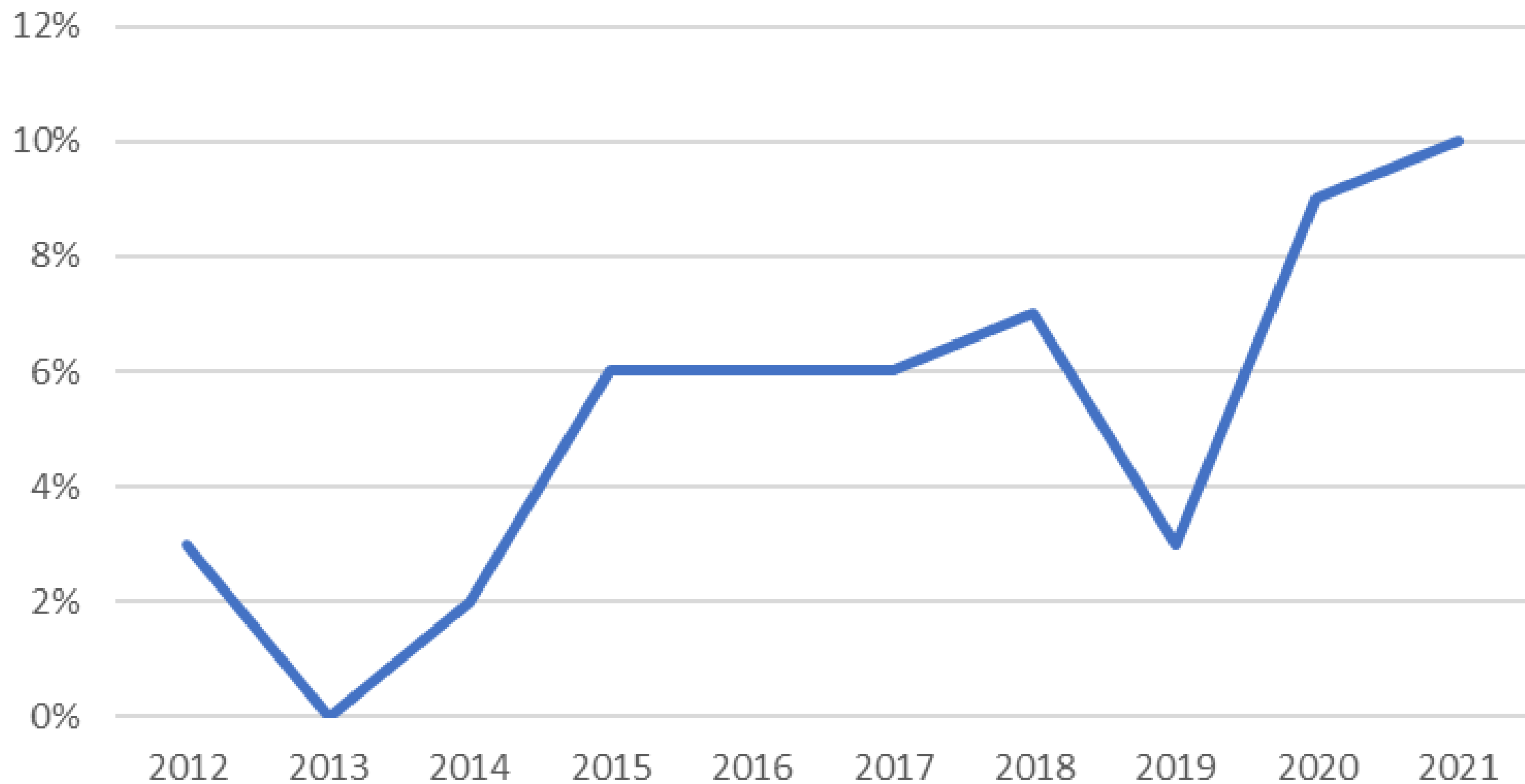


# Strategic Use of Mandamus Proceedings

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# Mandamus Argued



# Grant Rates – Texas Supreme Court

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Avg
Writs	3%	0%	2%	6%	6%	6%	7%	3%	9%	<b>10%</b>	5%

# Mandamus Standard

“extraordinary remedy” / “remedy of last resort”

Two-prong test:

1. clear abuse of discretion
2. no adequate remedy by appeal

## Mandamus Standard:

### Evolution of “No adequate remedy by appeal”

*Walker v. Packer* – categorical approach

*Prudential* –

- “a proxy for the careful balance of jurisprudential considerations”
- “an appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments”

**Mandamus Standard:  
Reality of “No adequate remedy by appeal”**

categorical \*and\* balancing

But, yes, sometimes mandamus will issue to “spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.”

## Means for interlocutory review?

- Ever-expanding list of permitted interlocutory appeals in TCPRC § 51.014(a) plus other statutes.
- New:
  - Either party can appeal a preliminary determination of whether a claim is a HCLC.
  - If CA determines it is a HCLC, claimant can file affidavit instead of having case dismissed.

## Permissive interlocutory appeal?

- Purely discretionary (trial court, CA, SCOTX).
- TC order must (amended order will do):
  - grant permission,
  - specify controlling questions of law for which there is a substantial ground for difference of opinion, and
  - state why appeal may materially advance end of litigation.



# Permissive interlocutory appeal?

- Two-step process is different.
  - Application (or petition) for permissive appeal is due 15 days after TC order.
  - Like PFR process in SCOTX—encourage grant.
  - If CA grants permission, then go to usual TRAPs for interlocutory appeal procedures.

# Common Mandamus Cases

- Jurisdictional or Forum Issues (including arbitration)
- Discovery issues
- Contempt/sanctions
- New trial orders
- Disqualification (attorney or judge)
- Void orders

Even: denials of 91a motions/SJM

*Bonsmara Natural Beef Company, LLC v. Hart of Texas Cattle Feeders, LLC.,*  
603 S.W.3d 385 (Tex. 2020)

- Failure to appeal an interlocutory order denying a motion to compel arbitration does not result in the forfeiture of the right of appeal at the conclusion of the case.
- Interesting tidbit about case: after the time passed for an interlocutory appeal, the defendant filed a petition for writ of mandamus. That petition was denied because the defendant had an adequate remedy by appeal since it could have filed an interlocutory appeal even though it did not timely do so.

## *In re Whataburger* (April 22, 2022)

- Mandamus relief granted when Whataburger could have taken an interlocutory appeal, but did not appeal because it had no notice of the order denying its motion to compel arbitration until after the interlocutory appeal deadline expired
- Footnote: Texas appellate courts should not again be presented with a case in which a court of this State has prevented a party from taking an appeal to which the party has a clear right. If such a case does again arise, its nature and context will determine the scope of the relief. Because this case involves arbitration, claimed deprivations of which we traditionally addressed via mandamus, and because of the unusually elongated procedural history, we have addressed the merits directly as a matter of judicial economy rather than, for example, directing the court of appeals to first address the case on the merits.

# Mandamus Strategy

- Who is on your team and how much will this cost?
- How likely are you to succeed?
  - category? balancing? was TC ruling really offensive?
  - legal issues?
  - factual disputes that preclude mandamus relief?
- Do you have any record issues? (including presentment/cleaning up with a motion for reconsideration)
- How will an immediate appeal impact ongoing litigation? (temporary orders/relational issues)
- What will the delay mean for your client?
- Is mandamus really the avenue for relief? (other means for review? Correct writ?)

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