

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: LATEX GLOVE PRODUCTS           :     MDL DOCKET NO. 1148  
LIABILITY LITIGATION                    :     :  
  :     ALL CASES

**CASE MANAGEMENT ORDER NO. 38  
ADOPTION OF TEST AND PROCEDURES FOR  
DISMISSAL BASED ON STATUTE OF LIMITATIONS**

With the assistance of plaintiffs’ lead counsel and defendants’ liaison counsel-spokesperson, the Court has adopted a test to accomplish the dismissal of appropriate cases based upon the applicable statute of limitations. Recognizing that this litigation is limited to claims of systemic allergy to natural rubber latex — commonly referred to as Type I (immediate) hypersensitivity — the objective was to develop a test that would be relatively easy to apply in good faith by plaintiffs’ and defendants’ counsel. To the extent that counsel can not agree in individual situations, however, a simple dispute resolution procedure is provided. This process will not preclude defendants from the subsequent filing of Rule 12 motions on the statute of limitations in appropriate cases, or Rule 56 motions if it is determined by the Special Master or the Court that a case will not be dismissed under this protocol. Nor will this process preclude defendants from filing Rule 12 or 56 motions in lieu of seeking dismissal under this test and procedure. Nor is the purpose of this procedure to lower the

standards necessary to accomplish a dismissal under Rule 12 or Rule 56. Rather, it is intended for use in cases in which the evidence appears clear to the moving defendant that there is no genuine issue of material fact or law to obtain an early dismissal on a more informal basis. Reference in this Case Management Order to “statutory period” means the time under the applicable state statute of limitations within which an action must be filed. Accordingly, the Court hereby adopts the following test:

### **TEST**

If, at any time during merits discovery in a case, the question of whether the case was timely filed under the controlling state statute of limitations arises, any defendant may request a dismissal under this CMO if the evidence supports findings that:

1. A diagnosis was made by a physician that plaintiff has systemic allergy to natural rubber latex — often referred to as Type I (immediate) hypersensitivity — due to exposure to latex gloves;
2. Plaintiff has physical symptoms which a physician attributes to the systemic allergy to natural rubber latex;
3. Plaintiff was apprised of the diagnosis and plaintiff’s state of knowledge was such that, under applicable state law, the statutory period commenced; and
4. The legal action was not filed within the statutory period.

If the evidence demonstrates that there is no genuine issue of material fact or law, the action shall be dismissed with prejudice.

## **PROCEDURE FOR APPLICATION AND RESOLUTION OF THE TEST**

The Court hereby adopts the following procedure for application and resolution of the test for the dismissal of actions pursuant to the applicable statute of limitations in individual actions which are part of MDL No. 1148.

1. At any time during the course of merits discovery, defendant's counsel may send a letter to plaintiff's counsel outlining the basis for defendant's contention that plaintiff's complaint was not timely filed pursuant to the applicable statute of limitations. Within 20 days after receipt of that letter, counsel will meet and confer on the issue.

2. If counsel agree on a dismissal of the complaint, an appropriate consent order will be prepared and submitted to the Court. If counsel agree that no dismissal is appropriate, no further action will be required. If the parties can not agree, either party may submit the dispute to the Special Master.

3. The Special Master will promptly conduct a hearing on the dispute and will deliver a written advisory opinion to the parties no later than seven days after the hearing.

4. If, based on the opinion of the Special Master, counsel agree on a dismissal of the case, an appropriate consent order will be prepared and submitted to

the Court. If counsel agree that no dismissal is appropriate no further action will be required. If the parties can not agree, either party may submit the dispute to the Court in accordance with the following procedure:

a) Within 10 days after receiving the Special Master's advisory opinion, the parties will notify him in writing whether or not they will enter into a consent order. In cases in which the consent order is not forthcoming, the Special Master will submit a proposed order to the Court, together with a brief explanation.

b) Within 20 days after receiving the Special Master's proposed order, either party may object to it by causing a single joint submission of the issues to be delivered to the Court.

c) The submission will set forth the positions of the parties to the dispute — first defendant(s) and then plaintiff(s), together with any short reply and counter-reply.

d) The submission will be signed by all pertinent counsel and shall contain their certification that they have exerted every reasonable effort to resolve the dispute.

DATED: \_\_\_\_\_, 1998

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Edmund V. Ludwig, J.