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Ninth Circuit Review—Mandamus and Appellate Review—Formulating Specific Criteria for Obtaining the Writ

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MANDAMUS AND APPELLATE REVIEW—FORMULATING SPECIFIC CRITERIA FOR OBTAINING THE WRIT

I. INTRODUCTION

The orderly progression of litigation in federal courts is accomplished through the use of procedural orders issued pursuant to either the Federal Rules of Civil Procedure or specific acts of Congress.[1] Since a decision affecting procedure rarely touches the merits of a case, a party injured thereby is faced with a problem in obtaining review. The litigant must either qualify for one of the limited types of interlocutory review[2] or await final judgment and take an appeal.[3] If forced to do the latter, there is always the possibility that ultimate success on the merits will eliminate the need for appeal, or that the procedural injury will lose importance in the context of other appealable issues.

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1. Statutory authority for procedural orders is embodied in title 28 of the United States Code. *See* note 2 *infra*.

2. 28 U.S.C. § 1292(a) (1970). This section reads as follows:

> The courts of appeals shall have jurisdiction of appeals from
> (1) Interlocutory orders of the district courts . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . .
> (2) Interlocutory orders appointing receivers . . . .
> (3) Interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases . . . .
> (4) Judgments in civil actions for patent infringement . . . .

Id.

In addition to interlocutory appeal of right, Congress has provided for discretionary interlocutory review:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal from such order . . . .

Id. § 1292(b).

The availability of these types of interlocutory review becomes an important consideration in determining the likelihood of receiving a writ of mandamus. *See* notes 76-83 *infra* and accompanying text. For further discussion of interlocutory appeals, see Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 367-75, 378-82 (1961).

3. 28 U.S.C. § 1291 (1970). This section provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." *Id.*

The scope of the "final decision" test is still uncertain. *See* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932). The Supreme Court admits that the problem is still a confusing one. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170-71 (1974).

A partial solution to the litigant's dilemma is the availability of a writ of mandamus.[4] Use of the writ, however, is severely limited. The courts are required to effectuate an overwhelming congressional policy against piecemeal litigation[5] while, at the same time, avoiding irreparable injury to litigants.[6] In order to achieve this balance, the writ is used only in "exceptional circumstances," and therefore courts commonly refer to mandamus as an "extraordinary writ."[7]

Although Congress enacted the All Writs Statute,[8] courts have traditionally struggled in their attempts to more specifically define the parameters of when mandamus is properly employed. In so doing, the Supreme Court has set forth basic policies that direct lower appellate courts to use the writ sparingly in order to preserve the forcefulness that Congress intended it to have. It has been left to the individual circuits, however, to specifically delineate criteria which, once satisfied, will persuade the courts that a writ of mandamus is the appropriate remedy in a given instance.

The Ninth Circuit recently reviewed its previous decisions regarding mandamus and, in *Bauman v. United States District Court*,[9] concluded that issuance of the writ will depend upon the analysis of five factors.[10] While recognizing a need for specific guidelines,[11] the court noted that guidelines are, at most, a helpful starting point and that "[t]he considerations are cumulative and proper disposition will require a balancing of conflicting indicators."[12] It is clear from the variety of circumstances in

4. Appellate courts derive their power to issue the writ from the All Writs Statute, 28 U.S.C. § 1651(a) (1970): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The statute also authorizes writs other than mandamus (such as prohibition and certiorari).

5. This policy is inherent in 28 U.S.C. § 1291 (1970) and is given tremendous force by the courts. *See* Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25, 30 (1943); Cobbledick v. United States, 309 U.S. 323, 325-26 (1940).

6. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953); *Ex parte* Fahey, 332 U.S. 258, 260 (1947); Maryland v. Soper, 270 U.S. 9, 29-30 (1926).

7. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383-85 (1953); *Ex parte* Fahey, 332 U.S. 258, 259-60 (1947); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

8. 28 U.S.C. § 1651(a) (1970).

9. 557 F.2d 650 (9th Cir. 1977).

10. *Id.* at 654.

11. *Id.* at 653.

12. *Id.* at 655. The problems that can occur from rote application of the guidelines are that: (1) the prescribed situations will be present in varying degrees (*i.e.*, differing degrees of error or injury), and (2) application of each guideline may result in differing conclusions. This calls for a balancing approach in order to enable the court to reach a final decision on issuance of the writ. *Id.*

which mandamus is arguably available that the court must still consider the propriety of the writ on an individual basis.[13]

II. SUPREME COURT DECISIONS

A. *Traditional View*

Since all guidelines provided by the circuit courts must fit into the framework of policy enunciated by the Supreme Court, an overview of the Court's decisions is necessary to an understanding of the more specific criteria. Early decisions were clear in expressing the Court's distaste for review by mandamus.[14] Few guidelines were given to describe when the writ would be appropriate. Instead, it was more common for the Court to affirm the lower courts' denials of the writ by simply stating that the cases did not involve the type of exceptional circumstances normally warranting mandamus.[15] Although the Court suggested that appellate courts do have jurisdiction to issue writs of mandamus,[16] it put the onus of discretionary use on the appellate judges.[17] The exercise of that discretion was generally reserved for times when the trial court exceeded its jurisdiction or power.[18] The test was not merely whether the order was erroneous,[19] since mandamus is not a substitute for appeal.[20]

13. *Id.*

14. *See, e.g.*, Parr v. United States, 351 U.S. 513 (1956); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953); *Ex parte* Fahey, 332 U.S. 258 (1947); Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943).

15. *See, e.g.*, Parr v. United States, 351 U.S. 513 (1956); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953); *Ex parte* Fahey, 332 U.S. 258 (1947); Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943).

16. In Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943), the Supreme Court essentially concluded that the appellate court was entitled to hear the case on the basis of "prospective" jurisdiction: "Its [the appellate court's] authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." *Id.* at 26. Since the court would have jurisdiction over any appeal that is filed, it has jurisdiction prior to appeal to insure that the district court does not take action which would frustrate an appeal and negate the possibility of review. *See* McClellan v. Carland, 217 U.S. 268 (1910); Insurance Co. v. Comstock, 83 U.S. 258 (1872).

17. Parr v. United States, 351 U.S. 513, 520 (1955); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25-26 (1943).

18. In Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) the Court stated:

> The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it is competent to decide . . . .

Id. at 26. *See also* De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945).

19. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).

20. *Id.*; Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

Rather, the writ was appropriate only "where there is clear abuse of discretion or 'usurpation of judicial power.' "[21] For example, issuance of the writ was proper where the trial judge erroneously stayed the proceedings before him pending disposition of the same cause of action in a state court.[22] The Court found this to be an abdication of authority and jurisdiction by the trial judge.[23] The abuse of discretion test sharply restricted the scope of review available through mandamus due to the difficulty in satisfying the initial burden.

Another problem recognized by the Court as reason for inhibiting the use of mandamus is that, where the writ is sought, the trial judge is made a party to the action.[24] The judge becomes the respondent to the petition[25] and, thereby, he is forced into a position of partiality.[26] A writ, therefore, takes on a more personal tone than does an ordinary appeal, since the former is issued *directly* to the trial judge.[27] Although this does not totally dispense with the writ as a viable remedy,[28] appellate courts recognize this factor as an issue in determining the propriety of mandamus.[29]

B. Supervisory and Advisory Mandamus

By its decision in *La Buy v. Howes Leather Co.*,[30] the Supreme Court

21. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).

22. McClellan v. Carland, 217 U.S. 268 (1910).

23. *Id.* at 281.

24. *Ex parte* Fahey, 332 U.S. 258, 260 (1947).

25. The judge is "obliged to obtain personal counsel or to leave his defense to one of the litigants before him." *Id.*

26. Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965) is a rare example where the judge, by employing the counsel of one of the litigants to aid him in answering the petition, was later disqualified from proceeding with the case. As suggested by some commentators, this problem has been somewhat alleviated by rule 21(b) of the Federal Rules of Appellate Procedure, which allows the judge not to appear on the petition, without inferring any admission of error. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3932, at 211-12 (1977).

27. Court opinions do not address themselves directly to this issue but the attitudes of the judges involved can be assessed through inferences within the decisions. *See generally* Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 512-13 (1969); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 771-78 (1957).

28. *But cf.* Bell, *The Federal Appellate Courts and the All Writs Act*, 23 SW. L.J. 858, 862 (1969) ("[C]onfrontation is still cited as the principal reason for denial of mandamus.").

29. Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976). The Ninth Circuit has apparently resolved this problem by recognizing that the *parties* to the litigation are the appropriate individuals to present the issues on the petition. *See* Hartland v. Alaska Airlines, 544 F.2d 992, 1001 (9th Cir. 1976). The court continues, however, to acknowledge that there is still concern over the district judge's role during mandamus proceedings. *See* Bauman v. United States Dist. Court, 557 F.2d 650, 653 & n.5 (9th Cir. 1977).

30. 352 U.S. 249 (1957).

made the courts of appeals more accessible to litigants seeking writs of mandamus. *La Buy* involved the practice by a district court judge of continually referring complex lawsuits to masters.[31] After numerous reversals on appeal, the judge continued to refer cases with seeming disregard of the prerequisite that exceptional circumstances exist. After dispensing with any doubts as to an appellate court's power to issue the writ,[32] the Court introduced the type of mandamus most commonly invoked today, known as "supervisory"[33] mandamus. Limited to review of the trial court's application of the Federal Rules of Civil Procedure,[34] "supervisory" mandamus is proper to vacate an order issued thereunder "to prevent . . . action . . . so palpably improper as to place it beyond the scope of the rule invoked."[35]

Since the Federal Rules of Civil Procedure are promulgated by the Supreme Court,[36] appellate supervision of the district courts is necessary to insure their proper application.[37] In order to fit supervisory mandamus into the existing framework of limitations on the use of the writ, *La Buy* restricted its use to situations involving repeated error by the district judge.[38] "Repetition" provided the necessary exceptional circumstance and indicated that review by appeal was inadequate to correct the trial judge's errors.

A further step toward defining when mandamus would be proper was taken in *Schlagenhauf v. Holder*.[39] In this case, the Court developed the

31. The trial judge made the references pursuant to rule 53(b), which provides:

> A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

FED. R. CIV. P. 53(b).

32. 352 U.S. at 254-55. The Court reaffirmed the prospective jurisdiction approach taken in *Roche* and introduced the term "naked power," which is used in subsequent opinions to summarily dispense with the power issue.

33. *Id.* at 259. For further discussion of supervisory mandamus, see Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 HARV. L. REV. 595 (1973) [hereinafter cited as *Supervisory and Advisory Mandamus*].

34. The Court made special note of the fact that the order in *La Buy* involved a federal rule while previous mandamus actions usually involved procedural orders issued pursuant to statutory authority. 352 U.S. at 257.

35. *Id.* at 256.

36. *See* 28 U.S.C. § 2071 (1970); *id.* § 2072 (Supp. V 1975).

37. 352 U.S. at 259-60.

38. The Court stated that "there is an end of patience and it clearly appears that the Court of Appeals has for years admonished the trial judges [not to overuse the reference procedure]." *Id.* at 258.

39. 379 U.S. 104 (1964).

concept of "advisory" mandamus.[40] Again limited to violation of the Federal Rules of Civil Procedure,[41] the writ could be used to review orders that required application of *new* rules where there was no clear existing interpretation for the trial judge to follow.[42] *Schlagenhauf* was concerned with whether rule 35[43] required a defendant in a civil trial to submit to a physical examination. This aspect of the rule had never been considered by the appellate courts.[44] It was held that once the issue is properly before the court of appeals,[45] the court has a duty to instruct the district judge on the proper scope of the rule.[46] Advisory mandamus has limited use, however, in that once invoked to obtain higher court interpretation, it can no longer be used regarding that particular aspect of the rule.[47] The remedy for the trial judge's failure to follow the instructions of the appellate court remains appeal. Writ of mandamus does not attach as the appropriate remedy for *subsequent* misapplications of the federal rule.[48]

Both *La Buy* and *Schlagenhauf* have, by devising new terminology, expanded the situations in which mandamus can appropriately be applied. They move from the earlier "confining jurisdiction"[49] approach to a broader supervision theory.[50] However, appellate courts must carefully exercise their discretion[51] and avoid overly broad interpretations of these

40. *But see Supervisory and Advisory Mandamus, supra* note 33, at 612-13 (asserting that advisory mandamus is a normal outgrowth of supervisory mandamus and not a new concept developed in *Schlagenhauf*).

41. 379 U.S. at 112.

42. *Id.* at 110.

43. FED. R. CIV. P. 35.

44. 379 U.S. at 110.

45. In *Schlagenhauf* the Court remarked that

> the petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context. . . . [T]he Court of Appeals should have also . . . determined [the scope of the rule] to settle new and important problems.

Id. at 111.

46. The scope was the issue of "good cause" and whether it was a prerequisite to a physical examination of the defendant once it was determined that rule 35 was applicable to defendants. *Id.*

47. *Id.* at 112.

48. *Id. See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3934, at 232 (1977).

49. Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943). *See* note 18 *supra*.

50. The standard of confining the lower court to its prescribed jurisdiction is increasingly referred to as the "traditional use of the writ." 379 U.S. at 109-10. This has led some commentators to believe that *La Buy* and *Schlagenhauf* grant a separate basis for the writ. *See, e.g.*, Supervisory and Advisory Mandamus, supra note 33, at 607.

51. Schlagenhauf v. Holder, 379 U.S. at 111-12; La Buy v. Howes Leather Co., 352 U.S. at 255-60.

Supreme Court decisions. The earlier language of "extreme circumstances" remains as the standard by which appellate judges are guided.[52]

C. *Recent Decisions*

Some commentators[53] believe that the later Supreme Court decisions have retreated from the more expansive policy developed in *La Buy* and *Schlagenhauf*. In *Will v. United States*,[54] the defendant in a tax evasion prosecution filed a motion for a bill of particulars to obtain certain information from the Government. Upon the Government's refusal to supply the requested information, the district judge indicated his intention to dismiss the case if the Government persisted in its failure to disclose. The Government sought a writ of mandamus to compel the district judge to strike the order for the bill of particulars. After initially denying the writ, the Seventh Circuit altered its decision and issued the writ. The Supreme Court reversed, stating that mandamus is a "drastic remedy"[55] and "among the most potent weapons in the judicial arsenal."[56]

The *Will* Court, however, did reaffirm the use of supervisory and advisory mandamus by stressing their value in instructing trial court judges.[57] Since the court of appeals involved in *Will* had done nothing more than issue the writ,[58] it had not satisfied the educational purposes[59] expressed in *La Buy* and *Schlagenhauf*. The factual circumstances presented in *Will* were equally important to the restrictive nature of the

52. La Buy v. Howes Leather Co., 352 U.S. at 257.

53. *See, e.g.*, 9 MOORE'S FEDERAL PRACTICE ¶ 110.28 (2d ed. 1977).

54. 389 U.S. 90 (1967).

55. *Id.* at 104.

56. *Id.* at 107.

57. *Id.* at 104-07.

58. The Supreme Court stated:

> Mandamus is not a punitive remedy. The entire thrust of the Government's justification for mandamus in this case, moreover, is that the writ serves a vital corrective and didactic function. While these aims lay at the core of this Court's decisions in *La Buy* and *Schlagenhauf* . . . we fail to see how they can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the Government rests its attempt to justify the action below.

Id. at 107 (citation omitted).

59. Due to the extraordinary nature of mandamus, the issuing court must justify its decision to issue the writ with a well-reasoned opinion. This serves two functions: (1) to assure that the Supreme Court is in a position to conduct an "informed review" of the circuit court decision, if necessary, and (2) to provide the district court with the proper interpretation and scope of the rule which it had erroneously applied. *Id.* at 105-07.

decision, as noted by the Court itself[60] and several commentators.[61] The trial was a criminal prosecution and it was the Government which sought the writ. The case, therefore, raised substantial issues regarding the availability of appeal by the prosecution in a criminal setting.[62] Although many courts, including the Supreme Court,[63] have cited *Will* as applicable to cases arising in the context of civil proceedings, its usefulness must be considered in light of the particular facts presented therein.[64]

The Court's most recent decision, *Kerr v. United States District Court*,[65] re-emphasizes the extraordinary quality and restrictive use of mandamus. It stresses the basic congressional policy against piecemeal litigation,[66] as the Court had stressed in previous decisions.[67] In addition, the Court reviewed its prior decisions and devised a general framework within which the appellate courts may exercise their power:

> As a means of implementing the rule that the writ will issue only in extraordinary circumstances, we have set forth various conditions for its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires, . . . and that he satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable . . . .'" Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.[68]

The decision in *Kerr* illustrates that the Supreme Court, with increasing frequency, is willing to give more specific guidelines to the circuit courts. It stresses the factors that the Court views as the most important in determining when mandamus is proper. However, *Kerr* still leaves appellate judges with vast discretion in deciding whether the writ will issue.[69]

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60. 389 U.S. at 96, 100 n.10.

61. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 110.28, at 308 (2d ed. 1977); *Supervisory and Advisory Mandamus, supra* note 33, at 620. In addition, the Ninth Circuit has taken this view. *See* note 64 *infra*.

62. 389 U.S. at 96.

63. *See* Kerr v. United States Dist. Court, 426 U.S. 394 (1976).

64. Lampman v. United States Dist. Court, 418 F.2d 215, 217 (9th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 952 (9th Cir. 1968). *But see* Kerr v. United States Dist. Court, 511 F.2d 192, 196 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976) (citing *Will* as authority in the context of a civil proceeding).

65. 426 U.S. 394 (1976).

66. *Id.* at 403.

67. *See* note 5 *supra* and accompanying text.

68. 426 U.S. at 403 (citations omitted).

69. *Id. See also* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976) (mandamus proper to correct district court's habit of remanding cases properly removed).

III. THE NINTH CIRCUIT

The Ninth Circuit has attempted to develop practical guidelines for mandamus and, at the same time, to incorporate the policies enunciated by the Supreme Court. In a recent decision, *Bauman v. United States District Court*,[70] the court listed the following factors as recurring in many of its prior opinions:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. . . . (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.). . . . (3) The district court's order is clearly erroneous as a matter of law. . . . (4) The district court's order is an oft-repeated error, or manifests persistent disregard of the federal rules. . . . (5) The district court's order raises new and important problems or issues of law of first impression.[71]

The apparent simplicity of these criteria, on its face, creates an illusion that the court has finally stated the law in such a way as to afford easy application.[72] But, as the Ninth Circuit recognizes, "these guidelines . . . do not always result in bright-line distinctions."[73] A policy that the person seeking the writ has the burden of showing a "clear and indisputable" right to the writ[74] has been incorporated into these factors; the petitioner is required to prove each factor clearly and indisputably.[75] Each factor carries with it, however, different weight depending entirely on the circumstances to which it is applied. Therefore, the circuit court is still forced to employ a balancing approach in order to reach a final decision.

IV. THE *BAUMAN* FACTORS

A. *The Party Seeking the Writ Has No Other Adequate Means, Such as a Direct Appeal, to Attain the Relief He or She Desires*

Following the policy that mandamus is not a substitute for appeal,[76] the writ will not issue when there are other avenues of interlocutory appeal

70. 557 F.2d 650 (9th Cir. 1977).
71. *Id.* at 654 (citations omitted).
72. *See generally* notes 126-62 *infra* and accompanying text.
73. 557 F.2d at 655.
74. Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976); Will v. United States, 389 U.S. 90, 96 (1967); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953).
75. *See* Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 692 (9th Cir.), *cert. denied*, 98 S. Ct. 109 (1977).
76. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

available.[77] Statutory provisions[78] for interlocutory appeal and judicially created exceptions[79] to the final judgment rule are included in the court's assessment, thereby creating a variety of alternative remedies.

In satisfying his burden, the petitioner must prove, that he has exhausted all of these other remedies.[80] This includes having been denied certification pursuant to 28 U.S.C. section 1292(b),[81] refused entry of final judgment under federal rule 54(b),[82] and denied appeal under the collateral order doctrine.[83]

The Ninth Circuit has made it easier for a petitioner to know at the outset what alternatives are available. There are certain orders for which

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77. Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976); Bauman v. United States Dist. Court, 557 F.2d 650, 655-56 (9th Cir. 1977); Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 691-92 (9th Cir.), *cert. denied*, 98 S. Ct. 109 (1977); Belfer v. Pence, 435 F.2d 121, 123 (9th Cir. 1970); CMAX, Inc. v. Hall, 290 F.2d 736, 739 (9th Cir. 1961).

78. *See, e.g.*, 28 U.S.C. § 1292 (1970). *See* note 2 *supra*.

79. The most well known exception is the "collateral order" doctrine developed in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). A "collateral order" is one which falls within "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that the consideration be deferred until the whole case is adjudicated." *Id.* at 546. These orders are deemed final and appealable under 28 U.S.C. § 1291 (1970).

Although the Ninth Circuit has granted mandamus partially based on the fact that review under the *Cohen* exception was not yet established as a "right," Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 952 n.8 (9th Cir. 1968), the trend seems to be away from mandamus when *Cohen may* be applicable. Bauman v. United States Dist. Court, 557 F.2d 650, 656 (9th Cir. 1977). For further discussion of *Cohen* and the application of the "collateral order" doctrine, see 9 MOORE'S FEDERAL PRACTICE ¶ 110.10, at 130-37 (2d ed. 1977); Underwood, *Appeals in the Federal Practice from Collateral Orders*, 36 VA. L. REV. 731 (1950); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1961).

80. Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 692 (9th Cir.), *cert. denied*, 98 S. Ct. 109 (1977).

81. Mohasco Indus., Inc. v. Lydick, 459 F.2d 959, 960 (9th Cir. 1972). *See* 28 U.S.C. § 1292(b) (1970). If certification is denied, writ of mandamus will not lie to compel the district judge to certify the question. The statute requires the concurrence of both the trial and appellate courts. Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1338 (9th Cir. 1976).

82. Askew v. United States Dist. Court, 527 F.2d 469 (9th Cir. 1975). Rule 54(b) of the Federal Rules of Civil Procedure provides:

> When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment . . . .

FED. R. CIV. P. 54(b).

83. Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 952 (9th Cir. 1968). *See* note 79 *supra*.

the court has decided the viability of appeal. For example, venue transfers are interlocutory and therefore not appealable[84] absent certification by the district judge. Denial of class action certification, particularly in rule 23(b)(2)[85] actions, is appealable under 28 U.S.C. section 1292(a).[86] In contrast, granting class action certification is interlocutory and carries with it a strong preference for review only after final judgment.[87]

The court's handling of discovery orders shows its strong preference for remedies other than mandamus. First, the injured party must ask for a protective order.[88] If this request is denied, he must disobey the discovery order, receive a contempt citation, and take an appeal from the citation.[89] Although the Ninth Circuit has indicated that not all contempt citations are final and therefore appealable,[90] recent indications are that the mere *possibility* that another remedy exists will discourage the court from allowing mandamus.[91]

In situations where it is unclear whether appeal or mandamus is the appropriate remedy, the court has permitted a party to file both an appeal and a petition for the writ.[92] The court then determines which remedy, if any, it will employ. Similarly, the court will convert an appeal into a petition for mandamus.[93] Therefore, recognition by the party seeking review that an appeal *may* be proper is not a complete bar to obtaining

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84. Kasey v. Molybdenum Corp. of America, 408 F.2d 16, 18 (9th Cir. 1969); Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 951 (9th Cir. 1968); Gulf Research & Dev. Co. v. Harrison, 185 F.2d 457, 459 (9th Cir. 1950).

85. FED. R. CIV. P. 23(b)(2). This rule provides:

> [A]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole.

86. Price v. Lucky Stores, Inc., 501 F.2d 1177, 1179 (9th Cir. 1974). *See* note 2 *supra*.

87. Blackie v. Barrack, 524 F.2d 891, 895-97 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

88. Southern Cal. Theatre Owners Ass'n v. United States Dist. Court, 430 F.2d 955, 956 (9th Cir. 1970).

89. Belfer v. Pence, 435 F.2d 121, 122 (9th Cir. 1970).

90. Hartley Pen Co. v. United States Dist. Court, 287 F.2d 324, 329 (9th Cir. 1961). *But see* Belfer v. Pence, 435 F.2d 121, 123 (9th Cir. 1970) (petitioner was certain the order would be appealable).

91. Bauman v. United States Dist. Court, 557 F.2d 650, 656 (9th Cir. 1977).

92. Hartland v. Alaska Airlines, 544 F.2d 992 (9th Cir. 1976); McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); United States v. United States Dist. Court, 509 F.2d 1352 (9th Cir.), *cert. denied*, 421 U.S. 962 (1975).

93. Steccone v. Morse-Starrett Prods., Inc., 191 F.2d 197 (9th Cir. 1951); Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950).

the writ so long as the court can, in the first instance, determine that an appeal is not available.[94]

B. *The Petitioner Will Be Damaged or Prejudiced in a Way Not Correctable on Appeal*

Whenever review after final judgment is the only remedy available to an injured party, the court will grant interlocutory review upon a showing of irreparable injury.[95] The burden which the party must satisfy, "that the harm will, in all likelihood occur, absent the writ,"[96] indicates that a possibility of harm[97] is insufficient.[98] In seeking review of transfer orders, for example, the inconvenience of what may be an unnecessary trial is usually not sufficiently prejudicial to warrant mandamus.[99] The court is looking for damage to the petitioner that, if not corrected immediately, will never be correctable. Recognizing that a discovery order will result in trade secrets being irretrievably lost, the Ninth Circuit has found immediate review necessary to protect the rights of the injured party.[100] Similarly, the threat that notice of pending actions will be sent to

94. *But see* Hartland v. Alaska Airlines, 544 F.2d 992 (9th Cir. 1976); United States v. United States Dist. Court, 509 F.2d 1352 (9th Cir.), *cert. denied*, 421 U.S. 962 (1975). *See also* notes 159-62 *infra* and accompanying text.

95. Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686 (9th Cir.), *cert. denied*, 98 S. Ct. 109 (1977); Pan Am. World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975); Kerr v. United States Dist. Court, 511 F.2d 192 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976); Hartley Pen Co. v. United States Dist. Court, 287 F.2d 324 (9th Cir. 1961).

96. Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686 (9th Cir.), *cert. denied*, 98 S. Ct. 109 (1977).

97. In Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686 (9th Cir.), *cert. denied*, 98 S. Ct. 109 (1977) the Ninth Circuit stated: "Interference with the trial court's control over its own proceeding is not a matter to be undertaken lightly or *on the basis of mere speculation* by the parties or the reviewing court about what may occur at some future date." *Id.* at 692 (emphasis added). *But see* Pan Am. World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975) where mandamus was held proper upon a showing that there was a "*threat* of imminent action." *Id.* at 1076 (emphasis added).

98. Bauman v. United States Dist. Court, 557 F.2d 650, 656-58 (9th Cir. 1977).

99. Gulf Research & Dev. Co. v. Harrison, 185 F.2d 457 (9th Cir. 1950) (transfer based on 28 U.S.C. § 1406(a) (1970)—improper venue). *But see* Kasey v. Molybdenum Corp. of America, 408 F.2d 16 (9th Cir. 1969); Pacific Car & Foundry Co. v. Pence, 403 F.2d 949 (9th Cir. 1968). Where the transfer is based on 28 U.S.C. 1404(a) (1970), it is important to recall:

> The purpose of the rule is to avoid the disruption, expense and inconvenience parties and witnesses must suffer by having the trial in an improper forum. To require litigants to await final judgment for relief serves to defeat the very purpose of the venue rule by requiring them to submit to the disadvantages from which the rule is designed to relieve them.

403 F.2d at 952.

100. Hartley Pen Co. v. United States Dist. Court, 287 F.2d 324 (9th Cir. 1961).

other potential plaintiffs[101] is grounds for interlocutory review. Once notice is improperly sent to potential plaintiffs, a defendant may not be able to recover damages for the additional lawsuits that are filed against him.[102] At the very least, a showing of irreparable injury will encourage the court to go to the merits[103] of the order to determine if the trial judge, in making his determination, sufficiently considered all relevant factors.[104]

C. The District Court's Order is Clearly Erroneous as a Matter of Law

Satisfaction of this criterion requires more than a showing that the judge erroneously applied the law.[105] Since mandamus does not "run the gauntlet of reversible error,"[106] the petitioner must show that there was no legal basis for the trial judge's decision. A petitioner must satisfy this burden because of the circuit court's desire to refrain from substituting its judgment for that of the trial judge.[107]

Mandamus will not lie when there is a well-reasoned and substantial legal basis for the district judge's decision.[108] However, when the judge disregards precedent[109] or acts "without authority sanctioned by statute, rule, or equitable powers of the federal court,"[110] the writ may be issued as a proper remedy. The Ninth Circuit has granted mandamus to remedy venue transfers that were accomplished in a manner blatantly inconsistent with the provisions of the statute.[111] Also, the writ has issued to vacate a stay of proceedings when the order did not fit into any of the criteria outlined by the Supreme Court.[112]

101. Pan Am. World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975). In *Pan Am*, which involved a mass accident tort action originating with an airplane crash, the judge indicated his intent to notify all other passengers of the airplane which crashed that claims were pending before him. The judge's intention was evidenced by his order for production of a passenger list. Petitioner sought mandamus to vacate the production order, thereby avoiding the intended notice procedure.

102. *Id.* at 1076.

103. Heathman v. United States Dist. Court, 503 F.2d 1032, 1033 (9th Cir. 1974).

104. Kasey v. Molybdenum Corp. of America, 408 F.2d 16, 20 (9th Cir. 1969).

105. Gulf Research & Dev. Co. v. Harrison, 185 F.2d 457, 459 (9th Cir. 1950).

106. Will v. United States, 389 U.S. 90, 104 (1967).

107. Kasey v. Molybdenum Corp. of America, 408 F.2d 16, 20 (9th Cir. 1969).

108. *Id. See also* American Fidelity Fire Ins. Co. v. United States Dist. Court, 538 F.2d 1371, 1374-75 (9th Cir. 1976).

109. McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083, 1087 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 824 (9th Cir. 1963).

110. Pan Am. World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073, 1076 (9th Cir. 1975).

111. Commercial Lighting Prods., Inc. v. United States Dist. Court, 537 F.2d 1078 (9th Cir. 1976) (transfer to a district where the action could not have been instituted).

112. Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963).

Application of this criterion is further exemplified by the court's interpretation of federal rule 23.[113] The Ninth Circuit encourages innovation by the district judges in finding new methods of dealing with the complexities of class action litigation.[114] The court is equally willing, however, to communicate its disfavor for orders that are unsupported by the *clear* language of the rule.[115] Mandamus is the tool which allows an appellate court to voice its disfavor in this situation.

D. The District Court's Order is an Oft-Repeated Error, or Manifests Persistent Disregard of the Federal Rules

This requirement is taken directly from the Supreme Court's decision in *La Buy v. Howes Leather Co.*[116] According to the Court, in order to satisfy the requirement, the petitioner must show that the district judge has repeatedly entered the particular order in opposition to the circuit court's previous rulings.[117] The extent to which the Ninth Circuit has had to resort to this criterion in the past to justify issuance of the writ is uncertain.[118]

E. The District Court's Order Raises New and Important Problems, or Issues of Law of First Impression

According to the Supreme Court,[119] this factor calls for the appellate court to use its power of "advisory" mandamus. Since the circuit court encourages innovation by trial judges,[120] it only intervenes when the trial judge is innovative beyond the parameters of the law.[121] In one case,[122]

113. FED. R. CIV. P. 23.

114. Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 697 (9th Cir.), *cert. denied*, 98 S. Ct. 109 (1977).

115. McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

116. 352 U.S. 249 (1957). *See* notes 30-38 *supra* and accompanying text.

117. 352 U.S. at 258-59.

118. The *Bauman* court cites McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) as exemplifying the "oft repeated error/persistent disregard" criterion. However, it is doubtful that the "persistent disregard" in *McDonnell Douglas* was the type of error that created the "extraordinary circumstances" in *La Buy*. In *Bauman*, it was recognized that the Seventh Circuit Court of Appeals "had warned its district judges against excessive use of reference to special masters for at least 17 years before Judge LaBuy's [*sic*] improper reference." 557 F.2d at 660. In *McDonnell Douglas*, on the other hand, the writ was issued on the basis of the "persisent disregard" standard after only a single prior Ninth Circuit case rendered the *McDonnell Douglas* judge's order erroneous. *See* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973). *See also* notes 150-55 *infra* and accompanying text.

119. *See* Schlagenhauf v. Holder, 379 U.S. 104 (1964).

120. *See* note 114 *supra* and accompanying text.

121. *Id.*

122. Pan Am. World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975).

the Ninth Circuit considered what remedy is proper when the lower court intends to erroneously order that notice be given in consolidated tort actions. The court delineated the boundaries of the rules[123] upon which the district court had erroneously relied.

Through its decisions, the circuit court has indicated that this criterion is not limited to interpreting new rules.[124] It will not, however, utilize mandamus to speak on new interpretations of older rules or to give its position on an area of the law over which the other circuits have split, absent a showing of some additional basis for issuance of the writ.[125]

V. SPECIFIC APPLICATIONS OF THE *BAUMAN* CRITERIA

The Ninth Circuit, in *Bauman*, recognized that consideration of the aforementioned five factors requires considerable balancing.[126] Often the factual situation satisfying one of the standards will bear so heavily on the need for immediate action by mandamus that the other factors lose importance. The court is usually willing to consider the very real consequences (to the litigants) of the trial judge's order. Although *Bauman* provides a warning to the circuit judges not to be influenced by their sympathy for the petitioner's position,[127] there are circumstances which have demanded this type of response.

In *Hartley Pen Co. v. United States District Court*,[128] the petitioner was forced, by a discovery order, to reveal a secret ink formula. The defendant's dye was used in the production of the ink and an alleged defect in the dye caused the petitioner to sue for damages. The petitioner sought mandamus to vacate the discovery order since the order would force disclosure of a trade secret, the protection of which was more compelling than the defendant's need for the information. Although the court readily admitted that, in theory, the petitioner might have other remedies,[129] such remedies might not have been available from a practical standpoint.[130] Furthermore, the court observed that, if the discovery order in question was left unreviewed, the petitioner would incur substantial economic harm and sustain irreparable damage.[131] If improper,

123. *Id.* at 1077-81.
124. *Id.* at 1078-81.
125. Bauman v. United States Dist. Court, 557 F.2d 650, 661-62 (9th Cir. 1977).
126. *Id.* at 655.
127. *Id.* at 653.
128. 287 F.2d 324 (9th Cir. 1961).
129. *Id.* at 329.
130. The Ninth Circuit remarked: "The weakness of [respondent's] argument is that not all of the sanctions which the district judge might impose under Rule 37 are final and therefore appealable." *Id.*
131. *Id.* at 329-30.

discovery of the petitioner's trade secrets would result in such a "grave miscarriage of justice"[132] that the court felt compelled to review the propriety of the district court's order. Upon review, it was determined that the equities weighed heavily in favor of the writ and the court acted accordingly.[133]

Similarly, in *Pan American World Airways, Inc. v. United States District Court*,[134] the trial judge had threatened to send notice to potential plaintiffs of the actions pending before him stemming from the same incident. The Ninth Circuit found that the potential[135] damage to the petitioner, coupled with the lack of a legal basis for the judge's order,[136] was sufficient to warrant mandamus without consideration of other factors (*i.e.*, the availability of appeal).[137] Since the harm to the petitioner was substantial, the court scrutinized the legal basis for the order. The district court found support for its order in various procedural rules.[138] The circuit court found that none of these rules authorized the action taken by the district judge. The dissent points out, however, that the circuit court had previously affirmed application of procedural rules that were based on "loose" readings so long as there was no express prohibition against such application stated in the rule.[139] The decision to issue the writ was based on the unfair position imposed upon the petitioner.

Although the court had previously indicated that misapplication or misinterpretation of the law by the trial judge is not "error as a matter of law,"[140] such misapplication was held sufficient to warrant mandamus in *Green v. Occidental Petroleum Corp.*[141] The trial judge in *Green* had erroneously found that the plaintiffs satisfied the requirements for main-

132. *Id.* at 328.

133. The court vacated the discovery order, without prejudice, leaving it to the respondent to satisfy his burden that the information sought was relevant and necessary to his defense. *Id.* at 331-32.

134. 523 F.2d 1073 (9th Cir. 1975). *See* note 101 *supra* and accompanying text.

135. The court observed that the district judge had not yet ordered notice to the potential plaintiffs, but notice was "implicit in [the court's] denial of the motions of McDonnell Douglas." 523 F.2d at 1076, 1081.

136. *Id.* at 1076-78.

137. *Id.* at 1076.

138. In addition to basing its order on the general equitable powers of the federal courts, the district court also found that various federal rules applied: rule 16 (concerning pretrial conferences); rule 19 (joinder); rule 83 (promulgation of court rules); rule 23 (class actions); rule 21 (joinder of parties); and rule 42 (consolidation of issues). The circuit court rejected all of these bases of support for the notice procedure. 523 F.2d at 1077-81.

139. 523 F.2d at 1082.

140. *See* note 105 *supra* and accompanying text.

141. 541 F.2d 1335 (9th Cir. 1976).

tenance of a valid class action under rule 23(b)(1)[142] and (b)(3).[143] Admitting that the decision to grant class action certification was not appealable until final judgment[144] because such decisions usually do not cause serious harm, the court issued the writ. It was noted that in situations which resulted in certification under (b)(1) and (b)(3), the (b)(1) classification would predominate,[145] thereby eliminating the notice requirements of a (b)(3) action.[146] Framing its decision in terms of error as a matter of law,[147] the court was influenced enough by the harm to the petitioner that would occur, to raise the level of error to the requisite standard. The decision, on its face, however, discusses nothing more serious than the judicial error that occurred through misapplication of the rule 23(b)(1) requirements to the facts of the case.

At times the court apparently feels so compelled to issue a writ of mandamus that clear standards are applied with questionable accuracy. The Supreme Court in *La Buy* concluded that "repeated error" satisfied the "extraordinary circumstances" test.[148] Meeting the standard requires a showing of repeated error by the particular judge, *and* that he had been previously reversed for commiting the same error.[149] Flagrant and persistent disregard of precedent by the inferior courts would be sufficient to warrant issuance of the writ.

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142. FED. R. CIV. P. 23(b). The rule provides that:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . .

143. FED. R. CIV. P. 23(b)(3). This rule states that:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
. . . .
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

144. 541 F.2d at 1338-39.

145. *Id.* at 1340.

146. *Id.* at 1339-40. *Cf.* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (notice required in rule 23(b)(3) class action).

147. *Id.*

148. 352 U.S. at 258-59.

149. *Id.*

The Ninth Circuit felt that it found this type of disregard in *McDonnell Douglas Corp. v. United States District Court*.[150] *McDonnell Douglas* involved a group of tort claims that arose from an airplane crash. The district judge had certified the action as a class action and the Ninth Circuit issued a writ of mandamus to vacate the class certification order. The court based its decision that repeated error had been committed on: a similar order issued by the same district judge in a prior case (*Gabel*);[151] an opinion one year later by the circuit court (*La Mar*);[152] and the "repeated error" committed in *McDonnell Douglas*.[153] The conclusion was faulty because: the first district court order (in *Gabel*) was not clearly erroneous at the time it was issued because the *La Mar* case had not yet been decided; there was uncertainty as to whether *Gabel* was actually overruled by *La Mar*;[154] and the *La Mar* decision addressed itself to a different district judge. The language in *McDonnell Douglas*, referring to "repeated errors of this magnitude,"[155] indicates that there was misapplication of the *La Buy* test. Perhaps the Ninth Circuit is requiring a stricter standard for its district judges than the standard furnished by the Supreme Court. By accepting a single repetition of the error as satisfaction of this requirement, the court seems to be guided more by a sense of justice than by the legal guidelines enunciated in *La Buy*.

Considering the court's willingness to find that the *La Buy* test was satisfied in *McDonnell Douglas*, and that the clear error standard was met in *Green*, the Ninth Circuit's refusal to make similar findings in *Bauman* is curious.[156] The circuit court has not clearly determined when

150. 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

151. *In re* Gabel, 350 F. Supp. 624 (C.D. Cal. 1972).

152. La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973).

153. 523 F.2d at 1087.

154. *Gabel*, like *McDonnell Douglas*, involved a mass accident tort claim resulting from an airplane crash. *La Mar* was based on alleged overcharges of loan interest and airline rates. *La Mar* did not address itself to the situation in *Gabel* or *McDonnell Douglas*. Rather, *La Mar* broadly discussed class actions and required subsequent opinions to indicate its applicability to mass accident claims.

155. 523 F.2d at 1087.

156. The petitioner in *Bauman* was seeking mandamus to correct an order that she felt would erroneously apply opt-out procedures to rule 23(b)(2) class actions. The court stated that, as of that time, it had issued no opinion regarding this issue. Two years before *Bauman*, the circuit's position was expressed in Elliott v. Weinberger, No. 74-1611, slip op. at 14 n.11 (9th Cir. Oct. 1, 1975) (vacated and replaced by 1977 decision) indicating that members in a rule 23(b)(2) action may not opt-out. On the day that *Bauman* was decided, the court reiterated the same proposition in Elliott v. Weinberger, 564 F.2d 1219, 1229 n.14 (9th Cir. 1977) but declined to apply it in *Bauman*. 557 F.2d at 659, 661-62. Had the court done so, the trial judge's order in *Bauman* may well have been, according to the circuit's standards, both erroneous as a matter of law and in disregard of the federal rules.

there is sufficient precedent to make a trial judge's ruling either erroneous as a matter of law or oft-repeated error. Perhaps the personal nature of mandamus and the emotions of the appellate judges are more significant factors than has been stated.

Admittedly, *Bauman* contains a compilation of factors which have been expressed in earlier opinions.[157] These factors seem to fall aside, however, when the writ is sought to correct actions such as the "traditional usurpation of power."[158] The court in *Hartland v. Alaska Airlines*[159] purposely declined to rule on the appealability of the judicial order in question.[160] *Hartland* involved a pre-settlement contribution to a discovery fund. The fund was applicable only to parties who had signed the stipulation creating it. The judge in *Hartland* ordered the petitioner to contribute, even though the petitioner was not a party to the stipulation and had not filed a claim in any court. The Ninth Circuit concluded that it was proper to issue the writ,[161] even though the petitioner failed to satisfy a primary burden—that no other remedy existed. The court glossed over this issue with surprising ease. It appears that there could be few, if any, factors that could outweigh the petitioner's need to show that he had no other available remedy. This requirement was devised in order to preserve the extraordinary nature of mandamus. A possible explanation lies in the recognition that the use of mandamus to remedy errors affecting jurisdiction and power was established long before the courts attempted to delineate any specific guidelines.[162] The correction of jurisdictional errors by use of the writ has survived the recent judicial attempt, in *Bauman*, to provide a workable framework.

VI. CONCLUSION

The specific applications hereinabove discussed illustrate that the Ninth Circuit's concepts of equity and procedural flexibility play a key role in its decisions. By examining the facts in each case, the court assesses, with an eye towards equity, the serious harm to the petitioner that will inevitably occur absent the issuance of a writ of mandamus. The greater the degree of harm, the more willing the court is to overlook the impact of the other factors. Also, while encouraging trial judges to use innovative procedural methods, the appellate court is primarily guided by

157. *See* 557 F.2d at 654.
158. *See* notes 18-21 *supra* and accompanying text.
159. 544 F.2d 992 (9th Cir. 1976).
160. *Id.* at 1001.
161. *Id.* at 1002.
162. *See* note 18 *supra* and accompanying text.

its own concept of the scope of lower court discretion. When lower courts pass the threshold of acceptable legal interpretation, mandamus becomes the appropriate device to monitor trial judges.

The aforementioned considerations underscore the guidelines that the court has enumerated in cases like *Bauman* and its predecessors. Articulated as attempts to develop a workable framework,[163] these guidelines are more realistically retrospective justifications of the court's decisions. When confronted with an appropriate factual situation, the court seems willing to react in disregard of its own guidelines. It then fashions its opinion by varying the emphasis it gives to each of the factors.

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163. 557 F.2d at 654.