. Tex. Civ. Prac. & Rem. Code §51.014(d).

Federal jurisprudence uses similar policies for consideration of interlocutory appeals – allowing interlocutory appeal to avoid protracted and expensive litigation – but the federal system builds in much more discretion to allow the pre-trial appeal both in the district court’s granting of permission and in the appellate court’s decision to allow review. In practice, the remedy is difficult to obtain.

### *Conclusion*

The Texas Legislature and the Texas Supreme Court have clearly broadened the opportunities for pre-trial appellate review to correct important, case-defining pre-trial rulings. However, the various courts of appeals have, in application, maintained a more conservative approach. See *In re Wilmer Cutler Pickerling Hale & Door, LLP*, 2008 WL 5413097, \*2 (Tex. App. – Dallas Dec. 31, 2008); *SCI Texas Funeral Svcs., Inc. v. Leal*, 2009 WL 332043 (Tex. App. – Corpus Christi Feb. 12, 2009); *In re Pilgrims Pride Corp.*,

No. 06-08-00109, 2008 WL 4907589, \*2 (Tex. App. – Texarkana Nov. 17, 2008). Where the Legislature and the Court may be viewing broader policy considerations, such as the negative view of the judicial process and increasing cost of litigation, the courts of appeals may be examining their individual dockets to control overuse of pre-trial “instant replay”. Nevertheless, interpretation of the availability of the remedies seems at odds, leaving litigants to wonder whether review of important pre-trial rulings is more available, or whether the recent expansions are only an empty nod to the Legislature’s public policy considerations. Without increasing the amount of cases reviewed pre-trial, litigation costs will continue to rise, some trials will continue to be unnecessary, and the judicial system will continue to be viewed negatively as the *McAllen* opinion fears.