

NO. 03-0895

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IN THE  
JUDICIAL PANEL  
ON MULTIDISTRICT LITIGATION

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UNION CARBIDE CORPORATION,

Movant,

vs.

AUDREY AMELIA ADAMS et al.,

Respondents.

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**UNION CARBIDE'S CONSOLIDATED REPLY  
IN SUPPORT OF MOTION FOR TRANSFER**

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## ARGUMENT

The plaintiffs' response<sup>1</sup> consists largely of unsupported allegations that if the presiding judges of the state's administrative judicial regions assign a pretrial judge or judges to pre-September 1, 2003 asbestos cases under Rule 11, the resulting delay will deprive certain plaintiffs of their day in court. While Union Carbide disagrees with the plaintiffs' predictions—and will address them because the plaintiffs did so—the issue before this Panel is a different one: whether post-September 1, 2003 cases should be transferred to one pretrial judge under the Texas MDL statute and Rule 13 for coordinated pretrial proceedings. Union Carbide seeks such coordination because (1) it would be more convenient for the parties and the witnesses involved in asbestos litigation because they would not be subject to expensive duplicative discovery and repeated consideration of common issues, (2) efficiency would be achieved because duplicative discovery, potentially inconsistent rulings, and repetitive motions could be eliminated, and (3) justice would be served by having a single judge who could coordinate discovery and scheduling and make consistent pretrial rulings on common issues that would apply to large numbers of cases and shape those cases for further proceedings.

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<sup>1</sup> A consolidated response to Union Carbide's motion has been filed by Waters & Kraus (W&K) and other firms, some of whom represent plaintiffs whose suits are the subject of the motion and some of whom represent plaintiffs whose suits are subject to Union Carbide's motions under Rule 11. An additional response was filed by Franklin, Cardwell & Jones (FCJ), who represents certain oilfield workers whose suits are subject only to the Rule 11 motions. Union Carbide addresses both responses in this consolidated reply.

**I. These related cases—as well as cases of the type filed by the FCJ oilfield workers—involve common questions of fact.**

Transfer for coordinated pretrial proceedings is proper so long as the related cases involve a common question of fact and the transfer will (1) be for the convenience of the parties and witnesses and (2) promote the just and efficient conduct of the actions. TEX. GOV'T CODE ANN. § 74.162.<sup>2</sup> Thus, a prerequisite for transferring cases for coordinated proceedings under the Texas MDL statute is that those cases involve “one or more common questions of fact.” *Id.*; *see also* TEX. R. JUD. ADMIN. 13.3(l). One respected commentator has noted that under the federal MDL statute—after which the Texas MDL statute is patterned, *compare* TEX. GOV'T CODE ANN. § 74.162 *with* 28 U.S.C. § 1407—the common-question-of-fact prerequisite is “easily satisfied.” 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 112.04[1][a] (3d ed. 2003).<sup>3</sup>

The cases for which Union Carbide has requested transfer and coordination involve many common fact issues, the plaintiffs' protestations notwithstanding. The federal MDL panel has held repeatedly that common fact questions exist in asbestos litigation. *See In re Asbestos Prods. Liab. Litig. (VI)*, 771 F. Supp. 415, 418 (J.P.M.L. 1991) (holding common questions of fact exist and noting that even when panel had

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<sup>2</sup> Contrary to the plaintiffs' suggestion in their response, “essential need” is not the standard. (W&K Resp. at 5.) When the legislature wants to require a showing of “essential need,” it knows how to do so. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a)(3); *cf. Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598, 604 (Tex. 1999) (recognizing that burden to establish “essential need” is “very high”).

<sup>3</sup> When a state law is modeled after federal law, Texas courts often look to federal law as persuasive authority in interpreting that state law. *See, e.g., Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000).

previously denied transfer, it had recognized the existence of common questions of fact).<sup>4</sup> Asbestos plaintiffs’ lawyers themselves—including those now opposing this MDL—often join hundreds of plaintiffs with disparate alleged exposures in one lawsuit based on pleadings that these different plaintiffs’ claims “involve common questions of law *and fact*.” (See, e.g., UCC App. 2A, ¶ 1; 2B, ¶ 108.)<sup>5</sup>

A brief review of the petitions in the cases before the Panel demonstrates many common fact issues.<sup>6</sup> Each petition alleges injuries resulting from exposure to asbestos and asserts causes of action for negligence, strict products liability, and conspiracy. (*Id.* 1A, ¶¶ 54, 57-74; 1B, ¶¶ 26-27, 31-38, 56-57, 71-74; 1C, Parts III, IV, VI & VII.) Each alleges, among other things, that the defendants failed to warn, misrepresented the dangers of asbestos, concealed scientific and medical data relating to asbestos exposure, and conspired to disseminate incorrect information. (*Id.* 1A, ¶¶ 75-92; 1B, ¶¶ 39-45, 58-62, 71-74; 1C, Parts IV, V & VII.) *Cf. In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 170 F. Supp. 2d 1356, 1358 (J.P.M.L. 2001)

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<sup>4</sup> The plaintiffs go to great lengths to try to distinguish the federal MDL panel’s decision to transfer federal asbestos cases for coordinated pretrial proceedings. (W&K Resp. at 5-6.) For example, the plaintiffs note that federal judges asked for the federal MDL transfer. But while the judges’ request was the impetus considering transfer, the panel analyzed the factors supporting transfer independently. And while many plaintiffs did support MDL treatment, plaintiffs in 5,200 cases opposed it. *In re Asbestos Prods. Liab. Litig. (VI)*, 771 F. Supp. at 416. Moreover, the mere fact that here plaintiffs oppose MDL treatment is not dispositive in any way. See, e.g., *In re Dow Chem. Co. “Sarabond” Prods. Liab. Litig.*, 650 F. Supp. 187, 188 (J.P.M.L. 1986) (granting MDL motion even though all plaintiffs and all but two defendants opposed centralization).

<sup>5</sup> In the *Adams* case, which is one of the related cases that is subject to Union Carbide’s motion, the petition alleges that claims of two plaintiffs living several states apart “involve common questions . . . of fact.” (UCC App. 1A, ¶ 51.)

<sup>6</sup> Union Carbide moved for transfer with respect to five cases. One has settled, and another has been nonsuited by plaintiffs. Thus, the *Adams*, *Capelli*, and *Tittle* lawsuits remain. Parts of these petitions contain nearly identical language.

(acknowledging common questions of fact arising out of allegations that defendants misrepresented health risks); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 844 F. Supp. 1553, 1554 (J.P.M.L. 1994) (listing as common fact issues product defect and failure to warn and adequately test); *In re Dow Chem. Co. "Sarabond" Prods. Liab. Litig.*, 650 F. Supp. at 188 (listing defendant's alleged knowledge of product's injurious effects as common fact issue).

Moreover, there are a plethora of common fact issues related to all asbestos litigation, several of which Union Carbide identified in its motion for transfer. The plaintiffs argue—incorrectly—that these issues have been “resolved.” (W&K Resp. at 16-17.) To the contrary, these facts are at issue in every asbestos case of which Union Carbide is aware. For example, in a failure to warn case, the sufficiency of each defendant's warning will always be an issue. Although in many (but not necessarily all) cases it may be a jury issue, common discovery still exists regarding that defendant's warnings, as well as that defendant's state of knowledge and the state of scientific knowledge in the industry. Similarly, because the plaintiffs allege negligence in every case, there will be common written and oral discovery on the defendants' practices and procedures, including safety precautions taken. And while the relevant time periods may vary, virtually all of the plaintiffs' counsel represent multiple—if not hundreds or thousands—of asbestos plaintiffs who allege exposure during common time periods. Thus, the plaintiffs cannot claim that discovery on these issues would not be common.

Moreover, despite the plaintiffs' contentions, general causation is a common question. First, the plaintiffs simply are incorrect that all causation experts testify only with regard to a particular plaintiff's medical history. Many experts testify generally as to the effects of asbestos exposure—including Dr. Brody and Dr. Longo. In addition, there is certainly an unresolved issue regarding the admissibility of expert testimony about the effects of exposure to certain types of asbestos. (*See infra* Part III.A.2.) Finally, the plaintiffs mischaracterize Justice Baker's concurring opinion regarding general causation in *Bernal*, 22 S.W.3d at 440 (Baker, J., concurring). In *Bernal*, Justice Baker addressed the propriety of general and specific causation's being tried by separate *juries*. *Id.* He never rejected the proposition that general causation can be a common issue in an MDL, which involves pretrial proceedings only. Indeed, this argument reflects a fundamental problem with much of the plaintiffs' briefing—they rely on class certification and trial consolidation cases, for which the commonality concern is very different.<sup>7</sup>

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<sup>7</sup> Class actions are concerned with the ability to adjudicate or settle issues on a representative basis and apply those findings to absent class members. In such a situation, there is little room for dealing with individual issues. *See Bernal*, 22 S.W.3d at 434 (expressing fear of certifying class when “individual issues would overwhelm or confuse a jury”). Indeed, one commentator has noted that the unavailability of class action treatment for mass torts such as asbestos litigation militates in favor of utilizing MDL treatment instead as an “important device in achieving lower transaction costs in such cases.” 17 MOORE, *supra*, § 112.04[1][e]. Similarly, consolidation of cases for trial carries the risk of juror confusion with regard to any individual issues. For that reason, the Texas Supreme Court has cautioned against consolidation of too many asbestos claims *for trial*. *See In re Ethyl Corp.*, 975 S.W.2d 606, 614 (Tex. 1998) (discussing fear that consolidation of claims for trial will “overwhelm or confuse the jury”). The oppositions to joinder or consolidation filed by Union Carbide—on which the plaintiffs rely—are based on the same concerns regarding trial. (*See* W&K App. J, at 2, 11 (arguing that differences in plaintiffs' claims “will create too great a risk of confusion and prejudice if they proceed to trial together” and discussing the “high risk of juror confusion”).

Finally, the oilfield workers represented by FCJ—who are plaintiffs in asbestos litigation not subject to the motion to transfer before the Panel—argue that their cases have no fact issues in common with the asbestos cases at issue here. But like plaintiffs in so-called “traditional” asbestos cases, the FCJ plaintiffs are alleging exposure to asbestos fibers.<sup>8</sup> They assert causes of action for negligence and strict products liability. (*E.g.*, UCC App. 3A, ¶10; 3B, ¶¶ 9, 11.)<sup>9</sup> The evidence involved in the FCJ plaintiffs’ claims is largely the same as that involved in other asbestos cases. (*See* UCC App. 4.) Drilling mud is just another product through which plaintiffs allege to have been exposed to asbestos.

The FCJ plaintiffs challenge the existence of common questions by asserting a laundry list of facts that they allege to be “undisputed.” (FCJ Resp. at 6-7.)<sup>10</sup> But ironically, they have taken these allegedly undisputed facts—on which they have put their own spin—from documents relied upon by plaintiffs in “traditional” asbestos cases. Most of these documents are not specific to drilling mud. Moreover, the admissibility of

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<sup>8</sup> Union Carbide was not a manufacturer of asbestos products but rather mined raw asbestos that was then used in various products, including drilling mud. The FCJ plaintiffs allege that they were exposed to Union Carbide’s raw asbestos used in mixing drilling mud.

<sup>9</sup> Even if some of the legal theories involved were different, that would be no bar to transfer. *See In re Air West, Inc. Sec. Litig.*, 384 F. Supp. 609, 611 (J.P.M.L. 1974); *see also In re Data Gen. Corp. Antitrust Litig.*, 470 F. Supp. 855, 858 (J.P.M.L. 1979) (involving lawsuit with different claims and relating to different products and technology, but granting MDL motion because of common fact questions relating to marketing, licensing, and principles of computer technology).

<sup>10</sup> Of course, Union Carbide disagrees with the FCJ plaintiffs’ claim that these facts are undisputed. But it is not the Panel’s job to pass on the merits of the claims or to prejudge how a pretrial judge will structure coordinated proceedings. *See In re Asbestos Prods. Liab. Litig. (VI)*, 771 F. Supp. at 421 (“The Panel has neither the power nor the disposition to direct the transferee court in the exercise of its powers and discretion in pretrial proceedings.”). Suffice it to say, while the FCJ plaintiffs may allege that whether Union Carbide’s products cause asbestosis and cancer is undisputed, there is a substantial question in that regard.

these documents has been a contested issue in both “drilling mud” cases and “traditional” cases. (See UCC App. 4-5.) Thus, the FCJ plaintiffs’ own response demonstrates that they rely almost solely on facts that are common with other asbestos cases. Accordingly, common questions of fact are present in all cases alleging asbestos exposure, including those brought by the FCJ plaintiffs.

**II. Coordinated pretrial proceedings in all related cases would be more convenient for parties and witnesses.**

Transfer of related cases for coordinated pretrial proceedings also requires a finding that the transfer will “be for the convenience of the parties and witnesses.” TEX. GOV’T CODE ANN. § 74.162(1); *see also* TEX. R. JUD. ADMIN. 13.3(l). As the federal MDL panel has held, one of the purposes of coordinated pretrial proceedings “is to streamline the efforts of the parties and witnesses, their counsel and the judiciary in order to effectuate an overall savings of cost and a minimum of inconvenience to all concerned.” *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 507 (J.P.M.L. 1976). Coordinating pretrial proceedings—especially discovery—before a single pretrial judge would be more convenient for both plaintiffs and defendants (and their witnesses) than the current system, which requires parties to deal with duplicative discovery and to file repetitive motions in multiple courts all over the state. Certainly coordinated proceedings would reduce the transaction costs, including attorneys’ fees, attendant with this type of litigation. *See In re Asbestos Prods. Liab. Litig. (VI)*, 771 F. Supp. at 422 (noting that streamlining of efforts by parties and witnesses and uniform

case management approach would “lead to sizable reductions in transaction costs (and especially in attorneys’ fees)”).

Most cases under the federal MDL statute addressing the convenience factor involve parties complaining that they will have to participate in pretrial proceedings far from the location in which their case is pending. *See, e.g., In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. at 506 (rejecting Alaska plaintiffs’ concern that transfer would impose financial hardship and noting that there is little need for parties and witnesses to travel to transferee district); *see also In re Swine Flu Immunization Prods. Liab. Litig.*, 464 F. Supp. 949, 954 (J.P.M.L. 1979). These plaintiffs have not even raised that concern. Moreover, the federal cases uniformly have dealt with this argument by looking to the overall convenience and efficiencies for all parties. *See In re Library Editions of Children’s Books*, 297 F. Supp. 385, 386 (J.P.M.L. 1968) (“Of course it is to the interest of each plaintiff to have all of the proceedings in *his* suit handled in *his* district. But the Panel must weigh the interests of all the plaintiffs and all the defendants, and must consider multiple litigation as a whole in the light of the purposes of the law.”); *accord In re Antibiotic Drugs*, 303 F. Supp. 1056, 1057 (J.P.M.L. 1969). Moreover, any inconvenience can be ameliorated by the appointment of liaison counsel to take the lead for aligned parties on common matters. *See* TEX. R. JUD. ADMIN. 13.6(c)(7) (providing that pretrial judge may appoint organizing or liaison counsel); *see also* MANUAL FOR COMPLEX LITIGATION THIRD § 20.22 (2003).<sup>11</sup>

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<sup>11</sup> The FCJ plaintiffs appear to suggest that because there are defendants in other asbestos cases that are not involved in their cases, coordinated pretrial proceedings may not be as convenient for them. But it

**III. Efficiency and justice would be served by coordinated pretrial proceedings in all related cases.**

Transfer of related cases for coordinated pretrial proceedings also must “promote the just and efficient conduct of the actions.” TEX. GOV’T CODE ANN. § 74.162(2); *see also* TEX. R. JUD. ADMIN. 13.3(l). Transfer of asbestos cases would accomplish just that.

**A. As even the plaintiffs recognize, coordinated pretrial proceedings achieve efficiencies.**

The most commonly cited factors in support of the judicial efficiency and economy achieved by MDL treatment are the ability “to avoid duplication of discovery, prevent inconsistent pretrial rulings and, conserve the resources of the parties, their counsel and the judiciary.” 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3863, at 175 (2d ed. Supp. 2003); *see also* 17 MOORE, *supra*, § 112-04[1][d] (“Efficient judicial administration can be achieved by conducting the pretrial proceedings in the related cases in one forum, where the duplication of discovery that would result from trying the actions separately can be avoided. One judge also may issue a single ruling on pretrial matters, thus avoiding repeated rulings on the same issue and the possibility of conflicting rulings issued by several judges.”). Coordination of pretrial proceedings in these related asbestos cases would further each of these goals.

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is well-established that parties do not have to participate in pretrial proceedings on issues unrelated to their claims. *See, e.g., In re Vernitron Sec. Litig.*, 469 F. Supp. 297, 299 (J.P.M.L. 1979); *In re Capital Underwriters, Inc. Sec. Litig.*, 464 F. Supp. 955, 960 (J.P.M.L. 1979); *In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. 969, 974 (J.P.M.L. 1979). Moreover, while the Franklin, Cardwell & Jones firm has chosen to sue only a few defendants, most “drilling mud” cases involve many defendants. (*E.g.*, UCC App. 3C-3D.)

**1. Coordinated pretrial proceedings would reduce duplicative discovery.**

A primary objective of multidistrict litigation is to avoid or minimize conflict or duplication in discovery and other pretrial procedures in related cases by providing centralized management under court supervision. *Hearings on H.B. 4 Before Senate Comm. on State Affairs, 78th Leg., R.S. (May 7, 2003)*;<sup>12</sup> accord H.R. REP. No. 1130 (1968), reprinted in 1968 U.S.C.C.A.N. 1898 (discussing federal MDL statute). Indeed, the avoidance of duplicative discovery can be a primary reason for coordinated pretrial proceedings. See, e.g., *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 196 F. Supp. 2d 1375, 1376 (J.P.M.L. 2002) (noting that cases involved a significant number of common events, defendants, and/or witnesses and that centralization was necessary to eliminate duplicative discovery).

Currently, defendants are faced with answering discovery in thousands of cases. Although some counties have standing orders that create master discovery files, many more counties do not. As a result, Union Carbide must answer duplicative discovery in each standing order county and in each case pending in counties without standing orders. Indeed, several law firms serve Union Carbide with identical requests for production in case after case (each of which, of course, Union Carbide must answer). (See UCC App. 6.) See *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. at 506 (noting, in granting MDL motion, that defendants had already been subjected to duplicative discovery requests).

More importantly, fact and expert witnesses (whose time is, of course, limited) are subject to deposition over and over again. *See In re Oil Spill by “Amoco Cadiz” Off Coast of France on Mar. 16, 1978*, 471 F. Supp. 473, 477-78 (J.P.M.L. 1979) (noting that party had listed same witnesses and produced same documents in related cases, thus showing the need for coordination to reduce duplicative discovery). Because of the latency period for asbestos-related illnesses, many of the fact witnesses must testify about facts that occurred decades ago. As a result, many are elderly. But currently there is no mechanism—other than by agreement—to take depositions of these witnesses for large groups of cases.<sup>13</sup>

In addition, many experts’ depositions are taken over and over again as well. Plaintiffs contend that experts testify as to individual plaintiffs’ medical conditions. But while some pathologists provide case-specific testimony, plaintiffs’ lawyers retain several experts who give general testimony unrelated to the facts of a specific case. For example, Dr. Brody testifies about how asbestos fibers affect the lung, not about any particular plaintiff. (*See* UCC App. 8E;<sup>14</sup> *accord id.* 8A-8D.) Dr. Longo testifies

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<sup>12</sup> Transcripts of legislative hearings can be found at [www.house.state.tx.us/media/chamber/78.htm](http://www.house.state.tx.us/media/chamber/78.htm) and [www.senate.state.tx.us/75r/Senate/AVarch.htm](http://www.senate.state.tx.us/75r/Senate/AVarch.htm).

<sup>13</sup> For example, John Myers, who was in charge of Union Carbide’s Calidria asbestos business and is currently 74 years old, is a witness in virtually every Union Carbide asbestos case. He testifies generally about Union Carbide’s Calidria asbestos business. Union Carbide has obtained an agreement with Waters & Kraus that Myers’s deposition be taken once for use in all cases. But, in order to do so, Union Carbide had to file deposition cross-notices in cases across the state, which Waters & Kraus moved to quash and on which hearings were held. (*See* UCC App. 7.) An agreement ultimately was reached, but not after a tremendous amount of attorney time was spent on both sides. This type of procedure is far less efficient than a single pretrial judge’s ability to streamline this type of duplicative discovery.

<sup>14</sup> Q. . . . [J]ust so we can be clear, you weren’t provided any medical documentation involving a plaintiff named Marty Mitchell?

generally regarding how asbestos particles are ejected into the atmosphere. (*Id.* 8F.<sup>15</sup>) Neither witness examines individual plaintiffs or even their medical records.

A pretrial judge could streamline procedures to eliminate this duplicative discovery. Indeed, the pretrial judge would have broad discretion in formulating procedures to manage discovery. *See* TEX. R. JUD. ADMIN. 13.6(c)(4), (5), (9).

## **2. Coordinated pretrial proceedings would prevent inconsistent rulings.**

Another significant advantage of a single pretrial judge is the elimination of inconsistent rulings. *E.g., In re Plumbing Fixture Cases*, 298 F. Supp. 484, 490-91 (J.P.M.L. 1968) (stating that the remedial aim of the federal MDL statute “is to eliminate the potential for conflicting contemporaneous pretrial rulings”); *see also Hearings on H.B. 4 Before Senate Comm. on State Affairs*, 78th Leg., R.S. (May 7, 2003). Currently, hundreds of trial judges across the state are being asked to rule on identical or similar issues.<sup>16</sup> The potential for inconsistent rulings is necessarily great.

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A. Okay. Let me tell you now, and I think everybody knows what I’m going to say. I have no specific information on any patient, any case, any client. I have no information on any products of any kind. I am not going to give any kind of testimony specific to named individuals or any products.

(UCC App. 8E at 36.)

<sup>15</sup> Q. And you have not formed any specific opinion about any specific defendants or their conduct or lack thereof in this particular case, have you?

A. I have not.

(UCC App. 8F at 74.)

<sup>16</sup> The plaintiffs argue that the panel should ignore these common legal issues because only common fact issues are relevant. (W&K Resp. at 20.) That is wholly incorrect. While only a common fact issue is a prerequisite for MDL treatment, the presence of common legal issues on which repeated rulings must be made can be a significant factor in assessing the efficiencies that would be gained from coordination of those rulings.

Indeed, Union Carbide is aware of several inconsistent rulings. For example, one of the issues that arises repeatedly concerns the reliability of testimony regarding the tendencies of certain types of asbestos to cause disease. Several defendants have filed *Robinson* motions seeking to exclude such testimony. While the plaintiffs attach orders indicating that some have been denied, at least one has been granted. (*Compare* UCC App. 9 *with* W&K App. E.)

Rulings also have been inconsistent on motions to dismiss based on forum non conveniens for plaintiffs who have absolutely no relationship to the State of Texas.<sup>17</sup> While several such motions have been denied, some have been granted. (*Compare* UCC App. 10A-C *with id.* 10D-E.) Likewise, Union Carbide may well be subject to inconsistent rulings with regard to its privileged documents. While one judge ruled that several documents were not privileged, the First Court of Appeals has stayed that ruling, and a mandamus proceeding is pending. (UCC App. 11A-B.) However, some of the same documents were at issue in another case, and that judge admitted them at trial over Union Carbide's objections.<sup>18</sup> (*Id.* 11C.) The privileged nature of documents is an issue

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<sup>17</sup> The plaintiffs argue that forum non conveniens motions are fact-specific and cannot be determined globally. (W&K Resp. at 16.) However, for a large number of plaintiffs who have never set foot in Texas—much less been exposed to asbestos in Texas—the facts often are quite uniform. Indeed, the federal courts have been able to resolve forum non conveniens motions in a group fashion in MDL proceedings. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1469, 1471 (N.D. Ala. 1995) (ruling by federal MDL pretrial court on forum non conveniens motions as to groups of plaintiffs). Moreover, there are legal issues that need to be determined with regard to forum non conveniens, including whether a court is prevented from staying or dismissing a claim based on an act or omission of a nonparty that occurred within the state. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(f).

<sup>18</sup> Moreover, because the issue arose during the middle of trial, Union Carbide had little time to prepare its evidence and little time to seek mandamus relief. Although counsel considered the filing of a

on which a pretrial judge could easily rule globally and on which pretrial rulings would be beneficial. *See In re Asbestos Litig.*, 1992 WL 302025, at \*1 (Del. Super. Ct. 1992) (determining whether document was privileged).<sup>19</sup> Other inconsistent rulings include special exception rulings. (*See* UCC App. 12.)

A pretrial judge could rule once and for all on many, if not all, of these issues. Moreover, the pretrial judge's ruling on an issue in even one or a few cases would serve as guidance for future cases. (For example, once the pretrial judge ruled on special exceptions, the parties would have guidance as to pleadings requirements for future cases.) *Cf. In re Asbestos Litig.*, 1992 WL 310221, at \*2 (Del. Super. Ct. 1992) (granting motion of three asbestos defendants to compel a more detailed interrogatory response and ruling that sufficient answers must be given in future cases or else trial testimony would be limited). The plaintiffs cannot reasonably claim that efficiency would not result from the ability to obtain consistent, instead of inconsistent, rulings.

### **3. Coordinated pretrial proceedings would conserve the parties' resources by minimizing repetitive activities.**

As shown above, parties in asbestos litigation are forced to urge positions repeatedly before different judges. Even with regard to issues on which a party believes that it has a legitimate argument, but on which it has not yet prevailed, that party

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mandamus petition, shortly afterwards the jury returned a verdict favorable to Union Carbide. As a result, the case was not appealed.

<sup>19</sup> The plaintiffs argue that privilege rulings cannot be rendered globally. (W&K Resp. at 23.) But whether a document is privileged in the first place is clearly a global issue. In addition, to the extent that waiver is an issue, a pretrial judge could determine whether that issue is global. In reality, plaintiffs' counsel often share documents with one another rather than receiving them from defendants through traditional document production, so the facts regarding waiver often are uniform.

nevertheless must reurge the argument over and over in each case. The plaintiffs make much of their contention that Union Carbide has not yet been successful on certain issues. (See W&K Resp. at 20-23.) The plaintiffs' contention is partially incorrect, as shown by the inconsistent rulings described in the previous section. Moreover, just because a party has not yet succeeded on a particular motion does not mean that it is not forced to reurge that motion in every case, because the ruling by one trial judge is not precedential on any other trial judge. That is the problem with the current system: there is no mechanism for a ruling to be applied to other cases.<sup>20</sup>

With coordinated MDL proceedings before a single pretrial judge, that judge could make common rulings applicable to every case pending in the MDL or to large groups of those cases. The certainty that would result from such rulings would shape the cases for further pretrial proceedings and for trial. For example, the pretrial judge could make rulings that would govern pleading requirements or the conduct of discovery. TEX. R. JUD. ADMIN. 13.6(c)(1), (4), (9); see *In re Asbestos Litig.*, 492 A.2d 256, 259 (Del. Super. Ct. 1985) (ruling as to conduct of deposition and stating that ruling had “full force and effect in all matters relating to pending Delaware asbestos cases”). The pretrial judge could rule on motions in limine, privilege issues, expert qualifications and reliability, and the admissibility of evidence. TEX. R. JUD. ADMIN. 13.6(b); see *In re Eighth Judicial Dist. Asbestos Litig.*, 576 N.Y.S.2d 757, 758-60 (N.Y. Sup. Ct. 1991) (ruling on admissibility of evidence). Whether a party was successful or unsuccessful,

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<sup>20</sup> The only way to receive a ruling that will be applied to other cases is to take the issue up on appeal. But because so many asbestos cases settle, and because Union Carbide often wins the few cases

valuable (and expensive) attorney time would not be taken up arguing these issues over and over.

For example, Union Carbide maintains a document repository containing documents relevant to its Calidria asbestos business. Texas law expressly permits this. *See Steenbergen v. Ford Motor Co.*, 814 S.W.2d 755, 758-59 (Tex. App.—Dallas 1991, writ denied). Nevertheless, Union Carbide finds itself often in the position of defending its right to use a repository, whether and what type of index it must provide, and other issues related to the repository. (*See* UCC App. 13.) An enormous amount of resources is expended. If these issues could be aired once, those resources would be conserved.

The plaintiffs apparently question the value of this conservation of resources, arguing that Union Carbide has filed only one motion in the pending federal asbestos MDL, which it later withdrew (without prejudice).<sup>21</sup> (*See* W&K App. B.) The plaintiffs also contend that Union Carbide has not taken advantage of coordinated pretrial proceedings in other states, but that is incorrect. Union Carbide has filed motions in such coordinated proceedings. (UCC App. 14.) And regardless of whether Union Carbide filed its own motion on any issue, it—like other parties—has benefited from coordinated discovery and from consistent rulings on issues raised by other defendants. Moreover,

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that go to trial, the opportunities for appellate review of these issues have been few.

<sup>21</sup> The motion involved whether a supplier of raw materials has a duty to warn the ultimate user or whether the supplier may rely on a sophisticated intermediary to warn. The plaintiffs assert that the issue is fact-specific, but while the sufficiency of a warning is a fact issue, the duty to warn is generally a question of law. *See, e.g., Humble Sand & Gravel, Inc. v. Gomez*, 48 S.W.3d 487, 500 (Tex. App.—Texarkana 2001, pet. granted). And while there may be some variations on this issue among cases, the issue certainly could be resolved for a large group of cases. Moreover, while the FCJ plaintiffs allege that

although the federal asbestos MDL has existed since 1991, Union Carbide has been a “target” asbestos defendant for less than two years. It is, therefore, not surprising that Union Carbide has not taken the lead as often in the federal MDL. In Texas, there is no dispute that Union Carbide has been forced to expend tremendous resources urging and reurging the same issues in different cases.

**4. The plaintiffs’ acknowledgment that standing orders promote efficiency proves Union Carbide’s point that coordinated pretrial proceedings are efficient.**

One of the plaintiffs’ primary arguments against coordinated pretrial proceedings is the existence of standing orders in some counties that govern certain asbestos litigation in those counties. But the plaintiffs’ arguments regarding the efficiencies gained from standing orders *support* Union Carbide’s position that coordinated pretrial proceedings would be beneficial. And they fly in the face of the plaintiffs’ contentions that there are no common fact issues for which coordinated discovery and hearings could be utilized.

Union Carbide agrees with the plaintiffs that standing orders have, to some extent, achieved efficiencies. But those efficiencies would be greatly enhanced by statewide coordination. Only a few of Texas’s 254 counties have adopted standing orders. (*Cf.* W&K App. A1-A10.) As a result, many asbestos cases are left without the benefit of any coordinated procedures. *Cf. In re Asbestos Prods. Liab. Litig. (VI)*, 771 F. Supp. at 420 (acknowledging that asbestos litigation may be resolved satisfactorily in

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this issue does not arise in drilling mud cases, that is flatly wrong. Union Carbide went to trial in a drilling mud case in August 2002, and the doctrine was a significant issue in that case. (UCC App. 15.)

some districts, as the impact of asbestos litigation varies among districts, but holding that when interests of all plaintiffs and all defendants were weighed, MDL treatment was desirable). As discussed earlier, that results in many inefficiencies.

Moreover, the standing orders that do exist are not uniform.<sup>22</sup> While the plaintiffs argue that this is because counties have “different circumstances,” they fail to explain what those circumstances are or why discovery practice or legal issues should differ from county to county.<sup>23</sup> Some standing orders apply only to certain parties, certain courts, or certain types of cases. (*See* W&K App. A2, A3, A8, A9.) Also, some of the standing orders are outdated. For example, many of the standing orders were adopted before the discovery rules were amended in 1999, and do not even address discovery levels. (*See* W&K App. A1, A2, A5, A6, A8, A10.)

The plaintiffs claim that the standing orders are the product of negotiation between plaintiffs’ counsel and defense counsel. (W&K Resp. at 9-10.) Such negotiations—to the extent that they occur—are of course commendable. But they do not obviate the need for statewide pretrial coordination. *See, e.g., In re Bristol Bay,*

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<sup>22</sup> Far from promoting uniformity in the management of asbestos litigation, the standing orders contain numerous variances. For example, Dallas County forbids the filing of any petition by more than ten injured plaintiffs or decedents, (*see* W&K App. A3), while El Paso County limits the number to three, (*see id.* A4), and Milam and Tarrant Counties permit no more than five. (*See id.* A7, A9.) While some counties have instituted procedures for the severance and transfer of claims involving bankrupt defendants, (*see id.* A3, A4), most have not. (*See id.* A1, A2, A5-A10.) Standing orders vary regarding the time before trial a plaintiff must be tendered for deposition: Dallas County requires 60 days, (*see id.* A3), El Paso County requires 90 days, (*see id.* A4), and Bexar County requires not more than 120 days, (*see id.* A1). Finally, two counties—Bexar and El Paso—subject asbestos cases to mandatory mediation before they may proceed to trial. (*See id.* A1, A4.) A multitude of other variances exist. (*See generally id.* A1-A10.)

<sup>23</sup> The only local consideration that is relevant is the trial judge’s docket. The MDL rules address that issue specifically. TEX. R. JUD. ADMIN. 13.6(d) (requiring conference with the trial court regarding potential trial setting and requiring the pretrial court to defer appropriately to the trial court’s docket).

*Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. at 506 (acknowledging that although “voluntary coordination among the parties as a means of avoiding duplicative discovery is commendable, . . . the Panel prefers to place the actions under the control of a single judge in order to ensure that the objectives of [the federal MDL statute] are met.”); *In re Commonwealth Oil/Tesoro Petroleum Sec. Litig.*, 458 F. Supp. 225, 229 (J.P.M.L. 1978) (same); *In re Capital Underwriters, Inc. Sec. Litig.*, 464 F. Supp. at 959 (same). Moreover, the opposing bars often do not agree. Indeed, Union Carbide repeatedly has had to seek intervention from the courts in order to obtain simple scheduling orders governing pleading, discovery, and other deadlines and to compel discovery under standing orders. (See UCC App. 16.) Finally, standing orders arguably are local rules that should be subject to Texas Supreme Court approval, creating a hurdle to the ease in which they can be adopted or amended. TEX. R. CIV. P. 3a & 1990 cmt. Orders from an MDL pretrial judge, on the other hand, would not require supreme court approval. See TEX. R. JUD. ADMIN. 13.6(b)-(c); see also TEX. R. CIV. P. 166, 190.4.

Contrary to the position taken by the FCJ plaintiffs, most standing orders expressly apply to all cases involving claims of asbestos exposure.<sup>24</sup> No standing order carves out an exception for drilling mud cases. To the extent that portions of the standing orders may seem inapplicable to certain cases, that simply demonstrates the fundamental

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<sup>24</sup> The standing orders in place for Bexar, Cameron, El Paso, Harris, Jefferson, Milam, Orange, and Travis Counties apply to all cases “in which a claim for money damages is made for any injury, illness, malignancy, fear of malignancy, mental anguish, loss of consortium, survival benefits, wrongful death, or other damages claimed as a result of exposure to products containing asbestos.” (See W&K App. A1, A2, A4-A8, A10.) The Dallas County standing order applies to “all asbestosis related personal injury cases.” (See *id.* A3.) Similarly, the stated purpose of the Tarrant County standing order is to “facilitate the administration of asbestos disease cases.” (See *id.* A9.)

problem with relying on multiple standing orders, applicable on a countywide basis, rather than utilizing one pretrial judge who can deal with variations that arise in certain groups of cases.

Finally, despite the plaintiffs' contention that, with standing orders, asbestos litigation "consumes remarkably little court time," (W&K Resp. at 14), they nevertheless argue that statewide MDL coordination would put a "massive" burden on the pretrial judge, (*id.* at 10). Of course, the federal asbestos MDL—which has many more cases—has functioned for years before a single pretrial judge. In addition, the extent of coordinated pretrial proceedings is within the pretrial judge's discretion. *In re Fine Paper Antitrust Litig.*, 446 F. Supp. 759, 760 (J.P.M.L. 1978), *aff'd*, 685 F.2d 810 (3d Cir. 1982). In the event that the job is taking up too much time, the Texas pretrial judge could take advantage of procedures by which a special master handles issues such as discovery, thus lessening any burden. *See, e.g.*, TEX. R. CIV. P. 171.

The bottom line is that asbestos litigation currently is taking up the time of many Texas judges who are dealing with the same or similar pretrial issues. Statewide coordination would take up only one judge's time and inevitably would take up less and less of that judge's time as he or she made decisions applicable to all or large number of cases and thereby streamlined the process. Transferring all asbestos cases under the MDL statute will "plac[e] all actions before a single judge who will be in the best position to determine the manner and extent of coordination or consolidation of the pretrial proceedings for the optimum conduct of the litigation as a whole . . . . [Such a]

single judge with an overall perspective of the entire litigation will be able to formulate a pretrial schedule that will minimize the overall expense to the parties and avoid . . . delay . . . .” *In re Bomb Disaster at Roseville, Cal., on Apr. 28, 1973*, 399 F. Supp. at 1402-03.

**5. The presence of some individual issues does not negate the efficiencies achieved by coordinated pretrial proceedings on common issues.**

Contrary to the plaintiffs’ contentions, nothing in the Texas MDL statute requires the denial of transfer and coordination merely because some individual issues are present. Asbestos litigation—like any litigation—involves issues unique to certain plaintiffs. That does not mean, however, that there are not enormous efficiencies to be gained by coordinated treatment of common issues (just as now occurs in some counties under standing orders).

Federal cases are instructive. In *In re Cutter Laboratories, Inc. “Braunwald-Cutter” Aortic Heart Valve Products Liability Litigation*, the defendant opposed MDL coordination for litigation regarding an allegedly defective heart valve on the grounds that issues of causation were individual and that discovery would focus on individual factors such as the plaintiff’s health, medical treatment rendered, and local medical practices. 465 F. Supp. 1295, 1296 (J.P.M.L. 1979). The MDL panel rejected this argument, holding that while “some individual factual questions will be present in each action, an analysis of the record before us reveals a commonality of factual questions concerning the design, development, manufacture, testing and marketing of [the heart valve]; the state of medical knowledge regarding heart valves; the causal

relationship between the use of the [heart valve] in the aortic position and the severe injuries alleged to have resulted therefrom; [and the defendant's] knowledge of the allegedly defective condition of the valve.” *Id.* at 1297. In *In re Capital Underwriters, Inc. Securities Litigation*, the federal MDL panel rejected the argument that individual fact issues and legal theories prevented pretrial coordination in cases involving purchase of interests in different limited partnerships by different plaintiffs from a variety of defendants at different times and involving distinct oral solicitations rather than a common written representation. 464 F. Supp. at 958. The panel noted that the parties would have to depose many identical parties and witnesses and examine many of the same documents in order to prepare for trial. *Id.* at 959; *see also In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. at 974 (acknowledging presence of individual fact issues in products liability litigation, but holding that there were still common fact issues concerning product design, state of knowledge within the industry, and alleged failure to warn); *In re Commonwealth Oil/Tesoro Petroleum Sec. Litig.*, 458 F. Supp. at 229 (rejecting MDL opponents’ argument that unique issues should preclude MDL treatment even though time periods involved differed).

Again, the plaintiffs rely extensively on class certification and trial consolidation cases, which are concerned with presenting multiple claims with individual issues to one jury. These concerns are not present in the MDL context because cases are coordinated only for pretrial proceedings and then will be remanded to the original

court.<sup>25</sup> TEX. GOV'T CODE ANN. § 74.163(a)(3); TEX. R. JUD. ADMIN. 13.7. Moreover, to the extent that there are individual issues to be dealt with during pretrial proceedings, the pretrial judge either can address those issues on a different track or can reserve those issues for the regular judge upon remand. *See In re Dow Chem. Co. "Sarabond" Prods. Liab. Litig.*, 650 F. Supp. at 189 (noting that a pretrial judge can allow discovery to proceed on any unique issues).

**6. The plaintiffs' delay argument is a red herring.**

The plaintiffs predict that trial-ready cases will be delayed if a pretrial judge is appointed under Rule 11.<sup>26</sup> This argument, of course, does not even apply to the cases before the Panel, which were filed only recently.<sup>27</sup> But because the plaintiffs raised it here, Union Carbide will address it as well.

Even with regard to pre-September 1, 2003 cases that the presiding judges of the administrative regions have before them, no such delay need occur. The plaintiffs profess to fear that dying plaintiffs in trial-ready cases will lose their day in court if those cases are included in coordinated Rule 11 pretrial proceedings, but any cases subject to coordinated pretrial treatment that are indeed trial-ready can be remanded immediately for trial. TEX. GOV'T CODE ANN. § 74.163(a)(3); TEX. R. JUD. ADMIN. 13.7(b); *id.*

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<sup>25</sup> Although a pretrial judge has discretion to consolidate cases, in doing so the pretrial judge would be limited by the concerns set forth in *Ethyl*. *See* TEX. R. JUD. ADMIN. 13.6(c)(2).

<sup>26</sup> The plaintiffs also contend—without authority—that Union Carbide's motion is merely a forum-shopping tactic. They ignore, however, the fact that the Panel, not Union Carbide, would select the judge to preside over coordinated pretrial proceedings.

<sup>27</sup> To the contrary, the decision whether to assign a pretrial judge to the cases involving Mr. Tedrow and Ms. Wingate, (*see* W&K Resp. at 1-2), will be resolved by Judge Ovard of the First Administrative Judicial Region and Judge Underwood of the Second Administrative Judicial Region, respectively.

11.3(f)(i), (iii); *see also In re Civil Actions Air Crash Disaster at Greater Cincinnati Airport*, 295 F. Supp. 51, 51 (J.P.M.L. 1968) (rejecting contention that MDL treatment would cause delay and noting that cases could be remanded when ready for trial); *accord In re Cutter Labs., Inc. "Braunwald-Cutter Aortic Heart Valve Prods. Liab. Litig.*, 465 F. Supp. at 1297 (holding that claim can be remanded if it is, in fact, ready for trial); *In re Swine Flu Immunization Prods. Liab. Litig.*, 464 F. Supp. at 953 (same); *In re Bomb Disaster at Roseville, Cal., on Apr. 28, 1973*, 399 F. Supp. 1400, 1403 (J.P.M.L. 1975) (same); *see also In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. at 975 ("The [pretrial] transferee judge will be in the best position, in connection with the organization of the pretrial program in this litigation, to determine which, if any, actions or claims are susceptible to immediate separation and remand.")

The plaintiffs also argue that asbestos litigation is under control in Texas and that asbestos cases are being resolved expeditiously. *Cf. In re Cutter Labs., Inc. "Braunwald-Cutter" Aortic Heart Valve Prods. Liab. Litig.*, 465 F. Supp. at 1296 (rejecting MDL opponent's argument that MDL treatment was unnecessary because "most of the actions are proceeding expeditiously towards trial"). But taking the plaintiffs' statistics as true,<sup>28</sup> there are still thousands of asbestos cases being filed every

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<sup>28</sup> Because most of the plaintiffs' statistics consist of internal records from plaintiffs' law firms, Union Carbide has no way of verifying them. Union Carbide notes, however, that published figures indicate that there is no end in sight to asbestos litigation. *See, e.g.,* Michael Freedman, *The Tort Mess*, FORBES, May 13, 2002, at 90; Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1; Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 2002, at 154, 156. The United States Supreme Court recently characterized asbestos litigation as an "elephantine mass." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Texas has been hit with a disproportionately large number of these cases. *See* RAND INSTITUTE FOR CIVIL JUSTICE: ASBESTOS LITIGATION COSTS AND COMPENSATION, AN INTERIM REPORT, 2002, at 32-34 (stating that Texas is one

year in Texas. Indeed, Peter Kraus (one of the lead plaintiffs' counsel on the response) recently described asbestos litigation as "the 800-pound gorilla of the tort system." Peter Kraus, *Asbestos Payoffs Go Awry*, DALLAS MORNING NEWS, May 28, 2002, available at [http://waters-kraus.com/dmn\\_kraus.htm](http://waters-kraus.com/dmn_kraus.htm). To say that convenience will not result from reducing the inherent duplication in this many cases is simply incorrect.<sup>29</sup>

Indeed, although there could be some brief delay as a pretrial judge worked to coordinate scheduling and discovery and rule on common issues, there is reason to believe that the ultimate outcome would be less, not more, delay as the coordinated proceedings and rulings streamline the cases. Moreover, deserving cases could be given priority, and the pretrial judge could work with trial judges to ensure that all litigants' cases are resolved with reasonable expediency. TEX. R. JUD. ADMIN. 13.6(d), 13.7(b); *see also In re Asbestos Prods. Liab. Litig. (VI)*, 771 F. Supp. at 422 (noting that pretrial judge may determine that some claims should be remanded in advance of others).

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of five states accounting for 66 percent of all asbestos filings between 1998 and 2000, and has been listed as one of the "[t]op five states with most asbestos filings" since 1988); *see also Hearings on H.B. 4 Before Senate Comm. on State Affairs*, 78th Leg., R.S. (Apr. 22, 2003) (testifying in favor of provisions of House Bill 4 that Texas has a "disproportionate proportion" of asbestos litigation) (statement of David Crump).

<sup>29</sup> The plaintiffs also seem to suggest that because only a few cases have been filed since September 1, 2003, coordination is not needed. Of course, the plaintiffs control the filings, and even they admit that decreased filings could be due to recent changes in Texas law (which precipitated a mass of filings of many types of cases just prior to September 1) or other factors—perhaps including proposed federal legislation that might shape asbestos litigation. Of course, if plaintiffs simply have stopped filing asbestos cases, Union Carbide agrees that there would be no need for an MDL. But Union Carbide doubts very seriously that anything like that has occurred.

**B. Coordinated pretrial proceedings would advance justice in these cases.**

The final requirement for invoking MDL treatment is that coordinated pretrial proceedings promote the “just” conduct of cases. TEX. GOV’T CODE ANN. § 74.162(2). The increase in efficiencies described in the previous section certainly will promote justice, of course. But there are further reasons why justice will be served by pretrial consideration of common issues.

The plaintiffs’ position seems to be that speed per se equals justice and efficiency. But Union Carbide respectfully submits that efficient and just disposition of cases requires that they be disposed of as quickly as reasonably possible, but with due respect for the rights of all the parties. As the supreme court made clear in the case quoted by the plaintiffs,

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.*

*Ethyl*, 975 S.W.2d at 610 (emphasis added). (See also W&K Resp. at 24.)

Under current practice, courts often set several (sometimes even hundreds) of asbestos cases for trial on a single date. (See, e.g., UCC App. 17; see also W&K App. L.) They do so with the expectation that most of these will settle. See *Ethyl*, 975 S.W.2d at 614. When so many cases are set, it is impossible to prepare them all for trial. Thus, the sheer number of cases forces defendants into settlement. Moreover, the vast majority of the cases that are set involve plaintiffs who have minimal, if any, impairment from an

asbestos-related disease. *See, e.g.,* Terry Maxon, *Texas Coalition Pushes to Limit Asbestos Lawsuits*, DALLAS MORNING NEWS, Feb. 5, 2003 (citing RAND study that 65% of compensation is going to plaintiffs with no malignancies). With regard to these plaintiffs, whose claimed damages are relatively low, the value of the case does not warrant spending significant time and resources taking discovery and addressing legal issues.

Under the current system, it makes no sense for a judge to spend time hearing a pretrial motion in one case, when there is a great likelihood that the case will settle, making the time spent a waste. As a result, most of the motions filed by both parties are not heard until the beginning of (or even during) trial. Unfortunately, this means that parties approach a trial date with little guidance as to how the case will be tried. If an MDL pretrial judge could hear pretrial motions and have the rulings applied to all or many cases, parties would approach trial with guidance and realistic expectations about their cases.

Similarly, given the sheer number of asbestos cases set for trial and the uncertainty of whether a case may be reached, the parties are unable to perform significant case workup, including depositions of key witnesses, until shortly before (or even at night during) trial. Obviously, justice is not served by this haphazard approach of preparing for trial.

Under coordinated pretrial MDL proceedings, this system would be largely eliminated. The pretrial court could manage discovery, scheduling, and pretrial issues so

that they are addressed with respect to large numbers of cases. As a result, parties would be better prepared for trial and have a better sense of their respective positions, so that settlement could intelligently be explored—not forced due to overwhelming numbers. Indeed, the pretrial judge could even explore means by which large numbers of cases could be settled together. *Cf. In re Asbestos Prods. Liab. Litig. (VI)*, 771 F. Supp. at 421 (discussing possibility that pretrial judge could explore settlement or other alternative dispute mechanisms). And the pretrial judge also has some control over the trial docket and can make sure that deserving cases have precedence for trial.

**IV. None of the plaintiffs’ remaining arguments against coordinated MDL treatment have merit.**

**A. The fact that asbestos often is considered a “mature tort” does not support the plaintiffs’ argument that coordination would not be convenient, efficient, and just.**

The plaintiffs assert that because asbestos litigation is a “mature tort,” it is not appropriate to transfer asbestos cases under the MDL statute. The plaintiffs, however, confuse the concept of a mature tort with a mature case—one which has been worked up and is ready for trial. While the latter may not be appropriate for an MDL transfer (or may be subject to immediate remand if transferred), there is nothing improper about using MDL procedures to facilitate pretrial activities in cases involving mature torts.

Tellingly, not a single one of the plaintiffs’ cited authorities provides support for their theory that asbestos litigation is not proper for MDL pretrial coordination because it often is referred to as a “mature tort.” To the contrary, the

portions of some of those authorities that the plaintiffs do not cite support MDL treatment. For example, the Roades article generally supports MDL in the paragraph just prior to the plaintiff's quoted language, stating,

“Efficient justice” is largely oriented toward saving judicial resources, although litigants’ resources may be preserved simultaneously. Efficient judicial administration can be achieved by conducting the pretrial proceedings of related cases in one forum. The duplication of discovery that would result from trying the actions individually can be avoided. One judge can issue a single ruling on pretrial matters, avoiding repeated rulings on the same issue and the possibility of conflicting rulings by numerous judges.

Blake M. Roades, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 719 (1991) (footnotes omitted). In fact, the premise of this article is that MDL needs to have an enhanced role in the resolution of cases, urging enhanced powers under the federal MDL statute. *Id.* at 711-712.

As demonstrated in the sections above, the fact that asbestos litigation is often considered a mature tort has no impact on whether coordinated pretrial proceedings will achieve efficiency and justice by reducing duplicative discovery, preventing the possibility of inconsistent rulings, and conserving the parties’ resources by eliminating repeated urging of the same issues before different judges. To be sure, some aspects of asbestos litigation are well-developed. There are many motions, raised by both sides of the bar, to be ruled upon. Science evolves, sometimes creating new issues that are raised. Given the changes in the law under House Bill 4, even more issues are likely to arise.<sup>30</sup>

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<sup>30</sup> For example, Texas has wholly revised its proportionate responsibility scheme. Under the new statute, the proportionate responsibility of all responsible parties—including employers who are exempt

**B. Rule 13 and Rule 11 can properly be used in conjunction with each other, should the presiding judges of the administrative regions grant Union Carbide’s Rule 11 motions.**

Although not an issue before the Panel, the plaintiffs, including the FCJ plaintiffs, argue that Rule 11 (involving the assignment of a pretrial judge to pre-September 1, 2003 related cases within an administrative judicial region by the presiding judge of that region) and Rule 13 (involving the transfer of post-September 1, 2003 related cases statewide to a pretrial court under the new MDL statute) cannot be used in tandem. The plaintiffs fail to acknowledge that Union Carbide seeks Rule 13 transfer and coordination with regard to post-September 1, 2003 cases regardless of what decision the respective presiding judges make regarding pre-September 1, 2003 cases. But coordination of both pre- and post-September 1, 2003 cases would achieve the goals of convenience, efficiency, and justice promoted by both rules, and it is expressly permitted under Texas law.

**1. The coordination of pending cases would maximize efficiency without prejudicing litigants.**

The plaintiffs’ contention that the coordination of pre-September 1 cases with a statewide Rule 13 proceeding will prejudice litigants with cases currently set for trial reflects a fundamental misunderstanding of Union Carbide’s motion to transfer under Rule 13 and the Rules of Judicial Administration. First, the power to require

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from liability under workers’ compensation laws and bankrupt defendants—is submitted to the jury. TEX. CIV. PRAC. & REM. CODE ANN. § 33.003, 33.011(6). Because the responsibility of those parties cannot be submitted to the jury unless there is evidence regarding them, however, asbestos defendants will be seeking discovery for the first time from these entities. *See also id.* § 82.008 (regarding government safety standards in products liability cases).

coordinated pretrial proceedings in pre-September 1, 2003 cases lies *not* with the MDL panel but with the presiding judges under Rule 11.3(a). TEX. R. JUD. ADMIN. 11.3(a). If the plaintiffs are concerned about the possible prejudice to litigants in pre-September 1 cases, they have two options. First, they can oppose the Rule 11 motions already filed in trial-ready cases. Or, second, pursuant to Rule 11.3(f)(i) or (iii), they can request that any Rule 11 pretrial judge who is assigned to a trial-ready case terminate the assignment. *Id.* 1.3(f)(i), (iii). Neither of these options concerns the decision currently before the Panel—whether asbestos related cases filed after September 1, 2003 should be coordinated pursuant to Rule 13.

The limited use of Rule 11 may reflect a perception that the benefits of coordinated proceedings on a regional basis do not represent a significant improvement over the present system. Given the greater ability to coordinate regional Rule 11 proceedings with statewide Rule 13 proceedings, maximum efficiency now can be achieved.

**2. The coordination of pre-September 1 cases does not violate the legislature's intent that Rule 13 apply only to cases filed after September 1, 2003.**

Contrary to the plaintiffs' assertion, Union Carbide is not asking that Rule 13 be applied to cases filed before September 1, 2003. Rather, Union Carbide is asking that the Panel, in deciding whether to transfer post-September 1, 2003 cases, consider the possibility that all related asbestos could be coordinated in a single statewide proceeding, either as a result of the consultation between Rule 11 pretrial judges and the

Rule 13 pretrial judge, as required by Rule 11.7(d), or by the chief justice’s assignment of the judge selected by the MDL panel as the Rule 13 judge to each of the regions, as contemplated by Rule 11.3(d), which would allow the same judge to coordinate pre- and post-September 1 cases. Should either of those alternatives occur, consistent with the legislature’s intent, Rule 11 will still apply to pre-September 1, 2003 cases while Rule 13 will apply only to post-September 1, 2003 cases. The plaintiffs’ argument that this is somehow impermissible is confusing, given their own admission that statewide coordination is available: “[T]he procedure allowing the Chief Justice to assign judges from other regions to serve as presiding judges was in the original [Rule 11, which] has been available since 1997.” (W&K Resp. at 28.) So long as the cases are related, there is no retroactivity problem in conducting coordinated statewide pretrial proceedings.<sup>31</sup>

The plaintiffs’ argument that a single pretrial proceeding violates the legislature’s intent to make the MDL statute prospective is further undermined by the supreme court’s interpretation of House Bill 4. Following the enactment of House Bill 4, the court revised Rule 11 to require that it be “construed and applied so as to facilitate the implementation of Rule 13 to the greatest extent possible.” TEX. R. JUD. ADMIN. 11.7(a). Consistent with the court’s apparent belief that, where appropriate, all related cases,

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<sup>31</sup> The legislative history cited by the plaintiffs reflects only the legislature’s intent that the procedures delineated in what became Rule 13 not be applied to cases filed before September 1, 2003. (See W&K Resp. at 29 n.10.) Since, as the plaintiffs recognize, statewide coordinated proceedings have always been possible under Rule 11, the cited legislative history says nothing as to whether related cases may be coordinated in a single statewide pretrial proceeding. To the contrary, the legislative history indicates that the plaintiffs’ bar is well aware that coordinated statewide proceedings are available under Rule 11. *Hearing on H.B. 4 Before the House Comm. on Civil Practices*, 78th Leg., R.S. (Feb. 26, 2003) (statement of Tommy Fibich for Texas Trial Lawyers Association); *Hearing on H.B. 4 Before Senate*

whether filed before or after September 1, 2003, should be coordinated, Rule 11.7(c) directs that any assignment of a Rule 11 judge be made in consultation with the chair of the MDL panel. *Id.* at 11.7(c). Furthermore, in deciding pretrial matters for pre-September 1, 2003 cases, Rule 11 judges are required to consult with the pretrial judge to which related cases have been transferred pursuant to Rule 13. *Id.* at 11.7(d). Far from contemplating that cases filed before and after September 1, 2003 operate in separate vacuums, the supreme court provided that Rule 11 and Rule 13 should work together.

**3. Applying Rule 11 to pending asbestos litigation is not unconstitutional.**

Finally, the plaintiffs, including the FCJ plaintiffs, contend that despite the use of Rule 11 in various cases for several years, its use here would “arguably” violate the Texas Constitution. The constitutional provision on which the plaintiffs rely is Article 5, Section 7, which provides that “[t]he Court shall conduct its proceedings at the county seat of the county in which the case is pending, *except as otherwise provided by law.*” TEX. CONST. art. V, § 7 (emphasis added). The plaintiffs, however, overlook the fact that since 1999 Texas law expressly has provided that a pretrial judge assigned under Rule 11 may conduct proceedings outside the county in which a particular case is pending.

Under Section 74.094(f) of the Texas Government Code,

[a] pretrial judge assigned to hear pretrial matters in related cases under Rule 11, Texas Rules of Judicial Administration,

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*Comm. on State Affairs*, 78th Leg., R.S. (Apr. 10, 2003) (statement of Mike Gallagher on behalf of Texas Trial Lawyers Association).

may hold pretrial proceedings and hearings on pretrial matters for a case to which the judge has been assigned in:

- (1) the county in which the case is pending; *or*
- (2) a county in which there is pending a related case to which the pretrial judge has been assigned.

TEX. GOV'T CODE ANN. § 74.094(f) (emphasis added).<sup>32</sup> Thus, if the presiding judge of an administrative judicial region decides to assign a pretrial judge to related cases, that pretrial judge can conduct proceedings in any county in which a related case is pending. Given the ubiquitousness of asbestos litigation in Texas, there are plenty of counties from which to choose. Moreover, should the state's presiding judges, in consultation with the MDL panel chair, decide to ask the chief justice to assign to each of their regions the judge designated under Rule 13 by this Panel, so that he or she also could be assigned under Rule 11, Section 74.094(f)(2) of the Government Code would permit that judge to conduct proceedings in any county of the state in which a "related case," under either Rule 11 or Rule 13, is pending.

### CONCLUSION

For these reasons, Union Carbide respectfully requests that the Panel transfer these related cases for coordinated pretrial proceedings. Doing so would be more convenient for the parties and the witnesses and would promote the just and efficient

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<sup>32</sup> The plaintiffs, including the FCJ plaintiffs, ignore this provision and rely only on House Bill 3386's recent amendment of section 74.024(c)(10) of the Government Code. While this amendment gave the supreme court the authority to adopt rules further expanding the places where a Rule 11 judge can conduct proceedings, the supreme court has chosen not to act on that authority. In fact, by amending Rule 11.1 to provide that Rule 11 applies only to pre-September 1, 2003 cases, the supreme court effectively mooted the rule-making authority granted by the enactment of House Bill 3386, which applies only to suits filed on or after September 1, 2003.

conduct of asbestos litigation in Texas. Union Carbide requests any further relief to which it may be entitled.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on November 13, 2003, true and correct copies of this consolidated reply were provided by Federal Express to those listed below as well as by regular mail to all counsel who have appeared for parties in the cases listed in Appendix A to the Motion for Transfer or who are known by me routinely to represent parties that have not yet appeared:

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Hon. Errlinda Castillo  
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Hon. Mack Kidd  
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