Honorable Mark Davidson

MDL Asbestos Judge
201 Caroline, 8th Floor
Houston, Texas 77002

October 16, 2012

Ms. Samantha Flores
Ms. Kay Andrews

Dear Counsel:

You will recall that a hearing was held on October 5, 2012 on the motion of the firm of Williams Kherker to amend the Master Scheduling Order governing asbestos cases. The proposed amendment by the Court followed a meeting of the liaison committee to the MDL Asbestos Judge held in September. At the October 5th meeting, objections were made to the amendment, and I took the matter under advisement. This letter is a ruling on the Motion to Amend and considers the arguments made by all parties appearing at the hearing.

The essence of the amendment is to require a Defendant who is sued in an asbestos case in which a finding of gross negligence, or malice, is a prerequisite of liability to tender a corporate representative on the Defendant's knowledge of the dangers of asbestos before they can seek a no evidence summary judgment. This allegation is typically made in cases in which an asbestos Plaintiff, or the statutory heirs of an asbestos plaintiff, has brought suit against an employer alleging gross negligence as a means of overcoming the protections of the Workers' Compensation bar. At the original hearing, it was argued that a defendant ought not to be able to argue that there is no evidence of the mental state of a corporation unless and until a plaintiff has been able to adequately discover facts germane to that state of mind. That argument seemed plausible on its face, and that plausibility was the basis of the language of the rule I proposed to the asbestos bar.

At our October 5th hearing, several arguments were made that have convinced me that this change to the CMO is not needed at this time.

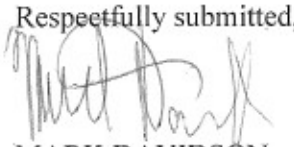
1) Not all employers sued for asbestos liability are able to file motions for summary judgment based on the workers' compensation insurance defense. While a plaintiff may sue an employer for gross negligence, not every employer carried insurance. Even those who did are not able to prove the existence of insurance forty or fifty years ago. Given the speedy nature of the typical docket management of an asbestos case, requiring that a defendant tender a representative implies a presumption that does not always exist.

2) Many corporate defendants have representatives that have been deposed dozens of times since asbestos litigation first appeared forty years ago. A presumption of a right to take a deposition flies in the face of reality.
3) Many smaller (and less frequently sued) asbestos employer defendants do not have a corporate representative.
4) A Plaintiff already has the right to seek the corporate representative's deposition at any point in the pretrial proceedings, even before a case obtains a trial setting. I am unaware of any case in which I have been asked to compel the timely deposition of a corporate representative in which one has not been ordered. I am confident that, if requested, I would defer a hearing on a "comp bar" summary judgment for a defendant that had stonewalled a Plaintiff on a deposition request.
5) I am not unsympathetic to the claim that a defendant can obtain the delay of a trial beyond the six month trial setting rule set forth in Chapter 95 of the Civil Practice and Remedies Code by making sure their corporate representative is unavailable. While this is true, I certainly have the right to decide that in any case in which the corporate representative's deposition is sought and not obtained, that an adequate time for discovery has not yet taken place.

The overriding question is: What is the exception and what is the rule? In the eight and a half years I have presided over this docket, I am aware of very few times in which a Defendant has sought a summary judgment on *scienter* grounds without offering; on request, their corporate representative's deposition. I hope that, even without a modification to the MSO, there will be few (or no) such times in the future. In short, I do not consider this to be enough of a problem on enough cases to justify an exception to discovery rules.

The motion is respectfully denied, but all counsel are encouraged to facilitate the taking of necessary discovery as early in a proceeding as possible to enable the Court to be able to address all issues that may be presented in a timely and thoughtful manner.

Respectfully submitted,



MARK DAVIDSON

MD/ms