

ORAL ARGUMENT REQUESTED

No. 03-0203

**IN THE
JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

Union Carbide Corp.,

Petitioner,

v.

Audry Amelia Adams, et al.

Respondents.

RESPONSE TO MOTION FOR TRANSFER

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. MDL transfer is useful and appropriate only for immature torts, not for mature litigation like asbestos. 3

II. Statewide MDL consolidation would be inefficient, uneconomical, and disastrous for the litigants and for the judicial system of Texas. 8

 A. Asbestos litigation has been locally managed by Texas courts for years with marked success. 8

 B. Centralization would impose needless delay and expense on litigation and on the courts; on the other hand, the benefits promised by Union Carbide are illusory. 14

III. Use of the MDL procedure in coordination with Rule 11 of the Texas Rules of Judicial Administration would be impractical, would violate the Legislature’s intent that the MDL statute be applied only prospectively, and would run afoul of the constitutional limitation on the location of pretrial proceedings. 27

 A. The effective consolidation of pending cases sought by Union Carbide would be impractical, counter-productive, and terribly unfair. 28

 B. Coordinated application of Rule 13 and Rule 11 to cases filed prior to September 1, 2003, would violate the intent of the Legislature in making the MDL statute prospective only. 29

 C. Application of Rule 11 to pending asbestos litigation would arguably violate the Texas Constitution. 30

CONCLUSION AND PRAYER 31

INDEX OF AUTHORITIES

Texas Cases

<i>Allen v. Arco Industries</i> , No. B-169628 (Tex. Dist. Ct. Jefferson County, Aug. 28, 2003)	25
<i>Alm v. Aluminum Corp. of America</i> , 717 S.W. 2d 588 (Tex. 1986)	21
<i>Celotex Corp. v. Tate</i> , 797 S.W.2d 197 (Tex. App. – Corpus Christi 1990, writ dism'd)	22
<i>CSR, Ltd. v. Link</i> , 925 S.W.2d 591 (Tex. 1996).....	9
<i>Dal-Briar Corp. v. Tri-Angl Equities, Inc.</i> , 22 S.W.3d 520 (Tex. App. – El Paso 2000, no pet.).....	30
<i>DeShazo v. Hall</i> , 963 S.W.2d 958 (Tex. App. – Houston [14 th Dist.] 1998, no pet.)	30
<i>Franklin v. ACandS, Inc.</i> , No. 01-06238 (Tex. Dist. Ct. Dallas County, August 3, 2003).....	26
<i>Humble Sand and Gravel, Inc., v. Gomez</i> , 48 S.W. 3d 487 (Tex. App. – Texarkana 2001, pet. granted, No. 01-0652)	21
<i>In re Brooklyn Navy Yard Asbestos Litig.</i> , 971 F.2d 831 (2d Cir. 1992).....	29, 31
<i>In re Ethyl Corp.</i> , 975 S.W.2d 606 (Tex. 1998).....	3, 24, 29
<i>In re Union Carbide Corp.</i> , No. 01-02-01153-CV (oral argument held June 24, 2003)	23
<i>Mellon Serv. Co. v. Touche Ross & Co.</i> , 946 S.W.2d 862 (Tex. App. — Houston [1 st Dist.] 1997, no writ)	30
<i>Southwestern Refining Co. v. Bernal</i> , 22 S.W.3d 425 (Tex. 2000)	8, 17, 18
<i>Stobaugh v. Norwegian Cruise Line, Ltd.</i> , 105 S.W.3d 302 (Tex. App. – Houston [14 th Dist.] 2003, n.p.h.)	8
<i>U.S. Silica Co. v. Tompkins</i> , 92 S.W.3d 605 (Tex. App. – Beaumont 2002, pet. filed, No. 03-0195).....	21

<i>Wood v. Phillips Petroleum Co.</i> , ___ S.W.3d ___, 2003 WL 22077294 (Tex. App. – Houston [14 th Dist.], Sept. 9, 2003).....	21
--	----

Federal Cases

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997)	7, 16
<i>Blanca v. Keene Corp.</i> , 1991 WL 224573 (E.D. Pa. 1991)	22
<i>Cimino v. Raymark Ind., Inc.</i> 151 F.3d 297 (5 th Cir. 1998)	21
<i>In re Agent Orange Prod. Liab. Litig.</i> , 818 F.2d 145 (2d Cir. 1987).....	18
<i>In re American Financial Corp. Litig.</i> , 434 F.Supp. 1232 (J.P.M.L. 1977)	6
<i>In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.</i> , 431 F.Supp. 906 (J.P.M.L. 1977).....	6
<i>In re Asbestos Products Liability Litigation (No. VI)</i> , 771 F.Supp. 415 (J.P.M.L. 1991)	5
<i>In re Eli Lilly & Co. Oraflex Products Liability Litig.</i> , 578 F. Supp. 422 (J.P.M.L. 1974)	6
<i>In re Photocopy Paper</i> , 305 F.Supp. 60 (J.P.M.L. 1969)	6
<i>In re Protection Devices and Equipment and Central Station Protection Service Antitrust Cases</i> , 295 F.Supp. 39 (J.P.M.L. 1968)	6
<i>In re Repetitive Stress Injury Litigation</i> , 11 F.3d 368 (2d Cir. 1993)	6
<i>In re Repetitive Stress Injury Product Liability Litigation</i> , 1992 WL 403023 (J.P.M.L. Nov. 27, 1992)	6
<i>In re Seeburg-Commonwealth United Merger Cases</i> , 333 F.Supp. 911 (J.P.M.L. 1971)	6
<i>In re Westinghouse Electric Corp. Employment Discrimination Litig.</i> , 438 F. Supp. 937 (J.P.M.L. 1977).....	6
<i>In re Westinghouse Electric Corp. Uranium Contract Litig.</i> , 436 F.Supp. 990 (J.P.M.L. 1977)	6
<i>Sears, Roebuck & Co. Employment Practices Litig.</i> , 487 F.Supp. 1362 (J.P.M.L. 1980);	6

Other States' Cases

Eagle-Picher Ind., Inc. v. Balbos, 578 A.2d 228 (Md. App. 1990), aff'd in part & rev'd in part, 604 A.2d 445 (Md. 1992) 22

Statutes

Acts 2003, 78th Leg., ch. 204, § 23.02..... 29

TEX. CIV. PRAC. & REM. CODE §71.051 23

TEX. CONST. Art. 5, § 7 30

TEX. GOV'T CODE § 74.161-164 27

TEX. GOV'T CODE § 74.024..... 30

Rules

Order in In re: All Asbestos-Related Personal Injury or Death Cases Filed or To Be Filed in Dallas County, Texas (Feb. 19, 1990)..... 9

Secondary Sources

Blake M. Rodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L.REV. 711 (1991)..... 4

Patricia D. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479 (1989)..... 4

INTRODUCTION

Union Carbide asks this Panel to centralize mature asbestos litigation before a single judge who will issue discovery and other pretrial rulings on an array of “common” issues of fact. But as experienced Texas judges know and as this Response will further explain, no positive purpose will be served by centralizing all Texas asbestos cases before a single judge. As a practical matter, discovery in asbestos litigation is already ably coordinated by the Texas courts. Union Carbide does not even attempt to show, let alone demonstrate, the contrary. It is thus hardly surprising that no judge or defendant has previously invoked Rule 11 of the Texas Rules of Judicial Administration to coordinate discovery in asbestos litigation in the nine judicial regions. And the “common” issues cited by Union Carbide are actually highly fact-specific defenses that cannot be considered on a global basis.

The ulterior motives behind Union Carbide’s request are transparent and two-fold: to bring the resolution of asbestos litigation to a screeching halt, and to shop for a forum that it believes will be more favorably disposed to its “common” defenses than the many Texas courts that have previously considered and rejected them. But these are not the intended purposes of the MDL rule and the statute under which it was promulgated, and should not be effectuated by the Panel.

Union Carbide’s motion is really about cases like that of James Tedrow, a 57-year old man dying of mesothelioma. His case against Union Carbide is set for trial in Dallas in February. Although he is in his seventh round of chemotherapy and has a port in his

chest that must be dressed twice a day, he still has some chance of his day in court before he dies. If Union Carbide's motion is granted, that chance is extinguished.

Kathryn Wingate would also like her day in court. She is dying at 57 of mesothelioma, caused by breathing the asbestos dust on her husband's work clothes. He worked at Union Carbide for 23 years. Mrs. Wingate, a teacher, is the family's primary breadwinner. Her case, which has been pending almost three years, is set for trial in Brazoria County in January. If it suddenly is thrown together with all other cases in the state, however, Mrs. Wingate will surely die before seeing her case resolved.

There are hundreds of cases like Mrs. Wingate and Mr. Tedrow — workers dying from mesothelioma, with trial dates in the next few months, some of whom will make it to those trial dates before they die. Some won't, of course; it is worth noting that just since Union Carbide filed its motion last month, one of the claimants named in the motion has died (Giuseppe Cappelli, who died October 8). Since perhaps four Texans die of mesothelioma each week, delay is of great benefit to Union Carbide. And these are just the mesothelioma cases; Union Carbide also benefits greatly by stopping the progress of other cancer claims and asbestosis claims.

This response is filed by the plaintiffs in four of the five cases identified by Union Carbide in its motion, and is joined by counsel for what we believe to be the overwhelming majority of plaintiffs in asbestos litigation in Texas, whose interests will be affected by the outcome of Union Carbide's motion. One of the five cases listed in the motion, the *Platz* case, has been settled, and Union Carbide has informed the undersigned

plaintiffs' counsel that the motion is therefore withdrawn as to that case. Plaintiffs respectfully request an oral hearing.

ARGUMENT

I. **MDL transfer is useful and appropriate only for immature torts, not for mature litigation like asbestos.**

Although Union Carbide asserts that “there can be no area of litigation more suited for the MDL procedure than asbestos,” motion at 2, precisely the opposite is the case: asbestos litigation is particularly *unsuitable* for aggregated pretrial management. There can be no dispute that asbestos is the paradigmatic “mature mass tort.” Five years ago, the Texas Supreme Court 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).

The conditions observed by Justice Owen in *Ethyl* still prevail today. Trial courts in Texas have continued to coordinate pretrial discovery, schedule trials, and generally manage the asbestos litigation in a manner that has minimized the economic and time burden on the trial and appellate courts of Texas.

Although the multidistrict litigation statute and rule do not by their terms restrict multidistrict transfer to “immature” litigation, most commentators acknowledge that multidistrict consolidation procedures are most useful in new areas of litigation which require extensive discovery and whose future course is unpredictable. *See* Patricia D.

Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 489-90 (1989) (“The early identification of multidistrict litigation is essential to insure that the full value of coordinated or consolidated pretrial proceedings is realized”); Blake M. Roades, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L.REV. 711, 719 (1991) (“Generally, pretrial consolidation will not conserve judicial resources nor serve the interests of the litigants if the cases are nearing trial in the transferor forum, or if discovery is well along.”). The authoritative treatise on complex litigation in the federal courts also makes clear that centralizing mature litigation, even if only for pretrial purposes, may “have the effect of delaying disposition and of limiting the judicial resources available for managing mass tort litigation.” MANUAL FOR COMPLEX LITIGATION 3d ¶ 33.21 n. 1020, at 311 (Federal Judicial Center 1995).

If MDL transfer and consolidation is disruptive and counterproductive in mature mass tort litigation in general, it would be particularly disruptive and expensive in asbestos litigation in Texas. As the supreme court recognized, Texas courts are “coordinating pretrial discovery and scheduling trials in a satisfactory manner.” *Ethyl*, 975 S.W.2d at 610. Aside from its conclusory representations about asbestos litigation (which we deny), Union Carbide has made no showing at all of any duplicative discovery, inconsistent rulings, or pretrial mismanagement that could be rectified or ameliorated by the massive transfer and consolidation that it seeks.

We respectfully submit that in view of the fundamental, permanent reordering of the way Texas resolves asbestos cases that is sought by Union Carbide, some showing of

essential need should be required. A system that functions well, that resolves cases within reasonable time periods, and that entails only a minimum of court time and involvement should not be cast aside on the basis only of conclusory rhetoric. If the system truly was in “crisis” — a term deployed so loosely by Union Carbide as to have lost its real meaning — one would expect to see statistics to that effect. Asbestos case filings are increasing rapidly, or resolution times are unacceptably high (not that this would trouble Union Carbide), or some judges do nothing but try asbestos cases -- something like this should have been demonstrated by the movant. But the motion does not even contain any concrete factual allegations, much less support.

In truth, what motivates the motion is that the asbestos litigation system in Texas works well. The procedure afforded by Rule 11 of the Rules of Judicial Administration, for regional consolidation of like cases, has never once been requested for asbestos cases by any Texas judge. Nor has Union Carbide, or any other party, ever requested it. This fact alone shows that the system works well for all concerned.

It is true, as Union Carbide will undoubtedly point out on reply (though it failed to mention in its motion) that the federal Judicial Panel on Multidistrict Litigation transferred all asbestos cases in the federal courts to the United States District Court for the Eastern District of Pennsylvania in 1991 for unified pretrial management. *In re Asbestos Products Liability Litigation (No. VI)*, 771 F.Supp. 415 (J.P.M.L. 1991). The federal decision to transfer asbestos litigation to a single court does not dictate the result of Union Carbide’s motion for several reasons. The federal Panel explicitly

acknowledged that the “impetus” for its consideration of MDL transfer was its receipt of a letter signed by eight federal district judges imploring the panel to consider transferring all asbestos litigation to a central forum to get the cases out of their courts. 771 F.Supp. at 417. Before this, the federal panel had repeatedly rejected consolidation because the cases were too dissimilar. *E.g. In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F.Supp. 906, 907-11 (J.P.M.L. 1977).¹

Again, to our knowledge, no similar request has been lodged here; indeed, in the six years of Rule 11's existence, no administrative region has invoked the rule to centralize cases within a region. And no defendant, or any other party in the litigation, has previously even asked for assignment of a pretrial judge under Rule 11. Further, although the majority of responding plaintiffs supported federal MDL transfer, 771 F. Supp. at 416, Texas asbestos plaintiffs uniformly oppose centralization of Texas state

¹ The unique request by eight judges for an MDL in federal court distinguished asbestos litigation, for the federal MDL Panel had frequently denied transfer when the commonality of facts did not outweigh the differences in factual issues to be resolved. See, e.g., *Sears, Roebuck & Co. Employment Practices Litig.*, 487 F.Supp. 1362, 1364 (J.P.M.L. 1980); *In re Westinghouse Electric Corp. Uranium Contract Litig.*, 436 F.Supp. 990, 995-96 (J.P.M.L. 1977); *In re Westinghouse Electric Corp. Employment Discrimination Litig.*, 438 F. Supp. 937, 938 (J.P.M.L. 1977); *In re Eli Lilly & Co. Oraflex Products Liability Litig.*, 578 F. Supp. 422, 423 (J.P.M.L. 1974); *In re Seeburg-Commonwealth United Merger Cases*, 333 F.Supp. 911, 912 (J.P.M.L. 1971). In *In re Repetitive Stress Injury Litigation*, the Second Circuit Court of Appeals, on mandamus, overturned the consolidation of 44 cases involving repetitive stress injury based on two principal sets of differences in the cases: (1) the wide variety of health problems among the plaintiffs, and (2) the different devices responsible for the plaintiffs' injuries. 11 F.3d 368, 373 (2d Cir. 1993). For similar reasons, the federal MDL Panel declined to consolidate such cases. See *In re Repetitive Stress Injury Product Liability Litigation*, 1992 WL 403023, at *1 (J.P.M.L. Nov. 27, 1992). For other cases denying transfer of cases that were set for trial or in which discovery was substantially underway, see e.g., *In re Photocopy Paper*, 305 F.Supp. 60, 62 (J.P.M.L. 1969)("As discovery has been completed in the Virginia Impression Products Company case and trial is scheduled to begin shortly, this action would certainly be excluded from any consolidated or coordinated pretrial proceedings. Discovery in several other actions has also progressed to a point that their transfer under section 1407 would be inappropriate.")(citation omitted); *In re American Financial Corp. Litig.*, 434 F.Supp. 1232, 1234 (J.P.M.L. 1977)("[W]e further agree with Judge Werker's conclusion that Merton, wherein discovery has been completed and trial is imminent, should be left alone to proceed to trial as expeditiously as possible."); *In re Protection Devices and Equipment and Central Station Protection Service Antitrust Cases*, 295 F.Supp. 39, 40 (J.P.M.L. 1968).

court litigation under the new MDL rule. This is for the simple reason that Texas courts, unlike the federal courts, have had no problem managing the asbestos cases before them.

Moreover, at least one purpose for MDL transfer cited by the panel in its opinion was to promote exploration of “opportunities for global settlement or alternative dispute resolution mechanisms.” 771 F.Supp. at 421. Indeed, settlement discussions in the federal MDL led to a nationwide class action settlement. But that settlement was disapproved by the United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), because the class was improperly certified “[g]iven the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions.” 521 U.S. at 624. Thus, two main reasons prompting federal MDL transfer of asbestos litigation – the inability or unwillingness of heavily impacted federal districts to process the cases and the desire to explore opportunities for a one-shot “global resolution” of the litigation – simply do not exist here.

The Texas Supreme Court relied on the considerations in *Amchem* to effectively bar personal injury class actions in Texas:

Personal injury claims will often present thorny causation and damage issues with highly individualistic variables that a court or jury must individually resolve. See generally *Amchem Prods., Inc.*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689. Thus the class action will rarely be an appropriate device for resolving them.

Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 436 (Tex. 2000).² So while Union Carbide seeks across-the-board adjudication of its defenses, by one judge in all cases, plaintiffs could never request similar treatment — a one-time trial on liability, say. Union Carbide simply wants the benefits of aggregation without the risks.

II. Statewide MDL consolidation would be inefficient, uneconomical, and disastrous for the litigants and for the judicial system of Texas.

Given the “satisfactory manner” in which Texas courts have been managing asbestos litigation, any defendant seeking MDL transfer should be required to show that such transfer would significantly improve the administration of the cases in specific ways. Union Carbide has failed to make such a showing. Its motion fails to acknowledge the procedures already in place for managing the litigation adopted by local Texas courts, and does not consider the problems that would be created by discarding those successful procedures and transferring thousands of files to a single forum.

A. Asbestos litigation has been locally managed by Texas courts for years with marked success.

Union Carbide’s motion admits that Texas courts have managed asbestos litigation with “sometimes admirable” results, motion at 1, but fails to describe and to fully appreciate the efficiency with which Texas courts have resolved asbestos cases over the past decade in general and the past several years in particular. The success of the Texas courts can be measured by the volume of litigation filed in and resolved in the Texas courts, the speed with which the cases are resolved, and the amount of court time

² See also, e.g., *Stobaugh v. Norwegian Cruise Line, Ltd.*, 105 S.W.3d 302, 311-312 (Tex. App. – Houston [14th Dist.] 2003, n.p.h.) (“Although our high court has not precluded class actions in mass torts, it has made it very clear

consumed by the courts in resolving contested matters. First, however, the Panel should note the procedures adopted by the courts to assist them in the efficient management of the cases.

1. Courts have already developed efficient systems to resolve asbestos cases.

In February of 1990, the Dallas County courts adopted standing orders to govern asbestos litigation. As described by the Dallas County order, the purpose of the orders was and is “to establish a 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 impacted by asbestos litigation have adopted similar asbestos dockets and standing orders governing the conduct of asbestos litigation. The orders creating the dockets and/or specifying the common procedures and discovery in asbestos litigation are listed at Tab A.³ Together these orders guide the resolution of the vast majority of all asbestos cases in Texas.

The various standing orders governing asbestos litigation in Texas were invariably the product of negotiation between the plaintiffs’ bar and the defense bar, generally

that class-action treatment is rarely appropriate for resolving personal-injury claims.”).

³ We are providing the Panel with a bound volume of all standing orders.

follow the same template, and are amended from time to time as circumstances dictate. A typical standing order will accomplish the following:

- provide that all common issues of law or fact will be heard and decided by a single “asbestos judge”
- authorize the asbestos judge to establish a uniform trial schedule for asbestos cases;
- create a “Master Asbestos File” consisting of pleadings and orders applicable to all asbestos cases in the county;
- limit the number of plaintiffs that may be joined in a single petition or case;
- provide for “short form pleadings” to be used by the parties; and
- establish a discovery control plan and establish “master” discovery requests to be responded to by each plaintiff within a specified time after filing the case.

See, e.g., Master Asbestos Case Management Order – 2001, Dallas County, Texas, signed November 27, 2001. That the orders are not identical simply reflects the reality that each impacted county has different circumstances.

The effect of these standing orders is to promote centralized, efficient, local administration of the asbestos litigation in Texas counties heavily impacted by asbestos litigation. The “asbestos dockets” have at least three critical advantages over a proposed MDL. First, an efficient system is already in place; the massive economic burden that the State (and one unlucky county) will incur by undertaking the transfer — and, ultimately, retransfer — of thousands of voluminous files is not necessary under the current system. Second, the task of coordinating asbestos litigation falls not on one presiding judge (who presumably will retain his or her own docket of “ordinary” cases), but on ten “asbestos

judges” already versed in the handling of this litigation. Third, the “asbestos judges” in the various counties can more easily perceive local conditions — such as the speed with which parties can be expected to respond to discovery and the conditions of the local docket — that may and should affect the administration of the asbestos litigation. The advantage of this “hands-on” system created by district judges for their countries, over a single proceeding governing all cases and dockets no matter what the circumstances of the cases or particulars local dockets, are obvious.

The standing orders work. Judges who employ them have voiced no complaints about the way asbestos litigation is handled in Texas. Again, if the opposite were true and there were widespread dissatisfaction about the litigation among Texas judges, Union Carbide would have documented it. But the system works.

Texas counties impacted by asbestos litigation have aggressively crafted and implemented procedures to promote the prompt, efficient, and fair administration of the litigation. As noted by the Texas Supreme Court, their efforts have been successful. The MDL Panel should not displace these efforts with a procedure so unrealistically ambitious that it promises to delay and make more expensive the resolution of asbestos cases.

2. *Resolutions have kept pace with filings.*

Notwithstanding Union Carbide’s rhetoric of crisis, the available empirical data supports the Texas Supreme Court’s observation that asbestos litigation is being managed in a satisfactory manner. The claim that “thousands” of case are backloging Texas

courts is simply not true. Although official data is unavailable because district clerks typically do not categorize asbestos cases as a separate type of litigation, data is available from some firms who have filed many of the asbestos cases in Texas (in terms of both the number of cases filed and the number of plaintiffs in those cases). This data indicates that the number of claims pending in the Texas courts is stable, *if not decreasing*. From January 1, 2000 through August 31, 2003, the major law firms have filed a total of 3,770 cases, encompassing the claims of 14,432 plaintiffs.⁴ In that same period of time, seven firms fully resolved 3,855 cases while filing 3,108 over the same period of time.⁵ These numbers show a ten percent *decrease* in the number of asbestos cases filed in the Texas courts.

It is also clear that the number of asbestos cases filed in Texas has recently begun to decrease even more quickly. Union Carbide has only identified five cases filed against it after September 1, 2003. One was settled shortly after filing. This leaves four cases pending after September 1. Whether this is due to changes in liability laws passed in the last legislative session, or fewer diagnoses of asbestos-related diseases, or some other cause, it seems clear that substantially fewer cases are now being filed.

⁴ For purposes of this survey, a “plaintiff” is an individual with an asbestos-related disease or a decedent; the term does not include persons with derivative claims and multiple wrongful death beneficiaries. Nine firms responded to the survey in adequate detail to be included in these totals. See attached spreadsheet at Tab K. The Harris County Courts do track asbestos cases, and show that the system resolves them in a timely fashion. *See* Tab K.

⁵ For purposes of this survey, a case is “fully resolved” if all claims of all plaintiffs are resolved against all defendants.

3. *Cases are promptly resolved.*

It is axiomatic that asbestos litigation generally is not fully resolved (i.e., settled or reduced to judgment) until a trial setting is reached. Thus, the “life-span” of an asbestos case can be measured from the date of filing to the date of trial. Although anecdotal, the attached documentation shows that in courts heavily impacted by asbestos cases (including Dallas and Harris counties), asbestos cases filed in the year 2001 receive special settings (in other words, firm, reliable trial dates) in 2003. Asbestos cases are thus being tried within two years of filing, a more than respectable rate of resolution for any litigation, let alone complex litigation like that involving asbestos-related injuries. More broadly, Baron & Budd’s internal information, summarized and appended in the form of a chart, attached at Tab L, indicates that the time from filing to full disposition has steadily decreased, from 53 months in 2001, to 44 months in 2002, to 24 months in the first 8 months of 2003. The experience of Baron & Budd, P.C., one of the law firms with a sizable asbestos docket in this state, demonstrates that, notwithstanding vague allegations of docket delay and backlogs, asbestos cases in Texas are resolved expeditiously. Attached at Tab L is Baron & Budd’s trial docket of asbestos-related product liability cases in Texas for the year 2004, and a summary of the information reflected in that docket. The trial docket reflects that asbestos cases are being called for trial within two to three years of filing, often *within a year* of being filed. The docket also shows that of the 965 cases set for trial in Texas in 2004, only 15 – roughly one percent – were filed prior to the year 2000. This is a more than respectable rate of

resolution for any litigation, let alone complex litigation like that involving asbestos-related injuries. It cannot be credibly suggested that MDL transfer – with its massive transfer of files, consideration of whatever “common issues of fact” the presiding court can identify, and retransfer of files to the courts of origin – will actually accelerate the rate at which these cases are resolved as to all defendants.

4. *Asbestos litigation consumes remarkably little court time.*

The procedures adopted by the various counties in their standing orders have effectively reduced the time that Texas judges, including “asbestos judges,” must devote to their asbestos cases. Although thousands of cases are pending, asbestos litigation consumes remarkably little in-court time. In Dallas County, “asbestos judges” spend as little as one afternoon per month on common issues, and trials are set once a month and divided among the seventeen district and county courts, so that no court must stage more than one asbestos trial per year. Other counties manage the litigation in a similar manner. The volume of asbestos litigation has not prevented any litigant in any type of litigation – asbestos or non-asbestos – from receiving a day in court within a reasonable time after suit is filed.

B. Centralization would impose needless delay and expense on litigation and on the courts; on the other hand, the benefits promised by Union Carbide are illusory.

A registry of the handful of *post*-September 1, 2003 asbestos cases in a single pretrial court would be far more expensive than simply allowing the cases to continue to be processed in the local courts where they are filed. The expense, burden, and

disruptive effect on the State would be exponentially increased if the post-September 1, 2003 cases were combined with the thousands of *pre*-September 1, 2003 cases for pretrial management before a single judge, as Union Carbide suggests. Because the management of such a “case” would be more than a full-time task for any judge, no matter how well-versed in the litigation he or she may be, the procedure advocated by Union Carbide would effectively remove one district court from the roster of courts created by the Legislature. And although the procedure would temporarily free local courts from the task of resolving the cases, the litigation will ultimately have to be returned to its home courts for disposition. The only tangible result will be unconscionable delay for the plaintiffs, many of whom are terminally ill and have no time to spare, and a windfall for Union Carbide and the other defendants.

1. *There are not sufficient “common issues of fact” to justify an MDL proceeding.*

In mature mass tort litigation like asbestos litigation, time and energy is spent not on resolving the factual or legal issues common to the cases – those issues have been resolved or at least are understood by the parties and the courts – but on resolving the fact-intensive variables presented in each individual case. Courts presiding over asbestos litigation spend the overwhelming majority of the time resolving questions such as: Was the plaintiff injuriously exposed to the defendant’s product (or on the defendant’s jobsite)? What other exposures contributed to the plaintiff’s injuries? Did the plaintiff smoke cigarettes? What are plaintiff’s damages? How should liability be apportioned? The resolution of these individual issues cannot conceivably be assisted by MDL

engineered pretrial proceedings. Given the reality — recognized by the United States Supreme Court in *Amchem* and by our supreme court in *Bernal* — that individual issues in asbestos litigation unquestionably predominate over common issues, transfer and consolidation of this mature litigation will not promote the “just and efficient conduct” of the actions.

Several of the “common” questions cited by Union Carbide – when and where each defendant supplied asbestos (i.e., whether each defendant supplied asbestos to any plaintiff’s job site) and the applicability of the forum non conveniens defense — are so inherently and transparently individual and specific to each case that it is surprising that Union Carbide would even mention them. Other questions cited by Union Carbide — such as the sufficiency of warnings of the dangers of the products, the degree to which each defendant took safety precautions over time, and the state of scientific knowledge at particular time periods may necessitate the use of internal company documents or the same authoritative literature, but do not yield the same answer in every case, and thus cannot legitimately be characterized as “common” questions. The literature and evidence relevant to a worker exposed to asbestos in, say, 1959 varies greatly from that relevant to the claim of a worker exposed in 1973. And a Navy veteran, a refinery worker, a home remodeler, a career mechanic, and the wife of a bricklayer who washed her husband’s dusty clothes all have vastly different circumstances.

Union Carbide also maintains that “at issue in all asbestos cases are general causation questions — whether exposure to asbestos causes particular diseases. The

same experts repeatedly testify (usually by deposition) as to these causation issues.” Motion at 2. But this is an intensely disingenuous statement. Union Carbide knows very well that while causation experts do frequently testify, it is invariably about a particular plaintiff’s medical history. For instance, a plaintiff may have smoked cigarettes, or perhaps had exposure to some other disease-causing factor. Likewise, there may be a dispute about a particular plaintiff’s diagnosis. But these issues are individual in nature.

By contrast, the common medical issues were decided decades ago. There is no longer any dispute that asbestos causes asbestosis, lung cancer and mesothelioma. Not even Union Carbide disputes this. Instead, causation questions litigated today involve individual plaintiffs’ medical condition and causation facts.

Moreover, courts have held that these allegedly threshold issues are generally not in fact dispositive of all cases and cannot be addressed collectively. As Justice Baker recently observed, “mass trials (or summary judgment proceedings) on the issue of general causation create substantial savings only when the plaintiffs lose [I]f the first jury [or court] finds general causation, for example, that the defendant’s product could have caused the plaintiff’s injury, individual trials will still be necessary, and therefore little or no time and expense is saved.” *Bernal, supra*, 22 S.W.3d at 440 (Baker, J., concurring). Justice Baker added that in the Agent Orange litigation, the court rejected the proposition that “general causation” was a common issue:

The relevant question . . . is not whether Agent Orange has the capacity to cause harm, the generic causation issue, but whether it *did* cause harm and to whom. That determination is highly individualistic, and depends upon the characteristics of individual plaintiffs (*e.g.* state of health, lifestyle) and

the nature of their exposure to Agent Orange. Although generic causation and individual circumstances concerning each plaintiff and his or her exposure to Agent Orange thus appear to be inextricably intertwined, the class action would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure.

Id., quoting *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (emphasis in original), *cert. denied*, 484 U.S. 1004 (1988).

It is doubtful, then, that there are *any* common issues that a presiding court could resolve for the totality of asbestos litigation. But it is clear beyond any doubt that individual, case-specific issues overwhelmingly predominate over common ones in the litigation. *Bernal* is worth quoting again: (“Personal injury claims will often present thorny causation and damage issues with highly individualistic variables that a court or jury must individually resolve.”). 22 S.W.3d at 436. The few common issues that *might* exist in the litigation provide no legitimate justification for the wholesale reassignment of all of the cases, with their innumerable individual issues, to a single judge.

Union Carbide also suggests generally that MDL transfer might make discovery more efficient. Motion at 3-4. But again, it provides no specifics at all about any inefficiencies or injustices in the current system, and no explanation of why or how discovery concerning the individual variables of each asbestos case – which accounts for the overwhelming majority of discovery disputes in the litigation – could be more efficiently managed centrally than locally. Its vague speculation that discovery might be better managed by a single judge than by the “asbestos judges” already in place in many Texas counties provides no basis for the tectonic shift in the litigation that it proposes.

Union Carbide's conduct in MDL proceedings in other jurisdictions suggests that its proposal for the mass consolidation of asbestos cases is not motivated by a sincere desire to address "common issues." As noted above, there has been a federal MDL proceeding in asbestos cases since 1991. *In that entire time, Union Carbide has never brought forward for hearing a single motion relating to any asserted common issue.* To plaintiffs' knowledge, Union Carbide has, in 12 years, filed only one such motion — a motion for summary judgment on its so-called "bulk supplier" defense. This is one of the issues Union Carbide advances as common in its Rule 11 motions. Yet it *withdrew* that motion before it was ever heard, let alone decided. *See* Praeceptum for Withdrawal of Union Carbide's Motion for Summary Judgment on All Claims Based upon its Alleged Supply of Raw Asbestos to U.S. Gypsum and Georgia-Pacific and Governed by Texas, Ohio, California, Florida, or New York Law, in MDL 875 (E.D. Pa. Sept. 23, 2003), attached at Tab B.

Moreover, to plaintiffs' knowledge, in the few states in which coordinated asbestos proceedings are held on a statewide basis, Union Carbide has again never sought relief applicable to all plaintiffs. For instance, Connecticut, Rhode Island, Massachusetts, and New York City have consolidated asbestos proceedings. Yet Union Carbide has never pursued a single common motion in any of these proceedings. *See* affidavits from experienced practitioners in these states, attached at Tab C.

2. *The legal issues asserted by Union Carbide in its Rule 11 motions to be common are not, and should not be considered here.*

Rule 13 provides for MDL treatment upon a finding of common issues of fact. The rule does not contemplate the consideration of any issues of *law* that are asserted to be common. Rather, it is only if the Panel finds that consolidation would help in the litigation of common issues of *fact* that an MDL proceeding can be established.

It is therefore inappropriate for the Panel even to consider the common questions of *law* that Union Carbide asserts in its Rule 11 motions. Nevertheless, Union Carbide invokes the pre-September 1, 2003 cases that are the subject of its Rule 11 motions, as a reason — if not the major reason — for the establishment of an MDL proceeding. Indeed, Union Carbide seeks to have all pre-September 1, 2003 cases ultimately under the control of one Rule 13 judge. Plaintiffs therefore feel compelled to demonstrate why the asserted common *legal* issues are actually highly fact-specific. It is also important to note, as we show below, that Union Carbide has consistently lost these motions in courts throughout Texas. Apparently what it seeks is a one-time shot at a different ruling, in front of a judge Union Carbide hopes will be much more favorable.

(a) Bulk Supplier Defense

In its Rule 11 papers, Union Carbide lists the “bulk supplier defense” as a common legal issue, but as with so many of the factual issues Union Carbide says are common, the bulk supplier defense itself is ultimately fact-dependent. There is some

Texas law on the “bulk supplier” doctrine.⁶ The supreme court has before it a case concerning this issue (the *Humble Sand & Gravel* case), and Texas courts continue to provide guidance.⁷ But the law is what it is; what varies from case to case is other relevant information such as the purchaser of Union Carbide’s asbestos, that purchaser’s knowledge of asbestos hazards versus that of Union Carbide, the time period involved, and so on. It is undoubtedly for this reason that Union Carbide *withdrew* its motion for summary judgment on the bulk supplier defense in the federal asbestos MDL proceeding.

Although not acknowledged by Union Carbide in its Rule 11 papers, it should be noted that not a single Texas court has ever accepted Union Carbide’s arguments on this score. To the contrary, at least two Texas trial judges, ruling in three different cases, have denied motions for summary judgment or directed verdict by Union Carbide on the bulk supplier defense. See, e.g., the affidavit and transcript of ruling, attached at Tab D.

(b) Calidria and Causation.

Union Carbide maintains that the type of asbestos, known as “Calidria,” produced from its mine in California cannot cause any asbestos-related disease. While at some threshold level this might be a common legal issue, in that Union Carbide argues that there is no admissible evidence for plaintiffs on the issue of causation, this is simply another issue on which Union Carbide has never prevailed.

⁶ See, e.g., *Alm v. Aluminum Corp. of America*, 717 S.W. 2d 588 (Tex. 1986); *Humble Sand and Gravel, Inc., v. Gomez*, 48 S.W. 3d 487 (Tex. App. – Texarkana 2001, pet. granted); *U.S. Silica Co. v. Tompkins*, 92 S.W.3d 605 (Tex. App. – Beaumont 2002, pet. filed); *Cimino v. Raymark Ind., Inc.* 151 F.3d 297 (5th Cir. 1998).

⁷ See the decision from less than two months ago in *Wood v. Phillips Petroleum Co.*, ___ S.W.3d ___, 2003 WL 22077294 (Tex. App. – Houston [14th Dist.], Sept. 9, 2003).

In virtually every case, Union Carbide files a no-evidence motion for summary judgment, contending that the plaintiff has no admissible evidence that Calidria caused his or her disease. While these motions frequently turn on whether the plaintiff can prove actual contact with Union Carbide's product, they also involve a contention that Calidria does not cause disease even if the plaintiff was exposed to it. This is said to be so because of unique properties of Calidria fibers.

While the question of whether a plaintiff was exposed to Calidria obviously differs from case to case, to plaintiffs' knowledge no Texas court has ever accepted Union Carbide's arguments about Calidria and its propensity to cause disease. That is, to the undersigned counsel's knowledge, no Texas court has ever granted summary judgment to Union Carbide on the ground that there is no admissible expert evidence that Calidria can cause disease. To the contrary, several courts have denied such motions. See orders from Dallas County and Tarrant County attached at Tab E.⁸ And even this issue, of course, can depend on whether a plaintiff was exposed to any other kind of asbestos, the duration and conditions of exposure, and so on.

⁸ Union Carbide also makes a broader contention about fiber type. Calidria is a variety of "chrysotile" asbestos; chrysotile is one of several main kinds of asbestos fibers. While Union Carbide contends that Calidria fibers, because of their dimensions, cannot cause disease, Union Carbide and other defendants also maintain that chrysotile fibers generally are not harmful. This position too has been uniformly rejected; by Texas courts, courts in other states, and numerous bodies including the World Health Organization, World Trade Organization, EPA, OSHA, the International Agency for Research on Cancer, the U.S. Dept. of Health & Human Services, and others. See the orders from Texas trial courts attached at Tab F; see also *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App. – Corpus Christi 1990, writ dismissed) (holding that there was sufficient evidence to support jury finding that exposure to chrysotile caused mesothelioma); *Eagle-Picher Ind., Inc. v. Balbos*, 578 A.2d 228, 243 (Md. App. 1990), aff'd in part & rev'd in part, 604 A.2d 445 (Md. 1992) ("Thus it was reasonable to infer that Eagle-Picher's asbestos-containing products — even if they contained only chrysotile asbestos — were a proximate cause of the decedent's mesothelioma); *Blanca v. Keene Corp.*, 1991 WL 224573, *2 (E.D. Pa. 1991) ("[A]ll types of asbestos do cause mesothelioma. Specifically chrysotile asbestos has caused mesothelioma.") Should the Panel desire copies of the findings of the governmental agencies listed above, they will be provided promptly.

(c) Forum Non Conveniens

Union Carbide argues that the issue of forum non conveniens is a common legal issue. Again, however, the law is what it is and is readily ascertainable. *See* TEX. CIV. PRAC. & REM. CODE §71.051. Any disputes about forum non conveniens today involve only whether a plaintiff meets the requirement of that statute. And once again, this is a motion that Union Carbide routinely loses. See orders attached at Tab G.⁹

(d) Privileged Documents

Union Carbide contends that whether certain of its documents are privileged is a common legal issue. This issue is currently before the First Court of Appeals, however, and should be decided soon. *In re Union Carbide Corp.*, No. 01-02-01153-CV (oral argument held June 24, 2003). Texas courts will therefore shortly have appellate guidance on this issue and to the extent the issue is a common one, it will be settled.

Moreover, as with Union Carbide's other issues, individual factual determinations also are necessary. For instance, whether Union Carbide waived any privileges is a matter that varies with the circumstances of its production to different plaintiffs. Many of the relevant document productions took place outside Texas. In some instances, Union Carbide asked for the documents back, and in other instances not.

(e) Noerr-Pennington doctrine

⁹ The orders attached reflect the denial specifically of Union Carbide's forum non conveniens motions. Many, many other orders could be supplied that simply reflect denials of forum non conveniens motions in asbestos cases, without specifying the moving defendant. For example, one of the undersigned firms, Waters & Kraus could supply the Panel with at least eleven orders denying forum non conveniens motions that do not specifically mention Union Carbide, but in which Union Carbide was one of the defendants that had requested forum non conveniens dismissal. Other firms have many more such orders. These will be supplied to the Panel if desired.

Union Carbide argues that whether the *Noerr-Pennington* doctrine bars admission of certain of its internal documents is a common legal issue. Plaintiffs do not dispute that this is a question that can be answered without regard to the facts of individual cases. It is the only question asserted by Union Carbide that is truly common, however, and as such it is far too thin a basis on which to consolidate all cases. Moreover, the number of documents at issue is small, and Union Carbide has never sought a blanket ruling on this issue in either the federal MDL or the few state consolidations.

3. *The ulterior motive for the motion to transfer is delay.*

Union Carbide's proposal offers no concrete advantages for litigants or the Texas courts. 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 the central court. 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.*

Ethyl, supra, 975 S.W.2d 610 (emphasis added).

Perhaps the plainest indication that Union Carbide seeks only delay and paralysis, by literally overwhelming one unfortunate judge with hundreds or thousands of files, is Union Carbide's long history of strenuous resistance to even the smallest consolidations of asbestos cases in Texas that are already pending in the same court. As noted above,

Union Carbide never once sought Rule 11 consolidations in the six years that Rule has been on the books. This is no doubt because the Rule 11 procedure did not effect the actual physical transfer of files, and thus the clogging of all cases into one court. Even more telling is Union Carbide's active, tenacious resistance to any efforts even to consolidate very small groups of plaintiffs.

For example, very recently Union Carbide opposed the joinder of just 25 plaintiffs in the same lawsuit, all of whom sought recovery for injuries caused by asbestos exposure. In *Allen v. Arco Industries*, No. B-169628 (Tex. Dist. Ct. Jefferson County, Aug. 28, 2003), Union Carbide insisted that the joinder of such a small group of plaintiffs was unfair and would not result in increased efficiency, because there was simply "no commonality" among the claims:

The Intervenor's crafts and work sites vary greatly from the Plaintiff Donna Allen. Donna Allen alleged exposure to asbestos through the occupations of her husband, father or siblings "while working for many years at powerhouses, refineries, commercial buildings, steel mills, plants, residential or household construction, or other sites." (See Plaintiffs' Original Petition and Jury Demand pg. 17, paragraph 148.) Intervenor's claim exposure to asbestos "in their occupations, or through the occupations of their husbands, fathers, or siblings, while working for many years at powerhouses, refineries, commercial buildings, steel mills, plants, residential or household construction, or other sites." (See Plaintiffs' Fifth Amended Petition and Jury Demand , pg. 18, paragraph 185.). Intervenor's indicate greatly varying types of facilities where they received their alleged exposure such as households, commercial buildings, refineries, or steel mills. *Id.* The factual background regarding Intervenor's individual claims of exposure as to when and to what product is unknown. There is no indication of where Intervenor's worked, when or how often they may have exposed to asbestos or from what source they allege exposure. Further, the types of diseases or injuries allegedly suffered by Intervenor's are unknown and would certainly be independent of those allegedly suffered by Donna Allen. There is no commonality among the Intervenor's claims and those

originally filed by Donna Allen, other than a general allegation of asbestos exposure.

See Union Carbide's Motion to Strike Intervention of Plaintiffs, attached at Tab H. All of this, of course, could be said hundreds of times over about the giant consolidation Union Carbide now seeks. Union Carbide put it more succinctly, perhaps, in another motion to strike intervention: "All asbestos claims are not the same. The mere assertion that a person is claiming injury as the result of exposure to asbestos does not qualify the claim to be joined to any other [asbestos claim] ... just as the claim to have been injured in a car wreck does not entitle that person to intervene into any other car wreck." See motion to strike attached at Tab I.

Union Carbide has even opposed consolidation of the cases of two — just *two* — claimants on the grounds that the circumstances of these claims were too disparate, even where both claimants suffered from mesothelioma. In *Franklin v. ACandS, Inc.*, No. 01-06238 (Tex. Dist. Ct. Dallas County, August 3, 2003), plaintiffs sought consolidation of two mesothelioma cases for trial. Union Carbide inevitably opposed even this most limited of aggregations. See Union Carbide's Objection to the Joinder of the Hall Plaintiffs, Motion to Sever or, in the Alternative, Motion for Separate Trials, attached at Tab J. The motion has not yet been ruled upon.

Many more examples could be given. Union Carbide has simply taken, in court after court in Texas, a position exactly opposite the one it takes before this Panel. And while the plaintiffs in these examples have sought consolidation, these are small groups of claimants, represented by the same counsel, whose cases are already pending in the

same court. This is, of course, entirely different in kind from the radical restructuring Union Carbide urges.

III. Use of the MDL procedure in coordination with Rule 11 of the Texas Rules of Judicial Administration would be impractical, would violate the Legislature's intent that the MDL statute be applied only prospectively, and would run afoul of the constitutional limitation on the location of pretrial proceedings.

Union Carbide has filed its motion in a handful of asbestos cases filed after September 1, 2003, the effective date of TEX. GOV'T CODE § 74.161-164 and Rule 13. It seeks to expand the reach of the MDL rule, however, suggesting that its application could be coordinated with use of Rule 11 so that “virtually all pending and future related asbestos cases could be brought within the jurisdiction of a single judge.” UC Mot. 6. Specifically, Union Carbide proposes that each administrative judicial region designate its own asbestos cases for coordinated proceedings under the rule, and that the Chief Justice of the Texas Supreme Court then designate the MDL pretrial judge (assuming that he or she is an “active district judge”) to serve as the presiding judge in each of the administrative judicial regions. Motion at 5 citing TEX. R. JUD. ADMIN. 11.3(d).

Pretrial aggregation of pending cases, however, would be even more inefficient and counterproductive than centralizing newly filed cases in a single court. It would severely prejudice plaintiffs who have prepared their cases and are approaching trial, and would defy the Legislature's intent to make MDL procedures prospective only. Finally, an order allowing a single judge to supervise pretrial proceedings would violate Article V, section 7 of the Texas Constitution, which requires a court to “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, sec. 7. Union Carbide’s promise of a “statewide pretrial court” (UC Mot. 7) is, and should be unattainable, and provides no basis for granting its motion to transfer.

A. The effective consolidation of pending cases sought by Union Carbide would be impractical, counter-productive, and terribly unfair.

It bears repeating that in the six years since the adoption of Rule 11, *no defendant, plaintiff, or court has sought application of the rule to any asbestos cases in any administrative judicial region.* Union Carbide’s motion fails to explain what has changed to justify a change in approach. Although Union Carbide implies that enactment of the MDL statute and recent amendments to Rule 11 establish a new mechanism for centralized administration of asbestos cases, the procedure allowing the Chief Justice to assign judges from other regions to serve as presiding judges was in the original rule and has been available since 1997. The conscious avoidance of Rule 11 by the parties and the courts reflects the uniform understanding of the bench and bar that asbestos litigation is being managed as effectively as it can be through the network of standing orders already in place; that asbestos litigation is mature litigation in which individual issues, not common issues, consume most of the judicial time and energy spent on the cases; and that use of Rule 11 at this late stage of the litigation would unnecessarily confuse and delay processing of the cases.

But application of Rule 11 to pending cases at this late stage in the life span of asbestos litigation would be worse than unnecessary, expensive, and unproductive. It would also be terribly unfair to litigants who have spent considerable time and money preparing their cases for trial under current rules and would suddenly be “cast in the shadow of a towering mass litigation.” *Ethyl, supra*, 975 S.W.2d at 613, quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992). Many pending asbestos cases are already set for trial, including cases brought by victims of terminal asbestos-related diseases, who will not survive the “coordinated pretrial proceedings” envisioned by Union Carbide. Inclusion of trial-ready or nearly trial-ready cases in any type of massive quasi-consolidation would be unconscionable.

B. Coordinated application of Rule 13 and Rule 11 to cases filed prior to September 1, 2003, would violate the intent of the Legislature in making the MDL statute prospective only.

Recognizing the unfairness and impracticality of subjecting pending, mature litigation to new, untested procedures, the Legislature determined that the MDL statute should not apply to pending cases. Acts 2003, 78th Leg., ch. 204, § 23.02. The decision to restrict MDL procedures to new cases was specific, express, and deliberate.¹⁰

The Legislature unquestionably wanted to confine application of the new MDL procedures it was creating to new cases. Applying Rule 11 as Union Carbide requests would circumvent this intent. If the Panel deems asbestos litigation appropriate for MDL

¹⁰ See colloquy between Rep. Joe Nixon and Rep. John Smithee during House Debate of Mar. 26, 2003 (available with RealOne Player at www.house.state.tx.us/media/chamber/78.htm, 2:41:53–2:46:15, 4:18:18–4:19:06) (observing that legislation affecting suits already pending is “like going out at half-time at a football game and one of the teams wanting to change the rules”).

treatment at all, it should do so only for newly filed cases; it should not create an MDL for the purpose of affecting pending litigation.

C. Application of Rule 11 to pending asbestos litigation would arguably violate the Texas Constitution.

The Texas Constitution requires that a court presiding over a case “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, sec. 7. The Legislature did not create an applicable exception to TEX. CONST. Art. 5, § 7 until 2003, when it passed H.B. 4 and H.B. 3386. These acts amended TEX. GOV’T CODE ANN. § 74.024 to allow the Texas Supreme Court to adopt rules relating to “transfer of related cases for consolidated or coordinated pretrial proceedings” and “the conducting of proceedings under Rule 11, Rules of Judicial Administration, by a district court outside the county in which the case is pending.” TEX. GOV’T CODE ANN. § 74.024(10). These statutory provisions apply only to cases filed after September 1, 2003, however. Thus, no legal exception to the constitutional requirement of TEX. CONST. Art. 5, § 7 permits proceedings outside the county for cases filed before September 1, 2003. “If a district court conducts proceedings in a case outside its jurisdictional geographic area, those proceedings are fundamentally defective and any order based on those proceedings is void.”¹¹ The Texas Constitution

¹¹ *DeShazo v. Hall*, 963 S.W.2d 958 (Tex. App. – Houston [14th Dist.] 1998, no pet.). *Accord Dal-Briar Corp. v. Tri-Angl Equities, Inc.*, 22 S.W.3d 520, 522-23 (Tex. App. – El Paso 2000, no pet.); *Mellon Serv. Co. v. Touche Ross & Co.*, 946 S.W.2d 862, 865-67 (Tex. App. — Houston [1st Dist.] 1997, no writ) (“A district court has no power to adjudicate the rights of litigants except at the time and places prescribed by law.... In Texas, that law is article V, section 7 of the Texas Constitution and statutes enacted after article V, section 7.”).

does not permit coordinated multidistrict proceedings of cases pending before September 1, 2003.

CONCLUSION AND PRAYER

The Panel should heed the admonition of Justice Owen, writing for the Texas Supreme Court, in *Ethyl*:

The systemic urge to aggregate litigation must not be allowed to trump our dedication to justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation.

975 S.W.2d at 613, quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992). The motion to transfer asbestos litigation under Rule 13 should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Response to Motion for Transfer was served upon all counsel of record, as listed below, via U.S. first class mail and electronic mail on this 29th day of October, 2003, pursuant to TEXAS RULE OF APPELLATE PROCEDURE 9.5 and TEXAS RULE OF JUDICIAL ADMINISTRATION 13.3(h):

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