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INTERLOCUTORY APPEALS IN TEXAS: A HISTORY

ELIZABETH LEE THOMPSON*

* J.D., Ph.D., The University of Texas at Austin; Staff Attorney, Texas Fifth District Court of Appeals. The author thanks Justice Elizabeth Lang-Miers, Greg Lensing, Harry Roberts, Judy White, Nancy Beth Roberts, Nicole Miller, and Whit Roberts for their insightful comments on this Article and ongoing encouragement. She is grateful to Mitchell Gonzales of the *Journal* for his excellent editorial assistance. The author owes particular thanks to David Thompson for his generous support and invaluable contributions. She is also thankful for the enthusiastic backing of Elizabeth, Margaret, and Catherine Thompson. The views expressed in this Article are solely those of the author and do not reflect the views of the Texas Fifth District Court of Appeals, its justices, or its staff.

I. INTRODUCTION

> *Interlocutory appeals are disruptive, time-consuming, and expensive. There are instances, however, when the [L]egislature deems a right or remedy so important that its vindication need not wait until the case concludes.*[1]

For over one hundred twenty years, Texas law has allowed interlocutory appeals[2]—meaning appeals from decisions that are not final judgments—in some form. Each time the Texas Legislature has carved out an exception to the general rule that only final judgments are appealable, the legislature has signaled the significance of that legal matter. This Article delves into the evolution of Texas's interlocutory appeals statute with the related goals of tracing the expanding subject matter of interlocutory appeals and identifying what these changes reflect about legal priorities and developments in Texas since the late nineteenth century.

Although interlocutory appeals "are strewn throughout Texas

1. Hernandez v. Ebrom, 289 S.W.3d 316, 322–23 (Tex. 2009) (Jefferson, C.J., dissenting).

2. For the first interlocutory appeal statute in Texas, allowing an interlocutory appeal from the "appointment of a receiver or trustee[,]" see Act approved Apr. 13, 1892, 22d Leg., 1st C.S., ch. 17, § 1, 1892 Tex. Gen. Laws 42, 43, *reprinted in* 10 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 406, 407 (Austin, Gammel Book Co. 1898) (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(1)).

statutes[,]"[3] the focus here is on the thirteen disparate types of interlocutory appeals currently permitted under the principal interlocutory appeal statute—Texas Civil Practice and Remedies Code section 51.014.[4] That section allows for an appeal of an interlocutory order that:

- "appoints a receiver or trustee;"[5]
- "overrules a motion to vacate an order that appoints a receiver or trustee;"[6]
- "certifies or refuses to certify a class in a" claimed class action;[7]
- "grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction[;]"[8]
- "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;"[9]
- "denies a motion for summary judgment" based on "a claim against or defense by a member" of the media "or a person whose communication appear[ed] in" the media "arising under the free speech or free press clause" of the United States Constitution, the Texas Constitution, or the Texas libel statute;[10]
- "grants or denies the special appearance" of a defendant;[11]
- "grants or denies a plea to the jurisdiction by a governmental unit;"[12]
- denies a physician either dismissal or attorney's fees or both in a health care liability claim on grounds that the plaintiff did not timely

3. *Hernandez*, 289 S.W.3d at 323 (citations omitted).

4. TEX. CIV. PRAC. & REM. CODE § 51.014 (West Supp. 2016).

5. *Id.* § 51.014(a)(1).

6. *Id.* § 51.014(a)(2).

7. *Id.* § 51.014(a)(3). For Texas's rule of civil procedure governing class action lawsuits, see TEX. R. CIV. P. 42.

8. CIV. PRAC. & REM. § 51.014(a)(4); *see also id.* ch. 65 (providing the law governing the availability of injunctions and temporary restraining orders along with procedural requirements to these "Extraordinary Remedies").

9. *Id.* § 51.014(a)(5).

10. *Id.* § 51.014(a)(6); *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."); TEX. CONST. art. I, § 8 (establishing free speech and press guarantees in Texas); CIV. PRAC. & REM. ch. 73 (constituting the libel statute in Texas).

11. CIV. PRAC. & REM. § 51.014(a)(7) (excepting suits under the Texas Family Code); *see also* TEX. R. CIV. P. 120(a) (authorizing a special appearance in Texas civil cases "for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant" on the basis that the "person or property is not amenable to process" in Texas courts).

12. CIV. PRAC. & REM. § 51.014(a)(8). A "governmental unit," for purposes of Section 51.014(a)(8), is defined under section 101.001 of the Texas Civil Practice and Remedies Code. *See id.* § 101.001 (defining a "governmental unit" as including the "state [of Texas] and all the several agencies of government that collectively constitute the government of th[e] state," "a political subdivision of th[e] state," "an emergency service organization[,]" or any other governmental body that has derived its power from the Texas Constitution or the Texas Legislature).

serve an expert report;[13]
- grants a motion challenging the adequacy of an expert report in a health care liability claim;[14]
- denies a motion to dismiss asbestos- or silica-related claims;[15]
- denies a motion to dismiss a claim based on the exercise of the right of free speech, right of petition, or right of association under the Texas Citizen Participation Act;[16]
- "denies a motion for summary judgment filed by an electric utility" under a statute limiting its liability.[17]

The story of the enactment of these thirteen subsections—beginning in 1892 and ending in 2013 with the passage of the thirteenth provision—reveals more than a century of legal concerns and legislative priorities. This Article approaches the study in two primary parts. After a brief overview of the primacy of final judgments, the first part examines interlocutory appeal statutes in Texas prior to their codification in section 51.014 of the Texas Civil Practice and Remedies Code, covering the period from 1892 to 1985.[18] Of primary concern are the types of orders subject to interlocutory appeal and why, at the time that each provision passed, the legislature concluded that these types of orders merited immediate appeal. The second part analyzes interlocutory appeal provisions enacted after the codification of section 51.014 in 1985 until 2013.[19] The numerous amendments to section 51.014 during this twenty-eight-year period fall into three categories:

13. *Id.* § 51.014(a)(9). Specifically, this subsection permits an interlocutory appeal where the lower court "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." *Id.* Section 74.351(b) mandates that, if an expert report has not been served within the time period required by section 74.351(a) and a timely motion has been filed, the court shall, subject to Section 74.351(c), award "reasonable attorney's fees and costs of courts" as well as dismiss the claim with prejudice in relation to the "affected physician or health care provider." *Id.* § 74.351(b).

14. *Id.* § 51.014(a)(10); *see also id.* § 74.351(*l*) (requiring a court to "grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report" in the statute).

15. *Id.* § 51.014(a)(11). Section 90.007(a) of the Texas Civil Practice and Remedies Code permits a defendant to file a "motion to dismiss [a] claimant's asbestos-related or silica-related claim[]" upon the failure of the claimant to timely serve an expert report or upon the failure to serve an export report in accordance with Sections 90.003 or 90.004. *Id.* § 90.007(a).

16. *Id.* § 51.014(a)(12); *see also id.* § 27.003(a) (permitting a motion to dismiss "[i]f a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association").

17. *Id.* § 51.014(a)(13). For the provision in the Civil Practice and Remedies Code limiting utility companies' liability, see *id.* § 75.0022.

18. *See infra* Section II.

19. *See infra* Section III.

they substantively expanded or altered the types of appealable interlocutory orders, they affected the procedure for interlocutory appeals, or they were minor "clean up" statutes. The second part of the Article focuses on the first two categories.

A. *The Final Judgment Rule*

Dating back to the Judiciary Act of 1789, the United States legal system has generally adhered to the English common law approach of permitting appeals only from "final decrees."[20] This "final judgment rule"—central to both federal and Texas law—provides that, as a general rule, a judgment is appealable only if it finally decides all issues and disposes of all parties before the court.[21] The final judgment rule promotes judicial efficiency, avoids piecemeal litigation, and "defer[s] to the decisions of the trial court."[22] As a result of this preference for final judgments, unless a statute authorizes an interlocutory appeal, "Texas appellate courts have jurisdiction only over final" judgments or orders.[23] Beginning in the late nineteenth century, the Texas Legislature began to pass statutes allowing narrow exceptions to the final judgment rule, appeals referred to as interlocutory appeals.[24]

II. TRUSTEES AND RECEIVERS, INJUNCTIONS, AND CLASS ACTIONS: INTERLOCUTORY APPEALS FROM 1892 TO 1985

A. *Orders Appointing Trustees and Receivers*

In 1892, the Texas Legislature passed the first law permitting an

20. *See* Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84 (codified at 28 U.S.C. § 1291 (2012)) (permitting review of a district court's "final decrees and judgments" by a circuit court); *see also* Alexandra B. Hess et al., *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995–2010)*, 60 AM. U.L. REV. 757, 759 (2011) (explaining Congress incorporated "the English common law approach [of] only permit[ting] appeals from final judgments" into the Federal Judiciary Act of 1789 (citations omitted)).

21. Lehmann v. Har–Con Corp., 39 S.W.3d 191, 195 (Tex. 2001); N.E. Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1996); Carleton M. Crick, *The Final Judgment As a Basis for Appeal*, 41 YALE L.J. 539, 539 (1932); *see* Canter v. Am. Ins. Co., 28 U.S. 307, 318 (1830) ("It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final* decrees only, that causes should not come up here in fragments upon successive appeals. It would occasion very great delays and oppressive expenses."); Fid. Funding Co. of S.F. v. Hirshfeld, 91 S.W. 246, 246 (Tex. Civ. App.—Austin 1906, no writ) ("It is well-settled law in this state that no appeal can be prosecuted until after a final judgment has been rendered, unless such an appeal is specially authorized by statute.").

22. 19 GEORGE C. PRATT, MOORE'S FEDERAL PRACTICE § 201.10[1] (3d ed. 2009).

23. Ogletree v. Matthews, 262 S.W.3d 316, 319 n.1 (Tex. 2007) (citation omitted).

24. *See infra* Section II; *cf.* Hess, et al., *supra* note 20, at 760 (discussing the passage of similar statutes at the federal level).

interlocutory appeal[25] and laid the first building block in what would become an extensive list of statutorily permitted interlocutory appeals under today's section 51.014 of the Civil Practice and Remedies Code. The provision was part of the 1892 law that organized the courts of civil appeals and defined the jurisdiction and power of those courts.[26] It provided that, in addition to appeals from final judgments of the district and county courts,[27] "an appeal shall lie from an interlocutory order of the district court appointing a receiver or trustee in any cause."[28] The appeal had to "be taken within twenty days" of the entry of the order, and the interlocutory appeal had precedence over other cases in the appellate court.[29] But trial court proceedings were not "stayed during the pendency of the appeal unless otherwise ordered by the appellate court."[30] In a separate law, the 1892 legislature provided that judgments by the "courts of civil appeals shall be final in all appeals from interlocutory orders appointing receivers or

25. Act approved Apr. 13, 1892, 22d Leg., 1st C.S., ch. 17, § 1, 1892 Tex. Gen. Laws 42, 43, *reprinted in* 10 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 406, 407 (Austin, Gammel Book Co. 1898) (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(1)); *see* - Naylor v. Naylor, 128 S.W. 475, 477 (Tex. Civ. App.—Austin 1910, no writ) (stating no appeals may be taken from a final judgment "except from interlocutory orders appointing a receiver or trustee, and except also from an order granting or dissolving a temporary injunction" (citation omitted)); Cotton v. Rand, 92 S.W. 266, 267 (Tex. Civ. App.—San Antonio 1906, writ dism'd) ("The only exception to the rule in this state, that appeals can be taken only from final judgments, is an appeal from an interlocutory order of the district court appointing a receiver or trustee in any cause."). Eight years later, in 1900, the Federal Judiciary Act was amended to allow interlocutory appeal of orders in receivership. Act of June 6, 1900, ch. 803, § 7, 31 Stat. 660, 660–61 (codified as amended at 28 U.S.C. § 1292(a) (2012)).

26. Act approved Apr. 13, 1892, 22d Leg., 1st C.S., ch. 17, § 1, 1892 Tex. Gen. Laws 42, 43, *reprinted in* 10 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 406, 407 (Austin, Gammel Book Co. 1898).

27. *Id.* (current version at CIV. PRAC. & REM. § 51.012).

28. *Id.* (current version at CIV. PRAC. & REM.§ 51.014(a)(1)); *see* Merchs.' Transfer Co. v. Hildebrand, 200 S.W. 551, 552 (Tex. Civ. App.—San Antonio 1918, no writ) (discussing passage of the statute allowing appeal from an interlocutory order appointing a receiver). The previous version of the statute in the Revised Statutes of 1879 simply provided, "An appeal or writ of error may be taken to the supreme court from every final judgment of the district court in civil cases." Act of Feb. 21, 1879, 16th Leg., R.S., tit. XXIX, ch. 19, art. 1380, *printed in The Revised Statutes of Texas*, at 214, 214 (Galveston, A. H. Belo & Co. 1879) (current version at CIV. PRAC. & REM. § 51.012). Four years earlier, the supreme court concluded it had no jurisdiction over "an interlocutory judgment of the court, which merely grants an injunction, and appoints a receiver," which the court viewed as "strictly ancillary to the main proceedings[] and merely intended to preserve the property in dispute pending the litigation." E. & W. Tex. Lumber Co. v. Williams, 71 Tex. 444, 450 (1888). The court stated that "because there ha[d] been no final judgment in the court below," the court had no jurisdiction and, as a result, dismissed the appeal. *Id.* at 451.

29. Act approved Apr. 13, 1892, 22d Leg., 1st C.S., ch. 17, § 1, 1892 Tex. Gen. Laws 42, 43, *reprinted in* 10 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 406, 407 (Austin, Gammel Book Co. 1898).

30. *Id.*

trustees or such other interlocutory appeals as may be allowed by law[.]"[31] As a result, the Supreme Court of Texas had no jurisdiction over the interlocutory appeals.[32]

Why were orders appointing receivers and trustees the first (and by implication the most pressing) type of order authorized for interlocutory appeal in Texas? And why were the pressures and interests contributing to its passage so strong in 1892? The session law and associated Senate and House proceedings do not state the reason for passing the interlocutory appeal legislation. But the broader legislative and historical context explains why the appointment of receivers and trustees was at the forefront of legislators' attention in 1892.

In 1874, the Texas Supreme Court recognized, "We have no statute regulating the subject of receivers. Though the authority of the courts to appoint them has been long recognized, yet the record in this case shows that the practice in making such appointments, and in calling the officer to account, is unsettled and loose."[33] Yet the appointment of receivers was common. In 1891, "about one-half of the railroads of the [s]tate were in the hands of receivers."[34] This development reflected national railroad distress, for after extensive building of railroads after the Civil War, a wave of railroad insolvencies followed.[35] Many of these insolvent railroads sought "the protection of a federal equity receivership pending reorganization."[36] Although the federal judiciary commonly oversaw railroad receiverships—"assum[ing] a role akin to episodic public management of the railways"[37]—Texas courts also appointed receivers for railroad companies.[38]

By the 1890s, there was growing populist-minded resentment against the railroads as a result of their overexpansion and financial troubles.[39] In

31. *Id.* ch. 15, § 5, 1892 Tex. Gen. Laws at 26, 10 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 390 (Austin, Gammel Book Co. 1898).

32. *See* First Nat'l Bank of Dall. v. Brown, 53 S.W.2d 604, 605–06 (Tex. 1932) (concluding the Texas Supreme Court did not have jurisdiction because the trial court entered "an interlocutory receivership order," and not a final judgment).

33. Weems v. Lathrop, 42 Tex. 207, 213 (1874).

34. *The Texas Commission as the Savior of Railways*, 38 RAILWAY AGE 100 (July 22, 1904).

35. Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 191 (1936).

36. *Id.*; William E. Forbath, *Law and the Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1155 (1998).

37. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 67 (1991).

38. *See* Howe v. Harding, 13 S.W. 41, 42 (Tex. 1890) (recognizing the appellant as the judicially-appointed receiver of the Houston, East & West Texas Railway Company); Bonner v. Hearne, 12 S.W. 38, 38 (Tex. 1889) (identifying the "appellee[] as receiver of the International & Great Northern Railroad Company, appointed by" the Anderson County district court).

39. David F. Prindle, *Railroad Commission*, HANDBOOK TEX. ONLINE (June 15, 2010),

addition, abuses arose from the appointment of railroad receivers. Governor James Hogg stressed some of these abuses in his letter to the Texas Legislature in 1891: "Some of the railroads have been placed and held in the hands of receivers long beyond the term prescribed by our [s]tate laws, and occasionally are operated by non resident receivers under the orders of federal judges in other [s]tates."[40] Hogg decried the "increase [of] [e]ncumbrances" on the railroads "to the detriment of the public" and creditors and the "exorbitant fees and salaries paid to useless officers in the apparent indulgence of favoritism and nepotism[.]"[41] He concluded that "the connection of these judges and officers with the receiverships and roads would demand investigation."[42] Proposed bills—bills that did not become law—before the 1892 legislature included bills "[f]ixing the salaries of receivers, attorneys for receivers and other appointees concerning receiverships" and amending a law[43] "entitled 'an [A]ct to provide for the appointment of receivers and to define their powers and duties[.]'"[44]

In addition, when James S. Hogg called a special session of the legislature in 1892, two of the sixteen enumerated purposes of the called session related to receivers.[45] First, Hogg called the special session to amend the law to make "receivers of railroads and other corporations" liable for damages when their negligence "in executing their trusts" caused death or injury to others.[46] The second purpose was "[t]o receive and act upon" a report by a "committee appointed to investigate" the "case of Jay Gould vs. the International and Great Northern Railroad Company in the [d]istrict [c]ourt of Smith County" and associated cases involving the railroad and its receivers.[47] These cases involved alleged impropriety in the appointment of receivers—in addition to other abuses—and the report from their investigation was one focal point of the 1892 called session in the House

http://www.tshaonline.org/handbook/online/articles/mdr01; *Creation of the Railroad Commission of Texas*, RAILROAD COMMISSION TEX. (July 20, 2015, 12:17 PM), www.rrc.state.tx.us/about-us/history/informal-history-toc/creation-of-the-rrc/.

40. H.J. of Tex., 22d Leg., R.S. 115 (1891) (message of Governor James S. Hogg to the House).

41. *Id.*

42. *Id.*

43. Act approved Mar. 19, 1889, 21st Leg., R.S., ch. 59, § 6, 1889 Tex. Gen. Laws 55, 56, *reprinted in* 9 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 55, 55 (Austin, Gammel Book Co. 1898).

44. H.J. of Tex., 22d Leg., R.S. 1018, 1079 (1891) (bill index). The Senate considered similar bills. S.J. of Tex., 22d Leg., R.S. 775–76 (1891) (bill index).

45. H.J. of Tex., 22d Leg., 1st C.S. 1–2 (1892) (message of Governor James S. Hogg to the House).

46. *Id.* at 2.

47. *Id.* at 2, 126; *see also id.* at 126–33 (1892) (majority report); S.J. of Tex., 22d Leg., 1st C.S. 2 (1892) (message of Governor James S. Hogg to the Senate); S.J. of Tex., 22d Leg., 1st C.S. 109–16 (1892) (majority report).

and Senate.[48]

Jay Gould, the "[W]izard of Wall Street" and labeled by some as "the Greatest Financier of Modern Times[,]" effectively "dominated the transportation system of Texas" in the 1880s.[49] In 1879, Gould acquired control of the International and Great Northern Railroad Company (I&GN), which he then leased to another railroad company he controlled, the Missouri, Kansas, and Texas Railroad Company.[50] In February 1889, Gould filed suit in the district court of Smith County against I&GN for payment of promissory notes aggregating about $500,000.[51] Numerous parties intervened and asserted personal injury and other damage claims against I&GN.[52] Ultimately, creditors filed numerous suits against I&GN in the Smith County district court, I&GN went into receivership that stretched until 1892, and during the receivership, various receivers received appointments and resigned or died.[53]

In March 1891, the Texas House and Senate passed a resolution "authorizing the appointment of a committee to investigate the case of Jay Gould versus the International and Great Northern [R]ailway [C]ompany in the district court of Smith County, and all the proceedings in that and other courts of the state affecting said railway company and its receivers."[54] The resolution stated that "grave charges have been made in the public prints and by current report, which tend[] to bring in disrepute the courts of this

48. *See* H.J. of Tex., 22d Leg., 1st C.S. 126–33 (1892) (printing majority report); S.J. of Tex., 22d Leg., 1st C.S. 109–16 (1892) (printing majority report); *see also An Inventory of Joint Committee to Investigate the Receivership of the International & Great Northern Railroad Records at the Texas State Archives, 1891*, TEX. ST. LIBR. ARCHIVES COMMISSION, www.lib.utexas.edu/taro/tslac/70030/tsl-70030.html (last visited Nov. 12, 2016) [hereinafter *Committee to Investigate the Receivership of the I&GN Records*] (explaining the duration, complexity, money involved, "and the fact that there were several changes in the receivership administration led to charges of inefficiency and overpayment for their services").

49. Robert L. Peterson, *Jay Gould and the Railroad Commission of Texas*, 58 SW. HIST. Q. 422, 422 n.1 (1955); *see* JANET SCHMELZER, OUR FIGHTING GOVERNOR: THE LIFE OF THOMAS M. CAMPBELL AND THE POLITICS OF PROGRESSIVE REFORM IN TEXAS 8–11 (2014) (discussing the International and Great Northern case and the contention between Gould and Hogg and the Railroad Commission).

50. *Committee to Investigate the Receivership of the I&GN Records*, supra note 48.

51. H.J. of Tex., 22d Leg., 1st C.S. 126 (1892) (majority report).

52. *Id.* at 127–128.

53. *Id.* at 127–31; *see* Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420, 1458–59 (2004) (including "the International and Great Northern's receivership"—and its bankruptcy proceeding—in a study of receiverships between 1890 and 1938). In addition, *Herndon v. Campbell*, 23 S.W. 558, 558–61 (Tex. Civ. App.—Galveston 1893), *rev'd*, 23 S.W. 980, 980–81 (Tex. 1893), indicates the contention among Judge Felix McCord, the receivers, and the attorneys involved in the I&GN case.

54. H.J. of Tex., 22d Leg., R.S. 768 (1891); *see* S.J. of Tex. 22d Leg., R.S. 588 (1891) (describing the concurrent resolution).

state touching the pending receivership of the [railroad.]"[55] During the special legislative session in 1892, committee members submitted a majority[56] and minority report to the legislature.[57] The majority report traced the numerous suits and receiverships involved and concluded that it did not appear that the judge or receivers had "acted corruptly or with intent to violate their official duties, either in the procurement, administration or continuation of said receivership."[58] But the report asserted that "[t]he laws regulating receiverships are defective in many particulars"—including that there was an "absence of statutory regulations" and "conflicting precedents"—so that "[m]uch is left to construction and much to the discretion of the court in which the proceedings are pending."[59] The report recommended various statutory amendments, which did not include interlocutory appeal of orders appointing receivers.[60] But the minority report submitted by Senator H.M. Garwood harshly criticized the appointment of the I&GN receivers, in addition to other aspects of the receivership.[61] The minority report concluded that the negotiations between Gould's attorneys and the receivership general solicitor concerning the resignation of a solicitor and appointment of another bore "all the semblance of a barter and sale[.]"[62] The report charged that the receivers were paid "[e]xtravagant salaries" and that a receiver was a partner in a bank that the court designated as the depository for the receivership—an arrangement "improper and contrary to law[.]"[63] The minority report also found that the Smith County district court judge, Felix McCord, promised "privately and in advance of his judicial determination, that he would appoint" a certain person as receiver, which "was highly unbecoming a judicial officer."[64] The minority report harshly criticized the "appointment of T.M. Campbell as receiver, over the objections of all parties, made privately, after a public hearing had been demanded and promised" and concluded the appointment "was illegal and improper, evincing a disregard both of judicial decorum and the rights of litigants."[65]

55. H.J. of Tex., 22d Leg., R.S. 768 (1891).

56. H.J. of Tex., 22d Leg., 1st C.S. 126–33 (1892) (majority report).

57. *Id.* at 134–37 (minority report).

58. *Id.* at 132.

59. *Id.*

60. *Id.*

61. *Id.* at 135–37.

62. *Id.* at 135.

63. *Id.* at 135–136.

64. *Id.*

65. *Id.* at 136. Campbell, a Hogg supporter, was later elected governor of Texas. *See* SCHMELZER, *supra* note 49, at 8–11 (discussing the relationship between Hogg and Campbell and Campbell's

So, when legislators met in regular session in 1891 and special session in 1892, legislative committee reports and the governor leveled harsh criticism on receivers and their sometimes "illegal and improper" appointments.[66] In addition, the legislature sought to pass laws to regulate the salaries and affect the appointment, powers, duties, and liability of receivers.[67] In this context, the legislature's passage of the first interlocutory appeal statute allowing for immediate appeal of orders appointing receivers and trustees is understandable. Apparently, the legislature viewed the need to address these perceived abuses as significant and pressing and that they called for the enactment of the first interlocutory appeal provision in Texas.

B. *Temporary Injunctions*

Fifteen years later, in 1907, the Texas Legislature authorized a second type of interlocutory appeal: appeal of a "granted or dissolved" temporary injunction.[68] As amended two years later, the law provided that a party

appointment as receiver of the I&GN). The minority report did "not deem it proper to" offer "any recommendation as to the proper course to be pursued in the premises, but submit[ted] the [report's] conclusions as fully substantiated by the evidence . . . before [the] committee." H.J. of Tex., 22d Leg., 1st C.S. 137 (1892) (minority report).

66. H.J. of Tex., 22d Leg., 1st C.S. 136 (1892) (minority report); H.J. of Tex., 22d Leg., R.S. 115 (1891) (message of Governor James S. Hogg to the House) (noting some railroads had been placed in the control of receivers longer than the time prescribed by law and demanded investigation due to the connection of the receivers and the judges who appointed them).

67. The Twenty-second Texas Legislature accomplished this, in part, by amending article 2899 of the Revised Civil Statutes of 1879. Act of Feb. 21, 1879, 16th Leg., R.S., tit. LII, art. 2899, *printed in The Revised Statutes of Texas*, at 419, 419 (Galveston, A. H. Belo & Co. 1879), *amended by* Act approved Apr. 11, 1892, 22d Leg., 1st C.S., ch. 7, § 1, 1892 Tex. Gen Laws 5, 5–6, *reprinted in* 10 H.P.N. GAMMEL, *The Laws of Texas 1822–1897*, at 369, 369–70 (current version at TEX. CIV. PRAC. & REM. CODE § 71.002(d)–(e)) (adding language making receivers of railroads liable for injuries to persons); *see also* S.J. of Tex., 22d Leg., 1st C.S. 14 (1892) (noting the law making railway and other corporations liable for death caused by their or their servants' negligence did not cover "receivers in charge of corporate property" and suggesting the law should be amended so "that these receivers and the corporate property operated by them shall be made liable also").

68. Act approved Apr. 16, 1907, 30th Leg., R.S., ch. 107, §§ 2–4, 1907 Tex. Gen. Laws 206, 206 (amended 1909) (current version at CIV. PRAC. & REM. § 51.014(a)(4)). In 1909, the legislature amended the law to provide for interlocutory appeal of a "granted, refused or dissolved" temporary injunction. Act approved Apr. 22, 1909, 31st Leg., 1st C.S., ch. 34, §§ 2–4, 1909 Tex. Gen. Laws 354, 355 (current version at CIV. PRAC. & REM. § 51.014(a)(4)). In the Revised Civil Statutes of 1911, the compilers placed the provisions allowing "[a]ppeals from interlocutory orders granting or dissolving temporary injunctions" and "appeals from interlocutory order[s] appointing receiver, or trustee" together as exceptions to the final judgment rule stated in an immediately preceding provision. Act approved Apr. 1, 1911, 32d Leg., R.S., tit. 37, ch. 20, arts. 2079–80, *printed in Revised Civil Statutes of the State of Texas*, at 449, 449 (Austin Printing Co. 1912) (current version at CIV. PRAC. & REM. § 51.014(a)(1), (3)); *id.* art. 2078 (current version at CIV. PRAC. & REM. § 51.012) (permitting "[a]n appeal or writ of error" only in the case of a "final judgment" from civil cases in a county court and civil court); *see also id.* tit. 69, ch. 1, arts. 4644–46, at 948–49 (stating 1909 law for interlocutory appeal

could appeal the grant, refusal, or dissolution of a temporary injunction to a court of civil appeals having jurisdiction "not later than fifteen days after the entry of record" of the injunction order or judgment.[69] The appeal did not suspend enforcement of the injunction unless the trial court ordered suspension.[70] The court of civil appeals or supreme court[71] heard the case based on the "bill and answer," any evidence and affidavits admitted in the trial court, and—if the parties chose to submit briefs—on the parties' briefs.[72] The law gave appeals of temporary injunctions "priority over other cases pending in" the court of civil appeals or supreme court.[73]

Although records of the legislature in 1907 and 1909 do not indicate the reasons for allowing interlocutory appeals of temporary injunctions,[74] case law identifies "the evil intended to be remedied" by the law.[75] In 1915,

of orders concerning temporary injunctions). Prior to this legislation, courts considered orders concerning temporary injunctions not to be appealable, final judgments. *See* Miller v. Berry, 13 Tex. 208, 208 (1854) (concluding judgment dissolving temporary injunction was not a final judgment reviewable by writ of error).

69. Act approved Apr. 22, 1909, 31st Leg., 1st C.S., ch. 34, § 2, 1909 Tex. Gen. Laws 354, 355 (current version at CIV. PRAC. & REM. § 51.014(a)(4)). In 1919, the legislature further amended the law to extend the time permitted for filing the transcript of the case involving a temporary injunction with the court of civil appeals. Act of Feb. 6, 1919, 36th Leg., R.S., ch. 17, § 1, 1919 Tex. Gen. Laws 22, 22 (providing that transcript for the case be filed with the clerk of the court of civil appeals "not later than twenty days after the entry of record of such order or judgment granting, refusing[,] dissolving or refusing to dissolve" the temporary injunction).

70. Act approved Apr. 22, 1909, 31st Leg., 1st C.S., ch. 34, § 2, 1909 Tex. Gen. Laws 354, 355.

71. Although the law referred to the supreme court hearing interlocutory appeals of temporary injunctions, members of the supreme court split on the question of whether the supreme court had jurisdiction over such appeals in light of other law specifying that judgments of the court of civil appeals were final over interlocutory appeals. *Compare* Spence v. Fenchler, 180 S.W. 597, 600–02 (Tex. 1915) (assuming jurisdiction over the appeal), *with* McFarland v. Hammond, 173 S.W. 645, 645 (Tex. 1915) (concluding review by writ of error not authorized).

72. Act approved Apr. 22, 1909, 31st Leg., 1st C.S., ch. 34, § 3, 1909 Tex. Gen. Laws 354, 355.

73. *Id.* § 4, 1909 Tex. Gen. Laws at 356.

74. In 1907, Senator Alfred J. Harper, an attorney and future judge of the Court of Criminal Appeals of Texas, first proposed the provisions to allow interlocutory appeals of injunction orders, but he revealed no reasons for the proposed provisions. S.J. of Tex., 30th Leg., R.S. 1000 (1907). Harper added the provisions to a House bill amending article 2989 of the Revised Civil Statutes of 1895, Act effective Sep. 1, 1895, 24th Leg., R.S., tit. LVI, art. 2989, *printed in Revised Civil Statutes of the State of Texas*, at 577, 577 (Austin, Eugene Von Boeckmann 1895), governing the grant of temporary injunctions. S.J. of Tex., 30th Leg., R.S. 1000 (1907). The focus of the bill was to provide that no district judge could grant a writ of injunction returnable in any court but his own. H.J. of Tex., 30th Leg., R.S. 98, 417–18 (1907); *see also* 4 FRANK W. JOHNSON, A HISTORY OF TEXAS AND TEXANS 1608–09 (1914) (describing Senator Harper's service as a state senator).

75. Hamner v. Garrett, 132 S.W. 951, 952 (Tex. Civ. App.—Fort Worth 1910, no writ) (clarifying the "evil intended to be remedied" was the "slow and tedious remedy of appeal from [a] final judgment"). In 1891, the Federal Judiciary Act authorized appeals in the federal courts from interlocutory appeals in equity "grant[ing] or continu[ing]" injunctions. Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826, 828 (codified as amended at 28 U.S.C. § 1292 (2012)). Texas legislative records do

Supreme Court Justice William Hawkins expressed in a dissenting opinion that the "statutes concerning interlocutory appeals in injunction cases, from caption to emergency clause, evidence a determination upon the part of the legislature to give the whole subject bold, and in many respects original, not to say heroic, treatment."[76] Hawkins stated:

> The entire plan of allowing appeals from orders or judgments granting, refusing, or dissolving temporary injunctions involved a distinct departure from the ancient policy of our laws, and was out of harmony with the provisions of our statutes relating to appeals which, for the most part, were restricted to review of 'final judgments,' an exception being found in the provisions . . . authorizing an appeal from 'an interlocutory order of the district court appointing a receiver or trustee in any cause.'[77]

In 1910, the court of civil appeals in Fort Worth explained:

> Prior to the [A]ct of 1907 . . . , appeals were not allowed from interlocutory orders in injunction cases, but whatever the merits of the application when refused, or whatever its demerits when granted, the party injuriously affected was remitted to his slow and tedious remedy of appeal from the final judgment in the cause when the case was finally reached in the trial court. It was the purpose of the act, then, to afford a speedy remedy by an immediate appeal from the order granting, refusing, or dissolving the temporary writ, irrespective of the final determination of the merits of the cause to which the injunction was an incident, and this, too, whether the order with respect to the injunction be made in term time or in vacation.[78]

The court concluded:

> [T]he evident purpose of its framers was to enlarge the rights of such parties [to injunction suits] by conferring upon them a remedy they had previously not possessed, viz., the right to an immediate review of that branch of their case granting, refusing, or dissolving the temporary writ of injunction.[79]

A decade after passage of the 1907 law allowing interlocutory appeals of temporary injunctions, an attorney extolled the innovative and beneficial

not indicate whether the federal statute influenced Texas legislators in 1907 when they enacted the statute authorizing interlocutory appeals of temporary injunctions.

76. McFarland v. Hammond, 173 S.W. 645, 652 (Tex. 1915) (Hawkins, J., dissenting).

77. *Id.*

78. *Hamner*, 132 S.W. at 952.

79. *Id.*

nature of the first two types of interlocutory appeals in Texas. The Texas Bar Association's 1917 annual meeting included a debate of a proposal to allow the interlocutory appeal of orders granting new trials.[80] In explaining his support for the proposal, Richard Mays of Corsicana argued, "This is not new. Why, for a long, long time there was no right of appeal allowed one against whom an injunction had been rendered, or against whom an injunction had been dissolved."[81] He noted that "as pioneers, we . . . gave the right of appeal in these two instances."[82] He argued, "Who can say that has not expedited and settled litigation in this [s]tate, and protected the rights of litigants?"[83] He noted that "the same proposition has been extended to the granting of receivers."[84] He proposed, "I do not suppose a man in this assembly would urge a proposition to abolish the right of appeal from injunction orders and the appointment of receivers."[85] Mays continued, "It has worked well. It has expedited litigation. It has not clogged the courts."[86]

80. *Texas Bar Association Proceedings of the Thirty-Sixth Annual Session*, 36 TEX. BAR ASS'N 18, 18–35 (1917) [hereinafter *Texas Bar Association Proceedings*]. Seven years later, the Texas Legislature acted on this proposal—enacting legislation providing for an interlocutory appeal of "every order of any district or county court in civil cases granting motions for new trials . . . and such appeal shall be taken within the same time and in the same manner as if the judgment was final." Act of Feb. 23, 1925, 39th Leg., R.S., ch. 18, § A, 1925 Tex. Gen. Laws 45, 45 (current version at TEX. CIV. PRAC. & REM. CODE § 51.102). The legislature repealed the law two years later. Act approved Feb. 21, 1927, 40th Leg., R.S., ch. 52, § 1, 1927 Tex. Gen. Laws 75, 75 (current version at CIV. PRAC. & REM. § 51.012). The repealing Act explained that after:

> the codification of 1925 . . . numerous appeals have been taken to the Court of Civil Appeals from orders of district and county courts in civil cases, granting motions for new trials for the sole purpose of securing delay to litigants and that in almost every case the order of the lower court has been affirmed for the reason that the granting of new trials is largely discretionary with the trial court and not subject to reversal except for abuse of discretion, and the further fact that such appeals have greatly [e]ncumbered the dockets of the various courts of civil appeals and increased the burden of such courts in numerous cases where there is no merit in the appeal.

Id. § 2, 1927 Tex. Gen. Laws at 75–76; *see also In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 209 (Tex. 2009) (orig. proceeding) (stating plaintiff's argument "that appellate review of orders granting new trials is inconsistent with legislative intent because the legislature once passed a law allowing appeals from such orders, but repealed it two years later" (first citing Act of Feb. 23, 1925, 39th Leg., R.S., ch. 18, § A, 1925 Tex. Gen. Laws 45, 45; and then citing Act approved Feb. 21, 1927, 40th Leg., R.S., ch. 52, § 1, 1927 Tex. Gen. Laws 75, 75)).

81. *Texas Bar Association Proceedings, supra* note 80, at 35.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

C. *Overruling a Motion to Vacate an Order Appointing a Receiver or Trustee*

During the same year Mays spoke, the Texas Legislature considered and passed a third category of interlocutory appeal. This third type was an enlargement and clarification of the first type enacted into Texas law—appeals of orders appointing receivers and trustees. The 1917 Texas Legislature authorized an appeal "from an interlocutory order of the district court overruling a motion to vacate an order appointing a receiver or trustee in any case[.]"[87] The law required an appeal to "be taken within twenty days from the entry of such order appealed from" and provided such appeals "take precedence in the appellate court[s.]"[88] "But the proceedings in other respects in the court shall not be stayed during the pendency of the appeal, unless" the appellate court ordered a stay.[89]

Why did the legislature perceive a pressing need to allow an appeal of this type of interlocutory order, particularly when the first type—appeal of orders appointing receivers and trustees—is so closely related? In his "Full Report" on House Bill 332,[90] Representative Rufus Templeton[91] reported to the Speaker of the House, "It is believed that since the present law is indefinite in matters of this sort, this bill should immediately pass."[92] The "indefinite" status of "the present law" likely derived from inconsistent court decisions since the 1890s concerning whether an order overruling a motion to vacate the appointment of a receiver was subject to interlocutory appeal under the first statute allowing interlocutory appeals of orders appointing receivers. Two early cases treated an appeal of an order overruling a motion to vacate appointment of a receiver as an appeal "from an interlocutory decree . . . appointing . . . [a] receiver" without discussion.[93] But beginning in 1906 and over the next decade, numerous appellate cases held that an order overruling or dismissing a motion to vacate the appointment of a receiver "cannot be treated as an order

87. Act approved Mar. 30, 1917, 35th Leg., R.S., ch. 168, § 1, 1917 Tex. Gen. Laws 379, 379 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(2)).

88. *Id.*

89. *Id.*

90. H. Comm. on Civ. Procedure, Full Report, Tex. H.B. 332, 35th Leg., R.S. (1917), http://www.lrl.state.tx.us/LASDOCS/35R/HB332/HB332_35R.pdf#page=4.

91. *See Rufus L. Templeton*, LEGIS. REFERENCE LIBR. TEX., http://www.lrl.state.tx.us/legeleaders/members/memberdisplay.cfm?memberID=1363 (last visited Nov. 13, 2016) (summarizing Rufus L. Templeton's service in the Texas House of Representatives).

92. H. Comm. on Civ. Procedure, Full Report, Tex. H.B. 332, 35th Leg., R.S. (1917), http://www.lrl.state.tx.us/LASDOCS/35R/HB332/HB332_35R.pdf#page=4.

93. New Birmingham Iron & Land Co. v. Blevins, 34 S.W. 828, 828, 834 (Tex. Civ. App.—Galveston 1896, no writ); *see* Cotton v. Rand, 92 S.W. 266, 267–68 (Tex. Civ. App.—San Antonio 1905, writ dism'd).

appointing a receiver from which the right of appeal is given by the statute" allowing an interlocutory appeal.[94] In 1917, the legislature acted to clear up this inconsistency.[95]

The interrelation between the first and third types of enacted interlocutory appeals that form present-day Civil Practice and Remedies Code section 51.014(a)(1) and (2)—appeals of orders appointing receivers and trustees and appeals of orders overruling a motion to vacate the appointment of a receiver or trustee—appears obvious. Yet at first blush they appear unconnected to the other early category of interlocutory appeals: appeal of orders granting, refusing, or dissolving temporary injunctions. But in 1933, the supreme court explained that "granting or refusing temporary injunctions" and "appointing receivers" were "exceptions as to the necessity for final judgments before appeal."[96] The court noted that "the statutes permit[ted] appeals from [these] interlocutory orders of trial courts" because appeals under these statutes "are predicated upon judgments, which though interlocutory in form as effectively deprive the litigant of his rights or his property for the time being as do final judgments or decrees."[97]

D. *Class Actions*

Over six decades passed before the Texas Legislature enacted another type of interlocutory appeal that is currently in Civil Practice and Remedies Code section 51.014[98]: Appeal from an interlocutory order "[c]ertifying or

94. Tex. & O. Lumber Co. v. Applegate, 114 S.W. 1159, 1160 (Tex. Civ. App.—Galveston 1908, no writ); *see* Williams v. Watt, 171 S.W. 266, 268–69 (Tex. Civ. App. —San Antonio 1914, no writ) (holding an appeal could not be taken from the order refusing to vacate the receivership); Moore v. Cobe, 156 S.W. 1142, 1143–44 (Tex. Civ. App.—El Paso 1913, writ ref'd) (deciding an order, which overrules a motion to vacate the receivership, is not appealable (citing Fid. Funding Co. of S.F. v. Hirshfield, 91 S.W. 246, 246 (Tex. Civ. App.—Austin 1906, no writ)); Maund v. Davidson, 123 S.W. 228, 228–29 (Tex. Civ. App.—Galveston 1909, no writ) (declaring the law permitted no appeal from refusing a motion "to vacate an order appointing a receiver"); *Fid. Funding Co.*, 91 S.W. at 246 ("This statute does not authorize an appeal from an order overruling a motion to set aside and vacate an order appointing the receiver, but only authorizes an appeal from the order appointing the receiver, and requires that right to be exercised within twenty days after the entry of such order.").

95. Almost ninety years later, in 2006, the Texas Supreme Court recognized, "The [l]egislature enacted the statute permitting interlocutory appeal of orders overruling motions to vacate orders appointing receivers or trustees in 1917, and the provision remains substantially unchanged today." De Ayala v. Mackie, 193 S.W.3d 575, 579 (Tex. 2006).

96. Morrow v. Corbin, 62 S.W.2d 641, 650 (Tex. 1933).

97. *Id.* at 650–51. The court also described cases involving "determining pleas of privilege" as a third type of interlocutory order that a party could appeal under Texas law. *Id.* at 650. This Article does not discuss interlocutory appeals of pleas of privilege as they are not a class of interlocutory appeal allowed under the current Civil Practice and Remedies Code section 51.014.

98. In the interim, the legislature tweaked the interlocutory appeal statute. In 1943, the legislature

refusing to certify a class in a suit brought pursuant to Rule 42 of the Texas Rules of Civil Procedure."[99]

Enacted in 1979, this provision authorizing interlocutory appeals of class certification decisions flowed from the Texas Supreme Court's adoption of revised Texas Rule of Civil Procedure 42 in 1977.[100] Commentators recognized that "the Texas Supreme Court took a major step in modernizing the Texas class action lawsuits when it adopted a new Rule 42" and proclaimed that the new rule "should result in modernizing Texas class action practice without revolutionizing it."[101]

One catalyst for the interest in class action lawsuits in the late 1970s—and, by extension, the perceived need for interlocutory appeal of orders concerning class certification—flowed from a series of the United States Supreme Court decisions that "effectively closed the federal courthouse to class actions in diversity cases."[102] Proponents of the Uniform Class Action Act desired to resuscitate class action practice.[103] In response, the Texas Supreme Court completely redrafted Texas Rule of Civil Procedure 42.[104] The revised Rule 42 adopted in 1977 reflected revisions made to Federal Rules of Civil Procedure eleven years earlier.[105]

Rule 42 resulted from the "work of a subcommittee of the Administration of Justice Committee" of the State Bar of Texas.[106] During the committee

amended the statute allowing interlocutory appeals of orders "appointing a receiver or trustee" or orders "[o]verruling a motion to vacate" such an order to include orders issued of county courts and county courts at law in addition to interlocutory orders of district courts. Act of May 7, 1943, 48th Leg., R.S., ch. 305, §§ 1–2, 1943 Tex. Gen. Laws 456, 456–57 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)).

99. Act of May 3, 1979, 66th Leg., R.S., ch. 159, § 1, 1979 Tex. Gen. Laws 348, 348 (current version at CIV. PRAC. & REM. § 51.014(a)(3)).

100. H. Comm. on Judiciary, Bill Analysis, Tex. S.B. 255, 66th Leg., R.S. (1979); *see also Civil Procedure Rules Amendment: Official Court Order*, 40 TEX. B.J. 563, 563–64 (1977) (revising Rule 42).

101. Michol O'Connor, *Legislative Program: Amendment to Article 2250*, 42 TEX. B.J. 23, 23 (1979); *see also* Joseph Jaworski, *The New Texas Class Actions Rule; A Comparison to the Federal Rule*, HOUS. LAW., Nov.–Dec. 1977, at 25, 25.

102. William V. Dorsaneo III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 769–70 (2013); *see also, e.g.*, Zahn v. Int'l Paper Co., 414 U.S. 291, 301–02 (1973) ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'" (citation omitted)), *superseded by statute*, Civil Justice Reform Act of 1990, Pub. L. 101-650, § 1367, 104 Stat. 5089, 5113 (codified at 28 U.S.C. § 1367 (2012)), *as recognized in* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 566–67 (2005).

103. Dorsaneo III, *supra* note 102, at 769–70.

104. *Id.*

105. *See* Russell T. Brown, *Class Dismissed: The Conservative Class Action Revolution of the Texas Supreme Court*, 32 ST. MARY'S L.J. 449, 456–57 n.41 (2001) (explaining Federal Rule of Civil Procedure 23 is "persuasive authority in Texas because" it served as the outline for Texas Rule of Civil Procedure 42).

106. O'Connor, *supra* note 101, at 23; *see also* Jaworski, *supra* note 101, at 25.

debates, members recognized that in order "to have an effective class action rule, the trial court's decision" as to "whether a true and correctly defined class exists must be an appealable interlocutory order."[107] But the committee noted that the legislature, not the supreme court in its rule-making capacity, would need to enact such a law.[108] As committee member Joseph Jaworski later wrote, the determination of whether parties should be able to appeal class certification decisions "is a policy question involving considerations of judicial economy, the public interest i[n] avoiding piecemeal litigation and other issues which are primarily legislative."[109] So when the committee submitted Rule 42 to the supreme court, it did not include a provision for immediate appeal in the proposed rule.[110]

In January 1978, the Administration of Justice Committee proposed to the Texas State Bar that the trial court's decision to certify a class should be an immediately appealable order.[111] The proposed legislation became "part of the legislative package of the . . . Bar."[112]

When the proposal was before the 1979 legislature, a report by the House Committee on the Judiciary described:

> Rule 42 gives the court authority to determine whether a true and correctly defined class exists. However, there are no means to appeal such a determination and order. The [s]upreme [c]ourt was unable to provide an appealable interlocutory order in Rule 42 because the immediate appealability of a court order is a legislative matter (rather than an issue that could be resolved by the [s]upreme [c]ourt in its rulemaking capacity).[113]

The report stated the "Texas State Bar recommends that the trial court's decision on whether a class exists be an immediately appealable order" and proposed that "[a] provision to allow temporary suspension of the trial process in order to clarify the class issue will make class action in Texas a more viable procedure."[114] The House committee report continued:

> Under current law, the trial court's determination that there is a class of defendants might be reversed on appeal, but only after extensive discovery and trial. Or a court's decision that there is no class necessitates that the trial

107. O'Connor, *supra* note 101, at 23.
108. *Id.*
109. Jaworski, *supra* note 101, at 25, 27.
110. O'Connor, *supra* note 101, at 23.
111. *Id.*
112. *Id.*
113. H. Comm. on Judiciary, Bill Analysis, Tex. S.B. 255, 66th Leg., R.S. (1979).
114. *Id.*

proceed as a simple action when the appellate court might rule differently.[115]

The committee concluded that interlocutory appeals of orders "certifying or refusing to certify a class in a Rule 42 class action would be in the interest of judicial economy."[116] The House Committee on Judiciary voted unanimously that Senate Bill 255 pass.[117] A legislative analysis report also stressed the judicial economy that would result:

> [Texas Revised Civil Statute article] 2250 provides for appealable interlocutory orders in Texas, and presently only addresses the appointment of a receiver or trustee in any cause.[118]

Rule 42, Texas Rules of Civil Procedure, provides for a class action suit. Class action suits can be particularly costly and timely. Presently, the trial court's determination of whether a class exists is only reviewable upon appeal of the entire case. This creates potentially costly problems. Examples:

> -trial court rules that a class exists, the case is tried with 20 or so attorneys attending discovery and trial, and, on appeal, the decision concerning the class is reversed
>
> -trial court rules that no class exists, the case is tried as a simple action, and, on appeal, the decision concerning the class is reversed
>
> In both cases much client money, lawyer efforts and judicial time is unnecessarily lost, and a new suit must be filed.[119]

115. *Id.*; *see also* Unnamed Members of the Class v. McMahon, 582 S.W.2d 600, 602 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (concluding because the determination of class action status was not final or irrevocable, a decertification order was not a final appealable order).

116. H. Comm. on Judiciary, Bill Analysis, Tex. S.B. 255, 66th Leg., R.S. (1979).

117. *Id.*

118. As noted below, prior to codification of the Civil Practice and Remedies Code in 1985, the immediate appeal of the grant or denial of temporary injunctions was in a separate statute. *See infra* Section III.

119. S. Comm. on Jurisprudence, Legislative Analysis, Tex. S.B. 255, 66th Leg., R.S. (1979); *see* Ernest E. Figari Jr., *Texas Civil Procedure*, 34 SW. L.J. 415, 445 n.311 (1980) (explaining the need to prevent a "waste of 'lawyer effort, client money, and judicial time' involved when a class action determination is found to be erroneous on appeal and a retrial of the case is therefore necessary" (quoting O'Connor, *supra* note 101, at 23); *see also* Lincoln Prop. Co. v. Kondos, 110 S.W.3d 712, 713 (Tex. App.—Dallas 2003, no pet.) (describing the Texas Legislature's rational for providing appeal of an interlocutory order relating to class certification).

The Texas Legislature's authorization in 1979 of interlocutory appeals of class certification decisions brought about two results. First, allowance for interlocutory appeals of class certification orders "represent[ed] a marked departure from the general rule followed in the federal courts" that prohibited interlocutory appeals of orders concerning class certification.[120] Second, the "change effectively overrule[d]"[121] a 1979 decision by the First Court of Appeals, *Unnamed Members of the Class v. McMahon*,[122] which held that a decertification order was not a final, appealable order.[123] The court stated that "the legislature has the power to confer jurisdiction on appellate courts to review interlocutory orders" and noted that "the legislature has exercised this power" by enacting statutes authorizing appellate courts to review certain orders, including orders "appointing a receiver or trustee" and orders "refusing to vacate the appointment of a receiver or trustee[.]"[124] Perhaps anticipating the legislation allowing for such appeals that passed the same month, the court expressed that the "legislature is in the better position, after obtaining guidance from a wide variety of sources, to determine whether class action determinations should be subject to immediate appellate review, and we defer to legislative action."[125]

III. CODIFICATION OF SECTION 51.014: CONSOLIDATING AND CENTRALIZING INTERLOCUTORY APPEAL STATUTES

Six years later, in May 1985, the Texas Legislature adopted a "nonsubstantive revision of the statutes relating to civil procedure and civil remedies and liabilities" and made "conforming amendments and repeals."[126] The goal was to make "statutes 'more accessible, understandable and usable' without altering the sense, meaning or effect of the law."[127] The resulting Civil Practice and Remedies Code consolidated three articles from the civil statutes authorizing interlocutory appeals, together into section 51.014: article 2250[128] permitting appeals of

120. Figari, Jr., *supra* note 119, at 445.

121. *Id.*

122. Unnamed Members of the Class v. McMahon, 582 S.W.2d 600 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

123. *Id.* at 602.

124. *Id.* The court also listed statutes giving interlocutory appellate jurisdiction over orders sustaining a plea of privilege and orders granting or denying class action status in deceptive trade practice cases. *Id.* Those statutes are outside the scope of this Article.

125. *Id.* (citing Bell v. Beneficial Consumer Disc. Co., 348 A.2d 734 (Pa. 1975)).

126. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242.

127. TEX. LEGISLATIVE COUNCIL, THIRD REVISOR'S REPORT: CIVIL PRACTICE AND REMEDIES CODE, at i (1984).

128. Act effective Sep. 1, 1925, 39th Leg., R.S., ch. 12, art. 2250, *printed in* 1 *Revised Civil Statutes of*

interlocutory orders "appoint[ing] a receiver or trustee[,]" "overrul[ing] a motion to vacate an order . . . appointing a receiver or trustee[,]" or "certify[ing] or refus[ing] to certify a class" in a class action and articles 2251[129] and 4662[130] allowing appeals of orders granting, refusing, or dissolving temporary injunctions.[131] The adopted section 51.014 read:

> Sec. 51.014. APPEAL FROM INTERLOCUTORY ORDER. A person may appeal from an interlocutory order of a district court, county court at law, or county court that:
>
> (1) appoints a receiver or trustee;
>
> (2) overrules a motion to vacate an order that appoints a receiver or trustee;
>
> (3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure; or
>
> (4) grants or refuses or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65 [concerning injunctions].[132]

During the years after codification, the Texas Legislature "dramatic[ally]" expanded the types of orders subject to interlocutory appeal—adding seven types of orders to the list of appealable interlocutory orders under section 51.014 between 1987 and 2005.[133] In 2001, Justice Nathan Hecht recognized "the recent and extensive legislative expansion of the jurisdiction of the courts of appeals over a wider variety of interlocutory orders."[134] Two years earlier, the Fourteenth Court of Appeals described "the considerable increase of interlocutory appeals to the already overcrowded

the State of Texas, at 602, 603 (Austin, A.C. Baldwin & Sons 1925), *repealed and codified by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, §§ 9, 1, 1985 Tex. Gen. Laws 3242, 3322, 3280 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(1)–(3)).

129. *Id.* art. 2251, at 603, *repealed and codified by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, §§ 9, 1, 1985 Tex. Gen. Laws 3242, 3322, 3280 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4)).

130. *Id.* tit. 76, ch. 1, art. 4662, *printed in* 2 *Revised Civil Statutes of the State of Texas*, at 1273, 1278 (Austin, A. C. Baldwin & Sons), *repealed and codified by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, §§ 9, 1, 1985 Tex. Gen. Laws 3242, 3322, 3280 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4)).

131. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3280; TEX. LEGISLATIVE COUNCIL, *supra* note 127, at i.

132. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, sec. 51.014, 1985 Tex. Gen. Laws 3242, 3280 (current version at CIV. PRAC. & REM. § 51.014(a)(1)–(4)).

133. Frank Gilstrap, *Interlocutory Appeals After House Bill 4*, 46 S. TEX. L. REV. 1017, 1022 (2005).

134. Wagner & Brown, Ltd. v. Harwood, 53 S.W.3d 347, 350 (Tex. 2001) (Hecht, J., dissenting) (first citing CIV. PRAC. & REM. § 51.014(a)(7); then citing CIV. PRAC. & REM. § 51.014(a)(8); and then citing City of Houston v. Lazell–Mosier, 5 S.W.3d 887, 890 n.8 (Tex. App.—Houston [14th Dist.] 1999, no pet.)).

dockets of our courts of appeals."[135] This expansion was particularly rapid when compared with the slower pace over the previous ninety-five years, when the legislature authorized only four types of orders that were subject to interlocutory appeal that later became part of section 51.014.[136]

A. *Denials of Summary Judgment Based on a State Official or Employee's Assertion of Immunity*

In 1989—four years after codification of section 51.014—the Texas Legislature again added a category of interlocutory appeal to track what Texas legislators viewed as a beneficial provision of federal law.[137] This fifth type of interlocutory appeal in section 51.014 authorized appeal of denial of "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."[138]

Prior to its passage, committees in the House and Senate noted the benefits of the proposed provision. The Senate Jurisprudence Committee reported:

135. *City of Houston*, 5 S.W.3d at 890 n.8.

136. Yet, while the legislature expanded the types of orders subject to interlocutory appeal and—as a result—the courts of appeals experienced a "considerable increase" in interlocutory appeals on their dockets, *id.*, the supreme court constricted its view of its so-called "conflict jurisdiction"—meaning its jurisdiction over interlocutory appeal of cases with holdings that conflict with prior supreme court or appellate court decisions. Gilstrap, *supra* note 133, at 1021–22. Beginning in 1957 until about 1997, the supreme court narrowly construed the statutory language that granted it conflict jurisdiction over an appealable judgment of a trial court in which a court of appeals "holds differently" from a previous decision of the supreme court or another court of appeals. *Id.* at 1019–21 (noting a broader interpretation of "'holds differently' . . . would have allowed more cases to come before the court under the conflict jurisdiction exception"). Prior to 2003, conflict jurisdiction applied when rulings in two cases were "so far upon the same state of facts that the decision of one case [was] necessarily conclusive of the decision in the other." *Id.* at 1020–21 (quoting Dockum v. Mercury Ins. Co., 135 S.W.2d 700, 701 (Tex. 1940)). The 2003 legislation "refined and expanded" the scope of the supreme court's conflict jurisdiction by defining "holds differently" to include an "inconsistency in the[] respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *Id.* at 1024 (citation omitted); *see also* TEX. GOV'T CODE § 22.225(e) (West Supp. 2016) (defining the term "holds differently" in relation to interlocutory appeals); *Id.* § 22.001(e) (stating the same definition of "holds differently" as applied to the Texas Supreme Court's general jurisdiction). As a result, the supreme court's conflict jurisdiction reflected the same expanding trend as interlocutory appeals under section 51.014.

137. *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."); *see also* 28 U.S.C. § 1291 (2012) (extending jurisdiction to the federal courts of appeals from all "final decisions" of the United States district courts).

138. Act of May 24, 1989, 71st Leg., R.S., ch. 915, § 1, sec. 51.014, 1989 Tex. Gen. Laws 3946, 3946–47 (current version at CIV. PRAC. & REM. § 51.014(a)(5)).

> In Texas, the overruling of a motion for summary judgment is interlocutory in nature and not appealable. In the case of a suit in which an individual who is an employee of the state or a political subdivision of the state may be a defendant, the employee may be able to use immunity as a defense to the suit. If an order de[]nies a motion for summary judgment based on the claim of immunity, and ultimately immunity is found to shield the employee from li[]ability, it can be argued that the employee needlessly has been put through the trouble and turmoil of trial, and judicial resources have been wasted.[139]

The House Judiciary Committee noted that the "[f]ederal [c]ourts already recognize" allowing "individual defendants to be dismissed in their individual capacity from suits against governmental agencies, avoiding the trouble and turmoil of trial" as "a significant policy matter[.]"[140] The House committee report explained:

> Under [f]ederal law, an individual defendant who is sued for an alleged civil rights violation is entitled to be dismissed from the suit if the plaintiff cannot state a claim of violation of clearly established law. Because the [f]ederal [c]ourts recognize that public officials having qualified immunity are immune from suit, they hold that this right would be lost if they were forced to defend a lawsuit even if their immunity to damages was eventually upheld. Therefore, the [f]ederal [c]ourts allow an interlocutory appeal of a district court's denial of a motion for summary judgment on immunity grounds.[141]

The report recommended that the "[s]tate courts should also, but they claim that their hands are tied due to the lack of legislation."[142]

Three years after passage of the law,[143] Texas Supreme Court Justice John Cornyn commented that "it is significant that the [l]egislature amended Section 51.014 . . . to allow a government employee an interlocutory appeal of an order denying a summary judgment based on official immunity."[144] Cornyn concluded that "[t]his rare opportunity for interlocutory appellate review reveals just how important the legislature considers the defense of official immunity for government employees to be."[145] A year later, in 1993, the Fourteenth Court of Appeals stated that the "enactment of 51.014(5) signaled the importance that the legislature places on a deserving

139. S. Jurisprudence Comm., Bill Analysis, Tex. S.B. 908, 71st Leg., R.S. (1989).
140. H. Comm. on Judiciary, Bill Analysis, Tex. S.B. 908, 71st Leg., R.S. (1989).
141. *Id.*
142. *Id.*
143. Tex. S.B. 908, 71st Leg., R.S. (1989).
144. Travis v. City of Mesquite, 830 S.W.2d 94, 102 n.4 (Tex. 1992) (Cornyn, J., concurring).
145. *Id.*

government official's ability to extricate himself from litigation at its earliest stages."[146]

Cornyn also noted that qualified immunity under section 51.014(5) affords "*immunity from suit*, not just immunity from liability."[147] Cornyn expressed that the "very reasons for . . . immunity are effectively unsalvageable if the official is determined to be immune from liability only after a trial on the merits."[148] Citing federal authority that recognized qualified immunity from section 1983 claims, Cornyn also spelled out the "articulated basis for such immunity": to enable officials to avoid distraction from their governmental duties, to avoid reticence by officials in performing discretionary actions, to minimize deterring "able people from public service[,]" to "avoid[] the costs of an unnecessary trial[,]" and to insulate governmental officials from burdensome discovery.[149]

B. *Denials of Summary Judgment Involving Free Speech or Free Press by a Media Defendant or a Defendant Whose Expression Appeared in Media*

In 1993, the Texas Legislature added the sixth interlocutory appeal provision to section 51.014. It allowed appeal of 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 in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73 [concerning libel].[150]

The passage evolved during the legislative process to become the lengthiest section 51.014 interlocutory appeal provision—an evolution explored below.

In addition to the new section 51.014 provision, the 1993 law affected and expanded interlocutory appeals in two ways. First, it added a new section 51.015 that provided that—solely for purposes of appeals brought under this new section 51.014(6) provision—if the appealed order "is affirmed, the court of appeals shall order the appellant to pay all costs and

146. Ervin v. James, 874 S.W.2d 713, 717 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

147. *Travis*, 830 S.W.2d at 102 n.4.

148. *Id.*

149. *Id.*

150. Act of May 25, 1993, 73d Leg., R.S., ch. 855, § 1, sec. 51.014, 1993 Tex. Gen. Laws 3365, 3366 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6)).

reasonable attorney fees of the appeal[.]"[151] But if it is not affirmed, each party would be responsible for its own costs.[152] Second, the law amended section 22.225 of the Government Code, which stated that "a judgment of a court of appeals is conclusive on the law and facts" in various types of cases, and listed exceptions where a writ of error was allowed from the supreme court.[153] The 1993 law added a new provision allowing a writ of error "from the supreme court for an appeal from an interlocutory order described by Section 51.014(6)[.]"[154]

Two aspects of the legislative process leading to passage of section 51.014(6) are notable. First, legislators amended this proposed legislation more than any previous legislation enacting a section 51.014 interlocutory appeal provision.[155] As noted, these amendments resulted in the lengthiest subsection of section 51.014.[156] Second, and relatedly, the wording and focus of the provision at the beginning and end of the legislative process were substantially different. The original Senate bill, as introduced in February 1993, provided only for the addition of section 51.014(6) and for writs of error to the supreme court from interlocutory orders under section 51.014(6) (the amendments to Government Code section 22.225).[157] The original wording of section 51.014(6), as introduced in the Senate in February 1993, allowed appeal of an interlocutory order that

> denies a motion for summary judgment that is based on a claim, or defense to a claim, for defamation, libel, or slander, or a claim, or defense to a claim, arising from a broadcast or written publication.[158]

The bill was then referred to the Senate Committee on State Affairs, which—a week later—reported the bill favorably to the Senate with two amendments. First, it completely rewrote subsection (6) to read largely in

151. *Id.* § 1, sec. 51.015, 1993 Tex. Gen. Laws at 3366 (current version at TEX. CIV. PRAC. & REM. CODE § 51.015).

152. *Id.*

153. *Id.* § 2, sec. 22.225, 1993 Tex. Gen. Laws at 3366 (current version at GOV'T § 22.225(b)).

154. *Id.* (amended 2003) (current version at GOV'T § 22.225(d)).

155. *See Actions: SB 76, 73rd Regular Session*, LEGIS. REFERENCE LIBR. TEX., http://www.lrl.state.tx.us/legis/billSearch/actions.cfm?legSession=73-0&billtypeDetail=SB&billNumberDetail=76&billSuffixDetail=&startRow=1&iDlist=&unClicklist=&number=100 (last visited Nov. 12, 2016) (providing the relevant dates of legislative action on Senate Bill 76).

156. Act of May 25, 1993, 73d Leg., R.S., ch. 855, § 1, sec. 51.014, 1993 Tex. Gen. Laws 3365, 3366 (current version at CIV. PRAC. & REM. § 51.014(a)(6)).

157. Tex. S.B. 76, 73d Leg., R.S. (1993) (introduced version).

158. *Id.*

the form that the legislature ultimately enacted. It allowed appeal of 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 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, Civil Practice and Remedies Code.[159]

The legislation veered from the original broad focus on denials of summary judgment related to "defamation, libel, or slander" claims or "arising from a broadcast or written publication" to a more media-centric focus. All of the witnesses who testified before the Senate Committee on State Affairs favored the bill;[160] several of these witnesses represented media organizations, including the Belo Corporation, the Round Rock Leader, the Texas Press Association, the Texas Daily Newspaper Association, and the Texas Association of Broadcasters.[161] Second, the Senate Committee on State Affairs added section 51.015, which provided that each party was liable for its own costs for an appeal under section 51.014(6).[162]

Numerous additional amendments followed. Senators made two amendments from the floor on the bill's second reading. One amendment added the qualifier that the "members of the electronic or print media" must be "acting in such capacity[.]"[163] A second amendment expanded the statute to apply not only to claims by or against a member of the media, but also to claims by or against "a person whose communication appears in or is published by the electronic or print media[.]"[164] An explanatory note accompanying the second amendment stated the amendment "would extend the right to an interlocutory appeal to persons other than members of the media in certain circumstances[,]" including, for example, "persons who have letters or op-ed pieces published in newspapers or magazines or who express their opinions on radio or television programs."[165] In

159. S. Comm. on State Affairs, Committee Report, Tex. S.B. 76, 73d Leg., R.S. (1993), http://www.lrl.state.tx.us/LASDOCS/73R/SB76/SB76_73R.pdf#page=4.

160. The committee report indicates that all witnesses were "for" the proposed legislation, although the report does not indicate whether the witnesses were "for" the bill in its original introduced form or if they were "for" the bill as amended by the committee. *Id.* (listing the votes of the witnesses).

161. *Id.*

162. *Id.*

163. S.J. of Tex., 73d Leg., R.S. 302 (1993) (Floor Amendment No. One by Senator Turner).

164. *Id.* at 312 (Floor Amendment No. Two by Senator Turner).

165. S. Comm. on State Affairs, Floor Amendment No. 2, Tex. S.B. 76, 73d Leg., R.S. (1993), http://www.lrl.state.tx.us/LASDOCS/73R/SB76/SB76_73R.pdf#page=9.

addition, the House Committee on Judicial Affairs amended section 51.015 to provide that, if the appealed order is affirmed, the court of appeals shall order the appellant to pay "all costs and reasonable attorneys' fees of the appeal;" otherwise, each party would pay their own costs of the appeal.[166] All of these amendments became part of the enacted law.[167]

The bill analyses produced by the Senate Research Center and the House Research Organization reflect the evolution of section 51.014(6) during the legislative process. The Senate Research Center bill analysis described the purpose in terms of the original, enrolled bill: "As proposed, [Senate Bill] 76 authorizes parties to appeal interlocutory orders denying a motion for summary judgment in cases involving defamation, libel, or slander, or arising from a broadcast or written publication."[168] The House Research Organization bill analysis, in contrast, reflected the media-focus of the amended bill. The bill analysis stated that supporters of the amended bill noted it "would allow a newspaper, radio station or television station that was sued for libel to make an immediate appeal of a judge's refusal to grant a summary judgment[.]"[169] The House Research Organization also noted the position of supporters of the bill:

> The free-speech and free-press rights of print and electronic media can be seriously eroded by the costs and management time involved in defending libel suits, even though about 75 percent of jury verdicts against the media are overturned or reduced on appeal. These reversals, which are generally based

166. H. Comm. on Judicial Affairs, Committee Report, Tex. S.B. 76, 73d Leg., R.S. (1993). The House Committee on Judicial Affairs also amended the bill to provide that it would not apply to "any matters in litigation prior to the effective date of the [A]ct." *Id.* The nine witnesses who testified or registered in support of the bill before the House committee largely mirrored the witnesses who appeared at the Senate committee hearing—and several represented media. *Compare* H. Comm. on Judicial Affairs Minutes 2, 73d Leg., R.S. (March 30, 1993), http://www.lrl.state.tx.us/scanned/legisCmteMinutes/houseCmtes/73-0/Judicial_Affairs/03301993.pdf (listing witnesses including representatives of the Texas Press Association, Texas Association of Broadcasters, and Texas Daily Newspaper Association), *with* S. Comm. on State Affairs, Committee Report, Tex. S.B. 76, 73d Leg., R.S. (1993), http://www.lrl.state.tx.us/LASDOCS/73R/SB76/SB76_73R.pdf#page=4 (listing witnesses including representatives of the Texas Daily Newspaper Association, the Round Rock Leader, and the Texas Press Association). One represented the Texas Trial Lawyers Association. H. Comm. on Judicial Affairs Minutes 2, 73d Leg., R.S. (March 30, 1993), http://www.lrl.state.tx.us/scanned/legisCmteMinutes/houseCmtes/73-0/Judicial_Affairs/03301993.pdf.

167. Act of May 25, 1993, 73d Leg., R.S., ch. 855, § 1, sec. 51.014, 1993 Tex. Gen. Laws 3365, 3365–66 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6)).

168. S. Research Ctr., Bill Analysis, Tex. S.B. 76, 73d Leg., R.S. (1993). The Senate Research Center produced four versions of the bill analysis on Senate Bill 76 between February and August 1993, primarily reflecting amendments to the proposed legislation. The wording of the "Purpose" section of the bill analysis did not change from the first version of the bill analysis from February.

169. H. Research Org., Bill Analysis, Tex. S.B. 76, 73d Leg., R.S. (1993).

> on constitutional issues, occur only *after* the media has incurred substantial expenses of defending against the suit. [Senate Bill] 76 would permit the courts to sort out unmeritorious libel cases *before* a case enters the time-consuming and expensive trial phase.[170]

Two years later, the First Court of Appeals in Houston noted the same purpose: "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 or statutory privilege."[171] Yet case law decided during the years immediately after passage of section 51.014(6) in 1993 also reflected a desire by litigants to stretch the wording of the Section so that it applied broadly—or, in other words, applied as originally written. The broadest case challenging section 51.014(6)'s constitutionality based on its application to the media was *KTRK Television, Inc. v. Fowkes*,[172] before the First Court of Appeals in 1998.[173] Fowkes and his wife sued a television station and reporter for libel based on statements in a news report alleging that Fowkes was withholding documents sought by a reporter.[174] The television station and reporter appealed the trial court's denial of their motion for summary judgment under section 51.014(6).[175] Fowkes challenged the constitutionality of section 51.014(6) on three grounds;[176] the court denied all three. Fowkes argued that section 51.014(6) was a "special law" under the Texas Constitution because it benefited one group—the media—without a reasonable basis for the classification and did not apply equally to all parties

170. *Id.*

171. Grant v. Wood, 916 S.W.2d 42, 46 (Tex. App.—Houston [1st Dist.] 1995, no writ). Another issue before the courts was whether section 51.014(6) applied to cases filed before the effective date of the section, September 1, 1993, based on the wording of the enacting legislation. *Id.* at 45 n.2 (declining to address the application of section 51.014(6) when "the underlying suit was filed before the effective date of the 1993 [Act]" because of the inappropriateness of addressing the issue in the mandamus proceeding (citing Act of May 25, 1993, 73d Leg., R.S., ch. 855, § 1, sec. 51.014, 1993 Tex. Gen. Laws 3365, 3366 (current version at CIV. PRAC. & REM. § 51.014(a)(6)). Because of the added provision that the section would not apply to "any matters in litigation prior to the effective date of the [A]ct[,]" courts held that the section did not apply to any cases filed prior to September 1, 1993, even if a court issued the appealed order after September 1, 1993. Time Warner Ent. Co. v. Hebert, 916 S.W.2d 47, 48 (Tex. App.—Houston [1st Dist.] 1996, no writ); H & C Commc'ns, Inc. v. Reeds Foot Int'l, Inc., 887 S.W.2d 475, 476 (Tex. App.—San Antonio 1994, no writ).

172. KTRK Television, Inc. v. Fowkes, 981 S.W.2d 779 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), *disapproved on other grounds by Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 115–16 (Tex. 2000).

173. *Id.* at 783–86.

174. *Id.* at 782–83.

175. *Id.* at 783.

176. *Id.* at 784.

within the class.[177] The court concluded that the classification was reasonable because section 51.014(6) "preserves the freedom of the press" by permitting "media defendants to appeal and obtain an immediate ruling on constitutional issues without incurring substantial expense."[178] Fowkes argued that the law did not apply equally "because the class completely excludes non-media libel defendants."[179] However, the court concluded that the statute created a "class" of media defendants and that "[n]on-media libel defendants are simply excluded from the class."[180] The court also concluded that the law does not violate the open courts provision of the Texas Constitution because it does not place unreasonable financial barriers on libel victims.[181] Among other reasons, the court reasoned that, if the media defendant loses the interlocutory appeal, the defendant must pay the plaintiff's attorney's fees and costs; if the media defendant wins the interlocutory appeal, "the plaintiff saves the costs and attorney's fees of a [full] trial and subsequent appeal."[182] In addition, the court concluded that section 51.014(6) does not place an unreasonable burden on non-media libel plaintiffs when balanced against the purpose of the statute of ensuring "that the chilling effect of protracted litigation will not diminish the free exchange of ideas guaranteed by the Texas and United States Constitutions."[183] Lastly, the court concluded that section 51.014(6) does not violate the equal protection guarantees in the United States and Texas Constitutions:

> The legislature has enacted the statute in question to eliminate the chilling effect that the threat of extended litigation has upon the exercise of the protections secured by the First Amendment. The state has a legitimate purpose in furthering our national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. The distinction between media libel defendants and non-media libel defendants created by the legislature is rationally related to a legitimate state purpose.[184]

177. *Id.*; *see also* TEX. CONST. art. III, § 56 (prescribing the Texas Legislature from enacting a "special law" of various enumerated types or "in all other cases where a general law can be made applicable").

178. *KTRK Television*, 981 S.W.2d at 784.

179. *Id.*

180. *Id.*

181. *Id.* at 785; *see also* TEX. CONST. art. I, § 13 ("All courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have remedy by due course of law.").

182. *KTRK Television*, 981 S.W.2d at 785.

183. *Id.*

184. *Id.* at 786; *see also* U.S. CONST. amend. XIV § 1 (stating no state shall deny any person equal protection of the laws); TEX. CONST. art. I, § 3 ("All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or

In other cases, plaintiffs argued that section 51.014(6) applied to them, although they were non-media litigants. In a 1997 case before the Thirteenth Court of Appeals and a 1998 case before the Eighth Court of Court of Appeals, plaintiffs who sued the media for defamation argued that section 51.014(6) enabled them to appeal an interlocutory order denying them summary judgment.[185] Both courts of appeals similarly stated that "[w]hile that is indeed an avenue of interpretation, the legislative history of the statute reveals that Section 51.014(6) [is] not intended to inure to the benefit of a plaintiff who claim[s] to have been libeled or slandered by the media."[186] Instead, both courts quoted the House Research Organization bill analysis and noted that the purpose of section 51.014(6) is to grant an immediate appeal of a denial of summary judgment to media defendants that are sued for libel.[187]

C. *Grant or Denial of a Special Appearance and Grant or Denial of a Plea to the Jurisdiction by a Governmental Unit*

In 1997, the Texas Legislature enacted the seventh and eighth types of interlocutory appeal under section 51.014: appeals of interlocutory orders granting or denying a special appearance or granting or denying a plea to the jurisdiction by a governmental unit.[188] Because passage of the two provisions was interrelated, this Article discusses them both in this section.

The 1997 legislation amended section 51.014 in three ways. First, the legislation added two types of interlocutory appeals to section 51.014. Litigants could appeal an interlocutory order that:

> (7) 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; or
> (8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.[189]

This 1997 legislation also inserted Subsection "(a)" before the listing of the types of appealable interlocutory orders in section 51.014 and created

privileges, but in consideration of public services.").

185. TSM AM-FM TV v. Meca Homes, Inc., 969 S.W.2d 448, 451 (Tex. App.—El Paso 1998, pet. denied); Rogers v. Cassidy, 946 S.W.2d 439, 443 (Tex. App.—Corpus Christi 1997, no writ).

186. *TSM*, 969 S.W.2d at 451; *see Rogers*, 946 S.W.2d at 443.

187. *TSM*, 969 S.W.2d at 451; *Rogers*, 946 S.W.2d at 443.

188. Act of May 27, 1997, 75th Leg., R.S., ch. 1296, § 1, sec. 51.014(a), 1997 Tex. Gen. Laws 4936, 4937 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7)–(8)).

189. *Id.*

subsection "(b)" which provided:

> (b) An interlocutory appeal under Subsection (a) shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal.[190]

The original bill introduced in the Senate included subsection (7), concerning special appearance rulings (although it did not mention the exclusion of orders in suits under the Texas Family Code).[191] But it contained an entirely different subsection (8)—and no mention of orders on pleas to the jurisdiction by government entities.[192] The original subsection (8) allowed appeal of an interlocutory order that "grants or denies a motion to join a responsible third party under section 33.004."[193] The Senate Committee on Jurisprudence substituted a new bill that (a) kept the original section concerning orders granting or denying a special appearance and added the qualifier "except in a suit brought under the Family Code"; (b) included the original section concerning orders granting or denying a motion to join a responsible third party; and (c) added a third new subsection to 51.014—subsection (a)(9)—allowing appeals of orders granting or denying pleas "to the jurisdiction by a governmental unit."[194] At the committee hearing, a representative of the Texas Association of Defense Counsel testified in favor of the bill, while representatives of the Texas Trial Lawyers Association testified against it.[195] Then, during its second reading on the floor, the Senate adopted an amendment proposed by Senator Robert Duncan, the sponsor of the bill, to delete the proposed subsection (a)(8) allowing appeal from interlocutory orders concerning joinder of a responsible third party.[196] Although the two additions to

190. *Id.* § 1, sec. 51.014(a)–(b), 1997 Tex. Gen. Laws at 4937 (current version at CIV. PRAC. & REM. § 51.014(a)–(b)).

191. Tex. S.B. 453, 75th Leg., R.S. (1997) (introduced version).

192. *Compare id.* (failing to mention pleas to the jurisdiction by governmental units), *with* Act of May 27, 1997, 75th Leg., R.S., ch. 1296, § 1, sec. 51.014(a), 1997 Tex. Gen. Laws 4936, 4937 (current version at CIV. PRAC. & REM. § 51.014(a)(8)) (discussing pleas to the jurisdiction by governmental units under subsection (8)).

193. Tex. S.B. 453, 75th Leg., R.S. (1997) (introduced version); *see also* CIV. PRAC. & REM. CODE ANN. § 33.004 (West. Supp. 2016) (prescribing procedural rules for joining responsible third parties).

194. S. Comm. on Jurisprudence, Committee Substitute, Tex. S.B. 453, 75th Leg., R.S. (1997). The bill also provided that interlocutory appeals of orders granting or denying a motion to join a responsible third party "may not be brought after the 90th day after the filing of the original answer by the defendant or defendants." *Id.*

195. S. Comm. on Jurisprudence, Witness List, Tex. S.B. 453, 75th Leg., R.S. (Feb. 24, 1997).

196. S.J. of Tex., 75th Leg., R.S. 834 (1997) (Floor Amendment No. One by Senator Duncan). The Senate also adopted Senator Duncan's floor amendment to omit the associated subsection—

section 51.014(a) concerning special appearances and pleas to the jurisdiction were related, their origins differed.

1. Special Appearance

The impetus for enacting legislation allowing interlocutory appeals of rulings on special appearances arose from a 1996 Texas Supreme Court decision, *CSR Ltd. v. Link*.[197] Prior to *CSR*, the Texas Supreme Court held that "mandamus typically will not lie from the denial of a special appearance" because "in the ordinary case no circumstances apart from the increased cost and delay of trial and appeal are present[.]"[198] But in *CSR*, the Texas Supreme Court held that—under the circumstances of that case—mandamus relief was appropriate where a trial court had improperly denied a special appearance motion.[199] The court concluded:

> While the question of personal jurisdiction is remediable by appeal in most cases, we hold that under the circumstances of this case, the concerns of judicial efficiency in mass tort litigation combined with the magnitude of the potential risk for mass tort actions against the defendant makes ordinary appeal inadequate.[200]

When the legislature met during the year following the *CSR* decision, the House and Senate bill analyses of the Senate bill proposing sections 51.014(7) and (8), discussed *CSR*.[201] The Senate Research Center bill analysis stated, "The writ was issued [in the *CSR* case] because Texas law does not allow an interlocutory appeal for a special appearance."[202] The report by the House Committee on Civil Practices noted, "This bill provides a solution by allowing interlocutory appeals from an order granting or denying a special appearance."[203]

Four and a half months after the Act went into effect, in *Raymond Overseas*

subsection (b)—requiring that appeals of orders concerning joinder of responsible third parties be brought within ninety days of the filing of the first answer. *Id.*

197. CSR Ltd. v. Link, 925 S.W.2d 591 (Tex. 1996).

198. *Id.* at 597 (citing Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 307 (Tex. 1994)).

199. *Id.*

200. *Id.*

201. *See* H. Research Org., Bill Analysis, Tex. S.B. 453, 75th Leg., R.S. (1997) ("[R]ecently the court issued a writ of mandamus for the denial of a special appearance motion." (citing *CSR*, 925 S.W.2d at 597)).

202. S. Research Ctr., Bill Analysis, Tex. S.B. 453, 75th Leg., R.S. (1997) (concerning enrolled version).

203. H. Comm. on Civ. Practices, Committee Report, Tex. S.B. 453, 75th Leg., R.S. (1997).

Holding, Ltd. v. Curry,[204] the Second Court of Appeals considered the availability of mandamus relief after the Act "created an interlocutory remedy other than mandamus when a trial court grants or denies a special appearance."[205] The court denied Raymond Overseas's request in a motion for rehearing to construe its mandamus petition as an interlocutory appeal.[206] The court concluded, "When an interlocutory appeal is available, the 'extraordinary circumstances' dictating mandamus relief from the denial of a special appearance usually will not be present if the interlocutory appeal is an adequate remedy."[207]

2. Plea to the Jurisdiction by a Governmental Unit

The stimulus for including the second new category of interlocutory appeal—an order that "grants or denies a plea to the jurisdiction by a governmental unit"[208]—in the 1997 law is less clear. But the House Research Organization, in describing supporters' arguments for the proposed bill, outlined the relationship between the two new interlocutory appeal provisions. It described how "[d]eterminations of personal jurisdiction and subject matter jurisdiction are at the heart of a court's ability to hear a case[,]" but that "there [was] currently no procedure for appealing the decision of the trial court on these important issues until after a judgment is rendered."[209] The House Research Organization bill analysis also noted that "incorrect rulings on such decisions needlessly waste the time of the courts and can cost litigants hundreds of thousands of dollars as they defend cases which should have been dismissed."[210] The bill analysis stated that the reason the bill would "allow a governmental entity's denial of a plea to the jurisdiction to be taken up on an interlocutory appeal [was] because such entities would be wasting taxpayer money defending a suit in which the court lacked jurisdiction."[211]

But the House Research Organization limited the application of the plea

204. Raymond Overseas Holding, Ltd v. Curry, 955 S.W.2d 470 (Tex. App.—Fort Worth 1997, no pet.).

205. *Id.* at 471.

206. *Id.* at 472.

207. *Id.* at 471 (quoting CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996)).

208. Act of May 27, 1997, 75th Leg., R.S., ch. 1296, § 1, sec. 51.014(a), 1997 Tex. Gen. Laws 4936, 4937 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8)).

209. H. Research Org., Bill Analysis, Tex. S.B. 453, 75th Leg., R.S. (1997).

210. *Id.*

211. *Id.* The House Research Organization bill analysis also noted opponents' complaint that, because "the defendant in these cases would be governmental entities with resources superior to many plaintiffs, the tactic would just give these entities an even greater advantage than they already possess." *Id.*

to the jurisdiction provision. Without stating a basis for its position, it contended that "to avoid overloading the appellate courts with having to rule on routine motions, the bill would limit subject matter jurisdiction interlocutory appeals to cases involving government entities sued under the Tort Claims Act."[212] The following year, in 1998, parties before the Third Court of Appeals cited statements from the House Research Organization bill analysis, from the legislative hearing testimony by the bill's sponsor, and from an assistant attorney general to buttress their claim that the Civil Practice and Remedies Code "allows such interlocutory appeals only when the asserted lack of jurisdiction in the trial court is based on sovereign immunity."[213] Nevertheless, the court concluded the language of the statute did not limit these appeals to only orders concerning pleas of jurisdiction based on sovereign immunity.[214] The court also concluded that the cited legislative hearing testimony did not address the limits of section 51.014(a)(8).[215] Additionally, the court noted that (1) the statement from the House Research Organization bill analysis was from the section stating arguments by bill supporters, and (2) the Senate and House committee reports did not discuss restricting the provision to pleas involving sovereign immunity.[216] The court concluded "[t]he legislative history here is not sufficiently clear or compelling to require us to add a restriction to the statute that the legislature did not provide."[217]

D. *Expert Reports in Health Care Liability Claims*

Six years later, in 2003, two new amendments to section 51.014 reflected a primary priority of that legislative session: tort reform. A report by the House Committee on Civil Practices reflected these concerns:

> Texas faces a general environment of excessive litigation. This has resulted in a crisis in access to healthcare as medical providers leave the state or leave the profession altogether. It has also resulted in higher costs to patients and consumers, caused companies to locate outside of Texas, disproportionately burdened Texas courts, and even forced some companies into bankruptcy.[218]

212. *Id.*
213. City of Austin v. L.S. Ranch, Ltd., 970 S.W.2d 750, 752 (Tex. App.—Austin 1998, no pet.).
214. *Id.*
215. *Id.* at 752–53.
216. *Id.* at 753.
217. *Id.*
218. H. Comm. on Civ. Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003).

The Texas Legislature attempted to address these conditions with House Bill 4, major tort reform legislation that included revisions to section 51.014.[219] As the House Committee on Civil Practices expressed, "[House Bill] 4 is a comprehensive civil justice reform bill intended to address and correct problems that currently impair the fairness and efficiency of our court system."[220]

The enacted version of House Bill 4 spanned over fifty pages of the Texas General Laws and included numerous procedural and jurisdictional changes to interlocutory appeals (some concerning section 51.014 and some not), including broadening the conflict jurisdiction of the Supreme Court of Texas over interlocutory appeals.[221] Two provisions near the beginning of the wide-ranging legislation concerned section 51.014. First, the bill expanded the types of interlocutory appeals for which a petition of review could be filed in the supreme court to include an appeal from an interlocutory order that certifies or refuses to certify a class in a class action lawsuit (under section 51.014(a)(3)).[222] As a result, under House Bill 4, as enacted, a petition for review to the supreme court was permitted for two types of appeals of interlocutory orders: orders concerning class certification and orders denying summary judgment to media defendants or people whose communication appeared in the media on First Amendment grounds

219. *See* S. Research Ctr., Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003) (suggesting, at section 1.03 in the engrossed version, amendments to subsections 51.014(a), (b), and (c) of the Civil Practice and Remedies Code).

220. H. Comm. on Civ. Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003). House Bill 4 was "comprehensive." As the Senate Research Center described in its bill analysis, House Bill 4 "contains elements addressing: class action lawsuits, offers of settlement, venue and forum non conveniens, proportionate responsibility, products liability, interest, appeal bonds, seat belts, medical malpractice, charitable immunity and liability, admissibility of evidence regarding nursing homes, liability relating to asbestos claims, and assignment of judges in health care liability claims." S. Research Ctr., Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003).

221. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847; *see* Gilstrap, *supra* note 133, at 1017–18 (explaining the jurisdictional and procedural changes to interlocutory appeals in House Bill 4); Claudia Wilson Frost & J. Brett Busby, *HB4's New Appellate Rules: Interlocutory Appeals and Stays, Conflict Jurisdiction, Judgment Interest, and Stays of Foreign Judgments*, 16 APP. ADVOC., Fall 2003, at 6, 6–9 (describing how House Bill 4 changed the law concerning interlocutory appeals, including conflict jurisdiction).

222. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.02, sec. 22.225(d), 2003 Tex. Gen. Laws 847, 848–49 (amended 2005) (current version at TEX. GOV'T CODE § 22.225(d)). The Act also clarified that not only does the filing of an interlocutory appeal under any of the subsections of section 51.014 (except for appeal of an order concerning temporary injunctions) "stays the commencement of a trial" pending resolution of the interlocutory appeal, but that interlocutory appeals of orders concerning class certification, immunity of officers or employees of the state, or a governmental unit's plea to the jurisdiction under section 51.014 also stay all other trial court proceedings. *Id.* § 1.03, sec. 51.014(b), 2003 Tex. Gen. Laws at 849 (amended 2013) (current version at CIV. PRAC. & REM. § 51.014(b)).

(under section 51.014(a)(6)).[223] Second, the law added two types of orders that were subject to interlocutory appeal:

> An order that "denies all or part of the relief sought by a motion" under Civil Practice and Remedies Code Section 74.351(b)—which allows "a defendant physician or health care provider" to file a motion for a trial court to dismiss a health care liability claim and award the "physician or health care provider reasonable attorney's fees and costs of court" on the ground that the claimant did not timely file a required expert report.[224]

> An order that "grants relief sought by a motion under Section 74.351*(l)*"—which states that a "court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the" requirements for an expert report.[225]

The original version of House Bill 4, introduced in February 2003, included less comprehensive revisions concerning section 51.014 than the version that the legislature eventually enacted. The original version only included provisions concerning section 51.014 that related to class action suits.[226] The original bill did not include the two new types of interlocutory appeals concerning expert reports in health care liability claims that were in the final version.[227]

In late February 2003—nine days after the bill's introduction—the House Committee on Civil Practices considered the bill in a public hearing and heard testimony from over twenty witnesses, who were about evenly divided between those who favored the bill and those who opposed it.[228] Those in favor included representatives of the Texas Civil Justice League and Texans for Lawsuit Reform while representatives of the Texas Trial Lawyers

223. *Id.* § 1.02, sec. 22.225(d), 2003 Tex. Gen. Laws at 849 (current version at GOV'T § 22.225(d)).

224. *Id.* § 1.03, sec. 51.014(a), 2003 Tex. Gen. Laws at 849 (current version at CIV. PRAC. & REM. § 51.014(a)(9)); *see also* CIV. PRAC. & REM. CODE ANN. § 74.351(b) (West Supp. 2016). The law also provided that "an appeal may not be taken from an order granting an extension under Section 74.351." Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.03, sec. 51.014(a), 2003 Tex. Gen. Laws 847, 849 (current version at CIV. PRAC. & REM. § 51.014(a)(9)).

225. *Id.* (current version at CIV. PRAC. & REM. § 51.014(a)(10)) (emphasis added); *see also id.* § 74.351*(l)*.

226. Tex. H.B. 4, 78th Leg., R.S. (2003) (introduced version).

227. *Compare id.* (addressing only section 51.014(b)), *with* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.03, sec. 51.014(a), 2003 Tex. Gen. Laws 847, 849 (adding Section 51.014(a)(9) and (10)).

228. *See* H. Comm. on Civ. Practices, Witness List, Tex. H.B. 4, 78th Leg., R.S. (Feb. 26, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C1002003022614001.HTM (listing eleven witnesses "for" the bill and ten witnesses "against" it).

Association and Texas Municipal League Intergovernmental Risk Pool were among those opposed.[229] A week later, the committee reconvened and considered and recommended to the House a substituted committee version of the bill that incorporated numerous revisions.[230] These included the addition of the two types of orders (concerning health care liability claim expert reports) subject to interlocutory appeal under section 51.014.[231] The House and Senate ultimately passed—with some slight revision—the "Complete Committee Substitute" recommended by the House Committee on Civil Practices, including the new section 51.014(a) provisions.[232]

229. *Id.* Numerous witnesses representing groups or themselves also appeared before the Senate Committee on State Affairs. Some of these witnesses included representatives from similar groups that appeared before the House Civil Practices Committee, with representatives of the Texas Civil Justice League and Texans for Lawsuit Reform among the supporters and those opposed including representatives of the Texas Trial Lawyers Association. S. Comm. on State Affairs, Witness List, Tex. H.B. 4, 78th Leg., R.S. (Apr. 7, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C5702003040708001.HTM; S. Comm. on State Affairs, Witness List, Tex. H.B. 4, 78th Leg., R.S. (Apr. 10, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C5702003041008001.HTM; S. Comm. on State Affairs, Witness List, Tex. H.B. 4, 78th Leg., R.S. (Apr. 14, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C5702003041408001.HTM; S. Comm. on State Affairs, Witness List, Tex. H.B. 4, 78th Leg., R.S. (Apr. 15, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C5702003041508001.HTM; S. Comm. on State Affairs, Witness List, Tex. H.B. 4, 78th Leg., R.S. (Apr. 16, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C5702003041608001.HTM; S. Comm. on State Affairs, Witness List, Tex. H.B. 4, 78th Leg., R.S. (Apr. 22, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C5702003042208001.HTM; S. Comm. on State Affairs, Witness List, Tex. H.B. 4, 78th Leg., R.S. (May 5, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C5702003050508001.HTM; S. Comm. on State Affairs, Witness List, Tex. H.B. 4, 78th Leg., R.S. (May 6, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C5702003050608001.HTM; S. Comm. on State Affairs, Witness List, Tex. H.B. 4, 78th Leg., R.S. (May 7, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C5702003050708001.HTM.

230. *See* H. Comm. on Civ. Practices, Recommitted Committee Report, H.B. 4, 78th Leg., R.S. (2003) (detailing the revisions made to House Bill 4 by the House Committee on Civil Practices); H. Comm. on Civ. Practices, Committee Report, H.B. 4, 78th Leg., R.S. (2003) (providing a "Summary of Committee Action").

231. *See* H. Comm. on Civ. Practices, Recommitted Committee Report, H.B. 4, 78th Leg., R.S. (2003) (proposing subsections (9) and (10) as additions to section 51.014).

232. H. Comm. on Civ. Practices, Committee Report, H.B. 4, 78th Leg., R.S. (2003) (providing a "Summary of Committee Action" and showing the "[c]ommittee substitute" as being "[r]eported favorably" on March 4, 2003). On the bill's second reading, the House adopted numerous floor amendments, including amendments proposed by the sponsor of House Bill 4, Representative Joe Nixon. *See Actions: HB 4, 78th Regular Session*, LEGIS. REFERENCE. LIBR. TEX., http://www.lrl.state.tx.us/legis/billSearch/actions.cfm?legSession=78-0&billtypeDetail=HB&billNumberDetail=4&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100 (last visited Nov. 12, 2016) (listing the dates of legislative action on House Bill 4). Nixon's floor amendments expanded the reach of section 51.014(c) so that an interlocutory appeal of an order concerning the immunity of a state official under section 51.014(a)(5) and pleas to the jurisdiction under section 51.014(a)(8) (along with orders concerning class action certification under section 51.014(a)(3)) stayed all proceedings in the trial court—not just the commencement of trial. H.J.

The two new types of interlocutory appeals under section 51.014—allowing interlocutory appeal of rulings concerning expert reports in health care liability cases—related to and supported "[a] primary goal of the 78th [Texas] Legislature": "reform the law of medical malpractice."[233] The legislature expressed its concerns about "a medical malpractice insurance crisis in Texas" in its findings in the legislation: "The Legislature of the State of Texas" found that "the number of health care liability claims (frequency) ha[d] increased since 1995 inordinately[.]"[234] As a result of medical liability filings and payments by insurers, there was a resulting "serious public problem in availability of and affordability of adequate medical professional liability insurance" that "increased the cost of medical care both directly through fees and indirectly through additional services provided for protection against future suits or claims[.]"[235] The legislature stated that, in light of these conditions, it passed article 10 of House Bill 4 for the purpose of—among other things—reducing "excessive frequency and severity of health care liability claims through reasonable improvements and modifications in the Texas insurance, tort, and medical practice systems."[236]

In Article 10, "the legislature repealed the Medical Liability and Insurance Improvement Act of 1977 and replaced it with a new chapter 74 of the Civil Practice and Remedies Code entitled 'Medical Liability.'"[237] The new section 74.351 of the Civil Practice and Remedies Code implemented "a

of Tex., 78th Leg., R.S. 802–03 (2003) (Floor Amendment No. Three by Representative Joe Nixon). The House and Senate fine-tuned the provisions, incorporating slight additional revisions, before final passage. These revisions included (1) changing the references in the new section 51.014(a)(9) and (a)(10) from the previous Medical Liability and Insurance Improvement Act of Texas in the civil statutes to the newly enacted Medical Liability Act under Civil Practice and Remedies Code section 74.351; (2) adding a closing phrase to subsection (a)(9) so that it read in full: "[Subsection] (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"; and (3) allowing for the stay of all trial court proceedings in interlocutory appeals of orders concerning class certification, orders denying summary judgment based on official immunity, and orders concerning a plea to the jurisdiction by a governmental unit. H. & S., Final Conf. Comm. Report, H.B. 4, 78th Leg., R.S. (2003); *see also* S. Comm. on State Affairs, Committee Substitute, H.B. 4, 78th Leg., R.S. (2003) (recommending a substituted version to the engrossed House version of the bill); Tex. H.B. 4, 78th Leg., R.S. (2003) (engrossed version) (representing the House version of the bill).

233. Gilstrap, *supra* note 133, at 1025–26.

234. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(1), 2003 Tex. Gen. Laws 847, 884.

235. *Id.* § 10.11(a)(4), (9), 2003 Tex. Gen. Laws at 884.

236. *Id.* § 10.11(b)(1), 2003 Tex. Gen. Laws at 884.

237. Gilstrap, *supra* note 133, at 1025; *see* §§ 10.01, 10.09, 2003 Tex. Gen. Laws at 864, 884 (amending chapter 74 to include the Medical Liability Act and repealing the Medical Liability and Insurance Improvement Act of Texas); TEX. CIV. PRAC. & REM. CODE ch. 74 (West Supp. 2016) (codifying the Medical Liability Act).

revised procedure for expert reports in health care liability cases."[238] And the enactment of two new interlocutory appeals provisions in section 51.014(a)(9) and (10) made trial court rulings concerning those expert reports subject to interlocutory appeal.[239] As Justice Priscilla Owen described in a 2004 concurrence and dissent, "the [l]egislature amended section 51.014 . . . to provide for an interlocutory appeal if a trial court refuses to dismiss a health care liability claim when an expert's statement does not meet the statutory standards."[240] Justice Owen concluded, "This is another unmistakable statement of public policy that the [l]egislature does not want health care liability cases to proceed through the legal system if the threshold requirement of an expert report has not been met."[241] As a result, the legislature used the interlocutory appeal mechanism as an instrument "[i]n an effort to stem frivolous suits against health care providers[.]"[242]

E. *Denial of a Motion to Dismiss a Claim Related to Asbestos and Silica Exposure*

At the next legislative session in 2005, the Texas Legislature again employed the interlocutory appeal mechanism as a tool to address a tort reform issue:[243] an "asbestos litigation crisis" and the "precipitous[]" rise in claims of "silica-related disease[.]"[244] Proponents of tort reform

238. Gilstrap, *supra* note 133, at 1026; *see* CIV. PRAC. & REM. § 74.351 (mandating procedural requirements for filing expert reports "[i]n a health care liability claim" against a "physician or health care provider" with consequences—such as awarding the "affected physician or health care provider reasonable attorney's fees" and dismissing the claim—for failure to follow the requirements). Since 1995, Texas law had required a plaintiff in a health care liability suit to submit an "early expert report[.]" Lewis v. Funderbunk, 253 S.W.3d 204, 205 (Tex. 2008).

239. CIV. PRAC. & REM. § 51.014(a)(9)–(10); *see* Gilstrap, *supra* note 133, at 1026.

240. *In re* Woman's Hospital of Tex., Inc., 141 S.W.3d 144, 148 (Tex. 2004) (Owen, J., concurring in part and dissenting in part).

241. *Id.*

242. *Lewis*, 253 S.W.3d at 205.

243. John G. George, *Sandbagging Closed Texas Courtrooms with Senate Bill 15: The Texas Legislature's Attempt to Control Frivolous Silicosis Claims Without Restricting the Constitutional Rights of Silicosis Sufferers*, 38 ST. MARY'S L.J. 849, 854 (2006).

244. Act of May 11, 2005, 79th Leg., R.S., ch. 97, § 1(d), (*l*), 2005 Tex. Gen. Laws 169, 169–70 (citation omitted). The legislation—Senate Bill 15—had characteristics that overlapped with House Bill 4 from the 2003 legislative session discussed above (through which the legislature enacted two interlocutory appeal provisions in Section 51.014 concerning expert reports in health care liability claims). Representative Joe Nixon, the author of House Bill 4, was the House sponsor of Senate Bill 15. H. Comm. on Civ. Practices, Meeting Report, S.B. 15, 79th Leg., R.S. (May 3, 2005). Various groups represented by witnesses testifying for and against House Bill 4 also had witnesses testify concerning Senate Bill 15. *Compare* H. Comm. on Civ. Practices, Witness List, Tex. H.B. 4, 78th Leg., R.S. (Feb. 26, 2003), http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C1002003022614001.HTM (detailing witnesses supporting House Bill 4, including witnesses representing organizations such as the Texas Civil Justice League, Texans for Lawsuit Reform, and including witnesses opposing the bill, such as witnesses from the Texas Trial Lawyers Association), *with* S. Comm.

proclaimed that the 2005 legislation—of which the interlocutory appeal provision was a part—presented "[a] [n]ew [d]ay for [a]sbestos and [s]ilica [l]itigation in Texas"[245] while the "Plaintiffs Bar [b]emoan[ed] [e]nd of an [e]ra as [t]ort [r]eformers [t]arget [a]sbestos[.]"[246] Senate Bill 15 was "[o]ne of the most highly publicized events of the 79th [Texas] Legislature" and it was "expected to reduce drastically the number of asbestos and silica cases that are filed in Texas and that are tried in Texas courts."[247]

The legislature made numerous findings at the beginning of the 2005 law, including that (1) exposure to asbestos and silica has adverse health effects[248]; (2) "hundreds of thousands of lawsuits alleging asbestos-related disease ha[d] been filed throughout the United States" over the previous thirty years, with a large increase in the 1990s; (3) "from 1988 to 2000, more lawsuits alleging asbestos-related disease were filed in Texas than in any other state"; (4) in recent years, the "number of new lawsuits alleging silica-related disease being filed each year ha[d] risen precipitously"; and (5) both asbestos claims and silica claims often arise when a person "is identified as having markings on the individual's lungs" consistent with asbestos- or silica-related disease but "has no functional or physical impairment" and yet the person files a lawsuit "under the theory that" he or she "must do so to avoid having the[] claims barred by limitations[.]"[249]

To address this crisis, Senate Bill 15 imposed various requirements on claimants, including filing a pre-trial report from a physician supporting the claim.[250] The law included a new section 90.007 of the Civil Practice and Remedies Code.[251] That section authorized a defendant to file a motion to

on State Affairs, Witness List, Tex. S.B. 15, 79th Leg., R.S. (Apr. 11, 2005), http://www.capitol.state.tx.us/tlodocs/79R/witlistmtg/html/C5702005041109001.HTM (identifying witnesses supporting Senate Bill 15, including those representing organizations such as the Texas Civil Justice League and Texans for Lawsuit Reform, and also identifying those opposing the bill, including witnesses representing organizations such as the Texas Trial Lawyers Association).

245. Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 696 (2005).

246. Miriam Rozen, *Paradise Lost: Plaintiffs Bar Bemoans End of an Era as Tort Reformers Target Asbestos*, TEX. LAW., Feb. 28, 2005, at 1, 17.

247. Risley, *supra* note 245, at 696. Risley noted that "[t]here was little challenge to the bill as it proceeded through the [l]egislature." *Id.* at n.1.

248. Act of May 11, 2005, 79th Leg., R.S., ch. 97, § 1(b), 2005 Tex. Gen. Laws 169, 169 ("Exposure to asbestos, particularly through inhalation of asbestos fibers, has allegedly been linked to certain malignant and nonmalignant diseases, including mesothelioma and asbestosis.").

249. *Id.* § 1(c), (e), (*l*), (m), 2005 Tex. Gen. Laws at 169–70.

250. *See id.* § 2, secs. 90.003–.004, 90.006, 2005 Tex. Gen. Laws at 173–76 (current version at TEX. CIV. PRAC. & REM. CODE §§ 90.003–.004, 90.006) (adding provisions entitled "Reports Required For Claims Involving Asbestos-Related Injury" and "Reports Required For Claims Involving Silica-Related Injury[,]" while also imposing a thirty day time limit on serving expert reports under these provisions).

251. *Id.* § 2, sec. 90.007, 2005 Tex. Gen. Laws at 176–77 (current version at CIV. PRAC. & REM.

dismiss—and the court to grant the motion—when a claimant does not file the required physician's report or filed an inadequate report.[252] Other sections established a pre-trial multidistrict litigation procedure[253] and extended the statute of limitations for asbestos- or silica-related claims.[254] As the legislature expressed, "the purpose of this Act" is:

> [T]o protect the right of people with impairing asbestos-related and silica-related injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system, while at the same time preventing scarce judicial and litigant resources from being misdirected by the claims of individuals who have been exposed to asbestos or silica, but have no functional or physical impairment from asbestos-related or silica-related disease.[255]

Significantly for our focus: the Act added the eleventh type of appealable interlocutory order to section 51.014. The new section 51.014(a)(11) authorized appeal of an interlocutory order that "denies a motion to dismiss filed under [s]ection 90.007."[256] So in 2005, the legislature employed the interlocutory appeal in the asbestos and silica litigation context as it did in the health care liability context two years earlier—it allowed an appeal of the

§ 90.007).

252. *Id.* § 2, sec. 90.007(a), (c), 2005 Tex. Gen. Laws at 176 (current version at CIV. PRAC. & REM. § 90.007(a),(c)).

253. *Id.* § 2, sec. 90.010, 2005 Tex. Gen. Laws at 177–79 (current version at CIV. PRAC. & REM. § 90.010) (permitting transfer to a MDL pretrial court "if [a] claimant fails to serve a report" in accordance with sections 90.003 or 90.004, and detailing the procedural requirements for the court and the parties upon transfer to a MDL pretrial court).

254. *Id.* § 4, sec. 16.0031(a)–(b), 2005 Tex. Gen. Laws at 170–71, 179 (current version at CIV. PRAC. & REM. § 16.0031(a)–(b)) (authorizing a cause of action to accrue, for purposes of an asbestos- or silica-related injury, on the earlier of "the date of the exposed person's death" or the date the claimant serves a compliant expert report); *see also* H. Research Org., Bill Analysis, Tex. S.B. 15, 79th Leg., R.S. (2005) ("The [statute of limitations] would begin to run either on the exposed person's death or when the plaintiff served defendant a report complying with sec. 90.003 or sec. 90.004.").

255. Act of May 11, 2005, 79th Leg., R.S., ch. 97, § 1(n), 2005 Tex. Gen. Laws 169, 170; *see* S. Research Ctr., Bill Analysis, Tex. S.B. 15, 79th Leg., R.S. (2005) (concerning committee substituted version); Union Carbide Corp. v. Synatzske, 438 S.W.3d 39, 49–50 (Tex. 2014) (recounting the purpose of the Act adding chapter 90 to the Civil Practice and Remedies Code); *In re* GlobalSanteFe Corp., 275 S.W.3d 477, 482–83 (Tex. 2008) (describing the purpose of enacting chapter 90); Kansas City S. Ry. Co. v. Oney, 380 S.W.3d 795, 800–01 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (stating the reasons for enacting chapter 90).

256. Act of May 11, 2005, 79th Leg., R.S., ch. 97, § 5, sec. 51.014(a), 2005 Tex. Gen. Laws 169, 180 (current version at CIV. PRAC. & REM. § 51.014(a)(11)); *see also* CIV. PRAC. & REM. CODE ANN. § 90.007(a) (West Supp. 2016) (allowing a defendant to dismiss asbestos- or silica-related claims if a party fails to timely serve an expert report, or fails to serve an expert report in accordance with sections 90.003 or 90.004).

denial of a motion to dismiss for the plaintiff's failure to comply with a pretrial requirement for an expert or physician report.[257] In both instances, the interlocutory appeal mechanism acted as an additional roadblock to prevent unmeritorious claims from proceeding where the legislature perceived there was a crisis burdening the dockets of the courts.

The 2005 legislation also allowed a litigant to file a petition for review to the Texas Supreme Court "for an appeal of an interlocutory order" denying a motion to dismiss asbestos- and silica-related claims.[258] As noted above, prior to the 2005 legislation, the supreme court had jurisdiction over only two other types of section 51.014(a) appeals: appeals of interlocutory orders concerning class certification and denials of summary judgment concerning constitutional rights of media defendants or those publishing in the media.[259] By allowing a petition for review to the supreme court of an appeal under section 51.014(a)(11), the legislature signaled its willingness to employ all levels of the state's judicial system to address what it termed the "crush of asbestos litigation" and the "precipitous[]" rise of silica litigation.[260]

Although the legislature structured interlocutory appeals of asbestos and silica claims under section 51.014(a)(11) in a similar way to interlocutory appeals of health care liability claims under section 51.014(a)(9) and (a)(10), the path to enactment of the provisions differed. As discussed above, the interlocutory appeal provisions of the 2003 health care liability legislation were not in the introduced version and became part of the law through amendment.[261] But two years later, the introduced version of Senate Bill 15 included the interlocutory appeal provisions concerning asbestos- and silica-related claims.[262] After its first reading, the bill was referred to the Senate Committee on State Affairs, which substituted the original version with its own and reported it favorably back to the Senate.[263] This substituted

257. *Compare* Act of May 11, 2005, 79th Leg., R.S., ch. 97, § 5, sec. 51.014(a), 2005 Tex. Gen. Laws 169, 180 (current version at CIV. PRAC. & REM. § 51.014(a)(11)) (allowing appeal of denial of a motion to dismiss concerning expert reports of asbestos- or silica-related claims under section 90.007), *with* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.03, sec. 51.014(a), 2003 Tex. Gen. Laws 847, 849 (current version at CIV. PRAC. & REM. § 51.014(a)(9)–(10)) (allowing appeal of grant or denial of relief sought concerning expert reports in health care liability claims under section 74.351(b) and (*l*)).

258. Act of May 11, 2005, 79th Leg., R.S., ch. 97, § 6, sec. 22.225(d), 2005 Tex. Gen. Laws 169, 180 (current version at GOV'T § 22.225(d)).

259. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.02, sec. 22.225(d), 2003 Tex. Gen. Laws 847, 849 (current version at GOV'T § 22.225(d)).

260. Act of May 11, 2005, 79th Leg., R.S., ch. 204, § 1(g), (*l*), 2005 Tex. Gen. Laws 169, 169–70.

261. Tex. H.B. 4, 78th Leg., R.S. (2003) (introduced version).

262. Tex. S.B. 15, 79th Leg., R.S. (2005) (introduced version).

263. S. Comm. on State Affairs, Committee Substitute, Tex. S.B. 15, 79th Leg., R.S. (2005)

version allowed interlocutory appeals of orders concerning insufficient physician reports under section 51.014(a)(11), but also proposed adding another type of interlocutory appeal: appeals of orders granting or denying a motion to dismiss or a motion to remand by a multidistrict litigation (MDL) pretrial court.[264] The proposed legislation allowed a "defendant [to] file a notice of transfer [of the case] to the MDL pretrial court" if the claimant failed to serve a sufficient physician report.[265] The MDL pretrial court could, based on the timing of filing the claim and sufficiency of the physician report, retain jurisdiction, remand to the original trial court, or dismiss.[266] But when the Senate considered the bill, the Senate amended the proposed legislation to drop this interlocutory appeal concerning MDL pretrial court rulings.[267] As a result, the 2005 law added only one provision to section 51.014: to allow interlocutory appeal of an order denying a motion to dismiss an asbestos- or silica-related claim based on the failure to serve an adequate physician report.[268]

F. *Denial of a Motion to Dismiss Based on the Exercise of the Constitutional Rights of Free Speech, Petition, or Association Under the Citizen Participation Act*

In 2013, the 83rd Texas Legislature passed the last two subsections of the present Civil Practice and Remedies Code section 51.014(a).[269] When enacted, the legislature mistakenly labeled both as section 51.014(a)(12)[270]—an oversight the legislature corrected during the 84th Legislative Session in 2015.[271] As a result, subsection (12) allows

(reporting eight yeas and zero nays on the committee substitute version).

264. *Id.*

265. *Id.*

266. *Id.*

267. S.J. of Tex., 79th Leg., R.S. 1380 (2005) (Floor Amendment No. One by Senator Janek).

268. Act of May 11, 2005, 79th Leg., R.S., ch. 97, § 5, sec. 51.014(a), 2005 Tex. Gen. Laws 169, 180 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(11)).

269. Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 4, sec. 51.014(a), 2013 Tex. Gen. Laws 2499, 2500 (current version at CIV. PRAC. & REM. § 51.014(a)(12)); Act of May 1, 2013, 83d Leg., R.S., ch. 44, § 1, sec. 51.014(a), 2013 Tex. Gen. Laws 93, 93–94 (current version at CIV. PRAC. & REM. § 51.014(a)(13)).

270. *Compare* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 4, sec. 51.014(a), 2013 Tex. Gen. Laws 2499, 2500 (current version at CIV. PRAC. & REM. § 51.014(a)(12)) (adding section 51.014(a)(12) to allow "appeal of an interlocutory order" from the "deni[al] [of] a motion to dismiss filed under Section 27.003"), *with* Act of May 1, 2013, 83d Leg., R.S., ch. 44, § 1, sec. 51.014(a), 2013 Tex. Gen. Laws 93, 93–94 (current version at CIV. PRAC. & REM. § 51.014(a)(13)) (adding section 51.014(a)(12) to allow "appeal from an interlocutory order" from the "deni[al] [of] a motion for summary judgment filed by an electric utility regarding liability in a suit subject to Section 75.0022").

271. *See* Act of May 29, 2015, 84th Leg., R.S., ch. 1236, § 3.001, sec. 51.014(a), 2015 Tex. Gen. Laws 4096, 4098 (current version at CIV. PRAC. & REM. § 51.014(a)(12)–(13)) (segregating the provisions into subsection (12) and subsection (13)).

interlocutory appeals of denials of motions to dismiss under the Texas Citizen Participation Act, and subsection (13) authorizes interlocutory appeals of denials of summary judgment based on the limited liability of electric utility companies.[272]

In 2011, two years prior to passage of section 51.014(a)(12), the legislature enacted the Citizen Participation Act as chapter 27 of the Civil Practice and Remedies Code.[273] The Act gives protection to individuals and entities that express "communication[s]" concerning "matters of public concern."[274] The legislation establishes a procedure for dismissal of suits shown to suppress the rights of speech, press, or association.[275]

By the next legislative session in 2013, legislators recognized "there ha[d] been some inconsistency in the interpretation of the[] provisions" allowing appeal of an order denying a motion to dismiss under chapter 27.[276] The Senate Research Center stated that the "original statute passed last session provided for three situations where a party to the cause of action could appeal the interlocutory order disposing of the [m]otion to [d]ismiss": (1) "if the trial court failed to act within the time period in the statute"; (2) "if the trial court granted the motion"; or (3) "if the trial court denied the motion."[277] The Senate Research Center bill analysis noted that in "the process of these 'motions' going through the court system, the Second Court of Appeals ruled that in the case of a denial of a motion to dismiss signed by a judge, the statute did not allow an interlocutory appeal[,]" while "[b]oth the Thirteenth and Fourteenth Courts of Appeals have ruled that the existing statute does provide for the right to an interlocutory appeal

272. *Id.*

273. Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, secs. 27.001–.011, 2011 Tex. Gen Laws 961, 961–64 (current version at CIV. PRAC. & REM. §§ 27.001–.011).

274. *Id.* § 2, sec. 27.001, 2011 Tex. Gen Laws at 961–62 (current version at TEX. CIV. PRAC. & REM. § 27.001); *see* CIV. PRAC. & REM. ch. 27 (West Supp. 2016) (codifying the Citizen Participation Act); *see also* Tate Hemingson, *Anti-SLAPP Statute Changes: Slap Back with an Interlocutory Appeal When You Get Slapped Down*, STRASBURGER (Jan. 27, 2014), http://www.strasburger.com/anti-slapp-statute-changes-slap-back-interlocutory-appeal-get-slapped (recognizing the "significant protections" given to citizens who express "matters of public concern").

275. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, sec. 27.003, 2011 Tex. Gen Laws 961, 962 (current version at CIV. PRAC. & REM. § 27.003) (authorizing a motion to dismiss); *see also* CIV. PRAC. & REM. § 27.002 ("The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in the government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.").

276. H. Comm. on Judiciary & Civ. Jurisprudence, Bill Analysis, Tex. C.S.H.B. 2935, 83d Leg., R.S. (2013).

277. S. Research Ctr., Bill Analysis, Tex. H.B. 2935, 83d Leg., R.S. (2013).

under these circumstances."[278] These courts interpreted section 27.008 of the Civil Practice and Remedies Code differently. That section read:

> (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.
> (b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.
> (c) An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.[279]

The Second Court of Appeals concluded that the plain language of section 27.008 of the Citizen Participation Act statutorily authorized interlocutory appeals only in "situations in which a trial court has failed to timely rule on a timely-filed motion to dismiss," but "does not create an interlocutory appeal from a timely-signed trial court order that denies a timely-filed [C]hapter 27 motion to dismiss."[280] But the Thirteenth and Fourteenth Courts of Appeals concluded that holding that "no signed order can be the subject of an interlocutory appeal" would render language in section 27.008 superfluous.[281] In response to these conflicting interpretations, the Senate Research Center noted the purpose of the 2013 legislation was "to clarify the legislative intent to provide for an interlocutory appeal in all three of the circumstances outlined in Chapter 27[.]"[282] As the supreme court recognized in 2015, the 2013 law adding section 51.014(a)(12) "clarified that an interlocutory appeal is permitted from any interlocutory order denying a motion to dismiss under the

278. *Id.*; *see* San Jacinto Title Servs. of Corpus Christi, LLC. v. Kingsley Props., LP., 452 S.W.3d 343, 348–49 (Tex. App.—Corpus Christi 2013, pet. denied) (discussing the divergent interpretations by courts of appeals).

279. Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, sec. 27.008(a)–(c), 2011 Tex. Gen. Laws 961, 963, *repealed by* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 5, sec. 27.008(c), 2013 Tex. Gen. Laws 2499, 2500 (repealing subsection (c)).

280. Jennings v. Wallbuilder Presentations, Inc., 378 S.W.3d 519, 524, 529 (Tex. App.—Fort Worth 2012, pet. denied), *superseded by statute*, § 5, sec. 27.008(c), 2013 Tex. Gen. Laws at 2500.

281. *San Jacinto Title Servs.*, 452 S.W.3d at 348 (quoting Direct Com. Funding, Inc. v. Beacon Hill Estates, LLC, No. 14-12-00896-CV, 2013 WL 407029, at *3–4 (Tex. App.—Houston [14th Dist.] Jan. 24, 2013, order)); *see also* Better Bus. Bureau of Metro. Dall., Inc., v. BH DFW, Inc. 402 S.W.3d 299, 307 (Tex. App.—Dallas 2013, pet. denied) (recognizing a split of authority and finding the Fourteenth Court Appeals' reasoning persuasive).

282. S. Research Ctr., Bill Analysis, Tex. H.B. 2935, 83d Leg., R.S. (2013).

TCPA."[283] In addition, the legislature added appeals denying a motion to dismiss under the Citizen Participation Act to the group of three other section 51.014(a) appeals that stay trial court proceedings: (1) orders concerning class certification; (2) denials of summary judgment based on official immunity; and (3) the grant or denial of "a plea to the jurisdiction by a governmental unit[.]"[284]

The witnesses who testified or registered before the House Committee on Judiciary and Civil Jurisprudence in favor of the bill reflected the media's support. Witnesses included representatives of the Freedom of Information Foundation of Texas, the Texas Press Association, the Texas Broadcast Association, the Texas Association of Broadcasters, and the Austin American-Statesman.[285] Also among the witnesses were representatives of Texans for Lawsuit Reform and the Texas Civil Justice League—organizations that had supported enacting interlocutory appeals in health care liability claims and in asbestos- and silica-related claims.[286] No witnesses testified against the legislation.[287]

As the Senate Research Center expressed in 2011, the purpose of the Texas Citizen Participation Act is to "allow defendants—who are sued as a result of exercising their right to free speech or their right to petition the government—to" avoid "frivolous lawsuits" and to "encourag[e] public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights."[288] Section 51.014(a)(12) bolstered this purpose of avoiding frivolous lawsuits and encouraging public participation by granting defendants in those suits the right to immediate appeal.[289]

G. *Denial of a Motion for Summary Judgment by an Electric Utility Company Asserting Limited Liability*

In 2013, the legislature added another—and currently the last—category

283. *In re* Lipsky, 460 S.W.3d 579, 585 n.2 (Tex. 2015).

284. Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 4, sec. 51.014(b), 2013 Tex. Gen. Laws 2499, 2500 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(b)); *see also* CIV. PRAC. & REM. § 51.014(b) (West Supp. 2016) ("An interlocutory appeal under [s]ubsection (a)(3), (5), (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal.").

285. H. Comm. on Judiciary & Civ. Jurisprudence, Witness List, Tex. H.B. 2935, 83d Leg., R.S. (Apr. 1, 2013), http://www.capitol.state.tx.us/tlodocs/83R/witlistmtg/pdf/C3302013040114001.PDF.

286. *Id.*

287. *Id.*

288. S. Research Ctr., Bill Analysis, Tex. C.S.H.B. 2973, 82d Leg., R.S. (2011).

289. CIV. PRAC. & REM. § 51.014(a)(12).

of interlocutory appeal permitted under Section 51.014(a) of the Civil Practice and Remedies Code: appeal of the denial of a summary judgment motion "filed by an electric utility" company asserting limited liability under section 75.0022 of the Civil Practice and Remedies Code.[290] No legislator voted against the measure in either the Senate or the House.[291]

Section 75.0022—enacted during the same 2013 legislative session—allows electric utility companies to enter into recreational use agreements with a political subdivision and limits the companies' liability under those agreements.[292] The legislation also made the doctrine of attractive nuisance inapplicable to certain claims against the utility company and authorized the recreational use agreement to include a provision requiring the political subdivision to pay for or provide insurance to cover damage claims against the utility company.[293] The legislation also added the current section 51.014(a)(13),[294] which allows the electric utility company to appeal an interlocutory order denying its motion for summary judgment based on its limited liability under section 75.0022.[295]

The House and Senate committee bill analyses spelled out the underlying reasons for providing limited liability to electric utility companies and the associated provision for interlocutory appeals for denials of summary judgment. As the Senate Research Center stated:

> Public hike and bike trails provide many benefits, including supplementing transportation infrastructure, reducing congestion, connecting communities, and encouraging a healthy lifestyle. However, acquiring real estate in an urban area that is suitable for development of hike and bike trails can be both difficult and expensive. By utilizing an electric utility's property, miles of public hike and bike trails can be constructed at virtually no cost for land.

290. Act of May 1, 2013, 83d Leg., R.S., ch. 44, § 1, sec. 51.014(a), 2013 Tex. Gen. Laws 93, 93–94 (current version at CIV. PRAC. & REM. § 51.014(a)(13)).

291. *See id.* § 6, 2013 Tex. Gen. Laws at 95 (listing zero "nays" for both the House and the Senate upon its passage).

292. *Id.* § 3, sec. 75.0022, 2013 Tex. Gen. Laws at 94 (current version at CIV. PRAC. & REM. § 75.0022(c)–(f)).

293. *Id.* § 3, sec. 75.0022, 2013 Tex. Gen. Laws at 95 (current version at CIV. PRAC. & REM. § 75.0022(g)–(h)). But the law did not allow electric utilities to avoid liability for serious bodily injury or death proximately caused by the electric utility's willful or wanton acts or gross negligence. *Id.* § 3, sec. 75.0022, 2013 Tex. Gen. Laws at 94 (current version at CIV. PRAC. & CODE § 75.0022(e)).

294. As discussed above, the provision was originally designated section 51.014(a)(12), but revised to be section 51.014(a)(13) in the 2015 legislative session. Act of May 29, 2015, 84th Leg., R.S., ch. 1236, § 3.001, sec. 51.014(a), 2015 Tex. Gen. Laws 4096, 4098 (current version at CIV. PRAC. & REM. § 51.014(a)(12)–(13)) (resolving the legislative misstep).

295. Act of May 1, 2013, 83d Leg., R.S., ch. 44, § 3, sec. 51.014(a), 2013 Tex. Gen. Laws 93, 94 (current version at CIV. PRAC. & REM. § 51.014(a)(13)).

> [House Bill] 200 seeks to establish limitations on the liability of certain electric utilities that allow public use of the utility's property for recreation and certain other purposes.
>
> Under current law, an owner of real property who opens the owner's land for recreational use is liable for property damage, injury, or death arising from gross negligence on the part of the property owner, or if the owner has acted with malicious intent or in bad faith. Additionally, public utilities located in El Paso and municipal management districts in Houston may require that the municipality, county, or political subdivision carry general liability insurance to insure the public utility for liability.[296]

One provision of the 2013 law limits the applicability of the law and, by association, the interlocutory appeal provision: Section 75.0022 "applies only to an electric utility located in a county with a population of four million or more."[297] The Senate Research Center indicated why the legislation applied only in a county with a large population and its intended geographic focus: "[House Bill] 200 will assist in the development of hike and bike trails in Harris County."[298] Four of the seven witnesses who testified or registered in favor of the bill (no witnesses were against it) included representatives of the Greater Houston Partnership, the City of Houston, and Harris County.[299] Yet although the purpose of the law and the geographic area intended to benefit were definite and limited, the case law does not indicate the extent to which electric utility companies have entered into recreational use agreements under section 75.002. At present, no reported cases have concerned either section 75.0022 or the associated interlocutory appeal provision, section 51.014(a)(13).

IV. CONCLUSION

In 2012—one hundred and twenty years after the Texas Legislature passed the first statute authorizing an interlocutory appeal—Justice Sue Walker of the Second Court of Appeals described interlocutory appeals as "the new norm."[300] Walker cautioned that the rise in the number of

296. S. Research Ctr., Bill Analysis, Tex. H.B. 200, 83d Leg., R.S. (2013).

297. Act of May 1, 2013, 83d Leg., R.S., ch. 44, § 3, sec. 75.0022, 2013 Tex. Gen. Laws 93, 94 (current version at TEX. CIV. PRAC. & REM. CODE § 75.0022(b)).

298. S. Research Ctr., Bill Analysis, Tex. H.B. 200, 83d Leg., R.S. (2013).

299. H. Comm. on Judiciary & Civ. Jurisprudence, Witness List, Tex. H.B. 200, 83d Leg., R.S. (Mar. 11, 2013), http://www.capitol.state.tx.us/tlodocs/83R/witlistmtg/pdf/C3302013031114001.PDF.

300. Sue Walker, *Interlocutory Appeals*, TEX. CIV. APP. PRAC. 101 (State Bar of Tex. 2012) (updating and modifying Pamela Stanton Baron, *Interlocutory Appeals 2010*, CONFERENCE ON STATE AND

interlocutory appeals "impact[s] the ability of the courts of appeals to timely handle and process non interlocutory, non accelerated appeals."[301] Yet when the legislature passed the thirteen types of interlocutory appeals now authorized under Civil Practice and Remedies Code section 51.014(a), legislators specifically carved out discrete types of orders from the norm of the final judgment rule. Each of these disparate and broad-ranging categories of orders are similar in a central respect: each time the legislature enacted one of these interlocutory appeal provisions, the legislature viewed the matter for which it authorized an immediate appeal to be of particular concern. The concerns ranged from the appointment of receivers and trustees in 1892 to the viability of class actions in the 1970s to tort reform efforts in connection with health care liability claims and asbestos- and silica-related claims in the early-2000s. As legal concerns and priorities have shifted over the century, so has the content of the interlocutory appeal provisions authorized under section 51.014.

FEDERAL APPEALS (Univ. of Tex. School of Law 2010)).

301. *Id.*