

IN RE	§	JUDICIAL PANEL
	§	
ASBESTOS LITIGATION	§	ON MULTIDISTRICT
	§	
	§	LITIGATION

**PLAINTIFF OILFIELD WORKERS' RESPONSE TO UNION CARBIDE'S
RULE 13 MOTION FOR TRANSFER OF ASBESTOS-EXPOSURE CASES**

COME NOW Plaintiffs, as specifically identified on Attachment A by name and related case number, and file this Response to Union Carbide's Motion for Transfer of asbestos-exposure cases and for *de facto* consolidation of those matters.¹ Plaintiffs are 1,095 oilfield workers with one hundred sixty-six (166) cases filed against four defendants, including Union Carbide.²

I.

SUMMARY OF ARGUMENT

Over 1,100,000 oil and gas wells have been drilled in Texas. All of the Plaintiffs in the one hundred sixty-six (166) oilfield worker cases filed by this Firm are Texans who used Union Carbide's *pure asbestos* products while drilling many of those wells from the

¹ As a convenience to the Court, Plaintiffs have also submitted a Word and .pdf version of this pleading.

² All of the instant oilfield worker cases were filed *before* September 1, 2003.

mid-1960's until 1985. These men devoted their work life to the industry most clearly associated with the State of Texas – oil.

Their cases are different from the “traditional” asbestos cases that have been pending in this state for years. Union Carbide, however, makes no effort to distinguish them (or even acknowledge their existence), but instead seeks to delay and dilute its own liability by asking this Court to include them among the thousands of other cases with which they have virtually nothing in common.

Oilfield worker cases *are* different. First, they are not brought against a laundry list of defendants. Indeed, the “traditional” asbestos cases upon which Union Carbide bases its Motion has as many as seventy (70) defendants. Likewise, these “traditional” cases include virtually many, many different causes of action: negligence, premises liability, fraud, conspiracy, breach of warranty, etc. Oilfield cases, however, are *products liability cases brought against four parties* – the manufacturers and suppliers of a product that consisted of pure asbestos: Union Carbide Corporation and Phillips Petroleum Company, and their distributors, Messina Incorporated and Montello, Inc. Union Carbide’s statement that the oilfield cases are like “literally thousands of cases (that) are pending – and more are filed nearly every day,” is simply not true. Oilfield cases are distinct, focused, and in fact, very much *unlike* the “literally thousands of cases (that) are pending.”

Given the extraordinarily limited focus of oilfield worker cases, the factual and legal issues presented are similarly narrow as compared with “traditional” claims.

Indeed, the vast majority of the discovery and legal issues ordinarily associated with “traditional” asbestos cases are irrelevant to oilfield worker cases. There are no premises liability issues. There are no conspiracy or fraud issues. The unreasonably dangerous asbestos products in dispute in the oilfield worker cases were actually manufactured, packaged and shipped by Union Carbide for end-use as drilling mud additives. There is no “bulk supplier” defense.

Not surprisingly, oilfield worker Plaintiffs object to the prospect of being thrown among an assortment of unrelated cases simply because Plaintiffs’ Original Petition contains the word “asbestos.” After that word, the similarity ends.

II.

OILFIELD WORKER CASES ARE FACTUALLY DISSIMILAR FROM “TRADITIONAL” ASBESTOS CASES

Plaintiffs used pure asbestos products to help drill oil wells in Texas. They worked as roughnecks, derrick hands, roustabouts, drillers, tool pushers, all of which were involved in mixing drilling mud. Union Carbide products – specifically, Visbestos and Super-Visbestos – were used as drilling mud “additives” to alter the viscosity of the drilling mud. Akin to adding more flour to thicken cookie dough, these men were required to add pure asbestos to drilling mud to change its texture and thickness as part of their daily work.

To do so, these workers carried fifty (50) pound bags of Visbestos and Super-Visbestos, cut them open, and then dumped the asbestos fibers into a “mud-hopper” or mixing barrel. Usually, they did this in a small enclosed structure, called a mud-hut or mud-house, which was where the mud-hopper was located. There, the workers inhaled and ingested – that is, *swallowed* – large quantities of pure asbestos fibers as the dusty bags were opened and dumped into the hopper in this small room. Oilfield workers frequently describe the mud-hut as looking as if it was “snowing inside” while the asbestos drilling mud additives were being dumped or that they were working in a “fog.” They describe themselves as coming home in the evening appearing to be covered with flour.

III.

UNION CARBIDE HAS NOT MET ITS BURDEN OF PROOF UNDER RULE 11 AS IT RELATES TO OILFIELD WORKERS' CASES

Union Carbide asks this Supreme Court-appointed MDL Panel, to centralize – in effect, consolidate – these one hundred sixty-six (166) oilfield worker cases with thousands of other factually dissimilar asbestos cases before a single judge who, under Union Carbide’s suggested scheme, will issue discovery and other pretrial rulings on an array of “common” issues of fact and law. Union Carbide’s Rule 11 Motions, which are all identical, contain only conclusory statements about asbestos litigation in general. It makes no effort, whatsoever, to argue the necessity of adding oilfield worker cases to any

MDL or related administrative proceeding. Instead, Union Carbide presumably hopes that by simply intoning the mantra “asbestos,” that chant alone will be sufficient to meet its burden in this distinct category of cases.

Plaintiffs respectfully submit that one common word and a prayer (for relief) is not sufficient to meet Union Carbide’s burden. Oilfield worker cases are not “refinery” cases brought against a laundry list of peripheral defendants. They are not “gasket” cases brought against manufacturers of brake shoes by someone who may have inhaled brake dust. Indeed, there is virtually no factual commonality between oilfield worker cases and the thousands of these “traditional” asbestos cases. They *are* different.

A. Oilfield cases present virtually no common questions of fact or law relevant to traditional asbestos cases.

The authority granted by new Rule 11.3(a) may be exercised “*only if*” the cases to which a pretrial judge is to be assigned involve “material questions of fact and law in common with other cases pending in other courts in other counties.” In its Motion, however, Union Carbide fails to identify *even one* material question of fact or law that relates specifically to oilfield worker cases. While Union Carbide disingenuously asserts there are common questions of “general causation” related to its asbestos products, its own documents confirm that its asbestos drilling mud additives can and have caused asbestosis and cancer. Consequently, there are no questions of “General Causation” pertaining to these distinct Union Carbide products; the facts having already been established. With respect to the thousands of other cases with which it seeks to consolidate pre-trial matters,

Union Carbide suggests that the ultimate liability question – *i.e.*, was the product “unreasonably dangerous” – is sufficient to compel consolidation.

First and foremost, the thousands of other “traditional” asbestos cases pending in this state do not relate to the specific Union Carbide products at issue in the oilfield worker cases. Union Carbide cannot credibly allege “commonality” when the specific products at issue – Visbestos and Super-Visbestos – and their intended use, have nothing at all to do with refineries, brake shoes, or industrial insulation.

The undisputed facts concerning Union Carbide’s liability with respect to its asbestos mud-additive products are as follows:

- (1) In 1967, Union Carbide learned that the Calidria asbestos used in its drilling mud additives could be more hazardous than other forms of asbestos and could induce asbestosis within a shorter period of time than other asbestos products.
- (2) In 1967, Union Carbide knew that compliance with the threshold limit value did not ensure the safety of oilfield workers. Union Carbide chose to omit this warning from their bags of pure asbestos drilling mud additives used in the drilling industry.
- (3) In 1972, with the advent of new OSHA regulations, Union Carbide embarked on a strategy to protect its market share of the drilling mud additive market. With certain knowledge that its oilfield products consisted of raw asbestos, Union Carbide advised its salesmen to “keep customers on the defensive” if they raise any questions concerning the safe use of the product and to argue that the OSHA regulations were “irrational” and “premature.”
- (4) While on one hand describing the new OSHA regulations as “irrational,” Union Carbide embarked on the design and marketing of a new “dustless asbestos.” Per an internal Union Carbide memoranda dated July 24, 1972,

“a dustless asbestos will be important or possibly absolutely essential to maintain a position in the drilling mud market.”

- (5) In 1973, Union Carbide warned its own employees that its product, Calidria, could cause cancer. Here again, however, Union Carbide chose to exclude this warning from the asbestos drilling mud additives it sold for use in the drilling industry.
- (6) In 1974, Union Carbide performed air sampling tests at drilling rigs to determine the nature and extent of airborne transmission of asbestos from its mud-additive products. The tests revealed that “a thin layer of dust was present on every bag and as soon as the bag was moved some of it became airborne. This layer of dust problem became even more evident when one of the men loading the bags held the bag against his chest while waiting for an opportunity to set it down. When the bag was put down the man’s shirt was covered with dust.”
- (7) In 1975, Union Carbide was advised that the warnings on their bags of asbestos drilling mud additives were “obviously inadequate” and should include a warning about the risks of cancer. Union Carbide ignored this recommendation.
- (8) In 1976, Union Carbide was warned that they were going to “get nailed” in future litigation if they did not add the warning of cancer to their products. Again, Union Carbide chose not to warn.
- (9) Despite these facts and with this knowledge, Union Carbide continued to manufacture, package and distribute drilling mud additives that contained up to 100% pure asbestos which was used in a dusty, raw form in oil and gas drilling operations through 1985.

Moreover, Union Carbide has failed to demonstrate any common questions of law *vis-a-vis* the oilfield worker cases. Union Carbide does not have a “bulk supplier” defense in oilfield cases because its asbestos products were end-use products that were

manufactured, packaged, labeled and shipped by Union Carbide to be used as drilling mud additives.

B. “Traditional” asbestos discovery is not suitable for oilfield cases.

Oilfield worker cases are particularly *unsuitable* for aggregated pretrial management in the context of “traditional” asbestos cases. While Union Carbide would have the Court believe that all asbestos cases are alike, with common questions of fact and law, this clearly is not the case. First, “traditional” asbestos cases involve many defendants who are not parties in the oilfield worker cases. In fact, even the “traditional” asbestos cases Union Carbide seeks to consolidate have different party-defendants. For example, Alcoa Inc., one of the defendants whom Union Carbide presumably seeks to suck into its proposed MDL scheme, is not even a party in the oilfield worker cases.³ Because of the absence of commonality, Alcoa has filed a response to Union Carbide’s Motions in which it confesses confusion as to how the process can “assist in the administration of all asbestos-exposure cases currently on file in Texas.”⁴

Many Texas counties have entered “Standing Orders” that apply to “traditional” asbestos cases. These orders seek to streamline the filing process by establishing “a

³ Of course, neither are the 60-70 other defendants normally sued in the “traditional” asbestos cases listed as parties to the instant actions.

⁴ Alcoa correctly states, “[t]he reality is that there are hundreds of asbestos-exposure cases in Texas, thousands of plaintiffs, and over a hundred defendants. Because of the sheer number of cases and parties involved, the dynamics and mechanics of placing all these cases in one pretrial court needs to be carefully analyzed.”

procedure to resolve numerous pre-trial matters which the cases have in common, provide for an Asbestos Common Issues Judge (“Asbestos Judge”) and set the cases for trial in a coordinated manner.” Order in *In re: All Asbestos-Related Personal Injury or Death Cases Filed or To Be Filed in Dallas County, Texas* (Feb. 19, 1990). The Texas Supreme Court acknowledged and described the operation of the Harris County asbestos docket in *CSR, Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). Since 1990, at least eight other counties significantly impacted by asbestos litigation have adopted similar asbestos dockets and standing orders governing the conduct of asbestos litigation.⁵

The various standing orders governing asbestos litigation in Texas were invariably the product of negotiation between the plaintiffs’ bar and the defense bar, to generally follow the same template, and are from time to time amended as circumstances dictate. That the orders are not identical reflects the reality that each impacted county has different circumstances and, importantly, acknowledges the reality that there are cases that are

⁵ Texas Supreme Court has commented on the state of asbestos litigation in Texas: “Asbestos litigation, particularly asbestos products cases, has achieved maturity. Our state trial courts have gained considerable experience in managing the thousands of claims asserted in asbestos litigation. By and large, our courts appear to be coordinating pretrial discovery and scheduling trials in a satisfactory manner, given the paucity of appeals challenging trial settings of multiple claims.”

In re Ethyl Corp., 975 S.W.2d 606, 610-11 (Tex. 1998).

different from the “traditional” asbestos case.⁶ With respect to the oilfield worker cases, no defendant has requested application of a “Standing Order” in any case, even though forty-five (45) cancer cases are pending in Harris County, where a “Standing Order” has been in effect since 1990. This is because the parties realize that the cases do not have issues common to “traditional” asbestos cases. Instead, the parties have implicitly acknowledged that the cases are unique products liability cases that must be developed and defended on their own, at least until the filing of Union Carbide’s recent Motions.⁷

While the procedures in the “Standing Orders” are a reasonable attempt to reduce the amount of paper exchanged between the parties, the fact remains that the “Standing Orders” are simply not practical in many cases. This is particularly true in cases involving oilfield workers. Likewise, throwing the oilfield asbestos cases into an MDL mix with thousands of “traditional” asbestos cases would result in confusion and interminable delay. In short, it would unfairly prevent these oilfield workers from having their day in court.

⁶ For example, defendants’ standard interrogatories in many “Standing Order” jurisdictions inquire of the identity and location of each “plant” in which the plaintiff worked, or the “union” each belonged to. Oilfield workers, of course, did not work in “plants;” nor was there a “union” for them to join.

⁷ On October 27, 2003, two days before plaintiffs’ responses were due to be filed, Defendant Montello sent a letter related to one oilfield worker case pending in Jefferson County attempting to invoke part, but not all of Jefferson County’s Standing Order 1. It is still unclear how Standing Order 1 will be applied to any oilfield worker cases until the parties work out the procedures to be applied.

This Firm has filed one hundred sixty-six (166) “oilfield worker” cases in twenty (20) different Texas counties on behalf of one thousand ninety-five (1095) oilfield workers. Of those one hundred sixty-six (166) cases, seventy (70) cases were filed on behalf of individuals suffering from cancer. The largest number of Plaintiffs in a single case filed on behalf of individuals impaired with asbestosis is thirty-one (31); thus, the remaining ninety-five (95) cases on file contain an average of less than eleven (11) plaintiffs per case.

Union Carbide’s proposal offers no concrete advantages for litigants or the Texas courts in dealing with these cases. It does guarantee, however, an indirect and illegitimate benefit for Union Carbide: the prospect of an indefinite delay while alleged “common” issues in the litigation are identified and decided by a central court, the resolution of which will have nothing to do with “oilfield” related claims and will do nothing to advance justice. Such unnecessary delay would be unconscionable. As the Texas Supreme Court has observed,

The advent of mass torts necessitates that our courts devise a systematic means of resolving large numbers of cases that have issues in common. We must resolve such claims in a timely manner *while ensuring that justice is dispensed to each individual plaintiff and defendant in the process. The rights of the parties to a fair trial cannot be compromised in the name of judicial economy.*

In re Ethyl Corp., 975 S.W.2d 606, 610 (Tex. 1998) (emphasis added).

The Supreme Court in *In re Ethyl* has given Texas courts ample discretion in cases like the oilfield worker cases when determining whether consolidation will be fair and

impartial to all parties. To imply that the district courts of Texas cannot handle the oilfield worker cases, when not a single court has asked the MDL Panel to take the cases, is unreasonably presumptuous and unfair. These cases are being handled efficiently by the courts and professionally by counsel for the parties. As clearly stated by the Supreme Court, “[t]he rights of the parties to a fair trial cannot be compromised in the name of judicial economy.” *Id.* This is especially true when a movant for MDL consolidation, like Union Carbide, cannot reasonably articulate the judicial economy it seeks to invoke with such consolidation. So far, the only sure result would be mass confusion, as acknowledged by Union Carbide’s co-defendant, Alcoa, and inevitable delay. Surely this is not the kind of justice envisioned by the Texas Supreme Court in its *In re Ethyl* holding.

IV.

REFERRAL OF CASES FILED BEFORE SEPTEMBER 1, 2003 **IS UNCONSTITUTIONAL**

The omnibus tort reform statute enacted in the last regular session contained, for the first time, provisions for MDL litigation in Texas. *See* TEX. GOV’T CODE §§ 74.161, *et seq.* The new MDL statute expressly applies “only to an action filed on or after the effective date,” which is September 1, 2003, for the MDL provisions. *See* Acts 2003, 78th Leg., ch. 204, § 23.02 . The tort reform statute also modified Section 74.024 of the Texas Government Code to direct the Texas Supreme Court to consider the adoption of rules for “transfer of related cases for consolidated or coordinated pretrial proceedings.” *See* TEX.

GOV'T CODE § 74.024(c)(10). On August 23, 2003, the Texas Supreme Court issued new MDL rules, effective in all cases filed on or after September 1, 2003. *See In the Supreme Court of Texas*, Misc. Docket No. 03-9145.

Despite the Legislature's stated intent that the new MDL provisions apply only to cases filed on or after September 1, 2003, Union Carbide frankly admits that its motion is designed to force previously pending cases into coordinated proceedings under the new MDL rule. To accomplish this result, Union Carbide attempts to use Rule 11 of the Texas Rules of Judicial Administration. Union Carbide's scheme requires two steps: first, consolidation under Rule 11 of allegedly related cases within a single judicial administrative region; then two, mandatory "consultation" of the Rule 11 pretrial judges with a single judge appointed under Rule 13, the new MDL rule for post-September 1 cases.

Union Carbide's attempt at a facile end-run around the Legislature's intention that MDL proceedings be restricted to new cases should be denied for at least two equally compelling reasons. First, the attempt is illegal because, for cases filed before September 1, 2003, the law does not authorize coordinated proceedings outside of the county of venue. Second, the attempt is inequitable and contrary to justice because it is a dilatory tactic intended to deny plaintiffs – like oilfield workers – their day in court.

A. Cases filed before September 1, 2003, cannot be consolidated for pretrial proceedings outside the county in which they are pending.

As Union Carbide notes in its Motions, Rule 11 was very infrequently used, probably because there is no authority authorizing the consolidation of cases filed before September 1, 2003, for pretrial proceedings with cases pending in other counties. *See In re Beverly Enterprises-Texas, Inc.*, 1999 WL 569001, No. 01-99-00860-CV (Tex. App. – Houston [1st Dist.] Aug. 4, 1999) (orig. proceeding) (not designated for publication) (“ . . . no authority . . . allow(s) a district judge in one county to consolidate a case in another county”). To the contrary, the case law uniformly rejected such attempts. For example, in *Flores v. Peschel*, 927 S.W.2d 209, 213 (Tex. App. – Corpus Christi 1996) (orig. proceeding), the Corpus Christi Court of Appeals held, “[a]bsent specific authority, a trial court in one county has no power to order a matter pending before the trial court in another county transferred out of the latter court and into the former.” The Texas Court of Criminal Appeals held in *Enriquez v. State*, 429 S.W.2d 141, 142 (Tex. Crim. App. 1968) that the trial court had properly refused the defendant’s motion to consolidate the case with another against him pending in a different county because “the court in the instant trial had no jurisdiction to try the murder case committed in the other county, because no exceptions to the general venue statute here exist.” The Eastland Court of Appeals reversed a judgment entered after a trial held in Taylor County where the case was pending in Jones County, explaining that “the statute itself does not authorize the district judge to try a case in a different county from that in which the district court in which the

suit is pending is authorized to sit.” *Isbill v. Stovall*, 92 S.W.2d 1067, 1072 (Tex. Civ. App. – Eastland 1936, no writ).

Another line of cases discusses a related prohibition, this one constitutional: Article 5, Section 7 of the Texas Constitution mandates that proceedings by a district court “shall” be held in the county seat of the county in which the case is pending, “except as otherwise provided by law.” TEX. CONST. art. V, § 7. The recent case from the Houston Court of Appeals, *DeShazo v. Hall*, 963 S.W.2d 958 (Tex. App. – Houston [14th Dist.] 1998, no pet.) illustrates the point. In *DeShazo*, a civil lawsuit was tried in Harris County. *Id.* at 959. The trial judge, who was also acting as a visiting judge in Galveston County, conducted a hearing on competing motions to enter judgment while sitting in Galveston County. *Id.* The appellate court dismissed the ensuing appeal for lack of jurisdiction, holding that the underlying judgment was “void” because the proceedings held outside of Harris County were held to be “fundamentally defective.” *Id.* at 958; 960. Several other appellate decisions have applied the same principle. See *Dal-Briar Corp. v. Tri-Angl Equities, Inc.*, 22 S.W.3d 520, 523 (Tex. App. – El Paso 2000, no pet.) (holding that orders stemming from a hearing held outside any county included in the judicial district where the case was pending were void because they violated Article V, § 7); *Mellon Service Co. v. Touche Ross & Co.*, 946 S.W.2d 862, 865-67 (Tex. App. – Houston [14th Dist.] 1997, no writ) (observing that Article V, section 7 of the Texas Constitution requires district courts to conduct proceedings at the county seat of the county in which

the case is pending). Accordingly, proceedings held outside the county where a case filed before September 1, 2003, is pending are “fundamentally defective” and “void” unless an exception provided by law applies.⁸

Recognizing this limitation on a court’s ability to conduct pretrial proceedings outside the county where the case is pending, the Legislature passed, and the governor signed, House Bill 3386. H.B. 3386 amended Section 74.024(c) of the Texas Government Code to expand the Texas Supreme Court’s rule-making authority to include “the conducting of proceedings under Rule 11, Rules of Judicial Administration, by a district court outside the county in which the case is pending.” *See* Acts 2003, 78th Leg., ch. 747, *amending* TEX. GOV’T CODE § 74.024(c)(10). Because “the legislature is never presumed to do a useless act,” *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981), H.B. 3386 clearly must be interpreted as the expansion of the Texas Supreme Court’s rule-making authority into an area previously denied.⁹ This expanded authority, however, “applies only to a suit filed on or after September 1, 2003;” suits filed before then are still governed by the pre-September 1 law. Acts 2003, 78th Leg., ch. 747, § 2.

⁸ The only such exception prior to September 1, 2003, is Section 24.017 of the Texas Government Code, allowing judges in multi-county districts to sit in any county included in the district. *See Howell v. Mauzy*, 899 S.W.2d 690, 699-700 (Tex. App. – Austin 1994, writ denied).

⁹ This conclusion is further buttressed by the fact that § 74.024 does not address transfer or consolidation, whereas the rulemaking authority granted to local district and statutory county courts for local, countywide rules of administration specifically includes “[r]ules relating to the transfer of cases or proceedings.” *See* TEX. GOV’T CODE § 74.093.

To the extent Union Carbide’s motion purports to request that any proceedings in this case be conducted outside of the county where such action is pending, such relief would be unconstitutional, outside the court’s jurisdiction, and void. Accordingly, Union Carbide’s Motions must be denied.

CONCLUSION

Neither Plaintiffs – nor their counsel – are naive. They recognize the enormous pressure and complexity of dealing with the “asbestos issue” in this state. Recent months have witnessed failed attempts both in the Texas legislature and United States Congress to fashion a “remedy” for either perceived or real problems in this arena. Not surprisingly, Union Carbide now seeks to have this panel intervene. If this panel chooses to do so, which it should not, Plaintiffs respectfully request that the panel members acknowledge the very real distinction between the “thousands and thousands” of asbestos cases about which Union Carbide complains, and the cases at hand. These deserving Texans should not be thrown in the same basket as “traditional” asbestos cases. It makes no sense procedurally, and would be wrong.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that Defendant Union Carbide Corporation’s Motion for Assignment of Pretrial Judge and for *de facto* consolidation be in all things DENIED, or and for such other and further separate relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 29th day of October, 2003, a true and correct copy of the above and foregoing instrument was duly served upon all parties or their counsel of record by hand delivery or facsimile, return receipt requested, or by certified mail, return receipt requested.

Ronald G. Franklin