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<u>MULTIDISTRICT LITIGATION AND ITS POTENTIAL IMPACT ON TAX CODE CASES</u>

STATE BAR OF TEXAS
PROPERTY TAX COMMITTEE MEETING AND LEGAL SEMINAR
THURSDAY, APRIL 12, 2007

THOMPSON CONFERENCE CENTER, UNIVERSITY OF TEXAS
AUSTIN, TEXAS

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MULTIDISTRICT LITIGATION (MDL)

Background

1.

In 2003, Texas Government Code Chapter 74, the Court Administration Act, was amended by addition of subchapter H, creating the Judicial Panel on Multidistrict Litigation, for cases filed after Sept. 1, 2003.

2.

Government Code § 74.161 provides that the MDL Panel consists of five (5) members, designated from time to time by the Chief Justice of the Supreme Court. Members must be active justices on the courts of appeals or administrative judges.

3.

MDL genesis: Modeled on the federal multidistrict litigation statute, 28 U.S.C. 1407; medical malpractice and tort liability revisions in Texas – C.S.H.B. 4.

4.

Government Code § 74.162 provides that a transfer may be made by the judicial panel on multidistrict litigation on its determination that the transfer will:

(1) *be for the convenience of the parties and witnesses*; and
(2) *promote the just and efficient conduct of the actions*.

5.

Under authority of the amendment to Government Code Chapter 74, *supra*, and Chapter 90 of the Texas Civil Practices and Remedies Code (claims involving asbestos and silica), the Supreme Court promulgated Rule 13 of the Rules of Judicial Administration. TEX. R. JUD. ADMIN. 13 (**"Rule 13"**).

Rule 13 - MDL [1]

6.

In summary, Rule 13, Multidistrict Litigation, provides:

- Applicability - 13.1(b) This rule *applies to:*

  (1) *civil actions that involve one or more common questions of fact;*
  (2) *filed on or after Sept. 1, 2003, in a county court, probate court, or district court.*

- Definitions - 13.2(d) "Trial court" means the court in which a case is filed.

- 13.2(e) "Pretrial court" means the *district court* to which related cases are transferred for consolidated pretrial proceedings.

- 13.2(f) "Related" means that cases involve one or more common questions of fact.
-
- 13.2(g) "Tag-along case" means a case related to cases in an MDL transfer order, but not itself the subject of an initial MDL motion or order.

- Procedure - 13.3(a) A party in a case may move to transfer cases to a pretrial court and must:

  (1) State the *common question(s) of fact involved in the cases.*
  (2) Contain a clear and concise explanation of the reasons that transfer *would be for the convenience of the parties and witnesses* and *would promote the just and efficient conduct of the cases.*
  (3) State whether all parties agree to the motion.

- 13.3(b) A trial court or presiding judge of an administrative judicial region may request transfer to a pretrial court.

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[1] *Compare* TEX. R. JUD. ADMIN. 11, Pretrial Proceedings in Certain Cases, applicable to any case filed before Sept. 1, 2003, that involves material questions of fact and law in common with another case pending in another county, on or after Oct. 1, 1997.

- 13.3(c) The MDL panel may, on its own initiative, issue an order to show cause why related cases should not be transferred to a pretrial court.

- 13.3(j) The MDL Panel will accept as true facts stated in a motion, response, or reply unless another party contradicts them. A party may file evidence with the MDL Panel Clerk only with leave of the Panel.

- 13.3(k) The MDL Panel may decide any matter on written submission or after an oral hearing.

- 13.3(l) The *MDL Panel may order transfer* if three (3) members concur in a written order finding *one or more common questions of fact, and* that transfer to a specified district court *will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the related cases.*

- Transfer - 13.5(b) No further action in the trial court after transfer.
  13.5(e) A Tag-along case is deemed transferred when a notice of transfer is filed in the trial court and the pretrial court. Any party may move the pretrial court to remand, and an order of the pretrial court may be appealed to the MDL Panel by a motion for rehearing.

- Proceedings - 13.6(b) The pretrial court has the authority to decide all pretrial matters, including, for example, jurisdiction, joinder, venue, discovery, trial preparation – such as motions to strike expert witnesses, mediation, and disposition such as summary judgment. The pretrial court may set aside or modify any pretrial ruling made by the trial court before transfer.

- Remand - 13.7(b) The pretrial court may order remand of one or more cases, or separable triable portions of cases, when the purposes of the transfer have been fulfilled.

- Orders after Remand - 13.8(a) The trial court should recognize that to alter a pretrial order without a compelling justification would frustrate the purpose of consolidated and coordinated pretrial proceedings. The pretrial court should recognize that its rulings should not unwisely restrict a trial court from responding to circumstances that arise following remand.

- 13.8(b) & (c) Written concurrence of the pretrial court is required to change its orders, over objection. Exceptions: orders regarding the admissibility of evidence at trial – other than expert evidence. The trial court must support its action with specific findings and conclusions.

- Review - 13.9(a) An MDL Panel order may only be reviewed by the Supreme Court in an original proceeding.

- 13.9(b) An order or judgment of the trial court or pretrial court may be reviewed by the appellate court that regularly reviews orders of the court in which the case is pending.

- 13.9(c) Review of an order or judgment in a case pending in a pretrial court must be expedited by an appellate court.

Motions for transfer of cases brought under the Texas Property Tax Code [2]

It doesn't take long to call the roll . . .

7.

In re Ad *Valorem Tax Litigation*, No. 06-0095, 2006 WL 1047106 (Tex. J.P.M.L. April 19, 2006) (*copy attached*) (the "**2006 Decision**"). Without hearing oral argument, the MDL Panel denied the motion. Judge David Peeples, Chair, delivered the opinion for the unanimous MDL Panel, quoted in part below:

7.1

> ". . . Valero . . . asked the Panel to assign one judge to handle the pretrial phase of numerous ad valorem tax suits. Valero has challenged the valuation of its refineries, pipelines, terminals, and convenience stores by forty- two different appraisal districts. It has filed 150 lawsuits in forty-two counties; the cases are pending

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[2] *Compare Jim Wells County v. El Paso Production Oil and Gas Co.,* 189 S.W.3d 861, 866 (Tex. App.-Houston [1st Dist.] 2006, pet. denied) (Alleged undervaluation of reserves for ad valorem tax purposes. The presiding judges for the Fourth, Fifth, Sixth, and Seventh Judicial Administrative Regions consolidated 19 cases, brought by counties and school districts, under TEX. R. JUD. ADMIN. 11 [material questions of fact and law in common]. The consolidated cases were split into two groups and assigned to different pretrial judges.)

in eighty-five district courts. [footnote omitted] . . . Valero asserts that its properties have been appraised above market value and unequally with respect to comparable properties. The properties include land and improvements, inventory, furniture, fixtures, and equipment. Most of the districts have filed responses . . . no district has agreed with Valero's assertions . . . or with its request . . . ." *Id.* at *1.

7.2

"[W]e deny Valero's motion and decline to appoint a pretrial judge because it has not shown that these cases are related or that it would serve the convenience of the litigants, witnesses, or lawyers to have the pretrial issues heard by one judge." *Id.*

7.3

"Indeed, the individualized fact inquiries in these appraisal cases preponderate over whatever common issues there may be. Because property valuation is such an individualized and local inquiry, and because it is the core issue in each of these cases, we respectfully reject the argument that these cases involve one or more common fact questions within the meaning of rule 13." *Id.* at *2.

7.4

"On balance, any inconvenience to Valero's witnesses pales in comparison to the potential inconvenience to the local officials, their appraisal personnel, and their attorneys." *Id.*

7.5

"FN4. . . . [a]s the plaintiff in forty-two different venues, Valero is not in the same situation as were the tire, silica, and asbestos defendants who sought MDL treatment when they were sued by multiple plaintiffs in multiple counties." *Id.* at *3.

7.6

"FN8. We also note that if these cases are entitled to an MDL pretrial judge, the MDL procedures would be available to other statewide and nationwide property owners too numerous to list, who could assert that one judge should handle the pretrial portion

> of their tax valuation cases. We are confident that the Legislature did not intend for MDL procedures to [be] put to this use, and this conclusion is confirmed by the language of the statute and rule." *Id.*

7.7

Rule 13.9, Review, specifically provides that an order "denying a motion for transfer may be reviewed only by the Supreme Court in an original proceeding." Valero did not seek review by the Supreme Court of the MDL Panel order denying its motion for transfer.

Case closed ?

It's dejavu all over again . . .

8.

Subsequently, on January 5, 2007, Valero Energy Corporation filed with the MDL Panel its second motion for transfer: *In re Ad Valorem Tax Litigation*, Case Number 07-0009 (the "**2007 Motion**"). After appraisal district responses were filed, the MDL Panel set Valero's 2007 Motion for hearing. It is currently scheduled for 10:00 a.m. on Friday, April 20, 2007, in the Supreme Court Building, Austin Texas. The parties were also notified that Judge David Peeples, MDL Panel Chair, has recused himself from the case.

8.1

Valero's activities as plaintiff are set out in its pending 2007 Motion:

> "In 125 cases pending in 39 counties across the State, Valero has challenged the valuation of its refineries, pipelines, terminals, and convenience stores by 39 tax appraisal districts. The ultimate issue in each case is the same: whether the appraisal district incorrectly valued Valero's property above market value and/or unequally in relation to other comparable properties." 2007 Motion at pp. 1-2.

8.2

Once again, Valero is asking the panel to transfer its cases to a single pretrial judge. 2007 Motion at p. 14. Valero claims MDL is appropriate because:

- The ultimate issue in each case is the same.
- In the months since Valero's first motion was denied, conflicting rulings have demonstrated that transfer will promote Rule 13's goals.
- The need to conserve scarce judicial resources.
- To avoid subjecting parties and witnesses to duplicative and inconsistent demands.
- To prevent any appearance of judicial partiality.
- That inconvenience be addressed by appointment of liaison counsel to take the lead for aligned parties.

  2007 Motion at pp. 1-2, 12.

With the exception of two added arguments, the appearance of judicial partiality and liaison counsel, each of Valero's other claims were addressed and disposed of in the 2006 Decision. The appearance of judicial partiality is inapposite under Rule 13. Adding the layer of liaison counsel does not increase convenience or efficiency.

8.3

Valero also cites two subsequent developments: inconsistent *Daubert/Robinson* rulings and discovery rulings. The expert challenges referred to by Valero were post-trial, not pretrial rulings: Valero's expert testified in each case. Moreover, those cases are on appeal at this time. The discovery rulings arise in the context of the 125 suits that plaintiff Valero now has pending. Thus, the more suits filed, the greater the justification for MDL? Does Rule 13 become the tool by which the property owner/plaintiff can corral many defendants? As stated by the panel in the 2006 Decision, "our time-tested system, in which trial courts apply statutes and case law, subject to review by a layer of appellate courts . . . will ensure that our state enjoys a uniform body of law under the tax code." 2006 Decision at *2.

9.

Valero's reply. In its reply to the appraisal districts' responses to the 2007 Motion, Valero tells the panel that (i) the appraisal districts' arguments would be better addressed to the Texas Legislature, and that (ii) nothing in the text of the statute or legislative history supports the appraisal districts' position. Valero 2007 reply at p. 1. These statements are, however, contradicted by the 2006 Decision, *supra*, at *3: "We are confident that the Legislature did not intend for MDL procedures to be put to this use, and this conclusion is confirmed by the language of the statute and rule." Clearly, the panel's analysis is at variance with Valero's position.

In its 2006 Decision the panel held:

> "We conclude that Valero has not shown that the cases are related within the meaning of Rule 13 or that transferring them to one pretrial court would serve the convenience of the parties and witnesses. Rule 13 requires both showings." (at * 3).

This specific ruling notwithstanding, Valero argues that the Panel's 2006 Decision does not, under the law of the case doctrine, govern Valero's 2007 Motion.

Looking ahead at MDL in Tax Code cases

Shock and awe . . .

10.

If Valero's cases brought under the Tax Code are entitled to an MDL pretrial judge, other property owners will seek the same treatment for their cases. *See* the 2006 Decision at *3: "MDL procedures would be available to other . . . property owners too numerous to list . . . ." Envision numerous cases, driven by single plaintiffs too numerous to list, creating too many *In re Ad Valorem Tax* MDLs. Envision multiple pretrial judges ruling differently. As the panel has written, "the plaintiff . . . Valero is not in the same situation as were the tire, silica, and asbestos defendants . . . ." 2006 Decision at *3.

11.

If Valero's MDL motion is granted for its current cases, there is the likely prospect of MDL next year, and the year after, and the year after that. The same can be expected for other property owners' cases: MDL year after year.

12.

Valero urges that "the MDL statute requires only one such question of common fact." Valero 2007 reply at p. 7. Accordingly, cases not subject to an MDL transfer order, but involving one or more common questions of fact, may become tag-along cases. "Rule 13 makes it easy to transfer a tag-along case to the pretrial court by simply filing a notice . . . The tag-along case is then automatically deemed transferred." *In re Silica Products Litigation*, No. 04-0606, 2006 WL 1727324, at *2 (Tex. J.P.M.L. Dec. 19, 2006). Orders of the pretrial court on tag-along cases are then subject to appeal to the MDL Panel by a motion for rehearing. Thus, tag-along cases can be "automatically deemed transferred" by other plaintiffs who wish to tag onto Valero's MDL wagon.

13.

Is MDL transfer of Tax Code cases for the convenience of the parties and witnesses? Balance the convenience of one plaintiff vs. many defendants. Add to the equation multiple MDLs and the pretrial hearings in Beaumont, El Paso, Tyler, Dallas, Amarillo, San Antonio, Houston, Austin, etc. As observed by the dissent, *In re Silica Products Liability Litigation*: "Except for those parties and witnesses living in the city of the MDL court, the parties will have to travel across the state to attend every single pretrial hearing." 166 S.W.3d at 10. Last, but not least, "[a]ttorneys for the districts often will not know whether a pretrial hearing will implicate their interests, and they will therefore have to attend the distant hearing or risk being bound by the result." 2006 Decision at *2.

14.

The Constitutional and Tax Code requirement that ad valorem appraisal cases remain local matters is inconsistent with MDL, considering its breadth and effect. *See* TEX. CONST. art. 8, § 23(a), (b) (providing "no statewide appraisal of real property for ad valorem tax purposes;" "[a]dministrative and judicial enforcement of uniform standards and procedures for appraisal of property for ad valorem tax purposes . . . shall originate in the county where the tax is imposed"); *see also* TEX. TAX CODE ANN. §§ 6.01 (an appraisal district is established in each county), 42.09 (exclusive remedies), and 42.22 (venue is in the county).

15.

See also Senate Bill 1204. If enacted, it includes provisions relating to complex cases and multidistrict litigation.

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ORDER OF MULTIDISTRICT LITIGATION PANEL

Order Pronounced April 19, 2006

THE MOTION FOR TRANSFER IN THE FOLLOWING MULTIDISTRICT LITIGATION CASE IS DENIED:

06-0095 IN RE AD VALOREM TAX LITIGATION

Justice Peeples delivered the opinion of the unanimous Multidistrict Litigation Panel

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In re Ad Valorem Tax LitigationTex.Jud.Pan.Mult.Lit.,2006.Only the Westlaw citation is currently available.

Texas Judicial Panel on Multidistrict Litigation.
In re AD VALOREM TAX LITIGATION.
No. 06-0095.

April 19, 2006.

Background: Taxpayer challenged the valuation for tax purposes, by 42 appraisal districts, of its refineries, pipelines, terminals, and convenience stores by forty-two different appraisal districts, with taxpayer filing 150 lawsuits in 42 counties, resulting in cases pending in 85 district courts. Taxpayer brought motion to transfer to single pretrial judge.

Holdings: The Judicial Panel on Multidistrict Litigation, David Peeples, J., held that:

(1) cases did not involve common questions of fact, and

(2) transfer would not promote convenience and efficiency.

Motion denied.

[1] Courts 106 ⚷486

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)2 Transfer of Causes
106k486 k. Grounds. Most Cited Cases

Alleged use, by 42 appraisal districts, of mass appraisal procedures did not establish that taxpayer's pending actions, in 85 district courts, challenging the valuation, for tax purposes, of its refineries, pipelines, terminals, and convenience stores, involved common questions of fact, as basis for transfer to single pretrial judge. V.T.C.A., Government Code § 74.162; Judicial Administration Rules, V.T.C.A., Government Code Title 2, Subtitle F App., Rule 13.2(f).

[2] Courts 106 ⚷486

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)2 Transfer of Causes
106k486 k. Grounds. Most Cited Cases

Even if inventory at taxpayer's convenience stores had somewhat uniform value in different parts of state, such fact would not establish that taxpayer's pending actions, in 85 district courts, challenging the valuation for real estate taxation purposes, by 42 appraisal districts, of its convenience stores, involved common questions of fact, as basis for transfer to single pretrial judge; property valuation was an individualized and local inquiry. V.T.C.A., Government Code § 74.162; Judicial Administration Rules, V.T.C.A., Government Code Title 2, Subtitle F App., Rule 13.2(f).

[3] Courts 106 ⚷486

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)2 Transfer of Causes
106k486 k. Grounds. Most Cited Cases

Even if the legal principles governing the appraisals of taxpayer's properties were uniform throughout the state, such fact would not establish that taxpayer's pending actions, in 85 district courts, challenging the valuation for taxation purposes, by 42 appraisal districts, of its refineries, pipelines, terminals, and convenience stores, involved common questions of fact, as basis for transfer to single pretrial judge. V.T.C.A., Government Code § 74.162; Judicial Administration Rules, V.T.C.A., Government Code Title 2, Subtitle F App., Rule 13.2(f).

[4] Courts 106 ⚷486

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)2 Transfer of Causes
106k486 k. Grounds. Most Cited Cases

Transfer, to single pretrial judge, of taxpayer's pending actions, in 85 district courts, challenging valuation for taxation purposes, by 42 appraisal districts, of its refineries, pipelines, terminals, and convenience stores, would not promote convenience and efficiency; inconvenience, in absence of transfer,

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to taxpayer's corporate witnesses would pale in comparison to inconvenience to appraisal district personnel and their witnesses if cases were transferred. Judicial Administration Rules, V.T.C.A., Government Code Title 2, Subtitle F App., Rule 13.1 et seq.

[5] Courts 106 ⚷486

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)2 Transfer of Causes
106k486 k. Grounds. Most Cited Cases

Prospect that different judges would produce conflicting *Daubert-Robinson* rulings regarding admission of expert testimony was too remote and implausible to establish that convenience and efficiency would be promoted by transfer, to single pretrial judge, of taxpayer's pending actions, in 85 district courts, challenging valuation for taxation purposes, by 42 appraisal districts, of its refineries, pipelines, terminals, and convenience stores. Judicial Administration Rules, V.T.C.A., Government Code Title 2, Subtitle F App., Rule 13.1 et seq.

ON REVIEW BY THE MULTIDISTRICT LITIGATION PANEL

Justice PEEPLES delivered the opinion for the unanimous MDL Panel.

*1 Rule 13 authorizes this MDL panel to transfer "related" cases from different trial courts to a single pretrial judge if transfer will (1) serve the convenience of the parties and witnesses and (2) promote the just and efficient conduct of the litigation. *See* TEX. R. JUD. ADMIN. 13.3. Several companies in the Valero corporate family (Valero) have asked the panel to assign one judge to handle the pretrial phase of numerous ad valorem tax suits. Valero has challenged the valuation of its refineries, pipelines, terminals, and convenience stores by forty-two different appraisal districts. It has filed 150 lawsuits in forty-two counties; the cases are pending in eighty-five district courts.[FN1] In these cases, Valero asserts that its properties have been appraised above market value and unequally with respect to comparable properties. The properties include land and improvements, inventory, furniture, fixtures, and equipment. Most of the districts have filed responses objecting to Valero's motion and contesting its factual assertions; no district has agreed with Valero's assertions or with its request for a pretrial judge.

For the reasons stated more fully below, we deny Valero's motion and decline to appoint a pretrial judge because it has not shown that these cases are related or that it would serve the convenience of the litigants, witnesses, or lawyers to have the pretrial issues heard by one judge.

I. Are the cases related?

Under rule 13.2(f), cases are "related" if they involve "one or more common questions of fact." *See* TEX. R. JUD. ADMIN. 13.2(f); TEX. GOV'T CODE § 74.162 (West 2005). Valero makes three principal arguments to support its contention that these eighty-five cases are "related" within the meaning of rule 13. First, it argues that the appraisal districts have used a mass appraisal process that does not independently appraise the properties and "does not take into account all relevant factors and indicators of market value." Second, it argues that the items of property being appraised are common and of the same kind and therefore should be valued uniformly. Third, it argues that all these cases involve the same provisions of the tax code, which should be applied and interpreted uniformly across the state. We consider each of these arguments in turn.

[1] The legitimacy of a mass appraisal process, in which the appraiser does not examine the details of each and every individual property,[FN2] is not the issue before us. Our inquiry is whether use of a mass appraisal process by many districts links these cases for MDL purposes. We think it does not, because use of a mass appraisal process does not present a "common question of fact," which rule 13 plainly requires. Nor has Valero shown that any district court will use a mass appraisal process in these trials de novo.[FN3] If Valero has complaints about a mass appraisal process and considers it unlawful, it should make that argument to the trial courts and, if it is unsuccessful there, take the matter to the appellate courts. In any event, whatever kind of appraisal method is ultimately used, the degree of attention given to local characteristics of individual properties will be decided county-by-county by each trial court.

*2 [2] Concerning the similarity, or commonness, of the properties in these forty-two different counties, we do not accept the suggestion that the real property and improvements situated in different counties are necessarily similar. It is no doubt true that the inventory at some convenience stores, in contrast to the realty, may have a somewhat uniform value in different parts of the state, but we think that does not convert these cases into related cases. The valuation

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of property, certainly the major kinds of property at issue here, is an inherently individualized and local process. Valero admits this, as it must, when it says "the determination of each individual Property's appraised value ultimately will turn on the characteristics specific to that Property." FN4 Indeed section 23.01 of the tax code itself mandates that property be appraised at its market value and that "each property shall be appraised based upon the individual characteristics that affect the property's market value." Tex. Tax Code § 23.01 (West 2002). Valero has simply not shown how the appraisal of different properties in different parts of Texas will involve common questions of fact. Indeed, the individualized fact inquiries in these appraisal cases preponderate over whatever common issues there may be. Because property valuation is such an individualized and local inquiry, and because it is the core issue in each of these cases, we respectfully reject the argument that these cases involve one or more common fact questions within the meaning of rule 13.

[3] Finally, Valero argues that the legal principles governing these appraisals should be uniform throughout the state. The code provisions involved in these cases, it says, will be the same and should be interpreted and applied uniformly. And the cases will also involve "the same evidentiary and procedural issues." All this may be true, but assuring that legal principles are uniform throughout the state is a task that our system commits to the appellate courts. Rule 13 does not purport to strive for uniformity of *law;* it is, after all, limited to cases involving common questions of *fact.* We are confident that our time-tested system-in which trial courts apply statutes and case law, subject to review by a layer of appellate courts whose decisions are subject to supreme court review-will ensure that our state enjoys a uniform body of law under the tax code.

We hold that the appraisal cases at issue in this proceeding are not "related" within the meaning of rule 13.

II. Would transfer further convenience and efficiency?

[4][5] Valero argues that it would serve the goals of convenience and efficiency to transfer the cases to one pretrial court because some witnesses might have to sit for multiple depositions and also might be subjected to inconsistent *Daubert-Robinson* FN5 rulings. We have previously held that a party seeking a pretrial MDL court need not show that parties or witnesses have already been inconvenienced. FN6 But that holding does not mean that it is sufficient to make the bare assertion that witnesses might be inconvenienced. The circumstances of the litigation must at least make the assertion plausible. Valero has not shown that any witnesses except its own corporate witnesses may be exposed to multiple demands. Appraisal district personnel and their witnesses, however, will clearly be inconvenienced if they must travel to one central court for pretrial matters instead of to their forty-two local courthouses or to nearby conference rooms. Several of the districts are located in smaller counties, and the amount of tax revenue in their cases is small; to them there is a great difference between pretrial hearings in their own county and hearings in a distant central county for all these cases. Attorneys for the districts often will not know whether a pretrial hearing will implicate their interests, and they will therefore have to attend the distant hearing or risk being bound by the result. On balance, any inconvenience to Valero's witnesses pales in comparison to the potential inconvenience to the local officials, their appraisal personnel, and their attorneys.

*3 Valero argues that the forty-two (or more) FN7 different judges exercising their discretion differently may produce conflicting *Daubert-Robinson* rulings, even though the same witnesses and the same issues are involved. This is certainly a possibility, and if it happens we would agree that rule 13's goals would be implicated. But on these facts that prospect is too remote and implausible to override the overwhelmingly local nature of these cases.

We hold that Valero has not shown that consolidating these cases before one judge for pretrial proceedings would serve the convenience of the parties and witnesses.

For the reasons stated, FN8 we conclude that Valero has not shown that the cases are related within the meaning of rule 13 or that transferring them to one pretrial court would serve the convenience of the parties and witnesses. Rule 13 requires both showings. The motion is therefore denied.

FN1. In some of the larger counties there are several suits dealing with different properties and different tax years.

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FN2. For a discussion of mass appraisal procedures, see *Haney v. Cooke County Tax Appraisal Dist.*, 782 S.W.2d 349, 351-52 (Tex.App.-Ft.Worth 1989, no writ).

FN3. Section 42.23 of the tax code grants a dissatisfied owner an appeal de novo to the district court. *See* Tex. Tax Code § 42.23 (West Supp.2005).

FN4. In this sense, property appraisal is unlike the design, manufacture, and marketing of automobile tires and products containing asbestos and silica, which have been involved in some of our previous MDL proceedings. *See In re Firestone/Ford Litigation*, 166 S.W.3d 2 (Tex. Jud. MDL Panel 2004) (tires); *In re Silica Products Liability Litigation*, 166 S.W.3d 3 (Tex. Jud. MDL Panel 2004) (silica); *Union Carbide v. Adams*, 166 S.W.3d 1 (Tex. Jud. MDL Panel 2003) (asbestos). Valero's case also differs from these earlier cases in that the MDL movant is Valero, which has filed eighty-five lawsuits against forty-two local appraisal boards concerning property situated in forty-two counties. We realize that Valero had no choice about bringing suit in the counties where the property is located. Nevertheless, as the plaintiff in forty-two different venues, Valero is not in the same situation as were the tire, silica, and asbestos defendants who sought MDL treatment when they were sued by multiple plaintiffs in multiple counties.

FN5. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex.1995).

FN6. In *In re Silica Products Liability Litigation* we said: "Respondents point out that the movants have not shown that witnesses or parties have already been inconvenienced, either by having to respond to conflicting demands or otherwise. In effect respondents argue that Rule 13 requires the movants to show that there is an existing problem that needs to be corrected. But Rule 13 is not limited to correcting ongoing problems from the past; it seeks to prevent the occurrence of problems in the future. It does not require proof that witnesses have already been inconvenienced; it looks ahead and focuses on whether transferring cases to a pretrial judge would serve the convenience of parties and witnesses by preventing inconvenience in the future." 166 S.W.3d at 5.

FN7. As mentioned, there are 150 Valero cases pending before eighty-five district courts in forty-two counties. At this point it is not clear how many of these will be consolidated before one judge per county pursuant to local procedures.

FN8. We also note that if these cases are entitled to an MDL pretrial judge, the MDL procedures would be available to other statewide and nationwide property owners too numerous to list, who could assert that one judge should handle the pretrial portion of their tax valuation cases. We are confident that the Legislature did not intend for MDL procedures to put to this use, and this conclusion is confirmed by the language of the statute and rule.

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History

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