

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

In Re: ASBESTOS PRODUCTS	:	
LIABILITY LITIGATION (No. VI)	:	Civil Action No:
	:	MDL 875
This Document Relates to:	:	
	:	
<u>Clifford Malone</u>	:	ED. Pa Case No. 10-68124
<u>Larry Cooper</u>	:	ED. Pa. Case No. 08-90330

**ORDER**

And now this 2<sup>nd</sup> day of April, 2012, upon consideration of Georgia-Pacific's motion for sanctions (10-68124 Doc. 68; 08-90330 Doc. 76), and plaintiffs' response (10-68124 Doc. 72; 08-90330 Doc. 81), and after a March 26, 2012 teleconference on the matter, it is hereby **ORDERED** that:

1. The motion is **DENIED** to the extent that it seeks to preclude any evidence from those plaintiffs concerning Georgia-Pacific and to the extent that it seeks to quash the continued depositions of those plaintiffs;
2. The continued depositions of Messrs. Malone and Cooper regarding Georgia-Pacific shall occur as scheduled;
3. The motion is **GRANTED** to the extent that plaintiffs are precluded from utilizing any of the testimony from the depositions where Georgia-Pacific was unrepresented.<sup>1</sup>

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<sup>1</sup> CVLO noticed Mr. Malone's deposition four times. The first two notices identified Georgia-Pacific as a defendant about which Mr. Malone would testify. However, the second two notices, including the last one which lead to his February 28, 2012 deposition, did not. Similarly, Mr. Cooper's deposition was held on January 26, 2012, pursuant to a notice which did not list Georgia-Pacific. Under the Deposition Protocol, Georgia-Pacific was entitled to rely on this omission as a representation that it was not expected to be the subject of either plaintiff's testimony. Given this reasonable reliance, it did not attend either deposition. During both depositions, however, plaintiffs' counsel asked open-ended questions regarding joint compound, and both plaintiffs identified Georgia-Pacific products. Despite being fully aware that Georgia-Pacific had not been listed in the deposition notices and was not represented at the deposition,

(continued...)

Georgia-Pacific, however, may utilize any testimony elicited as it sees fit; and

3. Paragraph 6 of the Deposition Protocol shall be amended to read (a copy of the Amended Deposition Protocol is attached as Exhibit A):

In order that parties do not needlessly attend depositions, any defendants who have been named, served, and who have entered their appearance(s) in the case(s) listed in the caption of the deposition notice may attend the deposition. However, if any defendant, who has been named, served and appeared in the case(s) listed in the caption of the deposition notice is not listed in the deposition notice as being the subject of expected testimony, that defendant shall not be required to, but may attend the deposition. Set forth below are the procedures protecting a defendant that is not listed in the deposition notice from being unexpectedly implicated in said deposition. The purpose of this clause is to eliminate the need for parties to cross-examine a witness about the inability to provide testimony about a particular defendant which

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<sup>1</sup>(...continued)

counsel continued to question each plaintiff about his exposure to the Georgia-Pacific product. Such conduct is impermissible

During our March 26, 2012 teleconference, when asked by the court how this series of events had unfolded, plaintiffs' counsel suggested that there had been various break-downs in communication within plaintiffs' law firm, perhaps due to its heavy caseload. We are concerned that plaintiffs' counsel does not seem to appreciate the inadequacy of this kind of excuse. Federal Rule of Civil Procedure 11(b) specifically sets out that:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting or later advocating it—an attorney...certifies that to the best of the person's knowledge information, and belief, formed after an inquiry reasonable under the circumstances: [that...]

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b)(3). This obligation would have required CVLO to have an understanding of the factual basis of its clients' claims, including knowing that these two plaintiffs could identify Georgia-Pacific products during their depositions. CVLO did not meet its obligation in these situations. While Georgia-Pacific's request for the imposition of sanctions is understandable, we do not believe that it is necessary to impose a monetary sanction at this time. Continued violations, however, will likely result in sanctions to include assessments for the payment of costs under Federal Rules of Civil Procedure 11 and/or 37.

is not identified in the notice. If any defendant not listed in the notice of deposition is implicated in a deposition, the counsel eliciting the testimony shall discontinue any further questioning regarding that defendant and, if counsel intends to elicit further testimony regarding that defendant, shall provide notice within 14 days from the date the unlisted defendant is unexpectedly implicated to that defendant and schedule a time to resume the deposition for the purposes only of the testimony relating to the unlisted defendant. Failure to provide such notice within 14 days from the date the unlisted defendant is unexpectedly implicated shall constitute a waiver of any rights by the parties to use the testimony against the unlisted defendants in any matter and such testimony shall be barred as against the unlisted defendants. Failure to terminate the questioning of the witness regarding the unexpectedly implicated defendant may result in sanctions and will, in any event, result in any party except the unexpectedly implicated defendant from being prohibited from using that testimony. The requirements of this paragraph in no way erode the obligations set forth in paragraphs 2 and 11, or plaintiffs' obligation to list in the notice of deposition only those defendants about whom the witness is expected to testify.

BY THE COURT:

/s/ David R. Strawbridge  
DAVID R. STRAWBRIDGE  
United States Magistrate Judge