TEXAS MDL

D. Theodore Rave & Zachary D. Clopton[1]

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 these names will be familiar to Texas insurance lawyers because they produced countless cases litigating the obligations of 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.[2] In the federal system, many such cases are resolved through multidistrict litigation, or MDL.[3] Indeed, federal MDL has become the dominant mode of mass-tort resolution in U.S. courts.[4] But not all mass adjudications find their way into federal courts. In other work, we have studied mechanisms in more than half of the states to consolidate and coordinate litigation across state courts—what we call "state MDL."[5] 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 cases.

That brings us back to the Texas hurricanes. In 2003, Texas joined the MDL game with House Bill 4.[6] Texas MDL has been used to consolidate thousands of cases into scores of MDL proceedings, including coordinating groups of cases arising from those five hurricanes.[7]

Like the federal system, Texas relies on an MDL panel to select cases for consolidation.[8] Like the federal system, and unlike the overwhelming majority of other state MDL systems,

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[1] George A. Butler Research Professor, University of Houston Law Center; Professor of Law, Northwestern University Pritzker School of Law. Many thanks are due to Research Librarians Ashley Arrington and Katy Badeaux for extraordinary help tracking down historical sources.

[2] *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.") (internal note omitted).

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

[4] *See, e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (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 (2018); Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. __ (forthcoming 2020).

[5] Zachary D. Clopton & D. Theodore Rave, *MDL in the States* (in progress).

[6] *See infra* Part II.

[7] *See infra* Part IV.

[8] Texas Gov. Code § 74.161 *et seq.*; Tex. R. Jud. Admin. 13.

MDL consolidations in Texas are limited to pretrial purposes only.[9] 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,[10] sometimes tipping the balance between plaintiffs and defendants as compared to mine-run litigation. But unlike the federal system, the Texas story is complicated by the fact that Texas judges are elected and have local or statewide constituencies that they purport to represent.[11] Thus any analysis of Texas's MDL record must also account for its effects on democratic governance.

In this essay, we study 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.[12] 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, which 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 were filed for trial. This procedure allowed for temporary cross-county coordination of cases in a single administrative region, but it was philosophically different from a federal MDL.[14] Instead of transferring cases to a single judge in a single court, the Rule 11 procedure sent the judge to the cases. This temporary assignment of a single judge to handle cases that technically remain pending in different courts skirted any concerns about moving cases to improper venues.

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

[10] *See infra* Part III.

[11] *See infra* Part V.

[12] For an excellent summary of the drafting history and early functioning of the Texas MDL procedure, see Steven G. Tipps, *MDL Comes to Texas*, 46 S. TEX. L. REV. 829 (2005).

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

[14] *See* Paul Schlaud letter to Supreme Court Task Force, March 15, 2002.

The Rule 11 procedure's major limitation was its inherently limited geographic reach. For a massive dispute with related cases all over the state, the best the mechanism could do would be to coordinate pretrial proceedings in front of nine different judges—one in each administrative region. Anticipating this problem, the rule included a mechanism that could, in theory, 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.[15]

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.[16] 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–type cases) sharing common questions of fact as "complex" and then transfer them to a single court for coordinated proceedings. [17] The Jamail Committee recommended allowing for statewide consolidations for both pretrial proceedings and trial on the merits—two areas where it thought Rule 11 was deficient.[18] 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.[19]

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[15] Lonny S. Hoffman, *The Trilogy of 2003: Venue, Forum Non Conveniens & Multidistrict Litigation*, 24 THE ADVOCATE 74, 80 (Fall 2003); *see also* SCAC transcript June 21, 2003 AM pp. 8875-76 (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.").

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

[17] Letter from Joseph Jamail to Justice Nathan Hecht, March 25, 2003, Draft of Rule 42b.1 [hereinafter Jamail Committee Report].

[18] *See* Paul Schlaud March 15, 2002 Memo to Supreme Court Task Force re: Comparison of MDL Proposals p.2; Harry Reasoner March 2, 2002 Memo to Paul Schlaud re MDL Proposal: Revision of Rule of Judicial Administration 11.

[19] Jamail Committee Report Draft of Rule 42b.4(2). 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* Paul Schlaud March 15, 2002 Memo to Supreme Court Task Force re: Comparison of MDL Proposals p.2; Harry Reasoner March 2, 2002 Memo to Paul Schlaud re MDL Proposal: Revision of Rule of Judicial Administration 11; Paul Schlaud Letter to Task Force Members, June 25, 2002.

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. 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.[20] Supporters of the bill stressed efficiency and avoiding inconsistent rulings on similar cases.[21] 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.[22] 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."[23]

The House bill drew on heavily on the federal MDL model and specified the nuts and bolts for how the system of pretrial transfer would work.[24] The Senate, however, stripped most of those details out, and instead delegated the task of fleshing out the transfer procedures to the Texas Supreme Court's rulemaking process.[25] The legislation, as enacted, created an MDL Panel of five judges appointed by the chief justice and authorized the Panel to transfer cases for coordinated pretrial purposes, assuaging the supreme court's concerns about its authority.[26] The

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[20] *See* House Research Organization Bill Analysis HB4 (March 25, 2003).

[21] *Id.* at 44.

[22] *Id.* at 51-52.

[23] *Id.* 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 other than the trial court judge with pending cases does have a significant impact on forum shopping and the balance of power in litigation. *See* Clopton & Rave, *supra* note __. 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 notion that the inclusion of an MDL procedure in HB4 was an attempt to get more defense-oriented judges to decide these cases. SCAC Transcript July 17, 2003 PM at 9305.

[24] House Bill.

[25] Senate Committee substitute. *See* William V. Dorsaneo III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713 (2013) (explaining the collaboration between supreme court and legislature on rulemaking); Nathan L. Hecht, *Foreword to Symposium on HB4*, 46 S. TEX. L. REV. 729, 730-31 (2005).

[26] Tex. Gov't Code § 74.162; *see also* Senate State Affairs Committee May 7, 2003 transcript, tape 3, pp.9-10 (statement of Alan Waldrop: "The one thing 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 among members of the court that the court does not have the power to just go around creating things like MDL panels.").

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.[27] 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 them to be remanded to the transferor courts for trial on the merits.[28] Finally, the statute specified that appellate review of the Panel's decisions would be only by extraordinary writ.[29] The rest of the details were left to the Supreme Court.

HB4 passed the Texas House on a 94 to 46 vote. It passed the Senate 28 to 3. And Governor Rick Perry signed the bill into law on June 11, 2003.[30]

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.[31] As a result, there was no time for a public comment period before the MDL rules went into effect.[32] 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.[33] But they planned to seek comments anyway during the 60 days after the rules went into effect to consider whether amendments would be needed.[34] Chief Justice Phillips appointed the members of inaugural MDL Panel while the Advisory Committee was still drafting the rules.[35] Two of the judges that he appointed, Scott Brister and David Peeples, were members of the Advisory Committee.[36]

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[27] Tex. Gov't Code § 74.162

[28] *Id.*; *see also* § 74.163

[29] *Id.* § 74.163(a)(4).

[30] HB4 enrolled version. For reference, the partisan makeup of House was 88 Republicans and 62 Democrats; Senate was 19 Republicans and 12 Democrats.

[31] *See* SCAC June 21, 2003 Transcript p.8875 (statement of Chief Justice Phillips).

[32] *Id.* at 8879.

[33] *See* Letter from Justice Nathan Hecht to Charles Babcock (June 16, 2003) in supplement to SCAC June 2003 meeting.

[34] *See id.*; *see also* SCAC July 17, 2003 am Transcript pp. 8992-93 (statement of Justice Hecht)

[35] SCAC July 17, 2003 am Transcript pp. 9005-06 (statement of Judge Scott Brister); *see also* SCAC June 21, 2003 Transcript p. 8879 (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.").

[36] The other three initial panel members were Judge Douglas S. Lang, Judge Mack Kidd, and Judge Errlinda Castillo. *See* SCAC July 17, 2003 am Transcript pp. 9005-06 (statement of Judge Scott Brister); Tipps, *supra* note__, 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.[37] The Advisory Committee also considered the federal MDL statute and the approaches of other states including California and Colorado as potential models.[38]

With the statute as a guide, the Advisory Committee drafted Rule 13, fleshing out the procedures for initiating transfer, how the transfer would work, proceedings in the transferee court, remand, and appellate review. They also proposed amending Rule 11 to make it clear that Rule 13 would supersede it for cases filed after September 1, 2003.[39] 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.[40] 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. They also included a filing fee for each case, to be paid by the party requesting transfer, to offset some of the administrative costs.[41]

One issue on which the Advisory Committee did not have a choice was the extent of consolidation. Although California, Colorado, and 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. 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.[42] 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 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.[43] 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.

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

[38] SCAC June 21, 2003 transcript p. 8877.

[39] 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. Judicial Admin. 13.11.

[40] *See, e.g.*, SCAC July 17 am transcript pp. 9000-01.

[41] SCAC July 18, 2003 transcript p. 9321.

[42] *See* SCAC June 21, 2003 Transcript pp. 8889-90 (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.").

[43] Senate State Affairs Committee May 7, 2003 transcript, tape 2, p.2.

In any event, based on the work of the Advisory Committee, the Texas Supreme Court adopted Rule 13 governing multidistrict litigation on August 29, 2003.[44] 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 section surveys the lifecycle of a Texas MDL, focusing primarily on the procedures outlined in Rule 13 of the Texas Rules of Judicial Administration.[45] We supplement these materials with case law, judicial interviews, 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."[46]) The motion must be in writing, and it must identify all of the cases for which transfer is sought.[47] 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.[48] And the MDL Panel itself can issue an order to show cause why related cases should not be transferred to a pretrial court.[49] All parties in related cases are entitled to notice, and any party in a related case can file a response opposing transfer.[50]

Filing a motion to transfer with the MDL Panel does not automatically stay the proceedings in the trial court.[51] But both the trial court and the MDL Panel have the discretion to order a stay until the MDL Panel rules on transfer.[52]

The MDL Panel may hold a hearing or it may decide the transfer motion on the papers.[53] Any decision requires the concurrence of at least three of the five panel members.[54] The standard

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[44] Misc. Docket No. 03-9145 (Tex. Aug. 29, 2003).

[45] Rule 13.10 authorizes the Texas MDL Panel to adopt additional rules to govern its own procedures, but it has not done so.

[46] Tex. R. Judicial Admin. 13.2.

[47] Tex. R. Judicial Admin. 13.3(a).

[48] Tex. R. Judicial Admin. 13.3(b).

[49] Tex. R. Judicial Admin. 13.3(c).

[50] Tex. R. Judicial Admin. 13.3(d), (h), (n).

[51] Tex. R. Judicial Admin. 13.4(a).

[52] Tex. R. Judicial Admin. 13.4(b).

[53] Tex. R. Judicial Admin. 13.3(k).

[54] Tex. Gov't Code § 74.161.

for transferring and consolidating cases into an MDL is broad. Echoing the federal standard, the Texas Rule provides that 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 parties and witnesses" and must "promote the just and efficient conduct of the related cases."[55] 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.[56]

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 transfer and consolidation in front of a pretrial judge would serve the goals of convenience and efficiency.[57] 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 involving complicated, numerous, or significant common fact questions are more likely to be considered related."[58] Common questions need not predominate.[59] Cases may qualify as related "even though they involve different causation and damages facts or different defendants."[60] On the efficiency prong, the Panel asks "whether the 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."[61]

The Texas rules require the Panel to make written findings for its transfer orders,[62] and most 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.[63] Pretrial judges can be any active district judge in the state or any former or retired district or appellate court judge who has been

[55] Tex. Gov't Code § 74.162; Tex R. Judicial Admin. 13.3(l).

[56] SCAC July 17, 2003 PM transcript, pp. 9219-22.

[57] *See, e.g.*, In re Texas Opioid Litig., MDL No. 18-0358 (Tex. M.D.L. June 13, 2018).

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

[59] In re Texas Opioids at 4; *see also* In re Volkswagen Clean Diesel Litig., 516 S.W.3d 704, 708 (Tex. M.D.L. 2016).

[60] In re Texas Opioids at 6 (quoting In re Tex. Windstorm Ins. Ass'n Hurricanes Rita & Humberto Litig., 339 S.W.3d 401, 403 (Tex. M.D.L. 2009) (internal quotation marks omitted).

[61] In re State Farm Lloyds Hurricane Ike Litig., 392 S.W.3d 353, 355-56 (Tex. M.D.L. 2012).

[62] *See* Tex. R. Judicial Admin. 13.3(l).

[63] Tex. Gov't Code § 74.163(a)(4); Tex. R. Judicial Admin. 13.9(a).

approved by the chief justice.[64] 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.

Once an MDL has been established, newly filed related cases (or others that weren't subject to the initial transfer order) may be transferred to the MDL as tag-along cases.[65] The procedure for transferring tag-alongs is to file a notice of transfer in both the trial and pretrial court.[66] 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 was 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.[67] Texas's approach to tag-along cases thus differs from the federal approach, where the JPML, not the transferee judge, hears objections to its conditional transfer of tag-along cases in the first instance. 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.[68]

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.[69] Transfer is deemed effective when notice of the transfer is filed in trial and pretrial courts.[70] 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.[71] But it may not try transferred cases on the merits.[72] The pretrial court is also authorized to set aside or modify rulings made by the trial court before transfer.

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

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[64] Tex. R. Judicial Admin. 13.6(a). Ordinarily when former, senior, or retired judges are assigned to cases in trial court, each party is allowed one objection, which, if exercised, bars that judge from hearing the case. *See* Tex. Gov't Code 74.035. 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. Judicial Admin. 13.6(a).

[65] Tex. R. Judicial Admin. 13.2(g).

[66] Tex. R. Judicial Admin. 13.5(e).

[67] Tex. R. Judicial Admin. 13.5(e).

[68] *See* SCAC Transcript July 17, 2003 PM pp.9287-91.

[69] Tex. R. Judicial Admin. 13.5(a), 13.6(a).

[70] Tex. R. Judicial Admin. 13.5(a).

[71] Tex. Gov't Code § 74.162; Tex. R. Judicial Admin. 13.6(b).

[72] Tex. Gov't Code § 74.162.

actively" and requires the pretrial court to conduct a hearing and enter a case management order "at the earliest practical date."[73] 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.[74] As Rule 13's drafters made clear, this is not a grant of new power to the 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.[75]

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[73] Tex. R. Judicial Admin. 13.6(c).

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

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

[75] *See* SCAC Transcript July 18, 2003 p. 9483.

While they may not try transferred cases themselves, MDL pretrial judges are authorized to set trial dates in conjunction with the trial court.[76] This procedure allows the pretrial court to selectively remand cases for bellwether trials.[77] 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."[78] Once a trial date is set in this manner, the trial court cannot postpone the trial without the concurrence of the pretrial judge.[79]

Indeed, the pretrial judge in Texas is 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 who has gotten a case back from an MDL, Texas builds in a formal role for the pretrial judge that significantly limits the trial court judge's discretion after remand. Rule 13 admonishes the trial court judge that "to alter a pretrial court order without a compelling justification would frustrate the purposes of consolidated and coordinated pretrial proceedings."[80] 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.[81] Notably, this limitation expressly covers the pretrial court's determination on the admissibility of expert testimony.[82] 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."[83]

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.[84] 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.[85] When orders of the trial court or pretrial court are appealed, they go to the

[76] Tex. R. Judicial Admin. 13.6(d).

[77] *See also* Tex. R. Judicial Admin. 13.7(b).

[78] Tex. R. Judicial Admin. 13.6(d).

[79] Tex. R. Judicial Admin. 13.6(d).

[80] Tex. R. Judicial Admin. 13.8(a).

[81] Tex. R. Judicial Admin. 13.8(b).

[82] Tex. R. Judicial Admin. 13.8(b).

[83] Tex. R. Judicial Admin. 13.8(c).

[84] *See* SCAC Transcript July 18, 2003 pp. 9484-9501.

[85] Tex. R. Judicial Admin. 13.9(c).

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.[86]

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.[87] 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.[88] 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."[89] 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."[90] 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 section described the doctrinal requirements of state MDL. This section 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.[91] This website appears to offer a comprehensive list of all cases in which any party has sought state MDL treatment in Texas.[92] 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 assigned to handle them.

Petitions & Dispositions. From its inception in 2003 to 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 in 32 cases. Three transfer motions are still

[86] Tex. R. Judicial Admin. 13.9(b).

[87] Tex. R. Judicial Admin. 13.3(o).

[88] *See* SCAC Transcript July 17, 2003 PM p.9230.

[89] Tex. R. Judicial Admin. 13.3(o).

[90] *See* SCAC Transcript July 17, 2003 PM p. 9223; *see also id.* at 9228.

[91] *See* Texas Judicial Branch, Available Multidistrict Litigation Cases, https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/available-multidistrict-litigation-cases/.

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

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 grant rate in federal MDL for most of its history, but somewhat higher than the federal grant rate in recent years.[93]

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

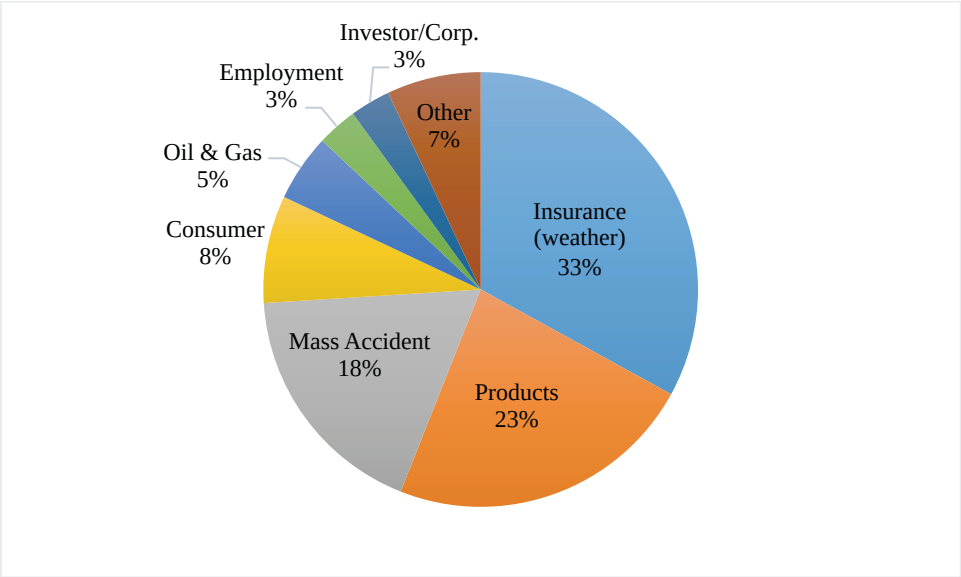
Weather-related insurance litigation was the largest single category, accounting for 20 (or 33%) granted petitions. The Panel also granted 14 (or 23%) product-liability petitions, 11 (or 18%) mass accident petitions, and another 3 (or 5%) miscellaneous tort petitions (medical malpractice, defamation,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

Texas does not appear to have consolidated any public law cases.[94] The Panel rebuffed several efforts to consolidate challenges to various local governments' tax appraisal practices. But public enforcement efforts by the state attorney general's office have been swept up into state MDLs alongside private claims (over the state's objections) on at least two occasions: in the *Volkswagen Clean Diesel Litigation* and the *Texas Opioids Litigation*.

[93] *See* Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. __ manuscript, at 9 (forthcoming 2019) (finding the federal grant rate from 2012-16 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 (2013) (finding the federal grant rate from 1968-2012 to be roughly 70%-80%).

[94] 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).

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 category data for federal MDLs pending in April 2018, reflected in Figure 2 below.[95] 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.[96] In the federal system, for example, while products liability cases 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.[97] So, it seems likely that the weather-related insurance claims represent a large proportion of what goes

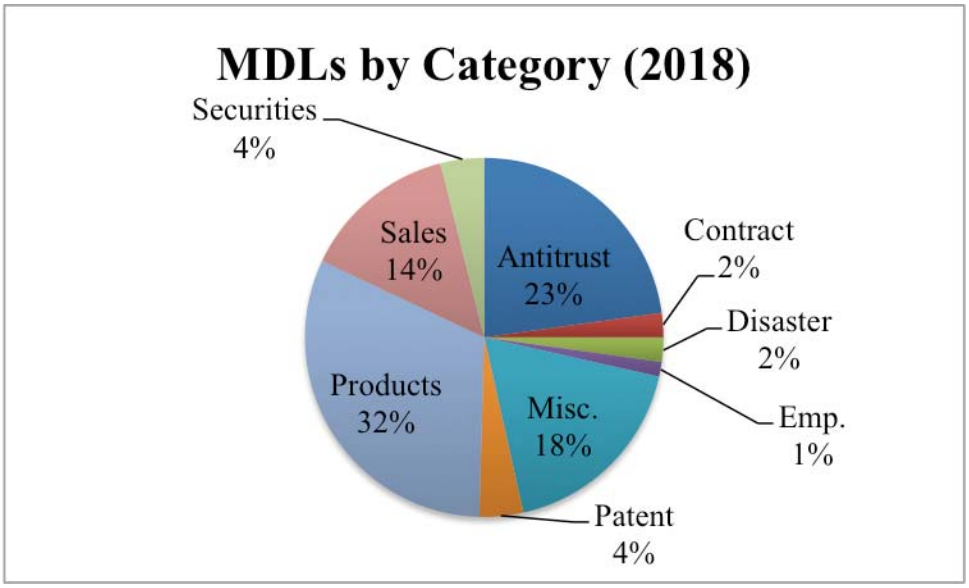
[95] *See* Clopton, *MDL as Category*, *supra* note __

[96] *See id*.

[97] For example, over 11,000 actions were consolidated in the various hailstorm MDLs in front of Judge Rose Guerra Reyna in Hidalgo County. *See, e.g.*, Mark Pulliam, *All Hail Breaks Loose*, CITY JOURNAL (Dec. 15, 2016), available at 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 tagalong actions later transferred into those MDLs. Because the tagalong 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.

on in Texas MDL, whether measured by number of MDLs created or total consolidated actions.[98] This might change going forward, however, as in 2017 the Texas legislature adopted the Hailstorm Bill, HB 1774, which made it harder to bring weather-related lawsuits against insurance companies.[99]

Figure 2: Federal MDLs by Case Type



Transferee Districts. When the Texas MDL Panel decides consolidation is appropriate, it must assign the MDL to a particular court (or courts). Unsurprisingly, the Texas MDL Panel has tended to create MDLs in major population centers. By far the most MDLs (23) 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 7 MDLs each. Travis County (fifth-most populous) had 5 MDLs and Bexar County (fourth-most populous) had 3 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.[100] But most MDL cases are transferred to pretrial courts in large cities.

Pretrial Judges. We then turned our attention to the MDL transferee judges, or "pretrial judges" as Texas calls them. The Panel not only assigns cases to courts, but hand picks the judge who will handle them. The Panel typically provides reasons supporting its decision to

[98] 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.

[99] Tex. H.B. 1774 (effective Sept. 1, 2017).

[100] The remaining counties with MDLs are: Galveston County (2), Webb County (2), Jefferson County (2), Fort Bend County (1), Montgomery County (1), and Potter and Randall Counties (1 jointly).

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, which is typically noted in a separate order.

In the federal system, the JPML had been criticized for assigning cases to a small group of non-diverse judges, though in recent years the Panel seems to be diversifying the pool of transferee judges.[101] In Texas, the Panel has assigned the 61 MDLs to 38 different judges. The Panel also retransferred MDLs to 5 additional judges. (We say more on retransfer below.) The judges who have been assigned the most MDLs (including retransfers) are: Mike Miller (8), Rose Guerra Reyna (5), David Evans (4), Sylvia Matthews (4), Daryl Moore (3), Robert Schaffer (3), John Specia (3), Randy Wilson (3), Dana Womack (3), Tracy Christopher (2), Lonnie Cox (2), Mark Davidson (2), Jim Jordan (2), Emily Tobolowsky (2), Jeff Walker (2), and R.H. Wallace (2). Even these numbers might overstate the degree to which the Texas MDL Panel favors repeat players. Seven of Mike Miller's eight MDLs were related 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.

Texas law allows former or retired judges to continue to serve in a judicial capacity under some circumstance.[102] 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.[103] Roughly 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,[104] and represents a slightly smaller proportion of female MDL judges than the current proportion of Texas district judges who are women (37% as of September 2019).[105]

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[101] *See* Clopton & Bradt, *supra* note __.

[102] *See* Tex. Gov't Code Ch. 74.

[103] We were able to identify gender based on publicly available sources. Race and ethnicity proved more difficult, so we do not include those numbers here.

[104] *See* Clopton & Bradt, *supra* note __ (finding that, from 2012-2016, about 30% of MDL judges were female, and almost 40% of first-time MDL judges were female).

[105] *See* Profile of Appellate and Trial Judges as of September 1, 2019, https://www.txcourts.gov/media/1444865/judge-profile-sept-2019.pdf.

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).[106] 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.[107] 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.[108] In the third case, the Panel transferred related oil and gas royalty litigation to two different pretrial judges in the same county.[109]

***Partisanship*.** Texas elects its judges in partisan elections, so we 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. The Chief Justice has always been a Republican since the Texas MDL procedure was created in 2003. 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).

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.[110] Although the sample size is far too small to draw any firm conclusions, there is no indication that 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 three Republicans as pretrial judges.

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.[111] Panel partisanship thus did not appear to drive transferee-judge selection at the federal level either.

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[106] In re Farmers Ins. Co. Wind/Hail Storm Litig., No. 14-0882, at 3-4 & n.4 (Tex. M.D.L. 2015).

[107] In re Farmers Ins. Co. Wind/Hail Storm Litig. No. 14-0882 Order of MDL Panel Pronounced April 7, 2015, http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=062b7dcb-44b3-4408-848c-59a953fc99f8&coa=cossup&DT=DISPOSITION&MediaID=2d4080ad-d78a-43a3-b2f9-b9b0f424a3b8.

[108] In re Farmers Ins. Co. Wind/Hail Storm Litig. 2, No. 16-0142.

[109] In re Chesapeake Barnett Royalty Litig., No. 15-0113.

[110] 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.

[111] *See* Clopton & Bradt, *supra* note __.

Retransfer. One particular 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."[112]

We identified 17 MDLs where the Panel has retransferred cases, including five in which the MDL was retransferred twice. 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.

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). The Panel does not seem to have used its ability to remove an MDL from a pretrial judge who just isn't getting the job done.[113]

Because retransfer after election presents unique considerations, we examined those ten retransfers separately. When judges who are assigned to Texas MDLs lose elections, the victorious candidates do not automatically take over the MDL pending in the district they have just won. 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. And the MDL Panel can appoint these former judges as pretrial judges with the approval of the Chief Justice. 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 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. 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 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. Again, party label does not appear to be the only driver here, though our sample size is too small to draw firm conclusions one way or the other. All four defeated judges were Republicans, and the Panel retransferred three of the cases to Republican judges and one to a Democratic judge.

Parallel Federal MDLs. Finally, we looked at whether the 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

[112] Tex R. Judicial Admin. 13.3(o).

[113] *Cf. supra* note 90 and accompanying text (noting Judge Peeples's concern).

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 thirteen Texas MDLs (or 21%) had parallel federal MDLs. One of the thirteen parallel federal MDLs had been consolidated in a federal district court in Texas. Twelve of the thirteen parallel MDLs (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. 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.[114] Indeed, the Panel has noted on several occasions that the existence of federal MDL supports creating a state MDL.[115]

V. ASSESSMENT

Having surveyed the history, doctrine, and data, this section begins the process of assessing what matters about Texas MDL. 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. In this section, we assess 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 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.[116]

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[114] The Texas Panel declined to consolidate cases in *In re Deepwater Horizon Incident Litigation*, No. 10-0376, 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*, No. 10-0677, the movant voluntarily dismissed the motion to transfer before the Panel could act on it. And in *In Re Firestone/Ford Litigation (II)*, No. 08-0912, the Panel dismissed a motion to transfer a single claim into the Firestone/Ford MDL it had already created because the parties should have used the tagalong procedure instead of filing a new transfer motion with the Panel.

[115] *See, e.g.*, In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.; In re Ford Motor Co. Speed Control Deactivation Switch Litig.; In re Texas Opioid Litig. *Cf.* Clopton & Rave, *supra* note __ (observing that New York and New Jersey list the existence of other consolidation litigation as a factor supporting consolidation in their courts).

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

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 there related cases 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 and thus temporary, 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. 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.[117] And there is at least reason to suspect that Texas—with its elected judges and geographic polarization—might exhibit this variation. Imagine a mass tort with claimants across Texas. Plaintiffs might elect to file as many of their cases as possible in the heavily Democratic Starr County in the Rio Grande Valley in South Texas, a county that has a reputation of being particularly plaintiff-friendly.[118] But as long as at least one related case is filed elsewhere in the state, then defendants can ask a panel of mostly Republican judges appointed by the Republican Chief Justice to take those cases away from the Democratic Starr County judges and give them to another judge somewhere else in the state. So, while defendants are not guaranteed the alternative judge of their choice, Texas MDL does afford them an opportunity to get out of the plaintiff's chosen forum.

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 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 a mass of disputes over insurance claims from the hardest hit city are transferred to a Republican judge in that city. The judge rules for the insurance companies on an important motion, and the public is outraged. In the next election, the judge is defeated and replaced by a Democratic former plaintiffs' attorney who campaigned on the incumbent's

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[117] *See* Clopton & Rave, *supra* note __.

[118] 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 just need to show that the guy was working and he was hurt. And that's the hurdle…." *See* http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2008.pdf.

mismanagement of the hurricane litigation. 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 newly elected Democratic judge and assign them to some other solidly Republican judge elsewhere in the state.[119] 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.[120] And as we note above, the Panel has 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 state 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.[121] 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

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[119] *See* Tex. R. Judicial Admin. 13.3(o).

[120] *See* Tex. R. Judicial Admin. 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, 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*, 14 J. L. & POL. 419 (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 dominated by national issues; indeed, that would seem to be consistent with the idea of electing judges in the first place.

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

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.[122]

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) is that departure worth it.

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

[122] *See, e.g.*, Juan Pablo Garnham & Davis Rich, *Local Texas officials balk at animus toward cities, plan for sales tax cuts in legislators' secretly recorded meeting*, TEXAS TRIBUNE (Oct. 15, 2018), 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").