

# THOMPSON COE

Attorneys and Counselors  
Thompson, Coe, Cousins & Irons, L.L.P.

One Riverway  
Suite 1600  
Houston, Texas 77056  
(713) 403-8210 | Fax: (713) 403-8299

Kevin F. Risley  
Direct Dial: (713) 403-8295  
krisley@thompsoncoe.com  
Board Certified in Civil Appellate Law  
Texas Board of Legal Specialization

Austin  
Dallas  
Houston  
Saint Paul

August 23, 2005

The Honorable Tracy Christopher  
Judge, 295<sup>th</sup> District Court  
301 Fannin  
Houston, Texas 77002

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

Dear Judge Christopher:

On behalf of 3M Company, I would like to express our appreciation for being able to provide comments on the proposed changes to Rule 13 of the Rules of Judicial Administration that you and Judge Davidson have submitted. We believe that the addition of cases filed before September 1, 2003 to the silica and asbestos MDL proceedings will present some significant case management issues that did not exist prior to the enactment of S.B. 15.

We have had a chance to review both the letter you and Judge Davidson sent to Justice Hecht dated July 25, 2005, and the Report of the Subcommittee on Rules of Judicial Administration ("Subcommittee") dated August 19, 2005. 3M agrees that Rule 13 should be amended to make appropriate provisions for the additional cases eligible for transfer to the MDL, and offer the following comments.

We agree with the Subcommittee that the proposed deadlines for filing a notice of transfer of December 30, 2005 for cases in which no medical report is filed and January 31, 2006 or cases in which a defendant wants to challenge the compliance of a medical report are unreasonably short. We believe that the deadlines should be extended until March 31 and April 30, 2006, respectively, due to the large number of individual claims that will have to be evaluated. As your letter indicates, the best estimate of cases that will become eligible for transfer after November 30, 2005, is probably in excess of 32,000 separate plaintiffs. It is an unrealistic burden to expect a party to review that number of cases to determine whether a medical report has been filed in either the thirty days you have proposed or the sixty days the Subcommittee has recommended. It will obviously take a longer time to review the medical reports that have been filed to determine whether those reports comply with the requirements of the new statute. Even if only 10% of the claimants file medical reports, that still leaves more

than 3000 medical reports that will have to be reviewed. If the number of plaintiffs who file reports goes to 25%, that will mean more than 8,000 medical reports to review. In light of the novelty of the statutory requirements and the detail required in the reports, it will place an extreme burden to try to do a meaningful review of such a large number of reports in only two or three months.

We also agree with the Subcommittee's recommendation that a mandatory "loser pays" rule should not be applied to contested notices of transfer or motions to remand. The reasons for the subcommittee's recommendation – the probable difficulty in determining what constitutes a compliant report and the situation in which one party files a notice on behalf of other parties – are very serious concerns. In addition, at several of the silica MDL hearings the Court has indicated that it will presume that parties act in good faith. A mandatory sanction provision is inconsistent with the presumption of good faith.

As between the alternative provisions for transfer of files, we would prefer proposed paragraph (f), which requires that a limited portion of a case file be transferred, rather than paragraph (3), which would not require an automatic transfer of the file, because we believe that will allow for a more orderly transition of cases between courts.

Finally, on the issue of whether severance of multiple-plaintiff cases, we believe that severance after transfer to the MDL will be more efficient for several reasons. First, requiring severance before transfer will delay the transfer. It will also result in a larger number of files being shipped, which increases the risk that one or more files will be lost or misplaced. In terms of paper flow, therefore, the less fragmentation of a case before it is sent to an MDL, the better chance all necessary papers will arrive securely.

Second, there is the matter of cost. The severance cost will be substantially the same, whether severance occurs before or after transfer. The difference in transfer cost will vary greatly, however, depending on when severance occurs. One example is the Cotton case, an asbestos case pending in Jefferson County which has over 1000 plaintiffs. If the case is severed before transfer, the transferring party will have to pay the transfer filing fee, which has been identified at \$165 a case. This will result in a total of \$165,000 in transfer fees. If the case is not severed until after transfer, the total transfer fee will be \$165. Because of the large number of cases involving multiple plaintiffs that are currently on file, requiring severance before transfer of the cases to the MDL will increase the transaction costs by several hundreds of thousands of dollars.

In order to simplify the process and minimize the cost, 3M suggests that in a multiple-plaintiff case in which the entire case is noticed for transfer to an MDL proceeding, either because no plaintiff filed a medical report or any medical report filed is believed to be noncompliant by the transferring party, the case be transferred to the MDL as a single case and the claims can be severed into individual cases after transfer. In a multiple-plaintiff case in which the claims of less than all of the plaintiffs are noticed for MDL transfer, we would recommend a two-step process. First, the party seeking to transfer the cases should request in the

August 23, 2005

Page 3

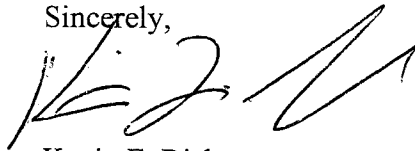
---

original court that the claims of any plaintiff that is to be transferred to the MDL be severed into a single lawsuit that will be transferred to the MDL. Second, after transfer to the MDL, the claims of individual plaintiffs in the case will be severed into individual suits.

As the Subcommittee noted, the severance/transfer issue "is tough." By minimizing the number of severances that occur before transfer to the MDL, however, there will be a smaller number of files to transfer and the cost to the transferring party will not be unnecessarily increased. This approach should work to the benefit of all parties.

We would appreciate it if you would forward these comments to the Advisory Committee. Should you or the Committee have any questions, we will be happy to respond. 3M thanks you for the opportunity to be heard on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. F. Risley', written in a cursive style.

Kevin F. Risley

COUNSEL FOR 3M COMPANY