

INTERLOCUTORY APPEALS FOR FUN AND PROFIT

Although interlocutory appeals are solely the creatures of statute and are generally the exceptions, rather than the rule, with the recent amendments to Chapter 51 of the Texas Civil Practice and Remedies Code, including several by the 79th Legislature in 2005, and a variety of other statutes, it is clear that interlocutory appeals are no longer the exclusive provinces of media tycoons and governmental entities.

This paper attempts to discuss the issues ripe for interlocutory review and the recent cases discussing these issues. The first section of this paper will address the types of interlocutory appeal specifically created in Chapter 51. The second section will explain what happens in the trial court while an interlocutory appeal is pending. The final section will briefly discuss several other statutes that allow for interlocutory review. If there is anything close to a pattern in these cases, it is the inconsistent and difficult treatment that occurs when an appellant takes an interlocutory appeal that is expressly permitted by a statute, but at a time other than that envisioned by the statute's drafters.

I. INTERLOCUTORY APPEALS UNDER CIVIL PRACTICE AND REMEDIES CODE CHAPTER 51.

After the 2005 legislative session, the general interlocutory appeals statute, Texas Civil Practice & Remedies Code section 51.014, now contains *twelve exceptions* to the general rule that interlocutory orders are appealable only after final judgment (the enumerated eleven plus the permissive interlocutory appeal). This part of the paper will examine each, in turn.

A. §51.014(a) (1) & (2): TRUSTEES AND RECEIVERS.

“A person may appeal from an interlocutory order... that
(1) appoints a receiver or trustee;
(2) overrules a motion to vacate an order

that appoints a receiver or trustee”

Fortunately for all concerned, there are relatively few cases interpreting this provision. A 1993 decision by the Houston court of appeals is one of these. *Sclafani v. Sclafani*, 870 S.W.2d 608 (Tex. App.--Houston [1st Dist.] 1993, writ denied) interprets the interlocutory appeals statute for the appointment of trustees or receivers. The case involved a couple that divorced in 1979, and serves to illustrate the what-do-you-do-when-someone-properly-interlocutorily-appeals-but-at-the-wrong-time issue. In 1986, the former wife requested that the court appoint a receiver to sell the real property. Without an objection from the former husband, the court granted the motion and appointed a receiver. For reasons undisclosed in the record, the property was not sold, and a new receiver was substituted by the court in 1990. In 1993, the former husband moved, for the first time, to set aside the receiver appointment, alleging that the appointment materially changed the terms of the divorce decree. *Id.* at 609-10.

The motion was denied, and the husband filed an interlocutory appeal *within twenty days of the order refusing to vacate the receivership*. As you know, a notice of appeal for an *interlocutory appeal* must be filed within *twenty days* of the order appealed from, not the customary thirty days allowed for normal appeals. TEX. R. APP. P. 42(A)(3). The question before the appeals court was thus when the husband's twenty-day time limit began running. The former husband appealed under both sections 51.014(a)(1) and (2). Under the first section of the statute, a person may make an interlocutory appeal from an order “appointing a receiver.” For an appeal under this section, the court held that the twenty days began running years ago, when the receiver was initially appointed. Any complaints the former husband had about the appointment of the receiver were not made timely and were waived, the court held. *Id.* at 610-11.

More significant was the Court's treatment of the husband's basis for appeal under § 51.014(a)(2). The husband argued that even if

an initial appeal of the receivership were time-barred, the second section of the statute allows a person to make an interlocutory appeal from an order that “overrules a motion to vacate an order that appoints a receiver.” The dissenting opinion in the case interpreted this provision and the appellate procedure twenty-day rule literally. The former husband made a “motion to vacate an order that appoints a receiver.” The motion was overruled. Thus, the former husband made an interlocutory appeal within twenty days of the signing of the order overruling his motion to vacate. Therefore, the dissent concluded, the court had jurisdiction to hear the interlocutory appeal, and should have decided the case on the merits. *Id.* at 613.

The majority disagreed with such a literal reading of the statute on policy grounds. Under the dissent’s argument, a party could *always* challenge the appointment of a receiver, no matter how long ago the appointment was made. A party would need only to file a motion to vacate the receiver appointment. If the motion to vacate was denied, the denial could be interlocutorily appealed, no matter how long ago the receiver was appointed. The court noted that setting aside an order of receivership would nullify all intervening acts of the receiver, or at least, raise serious concerns about the validity of those acts. *Citing Christie v. Lowery*, 589 S.W.2d 870, 873 (Tex. App.--Dallas 1979, no writ). Therefore, allowing the appointment of a receiver to be vacated at any time after its creation would work undue hardship on third parties who have dealt in good faith with the receiver. Instead, the majority held, the “motion to vacate an order that appoints a receiver” must also be made within twenty days of the appointment of the receiver. Such a rule furthers the public policy of allowing finality, upon which the parties, the receiver, and those who have transacted with the receiver are entitled to depend, the court reasoned. *Id.* at 611-13.

Similarly, an interlocutory order appointing a successor to a permanent receiver is not appealable. *Swate v. Johnston*, 981 S.W.2d 923, 925 (Tex. App.--Houston [1st Dist.] 1998, no pet.) (citing several cases construing predecessor statutes with identical language).

Another appeals court held the twenty-day

deadline for filing an interlocutory appeal was jurisdictional; that is, an appeals court lacks jurisdiction to dispense with or expand the time limit for any reason. *Revier v. Spargins*, 810 S.W.2d 298, 302 (Tex. App.--Fort Worth 1991, no writ).

A number of older cases interpret the statutory predecessor to sections 51.014(a)(1) and (2), formerly Tex. Rev. Civ. Stat. Ann. art. 2079. (“An appeal shall lie from an interlocutory order of the district court appointing a receiver or trustee in any cause: [p]rovided, such an appeal is taken within twenty days from the entry of such order”). This statute was held to apply only to the appointment of a receiver or trustee, and not to the denial of appointment. *Tipton v. Railway Postal Clerk’s Inv. Ass’n*, 173 S.W. 562, 566 (Tex. App.--Fort Worth 1914, no writ); *Leary v. International Coal & Wood Co.*, 185 S.W. 665, 666 (Tex. App.--San Antonio 1916, no writ); *Gulf Nat’l Bank v. Bass*, 177 S.W.2d 1019, 1021 (Tex. App.--San Antonio 1915, writ ref’d); *Holzman v. Stephen F. Austin Hotel*, 599 S.W.2d 679 (Tex. App.--Austin 1980, no writ) (per curiam).

It is interesting that the forerunner of section 51.014 was a one-way-street. An appellate court has no jurisdiction to hear interlocutory appeals on denials of appointment because it has been given no explicit statutory authority to do so. *Tipton*, 173 S.W. at 566. Even for interlocutory appeals of denials of appointments of a receiver, an appellate court only has jurisdiction when the motion to vacate has been made, overruled, and a timely appeal has been taken. *King Land & Cattle Corp. v. Fikes*, 414 S.W.2d 521, 524 (Tex. App.-- Fort Worth 1967, ref’d n.r.e). These old cases also established the standard of review for trial-court decisions relating to the appointment of trustees and receivers. Appointment of a receiver is within the sound discretion of the trial court, *Payne v. Little Motor Kar Co.*, 266 S.W. 597 (Tex. App.--Waco 1924, writ dism’d w.o.j.), and will not be disturbed on appeal absent a clear abuse of discretion, *Berkshire Petroleum Corp. v. Moore*, 268 S.W.2d 484 (Tex. App.--San Antonio 1924, no writ).

A handful of recent Court of Appeals cases provide greater clarity about when the

requirements for an interlocutory appeal to the appointment of a receiver or trustee have been met. In *Diana Rivera & Associates v. Calvillo*, 986 S.W.2d 795 (Tex. App.--Corpus Christi 1999, rehearing overruled), the court found that the appointment by the court of an auditor does not amount to the appointment of a receiver or trustee under 51.014(a)(1). During the course of litigation over referral fees stemming from breast-implant litigation, the court ordered the appellant, Diana Rivera, to prepare and deliver a sworn accounting to the appellee, Calvillo, of all her breast implant litigation and to tender at least 50 percent of all her recovered fees from those cases into the registry of the court. As part of its order, the court appointed an auditor to do “research and investigation necessary to prepare and deliver the accounting” of the breast-implant litigation if Rivera failed to follow the order voluntarily. Rivera attempted an interlocutory appeal of the order, claiming that it constituted an appointment of a receiver and was thus opened to interlocutory appeal. However, the court found that the appointment of an auditor did not constitute the appointment of a receiver under the Civil Practices and Remedies Code because the auditor only had power to review records and report to the court. The auditor did not have authority to hold property, take over the financial aspects of Rivera’s law firm, or act in any way as a fiduciary officer.

In *Dayton Reavis Corp. v. Rampart Capital Corp.*, 968 S.W.2d 529 (Tex. App.--Waco 1998, writ dismissed w.o.j.), the court found that the conditional appointment of a receiver to take control of property that is the subject of disputed claims is an appealable interlocutory order. Rampart claimed that a signed note entitled it to property currently held by Dayton Reavis, and asked the court to appoint a receiver to hold the property until the dispute was settled. The court granted the request and conditionally appointed a receiver to take charge of the property as a fiduciary upon transgression of any one of three conditions plus proper notice and a hearing. Dayton Reavis moved for an interlocutory appeal of the conditional appointment of the receiver, and the court found that the appointment of the receiver, even though conditional, was an appropriate interlocutory appeal.

In *Waite v. Waite*, 76 S.W.3d 222 (Tex. App.--Houston [14th Dist.] 2002, no pet.) (per curiam), the court held that neither an order dissolving a receivership nor the disposing of receivership funds may be challenged with an interlocutory appeal. The case addressed the appointment of a receiver during a divorce proceeding. The appellant filed notice of appeal of this decision, but the trial court refused the appellant’s motion to stay the trial. The morning of the trial setting, the appellant obtained a writ of mandamus from the appellate court granting temporary relief and staying the trial. *Id.* at 222-23.

Having stayed the trial, the trial court signed an order dissolving the receivership. The appellee then filed an expedited motion to dismiss the pending interlocutory appeal, noting that the appeal was moot because the trial court dissolved the receivership. The appellant contended that because the funds under the receiver’s control had been deposited in the registry of the court, the trial court failed to dissolve the receivership, and instead created a *de facto* receivership. *Id.* at 223.

The Court of Appeals found the appellant’s contentions unpersuasive. Because the statute only permits appeal “from an order that appoints a receiver,” the Court of Appeals concluded that an order dissolving a receivership may not be challenged with an interlocutory appeal. *Quoting* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(1). Continuing to strictly construe the statute, the court also held that the disposition of receivership funds may not be challenged by interlocutory appeal. The court dismissed the appeal as moot because the order that formed the basis for the interlocutory appeal was superseded by the trial court’s order dissolving the receivership. *Id.*

B. §51.014(a)(3): CLASS CERTIFICATION.

“A person may appeal from an interlocutory order... that...certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure.”

This wording is relatively straightforward. Interlocutory appeals are permitted

whenever the court certifies or refuses to certify a class. The statute was thus obviously designed for the situation where the trial court claps its gavel down and rules that a given case may proceed, or not proceed, as a class action. Again, real life presents more complicated situations, which has produced ample litigation over what types of interlocutory orders are appealable under this statute.

At the outset, it should be noted that courts have generously conferred standing to bring such appeals. After all, the statute does say “a person,” not “a party.” For instance, in *Northrup v. Southwestern Bell Telephone Co.*, 72 S.W.3d 1 (Tex. App.--Corpus Christi 2001, pet. denied), the class was certified simultaneously with the settlement of the case. Normally, class certification occurs well before settlement, giving any unnamed class members the chance to intervene and object. Since the appellants in this case had not formally intervened, the court of appeals initially refused to hear the case, based on the general principle that for unnamed class members to possess standing to appeal a settlement, they must have first filed a plea in intervention in the lawsuit prior to entry of the final judgment. But on reconsideration, the court realized that imposing the intervention requirement on appeals of certification for settlement class cases would unfairly abrogate a party’s right to interlocutory appeal of a settlement class certification decision. The court observed, “[w]e know of no Texas case that limits this right [to interlocutorily appeal class certification decisions] to only named class representatives.” *Id.* at 26.

Questions arise with § 51.014(a)(3) when the ruling involves not the initial certification decision, but “second generation” questions, such as tinkering with an existing class. Here are a few examples to illuminate the spectrum of case law regarding these issues:

The first example involves a decision to withdraw class certification to a previously certified class. In *Grant v. Austin Bridge Const. Co.*, 725 S.W.2d 366 (Tex. App.--Houston [14th Dist.] 1987, no writ), land owners brought suit in 1980 claiming the defendant’s actions in building a bridge impaired their right to use a nearby lake

and resulted in a diminution in the value of their property. The class of 128 named plaintiffs was certified in 1985. After 120 of the 128 named plaintiffs failed to file timely responses to the defendant’s discovery requests, the defendant moved for sanctions against the plaintiffs and for withdrawal of class certification. The trial court granted both the sanctions and the withdrawal of class certification. The plaintiffs appealed. *Id.* at 368.

The Houston Court of Appeals treated the two rulings separately. As far as the sanctions were concerned, the court, of course, held that the sanctions order was interlocutory and was not subject to interlocutory appeal because there is no statute authorizing interlocutory appeals of discovery sanctions. The plaintiffs would have to wait until after final judgment to appeal the sanctions order. *Id.* at 369.

The withdrawal of class certification was also an interlocutory order, and technically is not the initial certification decision. However, the Court held that the withdrawal of class certification falls within the meaning of “certify or refuse to certify” as used in the interlocutory appeals statute. In coming to this conclusion, the court noted that TEX. R. CIV. P. 42, which governs class-action suits, allows trial courts to alter, amend, or withdraw their class certification decision any time before final judgment. If a withdrawal of class certification is not within the scope of the term “certifies or refuses to certify” a class, then, the court reasoned, the trial court would have “the power to circumvent appellate review by first granting then withdrawing class certification.” *Id.* at 369; *see also Wood v. Victoria Bank & Trust Co.*, 69 S.W.3d 235 (Tex. App.--Corpus Christi 2001, no pet.) (holding that an order decertifying a class is appealable under 51.014(a)(3)).

Having jurisdiction to hear the interlocutory appeal of the order withdrawing class certification, the court then reached the merits of the claim. The court reviewed the trial court’s certification decision on an abuse of discretion standard. *See also Forsyth v. Lake LBJ Investment Corp.*, 903 S.W.2d 146 (Tex. App.--Austin 1995, writ dismissed w.o.j.) (reviewing trial-court class-certification decisions on an abuse-of-

discretion standard). The appeals court affirmed the trial court's decision of withdrawing class certification because the Rule 42 elements for maintaining a class action were no longer being met. *Grant v. Austin Bridge Const. Co.* at 369-70.

So far, so good. But what about when a court initially certifies a class, *but then later* changes its size or definition? Here, the results get a little muddier. The class-size issue was decided squarely *against interlocutory appeal* in *Pierce Mortuary Colleges v. Bjerke*, 841 S.W.2d 878 (Tex. App.--Dallas 1992, writ denied).

Pierce Mortuary Colleges involved a class action brought against a mortuary school by relatives or representatives of several decedents. The plaintiffs alleged that the school allowed its students to observe or participate in the performance of embalming procedures on their loved ones without their consent. On April 10, 1992, the trial court certified the class and delineated the *types of relatives* to be included in the class. Twenty-eight days later, on May 8th, the defendant filed an interlocutory appeal. Later that same day, the trial court signed a certification order *adding a category of relatives* eligible to be in the class. *Id.* at 879.

The basic issue for the Dallas appeals court was whether the defendant timely appealed the interlocutory order, which was *not* filed twenty days from the initial decision, but twenty days from the order adding a category of relatives to the class. As with all interlocutory appeals, appeals from trial-court class-certification rulings must be perfected within twenty days after the court signs the order or else the appellate court loses jurisdiction to consider the alleged error. TEX. R. APP. P. 42(a)(3); *see also Buffalo Royalty Corp. v. Enron Corp.*, 906 S.W.2d 275, 276, 277 (Tex. App.--Amarillo 1995, no writ) (holding that this deadline is immutable and cannot be extended).

The plaintiff, opposing the mortuary college's appeal, argued that the twenty day deadline began running when the original class certification deadline was signed on April 10th. The Dallas court accepted this argument, and rejected the defendant's argument that the twenty days should begin running when the court expanded the size of the class. The appeals court

held that "an amended order increasing the size of an existing certified class does not certify or refuse to certify a class pursuant to section 51.014(3)." The Court therefore concluded it did not have jurisdiction and dismissed the case. *Id.* at 880.

This holding contrasts with a later decision by the Texas Supreme Court in *De Los Santos v. Occidental Chemical Corp.*, 933 S.W.2d 493 (Tex. 1996), where the issue involved an order changing an already certified class from opt-out to mandatory. In *De Los Santos*, 8,600 plaintiffs brought suit against defendant chemical company alleging injury from an accidental release of chemicals from one of the defendant's chemical plants. The defendant sought to certify the plaintiffs' class. The trial court eventually certified the class as opt-out, and 505 plaintiffs chose to opt out of the class action. The class-action suit went to trial, which lasted nine weeks. At the completion of the damages phase, the jury found that of the twelve named plaintiffs, five sustained \$3,400 of damages. The other seven were found to not have been injured. Before the punitive-damages phase of the trial, the defendant offered to settle the suit with the class counsel for \$65 million plus an agreement to accept a mandatory class. The class counsel accepted, but the plaintiffs who had chosen to opt-out vigorously objected. Despite the objections, the trial court changed the class certification from opt-out to mandatory and approved the settlement. *Id.* at 494.

The plaintiffs who had previously opted out filed an interlocutory appeal. They claimed that when the trial court changed the class from opt-out to mandatory, it "certified" a class within the meaning of the interlocutory appeals statute. The appeals court disagreed. It held that the change was simply a modification enlarging the class, as in *Pierce Mortuary Colleges*. The appeals court held this action did not certify or refuse to certify a class within the meaning of the interlocutory appeals statute. *Id.* at 494-95.

The Texas Supreme Court reversed, holding that "[c]hanging a class from an opt-out to mandatory does not simply enlarge its membership; it alters the fundamental nature of the class." The Court specifically rejected the

appeals court's analogy to *Pierce Mortuary Colleges*, explaining that “[i]n *Pierce Mortuary* new members were added to the class prior to trial, but the relationship of class members to each other and their attorneys was not affected by the expansion.” The Court remanded the case to be decided on its merits. *Id.* at 495.

A word about shareholder derivative suits, which look just like class actions, but are not considered class actions for purposes of interlocutory appeals:

The Supreme Court ruled in *Stary v. DeBord*, 967 S.W.2d 352 (Tex. 1998) (per curiam) that shareholder derivative claims are not class action suits within the meaning of the interlocutory appeals statute. The plaintiffs were minority shareholders in two corporations. They sued the corporations and their officers, directors, and majority shareholders for oppressive conduct and breach of fiduciary duties. The plaintiffs alleged both personal and derivative causes of action. The defendant countered that the plaintiffs' personal claims irreconcilably conflicted with their derivative claims and moved to strike the derivative claims. The trial court granted the defendant's motion. *Id.* at 352.

The plaintiff filed an interlocutory appeal of this order under section 51.014(a)(3). The plaintiff argued that a derivative suit was the “functional equivalent” of class action, pointing out that Rule 42, which governs class action suits and is referenced by the interlocutory appeals statute, includes a subsection on derivative suits. Therefore, the plaintiffs argued, an order striking a derivative claim is sufficiently like an order that “certifies or refuses to certify a class” to qualify for an interlocutory appeal under section 51.014(a)(3). The appeals court agreed, holding that it had jurisdiction to hear the interlocutory appeal. The appeals court reached the merits of the case and reversed the trial court's order striking the derivative claims. *Id.* at 353.

The Supreme Court reversed on the jurisdiction issue, holding that “[a]n order striking a derivative claim is no kin to an order certifying or refusing to certify a class.” *Id.* The Court rejected on legislative-intent grounds the plaintiffs' reading of Rule 42 as encompassing derivative suits. Section 51.014(a)(3) allows for

interlocutory appeals of an order that certifies or refuses to certify a class “in a suit brought under Rule 42.” For the Court, the Legislature's use of the term “brought under” was key. By using the term “brought under,” section 51.014(a)(3) merely mentions Rule 42 because that is the class-action rule, but...does not incorporate the rule into the statute.” *Id.* at 354.

Since section 51.014(a)(3) merely mentions Rule 42, the Court reasoned that it should look to Rule 42 as written in 1979, the year the class-action section of the interlocutory appeals statute was written, and not as currently written. In 1979, Rule 42 did not mention derivative suits. Derivative suits had been included in Rule 42 both prior to 1977 and after 1984, but not in 1979 when section 51.014(a)(3) was enacted. Therefore, the Court concluded, it was not the intent of the Legislature to include the striking of derivative claims within the meaning of the term “certifies or refuses to certify a class” when section 51.014(a)(3) was enacted. This intent was controlling, given the wording of the interlocutory appeal statute. *Id.*

In contrast, the Court noted, had section 51.014(a)(3) used the term “pursuant to” Rule 42 rather than just “brought under” Rule 42, this would indicate a legislative intent to incorporate the rule rather than merely mention it. Had the interlocutory appeals statute been written in this manner, then when the Legislature amended Rule 42 in 1984 to add derivative suits, that language would have indicated a legislative intent to expand section 51.014(a)(3) implicitly to include derivative suits, the Court suggests. Given the current wording of section 51.014(a)(3), the Court held that the appeals court lacked jurisdiction to hear the appeal. The Court reversed the appeals court's judgment and dismissed the appeal for want of jurisdiction, without reaching the merits. *Id.*

In another opinion, *Christian v. ICG Telecom Canada, Inc.*, 996 S.W.2d 270 (Tex. App.--Houston 1999, rehearing overruled), the court clarified the holding of *Stary* by ruling that orders denying class certifications of derivative claims were not the same as orders striking derivative claims. Thus, in *Christian*, the appellants were able to make an interlocutory

appeal of the trial court's refusal to certify their derivative claims.

Moving away from shareholder derivative suits, there are other recent cases where Texas courts have attempted to clear the muddy waters surrounding interlocutory appeal of alterations to or withdrawal of a class certification. In *In re M.M.O.*, 981 S.W.2d 72 (Tex. App.--San Antonio 1998, no pet.), the court clearly decided that, when considering an interlocutory appeal of an order granting or denying the certification of a class, the court may review matters related to certification such as size, notice requirements, or any other issues that are within the certification order. In *M.M.O.*, child-support recipients sought certification of a class action to assert their claims seeking a declaratory judgment on the Attorney General's duty to collect accrued interest on late child-support payments and for a modification or overturning of past child-support orders. The court held that, on interlocutory appeal of a class certification, not only may the court examine the validity of class certification itself, but it also may "consider all matters pertaining to class certification encompassed within the certification order."

Furthermore, in another opinion, *Bally Total Fitness Corporation v. Jackson*, 2 S.W.3d 327 (Tex. App.--San Antonio 1999), *affirmed by* 53 S.W.3d 352 (Tex. 2001), the same Court of Appeals thoroughly discussed the availability of interlocutory appeal for class certification and found that orders denying decertification of a class and granting partial summary judgment were not appealable by interlocutory procedure. In that case, the trial court granted the plaintiffs' motion for a class, and then denied the defendants' motion for decertification and simultaneously granted the plaintiff's motion for partial summary judgment on the issue of liability. The defendants then filed a motion for withdrawal of certification on the grounds that the court had changed the nature of the class and had made a decision on the merits without giving prior notice to all the plaintiffs in the class. The request for withdrawal of class certification was denied, and the defendants appealed. The defendants argued that the granting of the partial summary judgment worked a major restructuring of the class, and that, like *De Los Santos*, it functionally changed

the class from an opt-out class to a mandatory "one-way intervention." The defendants thus argued that, like *De Los Santos*, this fundamental restructuring should be amenable to interlocutory review. The court disagreed and ruled that nothing in the partial summary judgment changed the nature of the relationships between class members and the defendants or prevented any of the class members from opting-out if they chose to do so. In other words, the court saw the granting of the partial summary judgment as more akin to the adding or subtracting of class members, as in *Pierce Mortuary*, and thus, not amenable to interlocutory review.

Another recent case again offered the court the opportunity to refine what constitutes an appealable order under section 51.014(a)(3). *Citgo Refining & Marketing, Inc. v. Garza*, 94 S.W.3d 322 (Tex. App.--Corpus Christi 2002, no pet.), involved an attempted appeal from a trial court's interlocutory order following a non-jury trial on the merits in a class action. The order approved notice to two previously certified subclasses of an anticipated judgment in plaintiffs' favor, which included class counsel's request for expenses and attorney's fees. Appellant, Citgo, argued in one of its issues that the trial court's order either "certified a new class or fundamentally altered the nature of the class, making it subject to interlocutory appeal and conferring jurisdiction" on the appellate court.

The order in question emerged from a complicated lawsuit beginning in 1993, when commercial and residential property owners filed suit for property damages from alleged long-term emissions of contaminants by a number of chemical manufacturers and owners of commercial facilities in the Corpus Christi area. When the trial court certified the case as a class action in November 1995, the certification order divided the class into several subclasses, including three residential areas: (1) the "Oak Park Triangle"; (2) the "I-37 South" properties; and (3) the "I-37 North" properties. After numerous complicated exchanges, the class claims against all of Citgo's co-defendants were resolved by trial, settlement, or dismissal. Citgo also finalized a buy-out of the Oak Park Triangle subclass, leaving only the two I-37 subclasses in active litigation at the time of a trial on a later-added

breach-of-contract claim.

In late April 2002, class counsel submitted the proposed notice to the court, which expressly excluded members of the Oak Park Triangle subclass who had participated in the buy-out by Citgo. At the hearing on the motion to approve the notice in May 2002, Citgo voiced a number of objections, including claiming that the notice “effectively certified a new class because it excluded the Oak Park Triangle subclass and because the breach-of-contract cause of action had not existed” at the time of original certification. The trial court later signed an order approving the notice, against which Citgo filed its interlocutory appeal. *Id.* at 324-26.

The trial court acknowledged that section 51.014(a)(3) permits accelerated appeal from certain interlocutory orders, including an order that “certifies or refuses to certify a class in a suit brought under rule 42 of the Texas Rules of Civil Procedure.” *Quoting* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3). Rule 42, which governs class actions, includes a provision that requires a court quickly to determine by an order whether an action commenced as a class action can be maintained. TEX. R. CIV. P. 42(c)(1). The provision establishes that the “determination may be altered, amended or withdrawn at any time before final judgment.” *Id.*

In refusing to find that the trial court’s order fell within the language of section 51.014(a)(3), the court focused intently on the Rule 42(c)(1) language and its grant of continuing power to alter or amend the nature of an existing, certified class. An order that merely modifies the size or attributes of a class “does not affect the underlying certification of the action as a class action” and “is not an order subject to interlocutory appeal under article 51.014(a)(3).” *Id.* at 348; *citing* *Pierce Mortuary*, 841 S.W.2d at 880 and *Koch Gathering Sys., Inc. v. Harms*, 946 S.W.2d 453, 456 (Tex. App.--Corpus Christi 1997, writ denied).

C. § 51.014(a)(4): TEMPORARY INJUNCTIONS.

“A person may appeal from an interlocutory order... that... grants or refuses a temporary injunction or grants

or overrules a motion to dissolve a temporary injunction as provided by Chapter 65.”

The first thing to note about the injunction provision is that it applies only to *temporary injunctions*. Now, before you say “Duh—*Any other* injunction would be final and immediately appealable!”, keep in mind that the appellate courts seems to interpret this provision narrowly: a temporary injunction is thus one preserving the status quo *pending a trial*. If, in the course of the litigation, the court issues an injunction, which is to stay in effect until the judgment becomes final, then that injunction is not subject to interlocutory appeal. Sometimes, it is difficult to discern whether an injunction is “temporary,” and thus subject to interlocutory appeal, or if it is “permanent,” and must wait until after final judgment for appeal. The title placed on an order is not controlling. *Brelsford v. Old Bridge Lake*, 784 S.W.2d 701, 701 (Tex. App.--Houston [14th Dist.] 1989, writ ref’d). Rather, the court looks to the substance of the order. *Id.*; *Conway v. Iricj*, 429 S.W.2d 648, 649 (Tex. App.--Fort Worth 1968, no writ).

Recently, the Texas courts have shed greater light on what amounts to a temporary injunction for the purposes of section 51.014(a)(4). In the case of *Qwest Communications International Inc. v. AT&T Corp.*, 983 S.W.2d 885 (Tex. App.--Austin 1999, rehearing overruled), the Austin Court of Appeals ruled that an order governing an agreement by the parties was not an appealable temporary injunction. The agreement governed digging and excavation activities by the parties and consummated compromise and settlement of the underlying case. The agreement was made between the appellant, Qwest, and the appellee, AT&T, in response to a temporary restraining order that the court had issued against Qwest. Because the agreement went beyond merely preserving the status quo prior to the suit, in that it dissolved a bond without providing for other security, was effective for three years without setting a trial date, and was made subject to modification only by a signed writing from both of the parties, the court held that the order was not a temporary injunction or restraining order and thus was not available to interlocutory appeal.

In *Diana Rivera & Associates v. Calvillo*, 986 S.W.2d 795 (Tex. App.--Corpus Christi 1999, rehearing overruled), which we discussed previously in the appointment-of-receiver section of this paper, the court issued an order that conditionally appointed an auditor (which is not appealable as an appointment of a receiver under 51.014(a)(1)); required the appellant, an attorney, to produce all of her records surrounding breast-implant litigation; and demanded a tendering of 50 percent of all fees collected from such litigation. The appellant objected to this order, classifying it as a “temporary injunction.” The court ruled that such an order was not a temporary injunction, because relevant case law shows that orders requesting a party to turn information over to the court and its registry are not temporary injunctions. Such orders are considered temporary injunctions only when one must turn over money or materials to the other party. See *Whatley v. King*, 249 S.W.2d 57 (Tex. 1952). The court pointed out that if such an order were deemed to be a temporary injunction, then each time the court ordered a deposit of funds into the registry, interlocutory appeal would be available, which would create tremendous amounts of delay and inefficiency.

In *Swanson v. Community State Bank*, 12 S.W.3d 163 (Tex. App.--Houston [1st Dist.] 2000, no pet.), the court explained that classification of an order as temporary injunction for determining whether it can be appealed must be based on the character and function of the order, and not solely on the order’s form. In holding that the substance of the order determines whether it meets the requirements for interlocutory appeal, the court focused on the fact that the actual substance of the order was permissive. *Id.* at *3. (holding that order granting motion to liquidate was only permissive and that if value of stock rose after the motion was signed, Bank could choose not to liquidate stock).

The best way to look at it is this: an interlocutory order is permanent, and thus not subject to interlocutory appeal, if it does not depend on any further order of the court. *Brelsford* 784 S.W.2d at 702; *Elizondo v. Williams*, 643 S.W.2d 765, 767 (Tex. App.--San Antonio 1982, no writ); *Vera v. CIC Cosmetic*, 517 S.W.2d 433 (Tex. App.--Dallas 1974, no writ)

(construing article 4662, an analogous statutory predecessor to the current section 51.014(a)(4)). Here are some recent examples demonstrating the trouble sometimes caused by injunctions:

In *Kelso v. Thorne*, 710 S.W.2d 735, 736 (Tex. App.--Corpus Christi 1986, no writ), the court ordered a party to disclose, within twenty-four hours of the signing of the order, the location where it released a wild animal. The order was held to be a permanent rather than temporary injunction within the meaning of the interlocutory appeal statute because the court contemplated no further court action in the matter.

An order prohibiting school board officials from making phone calls in violation of the Open Meetings Act and from using school funds to disseminate political information not related to school-district matters also was held to be a permanent, rather than temporary, injunction for three reasons. *Elizondo*, 643 S.W.2d at 766, 767. First, the trial court explicitly delineated the prohibited acts in its injunction. Second, the trial court made no suggestion of further hearings regarding the duration of the injunction. Finally, the injunction would not be ended either by the passage of time or by the actions of the party subject to the injunction.

Keep in mind that the statute provides for interlocutory appeals of orders that “grant or refuse a temporary injunction or grants or overrules a motion to dissolve a temporary injunction.” Where in this scheme does an order fit in which modifies a previously issued injunction? Although a strict reading would suggest that such a modification order is not appealable, there is authority taking the broader view. Several courts have ruled that appellate courts have jurisdiction over interlocutory appeals of orders “modifying” temporary injunctions, although § 51.014(a)(4) does not explicitly authorize such jurisdiction. *Currie v. Int’l Telecharge*, 722 S.W.2d 471 (Tex. App.--Dallas 1986, no writ); *Toby Martin Oilfield Trucking v. Martin*, 640 S.W.2d 352 (Tex. App.--Houston [1st Dist.] 1982, no writ) (interpreting Tex. Rev. Civ. Stat. Art. 4662, predecessor to the current section 51.014(a)(4), as giving appellate courts jurisdiction to hear interlocutory appeals of modifications of temporary injunctions).

Examples of modifications to a temporary injunction include striking some of the parties subject to the injunction, *Currie* at 472-73, or increasing the amount of a bond, *Toby* at 353-355:

Following *Toby* is *Ahmed v. Shimi Ventures, Inc.*, 99 S.W.3d 682 (Tex. App.--Houston [1st Dist.] 2003, no pet.). Here, the trial court granted the appellee a temporary restraining order. The appellant filed a proper and timely appeal, and then the trial court made some minor modifications to the original order. The appellant asked the Court of Appeals to review the modified temporary injunction order. The Court of Appeals held that the modified order implicitly superseded the earlier order. Specifically, the court reasoned that, because the modified order “concerned exactly what the earlier order had” and did not state that it merely supplemented the first order, the second order constituted a complete temporary injunction in itself that covered the exact issues addressed in the first injunction.

Although the court acknowledged that an order modifying a temporary injunction differs from the language of the § 51.014(a)(4), the court found the two types of orders sufficiently similar for the modifying order to support an interlocutory appeal. The court reasoned that allowing an interlocutory appeal of a modifying order seemed “especially appropriate,” when, as in this case, the latter order “implicitly vacates and then replaces the original.” *Id.* at 689.

However, in *Ludewig v. Houston Pipeline Co.*, 737 S.W.2d 15 (Tex. App.--Corpus Christi 1987, no writ), the court of appeals ruled that a modification of a temporary injunction was not appealable. In that case, the trial court had issued a temporary injunction but neglected to set a trial date. A year later, the appellants finally objected to this deficient order. The trial court responded by amending the injunction to include a trial date, and the appellants sought interlocutory review of this order amending the injunction. Without citing any authority, the court held that this order amending a temporary injunction was not appealable.

Likewise, an order compelling compliance with an injunction is not appealable *Tri-Star Petroleum co. v. Tipperary Corp.*, No.

11-03-00319-CV, 2003 Tex. App. LEXIS 9031 (Tex. App.--Eastland Oct. 23, 2003) (not designated for publication).

Appellate courts review trial-court decisions dissolving a temporary injunction under an abuse-of-discretion standard. *Desai v. Reliance*, 813 S.W.2d 640, 641, 642 (Tex. App.--Houston [14th Dist.] 1991, no writ); *Tober v. Turner*, 668 S.W.2d 831, 834 (Tex. App.--Austin 1994, no writ). Trial courts have authority to dissolve a temporary injunction upon a showing of changed circumstances. *Desai* at 641, 642; *Tober* at 835. For example, a temporary injunction designed to restrain abuse by a majority shareholder was dissolved after evidence that the majority shareholder had been excluded from participation in the management of the corporation. *Desai* at 642. The appellate court found that this evidence of exclusion from decision-making was sufficient to find changed circumstances, and thus to affirmed a trial court’s decision to dissolve a temporary injunction. *Id.*

When thinking about the procedural requirements of an injunction, keep in mind the time-of-trial issue mentioned above in the discussion addressing when an injunction will be considered temporary enough to be appealable. As with temporary injunctions generally, an order amending a temporary injunction must include an order setting the case for trial on the merits. TEX. R. CIV. P. 683; *Permian v. Texas*, 746 S.W.2d 873, 874 (Tex. App.--El Paso 1988, writ dismissed w.o.j.). A failure to do so renders the entire temporary injunction order fatally defective and void. *Interfirst Bank San Felipe v. Paz Construction*, 715 S.W.2d 640, 641 (Tex. 1986) (per curiam); *Permian* at 874. The error constitutes an abuse of discretion by the trial court and mandates a reversal by the appellate court, regardless of whether it is specifically raised as a point of error by the litigants. *Id.* See also *Desai* at 641 (had appellants timely appealed from trial-court temporary injunction for failure to set case for trial on merits, appellate court would have dissolved injunction). However, like all interlocutory appeals, an interlocutory appeal of a temporary injunction for failure to set the case for trial on the merits must be filed within twenty days after the injunction order was signed. *Desai* at 641. Otherwise, appellate courts lose

jurisdiction to hear the interlocutory appeal. *Id.* See also *Ludewig*, 737 S.W.2d at 16 (observing that had appellants timely appealed from trial-court’s temporary injunction for failure to set case for trial on merits, appellate court would have dissolved injunction). The same is true if the trial court fails to state reasons for its decision whether to modify or to grant a temporary injunction. *Toby*, 640 S.W.2d at 355 (applying TEX. R. CIV. P. 683).

Another recent case, *Federated Mutual Insurance Company, Inc. v. Davenport*, 85 S.W.3d 837 (Tex. App.--Waco 2002, no pet.) (per curiam), required the court to construe the limitations period applicable to an action under § 51.014(a)(4). According to the appellate rules, an appeal of this nature “will be accelerated.” TEX. R. APP. P. 28.1. The rules further require that, “in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed.” *Id.* 26.1(b).

In *Federated Mutual*, the appellees filed an interpleader action against the appellants and others to establish their ownership of a number of tractors that were the subject of a criminal-theft investigation in another country. In late November 2001, the trial court signed an order that placed the tractors in the care of the Department of Public Safety, and prohibited the D.P.S. from disposing of the vehicles “pending resolution and final adjudication” of their ownership. *Federated Mutual* filed a “Notice of Restricted Appeal” from the order more than three months after its signing. Appellees filed a motion to dismiss, which listed among its allegations, that a restricted appeal may be taken only from a final judgment. *Id.* at 838.

Federated Mutual characterized the trial court’s order as a temporary injunction. The reviewing court highlighted the appellate rules governing accelerated appeals in its decision to dismiss the interlocutory appeal for want of jurisdiction. Specifically, the court pointed to the twenty-day filing window allowed for an accelerated appeal. Because the appellants filed their attempted interlocutory appeal more than three months after the signing of the order, the court lacked jurisdiction over the appeal and was forced to dismiss. *Id.* at 839.

D. §51.014(a)(5): DENIAL OF SUMMARY JUDGMENTS BASED ON THE IMMUNITY OF A GOVERNMENTAL EMPLOYEE.

“A person may appeal from an interlocutory order... that... denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.”

In 1989, the Legislature made its first foray into the area of interlocutory appeals of governmental immunity, by giving *individual government employees* the right to appeal a denial of summary judgment “that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.” TEX. CIV. PRAC. & REM. CODE § 51.014(5); *Koerselman v. Rhynard*, 875 S.W.2d 347, 349 (Tex. App.-- Corpus Christi 1994, no writ). This change was added to make Texas law more akin to the interlocutory appeal rights conveyed to government officials in good faith/qualified immunity disputes in federal court. A government employee may appeal an interlocutory order denying her motion for summary judgment based on immunity even if she is sued in her individual capacity. *Boozier v. Hambrick*, 846 S.W.2d 593, 595, 596 (Tex. App.-- Houston [1st Dist.] 1993, no writ). The interlocutory appeals statute also applies to denials of summary judgment asserting qualified immunity. *Huddleston v. Maurry*, 841 S.W.2d 24, 27 (Tex. App.--Dallas 1992, writ dismissed w.o.j.). The statute, however, does not give an appellate court jurisdiction to hear interlocutory appeals of trial-court denials of summary judgment that are based on grounds other than immunity. *Boozier* at 596 (ruling that appellant does not have standing to appeal any ground set out in her motion for summary judgment other than immunity); *City of Beverly Hills v. Guevara*, 911 S.W.2d 901, 902 (Tex. App.--Waco 1995, no writ) (finding that section 51.014(a)(5) allows only official immunity grounds for summary judgment to be reviewed on interlocutory appeal); *Richardson v. Parker*, 903 S.W.2d 801, 803 (Tex. App.--Dallas 1995, no writ) (holding that appeals court has no jurisdiction to consider non-immunity grounds or

cross appeal on conversion claim); *Aldridge v. De Los Santos*, 878 S.W.2d 288, 293-94 (Tex. App.--Corpus Christi 1994, writ dismissed w.o.j.) (deciding that only sections of defendant's summary judgment motion dealing with "official or quasi-official" immunity would be considered on interlocutory appeal). When the defense of official immunity is successfully invoked, the officer or employee is immune from suit, not just from liability. *Font v. Carr*, 867 S.W.2d 873, 874 (Tex. App.--Houston [1st Dist.] 1993, writ dismissed w.o.j.).

A number of cases have shed more light on how the courts are applying section 51.014(a)(5). In *Espinola v. Latting*, 971 S.W.2d 144 (Tex. App.--Waco 1998, no pet.), the court denied the defendant's motion for summary judgment, and the defendant made an interlocutory appeal arguing that he had acted at the behest of a police officer and thus was immune from suit. The plaintiffs in the case had been injured when their vehicle was struck by the vehicle of fleeing suspects who were being shot at by the defendant, a private security guard. The defendant claims that he was acting at the direction of a police officer. As a result, he and his employer claimed immunity and argued that they should be able to obtain interlocutory appeal of the summary judgment ruling against them. The court ruled that section 51.014(a)(5) does not apply to a private citizen, such as a security guard, acting in a private capacity and not as an officer or employee of the police department. Thus, interlocutory appeal was not available.

Likewise, in *Xeller v. Locke*, 37 S.W.3d 95 (Tex. App.--Houston [14th Dist.] 2000, pet. denied), the court distinguished qualified immunity from liability pursuant to other statutes from the right to appeal under 51.014(a)(5). Dr. Xeller was being sued for a fraudulent conspiracy relating to his examination of the appellee at the behest of the Texas Worker's Compensation Commission. Texas Labor Code § 413.054 states that a doctor performing this task "has the same immunity from liability as a commission member under Section 402.010." The trial court declined to dismiss the case on these grounds, and Dr. Xeller filed for an interlocutory appeal of this decision.

Without expressing any opinion on the merits of the case, the court of appeals dismissed this appeal for lack of jurisdiction, noting, "Appellants are not and were not officers or employees of the state, and therefore, they cannot appeal under section 51.014(a)(5).... To give designated doctors a right to an interlocutory appeal, the legislature must explicitly confer this right in a statute. No matter how much public policy might favor appellate jurisdiction in this case, this court has no power to create appellate jurisdiction. Such arguments should be addressed to the legislature." *Id.* at 100-101.

In addition to limiting the scope of the review to government employees, the availability of review also has been restricted recently by limiting it to the courts of appeal. In *Gross v. Innes*, 988 S.W.2d 727 (Tex. 1998), the Texas Supreme Court ruled that it did not have jurisdiction over an interlocutory appeal of the denial of defendants' summary-judgment motion on official-immunity grounds, which had been affirmed by the Court of Appeals. The case involved the administrator of the estate of a patient who had died in the hospital after he had been brought there by firefighter/paramedics. The administrator brought a wrongful-death suit against the firefighter/paramedics, who then filed for summary judgment on the basis of immunity for a governmental actor. The defendants rightfully received interlocutory review in the court of appeals. The Texas Supreme Court ruled the right to interlocutory review ends there because TEX. GOV'T CODE § 22.225(b)(3) makes an interlocutory appeal under TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5) final in the Court of Appeals. Only when there is a conflict between the Court of Appeals decision and a decision of another appellate court or the Supreme Court, or when there is a dissent within the Court of Appeals opinion over a matter of law affecting the outcome, can the Supreme Court have jurisdiction over interlocutory appeals. *Gross* at 729.

In this case, it was very clear that no dissenting opinion existed in the Court of Appeals. However, the defendants argued that there was a conflict between the Court of Appeals decision and both a Supreme Court case, *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994) and a San Antonio Court of Appeals case, *Casas v. Gilliam*,

869 S.W.2d 671 (Tex. App.--San Antonio 1994, no writ). The Supreme Court disagreed, ruling that a conflict exists only when the fact scenarios between two cases are so similar that the result is a foregone conclusion. If one can distinguish the cases on the basis of factual differences, then no conflict exists. In *Gross*, the Supreme Court determined that factual distinctions did exist between the Court of Appeals decision and the cited case law; thus, interlocutory review was not available. *Gross*, 988 S.W.2d at 730.

Along with setting recent limits on the use of interlocutory appeal under section 51.014(a)(5), the courts have reiterated exactly when one can obtain such an appeal. In *Leyva v. Soltero*, 966 S.W.2d 765 (Tex. App.--Dallas 1998, no pet.), the court affirmed the use of interlocutory review for summary judgment based on the sovereign-immunity defense when employees are at fault. In *Leyva*, the Chief of Police of the City of Clint instructed one of his officers, Leyva, to engage in a hot pursuit of a suspect who already was being pursued by agents and officials from numerous federal, state, and county law-enforcement agencies. Leyva entered an intersection where the light was red and struck a vehicle carrying innocent citizens, the Solteros. The Solteros brought suit, and the defendant, the City of Clint, moved for summary judgment on the basis of immunity. Summary judgment was denied, and the City of Clint moved for interlocutory appeal, which the court decided it had jurisdiction to review under § 51.014(a)(5).

E. § 51.014(a)(6): FREE SPEECH DEFENSES TO SUITS AGAINST THE MEDIA.

“A person may appeal from an interlocutory 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 or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter

73.”

The Legislature enacted this section of the interlocutory appeals statute in 1993. The rationale for the statute was to save the time and expense of a trial on the merits when the media may be entitled to a constitutional privilege under the free speech and free press clauses of the U.S. or Texas constitutions, or a statutory privilege under Chapter 73 of the Texas Civil Practice and Remedies Code.

This provision of the interlocutory appeals statute was used by a defendant television station in *KTRK v. Felder*, 950 S.W.2d 100 (Tex. App.--Houston [14th Dist.] 1997, no writ). The plaintiff, a middle-school teacher, brought suit against the television station for defamation. The station broadcast allegations by parents that the teacher had physically threatened and verbally abused their children. At trial, the station moved for summary judgment, asserting defenses to defamation. The trial court denied the station’s summary-judgment request. The station appealed under section 51.014(a)(6) as a member of the media whose denied motion for summary judgment was based on a defense of freedom of speech or freedom of press.

To establish a defense to defamation at summary judgment, a defendant must prove one of two things as a matter of law. If the plaintiff is a public figure and/or public official, the summary-judgment proof must conclusively show an absence of actual malice. If the plaintiff is not a public figure, as in the *KTRK* case, the defendant may negate the essential elements of the plaintiff’s claim by showing that broadcast was substantially true. The appellate court, examining the gist of the broadcast, found that it met the substantially true test. The broadcast merely stated that the allegations had been made. To assert a defense of substantial truth in regards to reporting allegations, the station only had to show that the allegations were, in fact, made and were being investigated. To require more proof by the member of the media before reporting allegations would create an enormous amount of litigation against the media and would have an unacceptably chilling effect on its reporting, the court reasoned. The appeals court found that uncontroverted summary-judgment evidence conclusively

established that the allegations met this two-part test, and thus were substantially true. The court reversed the trial-court denial of the defendant's summary-judgment motion and ordered that the plaintiff take nothing. *Id.* at 106.

In another opinion, *ABC, Inc. v. Gill*, 6 S.W.3d 19 (Tex. App.--San Antonio 1999, pet. denied), the court attempted to give clarity to the scope of review under section 51.014(a)(6) by holding that the plain language of the statute allows review of the entirety of the trial court's order denying summary judgment on the basis of a freedom-of-speech defense. ABC was denied summary judgment on both Gill's defamation and non-defamation claims related to an ABC news show that investigated a failed savings and loan owned by the plaintiff. The court ruled that the language in *KTRK*, stating that interlocutory appeal only allows review of claims that are "defended in whole or in part on free speech grounds," is merely dicta. Instead, *Delta Airlines v. Norris*, 949 S.W.2d 422, 428-29 (Tex. App.--Waco, 1997, writ denied) was invoked to allow interlocutory review of the entirety of the trial court's order, including those parts not relating to free-speech-defense claims. *See also Dolcefino v. Randolph*, No. 14-00-00602, 2001 WL 931112 (Tex. App.--Houston [14th Dist.] Aug. 16, 2001) (not designated for publication) (holding that entire summary judgment order could be appealed because the appellant had raised First Amendment defenses).

F. §51.014(a)(7): SPECIAL APPEARANCE.

"A person may appeal from an interlocutory order... that:... grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code."

This provision allowing interlocutory appeals for orders granting or denying a defendant's special appearance was added to the interlocutory appeals statute in 1997. It applies to all civil actions commenced on or after June 20, 1997. It also applies to actions in which the trial, retrial, or appeal commenced after that date, but had been filed earlier, and were pending on that

date, and. Recently, a number of cases from Texas courts have addressed what is required to timely file for interlocutory appeal under section 51.014(a)(7), the factors and burdens that must be met to prevail, and the standard of review to be used by courts of appeal on interlocutory review.

One of the first cases to interpret section 51.014(a)(7) is *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Manufacturing, Inc.*, 964 S.W.2d 762 (Tex. App.--Amarillo 1998, no pet.). *Iron Mountain* does for interlocutory appeal of special appearances what *Sclafini* does for interlocutory appeal of the appointment of a trustee or receiver. *Iron Mountain* rules that, because section 51.014(a)(7) does not specify time limits for filing or perfecting an interlocutory appeal, one must look to the Texas Rules of Appellate Procedure. There, under Rule 28.1, interlocutory review under section 51.014(a) is considered an accelerated appeal. Thus, under *Sclafini*, one must file for interlocutory review within 20 days after the judgment or order is signed. In *Iron Mountain*, the trial court signed its order overruling the special appearance on August 11, 1997. The deadline for filing a motion for interlocutory appeal was August 31, 1997. Because the defendants in the case did not file until February 5, 1998, they failed to perfect their appeal and to preserve it for review. In coming to this decision, the court explicitly voiced its disagreement with the following case.

Providing an opposing viewpoint, the court in *Allied Erectors Corp. v. Barbara's Bakery*, 954 S.W.2d 197 (Tex. App.--Waco 1997, no writ), allowed the interlocutory appeal of a denial of a special appearance, although the order of denial was three years old. The court justified its ruling by stating that the plain language of the new statute permitted it. The lower court denied the special appearance on August 31, 1994. On May 27, 1997, new legislation was passed, which was made effective on June 20, 1997, with retroactive application to causes which had commenced prior to the effective date but had not yet gone to trial by June 20, 1997. The court argued that, even if the intention of the Legislature was not to allow interlocutory appeals of orders signed three years earlier, the plain reading of the statute clearly allowed for this interlocutory appeal because the case had not

gone to trial, and the court had provided for an extension to perfect the appeal.

It should be noted that, just like the denial by the trial court of a motion to vacate a receiver appointment does not create a new opportunity for interlocutory appeal (*see Sclafani*, 870 S.W.2d 608), there is no interlocutory appeal available from a denial of a motion to reconsider a denial or granting of special appearance. See *Digges v. Knowledge Alliance, Inc.*, No. 01-04-00710-CV, 2004 Tex. App. LEXIS 10408, at *2-3 (Tex. App.-Houston [1st Dist.] Nov. 18, 2004, no pet.) (per curiam) (not designated for publication) (finding that the court of appeals has no jurisdiction to hear interlocutory appeal challenging trial court's denial of "Motion to Reconsider Order Granting Defendant's Motion to Reconsider Denial of Special Appearance").

There used to be uncertainty about the standard of review for these appeals. Some cases endorsed the use of a "factual sufficiency review" on appeal, and others endorsed the use of an "abuse-of-discretion" standard on review. But the Supreme Court of Texas settled this matter in *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789 (Tex. 2002), ruling that for this type of appeal, the courts of appeals should review the trial court's factual findings for legal and factual sufficiency, and the trial court's legal conclusions *de novo*. The Court also noted that its own review of the trial court's fact findings in such cases will be limited to legal sufficiency. *Id.* at 794.

G. §51.014(a)(8): PLEA TO THE JURISDICTION BY A GOVERNMENTAL UNIT.

"A person may appeal from an interlocutory order... that... grants or denies a plea to the jurisdiction by a governmental unit as that term is defined by Section 101.001."

In 1997, the Legislature also added interlocutory appeal of a grant or denial of a plea to the jurisdiction by a governmental unit to § 51.014 There are two interesting things worth noting about this language. First, it is a "two-way street." That is, the language allows the government to appeal if it loses its plea, *and* it allows the plaintiff to quick-appeal if the

government wins its plea. In many cases where the government entity is the only defendant, this probably won't matter that much. But, one can easily imagine a situation where the government entity is not the only defendant, and, if the claim against the government gets dismissed, the plaintiff may take an interlocutory appeal so that she can proceed to trial at once and against all defendants, if she wins on appeal. The second interesting thing is that while the § 51.014(a)(5) individual-employee provision applies to motions for summary judgment only on immunity grounds, this provision covers only pleas to the jurisdiction. Thus, a plain-vanilla, non-jurisdictional defense (say, statute of limitations) is not appealable at this stage; only pleas to the jurisdiction.

A trial court's ruling on a plea to the jurisdiction will be reviewed by the appellate court under a *de novo* standard of review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998), cert. denied, 526 U.S. 1144 (1999).

In *Bland Independent School Dist. v. Blue*, 989 S.W.2d 441 (Tex. App.--Dallas 1999), *rev'd on other grounds* by 34 S.W.3d 547 (Tex. 2000), the court ruled that courts of appeals will have jurisdiction over interlocutory appeals of plea-to-the-jurisdiction motions only for those pleas brought by governmental units, as defined in § 101.001. In this case, the plaintiff, Blue, sought an injunction to prevent the school district, the school board, and the superintendent from making any further payments on a lease-purchase agreement for the construction of a new school, claiming that it was an illegal contract and did not comply with public-notice requirements. The school board, school district, and superintendent filed a plea to the jurisdiction, claiming that the court lacked subject-matter jurisdiction. The appellant-defendants argued that Blue did not have a justiciable interest and that the point was moot because the school already had been built. The court held that statutes authorizing interlocutory appeals are strictly construed, and thus, a plea to the jurisdiction brought by the school board and the school district may be reviewed. However, a plea to the jurisdiction brought by the superintendent himself may not be reviewed because he is a school official, not a governmental unit. Thus, in *Bland*, the plea to the jurisdiction was reviewed as it applied to the

school board and school district, but not to the superintendent. *See also Dallas County Community College District v. William H. Bolton*, 990 S.W.2d 465 (Tex. App.--Dallas 1999, no pet.) (ruling that individual members of a board of trustees for a county community college district were not “governmental units” under §§ 51.014(a)(8) and 101.001(3)(b)); *Castleberry Independent School District v. Doe*, 35 S.W.3d 777 (Tex. App.--Fort Worth 2001, pet. dismissed w.o.j.), (holding that § 51.014(a)(8) does not confer jurisdiction over the two individual teacher’s interlocutory appeals of trial court’s denials of their plea of immunity).

The previous opinions appeared to make it fairly clear that “governmental units” and not individuals are entitled to interlocutory appeal from pleas to the jurisdiction. However, a more recent cases have blurred the distinction between “individuals” and “governmental unit.”

The first case to blur the line was *Perry v. Del Rio*, 53 S.W.3d 818 (Tex. App.--Austin 2001, pet. dismissed). The case involved a group of citizens (“Del Rio”) who sued the Governor, Lieutenant Governor, Secretary of State, and Speaker of the House in their official capacities. Del Rio’s suit challenged the state’s failure to enact a redistricting plan reflecting the most recent census. The appellants’ pleas to the jurisdiction were denied by the district court. The appellants then brought an interlocutory appeal. Del Rio filed a motion to dismiss, arguing that the Court of Appeals lacked jurisdiction in the interlocutory appeal.

Appellants argued that section 51.014(a)(8) conferred jurisdiction over the interlocutory appeal on the appellate court. In support of its contention that appellants failed to qualify as “governmental units,” appellees cited several cases, including *Castleberry*, 35 S.W.3d at 780, in which appellate courts held that school officials or employees of school districts do not fall within the definition of “governmental units.” Despite these rulings, however, the Austin court explained that it did not “believe that the highest statewide officials in Texas occupy the same position as public school employees or trustees.” *Del Rio v. Perry* at 821. The court noted that definition of “governmental unit” includes the

“state and its agencies that constitute the government of Texas, including all departments, offices, and any organ of government whose authority is derived from the state constitution.” *Citing* TEX. CIV. PRAC. & REM. CODE § 101.001. Because the Texas Constitution specifically provides for the existence of a governor, a lieutenant governor, and a secretary of state, the court reasoned that the officers “constitute, at least in part, the executive department of the government.” *Citing* TEX. CONST. art. IV, § 1. The court explained that all three offices in question are state officeholders who derive their authority from the Texas Constitution, and each was sued in his individual capacity. *Id.* at 822.

In reaching its holding that appellants fell under the “governmental unit” umbrella, the court pointed to a number of factors. First, the court highlighted that the “governmental unit” definition includes the term “offices,” and the appellants undisputedly hold state offices and maintain authority to exercise a degree of sovereign power over the state. Second, the court noted that a suit against a state official in his official capacity constitutes a suit against the State. *Citing Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 738 (Tex. App.--Austin 1994, writ denied). The court also explained that a suit seeking to enjoin an agency action may be filed against an officer of the agency, rather than the agency itself. *Citing Texas Workers’ Comp. Comm’n v. Garcia*, 862 S.W.2d 61, 73 (Tex. App.--San Antonio 1993), *rev’d on other grounds*, 893 S.W.2d 504 (Tex. 1995).

Addressing all of these factors, the court concluded that the inclusion of “offices” in the “governmental unit” definition “indicates an intent to include state officials sued in their official capacity.” Because the governor, lieutenant governor, and secretary of state also constitute the “executive organ of government,” deriving authority from the state constitution, the court reasoned that the appellants met the qualifications inherent in “governmental unit” and held that the court had jurisdiction to evaluate the interlocutory appeal under section 51.014(a)(8). *Id.* at 823.

Based on the *Perry v. Del Rio* holding, courts have ruled that many other official

positions are governmental units for the purposes of 51.014(a)(8). See *Cornyn v. Fifty-Two Members of the Schoppa Family*, 70 S.W.3d 895 (Tex. App.--Amarillo 2001, no pet.) (finding that Texas Attorney General qualifies as a “governmental unit,” for 51.014(a)(8)); *Potter County Atty.'s Off. v. Stars & Stripes Sweepstakes, L.L.C.*, 121 S.W.3d 460, 464-65 (Tex. App.--Amarillo 2003, no pet.) (same for county attorney); *McLane Co. v. Strayhorn*, 148 S.W.3d 644 (Tex. App.--Austin 2004, pet. filed) (same for comptroller); *Nueces County v. Ferguson*, 97 S.W.3d 205, 210 & n.2 (Tex. App.--Corpus Christi 2002, no pet.) (same for sheriff).

“Some courts have extended this principle to government employees in general.” *Tex. A&M Univ. Sys. v. Koseoglu*, No. 10-03-00375-CV, 2005 Tex. App. LEXIS 1826, *6 (Tex. App.--Waco Mar. 9, 2005, pet. filed), citing *De Mino v. Sheridan*, Nos. 01-03-00794-C, 01-04-00099-CV, 2004 Tex. App. LEXIS 7252, at * 8-10 (Tex. App.--Houston [1st Dist.] Aug. 12, 2004, no pet.) (ruling that a university provost is a governmental unit for the purposes of 51.014(a)(8)); *Potter County Atty.'s Off.*, 121 S.W.3d at 464-65 (same for police chief).

In the *Koseoglu* case, however, the court dismissed the interlocutory appeal of a Texas A&M employee, for want of jurisdiction. *Koseoglu*, 2005 Tex. App. LEXIS 1826, at *8 (citing *Tex. Parks & Wildlife Dept. v. E. E. Lowrey Realty, Ltd.*, No. 10-02-00317-CV, 2004 Tex. App. LEXIS 9824, at * 2-5 (Tex. App.--Waco Nov. 3, 2004, no pet. h.) (holding that a Texas Parks & Wildlife Dept. employee is not a governmental unit)).

Finally, there is the question of how sovereign immunity and the interlocutory appeal to pleas to the jurisdiction interact. In *Texas Department of Transportation v. Jones*, 983 S.W.2d 90 (Tex. App.--Corpus Christi 1998), a Texas Court of Appeals decided that a plea to the jurisdiction under § 51.014(a)(8) may not be based on sovereign immunity. TXDoT moved for a plea to the jurisdiction, contending that the court lacked jurisdiction to hear the case because TXDoT had sovereign immunity. The court ruled that the plain language of subsection (a)(8) clearly refers to TEX. CIV. PRAC. & REM. CODE § 101.001

for the purpose of defining what a governmental unit is, not for the purpose of justifying the use of sovereign immunity as a basis for a plea to the jurisdiction. A plea to the jurisdiction is to be used to assert that the court lacks subject-matter jurisdiction over the case, and “may not be asserted as a jurisdictional obstacle to a trial court’s power to hear a case against a governmental defendant.” The Court of Appeals affirmed the lower-court dismissal of the plea to the jurisdiction and refused interlocutory review, noting that such review is only available under § 51.014(a)(8) when a governmental unit is a party to the case and has raised a plea to the jurisdiction.

However, the Texas Supreme Court reversed and remanded the case, noting that the appellate court misinterpreted earlier rulings and confused immunity from liability and immunity from suit. *Texas Dep’t of Transp. v. Jones*, 8 S.W.3d 636 (Tex. 1999); see also *Davis v. City of San Antonio*, 739 S.W.2d 394 (Tex. App.--San Antonio 1987), *rev’d*, 752 S.W.2d 518 (Tex. 1988). The Supreme Court reaffirmed its earlier holdings that immunity from suit “defeats a trial court’s subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction.” *Jones*, 8 S.W.3d at 639. The Court thus determined that the appellate court erred in affirming the trial court’s denial of TXDoT’s plea to the jurisdiction without first determining whether the plaintiff’s pleadings asserted a claim under the Texas Tort Claims Act

The case law interpreting the interlocutory appeals statute on the government’s plea to the jurisdiction is uncomplicated. Even before the 1997 amendment there was precedent for permitting a governmental entity to interlocutorily appeal a decision denying its summary judgment, based upon the transferring-up of the individual’s immunity. *City of Houston v. Kilburn*, 849 S.W.2d 810 (Tex. 1993). Thus, even without the 1997 section, governmental entities already had their noses in the interlocutory appeal tent via this “derivative immunity.” Recent cases have not varied from this rule. See, e.g., *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244 (Tex. 2004); *Los Fresnos Consol. Indep. Sch. Dist. v. Southworth*, 156 S.W.3d 910 (Tex. App.--Corpus Christ 2005, pet. filed).

H. § 51.014(a)(9) & (10): EXPERT MEDICAL WITNESSES

"A person may appeal from an interlocutory order...that:...

(9) denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351; or

(10) grants relief sought by a motion under Section 74.351(l)."

Chapter 74, Section 351 of the Texas Civil Practice and Remedies Code was created in 2003 as part of the “reforms” specifically enacted to decrease medical malpractice litigation. Section 74.351 strengthened the requirements for the furnishing of expert reports by plaintiffs in support of their claims of liability. If this report is not filed within 120 days of the claim being filed, the defendant can move to dismiss that claim with prejudice under §74.351(b). Under 74.351(l), the defendant can get a pre-trial evidentiary hearing on whether the expert report is substantially sufficient.

To further expedite the disposition of unsupported claims, the Legislature has allowed interlocutory appeal of these decisions. Note that 51.014(a)(9) & (10) are “one-way streets” which complement each other—only defendants will pursue interlocutory review of a decision not to dismiss a case under 74.351(b), and only plaintiffs will seek to overrule a 74.351(l) motion granting a request to exclude an expert report.

These sections have not been the subject of much appellate litigation, as of the time of this writing. In *Fort Worth Southwest Nursing Ctr., L.L.C. v. Bly*, No. 2-03-314-CV, 2004 Tex. App. LEXIS 1697 (Tex. App.--Fort Worth Feb. 19, 2004, no pet.) (not designated for publication), the court dismissed for lack of jurisdiction an appeal of the trial court's denial of a motion to dismiss an expert report due to its substantial defects. The court noted the one-way streets in 51.014(a) (9) & (10), which allows “interlocutory appeals in this context for orders *granting* motions to dismiss based on substantive defects of expert reports and for orders denying motions to dismiss based on *untimeliness* of expert reports.” *Id.* at *4 n4

(emphasis in original).

K. § 51.014(a)(11): REPORTS FOR ASBESTOS-RELATED CLAIMS

"A person may appeal from an interlocutory order...that:...

(11) denies a motion to dismiss filed under Section 90.007."

This section will not go into effect until September 1, 2005. The new Chapter 90 of the Texas Civil Practices and Remedies Code, which also takes effect on that date, requires plaintiffs making asbestos or silica-related injury claims to produce certain expert reports supporting those claims. If these reports are filed late or are substantially deficient, then the defendant can move to dismiss the claim under § 90.007. If the trial court denies this motion, the defendant will be able to quick-appeal that decision.

J. § 51.014(d) & (e): PERMISSIVE INTERLOCUTORY APPEALS

"(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 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."

In 2001, the 77th Legislature expanded access to interlocutory appeals beyond the specific circumstances listed in 51.014(a). These interlocutory appeals are characterized as “permissive.” The central feature of this types of interlocutory appeal is that everyone involved must permit the appeal—both parties, the trial

court, and the appellate court.

When the record fails to reflect an agreement to the appeal by both parties, the appeal will not be heard. *Stowe v. Stowe*, No. 13-03-633-CV, 2004 Tex. App. LEXIS 7028 (Tex. App.--Corpus Christi Aug. 5, 2004, no pet.) (not designated for publication).

Where a trial court has not issued an order for a permissive interlocutory appeal, and none of the conditions in § 51.014(a) apply, an appellate court has no jurisdiction to hear an interlocutory appeal. *Bennett v. Leas*, No. 13-04-362-CV, 2005 Tex. App. LEXIS 1988 (Tex. App.--Corpus Christi Mar. 17, 2005, no pet.) (not designated for publication). The mere issuance of an interlocutory order does not allow a party to file a permissive interlocutory appeal regarding that order. *Watson v. Moray*, 133 S.W.3d 877 (Tex. App.--Dallas 2004, no pet.).

It has been argued that an appellate court's ability to permit an appeal under § 51.014(f) is "purely discretionary," meaning that a trial court's refusal to issue an order for a permissive interlocutory appeal could be overruled by the appellate court. This has been soundly rejected. *Watson*, 133 S.W.3d at 878. The trial court must agree to a permissive interlocutory appeal.

Finally, a permissive interlocutory appeal requires the consent of the *appellate court* as well as the trial court and the parties involved. Since § 51.014(f) says, "the appellate court *may* permit an appeal" (emphasis added), an appellate court can decline to review a permissive interlocutory appeal. *Zale Lipshy Univ. Hosp. v. T.M.S.*, No. 05-03-01235-CV, 2003 Tex. App. LEXIS 7681 (Tex. App.--Dallas Sept. 3, 2003, no pet.) (not designated for publication).

The proper timeline for filing an application to hear a permissive interlocutory appeal with an appellate court was changed by the Legislature in 2005. Section 51.014(f) was repealed, which had imposed a ten-day deadline for filing a notice for appeal with the appellate court after the trial court has issued an order allowing a permissive interlocutory appeal. The twenty-day deadline for accelerated appeals in the Texas Rules of Appellate Procedure, which applies to other interlocutory appeals, now also

applies to permissive interlocutory appeals of interlocutory orders issued after June 18, 2005, the effective date of the Act repealing the 10-day deadline provision.

The same Act also expanded permissive interlocutory appeals to county courts at law and county courts.

Some courts have applied filing deadlines with leniency. In *Stolte v. County of Guadalupe*, 139 S.W.3d 406 (Tex. App.--San Antonio 2004, no pet.), the appellant obtained an order from the trial court allowing an interlocutory appeal, but did not file an application for permission to appeal in the appellate court within the 10 days specified by the old § 51.014(f). Instead, the appellant waited 19 days after the trial court's order to file a notice of appeal in the trial court and a copy with the court of appeals. In this case, the court held that "even if the timely filing of the application for permission to appeal contemplated by § 51.014(d) is jurisdictional, we may not dismiss this appeal without giving [the appellant] an opportunity to 'cure the error.'" *Id.* at 409. The appellant was allowed to take advantage of extension of time allowed by TEX. R. APP. P. Rule 26.3, combined with the doctrine that motions for extensions of time are implied when a good-faith appellant files a notice of appeal within the grace period allowed for requesting such an extension. *Stolte* at 410.

Other courts have applied deadlines strictly. See *In the interest of D.B.*, 80 S.W.3d 698, 701 (Tex. App.--Dallas 2002, no pet.) (dismissing an appeal that missed the old 10-day deadline).

Section 51.014's failure to set forth the proper form for an application for a permissive interlocutory appeal has caused some difficulty. In *In the interest of D.B.*, 80 S.W.3d at 701, the notice of appeal was found defective in that it did not mention § 51.014(d), and did not formally request the consideration of an appeal from an interlocutory order. In *Stolte*, the application for appeal was faulted for not containing any facts or arguments explaining why the appeal should be reviewed, although the appellant was allowed to file an amended petition. *Stolte*, 139 S.W.3d at 410.

A careful attorney will file an application for appeal with the court of appeals within 10 days of receiving the trial court's order allowing a permissive interlocutory appeal. This application should cite both § 51.014(d) and the trial court's order, and explain how “a controlling question of law as to which there is a substantial ground for difference of opinion” is at issue. *Richardson et al. vs. Kays et al.*, No. 2-03-241-CV, 2003 Tex. App. LEXIS 9255 (Tex. App.--Ft. Worth Oct. 30, 2003, no pet.) (not designated for publication).

Beware that appellate courts are loath to review permissive interlocutory appeals where the facts are in dispute. *Diamond Products Intl. v. Handsel*, 142 S.W.3d 491 (Tex. App.--Houston [14th Dist.]--2004, no pet.). When resolution of the issue being appealed pivots on fact issues that must be resolved in the trial court, the application for appeal will probably be denied. *Dimock v. Dimock*, No. 2-04-099-CV, 2004 Tex. App. LEXIS 4159 (Tex. App.--Corpus Christi May 6, 2004, no pet.) (not designated for publication).

II. WHAT HAPPENS IN THE TRIAL COURT PENDING AN INTERLOCUTORY APPEAL UNDER CIVIL PRACTICE AND REMEDIES CODE CHAPTER 51?

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

*“(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4)[temporary injunction], stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3)[class certification], (5) [individual’s governmental immunity summary judgment] or (8)[government entity’s plea to the jurisdiction] also stays **all other proceedings** in the trial court pending resolution of that appeal.*

(c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5)[individual’s governmental immunity summary judgment], (7)[special appearance], or (8) government entity’s plea to the jurisdiction] is not subject to the automatic stay 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.”

Until the amendments to §51.014 commencing in 1997, the trial judge had the discretion to decide whether to stay the trial pending the interlocutory appeal, especially if she thought that the interlocutory appeal was sought solely for delay or if it could have been taken earlier in the litigation. Several issues have developed as to the scope and invocation of these provisions.

Exactly what is meant by the statutory phrase “the commencement of a trial” is still up for some debate, even after the Legislature added: “An interlocutory appeal under Subsection (a)(3), (5), or (8) stays all other proceedings in the trial court pending resolution of that appeal” to § 51.014(b) in 2003. This amendment seems to imply that while an interlocutory appeal brought under § 51.014(a) (apart from 3, 5, and 8, of course) is pending, any “other proceedings” can go forth.

Case law permitting other proceedings to go continue while an interlocutory appeal is pending seems to confirm this, but it is important to note that in all these cases listed below the particular type of interlocutory appeal pending fell within the complete-stay-of-all-proceedings categories that the Legislature defined in 2003.

In *Tarrant Regional Water District v. Harden*, 962 S.W.2d 717 (Tex. App.--Waco [10th Dist.] 1998, no pet.), the stay was ruled to apply

only to issues to which the invoked section of the interlocutory appeals statute applies. The trial court may proceed with other issues. In the case, the appeals court stayed trial-court proceedings related to sovereign-immunity claims, but allowed claims outside the scope of sovereign immunity to proceed. Since the interlocutory appeal at issue was brought under § 51.014(a)(8), the outcome would be different today. But for the other cases that still fall within the general “stays the commencement of a trial” language, it seems likely that this ruling would apply.

In *City of Hidalgo Ambulance Service v. Lira*, 17 S.W.3d 300 (Tex. App.--Corpus Christi 2000, no pet.), the City appealed the trial court’s denial of its pleas to jurisdiction, based on the plaintiff’s original petition and second amended petition. Noting that the appeal stayed only the trial’s commencement, the appellate court allowed the plaintiff’s third amended complaint—filed after the City filed its interlocutory appeal—to be included as an exhibit to the plaintiff’s motion to dismiss the City’s appeal as moot. The Court of Appeals held that, because the “stay” provision operates narrowly, the trial court did not err in allowing the amended complaint, which addressed the deficiencies complained of in the appeal, as an exhibit or as part of the clerk’s record. Of course, if this case were decided today, the outcome would be different because 51.014(b) now specifically says that an interlocutory appeal under § 51.01(a)(8) stays *all* other proceedings in the trial court pending resolution of the interlocutory appeal.

Similarly, in *Peters v. Blockbuster, Inc.*, 65 S.W.3d 295 (Tex. App.--Beaumont 2001, no pet.), the appellate court held that the “stay” provision did not prohibit the trial court from amending its original settlement-only order in a class action, even though that order had been appealed interlocutorily. But once again, if this were decided today, the result would be the opposite because the interlocutory appeal at issue here was brought under § 51.014(a)(3) (class certification).

However, in another case, the appellate court refused to allow the trial court to get around the stay provision by severing the action into separate causes. In *Sheinfeld, Maley & Kay, P.C.*

v. Bellush, 61 S.W.3d 437 (Tex. App.--San Antonio 2001, no pet.) (per curiam), SMK interlocutorily appealed a trial-court order granting a temporary injunction in SMK’s disfavor. Further, the trial court denied SMK’s motion to stay the underlying proceedings. In that order, the trial court also severed the temporary injunction into a separate cause number.

Explaining that the stay provisions are statutory and allow “no room for discretion,” the court determined that, if the interlocutory appeal affected the pending claims at the time the trial court denied the motion to stay, it erred by granting that denial. The court said that allowing the trial court to use severance merely to isolate claims that would be affected by the temporary injunction would set a dangerous precedent. Particularly, the court expressed concern that legislative intent “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.” *Id.* at 437.

The Legislature addressed some of these issues with in 2003, but only for interlocutory appeals involving class certification and governmental / official immunity.

A related issue involves what, exactly, is stayed when the statute prohibits a “trial.” Some courts have ruled that there are some “other proceedings” which cannot progress while an interlocutory appeal of any kind is pending. For instance, in *Lee-Hickman’s Invs. v. Alpha Invesco Corp.*, 139 S.W.3d 698 (Tex. App.--Corpus Christi 2004, no pet.), the court of appeals ruled that the trial court had abused its discretion by issuing a summary judgment while an interlocutory appeal was pending. The court stated “a summary judgment proceeding is a trial within the meaning of § 51.014(b).” *Id.* at 701 (citing *Goswami v. Metro. Sav. & Loan*, 751 S.W.2d 487 (Tex. 1988) (holding that a summary judgment proceeding is a trial within the meaning of rule 63 of the Texas Rules of Civil Procedure)).

Failing to inform the trial court of operation of a stay waives any error that the trial court may commit by failing to stay the trial. *Henry v. Flintlock Feeders, Ltd.*, No. 07-04-0224-CV, 2005 Tex. App. LEXIS 4310 (Tex. App.--Amarillo June 1, 2005, no pet.) (not

designated for publication). Similarly, *Lincoln Prop. Co. v. Kondos*, 110 S.W.3d 712 (Tex. App.-Dallas 2003, no pet.) indicates that a party can waive the stay by proceeding with litigation. But it should be mentioned that because the appeal was dismissed as moot, this proposition was only implied in dicta.

Two other provisions of § 51.014 are also important. First there is § 51.014(c), which says that an appeal of a denial of a motion for a summary judgment, special appearance, or plea to the jurisdiction will not automatically stay of the commencement of trial, unless it is filed and requested for submission or hearing before the trial court not later than a date set by the trial court or the 180th day after the filing of an answer or pleading. The Texas Legislature added this provision in 2001 along with the sections relating to permissive interlocutory appeals. This measure significantly decreases the potential for abusing the interlocutory appeal and its accompanying stay, which could obviously be used for tactical advantage.

Second, it should be restated that § 51.014(e) gives special rules for stays while a permissive interlocutory appeal is pending:

“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.”

There are no cases interpreting this statute, but it seems straight-forward enough: a stay pending a permissive interlocutory appeal is, itself, permissive. Both parties must agree to a stay, although authorization for the stay is needed from only one judge, either at the trial or appellate level.

III. OTHER STATUTES OR RULES AUTHORIZING INTERLOCUTORY APPEALS.

A. Rule 76a Order Sealing Court’s File.

Under TEX. R. CIV. P. 76a, any order (or portion of an order) relating to the sealing or unsealing of court records is deemed to be severed

from the underlying case and is subject to immediate interlocutory appeal. The rule allows an appeal to be made by any party or intervenor who participated in the hearing preceding the sealing or unsealing order. Although the rule severs the “sealing or unsealing” order—thus making it, technically, a final judgment—the whole process seems sufficiently interlocutory to warrant that a little ink (toner?) be spilled.

General Tire v. Kepple, 970 S.W.2d 520 (Tex. 1998) is a case from the Texas Supreme Court that raised a number of issues relating to interlocutory appeals under Rule 76a. In this case, plaintiffs sued a tire manufacturer alleging the defendant manufactured defective tires that lead to plaintiffs’ injuries in a car accident. During discovery, the defendant produced, under a limited protective order, documents that it claimed contained trade secrets. After the case settled, the trial court held a hearing under Rule 76a and ordered the documents to be opened to the general public.

The Court considered four issues. First, the court considered whether Rule 76a applies to the case. Rule 76a had been held by the appeals court to apply only to the sealing or unsealing of “court records,” as that term is defined in the rule itself. For example, the term does not include documents filed with the court for in camera inspection and interlocutory protective orders relating to such documents are not subject to interlocutory appeal, a different appeals court has held. *See Texans United Education Fund v. Texaco*, 858 S.W.2d 38, 40 (Tex. App.-Houston [14th Dist.] 1993, writ denied). Rule 76a does apply to the present case. However, the stringent procedures of Rule 76a are triggered only once the court has determined that the documents and data in question actually constitute, “court records” under Rule 76a.

Second, the Court decided that the trial court must hold a separate, closed hearing to determine whether documents are “court records” before conducting a Rule 76a hearing. In the area of unfiled discovery, as the case was dealing with here, the court held that if one party moves for a protective order and no other party, intervenor, or court itself has any problem with that protective order, then the order will apply and there will be

no Rule 76a hearing or procedures. However, if any one does object, then before any other party sees the disputed records, the court will hold its own hearing to determine whether the documents are “court records” under Rule 76a and thus subject to 76a’s special procedures. The Court took special note to point out that the mere “filing” of the disputed records with the court for the purpose of determining whether Rule 76a should apply to them does make them “court records” under 76a. To allow an open, public hearing under Rule 76a before determining whether the unfiled discovery is truly “dangerous to public health and safety,” and therefore a “court record” would undermine the purposes behind Rule 76a. It would endanger the legitimate right of parties to protect unfiled discovery that doesn’t affect public health and safety, and it would pervert the Rule 76a procedures from being a tool of the public interest to being a tool of the different parties and interests intervening in a public hearing.

The Court also considered the standard of review to be used for examining a Rule 76a motion. Appellate courts have split on this issue [Split between an abuse-of-discretion standard as seen in *General Tire* at 448; *Boardman v. Elm Block*, 872 S.W.2d 297, 298 (Tex. App.--Eastland 1994, no writ); *Upjohn v. Freeman*, 847 S.W.2d 589, 590 (Tex. App.--Dallas 1992, no writ); *Dunshie v. General Motors*, 822 S.W.2d 345, 347 (Tex. App.--Beaumont 1992, no writ) versus a sufficiency-of-the-evidence standard or review as in *Burlington Northern v. Southwestern Electric Power*, 905 S.W.2d 683, 686 (Tex. App.--Texarkana 1995, no writ)]. The Texas Supreme Court settled on the abuse-of-discretion standard and ruled that the lower court had abused its discretion in finding that the protected evidence in question were “court records,” within the meaning of Rule 76a because there was no evidence whatsoever showing that such data could adversely affect public health and safety. Finally, the Court determined that documents from other litigation were not erroneously included in the Rule 76a order, because they were “constructively” produced in the present lawsuit. As a result, they were within the control of the trial court, and this trial court had the discretion to include them within any orders that it chose to

issue, including a Rule 76a order, so long as the order itself was correct.

B. Arbitration Under the General Arbitration Act.

TEX. CIV. PRAC. & REMEDIES CODE § 171.098:

“(a) A party may appeal a judgment or decree entered under this chapter or an order:

(1) denying an application to compel arbitration made under Section 171.021;

(2) granting an application to stay arbitration made under Section 171.023;

(3) confirming or denying confirmation of an award;

(4) modifying or correcting an award; or

(5) vacating an award without directing a rehearing.

(b) The appeal shall be taken in the manner and to the same extent as an appeal from an order or judgment in a civil action.”

Interlocutory appeals are not allowed for a case involving the common-law right to arbitration. *Central National Insurance v. Lerner*, 856 S.W.2d 492, 494 (Tex. App.--Houston [1st Dist.] 1993, no writ). However, for a case that meets the requirements of the *Texas General Arbitration Act*, TEX. CIV. PRAC. & REM. CODE § 171.001 et seq. [TGAA], interlocutory appeals are authorized by the statute.

This statute had a nomadic existence in the 1990s. It began as Article 238-2, Title 10, Revised Statutes, then was codified in 1995 as TEX. CIV. PRAC. & REM. CODE § 171.017, and finally settled down at its current address at §171.098 of the same Code.

Note that the first two subsections are one way streets, which only allow litigants to move toward arbitration, not avoid it. Thus, it affords no right to interlocutory appeal from an order compelling arbitration, as opposed to an order denying an application to compel arbitration. *Materials Evolution Dev. USA v. Jablonowski*, 949 S.W.2d 31 (Tex. App.--San Antonio 1997, no

writ).

Also, there is no right to interlocutory appeal if the trial court orders arbitration under the *Federal Arbitration Act* [FAA]. *Jack B. Anglin v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992). Arbitration under the FAA can only be enforced by mandamus. *Cantella v. Goodwin*, 924 S.W.2d 943 (Tex. 1996).

The FAA governs an arbitration agreement contained in “a contract evidencing a transaction involving commerce...” 9 U.S.C. § 2 (2000). This statute has been interpreted as being coextensive with the reach of the Commerce Clause of the United States Constitution. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 272-81 (1995). In *In re Anaheim Angels Baseball Club*, 993 S.W.2d 875 (Tex. App.--El Paso 1999, rehearing denied), the court found that interstate commerce existed in a minor-league baseball player’s contract because services performed for the Midland farm team were for the direct benefit of the Angels’ California operation. Although the dispute arose as a result of an injury sustained while playing in Midland, because an element of interstate commerce existed, the contract was subject to the FAA, and therefore mandamus was the appropriate way to get the trial court to order arbitration.

Of course, parties may “specify by contract the rules under which...arbitration will be conducted.” *Volt Info. Sciences v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989); *see also Russ Berrie and Co. v. Gantt*, 998 S.W.2d 713, 715 n.6 (Tex. App.--El Paso 1999, no pet.); *D. Wilson Constr. Co. v. Cris Equipment Co.*, 988 S.W.2d 388, 392 (Tex. App.--Corpus Christi 1999, no pet. h.).

If another state’s arbitration statute applies, a writ of mandamus should be requested. *In re J.D. Edwards World Solutions*, 87 S.W.3d 546, 551 (Tex. 2002).

In uncertain situations it is best to hedge your bets by filing both an interlocutory appeal and a writ of mandamus. *Russ Berrie v. Gantt*, 998 S.W.2d 713, 715 (Tex. App.--El Paso 1999, no writ) (stating “If a party is unsure which act applies, it must file both an interlocutory appeal and a mandamus to ensure our jurisdiction is

invoked”).

C. Orders Allowing or Denying Intervention or Joinder for Venue.

The Texas Legislature enacted a new venue scheme in 1995, TEX. CIV. PRAC. & REM. CODE § 15.003. The statute allows for interlocutory appeal under certain circumstances.

Any person seeking intervention or joinder, who is unable to independently establish proper venue, or a party opposing intervention or joinder of such a person, may contest the decision of the trial court allowing or denying intervention or joinder by taking an interlocutory appeal to the court of appeals district in which the trial court is located, under the procedures established for interlocutory appeals.

The venue statute requires the appeal to be perfected within twenty days of the signing of the order allowing or denying intervention or joinder. A number of appeals court cases offer interpretations of the interlocutory appeals provision of the venue statute. For instance, *Abel v. Surgitek*, 997 S.W.2d 30 (Tex. App.--San Antonio 1999), *rev’d on other grounds*, 997 S.W.2d 598 (Tex. 1999), held that a trial-court decision to transfer venue was not subject to an interlocutory appeal under § 15.003. The court held that the statute allows for interlocutory appeals for some joinder or intervention decisions, which are to be reviewed under a *de novo* standard. Similarly, *Shurert v. J.C. Penney*, 956 S.W.2d 634 (Tex. App.--Texarkana 1997, no writ), also dismissed a suit for lack of jurisdiction. The trial court granted J.C. Penney’s motion to transfer venue in a case alleging that the company made a concerted effort not to remedy construction problems that were allegedly giving plaintiffs respiratory problems. Like the court in *Surgitek*, the court in *Shurert* held that motions to transfer venue were not subject to interlocutory appeal, and thus, that the court lacked jurisdiction to hear the case.

A recent Texas Supreme Court case further clarified the § 15.003 venue provisions. In *American Home Products Corp. v. Clark*, 38 S.W.3d 92 (Tex. 2000), the Court explained that, if a trial court determines that venue is proper

under § 15.002, even if such determination proves erroneous, a party may not appeal interlocutorily under § 15.003(c). The divided Court embraced the general rule that a party may undertake an appeal under § 15.003(c) for only one purpose: “to contest the trial court’s decision allowing or denying intervention or joinder.” By that rationale, the Court determined that neither the courts of appeals nor the Supreme Court maintain jurisdiction over an interlocutory appeal to review a trial-court ruling that a plaintiff properly established venue under § 15.002.

The *Clark* ruling recently encouraged the Fort Worth appellate court to dismiss an interlocutory appeal under § 15.003(c) because the trial court’s order specifically stated that “venue is proper in Tarrant County under Section 15.002(a)(1) of the Texas Civil Practice and Remedies Code.” *Electronic Data Sys. Corp. v. Pioneer Elec.*, 68 S.W. 3d 254, 259 (Tex. App.--Fort Worth 2002, no pet.). The appellate court ruled that the trial court’s determination of the propriety of the plaintiff’s venue deprived the reviewing court of its jurisdiction over the appeal.

D. Order Setting Bond in Tax Lawsuit.

Under TEX. GOV’T CODE § 1205.105. (formerly TEX. REV. CIV. STAT. art. 717M-1 § 9), an order fixing the amount of a bond to be paid by a party to a lawsuit to prohibit a governmental taxing authority from issuing bonds is an appealable interlocutory order. In *Bucholts Ind. School Dist. v. Glaser*, 632 S.W.2d 146 (Tex. 1982), several taxpayers in a school district sued to have a school bond declared invalid under the Election Code. The trial court, pursuant to the old article 717M-1 § 9, ordered the plaintiffs to pay a bond to cover the cost of damages that might accrue while the case was pending. The plaintiffs failed to pay the bond, and the trial court dismissed the action. The plaintiffs appealed to the Texas Supreme Court. The Court held that the statutory requirement of placing a bond in a tax lawsuit was constitutional. The bond requirement did not deny the plaintiffs a trial on the merits, the court reasoned; it only required them to put up an amount sufficient to cover the expected damages caused by their suit, in the event that they lost. The Court found no procedural or substantive

due-process violation in this rule.

E. Election Contests.

TEX. ELEC. CODE §§ 232.014(b) and 232.015 allow for an interlocutory appeal from a primary election contest, and from a general or special election. The appeal must be perfected within five days of the trial court’s ruling. In two illustrative decisions, the Texas Supreme Court granted mandamus relief to candidates seeking to compel the Secretary of State to perform a nondiscretionary duty. *Davis v. Taylor*, 930 S.W.2d 581 (Tex. 1996) involved Rex Davis, who was appointed in May 1996 to fill a the chief-justice vacancy in the 10th District Court. Chief Justice Davis was to be the Republican Party’s nominee for the judicial seat during the next general election, but the party failed to certify the Justice’s nomination to the Secretary of State by the required deadline. The Secretary of State refused to accept a late certification, and Chief Justice Davis sought mandamus relief to compel his candidate certification by the Secretary. The Texas Supreme Court granted the Chief Justice’s mandamus request and ordered the Secretary of State to certify him as a candidate. The Court reasoned that, in like prior cases, it had refused to require strict compliance with statutory deadlines where the candidate is otherwise entitled to a place on the ballot. Mandamus also was granted in part because the candidate’s elimination from the race was due to the failure of an official to perform a nondiscretionary duty through no fault of the candidate’s own.

In *Bird v. Rothstein*, 930 S.W.2d 586 (Tex. 1996) an incumbent Republican State Representative withdrew from the race for his reelection after he was nominated by his party, in order to seek higher office. The withdrawal entitled the Democratic Party to nominate someone for the open House seat, and the party picked Phil Bird. However, the party failed to timely deliver the certification to the Secretary of State. Candidate Bird sought mandamus relief from the Texas Supreme Court to compel the Secretary of State to certify his candidacy. The Supreme Court granted relief because the candidate met all the other requirements for certification and because the certification was sent

to the Secretary of State before the Secretary's own deadline to certify candidates.

However, the unpublished decision in *Shull v. Bexar County*, No. 04-99-00286, 2000 WL 5251 (Tex. App.--San Antonio Jan. 5, 2000), failed to provide the same outcome for the election challenger. *Shull* involved a 1996 candidate for the Republican nomination for a congressional seat. Because of the Republican primary votes, Shull and another individual faced a run-off election. Shull lost the run-off, and afterwards, sued Bexar County, its election committee, the county elections director, and the local district attorney, asserting fifteen claims in total. Various orders and judgments from the trial court disposed of all of Shull's claims, and on December 22, 1997, the trial court signed the order rendering Shull's election contest moot. The court entered its final judgment on October 1, 1998, making the order final. Shull filed his appeal on October 29, 1998. Because the filing occurred twenty-three days late, the Court of Appeals dismissed Shull's election-contest claim for lack of jurisdiction.

F. Mental Health Commitments.

TEX. HEALTH & SAFETY CODE § 574.070(b) provides for interlocutory appeals from orders requiring mental health services. Notice of appeal must be signed within ten days of the signing of the mental health order. Similarly, § 81.191(b) of the Health and Safety Code provides for the interlocutory appeal of orders managing a person with a communicable disease, with notice of appeal required within ten days of issuance of the order.

Despite the ten-day window articulated in section 574.070(b), recent court decisions indicate that extensions may be allowed for appeals to temporary-commitment orders. Although the section itself fails to provide for an extension of the deadline, the Dallas Court of Appeals recently read the appellate rules as providing flexibility for such an extension. *In re J.A.*, 53 S.W.3d 869 (Tex. App.--Dallas 2001, no pet.). The court noted that the First District in Houston had concluded that the extension provisions of Rule 26.3 of the Texas Rules of Appellate Procedure apply to temporary-commitment appeals. *See*

Johnstone v. State, 988 S.W.2d 950, 956 (Tex. App.--Houston [1st Dist.] 1999), *rev'd on other grounds*, 22 S.W.3d 408 (Tex. 2000) (per curiam).

Johnstone v. State involved an individual who filed his notice of appeal twenty days after the commitment order was entered, along with a Rule 26.3 request in the Houston Court of Appeals to file a late notice of appeal. 988 S.W.2d at 956. Although the Supreme Court failed to address the Rule 26.3 issue when it reversed the Houston Court, the *J.A.* court noted that the fact that the high court reached the merits of *Johnstone* suggested that the Supreme Court concluded that it had jurisdiction over that appeal. As the Dallas Court explained, because *Johnstone* filed his appeal ten days after the window allowed under § 574.070(b), the only way the Supreme Court could have acquired jurisdiction was if it concluded that Rule 26.3's extension provisions applied. *In re J.A.*, 53 S.W.3d at 871. As such, the Dallas Court of Appeals adopted the general rule that the extension provisions of Rule 26.3 apply to appeals of temporary-commitment orders.

G. Motor Vehicle Licensee Suits

TEX. OCC. CODE § 2301.756 (formerly TEX. REV. CIV. STAT. art. 4413(36), § 6.06(g)) provides:

“(a) A writ of error is allowed from the supreme court for an appeal of an interlocutory order described by Section 51.014(a)(3) or (6), Civil Practice and Remedies Code, in a civil action involving a license holder.

(b) The supreme court shall give precedence to a writ of error under this section over other writs of error.

(c) The right to appeal by writ of error is without prejudice to the right of any party to seek relief by an application for leave to file a petition for writ of mandamus with respect to the order.”

Thus, class-action suits and suits involving a Free Speech defense (if you can imagine one) against motor-vehicle dealers and licensees have the added right of appeal from the Court of Appeals to the Texas Supreme Court. One such class-action case, *Ford Motor Co. v. Sheldon*, involving a DTPA class action (bad paint job on certain

Ford Broncos against Ford and its Texas dealerships) upheld a challenge to the constitutionality of this provision. The Austin Court determined, in the initial interlocutory appeal, that the trial court did not impermissibly bifurcate trial by separating the trial into a class action to jointly try common class issues of whether an automobile manufacturer's paint process was defective. 965 S.W.2d 65 (Tex. App.--Austin, 1998).

The plaintiffs challenged the defendant's ability to appeal to the Supreme Court, but the Supreme Court upheld the interlocutory appeal:

Before reaching the merits of this appeal, we must first consider Purchasers' contention that this Court lacks jurisdiction. Beginning in 1985, the Legislature provided for interlocutory review of the grant or denial of class certification under Rule 42, but only to the courts of appeals. This Court had authority to review such judgments of the courts of appeals only if jurisdiction was otherwise established under Section 22.001(a)(1) or (2) of the Texas Government Code. Thus, we have dismissed most attempts to secure Supreme Court review of class certification for want of jurisdiction.

Ford urges jurisdiction under Section 6.06(g) of the Texas Motor Vehicle Commission Code, recently enacted in 1997, which allows this Court to review a court of appeals' decision about the grant or denial of class certification involving a motor vehicle licensee even in the absence of a conflict or dissent. Purchasers concede that Section 6.06(g) vests this Court with jurisdiction, but they claim the statute is unconstitutional because it violates the prohibition against special laws, denies equal protection of the laws, and has an insufficient title.

Article III, Section 56 of the Texas Constitution prohibits the Legislature from enacting a special law "[r]egulating the practice or jurisdiction of ... any judicial proceeding or inquiry before courts."

* * *

We conclude that there is a reasonable basis for distinguishing class actions involving motor vehicle licensees from other class actions and that Section 6.06(g) operates equally on all within the class. First, "[a] statute is not local or special ... if it operates on a subject in which people at large are interested."

Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 449-51 (Tex. 2000).

