RECENT TRENDS IN MANDAMUS PRACTICE

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CHAPTER 2

TABLE OF CONTENTS

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INTRODUCTION

This article discusses recent mandamus decisions from the Texas Supreme Court and the United States Court of Appeals for the Fifth Circuit and the trends these decisions reflect.

THE TEXAS SUPREME COURT

I. MANDAMUS TO PROTECT STATUTORY GOALS

A. *In re McAllen Medical Center, Inc.*, 275 S.W.3d 458 (Tex. 2008)

1. Background

Plaintiffs sued a hospital alleging negligent credentialing of a thoracic surgeon and related claims in an action characterized by the court as a "mass tort," *i.e.*, 400 plaintiffs representing 224 former patients. *Id.* at 462. Because plaintiffs' expert had no background in hospital administration and credentialing, hospital moved to dismiss case based on inadequacy of her expert report, due within 180 days under the then-governing statute. *See id.* at 463. Trial court denied motion after delay of four years, and court of appeals denied petition for mandamus. *See id.*

2. Holding

a. Abuse of Discretion

"The trial court committed a clear abuse of discretion by concluding these reports were adequate." *See id.*

b. Adequacy of Appellate Remedy

Test articulated in *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004): "Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review. As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories." *Id.* at 464.

Proceeding with the case would "defeat the substantive right involved," which the court characterized as a defendant's "entitle[ment]" to the statutorily-prescribed expert report. *Id.* at 405. The case is akin to uses of mandamus to enforce arbitration agreements, forum selection clauses, and choices of particular attorneys. *See id.* "[I]nsisting on a wasted trial simply so that it can be reversed and tried all over again creates the appearance not that the courts are doing justice, but that they don't know what they are doing. Sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded." *Id.* at 466.

Because the Legislature has determined that expert reports filed no later than 180 days are necessary, the cost-benefit balancing required by *Prudential* has already been accomplished in favor of review: "After extensive study, research and hearings, the Legislature found that the cost of conducting plenary trials of claims as to which no supporting expert could be found was affecting the availability and affordability of health care – driving physicians from Texas and patients from medical care they need. Given our role among the coordinate branches of Texas government, we are in no position to contradict this statutory finding. If (as appears to be the case here) some trial courts are either confused by or simply opposed to the Legislature's requirement for early expert reports, denying mandamus review would defeat everything the Legislature was trying to accomplish." *Id.*

This case "appears to be precisely the kind of case the Legislature had in mind when it enacted the expert report requirements." *See id.* at 467. The court criticized consolidation of "hundreds of malpractice claims by different patients with different health problems and different courses of treatment." *Id.* The hospital had to "attend numerous docket calls and status conferences" and move to dismiss the claims of 200 plaintiffs barred by limitations, while continued litigation would impose greater hardship. *Id.*

The court rejected the dissent's arguments based on *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). "There is no reason this analysis should entangle appellate courts in incidental trial court

rulings any more than *Walker's ad hoc* categorical approach... The balancing analysis we have followed for some years now merely recognizes that the adequacy of an appeal depends on the facts involved in each case." *Id.* at 469.

Summary: "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." *Id.* at 461.

c. Dissent

"A whole new world in mandamus practice, hinted by opinions in the last few years, is here. The Court's heavy reliance on costs and delay to support its conclusion that the hospital has no adequate remedy by appeal marks a clear departure from the historical bounds of our mandamus jurisprudence." *Id.* at 470. Litigation burdens are not enough to make an appellate remedy inadequate; there must be the deprivation of a substantial right, which "would occur if waiting for an appeal would vitiate or severely compromise a party's ability to present a viable claim or defense at trial." *Id.* at 472

B. *In re Roberts*, 255 S.W.3d 640 (Tex. 2008)

Medical malpractice defendant sought mandamus review of trial court decision granting 30-day extension to plaintiff to cure deficient expert reports filed within 180 days of filing suit. *See id.* at 641. Court of appeals granted petition. *See id.* Supreme Court reversed. The court did not reach the court of appeals' determination that expert reports were conclusory, but held: "[W]e disagree that appeal would be inadequate because the trial court's 30-day grace period would frustrate the statute's purpose. The Legislature certainly intended a grace period to be granted only under certain conditions (when inadequacy was 'the result of an accident or mistake'). But the only harm involved is a 30-day delay. By contrast, this original proceeding has now delayed the case for four years... By any measure, the benefits to mandamus review of a 30-day extension are outweighed by the detriments. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004)." *Id.* at 641-42.

C. *In Re Watkins*, __ S.W.3d __, 2009 WL 153251 (Tex. 2009)

Medical malpractice defendant sought mandamus review of trial court decision granting 30-day extension to plaintiff to cure challenged expert report. *See id.* at * 1. Justices divided on whether the report was deficient, in which case interlocutory review is barred by statute, or effectively no report at all, in which case interlocutory review is allowed. *See id.* In either case, mandamus is unavailable: "If no report was served, interlocutory appeal was available, so mandamus was unnecessary. If the report was merely deficient, then an interlocutory appeal was prohibited, and granting mandamus to review it would subvert the Legislature's limit on such review. Legislative findings balancing the costs and benefits of interlocutory review must work both ways: having treated them with respect when they encourage interlocutory review [citing *McAllen Medical Ctr*], we must treat them with the same respect when they discourage it." *Id.*

D. *In re Buster*, 275 S.W.3d 475 (Tex. 2008)

The court granted a medical malpractice plaintiff's petition seeking to overturn a court of appeals decision disallowing a substitute expert report (filed after extension) prepared by a different expert than the one who prepared the original report: "Because a claimant may cure a deficiency by serving a report from a new expert, the court of appeals erred in concluding otherwise." *Id.* at 477. The decision also denied defendant's objection to the trial court's allowance of the substituted report in the first place: "A report by an unqualified expert will sometimes (though not always) reflect a good-faith effort sufficient to justify a 30-day extension." *Id.*

E. *In re GlobalSantaFe Corp.*, 275 S.W.3d 477 (Tex. 2008)

1. Background

Seaman sued defendant under Jones Act claiming silica-related injuries while employed on defendant-owned vessel. *See id.* at 479-80. Claiming the plaintiff failed to file expert report required for silica cases by Chapter 90 of the Civil Practices & Remedies Code, Defendant moved to transfer the case to the silica pretrial MDL court. *See id.* at 481-82. Plaintiff responded by arguing that Chapter 90 procedures and requirements for silica cases are preempted by the Jones Act, and the trial court and court of appeals agreed. *See id.*

2. Holding

Like medical malpractice reforms, Chapter 90's provisions were enacted to address "the existence of an 'asbestos [and silicosis] litigation crisis.'" *Id.* at 482. "The MDL pretrial court's conclusion that Chapter 90 was preempted by the Jones Act was erroneous and mandamus relief is appropriate to correct the error. As we recently held in *In re McAllen Medical Center*, another case concerning legislatively mandated expert reports, mandamus relief is available when the Legislature has enacted a statute to address findings 'that traditional rules of litigation are creating an ongoing crisis,' and 'the purposes of the [enacted] statute would otherwise be defeated.' These precise grounds for mandamus relief are again presented. 'Here the Legislature has already balanced most of the relevant costs and benefits for us.'" *Id.* at 484 (quoting *McAllen Medical Ctr*, 275 S.W.3d at 466).

Substantive Jones Act rights preempt contrary state enactments, but state procedural rules will govern Jones Act cases. *See id.* at 485. Chapter 90's MDL and expert report rules are procedural, but the chapter's requirements of threshold levels of injury for recovery and higher standards of proof of causation are preempted by the Jones Act, which lack such requirements. *See id.* at 485-90.

II. MANDAMUS TO ADDRESS FORUM SHOPPING

A. *In re Team Rocket, L.P.*, 256 S.W.3d 257 (Tex. 2008)

1. Background

Family of pilot killed in crash brought claims in Harris County against defendants arising from their manufacture and sale of plane kit purchased by pilot. *See id.* at 258. Defendant successfully moved to transfer venue to Williamson County. *See id.* at 259. Plaintiffs then nonsuited and refiled in Fort Bend County, and the trial court denied defendants' motion to transfer to Williamson County based on *res judicata*. *See id.* Court of appeals denied mandamus relief. *See id.*

2. Holding

a. Abuse of Discretion

"Just as a decision on the merits cannot be circumvented by nonsuiting and refiling the case, a final determination fixing venue in a particular county must likewise be protected from relitigation... To interpret the provisions otherwise would allow forum shopping, a practice we have repeatedly prohibited. If a plaintiff has an absolute right to nonsuit and refile, as the Creekmores contend, nothing could stop him from filing in each of Texas's 254 counties until he finds a favorable venue." *Id.* at 261.

b. Adequacy of Appellate Remedy

The court focused on three factors derived from *Prudential*: whether important rights will be impaired, whether the case affords the opportunity to provide "helpful direction to the law," and whether "mandamus will spare litigants and the public 'the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" *Id.* at 262 (quoting *Prudential*, 148 S.W.3d at 136).

In this case, the court first held that defendant's procedural rights were impaired: "Our venue statutes create a balance: a plaintiff has the first choice of venue when he files suit,

and a defendant is restricted to one motion to transfer that venue. By defying the Harris County trial court's venue ruling by nonsuiting and refiling elsewhere, the Creekmores disrupted that balance in their favor and thereby impaired Team Rocket's procedural rights." *Id.*

Second, the court held that the venue/nonsuit issue was likely to recur and thus was well-suited to the "helpful direction" the court could provide on an issue "'that would otherwise prove elusive in appeals from final judgments.'" *Id.* (quoting *Prudential*, 148 S.W.3d at 136).

Finally, the case implicates the desire to spare litigants and the public from the waste stemming from improper proceedings. "When, as in this case, a trial court improperly applied the venue statute and issued a ruling that permits a plaintiff to abuse the legal system by refiling his case in county after county, which would inevitably result in considerable expense to taxpayers and defendants, requiring defendants to proceed to trial in the wrong county is not an adequate remedy. 'An appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ,' *Walker*, 827 S.W.2d at 842, but extraordinary relief can be warranted when a trial court subjects taxpayers, defendants, and all of the state's district courts to meaningless proceedings and trials. *See Prudential*, 148 S.W.3d at 137." *Id.*

B. *In re Union Carbide Corp.*, 273 S.W.3d 152 (Tex. 2008)

1. Background

Plaintiff family members of a Union Carbide worker (Hall) intervened in an existing suit against Union Carbide brought by another worker (Moffett). *See id.* at 154. The two cases contained some similarities – *e.g.*, Union Carbide and some other companies as common defendants, alleged benzene exposure, plaintiffs who worked at Union Carbide's Texas City facility – as well as some differences – *e.g.*, some non-common defendants, different (though arguably related) injuries, different work histories. *See id.* Union Carbide filed a motion to strike the intervention, but rather than decide the motion, the district court severed Hall's claims into a separate suit on the same district court's docket. *See id.* Court of Appeals denied the petition. *See id.*

2. Holding

a. Abuse of Discretion

Halls failed to meet test of justiciability, which governs intervention, since they could not bring Moffetts' claims in their own names: "While there is a real controversy between the Halls and Union Carbide...the Halls make no claim that their controversy will be affected or resolved by resolution of the Moffett case." *Id.* at 155. District court also abused its discretion in severing Halls' claims before ruling on the motion to strike their intervention, and lacked discretion to sever in this circumstance. *See id.* at 156.

b. Adequacy of Appellate Remedy

Benefits of upholding the random case assignment rule trumps any detriment to granting mandamus relief. "Random assignment of cases is designed to prevent forum-shopping. Practices that subvert random assignment procedures breed disrespect for and threaten the integrity of our judicial system... In regard to any detriment to the parties, the Halls' claims have now been filed as a separate lawsuit that is pending in Galveston County. There will be insignificant detriment to either party or the judicial system if mandamus relief is granted. On balance, mandamus review is warranted because the benefits of establishing the priority that trial courts must give to ruling on motions to strike interventions and re-emphasizing the importance of both the appearance and practice in maintaining integrity of random assignment rules outweigh any detriment to mandamus review in this instance. Thus, Union Carbide does not have an adequate remedy by appeal." *Id.* at 157 (quotations omitted).

III. MANDAMUS AND WAIVER

A. *In re Int'l Profit Associates, Inc.*, 274 S.W.3d 672 (Tex. 2009)

1. Background

Defendant moved to dismiss contract and tort claims based on forum selection clause. *See id.* at 674-75. Trial court denied the motion, and the court of appeals denied mandamus relief. *See id.* In the Supreme Court, plaintiff argued that defendant waived right to seek mandamus through dilatory conduct in the trial and appellate courts. *See id.*

2. Holding

Mandamus has long been available to enforce forum selection clauses; the issue in *Int'l Profit Associates* was waiver through delay in seeking relief. "Although mandamus is not an equitable remedy, its issuance is controlled largely by equitable principles. One such principle is that equity aids the diligent and not those who slumber on their rights. Thus, delaying the filing of a petition for mandamus relief may waive the right to mandamus unless the relator can justify the delay." *Id.* at 676 (citations and quotations omitted).

No fatal delay here, however. Plaintiff relied initially on delays in the hearing on defendants' motion to enforce the forum selection clause, but the court found that multiple written requests for the hearing and one continuance without objection did not establish unjustified delay. *See id.* Plaintiff also relied on a period following the hearing and issuance of an order during which the defendants attempted to correct the order, which was mislabeled and incorrectly dated. *See id.* But the court held that defendant's four-month delay in moving for a corrected order did not establish waiver. *See id.* Nor did an additional six-week delay in obtaining a copy of the signed order or a further six-week delay before petitioning the court of appeals for the writ. *See id.*

"IPA's actions following entry of the [initial, incorrect] May 29 order do not indicate the type of delay that forfeits a party's right to mandamus relief. IPA could have been more diligent in its efforts to have a corrected order entered, but Topicpak does not claim that IPA took any actions inconsistent with pressing its motion to dismiss or seeking mandamus relief, and it was the errors and delays of the trial court and Tropicpak that hindered IPA's ability to initiate mandamus proceedings. Nor was delay in filing for mandamus relief from the court of appeals... unreasonable... Based on the explanations provided by IPA and the record presented, we conclude that IPA did not slumber on its rights to the extent it waived its right to seek mandamus relief." *Id.* (citations and quotations omitted).

B. *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008), *cert. denied*, 129 S. Ct. 952 (2009)

1. Background

After prolonged litigation and only days before the case was set for trial, plaintiff successfully moved for referral to arbitration. *See id.* at 584-85. Defendants petitioned for writ of mandamus in the court of appeals and the Supreme Court and were denied. *See id.* at 585. Following arbitration, on direct appeal, defendants challenged the reference to arbitration, while plaintiffs argued that the denial of mandamus established the law of the case precluding any challenge. *See id.*

2. Holding

Denial of mandamus without treatment on the merits does not affect later appeals. "[T]he Culls assert it is too late to review the trial court's order referring this case to arbitration. First, they argue the pre-arbitration mandamus proceedings establish the law of the case and preclude the Defendants from raising the same arguments now. We recently rejected this argument, holding that as mandamus is a discretionary writ, 'its denial, without comment on the merits, cannot deprive another appellate court from considering the matter in a subsequent appeal.' [*Chambers v. O'Quinn*, 242 S.W.3d 30, 32 (Tex. 2007)] Mandamus is only available when a final appeal would be inadequate; if filing for mandamus precluded a final appeal, that requirement would become self-fulfilling. Because the earlier

proceedings here were denied without comment on the merits, they do not foreclose our review." *Id.* at 585-86.

IV. TEXAS SUPREME COURT STATISTICS

In FY 2008, the Supreme Court granted 11 of the 261 petitions for mandamus on its docket and set another 9 for argument. *See* 2008 Annual Report, Supreme Court Activity, Office of Court Administration, at www.courts/state/tx/us/pubs/AR2008/sc/2-sc-activity-2008.pdf. This represents a somewhat lower grant rate than in the past 4 years and is more akin to 2004 and earlier, before *Prudential.*

V. TRENDS

Petitions will have the best chance of success if they can call on some legislative policy, akin to those animating the medical malpractice and silica statutes. In that event, the petitioner can argue that *Prudential* balancing by the court is unnecessary because the Legislature has already balanced the benefits and detriments in favor of interlocutory review. *Team Rocket*, *Union Carbide* and *Cull* also illustrate that a petitioner will benefit from convincing the court that mandamus is necessary to correct some form of prohibited gamesmanship, such as forum shopping.

THE FIFTH CIRCUIT

I. MANDAMUS TO REVIEW VENUE DECISIONS

A. *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1336 (2009)

1. Background

Product liability claims brought against Volkswagen in the Eastern District of Texas, Marshall Division, stemming from auto accident in Dallas. *See id.* at 307. Witnesses to the accident lived in Dallas, plaintiffs lived in EDTX (albeit near Dallas) at time of accident but moved to Dallas or out of state at time of filing, other connections to Dallas and none to Marshall. *See id.* at 307-08. Volkswagen moved to transfer pursuant to 28 U.S.C. § 1404(a), district court denied motion, and Volkswagen petitioned for mandamus. *See id.* at 308. The Fifth Circuit initially denied the petition, then reheard and granted it, then reheard it a third time *en banc*. *See id.*

2. Holding

a. Governing three-part test

Mandamus governed by three-part test enunciated in *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004). *See Volkswagen*, 545 F.3d at 311. "[T]he Supreme Court has established three requirements that must be met before a writ may issue: (1) the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires – a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process; (2) the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable; and (3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* (quotations omitted).

b. Part One: Adequacy of Appellate Remedies

Appeal provides no remedy to an erroneous transfer decision because "the petitioner would not be able to show that it would have won the case had it been tried in a convenient venue." *Id.* at 319 (quotations omitted). Moreover, "the harm – inconvenience to witnesses, parties and others – will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle." *Id.* Thus, the court held that "an appeal will provide no remedy for a patently erroneous failure to transfer venue." *Id.*

c. Part Two: Clear and Indisputable Right to the Writ

Mandamus is reserved for "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Id.* at 309

(quoting *Cheney*, 542 U.S. at 380)). What is a "clear abuse of discretion?" Something distinct from and worse than a "mere abuse of discretion," *i.e.*, ordinary error. *Id.* at 310. "Admittedly, the distinction between an abuse of discretion and a clear abuse of discretion cannot be sharply defined for all cases. As a general matter, a court's exercise of its own discretion is not unbounded; that is, a court must exercise its discretion within the bounds set by relevant statutes and relevant, binding precedents. A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts. *On mandamus review, we review for these types of errors, but we only will grant mandamus relief when such errors produce a patently erroneous result.*" *Id.* (emphasis in original, quotation and citation omitted).

Thus, clear abuse of discretion = ordinary abuse of discretion + patently erroneous result. And "[i]f the district court clearly abused its discretion... [the] right to issuance of the writ is necessarily clear and indisputable." *Id.* at 311.

The court then concluded that the district court's decision not to transfer so deviated from § 1404(a) precedent that it constituted a clear abuse of discretion. *See id.* at 312-18.

d. Part Three: Appropriateness of Relief

"[W]rits of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case. Because venue transfer decisions are rarely reviewed, the district courts have developed their own tests, and they have applied these tests with too little regard for consistency of outcomes. Thus, here it is further appropriate to grant mandamus relief, as the issues presented and decided above have an importance beyond this case. And, finally, we are aware of nothing that would render the exercise of our discretion to issue the writ inappropriate." *Id.* at 319.

3. Dissent

"Notwithstanding almost two hundred years of Supreme Court precedent to the contrary, the majority utilizes mandamus to effect an interlocutory review of a nonappealable order committed to the district court's discretion." *Id.* at 319. "[H]ow the majority differentiates 'clear abuse' from 'mere abuse' is anything but clear." *Id.* at 320. Mandamus should be reserved for extra-jurisdictional actions; the "clear abuse of discretion" referred to in *Cheney* describes actions "outside [the district court's] power or authority... Our inquiry on mandamus should center on reviewing errors that implicate a district court's power to act as it did." *Id.* at 325.

B. Post-*Volkswagen* Venue Decisions

1. *In re TS Tech Corp.*, 551 F.3d 1315 (Fed. Cir. 2000)

Patent case filed in EDTX; defendant moved to transfer to S.D. Ohio given absence of connections to Texas and presence of most witnesses and documents in Ohio, Michigan and Canada. *See id.* at 1318. Following *Volkswagen*, Federal Circuit granted mandamus and ordered transfer: "Because the district court's errors here are essentially identical [to those in *Volkswagen*], we hold that TS Tech has demonstrated a clear and indisputable right to a writ." *Id.* at 1322.

2. *In re Toyota Motor Corp.*, No. 08-41323 (5th Cir., December 19, 2008) (unpublished)

Product liability case arising from Dallas car accident with facts substantially similar to those in *Volkswagen*, though requested transfer was intra-district. District court opinion suggested that § 1404(a) analysis may differ when the requested transfer is between divisions rather than districts. Writ granted and transfer ordered.

II. MANDAMUS AND REMAND: *In re Beazley Insurance Co.*, 2009 WL 205859 (5th Cir. 2009) (unpublished)

A. Background

Defendant petitioned for mandamus seeking remand where it did not consent to co-defendant's removal, but the district court found consent unnecessary because defendant was a nominal party. *See id.* at **1-2.

B. Holding

Writ denied. Applying the three-part test from *Cheney* and *Volkswagen*, the court held first that the defendant lacked an adequate appellate remedy. *See id.* at *3. Despite the "technical" appealability of decisions denying remand, there is "no rationale for distinguishing a denial of a motion to transfer venue from denial of a motion to remand to state court." *Id.*

Second, the court considered whether the district court clearly abused its discretion and found it had not. Quoting an Eighth Circuit decision, the court stated: "'Unless it is made clearly to appear that the facts and circumstances are without any basis for a judgment of discretion, the appellate court will not proceed further to examine the district court's action in the situation. If the facts and circumstances are rationally capable of providing reasons for what the district court has done, its judgment based on those reasons will not be reviewed.'" *Id.* at * 4 (quoting *McGraw-Edison Co. v. Van Pelt,* 350 F.2d 361, 363 (8th Cir. 1965)). In this case, the court held, "[t]he district court may very well have erred in making th[e] determination [that consent to removal was unnecessary], but that is a question for appeal, not mandamus. Our inquiry thus begins and ends with the fact that the district court's decision was rationally based on the facts." *Id.* at * 6.

III. PRUDENTIAL, DISCRETIONARY NATURE OF MANDAMUS: *In re Dean*, 527 F.3d 391 (5th Cir. 2008)

A. Background

Plaintiffs, victims of the 2005 explosion at BP's Texas City refinery, sought mandamus in parallel criminal proceedings against BP compelling district court to reject plea agreement reached by the government and BP because plaintiffs were denied sufficient input and consultation with the government under the Crime Victims Rights Act, 18 U.S.C. § 3771. *See id.* at 392-93.

B. Holding

The court agreed that the government and district court did not follow CVRA procedures, and conceded that the input the plaintiffs were allowed (testimony at a hearing prior to sentencing) was "substantially less" than that granted under the CVRA, but denied mandamus under the third prong of the *Cheney* test – appropriateness under the circumstances – because it was confident the district court would consider plaintiffs' views before final sentence was passed. *See id.* at 394-96. "The decision whether to grant mandamus is largely prudential." *Id.* at 396.

Thus, even in case of clear legal error, particular facts and circumstances may dictate that mandamus is prudentially inadvisable and should not issue.

IV. TRENDS

Volkswagen may signal a new willingness by the Fifth Circuit to conduct interlocutory appellate review of pretrial rulings through mandamus. It is too early to tell if the decision will result in significantly more petitions being filed and granted, or whether the decision will be limited to its somewhat unusual facts. Nor is it apparent how often or under what circumstances ordinary legal error, *i.e.*, a *mere* abuse of discretion, will be deemed so severe as to amount to a *clear* abuse of discretion. At a minimum, *Volkswagen* and *Beazley Insurance* indicate that the first prong of the *Cheney* test -- the adequacy of the appellate remedy -- may be easily met as long as the petitioner can argue that the challenged district court decision is unlikely to result in appellate reversal (because of the harmless error rule or some other factor) and will cause otherwise avoidable expense, inconvenience or other hardship to the petitioner or third parties.