
SUPREME COURT OF THE STATE OF NEW YORK
FIFTH JUDICIAL DISTRICT

In RE: FIFTH JUDICIAL DISTRICT ASBESTOS LITIGATION

This Document Relates To:

All Cases

FIFTH JUDICIAL DISTRICT ASBESTOS LITIGATION
(5JDAL)

AMENDMENT TO AMENDED CASE MANAGEMENT ORDER NO. 1

Date: March 24, 2003

Introduction:

More than 200 asbestos-related actions for personal injury or wrongful death are now pending in the Fifth Judicial District. Of that number less than 5% of the claimants or decedents suffer or suffered from asbestos-related malignant diseases, and a small percentage of the remainder have sustained functionally impairing asbestosis. For the great majority of plaintiffs and decedents, however, the only clinical markers of asbestos exposure are pleural thickening or plaques that caused no discernible physical impairment.

To protect the interests of the significantly impaired, the "first in, first out" system of docket management ("FIFO") heretofore used in the Fifth Judicial District as set forth in the Amended Case Management Order (the "CMO") shall be modified to establish a (1) a "Deferred Docket" of claimants with minimal or no impairment, (2) "Active Docket" for clustering and trying cases of significantly impaired claimants who are ineligible for the Accelerated Trials under the CMO [see also, New York Civil Practice Law and Rules § 3407], and (3) a procedure for transferring cases from the Deferred Docket to the Active Docket.

I. Amendment of CMO

To the extent that this order conflicts with any provisions of the CMO, this order supersedes those provisions. *except* that this order shall not apply to or affect any case which has already been assigned a trial date.

II. Definitions

For purposes of this order:

1. A "board-certified pulmonary specialist" or "board-certified internist" means a physician currently actively licensed to practice medicine in one or more of the States of the United States who is currently actively certified by the American Board of Internal Medicine in the Subspecialty of Pulmonary Medicine (pulmonary specialist) or the American Board of Internal Medicine (internist).
2. A "currently certified B-reader" shall refer to an individual who has successfully completed the NIOSH-sponsored X-ray interpretation course and whose NIOSH-certification is up-to-date.
3. "ILO grade" shall refer to the radiological ratings of the International Labor Office set forth in "Guidelines for the Use of ILO International Classification of Radiographs of

Pneumoconiosis" (1980).

4. "Chest X-rays" means chest films taken in four views (PA, Lateral, Left and Right Oblique) that are graded quality 1 for reading according to the ILO criteria.
5. "Pulmonary Function Testing" shall refer to spirometry, lung volume testing and diffusing capacity testing which conform to quality criteria established by the American Thoracic Society (ATS) and is performed on equipment which meets ATS standards for technical quality and calibration, all as set forth in 20 C.F.R. 718.103 and Appendix B thereto or in the ATS guidelines in 144 American Review of Respiratory Disease 1202-18 (1991). Each subject must be tested with and without inhaled bronchodilators, with best values taken. Predicted values for spirometry and lung volumes shall be those published by Morris, Clinical Pulmonary Function Testing, 2d ed., Intermountain Thoracic Society (1984).
6. The minimum criteria for activation" shall be defined as follows:

Non-Malignant Changes Shown by Testing:

A. Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/0; and pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:

- (i) $FVC \leq 80\%$ of predicted value with $FEV-1/FVC \geq 65\%$ (actual value), or
- (ii) $TLC \leq 80\%$ of predicted value.

OR

B. Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/1 or greater; *and* pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:

- (iii) **FVC** \leq 80% of predicted value with FEV-1/FVC \geq 65% (actual value), or
- (iv) **TLC** \leq 80% of predicted value

OR

C. Chest X-rays which, in the opinion of a currently certified B-reader, to a reasonable degree of medical certainty, demonstrate bilateral asbestos-related pleural thickening which has an IL0 grade B2 or greater and with pulmonary function testing that, in the opinion of a board certified pulmonary specialist or internist, to a reasonable degree of medical certainty shows either:

- (i) **FVC** \leq 80% of predicted value with FEV-1/FVC \geq 68% (actual value), or
- (ii) **TLC** \leq 80% of predicted value

and with a statement by a board-certified pulmonary specialist or internist that, based upon a complete review of the claimant's entire medical record, to a reasonable degree of medical certainty, the asbestos-related changes are a substantial contributing factor to the pulmonary function changes;

OR

Non-Malignant Changes Shown by Pathology:

D. In the case of a claim brought on behalf of a decedent, if representative lung tissue of the decedent is available, a report by a board-certified pathologist, stating that, to a reasonable degree of medical probability, more than one representative section of lung tissue that is unaffected by any other process (e.g., cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchyma scarring in the presence of characteristic asbestos bodies, and that there is no other more likely explanation for the presence of the fibrosis;

OR

Diagnosis of Cancer:

- E. A diagnosis of cancer, which is demonstrated by a medical report of a board-certified internist, pulmonary specialist, oncologist or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

III. Deferred Docket

1. The Deferred Docket consists of all actions brought by or on behalf of claimants who do not meet the minimum criteria for activation. All proceedings with respect to cases on the Deferred Docket are stayed, except for stipulations (as described below) to transfer cases to the Active Docket, as hereinafter defined, and motions for leave to amend the complaint (as described below), until further order of the Court.
2. Any case that, as of the date of this order, has been assigned a trial date is deemed to be on the Deferred Docket, unless:
 - A. On or before June 15, 2003:
 - (i) plaintiffs and (ii) Special Liaison Counsel for the defendants stipulate that the party allegedly injured from asbestos exposure satisfies the minimum criteria for activation;
 - B. On or before May 15, 2003:
 - (i) the plaintiff(s) (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure satisfies the minimum criteria for activation and (b) annex the requisite documentation to the proposed amended complaint, and

(ii) the Court grants leave to amend the complaint. Leave to amend shall be denied if the minimum criteria for activation have not been satisfied.

C. Any case that is commenced after the date of this order is deemed to be on the Deferred Docket, unless the complaint, as initially filed and served, alleges with specificity that the party claiming injury from asbestos exposure meets the minimum criteria for activation and annexes the requisite documentation as evidence thereof, No plaintiff may file a Request for Judicial Intervention for any Deferred Docket case commenced after the date of this order.

3. Any case that:

A. is commenced after the date of this order and initially deemed to be on the Deferred Docket.

OR

B. was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, under the procedures set forth above in section III(2),

shall be removed from it and placed on the "Active Docket," as described below, if

C. plaintiffs and Special Liaison Counsel for the defendants, Linda Clark, stipulate that the party allegedly injured from asbestos exposure now satisfies the minimum criteria for activation,

OR

D. (I) The plaintiff or plaintiffs (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure meets the

minimum criteria for activation and (b) annex the requisite documentation to the proposed amended complaint, *and*

- (ii) the Court grants leave to amend the complaint. Leave to amend shall be denied and the case shall remain on the Deferred Docket if the minimum criteria for activation have not been satisfied.

IV. Active Docket

1. All cases which (A) as of the date hereof, have been assigned a trial date shall be prosecuted and tried in the manner now set forth in the CMO.

2. All other cases which are not on the Deferred Docket are deemed to be on the Active Docket. A case on the Active Docket shall be scheduled for trial strictly in FIFO order except as described below. For cases on the Active Docket, FIFO order is determined by the date that the action was commenced, except for:
 - A. Cases which receive a preference pursuant to New York Civil Practice Law and Rules § 3407, or
 - B. Is commenced after the date of this order which is initially on the Deferred Docket, and which is later placed on the Active Docket by stipulation or Order of the Court granting leave to amend the complaint, or
 - C. was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, pursuant to Section III(2), shall be determined by the date of said stipulation or Order.

V. Docket Lists

On or before July 1, 2003, counsel for plaintiffs shall submit to the Court and plaintiffs' and defendants' liaison counsel, complete lists of (1) the inventory of cases on the Deferred Docket and (2) the inventory of cases on the Active Docket, specifying for each the disease alleged and FIFO date. The lists shall be every six months thereafter.

So Ordered:

Hon. James W. McCarthy
Acting Justice, Supreme Court