Mandamus in the Fifth Circuit: Life After *In re: Vollkswagen*

by David S. Coale

In 2008, *the en banc* Fifth Circuit granted mandamus relief in the case of *In re Volkswagen*,[1] reversing the denial of a motion to transfer venue from the Eastern to the Northern District of Texas. At the time, court observers wondered if *Volkswagen* signaled a more robust role for pretrial appellate review.[2] History has proven otherwise, and a brief survey of the case law since *Volkswagen* shows that the Fifth Circuit takes a careful and conservative approach to mandamus petitions.

Notable Denials After *Volkswagen*

The first major counterpoint to *Volkswagen* appeared in the case of *In re Crystal Power*,[3] which denied mandamus review of a refusal to remand for lack of subject matter jurisdiction, relying on Supreme Court cases from the late Nineteenth Century.[4] As to the practical result of this holding, the Fifth Circuit observed:

[1] 545 F.3d 304 (5th Cir. 2008) (*en banc*).

[2] *See generally* Ashby, Coale & Kratovil, "The Increasing Use and Importance of Mandamus in the Fifth Circuit," 43 Tex. Tech. L. Rev. 1049 (2011).

[3] 641 F.3d 82 (5th Cir. 2011).

[4] *Id.* at 84 (citing, *inter alia*, *Ex parte Hoard*, 105 U.S. 578, 579-80 (1881)).

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> We confess puzzlement over why respondents insist on litigating this case in federal court even though, as our previous opinion explained, any judgment issued by the district court will surely be reversed — no matter which side it favors — for lack of federal jurisdiction due to improper removal.[5]

Nevertheless: "Since [Petitioner] as not proffered any reason why post-judgment review would be ineffective or why the cost of delay would be atypical . . . controlling Supreme Court precedent dictates that mandamus is not available here[.]"[6]

In the same spirit, the case of ***In re Atlantic Marine Construction***[7] denied mandamus relief to enforce a forum selection clause, finding no clear abuse of discretion by the district court,[8] although a special concurrence detailed its differences of opinion on the controlling issue.[9] (The Supreme Court later reversed 9-0 on the forum selection issue,[10] but did not engage the mandamus posture in which the case arose.)

Two other recent cases have declined to grant mandamus relief.

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[5] ***Id.*** at 86 n.10.

[6] ***Id***. at 85-86; ***see also*** Ryan, Meier & Counsellor, "Interlocutory Review of Orders Denying Remand Motions," 63 Baylor L. Rev. 734 (2011) (reviewing ***Crystal Power*** and related cases nationally).

[7] 701 F.3d 736 (5th Cir. 2012).

[8] ***Id***. at 738.

[9] ***Id***. at 743 (Haynes, J., specially concurring).

[10] 134 S. Ct. 568 (2013).

A short opinion about an expert fee under the Criminal Justice Act, ***In re Marcum LLP***, reminds that the All Writs Act's grant of authority to issue a writ of mandamus is not an independent grant of federal jurisdiction.[11] And in the case of ***In re Katrina Canal Breaches Litigation***, in the context of affirming several governmental immunity issues, the Court declined to grant a writ of mandamus to stay an upcoming trial because its opinion affirmed the immunity rulings that the district court would use for that trial.[12]

This year, in the case of ***In re American Lebanese Syrian Associated Charities***, a panel divided on whether a federal court has jurisdiction over a suit brought by an assignee of a receiver, finding no "clear and indisputable" error.[13] A dissent disagreed, noting: "It is unfortunate that the Petitioner charities should be forced to litigate this case to conclusion, if they can afford it, before resolving this difficult and novel jurisdictional issue."[14]

Notable Grants After *Volkswagen*

Returning to the general subject matter of ***Volkswagen*** in the

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[11] 670 F.3d 636, 639 (5th Cir. 2012).

[12] 673 F.3d 381, 399 (5th Cir. 2012); ***see also*** *All Plaintiffs v. Transocean Offshore*, No. 12-30237 (Jan. 3, 2013, unpublished) (applying *Mohawk Industries v. Carpenter*, 130 S. Ct. 599 (2009), finding that the collateral order doctrine did not allow appeal of an order requiring a psychiatric exam, and discussing the unavailability of mandamus). A later opinion mooted the mandamus issue by changing the resolution of the merits. ***In re Katrina Canal Breaches Litigation***, 696 F.3d 436, 454 (5th Cir. 2012).

[13] ___ F.3d ___, No. 15-11188 (5th Cir. March 3, 2016).

[14] Slip op. at 5 (Jones, J., dissenting).

case of ***In re Radmax, Ltd.***,[15] the Fifth Circuit found a clear abuse of discretion in declining to transfer a case from the Marshall Division of the Eastern District of Texas to the Tyler Division. It found that the district court incorrectly applied the eight relevant 1404(a) factors, giving undue weight to potential delay and not enough weight to witness inconvenience, and quoting ***Moore's Federal Practice*** for the principle that "'the traditional deference given to plaintiff's choice of forum . . . is less' for intra-district transfers."[16] A pointed dissent agreed that the 1404(a) factors favored transfer but saw no clear abuse of discretion, noting that there was no clear Fifth Circuit authority on several of the points at issue in the context of intra-district transfers.[17] The full court subsequently denied ***en banc*** review by a 7-8 vote, again over a dissent by Judge Higginson.[18]

The subsequent panel opinion in the case of ***In re: Rolls Royce Corp.***[19] built on *Atlantic Marine* after the Supreme Court's reversal and remand. First confirming that mandamus relief was available, despite the novel procedural context of a combined transfer and venue motion, the majority reviewed the applicability of *Atlantic Marine*, noting: "For cases where all parties signed a forum selection contract, the analysis is easy: except in a truly exceptional case, the contract controls." For a situation where only one of several defendants has a clause, however, the analysis is more subtle:

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[15] 720 F.3d 285 (5th Cir. 2013).

[16] ***Id.*** at 288-89.

[17] ***Id.*** at 290 (Higginson, J., dissenting).

[18] 736 F.3d 1012 (5th Cir. 2013).

[19] 775 F.3d 671 (5th Cir. 2014).

> While *Atlantic Marine* noted that public factors, standing alone, were unlikely to defeat a transfer motion, the Supreme Court has also noted that section 1404 was designed to minimize the waste of judicial resources of parallel litigation of a dispute. The tension between these centrifugal considerations suggests that the need — rooted in the valued public interest in judicial economy — to pursue the same claims in a single action in a single court can trump a forum-selection clause.[20]

Despite that observation, the panel majority granted mandamus to enforce the clause, even though only one defendant was a party to it.[21]

A special concurrence "believe[d] the majority have erroneously and confusingly diminished the scope of *Atlantic Marine*," concluding:

> Simple two-party disputes are near a vanishing breed of litigation. It seems highly unlikely that the Supreme Court granted certiorari and awarded the extraordinary relief of mandamus simply to proclaim that a forum selection clause must prevail only when one party sues one other party. The Court is not naive about the nature of litigation today.[22]

Finally, in the 2015 case of *In re Lloyd's Register North America,*

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[20] *Id.* at 679.

[21] *Id.* at 683-84.

[22] *Id.* at 685 (Jones, J., specially concurring).

Inc.,[23] a Fifth Circuit panel granted mandamus relief about a forum non conveniens issue. As in *Radmax*, the majority and dissent primarily disagreed about whether the perceived trial court error was "clear" or not.[24]

Conclusion

The Fifth Circuit's mandamus opinions since *Volkswagen* carefully balance the relevant policy concerns, frequently producing dissents and special concurrences. Thoughtful judges often differ on whether alleged errors are "clear," as well as the main practical question posed by a mandamus petition -- whether the benefit from early resolution of a perceived error in one case outweighs the risk of many more mandamus petitions on similar subjects, inviting a host of mandamus petitions.

These discussions emphasize the importance of framing the specific issue for mandamus review. Drawn too broadly, it can overlap with other areas of law and make the alleged error seem less clear. Drawn too narrowly, the issue may seem insignificant. However phrased, the Fifth Circuit has shown a willingness to consider the review of a range of matters in mandamus proceedings – but has been much slower to actually review them in that procedural posture.

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[23] 780 F.3d 283 (5th Cir. 2015).

[24] *See id.* at 294; *id.* at 294-95 (Elrod, J., dissenting).