

# **MULTIDISTRICT LITIGATION**

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**LEGISLATIVE HISTORY**

Hearing on Tex. H.B. 4 Before the Senate Comm. on State Affairs,  
78<sup>th</sup> Leg., R.S. (May 7, 2003) (statement of Alan Waldrop for Texans for Lawsuit Reform)  
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# Multidistrict Litigation

by Laurie Ratliff

## INTRODUCTION

Although multidistrict litigation under Rule 13 is still in its early stages, several motions have been considered by the MDL Panel. The purpose of this paper is to offer guidance on future MDL proceedings by analyzing the MDL Panel opinions and the documents filed in each Rule 13 request for transfer. The paper also discusses appellate cases and appellate issues arising out of MDL proceedings.

### I. Multidistrict Litigation under Rule 13

#### A. Overview

Rule 13 was adopted as part of HB 4 and became effective for cases filed on or after September 1, 2003. TEX. R. JUD. ADMIN. 13.1(b)(1), *reprinted in* TEX. GOV'T CODE ANN., TIT. 2, SUBTIT. F APP. (West Supp. 2005) ("Rule"). Rule 13 was amended in the 2005 legislative session to provide that the rule applies to cases filed before September 1, 2003 involving claims for asbestos or silica related injuries as allowed by Texas Civil Practice and Remedies Code chapter 90. Rule 13.1(b)(2).

A Rule 13 consolidation requires the movant to establish 3 elements: 1) one or more common questions of fact; 2) a transfer would be for the convenience of the parties and witnesses and 3) a transfer would promote the just and efficient conduct of the cases. Rule 13.3(a)(1), (2).

#### B. Significant changes in Rule 13 from Rule 11.

Rule 13 offers some significant changes from its predecessor in Rule 11. First, Rule 13 requires "one or more common questions of fact" to support the motion; Rule 11 requires "the cases to

involve "material questions of fact and law in common." Second, Rule 13 allows for statewide pretrial coordination; Rule 11 allows for regional coordination. Third, Rule 13 adds an additional requirement to support the motion: the transfer be for the convenience of the parties and witnesses. And, finally Rule 13 provides that the motion be determined by a panel rather than the judge of the administrative judicial region, thus allowing uniformity in the creation of MDL pretrial courts, as well as guidance for future MDL proceedings.

#### C. Statistics of Rule 13 proceedings

While Rule 13 changed the requirement from "material questions of fact and law in common" as in Rule 11, to "one or more common questions of fact," there have been few MDL pretrial coordination motions under the new rule.

Since its effective date in September 2003, only 13 motions have been filed and considered by the MDL Panel. Another motion is currently pending. Of the 13 motions filed, the Panel has granted 7 (4 were unopposed and 3 were opposed), denied 5 (1 was unopposed and 4 were opposed) and dismissed 1 (opposed). Defendants filed 8 of the motions; plaintiffs filed 5. Five of the granted motions were filed by defendants; 2 of the granted motions were filed by plaintiffs.

The kinds of cases in which Rule 13 pretrial coordination has been sought have included allegations of: product liability/negligence/personal injury; ad valorem tax; negligent misrepresentation and fraud; conversion; DTPA; breach of contract; and security law violations.

Pretrial cases have been transferred to judges in the following counties: Harris (3 MDL proceedings to 3 judges); Montgomery, Fort Bend, Dallas and Hidalgo (1 MDL proceeding in each).

## **II. An overview of the requirements in Rule 13 for multidistrict litigation.**

### **A. Terminology**

In Rule 13, the following terms are important to note:

- The **MDL Panel** is the panel of justices appointed by the Chief Justice of the Supreme Court.
- The **pretrial court** is the court to which the related cases are transferred for consolidated or coordinated pretrial proceedings.
- The **trial court** is the court where the case was originally filed.
- “**Related**” for purposes of the rule means cases with one or more common questions of fact.
- A “**Tag-along**” case is one “related to cases in an MDL transfer order but not itself the subject of an initial MDL motion or order.”

Rule 13.2(d), (e), (f) & (g).

### **B. MDL Panel members**

The MDL Panel consists of five judges, including a chair, all appointed by the Chief Justice of the Supreme Court of Texas. The judges must be active court of appeals justices or administrative judges. TEX. GOV'T CODE ANN. §74.161(a) (West 2005).

Currently, the MDL Panel members are: David Peeples (Chair); Douglas S. Lang (Dallas Court of Appeals); Justice Bea Ann Smith (Austin Court of Appeals); Justice George C. Hanks, Jr. (First Court of Appeals) and Justice Errlinda Castillo (Corpus Christi Court of Appeals).

### **C. Procedural requirements of Rule 13 proceedings**

#### **1. Filing, service and notice**

Documents are filed with the MDL Panel Clerk, as well as with the members of the MDL Panel. Rule 13.3(f). The Clerk of the Supreme Court serves as the MDL Panel Clerk. Rule 13.2(c). Parties must serve documents on all parties in related cases in which the transfer is sought. Rule 13.3(h). The MDL Panel Clerk may designate a party to serve the request for transfer on all other parties. *Id.* Service is controlled by TRAP 9.5. A party must also file a notice in the trial court that a Rule 13 motion has been filed. Rule 13.3(i).

The MDL Panel Clerk must give notice to all parties in all related cases of all actions by the Panel. Rule 13.3(n). The Clerk may also delegate that notice of the Panel's actions be done by the parties. Rule 13.3(n). The Clerk may also direct that notice may be by email or fax. *Id.*

#### **2. Page limits, filing fees and deadlines**

Unless the Panel grants leave, the motion to transfer's discussion of the common questions of fact and the convenience and efficiency elements must not exceed 20 pages. The Rule excludes additional explanation of the facts and other portions of the motion from the 20-page limit. The response and any reply are limited to 20 pages. Rule 13.3(e). The MDL Panel may request additional briefing. The documents must conform to TRAP 9.4. *Id.*

The rule does not contain a deadline for filing a motion to transfer. A response to a motion to transfer is due 20 days after the motion is served. Rule 13.3(d)(1). Any reply is due 10 days after service. Rule 13.3(d)(3). If the Panel issues a show cause order, the order sets the deadlines. Rule 13.3(d)(2).

The supreme court has adopted the following filing fees for Rule 13 proceedings: \$225 for filing a motion to transfer and for a motion for rehearing of a pretrial court's ruling on tag-along cases

under Rule 13.5(e). Misc. Docket Order 03-9151. Any other motion or document filed pursuant to Rule 13 is \$50. *Id.*; Rule 13.3(g).

**D. Substantive requirements for Rule 13 motions and responses.**

**1. Cases must involve one or more common questions of fact.**

A Rule 13 pretrial coordination transfer requires the cases subject of the motion to transfer to involve one or more common questions of fact and be filed in a constitutional county court, county court at law, probate court or district court on or after September 1, 2003. Rule 13.1(b)(1).

The motion must: 1) state the common question or questions of fact in the cases; 2) contain a clear and concise explanation of the reasons that transfer would be for the convenience of the parties and witnesses and would promote the just and efficient conduct of the cases; 3) state whether all parties in those cases for which transfer is sought agree to the motion; and 4) contain an appendix that lists: (A) the cause number, style, and trial court of the related cases for which transfer is sought; and (B) all parties in those cases and the names, addresses, telephone numbers, fax numbers, and email addresses of all counsel. Rule 13.3(a).

**2. Who can request an MDL transfer?**

A motion to transfer can be filed by: 1) a party, 2) a trial court judge, 3) a regional administrative judge, or 4) the Panel itself by filing a show cause order requesting why related cases should not be transferred. Rule 13.3(a), (b) & (c).

**3. The response and reply.**

Any party in a related case may file a response. Rule 13.3(d).

**4. Evidence can be filed only with leave.**

A party can submit evidence in an MDL motion only with leave of the Panel. Rule 13.3(j). The Panel may order evidence to be filed by affidavit or deposition or may order parties to file documents, discovery or stipulations from related cases. *Id.*

**E. The filing of a Rule 13 motion in the trial court is not an automatic stay.**

A motion filed pursuant to Rule 13 does not serve as an automatic stay, limit the trial court's jurisdiction or suspend proceedings or orders in that court. Rule 13.4(a). However, the trial court or the Panel may stay all or part of any trial court proceeding until the Panel rules on a pending motion. Rule 13.4(b).

After a MDL motion has been granted, and a notice of transfer is filed in the trial court notifying the trial court that a case is part of the MDL pretrial coordination, a trial court's jurisdiction is limited. The trial court must take no further action except for good cause stated in the order in which such action is taken and after conferring with the pretrial court. Rule 13.5(b). Service of process that has already issued may be completed and the return filed in the pretrial court. *Id.*

**F. Jurisdiction of the MDL Panel.**

**1. Determination of Rule 13 motions**

The Panel decides if the related cases in a motion to transfer involve one or more common questions of law and that transfer to a pretrial court will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the cases. Rule 13.3(l).

The Panel accepts as true facts presented in the motion, response and reply unless contradicted by another party. Rule 13.3(j). The Panel can rule on the written documents alone or may consider oral argument before one or more of the Panel members. Rule 13.3(k).

The decision to transfer requires the concurrence of 3 Panel members. Rule 13.3(l). Orders of the Panel must be signed by the Chair or the MDL Panel Clerk and must identify the Panel members who concurred in the decision. Rule 13.3(m).

## **2. Grant a stay of trial court proceedings.**

The Panel may grant a stay of trial court proceedings pending the Panel's consideration of a ruling of the Panel. Rule 13.4(b).

## **3. Appoint pretrial judges.**

If the Panel grants a motion to transfer, it may assign the following as pretrial judges: (1) an active district judge or (2) a former or retired district or appellate judge who is approved by the Chief Justice of the Supreme Court of Texas. Rule 13.6(a). Parties cannot object to the assignment. *Id.*

## **4. Review of motions to remand to trial court by pretrial court.**

The Panel also reviews determinations by the pretrial court of motions to remand when the pretrial court grants a party's motion to remand on the ground that the case is not a tag-along case. Rule 13.5(e).

## **5. Review delay in remanding to the trial court if ready for trial.**

The Panel can review complaints about the delay in remanding cases that are ready for trial. *In re Vioxx Litigation*, \_\_\_ S.W.3d \_\_\_, 2005 WL 3706911, \*1 (Tex. M.D.L. Panel Aug. 25, 2005) (No. 05-0436); *Union Carbide v. Adams*, 166 S.W.3d 1, 1 (Tex. M.D.L. Panel Dec. 30, 2003). The rule does not expressly grant such authority. However, the Panel's authority comes from the rule's overall policy in promoting the just and efficient conduct of the cases.

## **6. Issue a show-cause order on why related cases should not be transferred.**

The Panel may transfer on its own initiative by issuing a show cause order why certain related cases should not be transferred. Rule 13.3(c).

## **7. Order retransfer from one pretrial court to another.**

The Panel may also retransfer to another pretrial judge if requested by a party, the pretrial judge or on its own. Rule 13.3(o). A retransfer can be done if the pretrial judge dies, resigns, is defeated in an election, requests the transfer, is recused or becomes disqualified. A retransfer can also be done in other circumstances when retransfer will promote the just and efficient conduct of the cases. *Id.*

## **G. Effect of a granted MDL motion.**

### **1. Case is deemed transferred to the pretrial court with filing of notice of transfer.**

A case is deemed transferred from a trial court to the pretrial court with the filing of a notice filed with both courts that includes the following items: identity of the parties and counsel in the case and those who have not yet appeared and the MDL transfer order. Rule 13.5(a).

### **2. Files are moved to the pretrial court.**

The files in the related cases are physically moved to the pretrial court clerk. If the trial court and pretrial court are in the same county, then the local rules control the transfer of the cases. If the two are in different counties, then the trial court clerk transmits the case file to the pretrial court clerk. Rule 13.5(c). A master file is then created and new files are opened for the cases transferred. *Id.* The movant pays the filing fees and other "reasonable costs" to refile the cases in the pretrial court, unless

the Panel assesses costs in some other manner. Rule 13.5(d).

### **3. Treatment of “tag-along” cases.**

A tag-along case is one that is related to the cases in the MDL transfer order but is itself, not included in the MDL motion or order. Rule 13.2(g). Tag-along cases are “deemed transferred to the pretrial court when a notice of transfer—in the form described in Rule 13.5(a)—is filed in both the trial court and pretrial court.” Rule 13.5(e).

A party opposed to the transfer may request a remand. Within 30 days of service of a notice of transfer, a party to the case or to any of the related cases already transferred to the pretrial court may move the pretrial court to remand the case to the trial court on the ground that the case is not a tag-along case. Rule 13.5(e). That is, the party would argue that the case had been erroneously transferred and is not a “related” case because it does not involve one or more common questions of fact as with the MDL pretrial cases. The pretrial court’s determination of a motion to remand on the ground that the case is not a tag-along is reviewed by the MDL Panel. Rule 13.5(e); *In re Fluor Enters., Inc.*, 186 S.W.3d 639, 643 (Tex. App.—Austin 2006, orig. proceeding).

### **H. Supreme court reviews MDL Panel decisions.**

Determinations by the MDL Panel are reviewed only by the supreme court in an original proceeding. Rule 13.9(a). To date, there have been no original proceedings filed challenging an order of the MDL Panel.

### **I. Authority of the Pretrial Court after granted MDL motion.**

#### **1. Jurisdiction over all pretrial matters.**

The pretrial judge has exclusive jurisdiction over all related cases transferred under Rule 13 unless there is a retransfer by the Panel or a case is finally resolved or remanded to the trial court for trial. Rule 13.6(a)

The pretrial court has broad authority to decide all pretrial matters. Specifically, the pretrial court has authority to decide in all related cases transferred by Rule 13 including: jurisdiction, joinder, venue, discovery, trial preparation matters regarding experts, preadmission of documentary evidence, motions in limine, mediation, default judgments, motions for summary judgment and settlement. Rule 13.6(b).

The rule enumerates a number of specific matters for the pretrial court to address for management of the cases to ensure the expeditious resolution of the cases. Rule 13.6(c). The pretrial court is directed to establish a case management order to address among other matters scheduling of preliminary motions, discovery timing and parameters, scheduling of dispositive motions, determining if there is a need for severance or separate trials on issues, establishing a document depository, appointing liaison counsel and addressing any other matters necessary for the just and efficient resolution of the cases. *Id.*

#### **2. Set cases for trial in the trial courts.**

With consultation of the parties and the trial court, the pretrial court may set a transferred case for trial. Rule 13.6(d). Once set, the trial court “must not continue or postpone the setting without concurrence of the pretrial court. *Id.*

#### **3. Modify or set aside existing trial court rulings.**

The pretrial court may also set aside or modify pretrial rulings of the trial court made before transfer if the trial court would

not have expired had the case not been transferred. Rule 13.6(b).

#### **4. Finally resolve cases pending in the pretrial court.**

The pretrial court may render a final appealable judgment in a case. Rule 13.7(a). In that event, the case is not remanded to the trial court. *Id.*

#### **5. Remand cases to trial court that are ready for trial.**

The pretrial court may remand one or more cases or separately triable portions of cases when pretrial proceedings have been completed. Rule 13.7(b). Upon remand, the case is physically transferred back to the trial court under its original cause number without a new filing fee. Rule 13.7(c).

#### **6. Effect of pretrial court's rulings on cases remanded to trial court.**

The pretrial court's rulings are binding on the cases once remanded to the trial courts. Rule 13.8(a). The rule cautions both trial courts and pretrial courts on the issue of modification of pretrial court orders. Trial courts can modify only with a compelling reason noting that changing the orders frustrates the purpose of consolidation and coordination of pretrial proceedings. *Id.* Because modification requires concurrence of the pretrial court, the rule encourages pretrial courts to not "unwisely restrict" a trial court from responding to changes in circumstances after remand. *Id.*

If a party objects, a trial court cannot vacate, set aside or modify a pretrial court's orders, including summary judgments, jurisdiction, venue, joinder, special exceptions, discovery, sanctions related to a pretrial proceeding, privileges, expert admissibility or scheduling without concurrence of the pretrial court. Rule 13.8(b).

The trial court may, however, without concurrence of the pretrial court, modify, vacate or set aside a pretrial court's ruling on evidentiary matters, other than expert evidence, when necessary "because of changed circumstances, to correct an error of law, or to prevent manifest injustice." Rule 13.8(c). Such a modification requires the trial court to support its action with "specific findings and conclusions in a written order or stated on the record." *Id.*

Finally, if the pretrial court is unavailable to rule for any reason, the trial court must have the concurrence of the Chair of the MDL Panel. Rule 13.8(d).

### **J. Review of trial court and pretrial court rulings.**

#### **1. Review by the MDL Panel.**

The Panel reviews a pretrial court's determination to remand a case if the determination by the pretrial court is that the case is not a tag-along case. Rule 13.5(e).

#### **2. Review by the courts of appeals.**

Appellate review of trial court and pretrial court orders is by the court of appeals that would normally review the particular trial court "in which the case is pending at the time review is sought irrespective of whether that court issued the order or judgment to be reviewed." Rule 13.9(b). Thus, a final, appealable order, an interlocutory appeal or mandamusable ruling by a pretrial court will be appealed to the court of appeals that regularly reviews the pretrial court. If a pretrial court issues a final appealable order, the case is not remanded. Rule 13.7(a).

However, pretrial court rulings that are not immediately appealable but only reviewable after trial would be appealed to the court of appeals that regularly reviews the trial court's orders. Rule 13.9(b). The

rule further provides that a “case involving such review may not be transferred for purposes of docket equalization among appellate courts.” Rule 13.9(b). The comment expressly notes that the appeals could be transferred for some other purpose. Rule 13 Comment—2005.

Appellate review of an order or judgment in a case pending in a pretrial court must be expedited by the appellate court. Rule 13.9(c). According to the comment, expedited consideration applies whether an ordinary appeal, an accelerated appeal or a mandamus. Rule 13 Comment 2005.

### **K. Application of Rule 13 to asbestos and silica cases filed pre-September 1, 2003.**

The legislature revisited Rule 13 in the 2005 session to address the applicability of Rule 13 to asbestos and silica cases filed pre-September 1, 2003. Chapter 90 of the Civil Practice and Remedies Code was amended to allow asbestos and silica cases filed *before* September 1, 2003 to be transferred to an existing pretrial court under certain circumstances. TEX. CIV. PRAC. & REM. CODE §90.010(a), (b) (West Supp. 2006).

Section 90.010 provides that the MDL rules applies to pre-September 1, 2003 asbestos and silica cases unless the action was filed before September 1, 2003 and: 1) trial has commenced or is set to commence within 90 days that chapter 90 became law; 2) the claimant serves a report that complies with §90.003 or §90.004 within 90 days after chapter 90 became law, or 3) the exposed person has been diagnosed with malignant mesothelioma, other malignant asbestos-related cancer or malignant silica-related cancer. *Id.* §90.010(a)(1-3).

If, however, a claimant has not served the required medical report, then a defendant can file a notice of transfer to the MDL pretrial court. *Id.* §90.010(b). The pretrial court shall remand to the trial court

if it found that the required reports had been timely filed. If the pretrial court concluded that the report did not comply with section 90.003 or 90.004 or that the report was not timely, the pretrial court would retain jurisdiction over the case. *Id.*

Section 90.010(d) provides that if a case is pending on September 1, 2005, is transferred to or pending in an MDL proceeding, it remains in the MDL and shall not be remanded to the trial court unless the claimant files certain reports required by chapter 90. *Id.* §90.010(d).

Rule 13.11 provides the procedures for transferring pre-September 1, 2003 asbestos and silica cases, as permitted by Chapter 90 of the Civil Practices & Remedies Code. Rule 13.11(a).

A notice of transfer as provided by section 90.010(b) must be filed in the trial court and pretrial court and must be titled, “Notice of Transfer Under Section 90.010(b).” The notice must also list all parties in the case, identifying information of attorneys, identify each claimant transferred and attach to the notice filed in the pretrial court, a copy of the live petition and a certificate of conference. Rule 13.11(c).

If a motion for severance is pending in the trial court proceeding when a notice of transfer is filed, the trial court must rule on the motion for severance within 14 days after the notice of transfer is filed or the motion is deemed granted by operation of law. Rule 13.11(d).

A case is deemed transferred when the notice of transfer is in the trial court unless there is a pending motion for severance. Rule 13.11(e). The case is deemed transferred when the trial court rules on the motion to sever or when the motion is deemed granted by operation of law. *Id.*

When a party files a notice of transfer, the trial court must take no action

other than ruling on a pending motion for severance, or for good cause stated in an order after taking other action and with conferring with the pretrial court. Rule 13.11(f). Service of process issued when the notice of transfer is filed may be completed and returned. *Id.*

### **III. MDL Panel opinions**

The MDL Panel opinions are relatively short and have not included significant background, making a review of the motions and responses necessary to fully understand the issues and to give meaning to the opinions themselves. Accordingly, the discussion below includes details of the motions and responses to highlight the arguments and other circumstances involved in the transfer requests.

There have been 6 substantive opinions from the MDL Panel relating to requests for transfer that offer express guidance for future MDL proceedings. Those opinions are discussed in section A. Section B discusses the 7 non-substantive opinions that primarily involved unopposed motions. By reviewing the motions and responses, the non-substantive opinions provide insight as well.

#### **A. Substantive MDL Panel decisions**

##### **1. *Union Carbide v. Adams*, 166 S.W.3d 1 (Tex. M.D.L. Panel Dec. 20, 2003).**

In its first MDL opinion, the Panel granted Union Carbide's Rule 13 motion to create an asbestos pretrial court. The Panel assigned Judge Mark Davidson in Harris County as the pretrial judge.

##### **a. Arguments of the parties.**

Movant/defendant Union Carbide filed the motion listing five asbestos cases filed post-September 1, 2003. The motion listed a number of common fact issues including: sufficiency of warnings, when and where each defendant supplied asbestos

and the state of knowledge of asbestos danger at the relevant time.

In support of the convenience of the parties and witnesses and just and efficient conduct of the cases requirements ("convenience and efficiency"), Movant argued that discovery and witnesses were virtually identical, and that common legal issues existed concerning challenges to experts' qualifications and methodology, product identification, causation and duty to warn.

Respondent/plaintiffs opposed the transfer. Defendant Alcoa filed a response indicating that it could not agree or oppose, but noted its concern with the management of the cases by a single court.

According to respondents, Rule 13 was intended for immature torts, not mature litigation like asbestos. Respondents focused specifically on movants' conduct in historic asbestos litigation: movant had not sought Rule 11 consolidation and had consistently opposed any attempt at class certification or other consolidations.

Respondents argued that individual issues such as medical condition and causation, plaintiffs' individual exposure, contributing exposures and damages predominated and prevented a showing of common fact issues. Respondents also noted that most of movant's common issues were legal, not factual.

On convenience and efficiency, Respondents argued that existing pretrial case management orders were successfully disposing of asbestos cases. Also, respondents argued that there were existing trial settings and that pretrial coordination would cause delay and added expense.

In its reply, movant enumerated from the plaintiffs' petitions, the common allegations, including the defendants failure to warn, defendants' misrepresentations of dangers and defendants' concealment of

medical data regarding dangers of exposure. All plaintiffs allege negligence and thus discovery of the defendants' practices and procedures would be similar. Also, movant argued that the existing standing asbestos pretrial case management orders supported a Rule 13 coordination because it showed the common fact issues and that many courts had already observed the benefits of coordination. Those benefits would only be enhanced through statewide coordination under Rule 13.

Movant also disagreed with the "mature" tort analysis argued by respondents. According to movant, mature cases can be coordinated and then remanded for trial when ready. Movant also disputed respondents' comparison of Rule 13 with class certification and ordinary consolidation. Rule 13 applies to pretrial coordination and requires remand to the trial court for ultimate resolution. Class certification and ordinary consolidation remain throughout the life of the case.

Finally, movant defended its use of common legal issues. According to movant, common legal questions supported the efficiency and convenience elements of Rule 13. While the rule requires common fact issues, the rule does not foreclose the existence of common legal issues as support of the other rule requirements.

#### **b. Panel opinion**

In the one-page per curiam opinion, the Panel concluded that movant had satisfied the elements of Rule 13 and granted the motion. *Union Carbide*, 166 S.W.3d at 1. The Panel left open the possibility of assigning additional pretrial judges if necessary, and also stated that the Panel would entertain complaints regarding the failure to remand cases that were ready for trial. *Id.*

Justice Kidd dissented. According to Justice Kidd, the current system of agreed standing pretrial orders and assigning

asbestos judges in large counties successfully resolved asbestos cases. *Id.* at 2. The dissent pointed to the "pretrial paralysis" problem with the federal asbestos pretrial system. The dissent disagreed with the "bare majority" to transfer and concluded that the majority "disregards the standard to be applied in order to justify such a transfer, which requires that the transfer will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the case."

Justice Castillo also filed a dissenting opinion and concluded that movant failed to meet its burden. *Id.* Justice Castillo relied on Alcoa's response that it did not have enough information to agree or oppose. *Id.* In addition, Justice Castillo would also have allowed tag-alongs to show why they should not be transferred. *Id.*

#### **2. *In re Silica Products Liability Litigation*, 166 S.W.3d 3 (Tex. M.D.L. Panel Nov. 10, 2004).**

In its first substantive majority opinion, the Panel granted defendants' motion and assigned Judge Tracy Christopher in Harris County as the silica pretrial judge.

#### **a. Arguments of the parties**

The motion involved 71 lawsuits, 453 plaintiffs and 158 defendants, pending in 55 district courts in 20 counties. Six defendants sought Rule 13 transfer, 11 defendants opposed it and 141 did not weigh in. Plaintiffs opposed it.

Movant/defendants argued that common legal and factual issues existed. All the lawsuits involved occupational exposure to silica and have the same common liability issues: product identification and medical causation. According to movant, defendants were either manufacturers of silica; manufacturers and suppliers of blasting equipment or

manufacturers and suppliers of respiratory equipment. Similarly, defendants have common defenses, including employer fault and that the products are not defective.

Movants explained the current state of silica litigation and contended that discovery was not consistently handled by the various courts. According to movants, a pretrial court could, among other matters, set up a document depository, address pleading issues, develop and enforce consistent discovery obligations and determine expert issues.

Finally, movants used *Union Carbide* to argue that the reasons for establishing an asbestos pretrial court also supported establishing a silica pretrial court.

Respondent/plaintiffs argued that movants wanted to slow down the resolution of silica cases and to forum shop. According to Respondent/plaintiffs, existing discovery and docket control orders have allowed silica litigation to be resolved in a timely manner, and a single court was unnecessary. They also pointed out that silica defendants had not previously sought Rule 11 consolidation.

Respondent/plaintiffs disagreed with movants' characterization of the common questions of fact. Interestingly, respondent/plaintiffs argued that movants had to identify ways to resolve the common questions of fact, when Rule 13 only requires a movant to state the common questions of fact. They also challenged the use of common legal issues as a basis to support a Rule 13 consolidation.

Respondents/defendants argued that movants failed to meet their burden under Rule 13. According to respondent/defendants, the cases were highly individualized and were being handled efficiently without a pretrial court. Additionally, they pointed out that movants had taken a different position in a federal silica MDL proceeding.

In their reply, movants point out that the objecting defendants had taken a different position in a federal MDL proceeding. In addition, movants noted that if Rule 13 required identical cases, the rule would have no meaning and never apply. The rule requires factually similar, not identical, cases.

#### **b. Panel opinion**

The Panel granted the motion in a 3 to 1 decision by Justice Peeples. Justice Kidd dissented; Justice Castillo did not participate.

The Panel rejected the respondents' argument that there must be a showing of an existing problem relating to discovery and witnesses that requires correction through an MDL. According to the Panel, Rule 13 "is not limited to correcting ongoing problems from the past; it seeks to prevent the occurrence of problems in the future." 166 S.W.3d at 5. The rule does not require proof that witnesses have been inconvenienced. *Id.* The rule focuses on whether a transfer to a pretrial judge would prevent inconveniences in the future. *Id.* The Panel concluded that it was "undeniable" that it would be more convenient for witnesses and parties involved in multiple related cases to be in one pretrial court with one consistent set of orders, not several. *Id.*

The Panel expressly rejected the argument raised by respondents (and also by the respondents in *Union Carbide*) that the existence of standing pretrial case management orders for silica cases defeats the need for Rule 13 coordination. *Id.* at 5-6. According to the Panel, having the cases transferred to a single pretrial court does not prevent the parties' continued efforts to agree to various pretrial matters, but also adds the benefit of a single forum to resolve disputed matters. *Id.* at 6.

According to the Panel, the advantage of a Rule 13 transfer is that

disputed issues in cases with common factual questions will be decided the same way. “A consistent and steady judicial hand at the helm should in fact promote agreements because lawyers will know where the court stands on recurring issues. As contested issues arise, the pretrial judge will make consistent rulings, which can then be reviewed by the appellate courts as appropriate.” *Id.* at 6. Such pretrial coordination serves the goal of Rule 13 that related cases be handled consistently and efficiently.

The Panel also recognized the reality of busy trial judges who face addressing large number of similar cases. Trial judges cannot dedicate the necessary attention such cases need. A Rule 13 pretrial judge will be able to dedicate time to study the issues and schedule hearings to move the cases toward readiness for remand for trial. *Id.*

On the common questions of fact element, the Panel provided important guidance to future Rule 13 litigation. First, the Panel recognized that each personal injury case is different on causation and damages. *Id.* However, Rule 13 allows transfer to a pretrial judge when there are common fact questions, “even though in a given case the common issues might not outweigh the individual, case-specific issues.” *Id.* A pretrial judge could consider the case-specific issues and still maintain uniform treatment for the common, recurring issues. *Id.* Here, commonality was present given that there were more than 450 plaintiffs in 71 cases. *Id.* at 6-7.

Second, the Panel concluded that Rule 13 is not limited to pure questions of historical fact, but extends to mixed questions of law and fact, for example, negligence or adequacy of warnings. *Id.*

In response to the dissent’s argument that the number of movants was relatively small compared to number of all defendants, the Panel explained that, “[l]egal rights do not depend upon the number of

litigants who assert them.” *Id.* at 7. As the Panel explained, legal rights focus on the individual, not groups of parties; Rule 13 should be applied no differently. *Id.*

In his dissent, Justice Kidd emphasized the number of movants versus the number of parties opposed to the pretrial coordination request, that movant’s failure to meet the burden of proof. *Id.* at 8.

According to Justice Kidd, our judicial system is based on the local administrative of justice and the local trial judge’s accountability to the community. *Id.* Rule 13 is completely contrary to that basis and thus Rule 13 requires an “extremely onerous burden of proof.” *Id.* Also, the requirements of showing “convenience” and “efficiency” are “extremely high thresholds” for the movant to establish. *Id.* Finally, Justice Kidd characterized Rule 13 as “an extraordinary remedy.” *Id.* at 11.

Justice Kidd emphasized the historical processing and resolving of many silica cases under the current, non-coordinated process. *Id.* at 9. In silica litigation, the traditional means of grouping cases (class action or consolidation or Rule 11) had not been sought. *Id.* Justice Kidd questioned the need for Rule 13 coordination, describing it as an “unknown and untested mechanism that may create new problems without offering better resolution” in a system that through agreements of counsel and standing discovery orders had proven to be successful. *Id.*

**3. *In re Vanderbilt Mortgage & Finance, Inc.*, 166 S.W.3d 12 (Tex. M.D.L. Panel Mar. 2, 2005).**

The cases involved a commercial lender who had sued repossession companies for removing mobile homes without authority and for charging excessive fees. Six cases were pending in 5 counties. Plaintiff alleged more cases would be filed.

Plaintiff/movant sought a stay of the trial court proceedings, which the Panel denied.

**a. Arguments of the parties.**

Movant alleged common legal issues as support for coordination and also argued that a summary judgment had already been obtained in movant's favor on the legal issues. Because of pending trial settings, movant requested a stay. Movant attached as evidence a copy of a petition and its attachments.

For the elements of convenience and efficiency, movant argued, without detail, that consolidation would "greatly reduce time and expense" of discovery by preventing duplication of written discovery. Further, movant alleged that it is "anticipated that the same lay witnesses and expert witnesses will given essentially the same testimony in each of the related cases concerning reasonableness of charges to move and store a manufactured home." And, finally movant argued that "other pretrial matters can be handled more efficiently" through coordinated pretrial as explained above.

Respondent/defendant denied movant's allegations asserted on the merits of the lawsuit and did not specifically address the Rule 13 elements. Respondents emphasized the amount in dispute (less than \$70K); and argued that discovery was essentially complete and that two cases were set for trial within two months after the Rule 13 motion was filed. According to respondents, movant was attempting to avoid imminent trial settings by filing the Rule 13 motion.

In a reply, movant denied the allegation that discovery was complete and denied the allegation of busting the trial settings and attached evidence in support of the merits that respondents were illegally taking mobile homes.

**b. Panel opinion**

The Panel denied the motion in a unanimous opinion by Justice Lang. Although a denial, this is the first Panel opinion to address the number of cases and parties as relevant to an MDL determination. There were only 6 cases and the Panel noted that, "[w]hile relevant, the number of pending cases and parties is not directly determinative of the necessity for pretrial transfer." 166 S.W.3d at 14.

The opinion focused primarily on convenience and efficiency. The Panel characterized movant's allegations as being too general without giving specifics about common discovery and pretrial matters. *Id.* at 14, 15.

The Panel also seemed to be influenced by the procedural posture of the cases, in particular, imminent trial settings and the allegation that discovery was near completion. According to the Panel, of "great significance" were the pending settings and stage of discovery. *Id.* at 14. The opinion also highlighted respondent's denial that there were any real issues and the respondent's "different version of the facts." *Id.*

Relying on *Silica*, the Panel explained that while a movant is not required to show on-going problems in the pretrial process, a movant must "show some facts and well-founded reasons which logically suggest that transfer will create a more efficient process." *Id.*

Also citing *Silica*, the Panel reiterated the benefit of a pretrial court is to make consistent rulings in similar cases. *Id.* at 14-15. Here, movant did not establish a "reasonable likelihood of difficulties in the pretrial processing of the cases" to support the need for a single judge. *Id.* at 15. Discovery was essentially complete and movant failed to describe how a pretrial judge could address the alleged common issues in order to promote uniform decisions. *Id.* Also, the movant did not

state which fact or expert witnesses, if any, would be required to be deposed without consolidating. *Id.*

**4. *In re Kone, Inc.*, \_\_ S.W.3d \_\_, 2005 WL 2840329 (Tex. M.D.L. Panel Oct. 26, 2005) (No. 05-0738).**

The cases involved alleged breach of an elevator maintenance contract. Lawsuits arose after a doctor was killed in an elevator operated by Kone in a Houston hospital. The hospital then found defects in the maintenance programs at other hospitals outside Houston that Kone operated. Hospital then sued Kone.

**a. Arguments of the parties**

Movant/defendant sought Rule 13 coordination based on 4 cases in 4 counties. Movant enumerated the following common questions of fact and law without explanation: was there a material breach of the maintenance contract; did Kone's conduct damage the business reputation of the hospital; did Kone's breach proximately cause a decrease in hospital census; can the hospital recover for loss of business reputation and can the hospital recover for loss of census.

To support convenience and efficiency, movant argued that "the multiplicity of suits involving identical core issues is vexatious and does not involve an efficient use of judicial resources. KONE's witnesses will be subject to giving four depositions where one would do. Christus' consultants will likewise be in a position of having to give four depositions. The parties bear the risk of inconsistent discovery rulings, inconsistent decisions on motion for summary judgment."

Respondent did not dispute the issues, but argued that there are common issues with only limited common facts among the 4 cases. Whether a contract was violated depends on the services that were or were not provided at each hospital. The

presence of the same contract at the 4 hospitals did not alone justify consolidation. The alleged wrongful acts were done by different actors at different locations at different times and in different ways.

**b. Panel opinion**

The Panel denied the motion in a unanimous opinion by Justice Lang. The opinion focused on the lack of common facts, observing that each contract and location has its own issues and witnesses. 2005 WL 2840329, at \*1.

Noting its earlier opinion in *Silica* that Rule 13 is intended to provide consistent rulings, movant only showed common ultimate issues and no common fact issues and no recurring issues that required consistent rulings. *Id.* at \*2. The facts are individual by location and movant did not contradict that argument. For example, movant did not demonstrate how discovery in the Harris County case would have any bearing on the ultimate issues in the other county cases. *Id.*

Here, movant did not give examples of discovery rulings that would be common to all cases or how decisions on motions for summary judgment would bear on any other. *Id.* Citing *Vanderbilt*, the Panel noted that it would not speculate on issues to be decided consistently or how a pretrial judge can address the cases to promote uniformity. *Id.*

**5. *In re Hurricane Rita Evacuation Bus Fire*, \_\_ S.W.3d \_\_, 2006 WL 587845 (Tex. M.D.L. Panel Mar. 6, 2006) (No. 05-1073).**

Plaintiffs sued defendants following the bus fire carrying evacuees from an assisted living facility during Hurricane Rita.

**a. Arguments of the parties**

Movant/defendants sought pretrial coordination of 8 lawsuits, 4 in Harris

County and 4 in Hidalgo County. Some plaintiffs objected to the pretrial coordination and others did not oppose consolidation, as long as a Hidalgo County judge was assigned. Movant filed its Rule 13 motion within 3 months of the accident.

Movant listed causation, negligence and proximate cause as the common questions of fact. Movants argued that there were numerous witnesses common to all cases who would be deposed, including employees and corporate representatives of defendants, plaintiffs, expert witnesses, and non-party fact witnesses including eye-witnesses and rescue personnel. The cases also involved common discovery and other legal issues. Movant relied on *Silica* for the proposition that Rule 13 was intended to provide consistent rulings in cases with common facts. Movants also requested Harris County as the most convenient forum to the parties, witnesses and attorneys.

Some Respondents objected to consolidation and others only objected to the transfer to Harris County. Respondents agreed with the common issues, but characterized them as ultimate issues and not issues requiring a single judge.

Respondents argued that the cases were distinguishable even though arising out of the same accident. The cases involved the different claims, different defendants and various legal theories. For example, some residents received medical care and their claims would be chapter 74 healthcare claims. Other plaintiffs were employees of defendants, whose claims would be governed by workers' comp laws. Also, some plaintiffs did not sue Brighton Gardens.

As evidence of convenience and efficiency, Respondents attacked the number of cases – 6 – as insufficient to justify Rule 13 consolidation. In addition, they argued that discovery was proceeding smoothly, and that 4 of the 6 cases were in Hidalgo County and could be consolidated there.

Also, respondents pointed out that there were cases in federal court that could not be consolidated; thus, there will necessarily be the potential for inconsistent rulings that cannot be solved by Rule 13 consolidation.

Finally, respondents argued that movants were forum shopping. According to respondents, most defendants lived in Hidalgo County, including the bus company and its inspectors. Thus, respondents requested transfer to Hidalgo County.

In its reply, movants noted that two more cases had been filed and that Rule 13 does not require common parties and issues but instead one or more common factual issues. On the number of cases, movants noted that there were 23 deaths, thus, 8 is not the final number of cases likely to be filed.

#### **b. Panel opinion**

In a unanimous opinion by Justice Peeples, the Panel granted the motion and assigned Judge Rosa Guerra Reyna in Hidalgo County as the pretrial judge.

The Panel acknowledged that Rule 13 can be used in cases involving different parties and recognized that cases may not have the same parties, may be tried differently using different experts and may have plaintiffs with unique damages. 2006 WL 587845, at \*1, 2. Here, there was a common accident with common liability issues. “But every case is different. No two cases are alike. A Rule 13 transfer of cases does not require that the cases be congruent or anything close to it. It requires only that cases be ‘related’- i.e. that they involve one or more common questions of fact—and that transfer will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.” *Id.* at \*2.

The opinion reiterated that the element of convenience turns on promoting efficiency and convenience in the future, not

on the existence of current discovery problems. *Id.* at \*1. The same large pool of fact witnesses existed in all the cases (those in Houston where loaded, accident, investigators etc.). Accordingly, assigning one judge will further Rule 13's goals of efficiency and convenience. *Id.*

**6. *In re Ad Valorem Tax Litigation*, \_\_\_S.W.3d\_\_\_, 2006 WL 1047106 (Tex. M.D.L. Panel April 19, 2006) (No. 06-0095).**

Movant/plaintiff/Valero filed a motion seeking to consolidate 150 lawsuits against 42 defendant appraisal districts pending in 85 district courts. The underlying cases were ad valorem tax cases filed by Valero challenging appraised values. The cases involved refineries, pipelines and convenience stores, including both real and personal property located throughout Texas.

**a. Arguments of the parties.**

Movant argued that the following common issues of fact supported consolidation: 1) the appraisal districts' appraisal methods (mass appraisal) erroneously values property without considering each individual property; 2) similar properties involved in the suits should be valued uniformly, and 3) identical Tax Code provisions at issue should be applied uniformly.

Respondent/defendant appraisal districts argued that property tax valuation is local in nature and that all property tax lawsuits would be "tag-along" cases and transferred to the MDL. Thus, according to the Panel, to create an MDL in a property tax case would violate the constitutional requirement that taxation is to be local in nature. *See* TEX. CONST. ART. VIII §23(b) (administrative and judicial enforcement for appraisal of property "shall originate in the county where the tax is imposed").

Respondents also challenged movant's efforts to satisfy Rule 13's elements. The kinds of property (real and personal; refineries to convenient stores) do not support a common issue of fact. The use of mass appraisal in the initial valuation process is irrelevant because a district court appeal is *de novo*. Movant identified only common ultimate issues, not common issues of fact necessary for pretrial coordinated resolution.

**b. Panel opinion**

The Panel denied the motion in a unanimous opinion by Justice Peeples. On the issue of common questions of fact, the Panel contrasted property tax cases, where valuation is local in nature and the responsibility of the county appraisal districts, with the mass tort cases where there is a common link (design, manufacture, warnings, marketing similarities or a common event). 2006 WL 1047106, at \*2, n 4. Because the appeals are *de novo*, the use of mass appraisal in the initial valuation would not serve as a common issue for purposes of Rule 13. *Id.* at \*1. The Panel also disagreed that different property types in many different locations in the state had sufficient similarities to justify consolidation. *Id.* at \*2.

The Panel also pointed out that unlike most MDL requests, which are brought by Defendants, movant was the plaintiff in the 150 suits. *Id.* at \*2, n 4. By statute, property owners must file suit to appeal an appraisal district's value and have no choice but to be the plaintiff. TEX. TAX CODE ANN. §42.01(1) (West 2001).

The Panel rejected movant's argument that the Tax Code provisions should be uniformly interpreted as a basis for granting a Rule 13 motion. According to the opinion, Rule 13 is not concerned with uniformity of law, but rather with consolidating cases with common questions of fact. 2006 WL 1047106, at \*2. Appellate

courts can insure consistent legal rulings. *Id.* The Panel concluded that the cases were not related within the meaning of Rule 13. *Id.*

The Panel also addressed convenience and efficiency. Again relying on *Silica*, movant is not required to show an existing discovery problem or problems in the past. Rather, Rule 13 focuses on preventing future problems. *Id.* at \*2, n.6. However, the Panel noted that a movant must do more than simply allege that an MDL will be convenient. The movant must show that the circumstances of the litigation demonstrate that convenience issues will exist. *Id.* at \*2. Valero only discussed the convenience of its own witnesses. *Id.*

Here, a single pretrial court would be more inconvenient to the appraisal districts than to movant. *Id.* The Panel also pointed out that movant had another option: consolidation within each county. *Id.* at \*3, n.7. Also, the opinion indicated that the Panel was apparently persuaded by respondents' argument regarding the number of potential tag-along cases. *Id.* at \*3, n.8.

Although it denied the motion, the Panel recognized the possibility for a pretrial court in a tax case. According to the Panel, if inconsistent rulings became a problem, for example in expert witness rulings, "we would agree that rule 13's goals would be implicated." *Id.* at \*3. However, on the existing record, the potential for that problem was "too remote and implausible to override the overwhelmingly local nature of these cases." *Id.*

## **B. Non-substantive Panel dispositions of Rule 13 motions.**

### **1. *In re Firestone/Ford Litigation*, 166 S.W.3d 2 (Tex. M.D.L. Panel May 4, 2004).**

In these defective tire and vehicle personal injury cases, movants sought pretrial coordination of 3 post-September 1,

2003 cases. Eight of the 9 administrative regions had already assigned a Rule 11 judge in these kind of cases filed pre-September 1, 2003.

Movants listed a total of 19 common fact issues. Movants argued that all accidents involved the same vehicle and tire types and all involved the same allegations: products liability, negligence, tire failure, tread separation, improper design and failure to warn. Further, movants argued that the same defendants would be deposed and that experts are the same for the plaintiffs and defendants.

Movants also listed common questions of law: venue, scope of discovery, document production, corporate representative depositions, trial consolidation, admissibility of experts and trial scheduling. On the issues of convenience and efficiency, movant emphasized the existing Rule 11 pretrial matters – existing case management order – that could be used immediately for Rule 13 coordinated cases. No opposition was filed.

In a per curiam order, the Panel granted the motion and appointed Judge Michael Mayes in Montgomery County.

### **2. *In re Vioxx Litigation*, \_\_ S.W.3d \_\_, 2005 WL 3706911 (Tex. M.D.L. Panel Aug. 25, 2005) (No. 05-0436).**

The cases involved Merck's drug and its side effects. The motion was also essentially unopposed by the plaintiffs. In its motion, Merck indicated there were more than 50 lawsuits against it and anticipated more filings. *Vioxx* fit the more typical MDL-type scenario: a single defendant whose alleged conduct impacted many plaintiffs.

Interestingly, Merck requested not only a particular county for the MDL—Harris County—but also named two district judges that it believed based on the judges' "experience as trial lawyers handling

complex litigation matters prior to elevation to the bench” makes them particularly suitable as MDL judges.

The Panel granted the motion without discussion and selected one of the judges offered by Merck: Judge Randy Wilson in the 157th District Court in Harris County. The order specifically allows for additional pretrial judges if necessary and invites the parties to return to the Panel for complaints about delay in remanding cases to the trial court. 2005 WL 3706911, at \*1.

**3. *In re Mercedes-Benz USA, LLC Front Bumper Litigation*, \_\_ S.W.3d \_\_, 2005 WL 2614627 (Tex. M.D.L. Panel Oct. 7, 2005) (05-0674).**

Movant/defendant Mercedes was sued by more than 130 plaintiffs in 4 cases in 4 counties for allegations of a defective design in its CLK Class cars. The allegations involved the height of the bumper for clearance of curbs. The motion identified the common fact and legal issues and also categorized the witnesses (plaintiffs, dealer defendants, parent company defendants, experts) and then argued convenience issue. The motion also requested the appointment of a Dallas County judge who had heard several disputed motions in the “lead” case.

Respondent/plaintiffs opposed the motion, but acknowledged that it might be appropriate for some of the cases and indicated its intent to file a Rule 13 motion in the future.

The Panel denied the motion as prematurely filed. Several defendants had not been served when the Rule 13 motion was filed. The Panel noted that an MDL would “probably be appropriate” at a later date. Of note, the Panel reiterated its earlier view as stated in *Vanderbilt* that a pending trial setting made it inappropriate to transfer a case with a pending trial setting to an MDL.

**4. *In re Clayton Homes, Inc., et al. Litigation*, No. 05-0420 (Tex. M.D.L. Panel Oct. 14, 2005).**

The cases involved allegations of fraud and forgery relating to deeds of trust and other security documents on land obtained with the sale of manufactured homes. Defendant/movants sought pretrial coordination of 49 cases in 4 counties. Movants focused primarily on common legal issues. Movants also requested a stay from the MDL Panel.

Respondents argued that imminent trial settings and the stage of discovery (most depositions had been conducted, mediation had occurred and in some cases, pretrial documents, exhibit lists and proposed charges had been filed) as a basis for opposing the motion. Respondents alleged Movants were simply trying to avoid trial settings. The parties also had an agreement to consolidate the discovery in all cases to allow any discovery to be used in all cases.

Respondents also alleged that Movants were attempting to avoid the page limits in Rule 13 by filing a motion for stay that included additional arguments in support of the coordination. Movants filed a reply contradicting most of respondents’ arguments.

The Panel denied the motion to stay, but set the motion for oral argument. Before argument, the parties settled the cases. The Panel granted a joint motion to dismiss based on the parties’ settlement of the underlying lawsuits.

**5. *Janet Kennedy & Alamo Ranch, Inc. v. Kennedy*, \_\_ S.W.3d \_\_, 2006 WL 1131788 (Tex. M.D.L. Panel Mar. 13, 2006) (No. 06-0197).**

*Janet Kennedy & Alamo Ranch, Inc. v. Kennedy* involved a pro se litigant’s request to transfer 3 lawsuits in 3 counties that involved allegations of fraud

surrounding the sale of property from a divorce decree. No opposition was filed. In a one-sentence order, the Panel denied the motion concluding that the motion failed to satisfy the requirements of Rule 13.

**6. *In re DaimlerChrysler AG CLK430 Litigation*, \_\_ S.W.3d \_\_, 2006 WL 751833 (Tex. M.D.L. Panel Mar. 22, 2006)(No. 06-0073).**

Part two of the Mercedes Benz litigation. This time Plaintiffs moved for Rule 13 pretrial coordination. The common fact issues were the defective design, whether the defect was disclosed, and whether there was a duty to disclose. Movant also argued in support of convenience and efficiency that discovery and legal issues were common to the cases. Movants requested the 165th District Court in Harris County, where one of the cases was pending.

Mercedes disagreed with movant's common fact issues, but did not oppose the use of Rule 13 pretrial coordination. Mercedes requested Dallas County, the 95th District Court, where it had already been successful.

In a unanimous opinion by Justice Smith, the Panel granted the motion and assigned Judge Robert H. Frost, in the 116th District Court in Dallas County. *Id.* at \*1.

**7. *In re Raymond James & Assocs., Inc.*, \_\_ S.W.3d \_\_, 2006 WL 1140471 (Tex. M.D.L. Panel April 24, 2006) (No. 06-0114).**

The cases involved damages resulting from investing in a Ponzi scheme. Plaintiff/movants sought to transfer 2 cases to an existing Rule 11 pretrial court where 3 cases with more than 100 plaintiffs were pending. Defendants had filed the Rule 11 transfer.

Defendant/respondents did not oppose the motion for pretrial coordination

as long as arbitration of the underlying cases could proceed. Respondents alleged that the consolidation motion was an attempt to avoid arbitration.

In an opinion by Justice Lang, (Justice Hanks not participating) the Panel granted the motion in part and denied it in part. One of the cases had already been ordered to arbitration by the trial court; in the other case, a request for arbitration was pending in the trial court. As to the case already ordered to arbitration, the Panel granted the motion to transfer to the existing Rule 11 court. *Id.* at \*1. For the case with the pending arbitration motion, the Panel concluded that the Rule 13 motion was premature and denied without prejudice to refile after the trial court ruled on the motion to compel arbitration. *Id.*

**C. Pending MDL motion.**

**1. *Dicken v. Poly Implant Protheses, et al.*, No. 06-0056**

Plaintiff/movants seek to consolidate 5 breast implant cases pending in 4 counties. Movants listed 21 common issues of fact, including whether the implants were defective, unreasonably dangerous, defective in design and marketing, negligently manufactured and designed, and whether defendants are liable for fraud and negligent misrepresentation. Movants have alleged that the lawsuits and discovery are identical. Movants also requested appointment of Judge John Coselli, the judge before whom the oldest case is pending.

Respondents noted first that the oldest case in the Movant's motion was filed pre-September 1, 2003 and had a trial setting less than two months away. As to the remaining 4 cases, respondents had not been served and thus contended the motion to consolidate was prematurely filed.

#### **IV. What makes an effective Rule 13 motion and response?**

Most of the Rule 13 motions had unique circumstances that likely influenced the Panel's decision. The unique circumstances make it difficult to identify and make generalizations about the particular arguments or facts that were outcome determinative of a particular motion. However, analyzing the motions and responses along with the opinions, offers guidance for future MDL proceedings. This section is intended to analyze various arguments that were raised in the motions and responses, and to identify those arguments that appeared to be persuasive (or not) to the Panel.

##### **A. Arguments raised in support of common questions of fact.**

Rule 13 requires the movant to state the common questions of fact. Many motions did just that – enumerated common issues without discussion. Others focused on the petition's allegations, while other motions broke down the issues with considerable detail.

Commonality was not typically the focus in the Panel's decisions. In most cases, the underlying conduct or event made the common questions of fact relatively obvious. For example, a common event (the *Bus Fire* case) or common product that produced damage to many (*Union Carbide, Silica, Firestone* and *Vioxx*). Finally, a common pattern of similar conduct seemed to link the cases as in *Raymond James*, the two Mercedes Benz proceedings and *Clayton Homes*.

In two opinions, however, commonality was the primary issue. In *Kone* and *Ad Valorem Tax*, the Panel noted that the movants focused on common ultimate issues (breach of contract in *Kone* and the determination of market value in *Ad Valorem Tax*) without identifying any common fact questions among the cases to

link them together for Rule 13 consolidation.

For example, breach of contract was the ultimate issue in *Kone*, but according to the Panel, movant did not identify common fact questions given that there were 4 different locations with different witnesses and circumstances surrounding the alleged breaches. *Kone*, 2005 WL 2840329, at \*2. Similarly, in *Ad Valorem Tax*, according to the Panel, the movant could not overcome the local nature of each case sufficiently to show a common factual link among all the cases. *Ad Valorem Tax*, 2006 WL 1047106, at \*1-2.

##### **B. Arguments raised in support of convenience and efficiency.**

The Panel opinions focus primarily on the requirements of efficient conduct of the cases and convenience of the parties and witnesses. In several opinions, the Panel pointed out the need for parties to be specific, giving details about the issues that support the need for a pretrial judge and how a pretrial judge can promote the efficient processing of the cases. In several opinions, the Panel also noted that a party failed to contradict an opponent's allegations or argument.

##### **1. Status and extent of discovery.**

Discovery is the primary focus of Rule 13's convenience and efficiency requirements. The motions varied from statements such as "discovery will be the same," to giving detailed categories of witnesses and documents that will be produced. For example in *Vanderbilt*, while an MDL proceeding with a small number of cases, it appeared that the cases involved relatively small amounts of discovery and primarily documentary evidence, not witnesses. See *Vanderbilt*, 166 S.W.3d at 13-14. By contrast, in the *Bus Fire* case, movants articulated categories of witnesses, including their locations and relationship to

the cases, that would be common in all cases. *Bus Fire*, 2006 WL 587845 at \*1-2.

A movant should identify and give specifics about the discovery and witnesses that will be common, as well as explain how a single pretrial judge can accomplish the Rule's goals of consistent rulings. *Vanderbilt*, 166 S.W.3d at 15; *Bus Fire*, 2006 WL 587845, at \*1-2; *Kone*, 2005 WL 2840329, at \*2. Also, a movant should describe the location of evidence (documents and potential witnesses).

The convenience and efficiency requirements are prospective. The Panel was not concerned with the movant establishing a history of discovery problems, but focused on whether the cases had discovery and other pretrial issues that would benefit in the future by consolidation. Some motions effectively pointed out existing problems as examples that a single judge could address. Respondents' arguments that discovery was proceeding smoothly did not appear to persuade the Panel. The Panel reasoned that if discovery were proceeding smoothly in multiple courts, transferring to a single would enhance, not impede, the pretrial process. *Silica*, 166 S.W.3d at 5-6.

However, although the Panel consistently wrote that convenience and efficiency were prospective issues, in *Ad Valorem Tax*, the Panel acknowledged that Rule 13 could be implicated if inconsistent trial court rulings occurred with *Daubert* motions. *Ad Valorem Tax*, 2006 WL 1047106, at \*3.

Several proceedings involved allegations by respondents that discovery was essentially complete and therefore there was no need for a pretrial court. The Panel appeared to be persuaded by such allegations. *Vanderbilt*, 166 S.W.3d at 14-15.

## **2. Number of cases in the motion to transfer.**

While Rule 13 does not expressly state number of cases or parties required to support a transfer motion, the number of cases and parties is subsumed in the convenience element of rule. With too few cases, how can a movant establish that a transfer is necessary for the convenience of the parties and witnesses?

The Panel has expressly stated that the number of cases is not determinative. *Id.* at 14. However, looking at the granted MDLs, there were significant numbers of cases and parties. On the other hand, for the motions that were denied, it is difficult to conclude that the denial turned solely on numbers. Each denial had other issues that impacted the outcome. For example, in *Kone*, where only 4 cases were included in the motion to transfer, the Panel focused on the lack of common fact issues. *Kone*, 2005 WL 2840329, at \*2. Similarly, in *Vanderbilt*, there were imminent trial settings and apparently most discovery had been completed. *Vanderbilt*, 166 S.W.3d at 14.

The potential for more cases to be filed was raised in the *Bus Fire* case and also in *Vanderbilt*. The Panel acknowledged the potential for additional cases as support for granting the MDL in the *Bus Fire* case, but did not mention the argument in *Vanderbilt*. See *Bus Fire*, 2006 WL 587845, at \*1.

While the group of related cases may be small in number, it may be possible to argue in support of a Rule 13 motion that there are numerous witnesses, voluminous common discovery and numerous pretrial matters for resolution.

Finally, as a respondent, pointing out that the potential for too many tag-alongs may be effective. *Ad Valorem Tax*, 2006 WL 1047106, at \*3, n8 (MDL would create a statewide tax court potentially allowing every tax case to be a tag-along). Also, a respondent may be able to argue that

a pretrial transfer is disproportionately more inconvenient for respondents than movants. *Id.* at \*2; *Silica*, 166 S.W.3d at 10 (dissenting opinion).

### **3. Timing of a Rule 13 motion to transfer.**

The rule does not contain a deadline for seeking pretrial consolidation. Of the 13 motions filed to date, one was filed within 3 months of the accident, while other motions were filed with imminent trial settings.

Time for filing a Rule 13 motion was an issue in the testimony surrounding the adoption of HB 4: should there be a deadline to file a Rule 13 motion calculated off the answer date? The testimony was that a deadline would be problematic because commonality may not arise for several years after the initial suit is brought. Hearing on Tex. H.B. 4 Before the Senate Comm. on State Affairs, 78<sup>th</sup> Leg., R.S. (May 7, 2003) (statement of Alan Waldrop for Texans for Lawsuit Reform) (audio available at [http://www.senate.state.tx.us/75r/Senate/commit/c570/c570\\_78.htm](http://www.senate.state.tx.us/75r/Senate/commit/c570/c570_78.htm), May 7, 2003, Part 2, 1:04:30).

Imminent trial settings seemed to be a factor that impacted the Panel's decision in smaller cases, but not the larger cases, like asbestos. For example, in *Vanderbilt* and the Mercedes cases, the Panel noted that cases with imminent settings would not be appropriate for transfer. *Vanderbilt*, 166 S.W.3d at 14; *In re Mercedes Benz USA*, 2005 WL 2614627, at \*1. Although raised by respondents in *Union Carbide* as a reason to deny the transfer, the Panel did not mention existing trial settings in the opinion.

While not always apparent in the opinions, looking at the motions, a request for transfer filed earlier in the litigation seemed to fare better. For example, the *Bus Fire* case was filed within 3 months of the incident. Filing a Rule 13 motion early on avoids the problem of imminent settings. Also, because the Panel does not require a

history of problems with discovery, there appears to be no advantage to waiting.

### **C. Other arguments raised in Rule 13 proceedings.**

#### **1. Common legal issues.**

Unlike Rule 11, Rule 13 does not require common legal issues as a basis for the transfer. However, common questions of law can support the convenience and efficiency elements, and many of the motions raised common legal issues.

The Panel concluded that common mixed questions of law and fact are factors in considering a motion. *Silica*, 166 S.W.3d at 6. A movant, however, cannot rely solely on common legal issues. The Panel rejected the argument that Rule 13 was concerned with uniformity of laws. As set out in *Ad Valorem Tax*, appellate courts assure "that legal principles are uniform throughout the state. . . ." *Ad Valorem Tax*, 2006 WL 1047106, at \*2.

#### **2. An existing Rule 11 pretrial court or case management orders.**

The existence of a Rule 11 pretrial court was obviously persuasive in determining a motion under Rule 13. See *Raymond James*, 2006 WL 1140471, at \*1; *Firestone/Ford Litigation*.

However, case management orders that existed in asbestos and silica litigation in some of the larger counties did not dissuade the Panel from assigning a pretrial court under Rule 13. Also, several respondents raised the argument that the movant had not previously pursued a Rule 11 motion. This argument did not appear to persuade the Panel to deny a Rule 13 motion.

#### **3. Use of evidence in the proceeding.**

The rule only allows the submission of evidence on leave of the Panel. Rule

13.3(j). In the proceedings to date, the Panel's decisions have not turned on evidence provided by the parties. The Panel accepts as true the uncontradicted facts in the motion and responses. Rule 13.3(j).

#### **4. Requesting the Panel to appoint a particular pretrial judge.**

Although not mentioned in Rule 13, several motions and responses requested the Panel to appoint a particular judge or county. The better practice is to allow the Panel to make its own determination for a pretrial judge. Litigants can demonstrate a county or a judge that may be appropriate without requesting a specific appointment. For example, in the *Bus Fire* case, movant argued that many witnesses were in Harris County and respondent argued many witnesses were in Hidalgo County. Similarly, litigants could point out that a particular judge had already heard certain disputed issues without expressly requesting appointment of that judge.

#### **5. Amount in controversy in the related cases.**

Amount in controversy was raised by the respondent in *Vanderbilt*. Because Rule 13 applies to cases filed in constitutional county courts as well as county court at law, probate and district courts, the amount in controversy appears not to be a controlling factor. Rule 13.1(b)(1); *see* TEX. GOV'T CODE ANN. §26.042(a) (West 2004) (amount in controversy for a constitutional county court is \$200-\$5,000.).

#### **6. Availability of options other than Rule 13 consolidation.**

Respondents in both *Ad Valorem Tax* and the *Bus Fire* case argued that consolidation within counties was an available alternative for movants. The argument did not appear to be persuasive in the *Bus Fire* case, but the Panel recognized the possibility of consolidation within

certain counties in *Ad Valorem Tax*. *Ad Valorem Tax*, 2006 WL 1047106, \*3, n.7.

### **V. Appellate issues relating to Multidistrict Litigation.**

#### **A. Review of MDL Panel decisions.**

Decisions of the Panel are reviewable by the supreme court in an original proceeding. Rule 13.9(a). To date, none have been filed.

#### **B. Review of trial court and pretrial court rulings.**

##### **1. Review of pretrial court rulings by the MDL Panel.**

The Panel can review only one kind of pretrial court ruling. Rule 13.5(e) provides that when a tag-along case is remanded by the pretrial court to the trial court, the order may be appealed to the Panel by filing a motion for rehearing. Rule 13.5(e). The Panel reviews the order only if the remand was based on a determination that the case was not a tag-along. *In re Silica Products Liability Litigation*, \_\_ S.W.3d \_\_, 2006 WL 1727324, at \*4 (Tex. M.D.L. Panel June 19, 2006) (No. 04-0606) (*Silica II*).

At issue in *Silica II* was the remand to the trial court of a pre-September 1, 2003, filed by John B. Lopez against GlobalSantaFe Corp. GlobalSantaFe filed a notice of transfer in the trial court as provided in Civil Practice and Remedies Code § 90.010(b). Lopez filed a motion to remand arguing that the Jones Act preempted Chapter 90 and the MDL transfer provisions for failing to file a report. The pretrial court remanded Lopez's case to the trial court. GlobalSantaFe filed a motion for rehearing of the remand order with the MDL Panel.

In an opinion by Justice Smith, the Panel concluded it lacked jurisdiction to review the pretrial court's order. (Castillo

not sitting; Judge Steve Ables was appointed).

The Panel explained the limited jurisdiction of the Panel. Rule 13 grants the Panel express authority to the Panel to consider: 1) whether related cases involve common questions of fact and whether transfer is convenient and promotes efficient conduct of the cases; and 2) to review a pretrial court's determinations of remanding cases on the ground that the case is not a tag-along case. Rule 13.5(e); *Silica II*, 2006 WL 1727324, at \*3-4. In both situations, the Panel is limited to determining whether the cases "involve[] one or more common questions of fact." Rule 13.2(f), (g); 13.5(e).

The rule contemplates two types of transfers of tag-alongs. Rule 13.5(e); 13.11. First, Rule 13.5 provides for the transfer of September 1, 2003 or later tag-along cases and expressly grants the Panel authority to review the pretrial court's determination. Rule 13.5(e).

Second, Rule 13.11 permits transfer of pre-September 1, 2003 asbestos or silica cases. Rule 13.11 transfers require the pretrial court to determine the legal questions regarding both timeliness of filing the chapter 90 reports and the adequacy of such reports. Rule 13.11 provides no authority for the Panel to review a Rule 13.11 remand. *Silica II*, 2006 WL 1727324, at \*3. Accordingly, review of a pretrial court's remand order under a 13.11 transfer is governed by Rule 13.9. *Id.* at \*4; *In re Fluor Enters.*, 186 S.W.3d 639 (Tex. App.—Austin 2006, orig. proceeding) (Waldrop, Puryear and Smith) (pretrial court's decision to remand for a reason other than the determination that the case was not a tag-along case is reviewed as provided by Rule 13.9(b), not 13.5(e)).

The Panel reasoned that the pretrial court decision to remand Lopez's case to the trial court was for a reason other than whether the case was a tag-along under Rule 13.5(e). *Silica II*, 2006 WL 1727324, at \*4.

The pretrial court determined that the Jones Act preempted chapter 90 and the MDL rule. Thus, the question before the pretrial court was a legal one, not whether there were common questions of fact qualifying the case as a tag-along. Thus, the Panel concluded it lacked jurisdiction to review the order. *Id.* at \*4-5.

## **2. Appellate court review of pretrial court and trial court rulings.**

With the exception of Rule 13.5(e) tag-along remands that are reviewed by the MDL Panel, other trial court and pretrial court orders are reviewed by the courts of appeals.

Rule 13.9(b) provides that "an order or judgment of the trial court or pretrial court may be reviewed by the appellate court that regularly reviews orders of the court in which the case is pending at the time review is sought, irrespective of whether that court issued the order or judgment to be reviewed." Rule 13.9(b). For example, a pretrial court ruling on an expert would be appealed after judgment in the trial court and would be appealed to the court that regularly reviews the trial court. However, a pretrial court ruling that could be the subject of an original proceeding or interlocutory appeal, would be appealed to the court of appeals that ordinarily reviews the pretrial court.

There have been a few appellate opinions involving MDL pretrial court rulings that demonstrate the operation of Rule 13.9's provision that the appeal is filed based on where the case is pending.

In *In re Fluor Enters., Inc.*, 186 S.W.3d 639 (Tex. App.—Austin 2006, orig. proceeding), five days before a trial setting, defendants filed a notice of transfer to the MDL. Judge Davidson remanded it to the trial court in Travis County the same day the notice was filed. The Austin Court denied mandamus relief. According to the court, it had jurisdiction under Rule 13.9. Because

of the remand order, the case was pending in Travis County when the petition for writ of mandamus was filed. *See also In re J. Ray McDermott, Inc.*, No. 13-05-00289-CV, 2005 WL 1488379 (Tex. App.—Corpus Christi June 23, 2005, orig. proceeding) (not designated for publication) (mandamus filed in Corpus Christi Court of Appeals challenging pretrial court’s ruling to remand to trial court a silica case; relator dismissed petition).

On the other hand, a mandamus proceeding challenging Judge Davidson’s ruling on whether to establish an unimpaired docket in the asbestos MDL pending in Harris County was filed in the Fourteenth Court. *In re Union Carbide Corp.*, 145 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding) (court denied mandamus relief).

### **C. Other appellate issues involving MDL proceedings in the pretrial courts and trial courts.**

#### **1. Transfers and remands of tag-along cases.**

In addition to the jurisdictional issue discussed above in *Fluor*, the Austin Court of Appeals also addressed the issue of whether a remand by Judge Davidson in the asbestos MDL was appropriate. *In re Fluor Enters., Inc.*, 186 S.W.3d 639 (Tex. App.—Austin 2006, orig. proceeding).

It was undisputed that the plaintiff had not filed the appropriate reports required by Chapter 90. However, Fluor failed to meet the MDL case management order that required defendants to transfer within 30 days of filing an answer.

Fluor argued the section 90.010(b) provided the means to transfer the case to the MDL proceeding. The court rejected Fluor’s argument because the underlying lawsuit was filed after September 1, 2003, and section 90.010(b) applies to cases filed before September 1, 2003. *Id.* at 644.

According to the court, section 90.010 does not create a means to transfer post-September 1, 2003 asbestos cases. *Id.*

Fluor argued that section 90.010(d) supported its position that the case must remain in the MDL proceeding until the plaintiffs serve a report as provided in section 90.0003. The court rejected Fluor’s characterization of section 90.010(d) as a transfer mechanism for moving a case to an MDL. Section 90.010(d) applies once a case is properly transferred to the MDL. *Id.* at 645.

According to the court, the right to transfer a case is not absolute and can be waived. *Id.* at 647. The right to transfer is governed by the MDL procedural rules. This case was not transferred to the MDL in accordance with the MDL rules and case management order and was thus subject to remand. *Id.* at 647-48. The court denied mandamus relief.

Another mandamus is pending from the silica MDL. Judge Christopher’s order that remanded a case to the trial court based on the application of the Jones Act, and initially filed with the MDL Panel in *Silica II* discussed above, is pending in the Fourteenth Court of Appeals. *In re Global Santa Fe Corp.*, No. 14-06-00625-CV (mandamus proceeding filed from *In re Texas State Silica Products Liab Litigation* Cause No. 2005-76732, in the 295th District Court, Harris County, Texas; *John B. Lopez v. Global Santa Fe Corp.*, Cause No. 2003-30221, in the 55th District Court, Harris County, Texas).

#### **2. Transfers of cases pending on appeal?**

The Rule contemplates requesting a transfer of cases pending on appeal. Rule 13.9(b) provides that appeals involving appellate review of trial court and pretrial court rulings are not subject to docket equalization transfers. Rule 13.9(b). However, the Rule’s comment states that subsection (b) of Rule 13.9 does not forbid

transfer “for other purposes that might arise.” Rule 13 Comment-2005. As the supreme court has explained, its authority to transfer cases among the courts of appeals is not limited to docket equalization transfers, but may be made at any time for good cause. *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 (Tex. 1995); TEX. GOV’T CODE ANN. §73.001(West 2005).

### **3. Practical issues of a dispositive ruling by a pretrial court.**

From a practical standpoint, problems may arise with dispositive rulings by a pretrial court if a pretrial ruling disposes of a significant number of the cases.

Take for example, a pretrial ruling that disposed of a single defendant that had been sued in 100 cases in an MDL. Will there be 100 notices of appeal? Certainly consolidation on appeal can solve the logistical problem for the court of appeals, but what if the parties are represented by many different attorneys who have various theories and strategies for appeal? The litigants will have to address the issues of sharing page numbers for briefs and oral argument time.

Additionally, if in Houston, where two MDL case are pending, will the 100 notices of appeal all be filed in either the First or the Fourteenth courts of appeals? Perhaps such is an example of the need to transfer “for other purposes that might arise.” *See* Rule 13 Comment – 2005.

### **4. Review of pretrial court’s interlocutory orders.**

MDL cases may result in more original proceedings. In handling the pretrial proceedings, pretrial courts are likely to make many interlocutory rulings. Many of these rulings will affect every case in the MDL. Accordingly, litigants may be more likely to file a mandamus proceeding challenging a pretrial court’s ruling than in a

typical case. *See In re Prudential Ins. Co.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (recognizing benefit of mandamus review of significant rulings in exceptional cases); *In re Masonite*, 997 S.W.2d 194, 198-99 (Tex. 1999) (orig. proceeding) (exceptional circumstances may make an appeal an inadequate remedy justifying mandamus relief); *CSR Ltd. v. Link*, 925 S.W.2d 591, 596-97 (Tex. 1996) (orig. proceeding) (unique circumstances may justify mandamus relief).

Another option for review of certain interlocutory orders would be severance of one case from the MDL to make the ruling final and allow a test case to be appealed.