THE INCREASING USE AND IMPORTANCE OF MANDAMUS IN THE FIFTH CIRCUIT

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I. INTRODUCTION: THE GROWTH OF FIFTH CIRCUIT MANDAMUS DECISIONS

Petitions for writs of mandamus are an important and common part of appellate practice in the Texas state court system, and most Texas litigators are very familiar with the process for seeking mandamus relief in state court. In sharp contrast, petitions for writs of mandamus in the United States Court of Appeals for the Fifth Circuit—and, for that matter, in the federal appellate system more generally—are far more rare than are their Texas counterparts. Grants of mandamus by the Fifth Circuit have been, until recent years, even more exotic. Indeed, federal courts grant writs of mandamus so infrequently that many Texas litigators who might eagerly seek mandamus from a Texas court of appeals seem almost unaware of the writ's availability in the federal system.

Part of the reluctance of litigants to seek mandamus in the federal system is likely attributable to the very demanding standard for obtaining such extraordinary relief.[1] The Supreme Court has explained that mandamus is reserved for "exceptional circumstances amounting to a

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1. *See* Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380 (2004).

judicial usurpation of power or a clear abuse of discretion."[2] Moreover, the Supreme Court also warned that federal appellate courts reviewing petitions for mandamus "must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of non-appealable orders on the mere ground that they may be erroneous."[3] Consistent with the extraordinary nature of the writ, the Supreme Court imposed a demanding three-part test for mandamus in the federal system: (1) "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process"; (2) "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."[4] In setting out this exacting standard, the Supreme Court noted that "[t]hese hurdles, however demanding, are not insuperable."[5]

Despite the cautionary admonitions from the Supreme Court and the demanding test for obtaining the writ, mandamus has long been an available avenue to challenge a clear abuse of discretion by a federal district court. The Fifth Circuit's jurisdiction to issue writs of mandamus is afforded by the All Writs Act, which authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[6] The procedure and form of petitions for writs of mandamus (and all other extraordinary writs) are, in turn, governed by Federal Rule of Appellate Procedure 21 and Fifth Circuit Rule 21.[7]

The current trend in the Fifth Circuit towards the increased issuance of writs of mandamus commenced in 2003 and continues through the present.[8] The Fifth Circuit has granted the writ in a series of published opinions that greatly clarified the standards for obtaining mandamus relief.[9] That said, grants of mandamus remain relatively rare in the Fifth Circuit and are strictly limited to cases where there has been a clear abuse of discretion by the district court and no adequate relief is available via direct (i.e., post-

2. *Id.*

3. Will v. United States, 389 U.S. 90, 98 n.6 (1967); *see also* Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382-83 (1953) (rejecting reasoning that implied that "every interlocutory order which is wrong might be reviewed under the All Writs Act").

4. *Cheney*, 542 U.S. at 380 (alterations in original) (citations and internal quotation marks omitted).

5. *Id.* at 381.

6. 28 U.S.C. § 1651 (2006).

7. *See* FED. R. APP. P. 21; 5TH CIR. R. 21.

8. *See In re* Horseshoe Entm't, 337 F.3d 429 (5th Cir. 2003); *infra* Parts I.A-G.

9. *See infra* Parts I.A-G.

judgment) appeal.[10] As the following case summaries make clear, venue disputes involving district courts' denials of convenience-based transfer of venue under 28 U.S.C. § 1404(a) have proven to be particularly fertile ground for mandamus petitions in the Fifth Circuit.[11]

A. In re Horseshoe Entertainment

The first of the modern line of Fifth Circuit mandamus cases was *In re Horseshoe Entertainment*, in which the court of appeals held that mandamus was a proper vehicle to challenge the district court's denial of a motion to transfer venue.[12] Although a relatively brief opinion that is restrained in the scope of its ruling, *In re Horseshoe Entertainment* laid the foundation for the subsequent evolution of mandamus law in the Fifth Circuit.[13] The court expressly held that, under the All Writs Act, it had the authority to review the district court's denial of a convenience-based motion to transfer venue brought under 28 U.S.C. § 1404(a).[14]

Plaintiff Caroline W. Rogers (Plaintiff) alleged that Horseshoe Entertainment (Horseshoe) failed to make reasonable accommodations for her diabetes under the Americans with Disabilities Act (ADA) and also that she had been sexually harassed.[15] Plaintiff resided in Caddo Parish, Louisiana, the same Louisiana parish in which the city of Shreveport is located and within the Western District of Louisiana.[16] Plaintiff was employed by Horseshoe in its casino in Bossier City, adjacent to Shreveport and also within the Western District of Louisiana.[17] All of the conduct complained of occurred within the Western District.[18] In addition, virtually all of the witnesses and evidence material to the case were located within the Western District.[19] In sum, all of the parties, witnesses, and evidence relevant to Plaintiff's lawsuit against Horseshoe were located within the Shreveport Division of the Western District of Louisiana.[20]

Despite these facts, Plaintiff elected to file suit in the Middle District of Louisiana in Baton Rouge, more than 200 miles from Shreveport.[21] Horseshoe filed a motion to transfer venue under 28 U.S.C. § 1404(a) and

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10. *See Cheney*, 542 U.S. at 380.

11. 28 U.S.C. § 1404(a) (2006) (providing that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought").

12. *In re Horseshoe*, 337 F.3d at 432.

13. *See id.*

14. *Id.*

15. *Id.* at 431.

16. *Id.*

17. *Id.* at 430-31.

18. *Id.* at 431.

19. *Id.*

20. *Id.*

21. *Id.*

asked for a convenience-based change of venue to Shreveport.[22] The Middle District denied the motion and declined to transfer the case to the Shreveport Division of the Western District.[23] Although there was no precedent supporting its decision to do so, Horseshoe petitioned for a writ of mandamus and asked the Fifth Circuit to compel the transfer of the case to Shreveport.[24]

At the Fifth Circuit, Plaintiff initially questioned whether or not the court had jurisdiction under the All Writs Act[25] to review the district court's § 1404(a) venue decision.[26] The Fifth Circuit held that because Congress had not expressly made such motions unreviewable, they were reviewable and that past precedent stood only for the proposition that the court had to review the venue factors in order to determine if venue had been properly granted.[27]

After confirming that it had jurisdiction to entertain petitions for mandamus in the § 1404(a) context, the Fifth Circuit proceeded to analyze the venue factors in the context of the case's specific facts.[28] The court identified the "convenience of parties and witnesses, in the interest of justice" as the critical factor to be considered by a district court in determining whether or not to grant a motion to transfer.[29] Critically, the court held that the location of counsel was irrelevant for purposes of venue, instead keeping the focus of the inquiry on the location of witnesses, evidence, and parties.[30] Because the evidence, witnesses, parties, and relevant conduct all possessed an obviously stronger connection to the Western District of Louisiana in Shreveport than to the Middle District of Louisiana, 200 miles to the south in Baton Rouge, the Fifth Circuit held that the district court abused its discretion in denying Horseshoe's motion to transfer because the "convenience of the parties and witnesses" "militated" in favor of transfer.[31]

Although not widely noticed at the time it was issued in 2003, *In re Horseshoe Entertainment* has proven to be a critically important precedent because it marked the first use of mandamus by the Fifth Circuit to correct a district court's clear abuse of discretion in denying a motion to transfer venue under § 1404(a); it also established that the Fifth Circuit has

22. *Id.* at 430.
23. *Id.* at 430-31.
24. *See id.*
25. 28 U.S.C. § 1651 (2006).
26. *See In re Horseshoe*, 337 F.3d at 431-32.
27. *Id.* at 432.
28. *Id.* at 432-35.
29. *Id.* at 433 (quoting 28 U.S.C. § 1404(a)).
30. *See id.* at 434.
31. *Id.* at 435.

jurisdiction under the All Writs Act to consider a mandamus petition seeking such relief.[32]

B. In re Volkswagen I

In 2004, the Fifth Circuit further refined its emerging mandamus jurisprudence in *In re Volkswagen I*, a products liability case arising in the San Antonio Division of the Western District of Texas but filed in the Marshall Division of the Eastern District of Texas.[33] The case expanded on the principles first announced in *Horseshoe* and emphasized that, in evaluating venue in a products liability case, the location of the underlying accident or injury is a required factor for district courts to consider.[34]

The automobile accident that gave rise to the lawsuit occurred in San Antonio, Texas, located in the Western District of Texas.[35] San Antonio resident Matthew Fuentes was intoxicated and driving on the Northwest Military Highway in San Antonio in a truck owned by fellow San Antonio resident Carol Morrow.[36] Badly intoxicated, Fuentes veered onto the opposite side of the highway and collided with an oncoming Volkswagen Jetta sedan driven by San Antonio area resident Jennifer Scott, causing her serious injuries.[37] Fuentes was subsequently convicted of intoxication assault and incarcerated at the Bexar County Jail in San Antonio.[38] Morrow continued to reside in San Antonio.[39]

Jette Scott, Jennifer Scott's mother and guardian, subsequently brought suit against Volkswagen AG (VAG), a German corporation, and its New Jersey-based U.S. subsidiary, Volkswagen of America, Inc. (VoAI), collectively the "Volkswagen Defendants," asserting product liability claims related to the vehicle Scott was driving during the crash.[40] Scott filed suit in the Marshall Division of the Eastern District of Texas, over 400 miles away from San Antonio and near the Texas-Louisiana border.[41] The Volkswagen Defendants successfully moved to join Fuentes and Morrow into the case as third-party defendants.[42] After naming the two San Antonio residents as third-party defendants, the Volkswagen Defendants moved to

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32. *See id.* at 432-35.

33. *See In re Volkswagen I*, 371 F.3d 201, 202 (5th Cir. 2004). For the purposes of this article, *In re Volkswagen AG*, 371 F.3d 201 (5th Cir. 2004) will be referred to as *"In Re Volkswagen I"* to distinguish it from the similarly styled *In re Volkswagen of Am., Inc.*, 545 F.3d 304 (5th Cir. 2008), discussed *infra* Part I.C and referred to as *"In re Volkswagen II."*

34. *See id.* at 205-06.

35. *Id.* at 202.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *See id.* at 202-04.

42. *Id.* at 203.

transfer venue to the San Antonio Division of the Western District of Texas under 28 U.S.C. § 1404(a).[43]

The district court, despite recognizing that the two third-party defendants were located in San Antonio, focused its analysis only on the allegations in the original complaint and the location of the Volkswagen Defendants.[44] The district court concluded that it was equally convenient for the Volkswagen Defendants to travel to Marshall or San Antonio and that the main issue in the case was the design of the car, which took place in Germany, not the actual accident on the streets of San Antonio.[45] On this basis, the Marshall Division of the Eastern District of Texas denied the Volkswagen Defendants' motion to transfer venue.[46] Armed with the recent *In re Horseshoe* precedent, the Volkswagen Defendants filed a petition for writ of mandamus at the Fifth Circuit.[47]

The Fifth Circuit began its review by questioning the district court's decision to rely primarily upon the facts contained in the original complaint, noting that "[t]here is clearly nothing in § 1404(a) which limits the application of the terms 'parties' and 'witnesses' to those involved in an original complaint."[48] Accordingly, the Fifth Circuit disagreed with the district court's decision not to consider the fact that Fuentes and Morrow, third-party defendants, resided in San Antonio.[49] Because Fuentes and Morrow were parties within the meaning of § 1404(a), the court reasoned that their convenience must be considered in determining whether or not a motion to transfer should be granted.[50]

As parties whose convenience should be considered, the local interest of the case shifted to consider the new defendants.[51] Therefore, the court analyzed the facts of the case, noting that there was no direct air service between Marshall and San Antonio, and stating that "[w]hen the distance between [two forums] is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled."[52] The Fifth Circuit chided the district court for neglecting to adequately consider the convenience of the parties and witnesses, all of whom (save for the out-of-state Volkswagen Defendants) were based in San Antonio rather than Marshall.[53] The Fifth Circuit explained that a distance of 100 miles is the opening benchmark for measuring witness

43. *Id.*
44. *Id.* at 204-06.
45. *Id.* at 205-06.
46. *Id.* at 202.
47. *See id.*
48. *Id.* at 204.
49. *Id.* at 204-05.
50. *Id.*
51. *See id.* at 204.
52. *Id.* at 204-05.
53. *See id.* at 205.

inconvenience, as "[a]dditional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment."[54] The Fifth Circuit also announced an absolute subpoena power rule under Federal Rule of Civil Procedure 45(c)(3)(a)(ii), noting that the San Antonio Division of the Western District had subpoena power over virtually all relevant witnesses, while subpoenas for the same witnesses issued by the Marshall Division of the Eastern District could be subject to motions to quash.[55] Perhaps more importantly, the Fifth Circuit explained that the local interest factor of the venue analysis would not be satisfied simply because some products were sold in the plaintiff's chosen venue: a serious automobile accident involving injuries to a San Antonio resident occurred on the streets of San Antonio as the result of a crime (intoxication assault) committed by a San Antonio resident, thus giving San Antonio a distinctly local interest in the case that Marshall lacked.[56] The Fifth Circuit also reiterated that the location of counsel was irrelevant in deciding a motion to transfer venue, before finding that the district court, in failing to appropriately consider these factors, erred in its decision.[57]

In re Volkswagen I was significant to the Fifth Circuit's emerging mandamus jurisprudence because it expanded the use of the writ in the venue context to a products liability case. *In re Volkswagen I* also makes clear that the location of the underlying accident or injury—rather than just the location of the design of the product at issue—should be taken into account in the venue analysis. Finally, the case also confirmed that the Fifth Circuit was serious about supervising its district courts' application of 28 U.S.C. § 1404(a) and that it would issue a writ of mandamus to correct a clear abuse of discretion on a venue decision.

C. In re Volkswagen II

Building on its decision in *Volkswagen I*, in 2008, the en banc Fifth Circuit further clarified the circuit's law on mandamus in the context of venue.[58] In *Volkswagen II*, the Fifth Circuit stated affirmatively that § 1404(a) relief was an appropriate means to test venue, in addition to concluding that the "plaintiff's choice of venue" was not a factor in a § 1404(a) analysis, but rather a starting point in a burden of proof analysis

54. *Id.*

55. *See id.*

56. *See id.* at 206. Moreover, the sale of the product in question, Volkswagen Jetta automobiles, could not have taken place anywhere in the Marshall Division of the Eastern District of Texas because there is no Volkswagen dealership located there. *See id.*

57. *Id.*

58. *See In re* Volkswagen of Am., Inc., 545 F.3d 304 (5th Cir. 2008) (hereinafter *In re Volkswagen II*).

in which the movant (i.e., the defendant seeking to transfer venue) is obligated to show a "clearly more convenient" alternative forum.[59]

The facts of *Volkswagen II* differ slightly, but importantly, from those of *Volkswagen I*. In *Volkswagen II*, Ruth Singleton was driving a Volkswagen Golf automobile on a freeway in Dallas, Texas, in the Northern District of Texas.[60] Ms. Singleton was accompanied by two members of her family, including her young granddaughter, Mariana.[61] The Singletons were all residents of suburban Dallas, and their Golf had been purchased from a Volkswagen dealership in Dallas County.[62] The Singletons' Volkswagen was struck from behind by a large Chrysler sedan driven by Dallas County resident Colin R. Little.[63] The impact propelled the Singletons' Volkswagen into a flatbed trailer parked on the side of the freeway.[64] The Singletons were seriously injured in the crash, and Mariana subsequently died as a result of her injuries.[65] Dallas fire and emergency medical personnel responded to the crash, and the Dallas Police Department handled the investigation.[66] Two Dallas residents witnessed the fatal accident and offered statements regarding it.[67] The Singletons were treated for their injuries in Dallas, and the Dallas coroner performed the autopsy on the decedent.[68] The damaged Volkswagen Golf was stored as evidence in Dallas, as were all police and medical records related to the accident.[69]

Despite the overwhelming and exclusive connections between the accident and Dallas, the Singletons subsequently filed suit against the Volkswagen Defendants in Marshall, Texas, in the Eastern District of Texas.[70] Dallas and Marshall are approximately 150 miles apart.[71] The Volkswagen Defendants filed a third-party complaint against the Dallas County driver, Mr. Little, who caused the accident by striking the Singletons from behind.[72] Relying in substantial part on the Fifth Circuit's opinion in *In re Volkswagen I*, the Volkswagen Defendants sought to transfer the case from the Marshall Division of the Eastern District of Texas to the Dallas Division of the Northern District of Texas pursuant to 28 U.S.C. § 1404(a).[73]

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59. *Id.* at 315.
60. *Id.*
61. *Id.*
62. *Id.* at 307-08.
63. *Id.* at 307, 319-20.
64. *Id.* at 307.
65. *Id.*
66. *Id.*
67. *Id.* at 317.
68. *Id.* at 307-08.
69. *Id.* at 307-08, 317.
70. *See id.* at 307.
71. *See id.* at 317, 323.
72. *Id.* at 307.
73. *See id.*

The district court denied the Volkswagen Defendants' motion to transfer and also denied the Volkswagen Defendants' subsequent motion for reconsideration of the venue issue.[74] Believing that the district court had fundamentally erred in its application of 28 U.S.C. § 1404(a), the Volkswagen Defendants petitioned the Fifth Circuit for mandamus.[75] In a divided panel decision made without oral argument, the Fifth Circuit initially denied the Volkswagen Defendants' petition for writ of mandamus, with Judge Emilio Garza strongly dissenting.[76] The Volkswagen Defendants sought a rehearing en banc, which the court treated as a motion for panel rehearing and granted.[77] The case was assigned to the Fifth Circuit's oral argument calendar and, as a result, to a new oral argument panel.[78] Following oral argument, this second Fifth Circuit panel unanimously granted the Volkswagen Defendants' petition and issued a writ of mandamus, ordering the case transferred from Marshall to Dallas.[79] Now it was the Singletons' turn to seek an en banc rehearing, and the court granted their motion.[80] The full Fifth Circuit heard oral argument, with some seventeen Fifth Circuit judges in attendance.[81] A sharply divided Fifth Circuit granted the Volkswagen Defendants' petition for writ of mandamus by a 10-7 vote, marking the first time in modern history that a writ of mandamus was issued by the en banc Fifth Circuit.[82]

The Fifth Circuit majority began its opinion by noting that the only factor in favor of keeping the case in Marshall was the plaintiffs' preference for litigating there.[83] All other factors under § 1404(a) weighed in favor of transferring the case to Dallas.[84] The court also reiterated the following:

> We—and the other courts of appeals that have considered the matter—have expressly "recognized the availability of mandamus as a limited means to test the district court's discretion in issuing transfer orders." There can be no doubt therefore that mandamus is an appropriate means of testing a district court's § 1404(a) ruling.[85]

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74. *See* Singleton v. Volkswagen of Am., Inc., 2006 WL 2634768, at *5 (E.D. Tex. Sept. 12, 2006) (denying the Volkswagen Defendants' motion to transfer venue); *see also* Singleton v. Volkswagen of Am., Inc., 2006 WL 3526693, at *2 (E.D. Tex. Dec. 7, 2006) (denying the Volkswagen Defendants' motion for reconsideration).

75. *See In re Volkswagen II*, 545 F.3d at 308.

76. *See In re* Volkswagen of Am. Inc., 223 Fed. App'x 305, 305-07 (5th Cir. 2007).

77. *In re Volkswagen II*, 545 F.3d at 308.

78. *See In re* Volkswagen of Am., Inc., 506 F.3d 376, 376 (5th Cir. 2007).

79. *Id.*

80. *See id.*

81. *See In re Volkswagen II*, 545 F.3d at 306.

82. *See id.* at 307.

83. *Id.* at 308.

84. *Id.* at 308-09.

85. *Id.* at 309 (internal citations omitted).

The en banc court thus settled this matter affirmatively in favor of the availability of mandamus review.[86]

Turning to the question of which § 1404(a) standard is appropriate in the present case, the Fifth Circuit compared and contrasted the venue-transfer standard with the forum non conveniens standard.[87] The court focused particularly on the fact that the forum non conveniens standard was stricter, noting that "[t]he district court, in requiring Volkswagen to show that the § 1404(a) factors must substantially outweigh the plaintiffs' choice of venue, erred by applying the stricter forum non conveniens dismissal standard and thus giving inordinate weight to the plaintiffs' choice of venue."[88] Importantly, the court decided that the plaintiff's choice of venue represented a starting point for the parties and established the burden of proof with the movant to show that another, "clearly more convenient" forum existed.[89] Significantly, the plaintiffs' choice of forum in this analysis was not an independent factor to be considered in deciding venue, but simply an appropriate place to *begin* the analysis of whether a clearly more convenient alternative existed.[90]

Having established the appropriate standard, the court applied the standard to the particular facts before it.[91] Noting as a starting point that no plaintiffs resided in Marshall, no sources of proof were in Marshall, and that none of the facts giving rise to the suit occurred in Marshall, the court proceeded to decide every factor in favor of venue in Dallas.[92] The court reiterated the "100-mile rule" from *Volkswagen I*, concluding that "the district court disregarded our precedent . . . . [I]t is apparent that it would be more convenient [for the witnesses and parties] if this case is tried in the Dallas Division, as the Marshall Division is 155 miles from Dallas."[93] The court also dismissed one of the plaintiffs' arguments regarding the ease-of-access-to-records factor.[94] Plaintiff argued that technological advances rendered this factor irrelevant.[95] The court concluded that, despite technological advances, the physical location of records and tangible evidence remains relevant.[96] Because all of the factors favored Dallas, the en banc court reversed the district court, issued a writ of mandamus, and ordered a transfer to Dallas.[97]

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86. *Id.*
87. *Id.* at 314-15.
88. *Id.*
89. *Id.* at 315.
90. *See id.*
91. *Id.* at 315-16.
92. *Id.* at 316-18.
93. *Id.* at 317.
94. *Id.* at 316.
95. *Id.*
96. *Id.*
97. *Id.* at 319.

In the wake of the en banc Fifth Circuit's grant of mandamus to the Volkswagen Defendants, the Singletons petitioned for a writ of certiorari to the United States Supreme Court.[98] The Supreme Court received briefing from both the Singletons and the Volkswagen Defendants, as well as from various amici, and many "court watchers" speculated that certiorari would be granted.[99] The Supreme Court, however, ultimately declined to hear the case.[100]

The combination of the en banc Fifth Circuit's decision and the Supreme Court's denial of the Singletons' petition for certiorari has made it substantially harder for plaintiffs to maintain suits in so-called "magnet forums" that lack any meaningful factual connections to the case. Moreover, *Volkswagen II* is important for several distinct procedural reasons. Most critically, it put the en banc Fifth Circuit's seal of approval on the line of mandamus jurisprudence that began in *In re Horseshoe* and continued in *In re Volkswagen I*. Absent a contrary U.S. Supreme Court decision at some future point, it is now settled law in the Fifth Circuit that mandamus is available to test a district court's venue decisions under § 1404(a).[101] Second, *Volkswagen II* eliminated "plaintiff's choice of forum" from the analysis of which factors should be considered in determining the appropriate venue under § 1404(a), instead of establishing the plaintiff's choice of forum as merely the starting point for a district court's analysis of whether the movant has demonstrated that a clearly more convenient alternative venue exists.[102] Third, the en banc Fifth Circuit clarified that motions to transfer venue under § 1404(a) are subject to a different—and somewhat less strict—standard than are motions to dismiss for forum non conveniens.[103]

D. In re Ford Motor Co.

The first mandamus case decided by the Fifth Circuit in the wake of the *In re Volkswagen II* en banc decision was *In re Ford Motor Co.*[104] In this case, the Fifth Circuit applied the mandamus procedures and principles announced in *Volkswagen I* and *II* to a forum non conveniens case.[105]

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98. *Id.*, *cert. denied*, 129 S. Ct. 1336 (U.S. Feb. 23, 2009) (No. 08-754).

99. *See* Petition for Writ of Certiorari, at 11-31, Singleton v. Volkswagen of Am., Inc., 129 S. Ct. 1336 (2009) (No. 08-754); Brief in Opposition, at 8-34, *Singleton*, 129 S. Ct. 1336 (No. 08-754); Brief of Civil Procedure Law Professors as *Amici Curae* in Support of the Petition for a Writ of Certiorari, at 3-21, *Singleton*, 129 S. Ct. 1336 (No. 08-754).

100. *See Singleton*, 129 S. Ct. at 1336.

101. *See In re Volkswagen II*, 545 F.3d at 319.

102. *See id.* at 315.

103. *See id.* at 314-15.

104. *See In re* Ford Motor Co., 591 F.3d 406 (5th Cir. Dec. 2009).

105. *See generally id.* at 410-11 (applying mandamus procedures); *supra* Parts I.B-C (discussing the Volkswagen cases).

The *In re Ford* case arose when a group of Mexican citizens brought suit against Ford Motor Co. (Ford) in Val Verde County, Texas, for alleged defects in tires and cars resulting in rollovers.[106] The case was removed and subsequently transferred from the Western District of Texas to the Southern District of Indiana, which had been established as the multi-district litigation (MDL) court to deal with such cases.[107] The MDL court refused to dismiss the case on forum non conveniens grounds, holding that Mexico was not an adequate alternative forum.[108] Ford petitioned the Fifth Circuit to grant mandamus relief when the transferor court—the Western District of Texas—refused to reconsider the MDL court's decision.[109]

As an initial matter, the Fifth Circuit examined the degree of deference it ought to afford to an MDL court's pretrial orders that were not reviewed by a transferor court in considering whether or not to question that review, concluding that the "transferor courts should use the law of the case doctrine to determine whether to revisit a transferee court's decision."[110] In this case, the court held that review was appropriate and should have been performed.[111]

Relying primarily on *Volkswagen II*, the Fifth Circuit held that mandamus was appropriate because of a manifest injustice in the transferor court's refusal to reconsider the transferee court's decision on the forum non conveniens issue.[112] Specifically, the court held that the evidence was equivocal as to whether or not Mexico was an adequate alternative forum, stating that "[i]n the face of evidence and caselaw showing Mexico to be an available forum, it was clear error for the MDL court to reject this option."[113] Accordingly, the transferor court erred in failing to reconsider the clearly erroneous decision of the MDL court.[114]

The Fifth Circuit expressly held that, like § 1404(a) decisions, the denial of forum non conveniens dismissal is susceptible to review via mandamus, stating that "[p]lainly, a transferor court's refusal to reexamine a transferee court's FNC [(forum non conveniens)] decision can be one of the 'exceptional circumstances,' so long as the refusal meets our stringent criteria for granting mandamus."[115] The Fifth Circuit issued a writ of mandamus.[116]

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106. *See In re Ford Motor Co.*, 591 F.3d at 408.
107. *Id.*
108. *Id.* at 409-10.
109. *Id.* at 410.
110. *Id.* at 411.
111. *Id.*
112. *Id.* at 412.
113. *Id.* at 414.
114. *Id.*
115. *Id.* at 414-15.
116. *Id.* at 417.

In re Ford Motor Co. demonstrates that the expansion of mandamus first signaled in the venue cases is not restricted to that context.[117] The Fifth Circuit, borrowing from the venue cases, has now expressly applied mandamus to forum non conveniens cases.[118] The *In re Ford* case is also notable because it indicates that the courts of Mexico can, in some instances, be an adequate alternative forum for forum non conveniens purposes.[119]

E. In re Beazley Insurance Co.

The Fifth Circuit has also applied the basic *Volkswagen I* and *II* mandamus principles to the review of orders on motions to remand. In *In re Beazley*, the court held that the denial of a motion to remand, like a motion to transfer venue under 28 U.S.C. § 1404(a), was subject to challenge via mandamus.[120] The Fifth Circuit simultaneously declined, however, to extend the scope of mandamus review to a mediation order entered by the district court.[121]

In this case, Doctors Hospital 1997, L.P., (the Hospital) borrowed over $20 million from GE HSF Holdings, Inc. (GE); however, the Hospital promptly defaulted on these loans, and, as a result, GE refused to lend any additional funds to the Hospital.[122] The Hospital faced another setback when it elected to close one of its campuses after Hurricane Ike.[123] After the closure, it filed a claim with its insurer, Beazley Insurance Co. (Beazley), seeking relief both for its property damage losses and its business interruption losses.[124] GE disputed the Hospital's claims, believing it to be entitled to any funds acquired through the policy.[125] In response, the Hospital filed suit in a Texas state court naming both GE and Beazley as defendants.[126] GE, diverse from the Hospital, sought removal.[127] It neglected to obtain the consent of its co-defendant Beazley, who it alleged was a mere nominal defendant.[128] Mediation was almost immediately ordered, and all parties attended; the parties apparently reached a settlement, although the mediator reported that Beazley did not negotiate in "good faith."[129]

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117. *See id.*
118. *See id.*
119. *See id.*
120. *See In re* Beazley Ins. Co., No. 09-20005, 2009 WL 205859, at *3 (5th Cir. Jan. 2009).
121. *See id.* at *6.
122. *Id.* at *1.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at *2.

On the same day the parties had evidently reached a settlement, Beazley filed a motion to remand to state court, noting that it never consented to mediation.[130] The district court denied Beazley's motion to remand on the grounds that its consent was not required and ordered mediation.[131] Beazley petitioned the Fifth Circuit for a writ of mandamus on the district court's mediation order and the order denying remand.[132]

Addressing the issue of the denial of remand first, the Fifth Circuit examined whether or not the district court's denial of remand would qualify as an appropriate subject for mandamus.[133] The court examined whether or not another adequate means of relief (such as post-judgment relief on direct appeal) was available through the lens of *Volkswagen II*, noting that "[w]e recognize that, technically, the district court's denial [of the motion to remand] will be reviewable on appeal. . . . [V]enue transfer orders like the one in [*Volkswagen II*] are also reviewable on appeal. Our decision in [*Volkswagen II*] thus forecloses this fact from being determinative."[134] This ruling confirmed the holding in *Volkswagen II*, expanding the scope of orders eligible for mandamus review.[135] Therefore, the court concluded that, like § 1404(a) orders, rulings on motions to remand were eligible for mandamus because "no adequate means of relief other than the extraordinary writ" existed.[136]

Moving beyond the jurisdictional issue and examining the merits of the remand order, the Fifth Circuit did not find a clear abuse of discretion by the district court.[137] Instead, the Fifth Circuit found sufficient evidence to support the district court's decision that Beazley was, in fact, merely a nominal plaintiff whose consent was not required for removal.[138]

The Fifth Circuit then examined whether or not Beazley was entitled to mandamus on the issue of the mediation order.[139] Unlike remand, the court found "nothing extraordinary" in forcing Beazley to attend mediation where any resolution would be voluntary.[140] The court found a request for mandamus relief on these grounds "meritless,"[141] indicating that important limits remain on the use of mandamus to review trial court orders generally. Because the court found that Beazley failed to demonstrate that it qualified

130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at *3.
134. *Id.*
135. *See id.*
136. *Id.*
137. *Id.* at *6.
138. *Id.* at *4.
139. *Id.* at *6.
140. *Id.*
141. *Id.* at *7.

for mandamus relief on the remand issue and that it was not entitled to mandamus on the mediation issue, it denied the writ.[142]

F. In re TS Tech USA Corp.

A lingering and important question left open by *In re Volkswagen II* was whether the United States Court of Appeals for the Federal Circuit would, as has long been its practice, follow Fifth Circuit law in evaluating petitions for writs of mandamus arising out of the Eastern District of Texas. The Federal Circuit, which has national appellate jurisdiction over patent cases, normally follows the law of the relevant geographic circuit when addressing procedural issues. The question of whether the Federal Circuit would deem itself bound by the en banc Fifth Circuit's decision in *In re Volkswagen II* was of more than just academic interest, as the United States District Court for the Eastern District of Texas had emerged as the nation's leading patent court. But many of the high-stakes patent cases tried in the Eastern District of Texas had little or no factual connection to that district. Thus, if the Federal Circuit applied *In re Volkswagen II*, it would be substantially easier for patent defendants to transfer their cases out of the Eastern District of Texas and to a "clearly more convenient" alternative federal court.

The Federal Circuit confronted this critical mandamus issue in *In re TS Tech*.[143] Building on the Fifth Circuit's work in the *Volkswagen* cases, the Federal Circuit also embraced mandamus as a means to review § 1404(a) venue decisions in patent cases arising out of the Eastern District of Texas or elsewhere in the three states (including, of course, Texas) covered by the Fifth Circuit.[144]

The facts of *In re TS Tech* involved a Michigan corporation, Lear, who sued TS Tech and its affiliates, based in Ohio and Canada, for patent infringement on certain patents Lear held on headrest assemblies.[145] Despite the lack of any tangible connection to the district, Lear filed its suit in the Eastern District of Texas, Marshall Division.[146]

As in the *Volkswagen* products liability cases, TS Tech moved to transfer to the Southern District of Ohio, arguing that this represented a more convenient venue for all of the parties involved in the case and also presented a more convenient forum for accessing witnesses and other sources of proof necessary to deciding the case.[147] The district court denied

142. *Id.*
143. *See In re* TS Tech USA Corp., 551 F.3d 1315 (Fed. Cir. 2009).
144. *See id.* at 1319-22.
145. *Id.* at 1317-18.
146. *Id.* at 1318.
147. *Id.*

the motion to transfer, and TS Tech petitioned for mandamus.[148] Because the case was a patent matter, TS Tech's petition for writ of mandamus was properly directed to the Federal Circuit, rather than to the Fifth Circuit.

In reviewing the case, the Federal Circuit adopted the Fifth Circuit mandamus standards announced in *Volkswagen II*.[149] Accordingly, the Federal Circuit identified several errors in the district court's denial of TS Tech's motion to transfer venue.[150] In other words, the Federal Circuit deemed itself bound by the law developed by the Fifth Circuit in the *Volkswagen* cases, applying the law originally announced in products liability actions to its docket of patent infringement cases.[151]

The first error identified by the court was in the weight given to Lear's choice of venue under Fifth Circuit law; the court reiterated that under *Volkswagen II*, the plaintiff's choice of venue is not a distinct factor in the § 1404(a) analysis.[152] Rather, the court affirmed that a plaintiff's choice of venue corresponds to the burden a party seeking transfer must meet in showing that the transferee court is clearly more convenient.[153] The district court, in considering this as an independent factor, erred.[154] Second, under *Volkswagen I*, the district court erred in failing to consider the "100-mile rule" that when distance between venues is more than 100 miles, the factor of inconvenience increases in direct relationship to the distance to be traveled.[155] In this case, the district court totally ignored the rule and committed error as a result.[156] Third, the district court failed to acknowledge the "ease of access to sources of proof" factor that the Fifth Circuit affirmatively stated in *Volkswagen II* could not be written away merely by reliance on technology.[157] Finally, the district court erred in finding a "localized" interest in having the dispute resolved in the Eastern District of Texas because the simple fact that the product was sold in the district did not translate into a localized interest, as the Fifth Circuit acknowledged in the *Volkswagen* cases.[158] As in the *Volkswagen* cases, the Federal Circuit found that all of the interests predominated in favor of the transferee district.[159]

In light of these errors, the Federal Circuit found that the Eastern District's failure to properly apply Fifth Circuit law as announced in the

148. *Id.*
149. *Id.* at 1319.
150. *Id.* at 1320-21.
151. *See id.*
152. *Id.* at 1320.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 1320-21.
158. *Id.* at 1321.
159. *See id.*

Volkswagen cases sufficed to demonstrate TS Tech's "clear and indisputable" right to mandamus, and, therefore, the Federal Circuit issued the writ.[160]

The importance of *In re TS Tech* is that it expands the reach of the *Volkswagen I* and *II* decisions to apply to all patent cases arising out of the Fifth Circuit. While *Volkswagen I* and *II* were products liability cases, *In re TS Tech* confirmed that the Federal Circuit would follow the Fifth Circuit in utilizing mandamus as a means to test venue.[161]

G. In re Hoffmann-La Roche Inc.

Confirming that *In re TS Tech* opened the door to mandamus in § 1404(a) venue disputes, the Federal Circuit shortly followed *In re TS Tech* with multiple other opinions granting writs of mandamus, including *In re Hoffmann*.[162]

The facts of the case roughly parallel those of *In re TS Tech*. Novartis, a California company, brought suit in the Eastern District of Texas, Marshall Division, claiming that Fuzeon and Hoffmann-La Roche infringed upon its patent.[163] The patent involved a drug developed at Duke Medical Center in the Eastern District of North Carolina, and, after the parties submitted their initial disclosures identifying witnesses, Novartis moved to transfer to the Eastern District of North Carolina; the Eastern District of Texas judge denied the motion.[164] Hoffmann-La Roche petitioned the Federal Circuit for mandamus relief.[165]

The facts differed in a few ways from *In re TS Tech* in that at least one witness resided in Texas and sources of proof were located in several places around the country, with approximately 75,000 pages of documents already present in the Eastern District of Texas in electronic format by virtue of the fact that Novartis submitted them to its local counsel ahead of filing suit.[166]

Applying the precedent of both *Volkswagen II* and *In re TS Tech*, the Federal Circuit found several errors in the district court's analysis.[167] First, regarding the documents, the court found that because Novartis had submitted them in anticipation of litigation, they were not truly "Texas" documents, and, as a result, their presence was irrelevant.[168] Second, the Eastern District of North Carolina had a superior localized interest in the case because the drug was developed there, the litigation concerning its

160. *Id.* at 1322.
161. *See id.* at 1319-20.
162. *See In re* Hoffmann-La Roche, Inc., 587 F.3d 1333, 1335 (Fed. Cir. 2009).
163. *Id.*
164. *Id.*
165. *Id.*
166. *See id.* at 1336.
167. *Id.* at 1336-38.
168. *Id.* at 1336-37.

patents called into question was there, and because of the work and reputation of individuals residing in that district.[169] Third, although one of the witnesses resided in Texas, he resided over 100 miles from Marshall; therefore, under *Volkswagen I* and *II*, his subpoena was subject to a motion to quash and the district court did not have "absolute" subpoena power.[170] Relying on *Volkswagen I* and *II*, the court held that, in the absence of absolute subpoena power, the weight of this factor in favoring the district court diminished considerably.[171] Finally, by concluding that the Eastern District of North Carolina and the Eastern District of Texas had equal localized interests because the drug was marketed in Texas, despite the fact that it was developed in North Carolina, the district court "ignored this significant contrast" and "[b]y relying exclusively on how other forum non conveniens factors weigh, rather than assessing the locale's connection to the cause of action, the district court essentially rendered this factor meaningless."[172]

As a result of the district court's failure to properly apply the factors, the Federal Circuit granted the writ and ordered transfer.[173] This case, along with others like it, confirms the Federal Circuit's willingness to follow *Volkswagen I* and *II* in granting mandamus under § 1404(a) in patent actions.[174]

II. CONCLUSION: MANDAMUS IS AN INCREASINGLY IMPORTANT TOOL IN THE FIFTH CIRCUIT

While still reserved for extraordinary cases in which there has been a clear abuse of discretion and no adequate remedy is available on direct appeal, mandamus has become a more important part of Fifth Circuit practice in the seven years since *In re Horseshoe* opened the door. Faced with an adverse ruling from a federal district court on an important procedural issue—such as venue, forum non conveniens, or the denial of remand—prudent lawyers will evaluate whether a petition for writ of mandamus to the Fifth Circuit (or, in patent cases, the Federal Circuit) is potentially viable. Although mandamus will never be as important in federal appellate practice as it is in Texas appellate practice, federal mandamus is no longer obscure—at least in the Fifth Circuit. Instead, it should be part of every federal appellate practitioner's toolbox.

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169. *Id.* at 1336.

170. *Id.* at 1337-38.

171. *Id.*

172. *Id.* at 1338.

173. *Id.*

174. *See, e.g.*, *In re* Genentech, Inc., 566 F.3d 1338 (Fed. Cir. 2009); *In re* Nintendo Co., 589 F.3d 1194 (Fed. Cir. 2009).