

Subcommittee on Rules of Judicial Administration
REPORT ON PROPOSED REVISIONS TO RJA 13
—in response to SB15 (relating to civil claims involving asbestos and silica)—

The Subcommittee on the Rules of Judicial Administration has considered revisions to Rule of Judicial Administration 13 proposed by Tracy Christopher, Judge of the 295th District Court, and Mark Davidson, Judge of the 11th District Court, in response to the recent addition of Chapter 90 to Texas Civil Practices and Remedies Code pertaining to civil claims involving asbestos and silica. *See* Senate Bill 15, attached; *see also* “Christopher/Davidson Proposal” (with cover letter), attached.

Judge Christopher and Judge Davidson recommend amending current Rule 13—which, by its express terms, covers only cases filed *on or after* September 1, 2003—to account for the provisions in the new statute that allow all asbestos and silica cases filed *before* that date (an estimated 30,000 cases) to be transferred to MDL silica and asbestos pretrial judges unless certain criteria are met. Judge Christopher and Judge Davidson also recommend establishing time limitations for a defendant to file a notice of transfer to the pretrial court for report compliance review and for a plaintiff to move to remand to the trial court.

This report contains the subcommittee’s concerns and recommendations on that proposal.

- Judge Christopher and Judge Davidson proposed the following provision on attorney fees: “The party who prevails in the hearing on the motion to remand must be entitled to reasonable attorneys’ fees.” The subcommittee recommends against including this provision given the probable difficulty, for both sides, in determining what constitutes a compliant report under the new statute. Awarding attorney fees may also be difficult when one defendant files a notice on behalf of all defendants in the case.
- Judge Christopher and Judge Davidson proposed imposing a deadline of December 30, 2005, to file a notice of transfer for failure to file a report, and a deadline of January 31, 2006, to file a notice of conditional transfer. The subcommittee recommends extending both deadlines by ~30 days. Requiring a defendant to file notices within 30 days during the holiday season seems unduly burdensome given the lack of statutory deadlines. Further, the recommended timetable on conditional transfers gives defendants the same time to review the plaintiff’s report (90 days) as the plaintiff originally had to prepare and serve the report.
- Judge Christopher and Judge Davidson’s proposal contemplated severing claims of various plaintiffs in cases involving multiple claimants—some of whom can file complying reports and others of whom cannot—but did not provide a specific procedure for obtaining severance. This issue is tough. The subcommittee could not tell whether Judge Christopher and Judge Davidson anticipated the case would be severed at the trial court level, as their “costs” section implies, R13._(g) (“However the cost of severance in the trial court of multiple claimant cases must be borne by the claimants.”), or at the pretrial court level, as their notice provision implies, R13._(a) (requiring a defendant to indicate in its notice whether severance is necessary). With the rationale that it would be unfair to require a plaintiff to go through the expense of the MDL rigamarole (a technical, legal term) if the plaintiff meets the statutory medical requirements, this draft requires a defendant to seek severance before filing the notice. The subcommittee, however, recognizes the impact the severance provisions may have on a defendant trying to comply with the timetables created under these rules. To alleviate concerns about the timing, this draft places a duty on the trial court to rule “without delay” if the motion contains a “verified statement that the defendant was not served with a report as required under sections 90.003 and 90.004 in the cases to be severed or that the defendant reasonably believes that the reports served in the cases to be severed do not comply with

sections 90.003 and 90.004.” The idea is to make the severance as ministerial as possible in hopes of keeping the fight about report compliance in one forum – the pretrial court.

- The draft also adds a provision that would “deem” a case transferred upon filing a notice of transfer or a notice of conditional transfer. The Christopher/Davidson draft seems to imply that a case is deemed transferred upon filing a notice of transfer but leaves a case in procedural limbo once a conditional notice is filed. The subcommittee wondered whether the new rules should just treat conditional transfers similar to tag-along transfers under current R13.5(e). Doing so makes the remand section more intellectually honest – i.e., how does a pretrial court remand a case that had never been transferred? It also made the remand section easier to draft, as the subcommittee ran into the problem that the Christopher/Davidson draft did not contemplate a procedure where a claimant could respond to a notice of transfer for failure to serve a report with evidence that the claimant did, in fact, serve a report (i.e., the defendant just got his paperwork wrong). Assuming, for the sake of drafting, that the committee would favor this approach, this draft also changes the fees section.

With those recommendations and concerns stated, the subcommittee presents the following draft to the full committee for consideration.

Amend existing provisions of Rule 13.1 as follows:

13.1 Authority and Applicability.

(a) *Authority.* This rule is promulgated under sections 74.161-.164 of the Texas Government Code and sections 90.001-.012 of the Texas Civil Practices and Remedies Code.

(b) *Applicability.* This rule applies to civil actions that involve one or more common questions of fact and that were filed in a constitutional county court, county court at law, probate court, or district court on or after September 1, 2003. Except as provided in subsection (c), cCases filed before that date are governed by Rule 11 of these rules.

(c) *Applicability to Asbestos and Silica Claims.* Sections 13.2 and 13.6-[new section number] of this rule apply to civil actions that seek personal injury damages for asbestos-related injuries or silica-related injuries, as defined in Chapter 90 of the Texas Civil Practices and Remedies Code, filed before September 1, 2003, to the extent authorized by that chapter.

Add provisions to Rule 13 as follows:

13.____ Transfer of Civil Actions Involving Asbestos and Silica Filed Before September 1, 2003.

(a) *Transfer When No Report Served.* If a claimant, as defined in section 90.001, fails to serve a report as directed under section 90.003 or 90.004 on or before November 30, 2005, the claimant’s case may be transferred to the existing MDL asbestos or silica pretrial court as allowed under section 90.010. The notice of transfer must:

(1) be filed in the trial court and in the pretrial court by January 31, 2006, and be titled Notice of Transfer for Failure to File a(n) Asbestos/Silica Report;

(2) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party’s name, address and phone number;

- (3) state the names of the claimants who did not file the report;
- (4) attach to the notice filed in the pretrial court a copy of the plaintiffs' live petition.

(b) *Conditional Transfers for Report Compliance Review.* If a claimant serves a report pursuant to section 90.003 or 90.004, but a defendant reasonably believes that the report does not comply with the statutory requirements, a defendant may file a Notice of Conditional Transfer with the pretrial court to determine whether the report complies with the statutes. The notice must:

- (1) be filed in the trial court and in the pretrial court by February 28, 2006, and be titled Notice of Conditional Transfer For Asbestos/Silica Report Compliance Review;
- (2) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address and phone number;
- (3) state the names of the claimants whose report is alleged to be non-compliant;
- (4) attach to the notice filed in the pretrial court a copy of the plaintiffs' live petition; and
- (5) attach to the notice filed in the pretrial court a copy of the report alleged to be non-compliant.

(c) *Motion for Severance in Trial Court.* Before filing a notice under subsections (a) or (b), a defendant must move to sever the claims of plaintiffs who have filed reports complying with sections 90.003 or 90.004 from the claims of plaintiffs who have not filed such reports. The motion must be filed in the trial court and must contain a verified statement that the defendant was not served with a report as required under sections 90.003 and 90.004 in the cases to be severed or that the defendant reasonably believes that the reports served in the cases to be severed do not comply with sections 90.003 and 90.004. The trial court must grant the motion, if so verified, by written order and without delay. The written order must assign a new cause number to the claims that are being transferred.

(d) *Deemed Transferred Upon Filing Notice.* A case is deemed transferred to the pretrial court when a notice of transfer—in the form described in subsections (a) or (b)—is filed in both the trial court and the pretrial court.

(e) *Remand to the Trial Court.* Within 60 days from the date a case is transferred under subsection (d), a claimant may move to remand a case to the trial court on the ground that the claimant served a report complying with sections 90.003 and 90.004. If the pretrial court finds that the claimant served a report complying with sections 90.003 or 90.004, the pretrial court must remand that claimant's claim(s) to the trial court.

(f) *No Further Action in Trial Court.* After notice is filed pursuant to subsections (a) or (b) in the trial court, the trial court must take no further action in the transferred case until the pretrial court remands the case to the trial court.

(g) *Transfer of Files.* There is no automatic transfer of the case file for notices filed pursuant to this section. The pretrial court may issue appropriate orders for transferring files.

(h) *Filing Fees and Costs.* The party filing a notice under subsections (a) or (b) must pay the cost of refileing the transferred cases in the pretrial court, including filing fees and other reasonable costs.

There were several questions raised during the subcommittee meeting about the substance of the proposal in addition to the concerns about severance and "deemed transfers" mentioned above. The subcommittee determined, however, that these questions were better raised before the full advisory committee. For example:

1. Should the Court impose deadlines on the parties that the Legislature chose not to impose? Proponents of the deadlines note that prompt resolution of the legal issues that will arise under this new statute further the underlying goals of the statute and benefit plaintiffs and defendants alike. (And, as a practical matter, the MDL judges would likely impose these or similar deadlines on the parties through standing orders if the Court chose not to act.) Opponents of the deadlines maintain that, if the Legislature wanted to impose deadlines, they would have included them; adoption of these deadlines exceeds the scope of the Legislature's rule-making directive to the Court. *See* Sec. 90.012 ("The supreme court may promulgate amendments to the Texas Rules of Civil Procedure regarding the joinder of claimants in asbestos-related actions or silica-related actions if the rules are consistent with Section 90.009.").
2. What is the consequence if a defendant does not file a notice of transfer within the deadlines under this rule? Perhaps the rule needs a provision, similar to RJA 13.3(b) and/or (c), that allows a judge (the trial court, a presiding judge or a judge on the MDL panel) to transfer cases to MDL if the defendant does not?
3. Should the rules include a "good cause after consultation" exception to subsection (f), which prohibits a trial court from taking any further action in a case transferred to the pretrial court, similar to current RJA 13.5(b)?
4. Could the rule be drafted so that claims are deemed severed on the same day the claims are deemed transferred if a defendant includes in its notice of transfer a verified statement that the defendant was not served with a report as required under sections 90.003 and 90.004 in the cases to be severed or that the defendant reasonably believes that the reports served in the cases to be severed do not comply with sections 90.003 and 90.004? This removes one hoop for the defendant and requires no less proof than the subcommittee's rule, as currently drafted.
5. Should the rules specify that a case that is severed for the purpose of transfer and that is later remanded be re-assigned the cause number the case had before it was severed for transfer?
6. Should the rules apply to cases filed AFTER September 1, 2003, to the extent they are not already in the MDL (and were filed before September 1, 2005)?

Christopher/Davidson Proposal



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July 25, 2005

Honorable Nathan Hecht
Supreme Court of Texas
P.O. Box. 12248
Austin, TX 78711

Re: Proposed Changes to Rule 13 of the Rules of Judicial Administration

Dear Justice Hecht:

With the passage of SB 15 on asbestos and silica litigation, Judge Davidson and I respectfully request that we may need some changes to Rule 13. We believe that these changes need to be in place before Nov. 30, 2005.

SB 15 provides for the transfer of all asbestos and silica cases filed before 9/1/03 to the MDL silica and asbestos judges unless certain criteria are met. Rule 13 by its express terms only covers cases filed on or after 9/1/03. Therefore we request a change to Rule 13.1 to add a paragraph on the pre 9/1/03 asbestos and silica cases.

We would also like a clarification as to whether our current appointments would cover the pre 9/1/03 cases. I do not know whether this needs to be in the Rule itself or whether a new order from the MDL panel is needed. Our current orders cover tag-along cases but those are all post 9/1/03 tag-alongs.

There are approximately 4300 silica plaintiffs and 28,000 asbestos plaintiffs whose cases were filed pre 9/1/03 and are pending. They must either be tried, be suffering from mesothelioma or other malignant cancer or have a medical report filed by the 11/30/05 deadline. SB 15 provides for a medical report compliance review on the pre 9/1/03 cases. Even if a plaintiff files a medical report timely (by 11/30/05) a defendant can still file a notice of transfer, and transfer the case to the MDL pretrial court to determine if the report meets the statutory criteria. If the report meets the criteria, the case is remanded. If the report does not meet the criteria, the case stays in the MDL. We anticipate a large number of cases transferred to us for a medical report compliance review shortly after the 11/30/05 deadline.

The statute does not provide any time limits for when the defendant must file the notice of transfer, nor does it provide any time limits for the plaintiff to file a motion to remand on these medical report compliance

cases. Given the large number of reports that we anticipate will be filed, we respectfully suggest 60 days for both would be reasonable. This would give both sides more time to make certain that they are making good decisions. We also believe that a provision for attorney fees for the winning party might also be reasonable.

Given the 11/30/05 deadline, we would like to have the deadlines established and a provision for attorney fees in place before then so that all parties may know the proper procedures to follow. Therefore we request a new paragraph to deal with these issues.

Sincerely,

Tracy Christopher

Mark Davidson

**Proposed Amendments to Rule 13
Rules of Judicial Administration**

Additions to Rule 13 in bold

13.1 (a) *Authority.* This rule is promulgated under sections 74.161-.164 of the Texas Government Code and sections 90.001-.012 of the Texas Civil Practices and Remedies Code.

13.1(c) *Applicability to Asbestos and Silica Claims.* This rule applies to civil actions involving asbestos and silica filed before September 1, 2003 to the extent authorized by sections 90.001-.012 of the Texas Civil Practices and Remedies Code.

13.____ **Transfer of civil actions involving asbestos and silica filed before September 1, 2003 pursuant to sections 90.001-.012 of the Texas Civil Practices and Remedies Code.**

(a) *Transfer when no report served.* If a claimant, as defined in section 90.001, fails to file a report pursuant to section 90.003 or 90.004 on or before November 30, 2005, (and the other exceptions in section 90.010 do not apply) the claimant's case may be transferred to the existing MDL asbestos or silica pretrial court through a notice of transfer. The notice must:

- (1) Be filed by December 30, 2005 in the trial court and in the pretrial court and state that it is a Notice of Transfer for Failure to File a(n) Asbestos/Silica Report.
- (2) List all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address and phone number.
- (3) State the names of the claimants who did not file the report and whether severance is necessary.
- (4) Attach a copy of the plaintiffs' latest petition in the pretrial court filing.

(b) *Conditional transfers for report compliance review.* If a claimant serves a report pursuant to section 90.003 or 90.004, but a defendant reasonably believes that the report fails to comply with the requirements for such reports, a defendant may file a Notice of Conditional Transfer with the pretrial court to determine whether the report complied with the statutes. The notice must:

- (1) Be filed by January 31, 2006 in the master case number of the pretrial court and in the trial court and state that it is a Notice of Conditional Transfer For Asbestos/Silica Report Compliance Review.
- (2) List all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address and phone number.
- (3) State the names of the claimants whose report is alleged to be non-compliant.
- (4) Attach a copy of the plaintiffs' latest petition in the pretrial court filing.
- (5) Attach a copy of the report alleged to be non-compliant in the pretrial court filing.

(c) *Remand to the trial court.* The claimant may file a motion to remand to the trial court within 60 days from the date of conditional transfer. If the pretrial court finds that the claimant's report did comply with the requirements of 90.003 or 90.004, the pretrial court shall remand the claimant's action to the trial court and this rule will no longer apply to that claimant's action. If the pretrial court finds that the claimant's report did not comply with the requirements of 90.003 or 90.004, then the court shall order transfer of the claimant's action to the MDL. The party who prevails in the hearing on the motion to remand shall be entitled to reasonable attorneys' fees. If no timely

motion to remand is filed, the pretrial court shall order transfer of the claimant's action to the MDL.

- (d) *No further action in Trial Court.* After notice of transfer is filed pursuant to (a) or (b) in the trial court, the trial court must take no further action as to those claimants' actions, until the pretrial court orders a remand.
- (e) *Transfer of files.* There is no automatic transfer of the case file for notices filed pursuant to this section. The pretrial court may issue orders as to the extent of the transfer of the files from the trial court clerk.

Alternative

- (f) *Transfer of files* When a Notice of Transfer for Failure to File a(n) Asbestos/Silica Report is filed, the trial court clerk shall transmit the case file to the pretrial court clerk. If there are multiple claimants in one case, and only some of the claimants failed to file a report, those claimants who failed to file a report shall be severed into a new case file for transfer to the pretrial court. The new case file shall consist of the Notice of Transfer with the plaintiffs' latest petition attached only. When a Notice of Conditional Transfer For Asbestos/Silica Report Compliance Review is filed, the trial court clerk shall not transmit the file to the pretrial court clerk until ordered to do so by the pretrial court.
- (g) *Filing Fees and Costs.* The party moving for transfer for Failure to File a(n) Asbestos/Silica report must pay the cost of refiling the transferred cases in the pretrial court, including filing fees and other reasonable costs. However the cost of severance in the trial court of multiple claimant cases shall be borne by the claimants. There shall be no filing fees associated with the Conditional Transfer For Asbestos/Silica Report Compliance Review. If the pretrial court orders the transfer of claimant's case to the MDL, then the party moving for transfer must pay the cost of refiling the transferred cases in the pretrial court, including filing fees and other reasonable costs.