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**NEWSLETTER — SUMMER 2015**

## *Construction Sequencing: A Tool to Preclude Bystander Exposure*

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### Introduction

During a typical plaintiff's deposition concerning alleged asbestos exposure throughout his career as a tradesman, the plaintiff will generally describe all of the work that he performed at a construction site, after which it is not unheard of to hear the following colloquy: "Did you work around any other trades that you believe worked with or handled asbestos-containing products or equipment?" Inevitably, the plaintiff provides a laundry list of trades that worked not only in his vicinity, but within an arm's length of the work in which he was engaged. This line of questioning, other than being objectionable as leading and sometimes lacking foundation, invites the plaintiff to embark upon a tale of a time when the construction of a building was a ménage of trades, working concurrently on a variety of jobs—perhaps applying fireproofing spray while also installing telephone cables, the simultaneous installation of floors and walls, and sanding joint compound while painting. While even the most naive of asbestos litigation attorneys can see this magnification of various sources of exposure, the question becomes, how do we go about managing this alleged exposure during the deposition, challenging it during trial preparation, and keeping this theory from the jury?

The best way to unravel these various claims of bystander exposure is to become well-versed in construction sequencing and management, in order to understand the typical industry practice and the logical sequence in which certain trades perform work to complete the construction of a building. Construction sequencing and management is used to coordinate multiple trades, often working in limited workspaces, to ensure that intermediate milestones are met and that projects are completed in a timely manner.[1] The standard operating procedures of the construction industry may not only assist in disproving asbestos exposure, but may also assist in proving alternate exposures. This proves advantageous in circumstances where a plaintiff's exposure from another trade, or a co-defendant, may prove more likely according to the sequence of construction.

### Discussion

Based on initial laundry list-type deposition testimony during the deposition, defense counsel may want to consider cross-examining the plaintiff to elicit additional facts surrounding the allegations in order to pin down the plaintiff as to exactly where he was, where the other trades were, and exactly what they were doing. Often times plaintiffs will describe a situation that just would never have occurred. Defense counsel can then contrast this testimony with the expert testimony of someone in construction sequencing, who may opine that the plaintiff's allegations are not logically possible.

[1] *See* Bonsang Koo and Martin Fischer, *Formalizing Construction Sequencing Constraints for Rapid Generation of Schedule Alternatives*, Center for Integrated Facility Engineering, Stanford University, CIFE Working Paper #75 (January 2003).

Defense counsel returns from the deposition, and is presented with the challenge of debunking the plaintiff's testimony regarding how the sequencing of this particular project occurred. Generally, construction sequencing is uniform throughout the United States, and defense counsel would be wise to become familiar with the general sequencing of a commercial construction project.

In addition to knowing the general sequencing of commercial construction, defense counsel should understand the role materials, inspections and building codes, and permits play in construction sequencing.

**Materials**

Construction materials themselves carry their own sequencing requirements, and the sequencing of materials may further affect the time between trades. For example, concrete generally takes twenty-eight (28) days to fully cure, and be ready for the next phase of construction. However, factors such as mixture proportions, weather conditions, specified strength, size, and shape play into this curing period. Concrete usually must be fully cured before tile may be laid. Therefore, a plaintiff concrete layer's claim alleging exposure to asbestos from tile setters on his heels, may be disproven by the simple fact that the plaintiff would have been gone three weeks by the time the tile setters started their work.

**Permits, Inspections, and Building Codes**

Permits are required in most jurisdictions for new constructions, additions to pre-existing structures, and in some cases, major renovations. Because building permits usually precede construction, they are good indicators of the actual sequence of a particular construction. In order to apply for a permit, a detailed description of the proposed project must be provided, along with architectural plans, drawings, and specifications meeting mechanical, structural, and electrical requirements. Such documents can demonstrate what products were used and where, which allows for potential alternate exposures to be discovered. When a permit is issued, the issuing body provides the applicant with a list of required inspections, which play another important role in construction sequencing.

Generally, new construction must be inspected during construction and after completion to ensure compliance with national, regional, and local building codes. To ensure compliance with such standards, inspections are required and performed at several stages of the construction process. Inspections include structure, roof, electrical, mechanical, and gas systems, heating and air conditioning, plumbing, exterior components, interior components, and final inspection. Understanding the timing and sequencing of inspections, and the delays caused by the same, can assist in either establishing alternate exposure or disproving the plaintiff's allegations of overlap between various trades. For example, because plumbing lines must be inspected before insulation and drywalling can be completed, a plumber would not likely be present during the application of insulation and the erection of drywall. To determine the inspection sequence of a particular construction site, we recommend researching that jurisdiction's uniform building codes and inspection requirements.

**Case Study[2]**

The following case study demonstrates how, in this instance, a defendant building owner would use construction sequencing knowledge and expertise to preclude a plaintiff's typical testimony regarding bystander exposure from other trades on the construction site.[3]

Plaintiff is a sixty-five (65) year old male, mesothelioma claimant, who is alleging exposure to asbestos solely from his work as a cable installer

[2] This case study was provided by Morse Associates, Inc., a consulting firm specializing in building science, technical architecture, and environmental consulting work. Morse Associates is located in Troy, New York and West Palm Beach, Florida.

[3] This case study is also applicable to a defendant product manufacturer or supplier.

at a large commercial office space in an existing warehouse area, where he was responsible for pulling cable through the ceilings of the facility. During his discovery deposition, Plaintiff testified as follows as to the numerous trades within his vicinity:

> Q: If you can tell me what state of construction the [sic] building was in when you were at the site?
>
> A: The outside was completely finished. The inside, they were doing. . .They were still doing office work there. They were still putting up sheet rock, electricians, all of the trades were there, electricians were there, plumbers were there. We were there. General workers were there. I saw the GC there once . . .

Plaintiff goes on to say that he was exposed to asbestos from sheetrock workers, who applied and sanded asbestos-containing joint compound in his presence. Plaintiff testified that he would try to work in areas where sheetrock workers were not present, but that at times they were working right over the top of him.

Based on Plaintiff's testimony, as noted above, is his alleged exposure to dust from the sanding of asbestos-containing joint compound while he ran telephone cable plausible?

Typical industry practice is to sequence tasks so that interference between trades is minimized. The sequence of work must also allow access for installation of equipment and inspection by officials. In a typical project where interior partitions are installed to form offices in an open space such as a warehouse, the sequence of operations will be: framing, installation of electrical and other rough-in, inspection, installation of drywall panels, taping, painting, and finish work. First the walls must be framed in order to provide the necessary support for the electrical, telephone, plumbing, and mechanical rough-in work. In this case, this rough-in work would include the installation of telephone cable, which would be in the class of low-voltage wiring, as well as electrical wiring, plumbing, and HVAC. Once electrical, including low voltage such as telephone cabling, and plumbing rough-in work is complete, it is typically tested by the contractors to insure that all is in good operating condition before it is hidden behind drywall panels.

The installation must then be inspected by code officials to verify that it meets the requirements of the electrical and plumbing codes. Since the installation of drywall panel conceals electrical work, including low-voltage telephone wiring, the inspection must occur before the drywall installation. Once testing and inspection are complete, the telephone cable installation work in the drywall partitions is complete. After this, drywall panels are installed, the joints between the panels are taped, and the walls are painted or papered. There would be no reason for a telephone cable installer to be in the vicinity during the drywall work, as the telephone cable installation would be complete prior to this work.

Typical sequencing of operations followed in the construction of a commercial office space, such as that in which Plaintiff worked, would be as follows:

- Install interior stud walls (interior framing)
- Plumbing rough-in (including water and gas lines, waste lines, and vents)
- Electrical rough-in (including breaker panels, electrical boxes, wiring devices, telephone, security, and media systems)
- HVAC rough-in (including ductwork, condensate lines)
- Testing of roughed-in systems
- Inspections of rough-in work by building code officials
- Insulation (if any)
- Drywall installation (hang drywall panels)
- Drywall joint compound application
- Drywall joint sanding

Based on the foregoing typical sequencing, the installation of cable would have preceded and

been completed prior to drywall installation. Furthermore, as the drywall panels close off access to the framing where the telephone cables would have been installed, it is a practical necessity to complete the cable installation prior to the installation of the panels, much less applying joint compound and sanding between the panels.

Therefore, Plaintiff's testimony that he was exposed to dust from the sanding of asbestos-containing drywall joint compound would not be plausible as he described, for Plaintiff's work running telephone cable would have preceded and been completed prior to the drywall installation.

**Conclusion**

In a litigation environment where plaintiffs typically pursue claims against dozens of entities, knowledge and expertise in construction sequencing is an invaluable tool for defense counsel. Attending discovery depositions equipped with general knowledge regarding the sequence of construction allows counsel to elicit the proper testimony from a plaintiff alleging bystander exposure to then present to a construction sequencing expert for evaluation. It is important to gather the most specific information possible as to exactly what plaintiff saw, for many times, his recollection of multiple incompatible trades performing work all at once may be a drastic exaggeration. A construction sequencing expert can compare plaintiff's testimony with the typical industry practice, and may be able to conclude that plaintiff's description of his work environment was simply implausible. Further, much of construction sequencing is basic logic. Where the usual theories presented by defense experts such as fiber release and medical causation can go over the heads of a typical jury, the logical sequence of events is often a simple concept—one thing must happen before another. Understanding the proper construction sequence can not only serve to preclude a plaintiff's alleged exposure to asbestos from another trade, but it may in fact make alternate exposure from an entirely different trade even more plausible.

## *Medicare Set Asides*

Carol Tempesta (NYC, NY)

A Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) is a financial agreement that allocates a portion of a workers' compensation settlement to pay for future medical services related to the workers' compensation injury, illness, or disease. Money placed in the WCMSA pays for future medical and prescription drug expenses related to a work injury or illness that otherwise would have been covered by Medicare. These funds must be depleted before Medicare will pay for treatment related to the workers' compensation condition.

WCMSAs come with a few caveats: one can not use the WCMSA to pay for any other work injury, or any medical items or services that Medicare does not cover (for example, dental services). Medicare will not pay for any medical expenses related to the injury until after one has used all of their set-aside money appropriately.

Currently, there is no formal WCMSA appeal process, however, the Centers for Medicare and Medicaid Services (CMS) has historically provided an informal reconsideration process that allows parties to argue for a reduction or modification of the WCMSA amount. Claimants may also contact the regional office that issued the decision to provide additional documentation supporting the originally proposed set-aside amount, or submit a re-review request if they believe the decision contains an obvious error, or failed to consider relevant evidence. Since the turnaround time on such reviews has been problematic, parties have begun to request a more structured and expansive review process.

The Medicare Secondary Payer Act (MSPA) requires claim notification to CMS. This rule exists for coordination of benefits and recovery of conditional payments. However, under the MSPA, reporting any settlement, judgment, or payment is only necessary if the claimant is a Medicare beneficiary. Regulations compelling reporting to CMS only apply if CMS has actually made a Medicare payment. Accordingly, there is no legal requirement to notify Medicare of a claim resolution with a non-Medicare beneficiary. But in certain workers' compensation cases, reporting is required. CMS has requested information about non-Medicare beneficiary claim resolution where the total settlement value is $250,000 and the plaintiff is within 30 months of becoming a Medicare beneficiary.

CMS has attempted to address Medicare secondary payer issues in the past. On April 15, 2012, CMS submitted an Advance Notice Of Proposed Rulemaking soliciting comment on standardized options with respect to Medicare secondary payer claims involving automobile and liability insurance (including self-insurance), no-fault insurance, and workers' compensation when future medical care is claimed or the settlement, judgment, award, or other payment releases (or has the effect of releasing) claims for future medical care. However, some time in early October of 2014, CMS withdrew its proposed regulation for future medicals with respect to liability claim settlements and is expected to redraft the regulation.

At this time, no statutory or regulatory requirement exists for liability settlement Medicare set asides (MSAs); rather, the MSPA requires parties to "protect Medicare's interest." This language has led to inconsistent interpretations as to the law's requirements for parties to a settlement involving a Medicare beneficiary with future medical needs. Some courts have interpreted the regulations that apply to MSAs in workers' compensation cases to apply in third-party liability cases as well. See Hinsinger v. Showboat Atlantic City, No: L-3460-07, 2011 N.J. Super. LEXIS 96 (Jan. 21, 2011). However, most courts will only make a determination regarding the applicability of workers' compensation MSA rules to a liability MSA in the following two situations: (1) where the parties agree that an MSA is required, but cannot obtain the approval of CMS for the MSA arrangement, and (2) where the parties have a settlement agreement, but disagree as to whether the settlement agreement's terms include the creation of an MSA. The bottom line is that if parties fail to designate sufficient funds to cover future medical expenses, they leave themselves vulnerable to the possibility of a future recovery action by Medicare.

Advice from practitioners on the subject varies widely. Some say do nothing because CMS has not made any formal pronouncements on liability MSAs (particularly in "low risk cases"). Others suggest placing protective language in the settlement agreement and releasing the issue. Another possible maneuver is to estimate the cost of the claimant's future medical care and to allocate a specific amount for that care in the settlement agreement. This amount can be funded with a structured settlement to align the timing of payments to anticipated future needs and to reduce its cost. Practitioners might also seek a formal "outside" allocation from a professional vendor limited to the claimant's future anticipated "Medicare allowable" expenses (structured settlement). Finally, attorneys can submit the client's set-aside allocation to CMS for review and approval, acknowledging that CMS is unlikely to respond.

## *Defending Claims for Asbestos Related Lung Cancer – Radon*

Frank C.B. Friestedt (Philadelphia, PA)

Practitioners engaged in the defense of asbestos related disease cases know there are marked

differences among the diseases possible from asbestos exposure. The main malignancies associated with asbestos exposure, mesothelioma and lung cancer, have starkly different causation profiles in many respects.

Very few causes for mesothelioma other than asbestos have been identified, and those alternative causes are uncommon. Mesothelioma is caused primarily by asbestos, with rare exceptions including therapeutic radiation and erionite. Smoking is not a cause of mesothelioma. In contrast, lung cancer has many causes beyond asbestos, and they are relatively common. The 1964 Surgeon General's Report famously confirmed smoking as the leading cause of lung cancer in this country. As a result, cigarette packaging has carried warnings regarding the adverse health consequences of smoking for 50 years.

According to the World Health Organization ("WHO"), the second leading cause of lung cancer is radon. Radon is a gas emitted by decomposing rock bearing some percentage of radioactive material. Radon is now recognized as a Group 1 carcinogen by the WHO's International Agency for Research on Cancer ("IARC"). The primary basis for these determinations appears to be literature documenting lung cancer in uranium miners exposed to radon. Other sources further corroborate the relationship between the high incidence of lung cancer in individuals from homes containing elevated levels of radon. The scientific community has thus recognized radon's role in causing or contributing to lung cancer in humans following exposure over long periods of time. It is now routine practice for a prospective real estate buyer to have radon testing done in connection with a negotiated property purchase. Radon is one of several important causes of lung cancer, other than smoking.

This fact has obvious implications for the defense of asbestos lawsuits. But how does one prove that radon played a role in causing lung cancer? Radon is undetectable to ordinary senses. It is invisible and lacks any smell. It is only identified following sophisticated air testing undertaken at the request of a property owner. Radon air levels are detected by measuring units of radioactivity per volume of air, commonly expressed as picocuries per liter (pCi/L). In the context of an asbestos injury lawsuit, the property owner is unlikely to have any incentive to test for radon or to provide testimony which tends to undermine claims regarding asbestos exposure. Indeed, the property owner likely is the plaintiff or a close family member.

Moreover, although certain regions may be more prone to radon exposure than others, a specific property located in a high radon area does not necessarily have significant radon levels. That determination requires air testing. If such testing has not occurred prior to the suit, as a practical matter, it will be problematic, if not impossible, to compel it.

Notwithstanding these issues, there has been an upswing in plaintiffs' filing of lung cancer cases. Accordingly, radon's role as another cause of lung cancer has become significant to the asbestos practitioner. Alternative causes for lung cancer should not be overlooked during medical and factual discovery investigation. Depending upon the facts of the case, evidence of smoking, radon, pollution, diesel fumes, coal dust, genetics, family susceptibility, and other causes may bear on the medical defense. The designation by The World Health Organization International Radon Project in 2009 of radon as the second leading cause of lung cancer in America, behind smoking (see, McLaughlin, J. Radon: Past, Present and Future (2012) Rom. Journ. Phys., Vol. 58, Supplement 2013), makes it a potentially crucial alternative cause for lung cancer. This possibility exists whether the plaintiff smoked or not; the risk of lung cancer from radon is even higher in smokers, according to the American Cancer Society.

The IARC and the Environmental Protection Agency have determined that radon accounts for about 20,000 deaths from lung cancer each year. Natural and harmless outdoors, radon can become concentrated in homes in affected regions. Thus,

investigation of radon in real estate records, title documents, architect and contractor files, and local regulatory agency files is warranted in the defense of such cases. Deposition questions regarding radon testing and remediation in the homes or buildings in question, as well as those of neighbors, should be asked as a matter of course. Use of private investigators to find local geologic descriptions, maps, and information regarding radon in an area including neighboring homes may also contribute to the potential exposure picture.

For these reasons, the investigation of a lung cancer claim does not end with whether the plaintiff smoked. Radon and many other carcinogens are important elements of a fuller medical causation investigation necessary to the defense of asbestos defendants.

## Industry News

### *Revised Construction Industry Arbitration Rules Adopted By American Arbitration Association Designed To Bring Greater Efficiency and Cost-Effectiveness*

Robert Pollack (Ft. Lauderdale, FL)

Effective July 1, 2015, significant changes in the Construction Industry Arbitration Rules took place designed to make the arbitration process more efficient and cost-effective. The revised rules apply to any construction arbitration case initiated by demand or submission agreement on or after July 1, 2015, provided the administrative fees and filing requirements of the American Arbitration Association ("AAA") have been met. These revised rules apply retroactively to contracts entered into prior to July 1, 2015 provided they contain an arbitration clause incorporating, or are subject to the AAA Construction Industry Rules.

These revised rules include, but are not limited to, express deadlines and filing requirements for consolidation and joinder motions(R-7); mandatory mediation during the course of arbitration, subject to the right of opt-out(R-10); compulsory preliminary management hearing subsequent to the appointment of an arbitrator(R-23); greater control over the parties production of documents and other information (R-24); enforcement powers to implement Rules 23 & 24 (R-25); discretionary power to hear dispositive motions (R-34); application for emergency interim relief prior to appointment of the Merits Arbitrator(s) (R-39) as well as authority to order "appropriate sanctions" against parties (R-60).

It is anticipated that these rule changes will provide valuable additional tools to arbitrators and parties engaged in the arbitration process, which has long been referenced in American Institute of Architects (AIA) and other construction agreements. Effective and efficient management of the arbitration process has always been a priority of the AAA, and may cause more parties involved in construction defect disputes to not waive enforcement of arbitration clauses in the future.

Under the new Flexible Fee Schedule of the AAA, a lower initial filing fee is provided for. Subsequent payments are then spread out over the course of the arbitration with administrative fees being somewhat higher for cases that proceed to a hearing.

For a complete discussion of these new rules, please contact Robert Pollack at rpollack@mklaw.us.com.

## Firm News

***M&K Welcomes Janna Nuzum***

McGivney & Kluger, P.C. is proud to announce that Ms. Nuzum has joined the firm as a Partner in M&K's Fort Lauderdale, FL office.

Ms. Nuzum has dedicated her legal career to the defense of corporate clients in courtrooms across the nation. A tenacious trial attorney, she has extensive experience in the defense of product liability, class action, toxic tort and mass tort cases. She has served clients in the asbestos, tobacco, coal, chemical, pharmaceutical, petroleum, heavy machinery, medical device and hospitality industries. Ms. Nuzum also has significant litigation experience ranging from complex commercial litigation to insurance defense matters to First Amendment cases.

Ms. Nuzum is experienced in "bet the company" litigation and served for over seven years on the national trial team for R.J. Reynolds Tobacco Company. She has also served as national coordinating counsel, as well as regional and local counsel, on a wide variety of matters in West Virginia, Virginia, Pennsylvania, Ohio, Kentucky, Delaware, Illinois, South Carolina, California and Florida.

As a former in-house counsel, she understands that every client has a different objective for its litigation. With that perspective, Ms. Nuzum uses her background in crisis communications, policy and public affairs, combined with her legal acumen to create innovative and individually tailored legal strategies to help clients achieve success in the courtroom, as well as in the court of public opinion.

***M&K Welcomes Marc B. Zingarini, Christopher J. Rubinate, and Peter C. Kennedy***

McGivney & Kluger, P.C. is proud to announce the addition of Marc B. Zingarini, Christopher J. Rubinate, and Peter T. Kennedy to the growing General Liability Practice Group in our Philadelphia office.

Mr. Zingarini has defended clients in a range of matters, including product liability, premises liability, construction claims, wrongful death actions and commercial matters. He has tried more than 130 jury trials throughout various counties in Pennsylvania, New Jersey and New York, and has litigated cases including police misconduct, product liability, civil liability, negligent hiring and supervision claims, actions involving liability of recreational and sports facilities, fire loss, property damage, false advertising, wrongful death, construction claims and accounting malpractice.

Mr. Zingarini has achieved an AV Preeminent peer review rating from Martindale-Hubbell, and was included in Best Lawyers in America 2014 and 2015 for personal injury litigation - defendants and product liability litigation - defendants. From 2004 - 2015, Mr. Zingarini was recognized by the publisher of Super Lawyers magazine, and

appeared in the 2012 edition of "Philadelphia's Top Rated Lawyers."

Mr. Rubinate has defended clients in product liability matters, insurance companies, self-insured entities and third-party administrators in matters involving commercial and premises liability, and has defended housing inspectors in real estate and construction claims.

Mr. Kennedy has extensive jury trial experience in Pennsylvania State and Federal courts, and has taken cases to verdict in multi-million dollar product liability, negligence, toxic tort, personal injury, property damage, and civil rights actions. His trial experience includes the representation of businesses in a broad range of industries, including security, transportation, hospitality, consumer products, financial services, health care, and construction.

Mr. Kennedy was lead trial counsel representing a home security system provider in a catastrophic injury case, resulting in a favorable Philadelphia Common Pleas Court jury verdict. He was retained to represent another global security service provider defending a case arising from the death of a prospective employee.

Mr. Kennedy has represented general contractors and subcontractors in the defense of actions involving seriously injured construction workers. He successfully defended a high-ranking municipal official at trial in the defense of consolidated civil rights actions. Mr. Kennedy began his legal career with the Philadelphia District Attorney's Office prosecuting major felony cases.

Before becoming an attorney, Mr. Kennedy was an officer in the United States Navy. After completing aviation training and receiving his Navy Wings of Gold, Mr. Kennedy served as a naval aviator on active duty and as a member of the Naval Reserve. He belongs to a number of veterans' organizations. Mr. Kennedy also serves on the boards of directors of Fort Mifflin on the Delaware, a Philadelphia-based nonprofit organization, and the Maritime Academy Charter School, which provides a rigorous academic program with a maritime theme to students in grades 4-12.

## *In Memoriam*

It is with profound sadness that we announce our partner, Brian Walsh, recently lost his battle with pancreatic cancer at far too young an age. Not only was Brian a talented trial lawyer but he was a man of character, wit and humor. He was a mentor, advisor and confidant to many in the firm. He leaves behind his wife Meg and his daughters Colleen and Kayla Mae. We will miss "Walshie," but in remembrance, we will be dedicating our New York City conference room with a plaque in his name, noting his spirit and courage.