CONSOLIDATING CASES (INVOLVING ONE OR MORE COMMON QUESTIONS OF FACT) WITH THE BRAND NEW TEXAS MULTIDISTRICT LITIGATION PROCEDURE

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CHAPTER 1.3

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This Paper surveys the new Government Code Sections and Rule of Judicial Administration that establish and administer the new multidistrict litigation procedure for the Texas court system, hopefully making those Sections and the Rule easier to digest and understand. When helpful, the Paper compares and contrasts the likely practice under the new multidistrict litigation procedure with current practice under the federal multidistrict litigation procedure and "Rule 11 consolidation" within Texas courts.

I. HB4'S CHANGES TO THE GOVERNMENT CODE, AND THE CREATION OF THE MDL PANEL

HB4 creates a new Subchapter H for Chapter 74 of the Government Code. This Subchapter H, Sections 74.161-.164, establishes the new multidistrict litigation ("MDL") procedure for the Texas court system. The new MDL procedure enables the Texas court system to consolidate[1], on a state-wide basis, cases involving common fact issues into one District Court, for purposes of all discovery and pre-trial litigation. However, the District Court serving as an MDL court cannot try cases on the merits.

The MDL procedure is governed by a "judicial panel . . . consist[ing] of five members designated from time to time by the chief justice of the supreme court." TEX. CIV. PRAC. & REM. CODE § 74.161(a) (new) [hereinafter CPRC §§ 74.161-.164]. "The members of the panel must be active court of appeals justices or administrative judges." *Id.* § 74.161(a). The panel "may transfer civil actions involving one or more common questions of fact pending in the same or different constitutional courts, county courts at law, probate courts, or district courts to any district court for consolidated or coordinated pretrial proceedings, including summary judgment or other dispositive motions, ***but not for trial on the merits***." *Id.* § 74.162 (emphasis added). The panel can consolidate cases only after at least three of the five Panel members determine that such consolidation will "be for the convenience of the parties and witnesses" and will "promote the just and efficient conduct of the actions." *Id.* §§ 74.162(1)-(2) & 74.161(b).

The first five members of the Texas MDL panel were: Hon. David Peeples of San Antonio, Hon. Douglas Lang of Dallas, Hon. Scott Brister of Houston, Hon. Errlinda Castillo or Corpus Christi, and Hon. Mack Kidd of Austin. Because the Governor appointed Justice Brister to the Texas Supreme Court in late 2003, Justice Brister can no longer serve on the MDL Panel. Therefore, the Chief Justice has appointed Hon. George Hanks of Houston to replace Justice Brister. Judge Peeples is serving as the Panel Chair.

Government Code Section 74.163(a)(1)-(4) empowers the Texas Supreme Court to adopt rules that:

> allow the panel to transfer related civil actions for consolidated or coordinated pretrial proceedings;
>
> allow transfer of civil actions only on the panel's written finding that transfer is for the convenience of the parties and witnesses and will promote the just and efficient conduct of the actions;
>
> require the remand of transferred actions to the transferor court for trial on the merits; and
>
> provide for appellate review of certain or all panel orders by extraordinary writ.

The Court adopted such rules before September 1, 2003 (*i.e.*, HB4's effective date for the MDL procedure), which are subject to modification before December 1, 2003. The rules appear in the comprehensive Rule 13 of the Texas Rules of Judicial Administration ("RJA"); the new Rule 13 appears as **Exhibit A** to this Paper.

Also, the MDL Panel "may prescribe additional rules for the conduct of its business not inconsistent with the law or rules adopted by the supreme court." CPRC § 74.163(b).

II. RULE 11 OF THE RULES OF JUDICIAL ADMINISTRATION (BRIEFLY)

Rule 11 of the RJA was the previous mechanism within the Texas court system for consolidating separate

[1] The new Goverment Code provisions and Rule of Judicial Administration 13 contemplate "consolidated or coordinated" pretrial proceedings. This Paper frequently uses the words "consolidate" and "consolidation" when referring to the "consolidated or coordinated" proceedings under the new MDL procedure.

individual cases involving common fact and legal issues. Such consolidations under Rule 11, however, could not occur on a state-wide basis; rather, each "administrative region" – and Government Code Section 74.042 creates nine such regions – could have its own consolidation for cases within that region. The new MDL procedure under Rule 13 fo the RJA, which replaces Rule 11 for cases filed after September 1, 2003, allows for state-wide consolidations. The Supreme Court amended Rule 11 so that, for pre-September 1, 2003 consolidation cases, the "[p]arties may agree to the application of Rule 13 [the new MDL rule]," but such agreement "must be in writing and must be joined by all parties to the case." *See* RULE OF JUDICIAL ADMINISTRATION 11.7(b) (new) (**Exhibit A**).

III. RULE 13 OF THE RULES OF JUDICIAL ADMINISTRATION

A. Summary of Rule 13.3, Procedure for Requesting Transfer

New Rule 13 of the RJA provides that any "party in a case may move for transfer of the case and related cases to a ***pretrial court*** [*i.e.*, 'the district court to which related cases are transferred for consolidated or coordinated pretrial proceedings under [Rule 13]']" by filing a motion with the MDL Panel Clerk, which is the Clerk of the Supreme Court of Texas.[2] *See* Rule 13.3(a) (emphasis added), 13.2(e) & 13.2(c). And, "[a] party must file in the trial court [*i.e.*, 'the court in which a case is filed'] a notice – in the form prescribed by the MDL Panel – that a motion for transfer has been filed." *See id.* 13.3(I) & 13.2(d). This written motion for transfer must:

(1) state the common question or questions of fact involved 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.

Not only parties may initiate MDL consolidation. "A trial court or a presiding judge of an administrative judicial region may request a transfer of related cases to a pretrial court" by written motion that lists the cases to be transferred. *See* Rule 13.3(b). Or, "[t]he MDL Panel may, on its own initiative, issue an order to show cause why related cases should not be transferred to a pretrial court." *See id.* 13.3(c).

Parties wishing to respond to a motion or request for transfer may file a response within twenty days after service of such motion or request. *See id.* 13.3(d)(1). In the case of an MDL Panel's show cause order, parties wishing to respond must do so within the time provided in the order. *See id.* 13.3(d)(2). A reply to a response is due within ten days after service of the response. *See id.* 13.3(d)(3). And, motions for transfer, responses thereto, replies to responses, or "other document[s] addressed to the MDL Panel" must comply fully with Texas Rule of Appellate Procedure 9.4 and "must not exceed 20 pages." *See id.* 13.3(e).

The MDL Panel may utilize oral hearings before "one or more . . . members" for purposes of deciding any matter, including motions for transfer, or the Panel may decide any matter solely on written submission. *See id.* 13.3(k). The new MDL rule does not prescribe any particular place for hearings before the MDL Panel; the Panel may hold hearings in various places throughout the state.[3]

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[2] All initial filings in the MDL procedure must take place with the Clerk of the Texas Supreme Court. *See* Rule 13.3(f). Indeed, any filings directly with the MDL Panel will work through the Clerk; so, practice before the Panel will likely resemble practice before the Supreme Court in many respects.

[3] The MDL Panel ultimately may decide always to hold its hearings in one particular place, such as Austin. However, if the Panel does not fix a single place for its hearings, good places for MDL hearings throughout the State would include: the Hill Country in the springtime, Corpus Christi in the summertime, and

When the MDL Panel decides motions for transfer or related filings, it will "accept as true facts stated . . . unless another party contradicts them," and the Panel "may order parties to submit evidence by affidavit or deposition and to file documents, discovery, or stipulations from related cases." *See id*. 13.3(j). However, "[a] party may file evidence with the MDL Panel Clerk ***only with leave of the MDL Panel***." *See id.* (emphasis added). Most likely, evidence will not play a significant role in the MDL Panel's primary function – to determine whether to consolidate cases within an MDL court. For instance, under federal MDL practice, the federal MDL panel very rarely accepts or considers evidence when deciding whether to consolidate cases within an MDL court. Rather, the federal panel typically decides to consolidate a given case in an MDL court in light of the parties' pleadings in the original trial court, the subject matter of the litigation, the defendants' identities, and the legal arguments filed with the panel.

In order for a case to be transferred into an MDL proceeding, three members of the MDL Panel in an order must make written findings "that related cases involve one or more common questions of fact, and that transfer to a specified district court will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the related cases." *See id*. 13.3(l). And, the Panel's orders will reveal the voting of each Panel member. *See id.* 13.3(m).

If the pretrial judge for a particular MDL proceeding "has died, resigned, been replaced at an election, requested retransfer, recused, or been disqualified," the MDL Panel may order cases transferred to another pretrial court. *See id*. 13.3(o). It remains to be seen whether the MDL Panel will create another MDL proceeding in another pretrial court when a particular pretrial judge is no longer able to serve. Arguably, the inconvenience of setting up another MDL pretrial court, coupled with docket disruptions for the former pretrial court and the new pretrial court, will create incentives for the Panel to leave the MDL proceeding in the same pretrial court, even though the pretrial judge has changed.

B. Summaries of Rule 13.4, Effect on the Trial Court of the Filing of a Motion for Transfer, and Rule 13.5, Transfer to a Pretrial Court

Moving for transfer to an MDL proceeding does not limit an original trial court's jurisdiction or otherwise stay its proceedings. Only an order by the trial court or by the MDL Panel can stay "all or part of any trial court proceedings until a ruling by the MDL Panel." *See id.* 13.4(b). In this respect, Texas MDL practice mirrors federal MDL practice, in which the mere filing of a motion for transfer and a conditional transfer order by the federal MDL panel do not stay proceedings in the original trial court. *See* RULE 1.5 OF PROCEDURE OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION ("The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court."); MANUAL FOR COMPLEX LITIGATION 3D § 31.131 (1995) ("The transferor court should not automatically . . . postpone rulings on pending motions, or generally suspend further proceedings upon being notified of the filing of a motion for transfer. Matters such as motions . . . to remand, raising issues unique to the particular case, may be resolved before the panel acts on the motion to transfer.").

A "notice of transfer" – which incorporates a final MDL transfer order – automatically stays proceedings in the trial court once filed in that court, because "[a] case is deemed transferred from the trial court to the pretrial court" when such filing occurs. *See* Rule 13.5(a)-(b). The new MDL rule provides various procedures for transferring a case's physical files to an MDL pretrial court. *See id.* 13.5(c)-(d).

The term "tag along case" typically refers to a case that is filed after the MDL court is established and is related to (or similar to) cases already pending in the MDL court, so that one or more of the parties – typically, a defendant – requests that the case "tag along" with the MDL'ed cases and be consolidated with such cases. Under federal practice, the federal MDL panel "conditionally" transfers designated tag along cases to an MDL court, but allows for opposition to such transfers before they become final. More specifically, the parties opposing tag along case consolidation may file notices of opposition and motions to vacate that prevent the MDL consolidation, and such parties even may obtain hearings on their opposition filings before consolidation takes place. *See* RULES 7.4 & 16.1 OF PROCEDURE OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.

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either Van Zandt County or Smith County in Autumn.

After the opposition filings and hearings thereon[4], the federal MDL panel then decides whether a given tag along case should be consolidated into an MDL proceeding.

Unlike federal MDL practice, Texas MDL practice ***automatically*** sends "tag along" cases to the MDL court. Specifically, "[a] tag-along case is ***deemed transferred*** to the pretrial court when a notice of transfer . . . is filed in both the trial court and the pretrial court." *See* Rule 13.5(e) (emphasis added). However, parties opposing MDL consolidation "may move the pretrial court to remand the case to the trial court on the ground that it is not a tag-along case. If the motion to remand is granted, the case must be returned to the trial court, and costs including attorney fees may be assessed by the pretrial court in its remand order." *See id.* The pretrial court's remand order may be appealed to the MDL Panel. *See id.* Apparently, however, a pretrial court's order refusing to remand a case to its original trial court is not appealable to the Panel.

C. Summary of Rule 13.6, Proceedings in Pretrial Court

Pretrial courts may decide a wide variety of discovery and pre-trial litigation matters, but may not try cases on the merits. (Subchapter H of the Government Code, which creates the MDL procedure, ***twice*** states that pretrial courts may not try cases on their merits. CPRC §§ 74.162 & 74.163(a)(3). So the Legislature must really mean it.)

Pretrial courts may decide matters of "jurisdiction, joinder, venue, discovery, trial preparation (such as motions to strike expert witnesses, preadmission of exhibits, and motions in limine), mediation, and disposition by means other than conventional trial on the merits (such as default judgment, summary judgment, and settlement)." *See* Rule 13.6(b). Also, a pretrial court may undo an original trial court's orders/rulings in a given case before transfer, provided the pretrial court acts within the time period for plenary power revision by the trial court: "The pretrial court may set aside or modify any pretrial ruling made by the trial court before transfer over which the trial court's plenary power would not have expired had the case not been transferred." *See id.*

Rule 13.6(c) prescribes a wide variety of matters that a pretrial court "should" address in a case management order. An example of a case management order for a Rule 11 consolidation (Baycol litigation, Administrative Region 8) appears as **Exhibit B**, and several examples of pretrial orders by a federal MDL court (Baycol litigation, District Court for Minnesota) appear at http://www.mnd.uscourts.gov/Baycol_Mdl/pretrial.htm. These orders show the likely forms and substances of case management orders by Texas MDL courts.

Pretrial courts and trial courts should cooperate to set consolidated cases for trial – in the trial courts, not in the pretrial courts – "at such a time and on such a date as will promote the convenience of the parties and witnesses and the just and efficient disposition of all related proceedings." *See* Rule 13.6(d). Rule 13.6(d) contemplates some considerable communications among the parties, a pretrial court and a trial court in order to set an adequate trial date in the trial court. Also, the setting of a trial date in a trial court has implications for Rule 13.7(b) (discussed below), which loosely determines when a case is due for remand to a trial court.

D. Summaries of Rule 13.7, Remand to Trial Court, and Rule 13.8, Pretrial Court Orders Binding in the Trial Court After Remand

Cases, or "portions of cases," that do not end with "final and appealable judgment[s]" in pretrial courts are supposed to be remanded to trial courts for trials on the merits, pursuant to Rule 13.7(a)-(b). However, the ***timings*** for such remands depend upon highly subjective determinations by pretrial courts that "pretrial proceedings have been completed to such a degree that the purposes of the transfer have been fulfilled or no longer apply." *See id.* 13.7(b). The pretrial courts, in other words, have considerable discretion over when they decide to remand cases for trial in the trial courts. Arguably, giving the pretrial courts such broad discretion creates a tension between Rule 13.7(b) and Government Code Section 74.163 – which mandates that "[t]he [MDL] rules adopted by the supreme court ***must*** . . . ***require the remand*** of transferred actions to the transferor court [*i.e.*, 'trial court'] for trial on the merits." (Emphasis added.) Simply put, does a rule that gives a pretrial court broad discretion on remanding a case for trial satisfy the Government Code's mandate for a rule that"require[s] the remand"?

Given that setting a case's trial date (in a trial court) involves communications among the parties, the pretrial court and the trial court (*see* Rule 13.6(d)), the pretrial

[4] Oftentimes, the federal MDL panel decides whether a given tag along case should get MDL'ed ***without*** an oral hearing; however, the panel always gives the parties opposing MDL consolidation the opportunity to brief their positions before the panel.

court likely will receive substantial input from the parties and the trial court as to when "pretrial proceedings have been [sufficiently] completed" under Rule 13.7(b) so that a remand can occur. Also, such communications among parties, the pretrial court and the trial court hopefully will serve as an informal check against a pretrial court's dilatory view of when a case is due for remand.

Rule 13.7(c) governs when and how a case's physical files are transferred from a pretrial court to a trial court upon remand, whereas Rule 13.5(c)-(d) governs when and how such files go from a trial court to a pretrial court upon initial MDL transfer.

Rule 13.8 gives considerable binding weight to a pretrial court's orders, which can determine very important issues such as "jurisdiction, joinder, venue, . . . motions to strike expert witnesses, preadmission of exhibits, and motions in limine . . . and disposition by . . . default judgment, [and] summary judgment." *See id*. 13.6(b). In fact, Rule 13.8 admonishes trial courts not to frustrate the fruits of the pretrial court's pretrial proceedings, while advising pretrial courts "not [to] unwisely restrict a trial court from responding to circumstances that arise following remand." *See id.* 13.8(a). To that end, Rule 13.8(b) provides that "[w]ithout the written concurrence of the pretrial court, the trial court cannot, over objection, vacate, set aside, or modify pretrial court orders, including orders related to summary judgment, jurisdiction, venue, joinder, special exceptions, discovery, sanctions related to pretrial proceedings, privileges, the admissibility of expert testimony, and scheduling." And, if the pretrial judge in "unavailable to rule" (*e.g.*, judge resigned or lost election), then "the concurrence of the MDL Panel Chair must be obtained" before a trial court may change the pretrial court's orders. *See id.* 13.8(d).

If the parties agree to a trial court's proposed change to a pretrial court's order – so that the trial court is not acting "over objection" by making the change – then the trial court may make the change. *See id.* 13.8(b). Also, "[t]he trial court need not obtain the written concurrence of the pretrial court to vacate, set aside, or modify pretrial court orders regarding the admissibility of evidence at trial (other than expert evidence) ***when necessary because of changed circumstances, to correct an error of law, or to prevent manifest injustice***. But the trial court must support its action with specific findings and conclusions in a written order or stated on the record." *Id.* 13.8(c) (emphasis added). Under this exception, a trial court still may not change a pretrial court's orders as to the admissibility of expert evidence. It remains to be seen exactly when and how a trial court can change a pretrial court's order on non-expert evidence because of "changed circumstances, [or the need] to correct an error of law, or to prevent manifest injustice." It also remains to be seen how the pretrial court and the MDL Panel will react to such changes by a trial court.

E. Summaries of Rule 13.9, Review of MDL Panel Orders, and Rule 13.10, MDL Panel Rules

Orders by the MDL Panel are appealable directly to the Texas Supreme Court. The Court, in original proceedings, may review orders by the MDL Panel, "including those granting or denying motions for transfer." *See id*. 13.9(a). Parties seeking the Court's review of MDL Panel orders should seek writs of mandamus (or other applicable extraordinary writs), pursuant to Rule of Appellate Procedure 52.

Orders and judgments by a trial court or pretrial court are appealable to "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." *See id.* 13.9(b).

Rule 13.10 and Government Code Section 74.163(b) empower the MDL Panel to create rules (in addition to RJA 13) that govern how the Panel operates. It remains to be seen whether the Panel will promulgate rules that significantly affect practitioners, pretrial courts and trial courts – as does RJA 13 – or whether the Panel will promulgate rules affecting only its own internal operations.

IV. THE FIRST MDL PANEL RULING: *UNION CARBIDE V. ADAMS*[5]

On December 30, 2003, the MDL Panel issued an order, with two dissents, in *Union Carbide v. Adams*, the first case seeking an MDL consolidation. The order and two dissents appear behind **Exhibit C** to this Paper.

Before discussing the order and two dissents, a little procedural background is necessary: On September 29, 2003, Union Carbide Corporation, a defendant in many asbestos cases throughout Texas, became the first party to request MDL consolidation under RJA 13. *See*

[5] I would like to thank Justice Mack Kidd, an MDL Panel member, and Stephen Tipps, lead counsel for Union Carbide Corporation in *Union Carbide v. Adams* and the related cases, for their considerable assistance to me when I wrote Section IV of this Paper. – James