SYMPOSIUM

TEXAS MDL

by
D. Theodore Rave[*] *and Zachary D. Clopton*[**]

Federal multidistrict litigation (MDL) gets all the attention. This mechanism for consolidating cases filed around the country in a single federal district court for pretrial proceedings has become the dominant mode of resolving mass torts in U.S. courts. But not all mass adjudications find their way into federal court. Texas, like about half of the states, has developed an MDL mechanism to coordinate proceedings within its own courts. In this Essay, we examine the history, doctrine, and data of Texas MDL. Although Texas modeled its approach on the federal MDL statute, the Texas MDL system differs in important ways from federal MDL. And when those differences are combined with Texas's system for electing judges, we find that Texas's MDL design choices have important consequences for parties, courts, and voters.

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[*] George A. Butler Research Professor, University of Houston Law Center. Many thanks are due to Research Librarians Ashley Arrington and Katy Badeaux for extraordinary help tracking down historical sources. Thank you also to Lori Andrus, Lynn Baker, Bob Bone, Sarah Crooks, Brian Fitzpatrick, Robert Freedman, Steve Herman, Lonny Hoffman, Sam Issacharoff, Altom Maglio, Ellen Relkin, Gerson Smoger, David Sugarman, and the participants in the Pound Civil Justice Institute's Academic Symposium.

[**] Professor of Law, Northwestern University Pritzker School of Law.

I. INTRODUCTION

Harvey, Ike, Rita, Dolly, Humberto. These names will be familiar to Texans as major hurricanes that have afflicted the state in recent years. And they will be familiar to Texas insurance lawyers as the predicates for countless lawsuits against insurers in the state.

When mass accidents such as hurricanes harm large groups of claimants, legal systems are bound to look for efficient ways to resolve claims together.[1] In the federal system, many such cases are resolved through multidistrict litigation, or MDL.[2] Indeed, federal MDL has become the dominant mode of mass-tort resolution in U.S. courts.[3] But not all mass adjudications find their way into federal courts. In other work, we have studied mechanisms adopted by approximately half of the states to consolidate and coordinate litigation across state courts—what we call "state MDL."[4] These state MDL systems vary from federal MDL (and from each other) along multiple dimensions, but they all seek to find efficiencies in the resolution of complex disputes.

That brings us back to the Texas hurricanes. In 2003, Texas joined the MDL game with House Bill 4 (HB4).[5] Texas MDL has been used to consolidate thousands of cases into scores of MDL proceedings, including coordinating groups of cases arising from those major hurricanes.[6]

Like the federal system, Texas relies on an MDL panel to select cases for consolidation.[7] Like the federal system, and unlike the overwhelming majority of other state MDL systems, MDL consolidations in Texas are limited to pretrial purposes

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[1] *See, e.g.*, Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1573 (2004) ("In our view, the individualized justice accounts overlook a powerful counter-tradition in American tort law. Mature torts—by which we mean torts that over time develop repetitive fact patterns and repeat-play constituencies—have persistently resolved themselves into what are essentially bureaucratized, aggregate settlement structures." (footnote omitted)).

[2] *See* 28 U.S.C. § 1407 (2012); Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 833 (2017).

[3] *See, e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 9–10 (2019); Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1252 (2018); Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. (forthcoming 2020) (manuscript at 2).

[4] Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. (forthcoming 2021) (manuscript at 5).

[5] *See infra* Part II; *see also* Stephen G. Tipps, *MDL Comes to Texas*, 46 S. TEX. L. REV. 829, 830–31 (2005).

[6] *See infra* Part IV.

[7] TEX. GOV'T CODE ANN. §§ 74.161–.162 (West 2019); TEX. R. JUD. ADMIN. 13.

only.[8] And like the federal system, the Texas MDL Panel's authority gives it significant power to shape the way litigation is conducted through nonrandom assignment of judges, sometimes tipping the balance between plaintiffs and defendants as compared to mine-run litigation.[9] But unlike the federal system, the Texas story is complicated by the fact that Texas judges are elected and have particular constituencies that they purport to represent.[10] Thus, any analysis of Texas's MDL record must account for its effects on democratic governance.

In this Essay, we examine Texas MDL on three dimensions: history, doctrine, and data. Bringing together these threads gives us a better picture of how one of the largest legal systems in the country handles mass disputes, and it illuminates the consequences of its choices for parties, courts, and voters. While we do not reach any conclusions about whether Texas legislators made the right choices when adopting their MDL regime, we are able to identify some of the tradeoffs involved in those choices. In so doing, we can shed light on the stakes of complex litigation in the states.

II. HISTORY

Texas's MDL procedure was adopted in 2003 as part of a major tort reform bill.[11] But the need for some mechanism to coordinate mass litigation was apparent at least several years earlier.

In 1997, the Texas Supreme Court adopted Rule 11 of the Texas Rules of Judicial Administration.[12] Rule 11 allowed the presiding judge of each of the state's nine administrative judicial regions to assign a single "pretrial judge" to conduct all pretrial proceedings in related cases pending in that administrative region.[13] At the end of the pretrial phase, the pretrial judge's assignment would terminate and any cases that had not been resolved would be reassigned to the regular judges in the courts in which they had been filed for trial.[14] This procedure allowed for temporary cross-county coordination of cases in a single administrative region.[15] But instead of transferring cases to a single judge in a single court (as in federal MDL), the Rule

[8] Clopton & Rave, *supra* note 4 (manuscript at 18) (21 of the 24 states with prescribed MDL procedures allow consolidation for all purposes including trial; only Texas, New York, and Kansas limit consolidation to pretrial purposes).

[9] *See infra* Part III.

[10] *See infra* Part V.

[11] For an excellent summary of the drafting history and early functioning of the Texas MDL procedure, see Tipps, *supra* note 5.

[12] TEX. R. JUD. ADMIN. 11.

[13] At the time there were nine administrative judicial regions in Texas. Today there are eleven.

[14] *See* TEX. R. JUD. ADMIN. 11.3(f).

[15] *See* Letter from Paul Schlaud to Texas Supreme Court Task Force (Mar. 15, 2002).

11 procedure sent the judge to the cases. This temporary assignment of a single judge to handle cases that technically remained pending in different courts skirted any concerns about moving cases to improper venues.[16]

The Rule 11 procedure's major shortcoming was its inherently limited geographic reach. For a massive dispute with related cases all over the state, the mechanism essentially could do no better than coordinate pretrial proceedings in front of *nine* different judges—one in each administrative region. Technically the rule included a mechanism that could allow for greater consolidation, but it was clunky and never used in practice. The Chief Justice was authorized to assign a judge to multiple administrative regions, and then in turn, the presiding judges of those regions (if they were inclined to cooperate) could assign that judge as the "pretrial judge" in each region. But Chief Justice Tom Phillips was reluctant to use this mechanism, even in massive cases like the Fen-Phen litigation, in part because he questioned the supreme court's power to order statewide consolidation.[17]

Given the limitations of Rule 11, in 2001 the Texas Supreme Court asked a task force chaired by Houston trial lawyer Joe Jamail—affectionately known as the "committee to fix everything"—to look into potential improvements to procedures for managing mass litigation, among other issues.[18] The Jamail Committee reported its recommendations to the supreme court in March 2003. These included adding a new rule to the Texas Rules of Civil Procedure to govern "Complex Litigation." The Jamail Committee recommended that the supreme court create a panel of judges appointed by the Chief Justice that would be empowered to designate certain types of cases (mostly mass tort or mass disaster cases) sharing common questions

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[16] The federal MDL system adopts a different strategy to avoid similar concerns. As one of us has explained elsewhere, federal MDL has a sort of "split personality." Because federal MDL formally respects the individual nature of each consolidated case and only *temporarily* transfers them for pretrial proceedings, neither personal jurisdiction nor venue constrain the choice of which federal district can be chosen as the MDL transferee court. In practice, however, transfer is anything but temporary; federal MDL functions as a powerful aggregation device from which cases rarely escape. *See* Bradt & Rave, *supra* note 3, at 1296–99; Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1269–73 (2017); Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 103 –05 (2019).

[17] Lonny S. Hoffman, *The Trilogy of 2003: Venue, Forum Non Conveniens & Multidistrict Litigation*, 24 ADVOCATE 74, 80 (2003); *see also* Transcript of Hearing of Supreme Court Advisory Committee at 8875–76 (June 21, 2003) (statement of Chief Justice Phillips) ("I was the chair of National Conference on Mass Tort Litigation in 1994, and I caught all kinds of grief from people all across the country saying, why have you been so inefficient in getting pretrial consolidation. I said, 'Well, we don't have any power to do that at the supreme court.'").

[18] *See* Order Creating the Supreme Court Task Force on Civil Litigation Improvements, No. 01-9149 (Tex. Aug. 24, 2001).

of fact as "complex" and then transfer them to a single court for coordinated proceedings.[19] The Jamail Committee proposed allowing for statewide consolidation for both pretrial proceedings and trial on the merits—two areas where it thought Rule 11 was deficient.[20] But the procedure it ultimately recommended would limit transfers to a court where venue would be proper, meaning that sometimes it would be impossible to consolidate all of the related cases statewide.[21]

The Jamail Committee's work on MDL was overtaken by the state legislature. In 2003, the new Republican majority in the Texas House of Representatives introduced sweeping tort reform legislation, known as House Bill 4, that included MDL.[22] Although MDL was not the major subject of contention—that honor goes to damages caps placed on medical malpractice claims—the MDL proposals were supported by defense-side interest groups, such as Texans for Lawsuit Reform, and opposed by prominent plaintiffs' lawyers.[23] Supporters of the bill stressed efficiency and avoiding inconsistent rulings on similar cases.[24] Opponents were concerned that aggregate pretrial treatment of claims would ignore the uniqueness of plaintiffs' injuries and deny plaintiffs the right to be represented by their chosen attorneys, as the cases would be run by steering committees during pretrial proceedings.[25] Interestingly (as summarized by the House Research Organization), opponents also protested that an MDL procedure "would allow defendants to 'forum shop,' which the bill's supporters say plaintiffs should not be allowed to do. Defendants could combine cases into the court of their choosing rather than into the court that was most proper."[26]

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[19] Letter from Joseph Jamail, Chairman, Texas Supreme Court Task Force on Civil Litigation to Justice Nathan Hecht, Supreme Court of Texas (Mar. 25, 2003).

[20] *See* Memorandum from Paul Schlaud to Harry Reasoner (Mar. 4, 2002); Letter from Paul Schlaud to Texas Supreme Court Task Force (Mar. 15, 2002).

[21] Letter from Joseph Jamail, *supra* note 19. There was discussion of amending Rule 11 to assign a single judge to all related cases statewide for both pretrial and trial purposes. The thinking was that merely assigning a judge across districts would not raise the same venue concerns as a transfer model. But the Jamail Committee appears to have ultimately rejected that option. *See* Memorandum from Paul Schlaud to Harry Reasoner (Mar. 4, 2002); Letter from Paul Schlaud to Texas Supreme Court Task Force (Mar. 15, 2002); Letter from Paul Schlaud to Texas Supreme Court Task Force (June 25, 2002).

[22] H.B. 4, 78th Leg., Reg. Sess. (Tex. 2003).

[23] *See* House Res. Org., Bill Analysis on HB4 24 (Mar. 25, 2003).

[24] *Id.* at 44.

[25] *Id.* at 51–52.

[26] *Id.* at 52. It is not clear from the legislative history exactly how these opponents thought that an MDL procedure would allow the defendants to choose the court to which the cases would be transferred. The House version of HB4, like the final enacted law, vested the power to choose the transferee court in the MDL Panel, and did not give any special weight to the defendant's desired court. But, as we have explained elsewhere, vesting the power to decide whether to consolidate cases in the hands of an entity external to the trial court does have a significant impact

The House bill drew heavily on the federal MDL model and specified the nuts and bolts for how the system of pretrial transfer would work.[27] The Senate, however, stripped out most of those details and instead delegated the task of fleshing out the transfer procedures to the Texas Supreme Court's rulemaking process.[28] The legislation, as enacted, created an MDL Panel of five judges appointed by the Chief Justice, and it authorized the Panel to transfer cases for coordinated pretrial purposes, assuaging the supreme court's concerns about its authority.[29] The statute also specified the standard for consolidation: that the cases share one or more common questions of fact and that transfer would be for the convenience of parties and witnesses and would promote the just and efficient conduct of the action.[30]

While it authorized the MDL transferee court to decide dispositive motions, including summary judgment, the statute expressly prohibited the MDL court from trying transferred cases and required cases to be remanded to the transferor courts for trial on the merits.[31] The legislative history on that decision is sparse. The language limiting transfers to pretrial proceedings, which Texans for Lawsuit Reform appears to have had a hand in drafting, was in the bill from the start.[32] When pressed on the issue at a Senate State Affairs Committee hearing, Alan Waldrop, lead counsel for Texans for Lawsuit Reform, said that it was "a close call" whether the MDL

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on forum shopping and the balance of power in litigation. *See* Clopton & Rave, *supra* note 4 (manuscript at 3). At the very least, it gives the defendants an opportunity to attempt to move the cases out of the plaintiffs' chosen forum. It is worth noting that at least one of the first judges appointed to the MDL Panel, who was also a member of the Supreme Court Advisory Committee that drafted the MDL rules, Judge Scott Brister, rejected the notion that the inclusion of an MDL procedure in HB4 was an attempt to get more defense-oriented judges to decide these cases. Transcript of Meeting of Supreme Court Advisory Committee, Afternoon Session at 9305 (July 17, 2003).

[27] H.B. 4, 78th Leg., Reg. Sess. (Tex. 2003).

[28] *See* William V. Dorsaneo, III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 809 (2013) (explaining the collaboration between the supreme court and legislature on rulemaking); Nathan L. Hecht, *Foreword*, 46 S. TEX. L. REV. 729, 730–31 (2005) (describing the legislative and rulemaking coordination for HB4).

[29] TEX. GOV'T CODE ANN. §§ 74.161–.162 (West 2019); *see also* Transcript of Texas Senate State Affairs Committee at 9–10 (May 7, 2003) (statement of Alan Waldrop) ("The one thing that we [Texans for Lawsuit Reform] would suggest to the Committee, on that front, is to go ahead and create the MDL panel as a matter of statute. That there is, there has been, for a number of years, some concern amongst members of the court that the court does not have the power to just go around creating things like MDL panels.").

[30] TEX. GOV'T CODE ANN. § 74.162.

[31] *Id.*; *see also id.* § 74.163.

[32] *See* Transcript of Hearing of Supreme Court Advisory Committee at 8890 (June 21, 2003) (statement of Peter Schenkkan) ("I think [I] may be partially to blame in terms of people outside the court for this being in the package this year. I was one of the outside lawyers asked by Texans for Lawsuit Reform to consider other issues that weren't already on their agenda and suggested MDL reform as one.").

judge should be allowed to try transferred cases, but they were trying to parallel the federal model and counteract objections that they were altering the venue of the cases.[33] While the plaintiffs' lawyers who testified were generally opposed to adopting an MDL system, they do not appear to have specifically objected to limiting transfer to pretrial purposes.

Finally, the statute specified that appellate review of the Panel's decisions would be only by extraordinary writ.[34] The rest of the details were left to the supreme court.

HB4 passed the Texas House on a 94 to 46 vote.[35] It passed the Senate 28 to 3.[36] And Governor Rick Perry signed the bill into law on June 11, 2003.[37]

The Supreme Court Advisory Committee had to work quickly to draft MDL rules because of a statutory deadline. HB4 required the MDL procedure to go into effect on September 1, 2003.[38] As a result, there was no time for a public comment period before the MDL rules went into effect.[39] The Texas Supreme Court and the Advisory Committee took the position that no comment period was required because of the statutory deadline and because the MDL rules would be written into the Texas Rules of Judicial Administration, not the Texas Rules of Civil Procedure.[40] But they planned to seek comments anyway during the 60 days after the rules went into effect to consider whether amendments would be needed.[41] Chief Justice Phillips appointed the members of the inaugural MDL Panel while the Advisory Committee was still drafting the rules.[42] Two of the judges that he appointed, Scott Brister and David Peeples, were members of the Advisory Committee.[43]

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[33] Transcript of Texas Senate State Affairs Committee at 13 (May 7, 2003).

[34] TEX. GOV'T CODE ANN. § 74.163(a)(4).

[35] H.B. 4, 78th Leg., Reg. Sess. (Tex. 2003).

[36] *Id.*

[37] *Id.* For reference, the partisan makeup of the House was 89 Republicans and 63 Democrats; the Senate was 21 Republicans and 12 Democrats. *Legislators & Leaders*, LEGIS. REF. LIBR. TEX., https://lrl.texas.gov/legeLeaders/members/membersearch.cfm (last visited Mar. 25, 2020).

[38] *See* Transcript of Hearing of Supreme Court Advisory Committee at 8875 (June 21, 2003) (statement of Chief Justice Phillips).

[39] *Id.* at 8879.

[40] *See* Letter from Justice Nathan L. Hecht to Charles L. Babcock, Chairman, Texas Supreme Court Advisory Committee (June 16, 2003).

[41] *See id.*; *see also* Transcript of Meeting of Supreme Court Advisory Committee, Morning Session at 8992–93 (July 17, 2003) (statement of Justice Hecht).

[42] Transcript of Meeting of Supreme Court Advisory Committee, Morning Session at 9005–06 (July 17, 2003); *see also* Transcript of Hearing of Supreme Court Advisory Committee at 8879 (June 21, 2003) (statement of Chief Justice Phillips) ("And I have a tentative list of who I'm going to appoint in my mind, but I'm doing due diligence on it.").

[43] The other three initial panel members were Justice Douglas S. Lang, Justice Mack Kidd, and Justice Errlinda Castillo. *See* Transcript of Meeting of Supreme Court Advisory Committee, Morning Session at 9005–06 (July 17, 2003); Tipps, *supra* note 5, at 834.

The Advisory Committee set to work drafting the MDL procedures embodied in new Rule 13 of the Texas Rules of Judicial Administration in the summer of 2003. They had the Jamail Committee report in front of them as a potential model; indeed, several members of the Advisory Committee had also served on the Jamail Committee.[44] The Advisory Committee also considered the federal MDL statute and the approaches of other states including California and Colorado as potential models.[45]

With the statute as a guide, the Advisory Committee drafted Rule 13, specifying the procedures for transfer, proceedings in the transferee court, remand, and appellate review. The Committee also proposed amending Rule 11 to make clear that Rule 13 would supersede it for cases filed after September 1, 2003.[46] One overarching concern for the Advisory Committee was that the legislature had not appropriated any money to fund the MDL Panel that it had created.[47] So, the Advisory Committee sought to minimize the burden on the Panel judges and shift costs and administrative responsibilities to the parties and the trial courts. It also included a filing fee for each case, to be paid by the party requesting transfer, to offset some of the costs.[48]

One issue on which the Advisory Committee did not have a choice was the extent of consolidation. Although the Jamail Committee proposal allowed for consolidation for all purposes, the crucial decision to limit transfer to pretrial purposes only had been made by the legislature in HB4.

Based on the work of the Advisory Committee, the Texas Supreme Court adopted Rule 13 governing multidistrict litigation on August 29, 2003.[49] Three days later, the Rule went into effect, and Texas had a functioning MDL regime.

III. LIFECYCLE OF A COORDINATED PROCEEDING

What, then, does a Texas MDL look like? This Part surveys the lifecycle of a Texas MDL, focusing primarily on the procedures outlined in Rule 13 of the Texas Rules of Judicial Administration.[50] We supplement these materials with committee

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[44] Charles Babcock, Elaine Carlson, Tommy Jacks, and Steve Susman were on both committees. Justice Nathan Hecht served as the Texas Supreme Court's liaison to both.

[45] Transcript of Hearing of Supreme Court Advisory Committee at 8877 (June 21, 2003).

[46] There were, of course, legacy cases that continued in Rule 11 proceedings after Rule 13 took effect. In 2005, Rule 13 was amended (in response to legislative action) to create a special procedure for asbestos and silica claims filed before September 1, 2003. *See* TEX. R. JUD. ADMIN. 13.11.

[47] *See, e.g.*, Transcript of Meeting of Supreme Court Advisory Committee, Morning Session at 9000 (July 17, 2003).

[48] Transcript of Hearing of Supreme Court Advisory Committee at 9321 (July 18, 2003).

[49] Order Amending the Texas Rules of Civil Procedure, No. 03-9145 (Tex. Aug. 29, 2003).

[50] Rule 13.10 authorizes the Texas MDL Panel to adopt additional rules to govern its own

records, case law, and secondary sources where applicable.

A Texas MDL typically begins when a party files a motion with the MDL Panel to transfer a case and related cases to a "pretrial court." (In Texas, the MDL transferee court is referred to as the "pretrial court" and the transferor court is referred to as the "trial court."[51]) The motion must be in writing, and it must identify all of the cases for which transfer is sought.[52] Trial judges or the presiding judges of the administrative judicial regions can also initiate an MDL by requesting that the MDL Panel transfer a set of related cases to a pretrial court.[53] And the MDL Panel itself can issue an order to show cause why related cases should not be transferred to a pretrial court.[54] All parties in related cases are entitled to notice, and any party in a related case can file a response opposing transfer.[55]

Filing a motion to transfer with the MDL Panel does not automatically stay the proceedings in the trial court.[56] But both the trial court and the MDL Panel have the discretion to order a stay until the MDL Panel rules on transfer.[57]

The MDL Panel may hold a hearing or it may decide the transfer motion on the papers.[58] Any decision requires the concurrence of at least three of the five panel members.[59] The standard for transferring and consolidating cases into an MDL is broad. Echoing the federal standard, the cases must share "one or more common questions of fact" and the transfer to a specified district court must be "for the convenience of the parties and witnesses" and must "promote the just and efficient conduct" of the related cases.[60] The Advisory Committee considered writing factors into the rule for the MDL Panel to consider, but ultimately decided against doing so, preferring to allow the Panel to develop factors case by case.[61]

In practice, the Texas MDL Panel approaches the consolidation question through a two-pronged inquiry, asking first whether the cases are sufficiently "related," and second whether consolidation would serve the goals of convenience and efficiency.[62] The Panel has explained that: "While the number of common fact questions necessary to cause cases to be related is not capable of a bright-line rule, cases

procedures, but it has not done so. *See* TEX. R. JUD. ADMIN. 13.10.

[51] *Id.* r. 13.2.

[52] *Id.* r.13.3(a).

[53] *Id.* r.13.3(b).

[54] *Id.* r. 13.3(c).

[55] *Id.* r. 13.3(d), (h), (n).

[56] *Id.* r. 13.4(a).

[57] *Id.* r. 13.4(b).

[58] *Id.* r. 13.3(k).

[59] TEX. GOV'T CODE ANN. § 74.161 (West 2019).

[60] *Id.* § 74.162; TEX. R. JUD. ADMIN. 13.3(l).

[61] Transcript of Meeting of Supreme Court Advisory Committee, Afternoon Session at 9219–22 (July 17, 2003).

[62] *See, e.g.*, *In re* Tex. Opioid Litig., No. 18-0358, 2018 BL 211039, at *2–3 (Tex. J.P.M.L.

involving complicated, numerous, or significant common fact questions are more likely to be considered related."[63] Common questions need not predominate.[64] Cases may qualify as related "even though they involve different causation and damages facts or different defendants."[65] On the efficiency prong, the Panel asks "whether transfer would (1) eliminate duplicative and repetitive discovery, (2) minimize conflicting demands on witnesses, (3) prevent inconsistent decisions on common issues, and (4) reduce unnecessary travel," as well as (5) "allocate finite judicial resources intelligently."[66]

The Texas rules require the Panel to make written findings for its transfer orders,[67] and most orders are accompanied by opinions explaining its decision to create an MDL. But the Panel does not generally provide any explanation for its choice of pretrial judge. The pretrial judge assignment is typically noted in a short accompanying order. The MDL Panel's orders are reviewable only by extraordinary writ to the Supreme Court.[68] Pretrial judges can be any active district judge in the state or any former or retired district or appellate court judge who has been approved by the Chief Justice.[69] Notably the rules do not require the Panel to select a single pretrial judge, and the Panel has sometimes assigned cases to multiple pretrial judges.[70]

Once an MDL has been established, newly filed related cases (or others that were not subject to the initial transfer order) may be transferred to the MDL as tag-along cases.[71] The procedure for transferring tag-alongs is to file a notice of transfer

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[63] *In re* State Farm Lloyds Hidalgo Cty. Hail Storm Litig., 434 S.W.3d 350, 353 (Tex. J.P.M.L. 2014).

[64] *In re Tex. Opioid Litig.*, 2018 BL 211039, at *2; *see also In re* Volkswagen Clean Diesel Litig., 516 S.W.3d 704, 708 (Tex. J.P.M.L. 2016). The standard is thus more lenient than the requirements for most class actions in both federal and Texas court. *Cf.* FED. R. CIV. P. 23(b)(3) (requiring predominance for (b)(3) class certification); TEX. R. CIV. P. 42(b)(3) (same).

[65] *In re Tex. Opioid Litig.*, 2018 BL 211039, at *2 (quoting *In re* Tex. Windstorm Ins. Ass'n Hurricanes Rita & Humberto Litig., 339 S.W.3d 401, 403 (Tex. J.P.M.L. 2009)) (internal quotation marks omitted).

[66] *In re* State Farm Lloyds Hurricane Ike Litig., 392 S.W.3d 353, 355–56 (Tex. J.P.M.L. 2012).

[67] *See* TEX. R. JUD. ADMIN. 13.3(l).

[68] TEX. GOV'T CODE ANN. § 74.163(a)(4) (West 2019); TEX. R. JUD. ADMIN. 13.9(a).

[69] TEX. R. JUD. ADMIN. 13.6(a). Ordinarily when former, senior, or retired judges are assigned to cases in the trial courts, each party is allowed one objection, which, if exercised, bars that judge from hearing the case. *See* TEX. GOV'T CODE ANN. § 74.053(b). But no such objections are allowed when the MDL Panel transfers cases to a former or retired pretrial judge that has been approved by the Chief Justice. *See* TEX. R. JUD. ADMIN. 13.6(a).

[70] *E.g.*, *In re* Farmers Ins. Co. Wind/Hail Storm Litig., 481 S.W.3d. 422, 425 (Tex. J.P.M.L. 2015).

[71] TEX. R. JUD. ADMIN. 13.2(g).

in both the trial and pretrial courts.[72] At that point the transfer is deemed effective. But any party can ask the pretrial court to remand the tag-along case to the court where it was initially filed. If the pretrial court determines that the tag-along case is not related and grants the motion to remand, it may award costs and attorneys' fees. The pretrial court's decision on the motion to remand a tag-along case is appealable to the Panel.[73] Texas's approach to tag-along cases thus differs from the federal approach, where the Judicial Panel on Multidistrict Litigation (JPML), not the transferee judge, hears objections to its conditional transfer of tag-along cases in the first instance.[74] This difference appears to have been driven by a desire not to overburden the Texas MDL Panel, which the legislature created without appropriating any money to fund it.[75]

Like the federal MDL system, transfer to a Texas MDL is for pretrial purposes only. Once an MDL has been created, the pretrial judge has exclusive jurisdiction over all of the transferred cases, and the trial courts are generally barred from taking any further action in them.[76] Transfer is deemed effective when notice of the transfer is filed in the trial and pretrial courts.[77] The pretrial judge is expressly authorized to decide all pretrial matters, including summary judgment and other dispositive motions, as well as trial preparation matters such as motions in limine and motions to strike expert testimony.[78] But it may not try transferred cases on the merits.[79] The pretrial court is also authorized to set aside or modify rulings made by the trial court before transfer.[80]

Rule 13 stresses the need for active judicial management of the MDL. It states: "The pretrial court should apply sound judicial management methods early, continuously, and actively" and requires the pretrial court to conduct a hearing and enter a case management order "at the earliest practical date."[81] The Rule then provides a list of case management issues that the pretrial judge should consider at the hearing, including appointing lead or liaison counsel, coordinating discovery, setting up document depositories, and scheduling alternative dispute resolution conferences.[82] As Rule 13's drafters made clear, this is not a grant of new power to the

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[72] *Id.* r. 13.5(e).

[73] *Id.*

[74] U.S. JUD. PANEL MULTIDISTRICT LITIG. R. PROC. 7.1.

[75] *See* Transcript of Meeting of Supreme Court Advisory Committee, Afternoon Session at 9287–90 (July 17, 2003).

[76] TEX. R. JUD. ADMIN. 13.5(b), 13.6(b).

[77] *Id.* r. 13.5(a).

[78] TEX. GOV'T CODE ANN. § 74.162 (West 2019); TEX. R. JUD. ADMIN. 13.6(b).

[79] TEX. GOV'T CODE ANN. § 74.162.

[80] TEX. R. JUD. ADMIN. 13.6(b).

[81] *Id.* r. 13.6(c).

[82] The full text of Rule 13.6(c) is:

(c) *Case Management.* The pretrial court should apply sound judicial management methods

pretrial judge; every district judge in Texas has the authority to use these sorts of techniques to manage cases. Instead, the drafters included the specifics in the rule to emphasize to pretrial judges the importance of active case management in MDLs.[83]

The power of Texas pretrial judges extends back to the trial court. For one thing, while MDL pretrial judges may not try transferred cases themselves, they are authorized to set trial dates in conjunction with the trial court.[84] This procedure allows the pretrial court to selectively remand cases for bellwether trials.[85] And Rule 13 requires the trial and pretrial courts to cooperate reasonably with each other to both respect the trial court's docket and promote the "just and efficient disposition of all related proceedings."[86] Once a trial date is set in this manner, the trial court cannot postpone the trial without the concurrence of the pretrial judge.[87]

The pretrial judge in Texas is also given considerable authority to influence proceedings in the trial court after remand. Unlike the federal system, where only the law-of-the-case doctrine and judicial comity limit the power of a district judge

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> early, continuously, and actively, based on its knowledge of each individual case and the entire litigation, in order to set fair and firm time limits tailored to ensure the expeditious resolution of each case and the just and efficient conduct of the litigation as a whole. After a case is transferred, the pretrial court should, at the earliest practical date, conduct a hearing and enter a case management order. The pretrial court should consider at the hearing, and its order should address, all matters pertinent to the conduct of the litigation, including:
> (1) settling the pleadings;
> (2) determining whether severance, consolidation, or coordination with other actions is desirable and whether identification of separable triable portions of the case is desirable;
> (3) scheduling preliminary motions;
> (4) scheduling discovery proceedings and setting appropriate limitations on discovery, including the establishment and timing of discovery procedures;
> (5) issuing protective orders;
> (6) scheduling alternative dispute resolution conferences;
> (7) appointing organizing or liaison counsel;
> (8) scheduling dispositive motions;
> (9) providing for an exchange of documents, including adopting a uniform numbering system for documents, establishing a document depository, and determining whether electronic service of discovery materials and pleadings is warranted;
> (10) determining if the use of technology, videoconferencing, or teleconferencing is appropriate;
> (11) considering such other matters the court or the parties deem appropriate for the just and efficient resolution of the cases; and
> (12) scheduling further conferences as necessary.

Id. r. 13.6(c).

[83] *See* Transcript of Hearing of Supreme Court Advisory Committee at 9471 (July 18, 2003).

[84] TEX. R. JUD. ADMIN. 13.6(d).

[85] *See id.* r. 13.7(b).

[86] *Id.* 13.6(d).

[87] *Id.*

who has gotten a case back from an MDL, Texas builds in a formal role for the pretrial judge that significantly limits the trial judge's discretion after remand. Rule 13 admonishes the trial judge that "to alter a pretrial court order without a compelling justification would frustrate the purpose of consolidated and coordinated pretrial proceedings."[88] And more importantly, a trial judge "cannot, over objection, vacate, set aside, or modify pretrial court orders" without the written concurrence of the pretrial judge.[89] Notably, this limitation expressly covers the pretrial court's determination on the admissibility of expert testimony—often a central determinant of the outcome of complex cases.[90] The trial judge is allowed to modify other pretrial court orders relating to the admissibility of evidence, but only "when necessary because of changed circumstances, to correct an error of law, or to prevent manifest injustice," and only if the modification is supported by "specific findings and conclusions in a written order or stated on the record."[91]

Although the drafters of Rule 13 briefly considered making it easier to appeal rulings of the pretrial court, they ultimately decided not to alter the ordinary rules limiting interlocutory appeals.[92] Mandamus, however, remains available for pretrial court orders in appropriate circumstances, and appellate courts must expedite review of any cases pending in an MDL pretrial court.[93] When orders of the trial court or pretrial court are appealed, they go to the appellate court with jurisdiction over whichever court the case is pending in at the time of the appeal, regardless of whether that court issued the order being appealed.[94]

Finally, Rule 13 authorizes the MDL Panel to retransfer cases from one pretrial court to another pretrial court on its own initiative or at the request of the parties or pretrial judge.[95] This rule is primarily aimed at situations where the pretrial judge is no longer available because, for example, the judge has died, resigned, or been replaced at an election. Thus if a pretrial judge is voted out of office, the newly elected judge will not automatically take over the MDL; the MDL Panel may decide whether to leave the cases with the newly elected judge or send them elsewhere.[96] But the rule also authorizes the MDL Panel to retransfer a case "in other circumstances when retransfer will promote the just and efficient conduct of the cases."[97]

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[88] *Id.* 13.8(a).

[89] *Id.* r. 13.8(b).

[90] *Id.*

[91] *Id.*13.8(c).

[92] *See* Transcript of Hearing of Supreme Court Advisory Committee at 9484–501 (July 18, 2003).

[93] TEX. R. JUD. ADMIN. 13.9(c).

[94] *Id.* r. 13.9(b).

[95] *Id.* r. 13.3(o).

[96] *See* Transcript of Meeting of Supreme Court Advisory Committee, Afternoon Session at 9230–31 (July 17, 2003).

[97] TEX. R. JUD. ADMIN. 13.3(o).

Judge David Peeples, a member of the Advisory Committee and the first Chair of the Texas MDL Panel, thought this broader provision was essential to ensure that the MDL Panel could remove a pretrial judge "who is not getting the job done."[98] Thus, although appellate review of the consolidated pretrial proceeding is limited, the MDL Panel does retain some supervisory power and the ability to replace a pretrial judge at its discretion. We have more to say about this retransfer power below.

IV. THE DATA

The previous Part described the doctrinal requirements of Texas MDL. This Part turns from law on the books to law in action, analyzing data related to Texas MDL.

The Texas courts do not produce MDL-specific data, so we examined the dockets of all MDL cases listed on the Texas Multi-District Litigation Panel's website as of October 2019.[99] This website appears to offer a comprehensive list of all cases in which any party has sought state MDL treatment in Texas.[100] The results presented below are based on our hand coding of these docket sheets, with some reference to other publicly available information about the cases and the judges handling them.

Petitions & Dispositions. From its inception in 2003 until October 2019, the Texas MDL Panel received 98 requests to consolidate cases into an MDL. It granted those requests and created an MDL 61 times. It denied transfer motions 32 times. Three transfer motions are still pending as of this writing. One potential MDL was removed to federal court and another was stayed by a federal bankruptcy court before the petition could be decided.

Looking at decided motions, Texas has a 66% grant rate, which is lower than the grant rate in federal MDL for most of its history but somewhat higher than the federal grant rate in recent years.[101]

Case Type. To understand better how Texas MDL is used, we turned next to

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[98] *See* Transcript of Meeting of Supreme Court Advisory Committee, Afternoon Session at 9223 (July 17, 2003); *see also id.* at 9228.

[99] *See Available Multidistrict Litigation Cases*, TEX. JUD. BRANCH, https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/available-multidistrict-litigation-cases/ (last visited Feb. 3, 2020).

[100] *See* E-mail from Claudia Jenks, Chief Deputy Clerk of the Supreme Court of Texas, to Ashley Arrington (Aug. 26, 2019) (on file with authors).

[101] *See* Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1723–24 (2019) (finding the federal grant rate from 2012 to 2016 to be 57.7%); Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 433 (2013) (finding the federal grant rate from 1968 to 2011 to be roughly 70%–80%).

subject matter. We attempted to categorize the subject matter of the 61 granted petitions, relying on case names, descriptions in the Panel's transfer order or the motion to transfer, and secondary sources.

Weather-related insurance litigation was the largest single category, accounting for 20 granted petitions (33%). The Panel also granted 14 product liability petitions (23%), 11 mass accident petitions (18%), and another 3 miscellaneous tort petitions (medical malpractice, defamation, and barratry) (5%), for a total of 46% of granted petitions sounding in tort. The remaining granted petitions included: 5 consumer law (8%); 3 oil & gas law (5%); 2 employment law (3%); 2 investor or corporate law (3%); and 1 life insurance law (2%). These results are displayed in Figure 1.

Texas does not appear to have consolidated any public law cases.[102] The Panel rebuffed several efforts to consolidate challenges to various local governments' tax appraisal practices. However, public enforcement efforts by the state attorney general's office have been brought into state MDLs that also included private claims on at least two occasions: in the *Volkswagen Clean Diesel Litigation*[103] and the *Texas Opioids Litigation*.[104] In both cases, the state unsuccessfully opposed its inclusion in the MDL. In 2019, however, the Texas legislature enacted SB 827, which exempts certain consumer enforcement actions brought by the state attorney general's office from MDL treatment.[105] By its terms, the new legislation applies to pending cases as well as cases transferred after its enactment, and the legislative history suggests that it was intended to prevent MDL consolidation from interfering with the attorney general's ability to seek injunctive relief.[106] The state attorney general's office has again sought remand in the *Texas Opioids Litigation*, but as of this writing the court does not appear to have ruled on the motion.

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[102] For a discussion of the absence of public law cases in federal MDL, see Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 905 (2018).

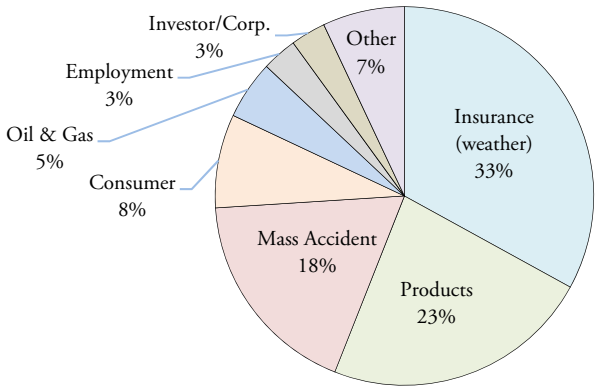
[103] State of Tex.'s Motion to Dissolve or Modify the Stay of Envtl. Enf't Cases at 18, *In re* Volkswagen Clean Diesel Litig., No. 15-0884 (Tex. J.P.M.L. Dec. 7, 2015); Order Granting Motion to Transfer, *In re* Volkswagen Clean Diesel Litig., No. 15-0884 (Tex. J.P.M.L. Jan. 14, 2016).

[104] Order Denying Motion for Rehearing, *In re* Tex. Opioid Litig., No. 18-0358 (Tex. J.P.M.L. Mar. 21, 2019).

[105] S.B. 827 § 2, 86th Leg. Reg. (Tex. 2019) (codified at TEX. GOV'T CODE ANN. § 74.1625) (exempting claims under the Texas Deceptive Trade Practices Act and Texas Medicaid Fraud Prevention Act).

[106] *Id.* § 3; *see also* Huffman, State Affairs, *Bill Analysis* (May 24, 2019), https://capitol.texas.gov/tlodocs/86R/analysis/pdf/SB00827F.pdf#navpanes=0.

Figure 1: Texas MDLs by Case Type



We also thought it was useful to compare the subject matter of Texas MDLs to federal MDLs. One of us previously compiled case category data for federal MDLs pending in April 2018, reflected in Figure 2 below.[107] While products liability cases make up almost one-third of federal MDLs, the proportion of products liability cases in Texas is lower at less than a quarter. Weather-related insurance claims, which make up only a small fraction of cases in federal MDLs, account for one-third of Texas MDLs. And mass accident cases make up a significantly larger percentage of proceedings in Texas state MDL than in federal MDL.

It is important to note that these comparisons treat each MDL as a unit, but, of course, not all MDLs are created equal. Some MDLs contain many more consolidated actions and parties than others.[108] In the federal system, for example, while products liability disputes make up only about one-third of all MDLs, they account for around 90% of the pending actions consolidated in MDLs. Although Texas does not provide statistics on the number of actions or parties consolidated in MDLs, it is worth noting that several of Texas's weather-related insurance MDLs are comprised of thousands of individual actions brought by thousands of plaintiffs.[109] So, it seems likely that the weather-related insurance claims represent a large proportion

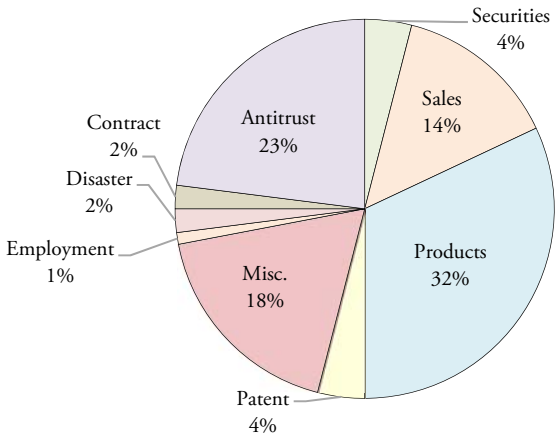
[107] *See* Clopton, *supra* note 3 (manuscript at 16).

[108] *See id.* at 15–16.

[109] For example, over 11,000 actions were consolidated in the various hailstorm MDLs in front of Judge Rose Guerra Reyna in Hidalgo County. *See* Mark Pulliam, *All Hail Breaks Loose*, CITY J. (Dec. 15, 2016), https://www.city-journal.org/html/all-hail-breaks-loose-14903.html. Although we were able to obtain data on the number of actions that the Texas MDL Panel originally consolidated in each MDL, we have not been able to obtain data on tag-along actions later transferred into those MDLs. Because the tag-along actions can greatly outnumber the originally transferred action in many MDLs, we think it would be misleading to present data on the originally transferred actions standing alone. We have not been able to obtain data on the number of parties in MDLs.

of what goes on in Texas MDL, whether measured by number of MDLs created or total consolidated actions.[110] This might change going forward, however, because in 2017 the Texas legislature adopted the Hailstorm Bill, HB 1774, which made it harder to bring weather-related lawsuits against insurance companies.[111]

Figure 2: Federal MDLs by Case Type



Parallel Federal MDLs. In addition to comparing the categories of Texas and federal MDLs, we also looked at whether the actual state MDLs in Texas had parallel federal MDLs. Our methodology here was necessarily imprecise. Sometimes the Texas MDL Panel's transfer order mentioned a parallel federal MDL, but not always, and the captions for state and federal MDLs are not always identical. So we searched the federal JPML database on Westlaw for key words and parties in the Texas MDL captions and tried to match the cases as best we could, relying on the transfer orders and other publicly available sources.

We found that at least 13 Texas MDLs (or 21%) had parallel federal MDLs, one of which had been consolidated in a federal district court in Texas. The Texas MDL Panel declined to create a state MDL on at least three instances where a federal MDL was pending, though all three times seemed to involve idiosyncratic facts, not any sort of reluctance to create a parallel litigation track in state court.[112] Indeed,

[110] This also suggests that weather-related insurance claims represent a larger proportion of Texas MDL than federal MDL (and that products cases represent a smaller proportion) by either measure.

[111] H.B. 1774, 85th Leg., Reg. Sess. (Tex. 2017).

[112] The Texas Panel declined to consolidate cases in *In re Deepwater Horizon Incident Litigation*, 387 S.W.3d 127, 129 (Tex. J.P.M.L. 2011), because the claims sought to be transferred were peripheral and did not relate to BP's liability for the oil spill. In *In re BP Shareholder Litigation*, the movant voluntarily dismissed the motion to transfer before the Panel could act on it. Order Granting Motion to Dismiss, *In re* BP Shareholder Litig., No. 10-0677 (Tex. J.P.M.L.

the Panel has noted on several occasions that the existence of a federal MDL supports creating a state MDL.[113]

Of the 13 parallel MDLs, 12 (or 92%) involved products liability claims. The one non-products Texas MDL with a parallel federal MDL involved consumer claims. It is not surprising that most of the parallel litigation involved products liability given the dominance of products liability cases—at least by number of actions pending—in federal MDL. But it is, perhaps, a little surprising to find so little overlap in other case types, given that more than two-thirds of federal MDLs—counting by consolidations, not individual actions—do not involve products liability, and many of those case types (e.g., sales, disaster, contract, employment) would seem like good candidates to spawn parallel state court litigation.

Transferee Districts. When the Texas MDL Panel decides consolidation is appropriate, it must assign the MDL to a particular court (or courts).[114] We present their choices in Table 1 below.[115] Unsurprisingly, the Texas MDL Panel has tended to create MDLs in major population centers. By far the most MDLs (23 of 61) were created in Harris County, Texas's most populous county and home to Houston, the largest city in the state. The next most frequent locations for MDLs were: Dallas County (second most populous), Tarrant County (third most populous), and Hidalgo County (seventh most populous), with seven MDLs each. Travis County (fifth most populous) had five MDLs and Bexar County (fourth most populous) had three MDLs. That is not to say that the Panel never creates MDLs in small counties. Orange County (forty-seventh most populous) and San Patricio County (fifty-second most populous), each with fewer than 90,000 residents, had one MDL apiece. But most MDL cases are transferred to pretrial courts in large cities.

Sept. 21, 2010). And in *In re Firestone/Ford Litigation*, the Panel denied a motion to transfer a single claim into the Firestone/Ford MDL it had already created because the parties should have used the tag-along procedure instead of filing a new transfer motion with the Panel. Order Denying Motion to Transfer, *In re* Firestone/Ford Litig., No. 08-0912 (Tex. J.P.M.L. Nov. 21, 2008).

[113] *E.g.*, *In re* Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 286 S.W.3d 669, 673 (Tex. J.P.M.L. 2007); *In re* Ford Motor Co. Speed Control Deactivation Switch Litig., 285 S.W.3d 185, 192 (Tex. J.P.M.L. 2008); Order Granting Motion to Transfer, *In re* Tex. Opioid Litig., No. 18-0358 at 1 (Tex. J.P.M.L. June 13, 2018); *cf.* Clopton & Rave, *supra* note 4 (manuscript at 18) (observing that New York and New Jersey list the existence of other consolidation litigation as a factor supporting consolidation in their courts).

[114] TEX. GOV'T CODE ANN. § 74.162 (West 2019).

[115] Population statistics are estimates from 2018 as compiled by The County Information Program, Texas Association of Counties. *See Texas County Profiles*, https://txcip.org/tac/census/CountyProfiles.php (last visited May 1, 2020).

Table 1: Transferee Courts

Transferee County (Population)	MDLs	Transferee County (Population)	MDLs
Harris (4,698,619)	23	Jefferson (255,001)	2
Dallas (2,637,772)	7	Webb (275,910)	2
Hidalgo (865,939)	7	Fort Bend (787,858)	1
Tarrant (2,084,931)	7	Montgomery (590,925)	1
Travis (1,248,743)	5	Orange (83,572)	1
Bexar (1,986,049)	3	Potter (119,648) & Randall (136,271) (jointly)	1
Galveston (337,890)	2	San Patricio (66,893)	1

Pretrial Judges. We next turned our attention to the pretrial judges to whom Texas MDLs are transferred. The Panel not only assigns cases to courts, but handpicks the judge who will handle them. The Panel typically provides reasons supporting its decision to consolidate and transfer cases into an MDL in a short opinion or written order. But it does not articulate its reasons for choosing any particular transferee district or pretrial judge. And it has, on multiple occasions, admonished parties not to advocate for a specific judge or district.[116]

In the federal system, the JPML has been criticized for assigning cases to a small group of non-diverse judges, though in recent years the JPML seems to be diversifying the pool of transferee judges.[117] In Texas, the Panel has assigned the 61 MDLs to 38 different judges. The Panel also retransferred MDLs to 5 additional judges. We present these results in Table 2 below. The judges who have been assigned the most MDLs (including retransfers) are: Mike Miller (8), Rose Guerra Reyna (5), David Evans (4), and Sylvia Matthews (4). Even these numbers might overstate the degree to which the Texas MDL Panel favors repeat players. Seven of Mike Miller's eight MDLs were weather-related insurance claims stemming from Hurricanes Ike and Dolly. Four of Rose Guerra Reyna's five MDLs arose out of severe hailstorms in South Texas. Two of David Evans's and Sylvia Matthews's four MDLs apiece were related wind and hailstorm claims against State Farm, and another one of Sylvia Matthews's MDLs involved claims against a different insurer for the same wind and hailstorm events.

[116] *See, e.g.*, *In re* Tex. Opioid Litig., No. 18-0358, slip op. at 9 (Tex. J.P.M.L. June 13, 2018); *In re* Alcon S'holder Litig., 387 S.W.3d 121, 125 (Tex. J.P.M.L. 2010); *In re* Digitek® Litig., 387 S.W.3d 115, 118 (Tex. J.P.M.L. 2009); *In re* Petroleum Wholesale Litig., 339 S.W.3d 405, 409 (Tex. J.P.M.L. 2009).

[117] *See* Clopton & Bradt, *supra* note 101, at 1718.

Table 2: Pretrial Judges (with Two or More MDLs)

Pretrial Judge	MDLs	Pretrial Judge	MDLs
Mike Miller	8	Dana Womack	3
Rose Guerra Reyna	5	Tracy Christopher	2
David Evans	4	Lonnie Cox	2
Sylvia Matthews	4	Mark Davidson	2
Daryl Moore	3	Jim Jordan	2
Robert Schaffer	3	Emily Tobolowsky	2
John Specia	3	Jeff Walker	2
Randy Wilson	3	R.H. Wallace	2

Texas law allows former or retired judges to continue to serve in a judicial capacity under some circumstances.[118] And Rule 13.6 of the Texas Rules of Judicial Administration allows the MDL Panel to appoint a senior, former, or retired judge as an MDL pretrial judge, if that judge has been approved by the Chief Justice of the Texas Supreme Court. The Panel has initially transferred MDLs to senior, former, or retired judges on at least eight occasions. It has also retransferred MDLs to such judges an additional seven times (sometimes, but not always, back to the same pretrial judge who was handling the MDL before ceasing active judicial service).

We also considered the gender balance of transferee appointments.[119] Approximately 28% of the pretrial judges the Texas MDL Panel selected were female and 72% were male. This is roughly on par with the gender breakdown for MDL judges in the federal courts,[120] and it represents a smaller proportion of female MDL judges than the current proportion of Texas district judges who are women (37% as of September 2019).[121]

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[118] *See* TEX. GOV'T CODE ANN. § 74.054.

[119] We were able to identify gender based on publicly available sources. Race and ethnicity are more difficult to assess without access to judicial records. Using publicly available sources, we were able to identify only ten appointments to nonwhite judges, or about 15%. This is roughly equal to the percentage of nonwhite judges assigned federal MDLs in the prior study, *see* Clopton & Bradt, *supra* note 101, at 1737–39, and much lower than the percentage of nonwhite Texas district judges (30%). *See Profile of Appellate and Trial Judges as of September 1, 2019*, TEX. JUD. BRANCH, https://www.txcourts.gov/media/1444865/judge-profile-sept-2019.pdf (last visited Feb. 3, 2020).

[120] *See* Clopton & Bradt, *supra* note 101, at 1737–39 (finding that, from 2012 to 2016, about 30% of federal MDL judges were female, and almost 40% of first-time MDL judges were female).

[121] *See Profile of Appellate and Trial Judges as of September 1, 2019*, *supra* note 119.

Finally, we observed that on three occasions, the Texas MDL Panel has appointed multiple pretrial judges to hear related claims in a single MDL. First, in *In re Farmers Insurance Company Wind/Hail Storm Litigation (Farmers I)*, the Panel transferred related cases against a single insurer stemming from eight major storms over a two-year period to three pretrial judges in three different districts around the state (Webb County, Tarrant County, and Harris County).[122] The three pretrial judges were tasked with deciding all common issues together as a panel and all case-specific pretrial questions as individual pretrial courts.[123] The Texas MDL Panel subsequently created a second *Farmers* MDL for claims arising from storms in the two-year period after *Farmers I* and transferred the cases to the same three pretrial judges.[124] In the third case, the Panel transferred related oil-and-gas royalty litigation to two different pretrial judges in the same county.[125]

Partisanship. Texas elects its judges in partisan elections, so we also looked at the political parties of both the members of the Texas MDL Panel and the pretrial judges it has selected.

The five members of the Panel are appointed by the Chief Justice of Texas, who is elected in a statewide partisan election.[126] The Chief Justice has always been a Republican since the Texas MDL procedure was created in 2003.[127] In that time, the Panel has always had a majority of Republican judges (three Republicans and two Democrats for most of its existence; four or five Republicans in recent years).[128]

Party label does not, however, appear to be a major driver in the selection of pretrial judges, whose political parties are about evenly split. In fact, the Panel has appointed slightly more Democrats than Republicans as pretrial judges.[129] Although the sample size is far too small to draw any firm conclusions, there is no indication that this pattern has changed since Republican judges took over all five spots on the MDL Panel in 2017. The all-Republican Panel has appointed three Democrats and

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[122] *In re* Farmers Ins. Co. Wind/Hail Storm Litig., 481 S.W.3d. 422, 425 n.4 (Tex. J.P.M.L. 2015).

[123] *Id.*

[124] *In re* Farmers Ins. Co. Wind/Hail Storm Litig. 2, 506 S.W.3d. 803, 807 (Tex. J.P.M.L. 2016).

[125] Order Granting Motion to Transfer, *In re* Chesapeake Barnett Royalty Litig., No. 15-0113 (Tex. J.P.M.L. Apr. 8, 2015).

[126] TEXAS CONST. art. V § 2(c).

[127] *Court History*, TEX. JUD. BRANCH, https://www.txcourts.gov/supreme/about-the-court/court-history/justices-since-1945/chief-justices/ (last visited Mar. 14, 2020).

[128] For a list of the current panel members, see *About Texas Courts*, TEX. JUD. BRANCH, https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/ (last visited Mar. 14, 2020).

[129] The Panel selected 33 Democrats and 31 Republicans. These numbers do not add up to the 61 MDLs that have been created because the Panel appointed multiple pretrial judges in three MDLs and we were unable to obtain the identity of the pretrial judge in two other MDLs.

three Republicans as pretrial judges.[130]

Here, too, a comparison to federal MDL is apt. From 2012 to 2016, the federal JPML was made up of almost three-quarters Democratic-appointed judges, but transferee judges were roughly 50-50.[131] Panel partisanship thus did not appear to drive transferee-judge selection at the federal level either.

Retransfer. One particularly notable feature of Texas MDL is Rule 13.3(o), which allows the MDL Panel to retransfer cases from one pretrial judge to another pretrial judge. The rule contemplates several reasons for retransfer, such as when the original pretrial judge has resigned or been defeated in an election, but it also allows the Panel to act "in other circumstances when retransfer will promote the just and efficient conduct of the cases."[132]

We identified 17 MDLs where the Panel has retransferred cases, including five in which the MDL was retransferred twice. Although the Rules allow the Panel to retransfer cases away from an active judge, all of the retransfers that we identified appeared to be prompted by the judge's unavailability (through resignation, electoral defeat, or recusal). Twelve of the 22 retransfers appear to have been prompted by the pretrial judge's retirement, resignation, recusal, or ascendance to higher office. The other ten retransfers occurred after the pretrial judge lost an election. It does not seem, therefore, that the Panel has used its ability to remove an MDL from a pretrial judge who just is not getting the job done.[133]

Because retransfer after election presents unique considerations, we examined separately the ten post-election retransfers. When judges who are assigned to Texas MDLs lose elections, the victorious candidates do not automatically take over the

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[130] Order Appointing Judge Daryl Moore as Pretrial Judge, *In re* KMCO Litig., No. 19-0489 (Tex. J.P.M.L. Oct. 9, 2019); Order Appointing Judge Steven Kirkland as Pretrial Judge, *In re* Freestanding Emergency Med. Care Facilities Litig., No. 19-0499 (Tex. J.P.M.L. Oct. 11, 2019); Order Appointing Judge Randy Wilson as Pretrial Judge, *In re* Kurary Am., Inc. Litig., No. 18-052 (Tex. J.P.M.L. Aug. 29, 2018); Order Appointing Judge Sylvia A. Matthews as Pretrial Judge, *In re* Farmers Ins. Co. Harvey Litig., No. 19-0547 (Tex. J.P.M.L. Aug. 29, 2018); Order Appointing Judge Craig Smith as Pretrial Judge, *In re* Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales, Practices, and Prods. Liab. Litig., No. 17-0307 (Tex. J.P.M.L. Oct. 16, 2017); Order Appointing Judge Joel Johnson as Pretrial Judge, *In re* Corpus Christi Tap Water Litig., No. 17-0069 (Tex. J.P.M.L. May 17, 2017).

[131] *See* Clopton & Bradt, *supra* note 101, at 1743. We recognize, of course, that there are differences between judges who have to run as partisans in elections and judges who are appointed for life by other elected officials. But we do not see much evidence of partisanship driving selection of transferee judges under either system.

[132] TEX. R. JUD. ADMIN. 13.3(o).

[133] *Cf. supra* note 98 and accompanying text (noting Judge Peeples's concern). Perhaps surprisingly, the MDL Panel's docket sheets suggest that parties have seldom filed briefs advocating for or against retransfer to particular judges. And, in keeping with its general practice of not explaining its reasons for selecting a particular judge when creating an MDL, the Panel has not explained its choice of judge on retransfer either.

MDLs pending in the districts they have just won.[134] In fact, we identified no instance where the Panel assigned the defeated incumbent's MDL to the newly elected judge. Instead, the Panel exercised its power to retransfer the case.

As noted above, in some circumstances, Texas law allows former judges to continue to serve in a judicial capacity even after they have lost an election.[135] And the MDL Panel can appoint these former judges as pretrial judges with the approval of the Chief Justice.[136] Accordingly, the MDL Panel need not even pick a new pretrial judge, if the electorally defeated judge is eligible to serve as a former judge and approved by the Chief Justice. This series of events happened in the very first Texas MDL. The asbestos MDL was originally assigned to Judge Mark Davidson in 2003. When Judge Davidson, a Republican, lost to a Democratic challenger in the 2008 election, the MDL Panel (with approval of the Chief Justice) retransferred the asbestos MDL back to now-former Judge Davidson.[137] The Panel has followed this same approach six of the ten times (60%) that a pretrial judge lost an election, retransferring the MDL back to the very same pretrial judge who had been handling it before.

On the four other occasions, the Panel retransferred cases away from the districts of pretrial judges who lost their elections and to other judges in the same county. With respect to party, all four defeated judges were Republicans, and the Panel retransferred three of the cases to Republican judges and one to a Democratic judge.

V. CONCLUSION

Perhaps the most fundamental feature of any MDL regime (including Texas's) is that it takes cases out of the normal process for forum selection and judicial assignment, and puts them on a separate track with different rules for picking the forum and judge. We conclude our Essay by assessing that switch from the perspective of parties, courts, and voters.

Most directly, MDL rules such as Texas's have consequences for parties' abilities to select their preferred forum. In normal Texas two-party civil cases, the plaintiffs can select their preferred court from among those with proper venue. In some cases, the defendants will be able to remove to federal court or seek a transfer to another Texas venue, but in the vast majority of cases, the plaintiffs' venue choice will govern.[138]

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[134] TEX. R. JUD. ADMIN. 13.6(a).

[135] *Id.*

[136] *Id.*

[137] Order Re-Appointing Judge Mark Davidson as Pretrial Judge, Union Carbide v. Adams, No. 03-0895 (Tex. J.P.M.L Dec. 3, 2008).

[138] Even in cases in which the defendant can file a motion to transfer venue, it would be the

Not so for Texas MDL. Under Texas's MDL rules, any party can ask the MDL Panel to consolidate cases in a pretrial court if related cases are pending in other judicial districts. By definition, therefore, every MDL will involve at least one case in which a plaintiff's initial venue choice is rejected in favor of the Panel's choice. While the consolidation is formally limited to pretrial purposes, the practical reality is that most of these cases are resolved during the pretrial phase, whether by settlement or dispositive motion. As a result, thousands of plaintiffs in Texas MDLs have their cases resolved in a court where they did not file. This is not to say that every consolidation decision in Texas favors defendants over plaintiffs. But it does appear that Texas's MDL regime shifts the balance of power away from at least some plaintiffs and in favor of some defendants by limiting the plaintiffs' venue privilege.[139] Indeed, the most common posture before the Texas MDL Panel is that the defendant seeks creation of an MDL, while the plaintiffs tend to oppose transfer.

We have observed in other work that this shift is particularly consequential when there is reason to believe that there is significant variation among trial courts throughout the state.[140] And there is at least reason to suspect that Texas—with its elected judges and geographic polarization—might exhibit this variation. Assume with us that Democratic judges are more plaintiff-friendly than Republican judges. We recognize that this is a gross overgeneralization, but it will help illustrate the effects of an MDL regime on whatever criteria are driving plaintiffs' initial forum selection. Now, imagine a mass tort with claimants across Texas. Savvy plaintiffs' lawyers might try to file most of their cases in heavily Democratic Starr County in the Rio Grande Valley in South Texas, a county that has a reputation of being particularly plaintiff-friendly.[141] But as long as at least one related case is filed somewhere else in the state, defendants can ask the majority-Republican MDL Panel to take those cases away from the Democratic Starr County judges and assign them to a handpicked judge somewhere else in the state. So, while defendants are not guaranteed the alternative judge of their choice, Texas MDL does give them an opportunity to escape the plaintiffs' chosen forum.

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original judge who decides that motion—so plaintiff's selection of venue also selects which judge decides whether to depart from that choice, subject, of course, to later appellate or mandamus review.

[139] For more elaboration on this dynamic, see Clopton & Rave, *supra* note 4 (manuscript at 45–48).

[140] *See id.* (manuscript at 39 n.189).

[141] Starr County and the surrounding counties in the Rio Grande Valley have been perennial favorites on the American Tort Reform Association's list of "Judicial Hellholes." Texas lawyer Tony Buzbee is reported to have said: "That venue probably adds about 75% to the value of the case . . . [W]hen you're in Starr County, traditionally you need to just show that the guy was working, and he was hurt. And that's the hurdle . . ." *See* AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2008/2009, http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2008.pdf.

Importantly, this result not only has consequences for parties but also reflects a conscious choice to empower certain judicial actors (and their constituencies) over others. To be more precise, the Texas MDL regime provides that—for a subset of cases—judges chosen at the state level get to make decisions about the allocation of judicial business across local jurisdictions. This is because the Texas MDL Panel members are selected by the Chief Justice, who is selected by statewide election, while trial judges are selected in local elections. The result is to shift power over a subset of civil cases from the local level to the state level.

For a more vivid illustration, consider the now-routine insurance litigation following a hurricane. Imagine that thousands of insurance lawsuits are consolidated in an MDL and assigned to a Republican judge in the hardest-hit city. The judge rules for the insurance companies on an important motion, and the public is outraged. In the next election, a Democratic former plaintiffs' attorney runs against the judge, campaigning on the incumbent's mismanagement of the hurricane litigation. The challenger wins; the voters in that city seem to want the litigation to come out a different way. The newly elected Democratic judge, however, will not automatically take over the litigation. Instead, the Texas MDL Panel—appointed by the Chief Justice, a Republican who was elected statewide—can take those cases away from the electoral victor and give them to some other solidly Republican judge elsewhere in the state.[142] Indeed, the MDL Panel can even retransfer the cases right back to the very judge who lost the election, if the Chief Justice approves of that former judge serving as an MDL pretrial judge.[143] And as we note above, the Panel has

[142] *See* TEX. R. JUD. ADMIN. 13.3(o). One could imagine a similar series of events playing out across multiple hurricanes—i.e., a judge wins an election based on promises of hurricane-litigation management, only to have their cases arising from the next hurricane taken away by the MDL Panel.

[143] *See id.* r. 13.6(a). This situation is hardly hypothetical. In 2018, in the wake of Hurricane Harvey, litigation against Farmers Insurance Company was consolidated in an MDL in Harris County in front of Judge Sylvia Matthews, a Republican. Later that year, Judge Matthews lost her election to former personal-injury lawyer Christine Weems, a Democrat. Chief Justice Hecht, a Republican, then approved now-former Judge Matthews to serve as an MDL pretrial judge under Texas Rule of Judicial Administration 13.6(a) and the MDL Panel (composed of five Republican judges) retransferred the Harvey insurance litigation back to former Judge Matthews. We hasten to add that we have no indication whatsoever that dissatisfaction with Judge Matthews's handling of the Harvey insurance litigation contributed to her electoral defeat; she is an experienced judge who has simultaneously handled other insurance MDLs involving a series of wind and hailstorms. And one of us lives in Harris County and has no recollection of the Harvey litigation being an issue in the election. It seems far more likely that Judge Matthews's defeat is primarily attributable to her Republican Party label in her down-ballot race in an election year where Democrats swept many offices in Harris County on the coattails of a popular Democratic Senate candidate. This is one of the consequences of relying on party labels shaped by national issues in local elections. *See* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 449–50 (2007). But it is quite plausible that a local judge's handling of high-profile MDL litigation could be an issue in an election year that is not so

retransferred MDLs back to judges defeated in an election on six of ten occasions.

When the Panel retransfers cases after an election, local constituencies might justifiably object to the state Panel interfering with their electoral choices. Of course, there is a different way to tell this story. One could argue that legal liability shouldn't turn on the outcome of a local election. And the Texas MDL Panel may be serving the interests of justice by taking the cases away from a partisan hack. Regardless of which story is more accurate, the intervention of the Texas MDL Panel reflects a change from the way non-MDL cases would be handled and a significant shift in judicial authority from the local level to the state level.

This concern is, in some sense, hypothetical. To date, we have not seen any indication that partisan politics is driving the choices of the Texas MDL Panel.[144] Over the course of its existence, the Panel has appointed slightly more Democratic pretrial judges than Republicans. This is true even though every Chief Justice since Texas adopted its MDL statute has been a Republican, and every Panel has had a Republican majority (and sometimes has been composed of only Republican judges). This is, in many ways, an extraordinarily encouraging finding. In an era where partisanship seemingly permeates many public institutions that are supposed to remain independent, the judges of the Texas MDL Panel appear to be an exception. The evidence suggests that they have been capable of separating their judicial function from their partisan preferences. But there is no guarantee that this pattern will continue to hold, particularly as partisan polarization increases at both the national and state levels, and conflicts between state-level and local political actors continue to increase in Texas.[145]

More to the point, to the extent that judicial elections serve as an accountability mechanism, the Chief Justice should be accountable to statewide voters when managing MDL, even though the trial judges themselves have local constituencies. Texas chose to have trial judges with local constituencies, so that is the baseline from which MDL departs. The harder question, then, is when (if ever) that departure is worth it.

It is not entirely obvious to us that the adopters of the Texas MDL statute and Rule 13 thoroughly considered these tradeoffs when bringing MDL to Texas. They seemed far more focused on ensuring that the MDL Panel would have the flexibility needed to pick the best and most experienced judges to handle complex litigation

dominated by national issues; indeed, that would seem to be consistent with the idea of electing judges in the first place.

[144] Interestingly, one of us has found a similar result at the federal level. *See* Clopton & Bradt, *supra* note 101, at 1745.

[145] *See, e.g.*, Juan Pablo Garnham & Davis Rich, *Local Texas Officials Balk at Animus Toward Cities, Plans for Sales Tax Cuts in Legislators' Secretly Recorded Meeting*, TEX. TRIB. (Oct. 15, 2019), https://www.texastribune.org/2019/10/15/texas-house-speaker-dennis-bonnen-animus-toward-cities-laid-bare-tape/ (quoting Republican Texas House Speaker Dennis Bonnen as saying "my goal is for this to be the worst session in the history of the legislature for cities and counties").

in the state than on MDL's effects on judges' democratic accountability. Perhaps they are to be commended for their belief that the judicial role remains distinct from partisan politics, even when judges are elected in partisan elections. And their wisdom may be borne out by the apparent absence of partisan considerations in the MDL Panel's choice of pretrial judges to date. But any system of MDL that changes the ordinary venue rules for a subset of cases in pursuit of efficient resolution will inevitably have an effect on the allocation of judicial power within the state. And we think debates about MDL in the states would benefit from more thorough consideration of these tradeoffs.