

Not Just for Toxic TORT Cases

Strategic Use of Multidistrict Litigation Consolidation

By Lynne Liberato and Laurie Ratliff

You have related cases in three Texas trial courts and are fighting battles on all fronts. In one court, the judge granted a partial motion for summary judgment that another judge denied. Elsewhere, a deposition is scheduled that you got quashed in another proceeding. You are sending out and answering multiple sets of interrogatories and requests for admissions. What's a lawyer to do?

You can ask the Multidistrict Litigation Panel to transfer those cases into a single court for pretrial proceedings. Since 2003, implementation of Texas Rule of Civil Procedure 13 authorizes an MDL panel to transfer related cases into a single court for pretrial proceedings.¹ After completion of pretrial, the cases are remanded to the original trial courts for trial.

BROADENING USE

As the MDL panel issues its opinions and lawyers explore its potential, it is clear that the rule is not just for massive toxic tort cases. As few as two cases have been consolidated and an array of areas have been covered. Not surprisingly, toxic tort, automobile product liability, mass disaster, and pharmaceutical cases have been referred to a single court for pretrial proceedings. In addition, the panel has granted MDL status to cases involving the Deceptive Trade Practices Act (DTPA), a Ponzi investment scheme, defamation, fraud and breach of contract in oil and gas cases, breach of fiduciary duty, wrongful foreclosure, and violations of the Texas Debt Collection Act.

Other kinds of cases where an MDL proceeding could be effective include certain insurance coverage issues, statutory construction, state tax, contract, employment cases, and those with a common link such as design, manufacture, warnings, marketing similarities, or damages arising out of the same event or company practice.²

The MDL procedure has been criticized as depriving plaintiffs of the right to choose venue and forcing them to litigate their cases in faraway forums. Nonetheless, a pretrial transfer of related cases may provide advantages to both sides of the docket. It reduces discovery costs. A single set of discovery can apply to all cases. Depositions can be taken one time and used in all the related cases. Discovery disputes can be resolved by one judge in a single proceeding, rather than fighting the same issue on several fronts.

Through an MDL proceeding, cases remain on equal footing by allowing the pretrial court to determine consistently the common issues in discovery and other pretrial matters. No case is at an advantage over another related case simply because of a different trial judge's rulings. As the MDL panel stated in its first substantive opinion, "A consistent and steady judicial hand at the helm should in fact promote agreements because lawyers will

know where the court stands on recurring issues. As contested issues arise, the pretrial judge will make consistent rulings, which can then be reviewed by the appellate courts as appropriate."³

The consistency of rulings on recurring issues also promotes realistic case evaluation for both sides. For example, knowing how a pretrial judge will rule on expert evidence allows the parties to more knowledgeably evaluate settlement options or to reconsider their positions. Finally, the rule allows a pretrial judge to rule on virtually any matter arising in pretrial, so the cases are streamlined and better prepared for trial.

STANDARDS FOR CONSOLIDATION

Rule 13 provides the mechanism to consolidate "related cases" — cases that involve one or more common questions of fact — for pretrial purposes.⁴ To obtain a Rule 13 transfer, the movant must establish that: 1) the cases involve one or more common questions of fact; 2) a transfer would be convenient for the parties and witnesses; and 3) a transfer would promote the just and efficient conduct of the cases.⁵ Rule 13 was adopted as part of the 2003 tort-reform legislative overhaul (H.B. 4) and applies, with a few exceptions, to cases filed on or after Sept. 1, 2003.⁶

Rule 13 does not require a common question of law. It requires only "one or more common questions of fact" to support the motion. Thus, there is no need for exact uniformity among the cases. So, for example, in *In re Cano Petroleum, Inc.*, the panel transferred property damage cases and wrongful death cases to a single pretrial court based on the common source of damages — a fire.⁷ Common legal questions may evolve as cases progress, where common facts are known at the outset. Also, without requiring a common legal issue, Rule 13 recognizes that the cases do not have identical causes of action or legal theories to be consolidated for pretrial purposes.⁸

Similarly, Rule 13 does not require that the cases be in the same stage of litigation for them to be consolidated. That some cases are ready for trial does not prevent consolidation with other cases that are in earlier stages of pretrial proceedings.⁹ Consolidated cases can proceed through pretrial at difference paces, but be managed by the same pretrial judge.¹⁰ It is common questions of fact that link the cases for Rule 13 consolidation.

MDL PROCEDURE

A five-member MDL panel appointed by the chief justice of the Supreme Court of Texas determines the motions and appoints the pretrial judges.¹¹ Panel members must be active court of appeals justices or regional administrative judges.¹² The MDL panel may grant a transfer and appoint an active district judge, or a former or retired district or appellate judge who

is approved by the chief justice of the Supreme Court of Texas, as the pretrial court judge.¹³ With one exception, the MDL panel has appointed active district court judges.¹⁴ Not surprisingly, most have been transferred to metropolitan-area courts: three in Harris County, two in Tarrant and Dallas counties, and one each in Montgomery, Fort Bend and Travis counties. The MDL panel has transferred one proceeding to Hidalgo County.

There is no deadline for filing a motion to consolidate under Rule 13. The MDL panel has rejected the argument that conducting discovery before seeking a Rule 13 transfer waives the right to file an MDL motion.¹⁵ Discovery conducted before filing a Rule 13 motion may develop additional similarities that support consolidation. In addition, requesting a transfer and consolidation under Rule 13 is not limited to the parties. A trial judge or the presiding judge of the administrative judicial region may also request a transfer.¹⁶

Upon granting of the motion to transfer and the filing of a notice of transfer, the cases are automatically transferred to the pretrial court.¹⁷ In addition, other related cases may be transferred as “tag-along” cases by simply filing a notice with the trial court and pretrial court.¹⁸ Tag-along cases are those cases related to the cases in the MDL transfer order but not included in the MDL motion or order.¹⁹ For example, *In re Fluor Enterprises* involved an eve of trial setting notice to transfer a tag-along case to the asbestos MDL pretrial court.²⁰ The filing of the notice automatically transferred the case to the asbestos MDL pretrial. The pretrial court immediately remanded the case and the court of appeals denied mandamus relief.²¹

The pretrial court has extensive authority to decide substantive legal issues in all related cases transferred by Rule 13 including jurisdiction, joinder, venue, discovery, trial preparation matters regarding experts, pre-admission of documentary evidence, motions in limine, mediation, default judgments, motions for summary judgment, and settlement.²² Although it may not actually try the case in a bench or jury trial, it may render a final appealable judgment in a case.²³ For example, it may grant a summary judgment that disposes of the parties and the issues. Also, a pretrial court could grant a plea to the jurisdiction, grant a special appearance, or strike a causation expert.

Once the pretrial court rules, with few exceptions, the decision is binding after the cases are remanded to the trial courts.²⁴ Trial courts can modify only with a compelling reason noting that changing the orders frustrates the purpose of consolidation and coordination of pretrial proceedings.²⁵

TYPES OF CASES CONSOLIDATED

While most expect pretrial transfers under Rule 13 to be in mass tort cases with hundreds of cases and virtually identical allegations, more than half of the granted Rule 13 proceedings have been in non-mass tort cases. Both the rule and the panel decisions establish that Rule 13 transfers apply to other types of cases and are not limited by the number of cases nor the amount in controversy. Nothing in Rule 13 limits its application to tort cases. As noted earlier, cases consolidated have involved the DTPA, a Ponzi investment scheme, defamation,

fraud and breach of contract in oil and cases, breach of fiduciary duty, wrongful foreclosure, and violations of the Texas Debt Collection Act.²⁶ Also, Rule 13 does not contain a restriction on the amount in controversy. In fact, cases filed in a county court at law are subject to Rule 13 transfer.²⁷

According to the panel, the number of parties and cases is relevant; however, “the number of pending cases and parties is not directly determinative of the necessity for pretrial transfer.”²⁸

The number of cases and parties are a consideration in the convenience requirement. Nonetheless, the most recent transfers involved very few cases.²⁹ In one proceeding, the panel transferred four cases pending in four counties.³⁰ In another, the panel transferred nine cases pending in seven counties.³¹ The panel also transferred, in an unopposed proceeding, three cases — two pending in Tarrant County and one pending in Dallas County.³² The panel, however, denied a transfer of two cases pending in two counties.³³

Neither will numbers alone guarantee a Rule 13 transfer. In *In re Ad Valorem Tax Litigation*,³⁴ Valero sought to transfer 150 ad valorem tax lawsuits filed in more than 40 counties. In denying the motion, the MDL panel focused on Valero’s failure to show a common fact issue that linked the cases noting that the different property types in many different locations in the state did not have sufficient similarities to justify consolidation.³⁵ The panel concluded that the cases did not have a com-

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mon fact and were thus not related within the meaning of Rule 13.³⁶ The panel also suggested that there were too many cases to manage as a Rule 13 MDL proceeding.³⁷ Valero filed a second motion seeking consolidation of 125 cases. After hearing oral argument, the panel again denied the motion.³⁸ The panel also recently denied a motion to transfer in nine toxic tort cases involving more than 130 plaintiffs.³⁹

Specific cases demonstrate the extent beyond mass tort that the MDL process works. In *In re Steven E. Looper*,⁴⁰ the panel granted a motion to transfer in oil and gas cases. There, the panel consolidated four cases pending in four counties involving allegations of breach of contract, fraud, breach of fiduciary duty, and conspiracy in obtaining mineral estates. Also, in *In re Ocwen Loan Servicing Litigation*,⁴¹ the panel transferred nine cases pending in seven counties. The lawsuits involve allegations of DTPA violations, breach of fiduciary duty, wrongful foreclosure, and violations of the Texas Debt Collection Act arising from the servicing of mortgage loans and subsequent foreclosures.

Conversely, the panel's denials show that it does not rely on the number of cases or parties but on other factors.⁴² Of the cases the panel has refused to consolidate, seven failed to articulate common issues of fact or to adequately support the convenience and efficiency requirements.⁴³ One had an imminent trial setting.⁴⁴

While the rule requires a common question of fact, the common questions of fact do not have to predominate in the cases subject of the transfer.⁴⁵ Cases do not have to be exact duplicates and can be transferred when the common issues do not outweigh the individual, case-specific issues.⁴⁶ According to the MDL panel, a pretrial court can address the relevant case-specific issues and still maintain uniform treatment of the common issues.⁴⁷

In *In re Hurricane Rita Evacuation Bus Fire*, the plaintiffs sued defendants following the bus fire carrying evacuees from an assisted living facility during Hurricane Rita.⁴⁸ Movants argued that discovery would involve numerous common fact witnesses. The cases involved different claims, different defendants, and various legal theories. Movants listed causation, negligence, and proximate cause as the common questions of fact.

In granting consolidation, the panel noted: "But every case is different. No two cases are alike. A Rule 13 transfer of cases does not require that the cases be congruent or anything close to it. It requires only that cases be 'related' — i.e., that they involve one or more common questions of fact — and that transfer will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation."⁴⁹

NOTES

1. The current MDL panel members are David Peeples (chair, administrative judge for the Fourth Judicial Region), Douglas S. Lang (Dallas Court of Appeals), Justice Ann McClure (El Paso Court of Appeals), Justice George C. Hanks, Jr. (Houston First Court of Appeals), and Justice Catherine Stone (San Antonio Court of Appeals).
2. See, e.g., *In re H&R Block, Inc.*, 444 F.Supp.2d 1339 (Jud. Pan. Mult. Lit. 2006) (financial services breach of contract and breach of fiduciary duty); *In re Volkswagen & Audi Warranty Extension Litigation*, 452 F.Supp.2d 1354 (Jud. Pan. Mult. Lit. 2006) (warranty program breach of contract); *In re Union Pac. RR Co. Employment Practices Litigation*, 314 F.Supp.2d 1383 (Jud. Pan. Mult. Lit. 2004) (employment discrimination); *In re Peanut Crop Ins. Litigation*, 342 F.Supp.2d 1353 (Jud. Pan. Mult. Lit. 2004) (insurance coverage dispute).
3. *In re Silica Products Liability Litigation*, 166 S.W.3d 3, 6 (Tex. M.D.L. Panel Nov. 10, 2004).
4. Tex. R. Jud. Admin. 13.2(f), reprinted in Tex. Gov't Code Ann., Tit. 2, Subtit.

- F App. (West Supp. 2007) ("Rule"); see Laurie Ratliff, "Multidistrict Litigation," State Bar of Texas 20th Annual Advanced Civil Appellate Practice Course (2006), Ch. 16 at 1-5 (discussing Rule 13 requirements and application).
5. Rule 13.3(a)(1), (2).
6. While pretrial consolidation existed before the 2003 addition of Rule 13, the earlier rule (Rule 11) was limited because it allowed only regional, not statewide, consolidation, and was more restrictive by requiring both a common question of law and fact. The new Rule 13 eases the burden to establish a transfer and broadens the applicability of pretrial transfers by modifying the requirements to obtain a transfer.
7. No. 07-0593 (Tex. M.D.L. Panel Jan. 2, 2008) (consolidation of property damage cases with wrongful death cases).
8. See *In re Hurricane Rita Evacuation Bus Fire*, 216 S.W.3d 70, 72 (Tex. M.D.L. Panel Mar. 6, 2006) (common facts supported the transfer even though legal questions could diverge).
9. *In re Cano Petroleum, Inc.*, No. 07-0593 (Tex. M.D.L. Panel Jan. 2, 2008).
10. See *id.*
11. Rule 13.3(l).
12. Tex. Gov't Code Ann. §74.161(a) (West 2005).
13. Rule 13.3(m); 13.6(a).
14. The panel appointed retired Judge Paul Davis, Travis County, as the pretrial judge in *Cano Petroleum*.
15. *In re Cano Petroleum, Inc.*, No. 07-0593 (Tex. M.D.L. Panel Jan. 2, 2008).
16. Rule 13.2(b); *In re Cano Petroleum, Inc.*, No. 07-0593 (Tex. M.D.L. Panel Jan. 2, 2008) (regional administrative presiding judge filed a letter with the MDL Panel on behalf of himself and the relevant district judges in support of the motion to transfer).
17. Rule 13.5(a).
18. Rule 13.5(a); *In re Silica Products Liability Litigation*, 216 S.W.3d 87, 89 (Tex. M.D.L. Panel June 19, 2006).
19. Rule 13.2(g); 13.5(e).
20. 186 S.W.3d 639, 641-42 (Tex. App. — Austin 2006, orig. proceeding).
21. *Id.* at 647-48; see Rule 13.9(b) (appellate court that regularly reviews orders of the trial court in which the case is pending when review is sought irrespective of whether that court signed the order being reviewed).
22. Rule 13.6(b), (c).
23. Rule 13.7(a).
24. Rule 13.8(a).
25. *Id.*
26. See Ratliff, "Multidistrict Litigation," State Bar of Texas 20th Annual Advanced Civil Appellate Practice Course (2006), Ch. 16 at 5-13 (detailed discussion of existing MDL proceedings).
27. Rule 13.1(b)(1).
28. *In re Vanderbilt Mortgage & Fin., Inc.*, 166 S.W.3d 12, 14 (Tex. M.D.L. Panel Mar. 2, 2005).
29. See, e.g., *In re Cano Petroleum, Inc.*, No. 07-0593 (Tex. M.D.L. Panel Jan. 2, 2008) (seven lawsuits in four counties transferred to a pretrial judge).
30. *In re Steven E. Looper*, No. 06-1010 (Tex. M.D.L. Panel Feb. 7, 2007).
31. *In re Ocwen Loan Servicing Litigation*, No. 07-0037 (Tex. M.D.L. Panel March 1, 2007).
32. *In re Gary Vanier*, No. 06-0784 (Tex. M.D.L. Panel Nov. 2, 2006).
33. *In re Custom Masonry*, No. 06-1111 (Tex. M.D.L. Panel Feb. 7, 2007).
34. 216 S.W.3d 83 (Tex. M.D.L. Panel April 19, 2006).
35. *Id.* at 84-86.
36. *Id.*
37. *Id.* at 87, n8.
38. *In re Ad Valorem Tax Litigation*, No. 07-0009 (Tex. M.D.L. Panel June 26, 2007).
39. *In re Somerville Railroad Tie Treatment Plant*, No. 07-0380 (Tex. M.D.L. Panel July 10, 2007).
40. No. 06-1010 (Tex. M.D.L. Panel Feb. 7, 2007).
41. No. 07-0037 (Tex. M.D.L. Panel March 1, 2007).
42. See Ratliff, "Multidistrict Litigation," State Bar of Texas 20th Annual Advanced Civil Appellate Practice Course (2006), Ch. 16 at 13-15 (analyzing and categorizing arguments raised in MDL proceedings).
43. *Vanderbilt Mortgage*, 166 S.W.3d at 13-15; *In re Kone, Inc.*, 216 S.W.3d 68, 70 (Tex. M.D.L. Panel Oct. 26, 2005); *Ad Valorem Tax Litigation*, 216 S.W.3d at 84-86; *In re Custom Masonry Corp.*, No. 06-1111 (Tex. M.D.L. Panel Feb. 7, 2007); *In re Personal Injury Litigation Against Great Lakes Dredge & Dock Co. L.L.C.*, No. 07-0025 (Tex. M.D.L. Panel Mar. 7, 2007); *In re Ad Valorem Tax Litigation*, No. 07-0009 (Tex. M.D.L. Panel June 26, 2007); *In re Somerville Railroad Tie Treatment Plant*, No. 07-0380 (Tex. M.D.L. Panel July 10, 2007).
44. *Vanderbilt Mortgage*, 166 S.W.3d at 14.
45. See Rule 13.3(a)(1).
46. *Hurricane Rita*, 216 S.W.3d at 72; *Silica*, 166 S.W.3d at 6.
47. *Id.*; *In re Cano Petroleum, Inc.*, No. 07-0593 (Tex. M.D.L. Panel Jan. 2, 2008).
48. 216 S.W.3d at 71.
49. *Id.* at 72.

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