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MANDAMUS DECISIONS OF THE TEXAS SUPREME COURT[1]

*Douglas S. Lang**
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I. INTRODUCTION

MANDAMUS relief is available when a party demonstrates that a lower court abused its discretion in making its decision and that party has no adequate remedy by appeal. This article analyzes, categorizes, and summarizes eighteen mandamus opinions written by the Texas Supreme Court between November 1, 2009 and December 31, 2010 and demonstrates how, in each case, the supreme court addressed the proof required to obtain mandamus relief. Further, this article particularly focuses on the Texas Supreme Court's treatment of the second, somewhat ephemeral element of mandamus—that the appellate remedy is inadequate.[2] There are no clear and hard rules in the process of determining whether an appellate remedy is adequate. Rather, it re-

1. Note that the Survey period for this edition of the Texas Survey is November 1, 2009 through September 30, 2010. We determined, however, the opinions released through December 31, 2010 were instructive and informative in demonstrating the court's approach to mandamus.

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2. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004). The classic language for the second element of the mandamus test is that "persons seeking mandamus relief [must] establish the lack of an adequate appellate remedy . . . ." Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992). In *Prudential*, the court used the phrase "no adequate remedy by appeal." *Prudential*, 148 S.W.3d at 135–36. The case law cited in this article uses other, slightly different language, including "appeal is not adequate" and "no adequate remedy at law." *In re* ENESCO Offshore Int'l Co., 311 S.W.3d 921, 923 (Tex. 2010) (per curiam); *In re* Daredia, 317 S.W.3d 247, 250 (Tex. 2010) (per curiam) (orig. proceeding). However, as is apparent in Part IV of the Survey there is no difference in meaning between the phrases. *See* discussion *infra* Part IV.

quires a "careful balance of jurisprudential considerations."[3]

The statistics on mandamus petitions filed or addressed during 2010 demonstrate that mandamus relief is reserved by the court as an extraordinary remedy.[4] In 2010, the supreme court issued sixteen opinions covering twenty petitions for writ of mandamus.[5] Of those cases, oral argument was heard in only four cases.[6] One of those oral arguments covered four consolidated writs.[7] Broader statistics on the volume of mandamus cases evaluated and disposed of are only available for the supreme court's fiscal year, which runs from September 1st through August 31st.[8] Those figures, however, are instructive. During the 2010 fiscal year, 276 new petitions were filed with the court, while 288 cases were disposed.[9] Of the dispositions, 69% were denied and 10.4% were conditionally granted.[10]

The case of *In re Prudential Ins. Co. of America* set the current applicable standard for determining when an appellate remedy is adequate.[11] While the Texas Supreme Court in *Prudential* followed the basic, time-honored requirements for mandamus, the supreme court also announced a departure from the more "rigid rules" previously articulated in its 1992 *Walker v. Packer* opinion.[12] The supreme court declared the determination of whether an appellate remedy is adequate "is not an abstract or formulaic one; it is practical and prudential."[13] Finally, the supreme

3. *See Prudential*, 148 S.W.3d at 136 ("The operative word, 'adequate', [sic] has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts.")

4. *See id.* at 138 ("Mandamus . . . is an extraordinary remedy . . . .") (quoting Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993)).

5. *In re* Olshan Found. Repair Co., 328 S.W.3d 883 (Tex. 2010) (orig. proceeding) (covering four petitions); *In re* Scheller, 325 S.W.3d 640 (Tex. 2010) (orig. proceeding); *In re* 24R, 324 S.W.3d 564 (Tex. 2010) (orig. proceeding); *In re* B.T., 323 S.W.3d 158 (Tex. 2010) (orig. proceeding); *In re* Daredia, 317 S.W.3d 247 (Tex. 2010) (orig. proceeding); *In re* Merrill Lynch & Co., 315 S.W.3d 888 (Tex. 2010) (orig. proceeding); *In re* ENSCO Offshore Int'l Co., 311 S.W.3d 921 (Tex. 2010) (orig. proceeding): *In re* Odyssey Healthcare, Inc., 310 S.W.3d 419 (Tex. 2010) (orig. proceeding); *In re* John G. & Marie Stella Kenedy Mem'l Found., 315 S.W.3d 519 (Tex. 2010) (orig. proceeding) (covering two petitions); *In re* Lisa Laser USA, Inc., 310 S.W.3d 880 (Tex. 2010) (orig. proceeding); *In re* Laibe Corp., 307 S.W.3d 314 (Tex. 2010) (orig. proceeding); *In re* United Servs. Auto Ass'n, 307 S.W.3d 299 (Tex. 2010) (orig. proceeding); *In re* Columbia Med. Ctr. of Las Colinas, 306 S.W.3d 246 (Tex. 2010) (orig. proceeding); *In re* ADM Investor Servs., Inc., 304 S.W.3d 371 (Tex. 2010) (orig. proceeding); *In re* Columbia Valley Healthcare Sys., 320 S.W.3d 819 (Tex. 2010) (orig. proceeding); *In re* United Scaffolding, Inc., 301 S.W.3d 661 (Tex. 2010) (orig. proceeding).

6. *In re Columbia Valley*, 320 S.W.3d; *In re Kenedy Mem'l Found.*, 315 S.W.3d; *In re Olshan*, 328 S.W.3d; *In re United Servs.*, 307 S.W.3d.

7. *In re Olshan*, 328 S.W.3d.

8. *See generally* SUPREME COURT ACTIVITY, http://www.courts.state.tx.us/pubs/AR2010/sc/2-sc-activity.pdf (last visited Mar. 31, 2011).

9. *Id.* at 2.

10. *Id.* at 3.

11. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding).

12. *Id.* at 136.

13. *Id.*

court concluded: "An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate."[14]

In Part II of this article, The Basics of Mandamus, we describe the mandamus jurisdiction of Texas appellate courts and the standard of proof a petitioner must meet in order to obtain relief. This foundation will facilitate a better understanding of the Texas Supreme Court mandamus opinions on which we focus. In Part III of the article, Survey of Recent Supreme Court Mandamus Cases, we describe each of the eighteen mandamus opinions issued during the survey period. The description of each case provides a basis for comparison of the court's treatment regarding the standard of proof for particular subjects. Finally, in Part IV, The Texas Supreme Court's Treatment of the "Adequacy" Requirement, we address the methods the supreme court used to analyze the adequacy of appellate remedy. The supreme court's analysis of this mandamus element ranges from a detailed analysis, to conclusory statements, to no reference at all. Regardless of how the supreme court addresses this "adequacy" element, we conclude that mandamus remains an extraordinary and sparingly granted remedy.

II. THE BASICS OF MANDAMUS

Before embarking on a survey of the Texas Supreme Court's mandamus decisions in late 2009 and 2010, we first describe briefly the statutory jurisdiction and requisite proof of this "extraordinary remedy"[15] for "review of significant rulings in exceptional cases . . . ."[16] Although this discussion will not cover Rule 52 of the Texas Rules of Appellate Procedure, a party seeking mandamus relief must recognize that Rule 52 is to be strictly followed.[17] For example, defects in the petition's form may lead to summary dismissal.[18] A court may similarly deny relief to a party that fails to properly authenticate evidence offered in support of its petition.[19]

A. Statutory Jurisdiction for Mandamus

The statutory jurisdiction over writs of mandamus is rooted in sections of the Texas Constitution and Texas Government Code, as well as other

14. *Id.*

15. Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993) ("Mandamus is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court.").

16. *Prudential*, 148 S.W.3d at 136.

17. *See* Tex. R. App. P. 52; *see, e.g.*, *In re* Butler, 270 S.W.3d 757, 758–59 (Tex. App.—Dallas 2008, orig. proceeding).

18. *See Butler*, 270 S.W.3d at 758 (petition for writ of mandamus was denied because, *inter alia*, the petition was not properly certified in accordance with Tex. R. App. P. 52.3(j)).

19. *See, e.g.*, *In re* Cullar, 320 S.W.3d 560, 567–68 (Tex. App.—Dallas 2010, orig. proceeding)

statutes.[20] Each of Texas's fourteen appellate courts "may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court."[21] The courts of appeals may additionally issue writs of mandamus respecting a "(1) judge of a district or county court in the court of appeals district; or (2) judge of a district court who is acting as a magistrate at a court of inquiry under Chapter 52, Code of Criminal Procedure, in the court of appeals district."[22] Similarly, the Texas Supreme Court has mandamus jurisdiction respecting county and district court judges.[23] Only the supreme court may issue writs of mandamus respecting Texas executive offices or to "compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform."[24] While the Texas Supreme Court and courts of appeals have concurrent jurisdiction over trial courts, the supreme court has the final word because it may issue writs as to rulings of the courts of appeals.[25]

B. MANDAMUS STANDARD OF PROOF

Generally, there are two categories of cases where a party may obtain mandamus relief. First, relief may be sought respecting a ministerial act of a court or an official.[26] A party must meet three requirements to receive this type of mandamus relief: (1) "a legal duty to perform a nondiscretionary act," (2) "a demand for performance," and (3) "a refusal [to act]."[27] The second type of mandamus relief (which is the focus of this Survey) may be available respecting actions of a court to correct a clear abuse of discretion when there is no adequate remedy by appeal.[28] In

20. *See* TEX. CONST. art. V, §§ 1, 3, 6; TEX. GOV'T CODE ANN. § 22.002 (West 2011); TEX. GOV'T CODE ANN. § 22.221 (West 2011); TEX. ELEC. CODE ANN. § 273.061 (West 2010).

21. TEX. GOV'T CODE ANN. § 22.221.

22. *Id.*; *see also* TEX. ELEC. CODE ANN. § 273.061 (courts of appeals have jurisdiction to consider a petition for "writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election . . . regardless of whether the person responsible for performing the duty is a public officer"); *see also* TEX. CONST. art V, § 6 (addressing judicial power of Texas courts and providing courts of appeals shall have "jurisdiction, original and appellate, as may be prescribed by law").

23. TEX. GOV'T CODE ANN. § 22.002(c).

24. *Id.*

25. *See id.* § 22.002.

26. *See, e.g.*, De Leon v. Aguilar, 127 S.W.3d 1, 2, 5 (Tex. Crim. App. 2004) (mandamus relief sought in criminal case to compel the trial judge to either recuse himself "or to refer [the] recusal motions for another judge to decide"); *see also* O'Connor v. First Ct. App., 837 S.W.2d 94, 95 (Tex. 1992) (orig. proceeding) (member of the court of appeals sought mandamus to compel the court of appeals to direct its clerk to file her dissent regarding the court's decision to refuse hearing a case en banc); *In re* Cullar, 320 S.W.3d 560, 562 (Tex. App.—Dallas 2010, orig. proceeding) (mandamus sought to compel party officials to remove allegedly disqualified nominee); *In re* Cercone, 323 S.W.3d 293, 294 (Tex. App.—Dallas 2010, orig. proceeding) (mandamus sought to compel party official not to certify a candidate and to order election official not place candidate on the ballot).

27. *O'Connor*, 837 S.W.2d at 97; *Cullar*, 320 S.W.3d at 564; *Cercone*, 323 S.W.3d at 297.

28. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

light of our focus on the supreme court's treatment of the adequacy of the appellate remedy test, we will briefly address the history of this standard.

From at least 1992 to 2004, appellate courts evaluated the adequacy of a petitioner's appellate remedy by a somewhat "rigid" rule.[29] However, in the 2004 case of *Prudential*, the Texas Supreme Court adopted a more flexible approach.[30] Specifically, the supreme court granted mandamus relief to enforce a jury waiver using a less "rigid," and more "practical and prudential" approach.[31] According to the supreme court: "The operative word, 'adequate', has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts."[32] Furthermore, the relevant "considerations implicate both public and private interests."[33] In describing the supreme court's shift away from the more "rigid" approach in *Walker*, the *Prudential* opinion stated:

> [A]lthough this Court has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue. Thus, we wrote in *Walker v. Packer* that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ." While this is certainly true, the word "merely" carries heavy freight.[34]

The supreme court continued, saying that "whether an appellate remedy is 'adequate' so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules."[35]

Even though the rule stated in *Prudential* was to be less "rigid," the supreme court appears to apply a somewhat "rigid" approach in evaluating the adequacy of the appellate remedy where mandamus is sought to vacate a lower court's order compelling arbitration.[36] One example is the 2009 case of *In re Gulf Exploration*.[37] There, the Texas Supreme Court granted mandamus relief and ordered the court of appeals to vacate its

29. *See Prudential*, 148 S.W.3d at 136–37 (describing the supreme court's treatment of petitions for writ of mandamus following *Walker*).

30. *See id.* at 136.

31. *Id.* at 136, 139.

32. *Id.* at 136.

33. *Id.*

34. *Id.* (internal citations omitted).

35. *Id.* at 137. "Mandamus review of *significant rulings in exceptional cases* may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate." *Id.* at 136 (emphasis added).

36. *See In re* Gulf Exploration, 289 S.W.3d 836, 843 (Tex. 2009).

37. *See id.* at 836.

order that a trial court reverse an order compelling arbitration.[38] The supreme court described the narrow availability of mandamus in this area, concluding a party seeking mandamus relief to set aside orders compelling arbitration under the Texas Arbitration Act "can rarely meet" the critical requirement for mandamus—that there is no adequate remedy by appeal—because an error in compelling arbitration can "be reviewed by final appeal."[39] The supreme court further noted that an incorrect order compelling arbitration may cause "the parties [to] waste time and money in arbitration. *Standing alone*, delay and expense generally do not render a final appeal inadequate."[40] The supreme court reasoned that the party could recover attorney fees and expenses incurred in arbitration after the appeal, should an appellate court determine a trial court erred in compelling arbitration.[41]

With this understanding of mandamus, we turn now to our survey of recent Texas Supreme Court mandamus cases.

III. SURVEY OF RECENT SUPREME COURT MANDAMUS CASES

The mandamus opinions issued by the Texas Supreme Court during the Survey period cover a wide range of topics such as arbitration, discovery, grandparent access, and more. This section briefly states the facts of each case and explains how the supreme court analyzed the adequacy of the party's appellate remedy. In Part IV, we highlight some trends and similarities across the opinions as to the supreme court's discussions of the adequacy of the appellate remedy.

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38. *Id.* at 843.

39. *See id.* at 842 (citing *In re* Palacios, 221 S.W.3d 564, 565 (Tex. 2006) (mandamus relief generally unavailable for orders compelling arbitration)).

40. *Id.* (emphasis added). One may question whether the "standing alone" language in *Gulf Exploration* is a return to the "merely" language in *Walker* that appeared to create a rigid standard, and from which the court appeared to move away in *Prudential*. *See In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). "[W]e wrote in *Walker v. Packer* that 'an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.' While this is certainly true, the word 'merely' carries heavy freight." *Id.* (citing Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992)). *See also In re* Merrill Lynch & Co., 315 S.W.3d 888, 893 (Tex. 2010) (per curiam) (orig. proceeding) (The preservation of arbitration rights demonstrated where mandamus imposed a stay of companion litigation because "[a]llowing [the] claims to proceed could moot the arbitration . . . and undermine Merrill Lynch's bargained-for arbitration rights."); *In re* Olshan Found. Repair Co., 328 S.W.3d 883, 888 (Tex. 2010) (orig. proceeding) (2010) (In concluding that error in refusing to compel arbitration must not await appellate review, the supreme court stated that "we have determined that relators have no adequate remedy by appeal when a trial judge erroneously refuses to compel arbitration under the FAA.").

41. *Gulf Exploration*, 289 S.W.3d at 842–43 ("[A]rbitration clauses are usually contractual.... A party that prevails on a contractual claim can recover its fees and expenses, even if they were incurred in collateral proceedings like arbitration.").

A. MANDAMUS AND ARBITRATION

1. Trial Court's Refusal to Compel Arbitration

The foundation for the Texas Supreme Court's recent cases in this area relates back to late 2009. In the case of *In re Golden Peanut Company, LLC*, the Texas Supreme Court granted mandamus where a trial court refused to compel arbitration in a wrongful death suit.[42] Here, a deceased employee of Golden Peanut Company "was a party to an employee benefit plan that contained an agreement to arbitrate" wrongful death claims against the company. His family sued Golden Peanut Company because the decedent received a fatal injury during the course of his employment. The trial court refused the company's motion to compel arbitration.[43] The Eastland Court of Appeals denied mandamus relief, concluding that because the decedent's family members were not signatories to the arbitration agreement, they were not bound by it.[44] During the period between the Eastland court's opinion and the supreme court's *Golden Peanut* decision, however, the supreme court concluded in *In re Labatt Food Service* that "a decedent's pre-death arbitration agreement binds his or her wrongful death beneficiaries because, under Texas law, the wrongful death cause of action is entirely derivative of the decedent's rights."[45] Consequently, in light of *Labatt*, the failure of the decedent-employee's family members to sign the arbitration agreement was not a bar to its enforcement.[46] Concluding that the trial court abused its discretion for denying the motion to compel arbitration, the supreme court analyzed the adequacy of Golden Peanut Company's appellate remedy by stating simply: "A party denied the right to arbitrate pursuant to an agreement subject to the FAA does not have an adequate remedy by appeal . . . ."[47] The same or similar brief, conclusory statement as to the adequacy of appellate remedy also appears in the 2010 arbitration mandamus cases discussed below.

In the case of *In re Odyssey Healthcare, Inc.*, the Texas Supreme Court granted mandamus relief after a trial court refused to compel arbitration in a negligence case.[48] In *Odyssey Healthcare*, an employee claimed the arbitration clause at issue was, among other things, substantively unconscionable.[49] The employee claimed in the trial court that arbitration in Dallas, hundreds of miles away from her home and workplace, would be prohibitively expensive. The trial court agreed, and the El Paso Court of

42. *In re* Golden Peanut Co., 298 S.W.3d 629, 630 (Tex. 2009) (per curiam) (orig. proceeding).
43. *Id.*
44. *Id.* at 630–31.
45. *Id.* at 631 (citing *In re* Labatt Food Serv., L.P., 279 S.W.3d 640, 646 (Tex. 2009) (orig. proceeding)).
46. *See id.* at 630–31.
47. *Id.* at 631 (citing L & L Kempwood Assocs., L.P., 9 S.W.3d 125, 128 (Tex. 1999)).
48. *In re* Odyssey Healthcare, Inc., 310 S.W.3d 419, 421 (Tex. 2010) (per curiam) (orig. proceeding).
49. *Id.* at 422.

Appeals denied Odyssey Healthcare's mandamus petition.[50] However, the supreme court reversed the court of appeals and concluded the employee "failed to establish that the arbitration clause [was] unconscionable."[51] While the arbitration clause did require the selection of arbitrators from a Dallas panel, it did not require the arbitration occur in Dallas.[52] The supreme court also observed the employee offered only conclusory assertions about her costs.[53] Accordingly, the supreme court determined the employee failed to meet her evidentiary burden of establishing the likelihood of incurring such costs by not providing "some specific information concerning those future costs."[54] Similar to the *Golden Peanut* decision, the supreme court simply includes in its opinion a brief, conclusory statement that "[m]andamus relief is appropriate because Odyssey has no adequate remedy by appeal."[55]

In the case of *In re 24R Inc.*, the Texas Supreme Court granted mandamus relief after a trial court denied a motion to compel arbitration in an employment discrimination case.[56] This case involved an age and disability discrimination suit by an at-will employee who signed multiple arbitration agreements during her fifteen-year tenure with The Boot Jack.[57] The company moved the trial court to compel arbitration pursuant to the parties' arbitration agreement. The trial court refused, and the Corpus Christi Court of Appeals denied mandamus relief.[58] The employee argued, *inter alia*, that the agreement was illusory, and therefore unenforceable because The Boot Jack retained the right to modify the agreement.[59] The two key documents at issue were an employee manual and the arbitration agreement.[60] In the employee manual, The Boot Jack reserved "the right to revoke, change or supplement guidelines at any time without notice."[61] Furthermore, the manual referenced the arbitration agreement by stating that "there are a number of The Boot Jack policies an applicant needs to understand and agree to before being employed, such as the Arbitration Policy."[62] The employee argued the modification language

50. *Id.* at 421–22.
51. *Id.* at 422.
52. *Id.*
53. *Id.*
54. *Id.* It is important to note this case arose from a motion to compel arbitration pursuant to the FAA. *Id.* at 421. After September 1, 2009, relief from denial of a motion to compel arbitration is no longer available by mandamus because there is an adequate remedy by appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (West 2011) (allowing for interlocutory appeals of orders denying arbitration pursuant to the FAA); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (appeal of order denying application to compel arbitration under section 171.021).
55. *Odyssey Healthcare*, 310 S.W.3d at 424 (citing *In re* Halliburton Co., 80 S.W.3d 566, 573 (Tex. 2002) (orig. proceeding)).
56. *In re* 24R Inc., 324 S.W.3d 564, 565 (Tex. 2010) (per curiam) (orig. proceeding).
57. *Id.* at 565–66.
58. *Id.* at 566.
59. *Id.*
60. *See id.* at 567.
61. *Id.*
62. *Id.*

from the manual also applied to the arbitration agreement, and thus the agreement was illusory.[63] The supreme court disagreed with the employee, stating that the two documents were entirely separate.[64] "Although language in the employee manual recognizes the existence of the arbitration agreement, this does not diminish the validity of the arbitration agreement as a stand-alone contract."[65] Consequently, the supreme court concluded that the trial court abused its discretion when it refused to compel arbitration.[66] Similar to *Odyssey Healthcare*, the supreme court briefly addressed the adequacy of The Boot Jack's appellate remedy stating that "[m]andamus relief is appropriate because The Boot Jack has no adequate remedy by appeal."[67]

In its final arbitration-related opinion of 2010, the Texas Supreme Court decided four cases in a consolidated opinion entitled *In re Olshan Foundation Repair Co.*[68] Each case involved the allegedly faulty residential foundation repair completed by Olshan Foundation Repair Company (Olshan) for four different Texas homeowners.[69] Three homeowners signed contracts containing arbitration clauses that stated "any dispute . . . shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association [ ] *pursuant to the arbitration laws in your state* . . . ."[70] The fourth family's agreement was nearly identical, except that the arbitration would be administered "*pursuant to the Texas General Arbitration Act.*"[71] In each case, Olshan asked the respective trial courts to compel arbitration pursuant to these clauses; and in each case the trial courts denied the motion.[72] The key issue before the supreme court was whether these choice of law provisions invoked the Texas Arbitration Act ("TAA").[73] Under the TAA, the arbitration agreements would be unenforceable because they were unsigned by the homeowners' legal counsel.[74] In the three cases where the agreements stated arbitration would be governed "pursuant to the arbitration laws in your state," the court concluded they did not invoke the Texas Arbitration Act.[75] "Courts rarely read such general choice-of-law provisions to

63. *Id.*

64. *See id.* at 568.

65. *Id.*

66. *Id.*

67. *Id.* (citing *In re* Odyssey Healthcare, Inc., 310 S.W.3d 419, 424 (Tex. 2010) (per curiam) (orig. proceeding)).

68. *In re* Olshan Found. Repair Co., 328 S.W.3d 883, 885 (Tex. 2010).

69. *Id.*

70. *Id.* at 886–87.

71. *Id.* at 887.

72. *Id.*

73. *See id.* at 888.

74. *Id.* at 887–88. Under the TAA, an arbitration agreement for services of $50,000 or less, must be signed by each party's attorney (among other requirements). *Id.* at 888 (citing TEX. CIV. PRAC. & REM. CODE § 171.002(a)(2)). None of the agreements in *Olshan* were signed by the respective families' attorneys. *Id.* at 887.

75. *Id.* at 890.

choose state law to the exclusion of federal law."[76] Additionally, the supreme court concluded that agreements in these three cases were not unconscionable for being prohibitively expensive as argued by the homeowners.[77]Consequently, the supreme court concluded that the trial courts erred by declining to compel arbitration as requested by Olshan.[78] In contrast, in the one case where the arbitration agreement explicitly invoked the TAA, the supreme court concluded the agreement was unenforceable under the Act because the homeowner's attorney did not sign the arbitration agreement as required by statute.[79] Similar to the other arbitration-related mandamus opinions during the Survey period, the supreme court made a brief, conclusory statement that in the three cases where the FAA applied, the appellate remedy was inadequate.[80] Specifically, the supreme court stated that "we have determined that relators have no adequate remedy by appeal when a trial judge erroneously refuses to compel arbitration under the FAA."[81]

2. *Abating Litigation Pending Outcome of Related Arbitration*

In the case of *In re Merrill Lynch & Co.*, two affiliated corporations sued Merrill Lynch with identical statutory and common law securities claims.[82] One plaintiff, MetroPCS Wireless, Inc. (Wireless), was a signatory to an arbitration agreement with Merrill Lynch, while the other plaintiff, MetroPCS Communications, Inc. (Communications), was not. Merrill Lynch moved to compel arbitration and requested a stay of litigation while arbitration with Wireless was pending. The trial court compelled arbitration for Wireless's claims, but refused to stay the companion litigation during the pendency of arbitration.[83] The court of appeals refused mandamus relief compelling the trial court to grant the stay.[84] The Texas Supreme Court conditionally granted mandamus based upon its earlier decision, *In re Merrill Lynch Trust Co.*, that addressed a similar

76. *Id.* (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59 (1995) and *In re* L & L Kempwood Assoc., L.P., 9 S.W.3d 125, 127 n.16 (Tex. 1999)).

77. *Id.* at 891. The homeowners argued that the American Arbitration Association charged fees that were so excessive, the parties would be unable to "vindicate their claims." *Id.* However, the supreme court concluded they did not meet their burden to provide "legally sufficient evidence that such fees [would] prevent the homeowners from effectively pursuing their claim in the arbitral forum." *Id.* at 897.

78. *Id.* at 899. The three families also argued the arbitration agreements were unconscionable because Olshan violated the Texas Home Solicitation Act. *Id.* at 897–98. The court declined to grant relief on this ground because "a trial court 'may consider only issues relating to the making and performance of the agreement to arbitrate'" and the decision of whether the agreements were void on this ground should be decided in arbitration. *Id.* at 898 (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967)).

79. *Id.* at 891.

80. *Id.* at 886–87.

81. *Id.* (citing *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 753 (Tex. 2001)).

82. *In re* Merrill Lynch & Co., 315 S.W.3d 888, 889 (Tex. 2010) (per curiam).

83. *Id.* at 890.

84. *Id.*

fact situation.[85] In the *Trust* case, the supreme court granted mandamus relief to stay collateral litigation "to ensure that an issue two parties have agreed to arbitrate is not decided instead in collateral litigation."[86] In that case, the supreme court reasoned that "when an issue is pending in both arbitration and litigation . . . arbitration 'should be given priority to the extent it is likely to resolve issues material to [that] lawsuit.'"[87]

In the 2010 *Merrill Lynch* opinion, the supreme court did not specifically address the issue of adequacy of remedy by appeal. However, the court did note: "Allowing [the non-signatories'] claims to proceed could moot the arbitration between [the signatory] and Merrill Lynch and undermine Merrill Lynch's bargained-for arbitration rights."[88] Although the supreme court did not articulate precisely how the arbitration agreement may be mooted in the 2010 case, the court did analyze the mootness issue in the *Trust* case.[89] There, the supreme court cited a federal case that required arbitration to proceed first while litigation was stayed, and noted the following observation from a federal court:

> [There] are cases in which a party to an arbitration agreement, trying to get around it, sues not only the other party to the agreement but some related party with which it has no arbitration agreement, in the hope that the claim against the other party will be adjudicated first and have preclusive effect in the arbitration. Such a maneuver should not be allowed to succeed . . . [and] would require the court to stay the proceedings before it and let the arbitration go forward unimpeded.[90]

Although the supreme court did not specifically discuss the lack of an adequate remedy in *Merrill Lynch*, the *Merrill Lynch* and *Trust* opinions together demonstrate there is no adequate remedy by appeal for the facts described.

B. Mandamus and the Granting of a New Trial

1. *Trial Court Must State Specific Grounds in Order Granting a New Trial*

In the case of *In re United States Scaffolding, Inc.*, the Texas Supreme Court conditionally granted a petition for writ of mandamus and directed a trial court to specify its reasons for setting aside a jury verdict and granting a new trial.[91] The decision was based on *In re Columbia Medical Center of Las Colinas, Subsidiary, L.P.*, a 2009 Texas Supreme Court de-

85. *Id.* at 891, 893 (citing *In re* Merrill Lynch Trust Co., 235 S.W.3d 185, 188 (Tex. 2007)).
86. *Id.* at 892 (quoting *Merrill Lynch Trust*, 235 S.W.3d at 196)).
87. *Id.* at 891 (quoting *Merrill Lynch Trust*, 235 S.W.3d at 195)).
88. *Id.* at 893.
89. *Merrill Lynch Trust*, 235 S.W.3d at 195.
90. *Id.* (quoting IDS Life Ins. Co. v. SunAmerica, Inc., 103 F.3d 524, 530 (7th Cir. 1996)).
91. *In re* United Scaffolding Inc., 301 S.W.3d 661, 663 (Tex. 2010) (per curiam) (orig. proceeding).

cision where the supreme court concluded that a trial court abused its discretion by disregarding a jury verdict and granting a new trial "in the interest of justice and fairness."[92] In *Columbia*, the supreme court held a trial court abuses its discretion if it disregards a jury verdict and grants a new trial but does not specifically set out its reasons.[93] In deciding *United Scaffolding*, the supreme court rejected, without comment, the contentions of the real party in interest that (1) mandamus is not the proper vehicle to implement the change that would require trial judges to specify reasons for granting a new trial, and (2) the benefits of a prompt retrial outweigh the detriments of interlocutory appellate review.[94] The *United Scaffolding* opinion included only a brief statement in its holding that "United does not have an adequate appellate remedy" but did not discuss the facts or reasons why an appeal was inadequate.[95]

2. *Granting a New Trial After the Expiration of Plenary Power*

The case of *In re Daredia* involved a default judgment for unpaid credit card accounts that was set aside after the trial court's plenary power expired.[96] At the plaintiff's request, the trial court signed a default judgment against a corporate defendant that failed to answer.[97] An individual defendant had answered at that time. The language of the judgment submitted by the plaintiff, however, stated judgment by default was granted against the corporate defendant and the individual defendant was not mentioned. Additionally, the judgment contained the following language: "All relief not expressly granted herein is denied. This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL."[98] Fifteen months later, the plaintiff recognized it had no judgment against the individual defendant and "moved for judgment nunc pro tunc to correct what it called 'typographical errors on behalf of the attorney in charge', who 'should have used the word "Interlocutory" in both the motion and judgment.'"[99] The trial court granted the motion despite the individual defendant's arguments that the judgment was final and that the court no longer had plenary power over the matter.[100] The court of appeals refused mandamus relief sought by the individual defendant to set aside the judgment *nunc pro tunc*.[101] The court concluded the judgment was "ambiguous on its face" because it did not address the claim against the individual defendant, thus it was interlocutory and the

92. *Id.* at 662 (citing *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204 (Tex. 2009)).
93. *Columbia Med. Ctr.*, 290 S.W.3d at 207.
94. *Id.* at 215–16, 219–20 (O'Neill, J., dissenting) (these contentions were previously advanced by the dissent in *Columbia*).
95. *United Scaffolding*, 301 S.W.3d at 663.
96. *In re* Daredia, 317 S.W.3d 247, 250 (Tex. 2010) (per curiam).
97. *Id.* at 248.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

trial court retained jurisdiction.[102] However, the Texas Supreme Court conditionally granted mandamus relief concluding the trial court abused its discretion when it set aside a default judgment after its plenary power expired.[103] Citing the seminal case of *Lehmann v. Har-Con Corp.*, the supreme court concluded the judgment was not "ambiguous" and was not an interlocutory judgment because the language of the judgment unequivocally indicated that it was a final judgment, despite its failure to mention the individual defendant's name.[104] The supreme court determined "that the trial court clearly abused its discretion in setting aside a judgment after its plenary power expired."[105] The supreme court then stated, without elaboration, that the individual defendant had "no adequate remedy at law."[106]

C. Mandamus and Discovery

The case of *In re Deere & Co.* arose from a discovery dispute.[107] The underlying case was a products liability suit between Arturo Martinez and Deere & Company for injuries Martinez experienced after falling under a Deere & Company backhoe loader. Claiming a step on the backhoe broke under his weight while it was moving, Martinez requested Deere & Company produce "all [non-governmental] documents of customer complaints received by [Deere] relative to the sidestep on any model backhoe."[108] Deere & Company objected, and at a hearing the parties agreed to narrow the scope of the request to "documents relating to models with similar handles and step assemblies, and only going back approximately 12 to 15 years."[109] Yet, the order submitted by Martinez was much broader in scope and included over thirty product lines with no time limit on their manufacture date. After hearing Deere's objections to the order, the trial court signed the original order.[110] The Texas Supreme Court concluded that absence of a "reasonable time limit" made the order overly broad and thus was an abuse of discretion.[111] Aside from stating the general rule that a party seeking mandamus must have no adequate remedy by appeal, however, the court did not discuss the adequacy of Deere's appellate remedy.[112] The court stated, "An order that compels overly broad discovery is an abuse of discretion for which man-

102. *Id.*
103. *Id.* at 250.
104. *Id.* at 249 (citing Lehmann v. Har-Con Corp., 39 S.W.3d 191, 205 (Tex. 2001)).
105. *Id.* at 250.
106. *Id.* (citing *In re* Dickason, 987 S.W.2d 570, 571 (Tex. 1998) and *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136–37 (Tex. 2004)).
107. *In re* Deere & Co., 299 S.W.3d 819, 820 (Tex. 2009) (per curiam).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 820–21. "Discovery orders requiring production from an unreasonably long period . . . are impermissibly overbroad." *Id.* (quoting *In re* CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003)).
112. *See id.* at 820.

damus is the proper remedy."[113]

D. Mandamus and the Absence of Jurisdiction

1. A Void Order in Probate Court

In the case of *In re John G. and Marie Stella Kenedy Memorial Foundation*, the Texas Supreme Court embarked on a complex analysis of a probate court's lack of jurisdiction. Because the probate court's order was void, the court concluded that the law did not require the relators to demonstrate the lack of an adequate appellate remedy.[114] The supreme court granted mandamus relief ordering a probate court to vacate its orders relating to exhumation of a decedent's body.[115] Claiming to be a decedent's non-marital child, Ann Fernandez filed a bill of review in the probate court asserting her alleged father's "will did not dispose of his real property" and "she [was] entitled to recover her intestate share."[116] She also filed three district court bills of review making her claims to heirship and seeking to set aside a "decades-old judgment."[117] The probate court granted Fernandez's motion to exhume decedent's body for DNA testing. The court of appeals denied mandamus relief from that exhumation order.[118] The relators then filed a petition for writ of mandamus in the supreme court; that court granted a stay. In the meantime, the trial court granted summary judgment that Fernandez take nothing in one bill of review case where the judgment Fernendez attacked declared the decedent died testate with no surviving children.[119] The supreme court concluded that "[a]lthough the merits of the probate court bills of review . . . are not yet before us, we can conceive of no alternative means by which Fernandez might successfully attack the final district court judgment."[120] Because there was "no pending probate proceeding . . . the court lacked jurisdiction to enter any order other than to dismiss."[121] Consequently, the supreme court concluded that "the probate court's [ ] order was void" and "constituted an abuse of discretion, and mandamus relief is appropriate without a showing that the relators lack an adequate appellate remedy."[122]

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113. *Id.* (citing *In re* Graco Children's Prods., Inc., 210 S.W.3d 598, 600 (Tex. 2006) (per curiam)).

114. *In re* John G. & Marie Stella Kenedy Mem'l Found., 315 S.W.3d 519, 522 (Tex. 2010).

115. *Id.* at 523.

116. *Id.* at 520.

117. *Id.*

118. *Id.* at 521.

119. *Id.*

120. *Id.* at 522.

121. *Id.* (citing State v. Morales, 869 S.W.2d 941, 949 (Tex. 1994)).

122. *Id.* (citing *In re* Sw. Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000)).

2. *Denial of a Plea to Jurisdiction and a Motion for Summary Judgment*

In the case of *In re United Services Auto Association*, the Texas Supreme Court granted mandamus relief after a trial court denied a plea to jurisdiction and a motion for summary judgment.[123] An employee brought an action in Bexar County county court at law against his employer, claiming age discrimination pursuant to the Texas Commission on Human Rights Act (TCHRA). At that time, the jurisdiction of that county court included civil claims where "the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition."[124] The petition only alleged that the damages exceeded the $500 statutory minimum, but omitted the statement required by Texas Rules of Civil Procedure 47(b) that the "damages sought are within the jurisdictional limits of the court . . . ."[125] In light of the fact that the employee's salary during discharge was almost $74,000 and he alleged, among other things, his loss of income and benefits would continue in the future if not for the rest of his life, the employer filed a plea to the jurisdiction claiming the suit sought damages above the statutory jurisdiction of the court. After the trial court denied the plea, the employee amended his petition alleging $1.6 million in damages.[126] The court tried the case and the jury awarded actual damages aggregating over $500,000.[127] The employer appealed and the court of appeals affirmed, but the supreme court reversed and dismissed the suit, ruling that the amount in controversy at the time the employee filed suit exceeded the jurisdictional limits of the court.[128]

The employee refiled his claim in the district court and the employer "filed a plea to jurisdiction and moved for summary judgment asserting" that the two-year statute of limitations had run.[129] The employee responded, arguing section 16.064 of the Civil Practice and Remedies Code tolled the limitations period. The employer replied that the tolling statute was inapplicable because the first action was filed "with intentional disregard of proper jurisdiction."[130] "The trial court denied the plea and motion [for summary judgment]" and "[t]he court of appeals denied [mandamus] relief, concluding that [the employer] had not established that its appellate remedy was inadequate."[131]

In granting mandamus relief, the supreme court described the appropriate procedure for a trial court to determine whether a party filed a suit

123. *In re* United Servs. Auto. Ass'n., 307 S.W.3d 299, 305, 314 (Tex. 2010).
124. *Id.* at 304–05 (quoting TEX. GOV'T CODE ANN. § 25.0003(c)(1)).
125. *Id.* at 305, 312 (quoting TEX. R. CIV. P. 47(b)).
126. *Id.* at 305.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

with "intentional disregard" for the court's jurisdiction, so as to bar assertion of the tolling provision of section 16.064(a).[132] The supreme court stated, "Once an adverse party has moved for relief under the 'intentional disregard' provision, the nonmovant must show that he did not intentionally disregard proper jurisdiction when filing the case."[133] The supreme court also concluded, on the record before it, that even though the plaintiff "subjectively anticipated a verdict within the jurisdictional limits," he "unquestionably sought damages in excess of the [court's] jurisdiction."[134] The court stated the rule that "mandamus [relief] is generally unavailable when a trial court denies summary judgment . . . ."[135] However, the supreme court concluded the extraordinary circumstances on this record warranted mandamus relief because the employer had "already endured one trial in a forum that lacked jurisdiction . . . and is facing a second trial on a claim that we have just held to be barred by limitations. Two wasted trials are not '[t]he most efficient use of the state's judicial resources.'"[136] The supreme court continued by saying: "Denying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years . . . and we should not 'frustrate th[at] purpose[ ] by a too-strict application of our own procedural devices."[137]

E. Mandamus and Forum Issues

1. *Refusing to Enforce a Forum Selection Clause May Constitute an Abuse of Discretion*

In the case of *In re ADM Investor Services, Inc.*, the Texas Supreme Court conditionally granted mandamus relief after deciding a trial court abused its discretion by refusing to enforce a forum selection clause and dismissing the Texas suit.[138] In the trial court, one defendant sought dismissal based on a forum selection clause that provided for suit in Illinois. The trial court denied the motion to dismiss.[139] The court of appeals denied mandamus relief, concluding the defendant waived enforcement of the clause.[140] At the supreme court level, plaintiff asserted defendant demonstrated waiver by, *inter alia*, substantially invoking the judicial process to plaintiff's detriment when the defendant simultaneously filed an answer, a motion to transfer to another Texas county, and a motion to dismiss based on the clause. Additionally, the plaintiff claimed the defendant demonstrated waiver by waiting approximately three months to re-

132. *Id.* at 311–12.
133. *Id.* at 312.
134. *Id.* at 313.
135. *Id.* at 314.
136. *Id.* (quoting CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996)).
137. *Id.* (quoting *In re* McAllen Med. Ctr., Inc., 275 S.W.3d 458, 467 (Tex. 2008)).
138. *In re* ADM Investor Servs., Inc., 304 S.W.3d 371, 372–73 (Tex. 2010).
139. *Id.* at 373.
140. *Id.*

quest a hearing on its motion to dismiss.[141] The supreme court concluded that "merely participating in litigation does not categorically mean the party has invoked the judicial process so as to waive enforcement [of the forum selection clause]."[142] Further, the supreme court concluded the three month "gap" did "nothing 'unequivocal' to waive enforcement."[143] Finally, the supreme court concluded, "There is no adequate remedy by appeal when a trial court refuses to enforce a forum-selection clause."[144]

Similar to *ADM Investor Services*, the case of *In re Laibe Corp.* also involved a trial court's refusal to enforce a contractual forum-selection clause.[145] The Texas Supreme Court granted mandamus relief and directed the trial court to enforce the forum selection clause, and consequently dismiss the suit.[146] The supreme court found the forum selection clause in a purchase contract permitting a drilling rig buyer to sue only in Indiana was enforceable by the seller, even though a prior invoice did not include the clause.[147] The buyer contended that suing in Indiana would disrupt its operations. However, the supreme court stated, "we will decline to enforce a forum-selection clause against a party only if the inconvenience it faces is so extreme as to effectively deny the party its day in court."[148] The buyer also contended that the court should deny mandamus relief because of the seller's lack of diligence in its first attempt to obtain mandamus relief at the appellate level.[149] The buyer claimed the seller waited two months after the trial court's order to file its petition for mandamus relief. The supreme court disagreed there was lack of diligence, saying "[t]o invoke the equitable doctrine of laches, the moving party ordinarily must show an unreasonable delay by the opposing party in asserting it[s] rights, and also the moving party's good faith and detrimental change in position because of the delay."[150] The supreme court concluded "there is no adequate remedy by appeal when a trial court refuses to enforce a forum-selection clause."[151]

In its final 2010 forum selection mandamus case, the Texas Supreme Court in *In re Lisa Laser USA, Inc.* granted mandamus relief after the trial court denied a motion to dismiss for improper forum on the basis of a contractual forum selection clause.[152] A distributor alleged that a medical device manufacturer failed to inform the distributor of new products and failed to give the distributor the right of first refusal. The supreme court determined the claim arose from a contract containing the forum

141. *Id.* at 373–74.
142. *Id.* at 374.
143. *Id.*
144. *Id.* at 376.
145. *In re* Laibe Corp., 307 S.W.3d 314, 315 (Tex. 2010) (per curiam).
146. *Id.* at 318.
147. *Id.* at 315, 316–17.
148. *Id.* at 317.
149. *Id.* at 318.
150. *Id.*
151. *Id.* at 316 (quoting *In re* ADM Investor Servs., Inc. 304 S.W.3d 371, 376 (Tex. 2010)).
152. *In re* Lisa Laser USA, Inc., 310 S.W.3d 880, 881 (Tex. 2010) (per curiam).

selection clause, rather than general obligations imposed by law.[153] Accordingly, the forum selection clause should be enforced.[154] In addition, the supreme court discussed the appellate remedy in detail, stating that "an appellate remedy is inadequate when a trial court improperly refuses to enforce a forum-selection clause because allowing the trial to go forward will 'vitiate and render illusory the subject matter of an appeal'—i.e., trial in the proper forum."[155]

2. *Forum Non Conveniens and the Improper Denial of a Motion to Dismiss*

In *In re ENESCO Offshore International Co.*, the Texas Supreme Court granted mandamus relief ordering a trial court to dismiss a case, thereby reversing the trial court's earlier ruling denying the defendant corporations' motion to dismiss on forum non conveniens grounds.[156] The widow of an Australian oil rig worker filed suit in Texas against her husband's employer, an Australian company. The worker died on a rig located near Singapore, and the majority of witnesses and physical evidence was located in Singapore or Australia.[157] In granting mandamus relief, the court addressed six statutory considerations set out in section 71.051(b) of the Civil Practices and Remedies Code.[158] The supreme court noted, "Nothing in section 71.051 indicates the Legislature contemplated the denial of forum non conveniens motions because multiple adequate alternate forums existed, or that a defendant should be required to focus on only one alternate forum to the exclusion of other forums."[159] Without discussion, the supreme court repeated its rule that "an appeal is not adequate when a motion to dismiss on forum non conveniens grounds is erroneously denied."[160]

F. Mandamus and A Trial Court's Error in Applying Appellate Directions

In the 2010 case of *In re Columbia Medical Center of Las Colinas, Subsidiary, L.P.*, a defendant returned to the Texas Supreme Court for mandamus relief shortly after the supreme court rendered judgment in that party's favor by reducing the award of economic damages.[161] The defendant requested the trial court reduce the punitive damages on remand, as

153. *Id.* at 882, 884–85. "[A] claim is brought in contract if liability arises from the contract, while a claim is brought in tort if liability is derived from other general obligations imposed by law." *Id.* at 884 (quoting *In re* Int'l Profit Assocs., 274 S.W.3d 672, 677 (Tex. 2009)).

154. *Id.* at 887.

155. *Id.* at 883 (quoting *In re* AIU Ins. Co., 148 S.W.3d 109, 115 (Tex. 2004)).

156. *In re* ENESCO Offshore Int'l Co., 311 S.W.3d 921, 923 (Tex. 2010) (per curiam).

157. *Id.* at 923, 927.

158. *Id.* at 924–28.

159. *Id.* at 925; *see* Tex. Civ. Prac. & Rem. Code Ann. § 71.051(b) (West 2011).

160. *In re* ENESCO, 311 S.W.3d at 923 (citing *In re* Gen. Elec. Co., 271 S.W.3d 681, 685 (Tex. 2008)).

161. *In re* Columbia Med. Ctr. of Las Colinas, 306 S.W.3d 246, 247 (Tex. 2010).

required by a statutory cap, based on the supreme court's opinion that reduced economic damages.[162] In granting mandamus relief, the supreme court determined the reduced economic damages judgment it previously rendered also required the reduction of punitive damages.[163] The supreme court concluded, "Although our judgment did not also expressly order a reduction of the award of punitive damages, it is what the statute requires."[164] The supreme court then succinctly addressed the remedy by appeal, saying "[b]ecause this issue arises in connection with a final judgment following an appeal to this Court, we conclude that Columbia has no other adequate remedy by appeal."[165]

G. Mandamus and the Transfer of a Juvenile to Adult Criminal Court

In the case of *In re B.T.*, the Texas Supreme Court granted mandamus relief to prevent a judge from transferring a juvenile to district court for trial as an adult, prior to the completion of a statutorily-mandated diagnostic evaluation.[166] This case involved a seventeen-year-old charged with murder, whom the state sought to prosecute as an adult. Under the Texas Family Code, a juvenile court may transfer a juvenile to adult court under certain conditions, one of which is that the juvenile court must "order and obtain a complete diagnostic study" of the child.[167] The juvenile court ordered a diagnostic study, but the study could not be completed according to a report that B.T. needed "inpatient psychiatric treatment 'in order to help him attain a minimal level of fitness to proceed' and [should then] be reevaluated . . . ."[168] B.T. was then committed to a state hospital for psychiatric treatment for ninety-days, at which point he was deemed "fit to proceed" by a different doctor.[169] The juvenile court then scheduled a hearing on B.T.'s transfer from juvenile court, despite the repeated requests of both B.T. and the state that the requisite diagnostic study be completed before holding any hearing. The juvenile court refused, apparently because the court believed it had enough information from the partial diagnostic study, the state hospital records from B.T.'s psychiatric treatment, and a 2007 evaluation stemming from an unrelated juvenile proceeding.[170] The supreme court concluded the juvenile court abused its discretion by substituting these three reports for a "complete diagnostic study" as required by statute.[171] The supreme court did not use the "adequate remedy by appeal" terminology or similar words. Rather, the supreme court said "B.T. has no plausible appellate remedy,"

162. *Id.*
163. *Id.* at 248.
164. *Id.* at 247; *see* Tex. Civ. Prac. & Rem. Code § 41.008(b) (West Supp. 2010).
165. *In re Columbia Med. Ctr.*, 306 S.W.3d at 248.
166. *In re* B.T., 323 S.W.3d 158, 159 (Tex. 2010) (per curiam).
167. *Id.* at 159 (quoting Tex. Fam. Code Ann. § 54.02(d) (West Supp. 2010)).
168. *Id.* at 160 (quoting the report of B.T.'s evaluator, Dr. Emily Fallis).
169. *Id.*
170. *Id.*
171. *Id.* at 162.

because although he could appeal his transfer out of juvenile court, such an appeal could only happen "after he has been convicted (or placed on deferred adjudication) in adult court. By this time, 17-year-old B.T. likely will have turned 18, and juvenile adjudication may be unavailable."[172]

H. Mandamus and Grandparent Access to a Child

In the case of *In re Richard Scheller*, the Texas Supreme Court granted mandamus relief in a grandparent-access suit.[173] The supreme court concluded the trial court abused its discretion in issuing temporary orders giving a grandfather access to his grandchildren.[174] The grandchildren were two young daughters of Amanda Scheller, who passed away in 2007. Although the children regularly visited their maternal-grandfather prior to and for a year after their mother's death, the relationship between their grandfather and father deteriorated. The grandfather eventually filed suit for grandparent access, and the trial court issued temporary orders giving the grandfather regular access through telephone, weekend visits, and more.[175] The supreme court cited *In re Derzapf* for the proposition that it is an abuse of discretion to grant temporary access to a grandparent who does not "overcome the presumption that a parent acts in his or her child's best interest by proving that 'denial . . . of access to the child would significantly impair the child's physical health or emotional well-being.'"[176] The supreme court conditionally granted the father's petition for mandamus relief, but did not discuss the adequacy of appellate remedy.[177]

I. Mandamus and Law Firm Disqualification

In the case of *In re Columbia Valley Healthcare System*, the Texas Supreme Court granted mandamus relief where the trial court refused to disqualify a law firm, despite evidence that a legal assistant for the plaintiff's attorney had previously worked for the defendant's attorney.[178] During her tenure with the defendant's attorney, the legal assistant worked on the underlying medical malpractice lawsuit against Columbia Valley Healthcare System (Columbia Valley) from its inception. The assistant left that firm, and joined the plaintiff's firm eleven months later where she was orally instructed not to work on any cases that she had worked on at the defense firm.[179] However, unknown to the plaintiff's

172. *Id.* (citing *In re* N.J.A., 997 S.W.2d 554, 557 (Tex. 1999)).
173. *In re* Scheller, 325 S.W.3d 640, 641 (Tex. 2010) (per curiam).
174. *Id.*
175. *Id.* at 641–42.
176. *Id.* at 643 (quoting *In re* Derzapf, 219 S.W.3d 327, 333 (Tex. 2007)).
177. *Id.* at 644. Note that the father in *Scheller* asked the court for relief from two of the trial court's orders: the temporary order for grandparent access and the order appointing an expert to serve as a guardian ad litem for his daughters and as a psychologist to evaluate the case. *Id.* Mandamus relief was granted only as to the order granting grandparent access. *Id.* at 645.
178. *In re* Columbia Valley Healthcare Sys., 320 S.W.3d 819, 821 (Tex. 2010).
179. *Id.* at 822–23.

lawyer, she worked on the malpractice suit involving Columbia Valley. Once the assistant's employment with the plaintiff's lawyer came to light, Columbia Valley moved for disqualification of the plaintiff's firm.[180] The trial court denied the motion, and the Corpus Christi Court of Appeals denied Columbia Valley's mandamus petition.[181] The supreme court granted mandamus relief, and in so doing, set forth a number of guidelines for trial courts to apply when considering disqualification of a law firm based on a nonlegal employee.[182] Where a nonlegal employee has "previously worked on the same or a substantially related matter for opposing counsel," the hiring firm must rebut a presumption that confidences were shared.[183] To do so, the firm must show: (1) it instructed the employee not to work any matter on which the employee worked, or had knowledge of, at the previous firm, and (2) "the firm took other reasonable steps to ensure" the employee does not work on any such matters.[184] "These other reasonable steps must include, at a minimum, formal, institutional measures to screen the employee from the case."[185] The supreme court's discussion of appellate remedy was limited to a footnote in its opinion's factual and procedural background section that stated: "Mandamus is available where a motion to disqualify is inappropriately denied as there is no adequate remedy on appeal."[186]

IV. THE TEXAS SUPREME COURT'S TREATMENT OF THE "ADEQUACY" REQUIREMENT

Parties considering mandamus relief must heed the Texas Supreme Court's directive in *Prudential* that reserves mandamus review for cases where appellate remedy is inadequate.[187] In the cases surveyed, however, subtle differences appear from decision to decision as to how the supreme court evaluated the adequacy of appellate remedy. The chart set out below describes these differences relative to the subject matter of the case. During the Survey period, the court treated the appellate remedy question in one of three manners identified by: 1) making a conclusory statement that the appellate remedy is inadequate; 2) explaining why, in that specific case, the appellate remedy is inadequate; or 3) not addressing the issue of the party's appellate remedy at all.

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180. *Id.* at 823.
181. *Id.*
182. *See id.* at 828–29.
183. *Id.* at 828.
184. *Id.*
185. *Id.*
186. *Id.* at 823 n.2 (citing NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989)).
187. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004).

Appellate Remedy Discussion	Opinion Name	Case Topics
A conclusory statement that the appellate remedy is inadequate	*In re* 24R Inc., 324 S.W.3d 564, 568 (Tex. 2010) (per curiam). *In re* ADM Investor Servs., Inc., 304 S.W.3d 371, 376 (Tex. 2010). *In re* Columbia Med. Ctr. of Las Colinas, 306 S.W.3d 246, 248 (Tex. 2010) (per curiam). *In re* Columbia Valley Healthcare Sys., 320 S.W.3d 819, 823 n.2 (Tex. 2010). In re ENESCO Offshore Int'l Co., 311 S.W.3d 921, 923 (Tex. 2010) (per curiam). *In re* Laibe Corp., 307 S.W.3d 314, 316 (Tex. 2010) (per curiam). *In re* Olshan Found. Repair Co., 328 S.W.3d 883, 888 (Tex. 2010). *In re* Daredia, 317 S.W.3d 247, 250 (Tex. 2010) (per curiam). *In re* Golden Peanut Co., 298 S.W.3d 629, 631 (Tex. 2009) (per curiam). *In re* Odyssey Healthcare, 310 S.W.3d 419, 424 (Tex. 2010) (per curiam). *In re* John G. & Marie Stella Kenedy Mem'l Found., 315 S.W.3d 519, 522 (Tex. 2010) (orig. proceeding). *In re* United Scaffolding, Inc., 301 S.W.3d 661, 663 (Tex. 2010) (per curiam).	Arbitration Discovery Error in the application of appellate directions Forum issues Granting a new trial Lack of jurisdiction Law firm disqualification
A specific discussion of the adequacy of the party's appellate remedy	*In re* B.T., 323 S.W.3d 158, 162 (Tex. 2010) (per curiam). *In re* Lisa Laser USA, Inc., 310 S.W.3d 880, 883 (Tex. 2010) (per curiam).	Forum issues Transfer of a juvenile for adult prosecution
No direct discussion of the adequacy of the party's appellate remedy.	*In re* Deere & Co., 299 S.W.3d 819, 820 (Tex. 2009) (per curiam). *In re* Merrill Lynch & Co., 315 S.W.3d 888, 891–93 (Tex. 2010) (per curiam). *In re* Scheller, 325 S.W.3d 640, 646 (Tex. 2010) (per curiam). *In re* United Servs. Auto. Ass'n, 307 S.W.3d 299, 314 (Tex. 2010).	Arbitration Grandparent access Discovery dispute Summary judgment on statute of limitations

As identified in the preceding chart, the supreme court's analysis of the appellate remedy in the majority of mandamus opinions issued during the Survey period has been limited to a succinct, conclusory statement that the remedy is inadequate. In most cases, the conclusory statements cite previous opinions explaining why appellate remedy is inadequate in similar fact situations.[188] This point is illustrated by *Daredia*, where the supreme court cited *In re Dickason* when in stated "*Daredia* [had] no adequate remedy at law."[189] The supreme court in *Dickason* made a similar conclusory statement and cited *Buttery v. Betts*, a 1967 mandamus opinion where a trial court granted a new trial after expiration of its plenary power.[190] In *Buttery*, the real party in interest argued the relators were not entitled to mandamus because they could appeal the decision after the new trial.[191] The Texas Supreme Court disagreed and concluded the "[r]elators [were] entitled to their final judgment . . . without establishing that right after a needless retrial and an appeal."[192]

In contrast, the supreme court pointedly explained why the appellate remedy was inadequate in its two opinions *B.T.* and *Lisa Laser*.[193] In *B.T.*, the supreme court explained that "B.T. has no plausible appellate remedy. . . . B.T. can appeal his transfer-but only after he has been convicted (or placed on deferred adjudication) in adult court. By this time, 17-year-old B.T. likely will have turned 18, and juvenile adjudication may be unavailable."[194] In *Lisa Laser*, the supreme court emphasized that "forum-selection clauses should be given full effect, and subjecting a party to trial in a forum other than the contractually chosen one amounts to 'clear harassment . . . injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics.'"[195]

In the third category of cases, there is no direct discussion of the adequacy of appellate remedy, yet the facts demonstrate the appellate remedy is indeed inadequate. However, prudent practitioners should not read the case law to diminish the importance of the issue of whether appellate remedy is inadequate. There is no indication that the supreme court has abrogated this element of mandamus relief. For example, in the case of *In re Merrill Lynch & Co.*, the supreme court did not directly

188. *See, e.g.*, *In re* Columbia Valley Healthcare Sys., 320 S.W.3d 819, 823 n.2 (Tex. 2010) ("Mandamus is available where a motion to disqualify is inappropriately denied as there is no adequate remedy on appeal.")

189. *In re* Daredia, 317 S.W.3d 247, 250 (Tex. 2010) (per curiam) (citing *In re* Dickason, 987 S.W.2d 570, 571 (Tex. 1998)).

190. *Dickason*, 987 S.W.2d at 571 (citing Buttery v. Betts, 422 S.W.2d 149, 151 (Tex. 1967)).

191. *Buttery*, 422 S.W.2d at 151.

192. *Id.* (citations omitted).

193. *In re* B.T., 323 S.W.3d 158, 162 (Tex. 2010) (per curiam); *In re* Lisa Laser USA, Inc., 310 S.W.3d 880, 883 (Tex. 2010) (per curiam).

194. *B.T.*, 323 S.W.3d at 162. Although the court deviated from their standard language, it is clear that "no plausible appellate remedy" is encompassed by the requirement for mandamus relief that there is no "adequate" appellate remedy. *See id.*

195. *Lisa Laser*, 310 S.W.3d at 883.

discuss why Merrill Lynch's appellate remedy was inadequate; but it did emphasize that if the companion litigation was not stayed, pending arbitration, the company's "bargained-for arbitration rights" would be lost.[196] Although the phrase "adequacy of the appellate remedy" or something similar is not used, this statement strongly suggests that loss of contractually bargained-for arbitration rights could not be remedied by appeal.[197]

V. CONCLUSION

This article surveyed the mandamus opinions issued by the Texas Supreme Court between November 1, 2009 and December 31, 2010. These opinions highlight the supreme court's varied approaches to the adequacy of the appellate remedy element of the mandamus test. In the final analysis *Prudential* and its progeny demonstrate mandamus is truly an extraordinary remedy sparingly granted. Mandamus is available for:

> [S]ignificant rulings in exceptional cases . . . to preserve important substantive and procedural rights . . . , allow[ing] the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.[198]

Even in light of some apparent anomalies, there appears to be no general retreat from the "practical and prudential" approach announced in *Prudential.* Nevertheless, before filing a petition for writ of mandamus, one must understand the nuances of mandamus relief in order to avoid unexpected barriers that may preclude a successful petition.

196. *In re* Merrill Lynch & Co., 315 S.W.3d 888, 893 (Tex. 2010) (per curiam).

197. *See id.* State and federal policies favor arbitration. *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 753 (Tex. 2001) (citing Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2000)).

198. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004).