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# McKENNA TOXIC TORT NEWSLETTER

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The McKenna toxic tort practice group is pleased to provide this newsletter on recent developments in the toxic tort arena. This issue begins with an article by Tom Hayes discussing the erosion of the Workers' Compensation Exclusive Remedy defense in asbestos cases in Missouri and elsewhere. The next article, by Bob Pisani, examines the recent clarification by CMS of Medicare reporting requirements. This is followed by an update by Tim Hayes on take home exposure developments in Illinois asbestos litigation. The newsletter concludes with Toxic Tidbits, including a cell phone radiation update and discussions of recent studies regarding 9/11 dust illnesses and genetic predisposition to malignant mesothelioma.

If you prefer to receive our newsletter electronically, please e-mail your request to Tom Hayes at thayes@mckenna-law.com. If there are individuals you would like us to add to our circulation list, please e-mail their mailing addresses or e-mail addresses to Tom Hayes. We would also welcome your comments on topics you would like to see addressed in our future newsletters.

You will also find this newsletter posted on our firm website: http://www.mckenna-law.com. We invite you to visit our website to learn more about our firm and our toxic tort practice group.

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## EROSION OF WORKERS' COMPENSATION EXCLUSIVE REMEDY DEFENSE IN ASBESTOS CASES

Under the "exclusive remedy" defense, a worker's civil suit for personal injuries sustained in the course of employment is barred in most states by workers' compensation statutes limiting the worker's remedies against the employer to a workers' compensation claim brought in administrative court. Although there are exceptions to the defense in some jurisdictions, such as for the employer's intentional acts, the worker's sole or exclusive remedy against the employer will be through the workers' compensation system no matter how egregious the employer's conduct.

Missouri's workers' compensation laws were among those initially designed to be the exclusive remedy for injured workers. However, changes to Missouri's workers' compensation law in 2005 have resulted in the erosion of the exclusive remedy defense through subsequent judicial decisions opening the doors of the civil courts to injured Missouri employees.

A recent decision by the Missouri Court of Appeals for the Western District further supports the continued erosion of the exclusive remedy defense in the state of Missouri. In a decision issued on September 13, 2011, the Court held that the long-standing exclusive remedy of the Missouri Workers' Compensation Act is no longer applicable in occupational disease cases. *State ex. rel. KCP&L Greater Missouri Operations Co. v. Cook*, --- S.W.3d ----, 2011 WL 4031146 (Mo.App. W.D. 2011).

The Missouri workers' compensation system has long categorized work injuries as one of two general types: accidental injuries or occupational diseases. An injury by "accident" is defined by Missouri law as

"an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single workshift." Section 287.020.2, RSMo. A classic example of an accidental injury would be a torn rotator cuff sustained while lifting an object in the course of employment. An injury by "occupational disease" is defined as "an identifiable disease arising with or without human fault out of and in the course of employment." Occupational disease claims include injuries due to exposure to harmful substances, such as asbestosis and mesothelioma, and repetitive or cumulative trauma injuries, such as carpal tunnel syndrome.

In *Cook*, the Plaintiff worked for KCP&L for 34 years, retiring in 1988. The Plaintiff was diagnosed with mesothelioma in 2010, and subsequently filed a lawsuit for damages in civil court naming various asbestos manufacturers and his former employer as defendants. Ultimately all defendants were dismissed from the lawsuit by settlement or otherwise except KCP&L. For his claim against KCP&L, the Plaintiff alleged that KCP&L negligently exposed him to asbestos in the course of his employment. KCP&L moved for summary judgment based on an affirmative defense that such claim is exclusively the province of workers' compensation proceedings. The Plaintiff countered that pursuant to the 2005 amendments to the workers' compensation law, only claims deriving from injuries by accident are subject to worker's comp exclusivity and injuries by occupational disease such as this case may proceed in civil court. The trial judge found for the Plaintiff on this matter and KCP&L filed a Writ of Prohibition, appealing the matter to the Western District Court of Appeals.

The issue before the Court was whether an "occupational disease" is covered by the exclusivity provision of the Act, which by its terms applies only to injury or death of the employee "by accident." The Court relied on the 2005 Amendments to the Act which require courts to "construe the provisions of this chapter strictly." The court stated that this strict construction or plain meaning interpretation is required even where such an interpretation creates an outcome at odds with what the court believes the legislature intended.

Specifically, the Court noted that Section 287.120, the exclusivity statute, only references personal injury or death due to an injury by accident, and does not address injury by occupational disease. Therefore, under the strict construction mandate of Section 287.800.1, the Court held that it could not extend exclusivity to occupational disease claims not referenced by the exclusivity provision. Admitting that its holding represents "a substantial departure from prior law", the Court made a point of defending its ruling by noting that its interpretation of the statute is not an "absurd or illogical result" that would justify ignoring the plain language of the Act.

In dissenting opinions, Justice Welsh and Justice Smart focused primarily on the Court's application of strict construction to remove occupational diseases from the exclusivity provisions of the Act. Relying on legislative history, Justice Welsh departed from the majority, concluding that "it cannot seriously be contended that the legislature intended to decouple the Act's coverage from the Act's exclusivity." Justice Smart agreed and added that the majority focused too heavily on the General Assembly's 2005 removal from § 287.800 of the concept of "liberal construction." Justice Smart suggested the legislature made an error as to the scope of the command, but did not intend to extend the strict construction requirement to every provision of the chapter.

The dissents also discussed, at length, the significant procedural implications this decision may have, in that this decision

leaves open to the employee the "unqualified, unilateral right to select his or her own initial forum" in occupational disease claims.

Under the *Cook* decision, a Missouri employee with a work-related occupational disease may now choose between bringing a workers' compensation claim in administrative court, and filing a lawsuit for damages in civil court. Several other recent Missouri cases have reached decisions that have similarly eroded workers' compensation as an exclusive remedy, including *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010) (holding that an employee's negligence claim against a co-employee was not pre-empted by the Missouri Workers' Compensation Act), and a Missouri Supreme Court decision, *Missouri Alliance for Retired Americans v. Department of Labor & Industrial Relations*, 277 S.W.3d 670 (Mo. banc 2009) (in which the Court declined to decide constitutional challenges to the 2005 amendments).

The erosion of the workers' compensation exclusive remedy defense in Missouri, as well the demonstrated reluctance of courts in other jurisdictions to grant defense motions brought under the defense (primarily if plaintiff's workers' comp claim would be time-barred due to the latent nature of the alleged disease), will have a growing impact on employers and their insurance carriers to defend employee claims in civil court. Unfortunately, efforts by the defense community to address this issue through legislative changes were unsuccessful in the 2011 Missouri General Assembly. As such, employers, and their insurance carriers and attorneys, should expect substantial new litigation concerning the exclusive remedy defense in civil courts and will need to carefully examine their respective insurance policies to determine whether they have coverage that will provide defense and indemnity for both workers' compensation claims and tort claims that might be filed against them by injured employees.

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## CMS CLARIFIES REPORTING OBLIGATION ON CASES INVOLVING PRE-DECEMBER 1980 EXPOSURES

Recently, the Centers for Medicare & Medicaid Services (CMS) attempted to clarify reporting requirements for claims involving exposures ending prior to December 1980. When the notion of mandatory Medicare reporting was revitalized a few years ago, some plaintiffs' counsel essentially refused to participate in the efforts of defendants and their insurers to comply with Medicare reporting requirements. One of the primary situations where this occurred was in claims involving exposures to so called toxic chemicals and materials that took place prior to December 1980. Their basis was that the statute providing Medicare's authority for recovery of secondary payments was not effective until December 5, 1980.

In the last few years, through provisions in the various editions and modifications to the CMS User Guides, and in discussions during CMS' "town hall" phone conferences, the topic of reporting obligations and the scope of CMS' recovery efforts in such instances have somewhat evolved, and have provided a measure of clarity to the general topic. But until recently, there was neither definitive explanation of the issue, nor any hard fast rule on when reporting in such instances is required.

Toxic tort litigation often involves long latency periods following exposures during the 1950s, 1960s and 1970s. It is not uncommon for such a claim to involve exposures that genuinely concluded before December 1980. Sometimes plaintiffs' complaints and written discovery responses are somewhat vague on the exposure year issues. Most cases involve several defendants with different, discrete exposure

periods. Further, when a defendant resolves such a claim, that defendant is usually looking for a complete, total and final end to litigation with that individual, and so drafts a release that essentially covers the entirety of time from the beginning of any exposure until the end of time. Until recently, these realities could create uncertainty as to Medicare reporting requirements because they involved time frames beyond December 1980.

However, a CMS Alert issued on September 30, 2011 has provided some needed guidance in situations were a claimant's suit alleges any exposures to an individual defendant's products/services terminated before December 1980. The formalization of the required analysis, which includes an individualized focus as to each defendant, is refreshing and should be a big step forward.

The key date for all of this is the "date of incident." As defined by CMS, this is the date of first exposure, which in a latent disease claim is somewhat confusing. What CMS has been suggesting, and has now clearly stated in writing, is that in a case involving a continued exposure to an environmental hazard, CMS focuses on the last date of exposure for purposes of deciding whether an exposure took place before December 5, 1980. If so, then CMS will not seek recovery, and so are not interested in knowing about it. This means there is no reporting requirement and no fear that CMS will seek recovery from the defendant/insurer paying the settlement or judgment in such an instance.

As there are a multitude of potential scenarios where non-reportable situations can arise, one needs to delve further into what is really happening, which is to say there are multiple ways CMS looks at this issue. CMS says reporting is required under the following circumstances:

- Exposure, ingestion, or the alleged effects of an implant on or after December 5, 1980 is claimed, released, or effectively released.
- A specified length of exposure or ingestion is required in order for the claimant to obtain the settlement, judgment, award, or other payment, and the claimant's date of first exposure plus the specified length of time in the settlement, judgment, award or other payment equals a date on or after December 5, 1980.
- A requirement of the settlement, judgment, award, or other payment is that the claimant was exposed to, or ingested, a substance on or after December 5, 1980. This rule also applies if the settlement, judgment, award, or other payment depends on an implant that was never removed or was removed on or after December 5, 1980.

As suggested above, the problem for the defense side is that (1) the typical settlement release covers the time frame after December 5, 1980 as such releases often encompass as much time as is possible; and (2) the complaint (perhaps written discovery and deposition testimony too) often contains exposure periods after December 5, 1980.

What CMS did in the September 30, 2011 Alert was to address the typical situation and lay out the requirements for avoiding the reporting rules in these kinds of cases. They also specifically addressed the situation where there are multiple defendants. When ALL of the following criteria are met, Medicare will not assert a recovery claim against a settlement, judgment, award, or other payment; and MMSEA Section III MSP reporting is not required. If these requirements can be met by an individual defendant, even if they cannot be met by all, the settlement by that defendant will be exempt from the reporting requirements. The criteria are:

- All exposure or ingestion ended, or the implant was removed before December 5, 1980; and,
- Exposure, ingestion, or an implant on or after December 5, 1980 has not been claimed and/or specifically released: and,
- There is either no release for the exposure, ingestion, or an implant on or after December 5, 1980; or where there is such a release, it is a broad general release (rather than a specific release), which effectively releases exposure or ingestion on or after December 5, 1980.

Thus, for example, if a plaintiff is employed by one company and worked at multiple locations over the years, and is only exposed at one or more such places, and/or to a given defendant's product/service prior to December 5, 1980, but not to that defendant's product/service after that date, it is not a reportable settlement even if a typical, general release is used. It is not clear what the effect of allegations in the initial, broad complaint would be on this situation, or whether an amended complaint, precise discovery responses and deposition testimony would be controlling. Hopefully, sworn evidentiary materials like written discovery responses and deposition testimony controls. The examples section of the Alert focuses on facts rather than raw, general allegations in a complaint. A brief recitation of the sworn factual material discovered during the case should help if there is any uncertainty.

This recent action by CMS should provide the necessary guidance for all of us in situations which are actually fairly common. Going forward, it should help motivate the plaintiffs' bar in pleading and responding more carefully to discovery so as to take advantage of this Alert as they tend to see themselves and their clients as the biggest victims of CMS.

For more information or if there are any questions, please contact Bob Pisani at 312-558-3959 or rpisani@mckenna-law.com.

## ILLINOIS TAKE-HOME ASBESTOS EXPOSURE UPDATE

There is a split of authority in Illinois in cases alleging take-home exposure to asbestos. The Second District Appellate Court's decision in *Nelson v. Aurora Equipment Company*, 391 Ill.App. 3d 1036, 909 N.E.2d 931 (2nd Dist., 2009), declined to extend a duty in a claim for premises liability to a person who had no contact with the premises, but was exposed to asbestos fibers from that premises that were brought home on the clothing of her family members. The Fourth District Appellate Court recently issued opinions in *Holmes v. Pneumo Abex*, No. 4-10-0462 (4th Dist., 2011) and *Rodarmel v. Pneumo Abex*, No. 4-10-0463 (4th Dist., 2011) where it declined to recognize a duty in two conspiracy cases claiming that the injury complained of was the result of take-home exposure to asbestos fibers. Conversely, the Fifth District Illinois Appellate Court ruled in *Simpkins v. CSX*, 401 Ill.App.3d 1109, 929 N.E.2d 1257 (5th Dist., 2010), that employers have a duty to protect the family member of its employees from the danger of exposure to asbestos brought home on the clothing of employees.

In reaching its decision, the *Nelson* court noted that the existence of a duty, an element of a negligence premises liability action, focuses on the relationship of the parties. Illinois law requires that the "defendant and plaintiff [stand] in such a relationship to one another that the law impose[s] upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." No such special relationship existed in *Nelson* because the injured party was never an entrant to the premises.

The Fourth District Appellate Court recently ruled in two conspiracy cases, *Holmes* and *Rodarmel*. Both cases involved allegations that Plaintiff's injury resulted from exposure to asbestos fibers that were carried home on the clothing of the injured party's husband. In *Holmes*, the Plaintiff's husband worked at Unarco Industries, and during the term of his employment he carried asbestos fibers into his home which were subsequently inhaled by his wife. Plaintiff's husband was never employed by Pneumo Abex nor present at a Pneumo Abex facility, but Pneumo Abex was found liable as a co-conspirator with Unarco. On appeal, the court determined that the Defendant owed no duty to the Plaintiff because the injury sustained was not foreseeable. In particular, the Defendant's exposure to asbestos at Unarco took place from 1962 to 1963. Expert testimony at trial established that there was no known association between a disease and asbestos fibers brought home from the workplace until 1964. The court determined that without the requisite knowledge, the Plaintiff's injury was not foreseeable. An identical factual situation was present in *Rodarmel*. In *Rodarmel* the alleged take-home exposure took place from 1953 to 1956. Again, the Fourth District Appellate Court determined that the Defendant owed no duty to the injured party because the risk of this type of injury was not foreseeable prior to 1964.

The Fifth District Appellate Court also addressed the relationship of the parties when reaching its decision in *Simpkins*. The Simpkins court stated that the existence of a duty under Illinois law is dependent upon whether the relationship of the parties is one that would impose an obligation on the defendant to act reasonably for the benefit of the plaintiff. The court determined such a relationship existed after concluding that the employer, through reasonable care, should have foreseen the risk of harm to his employee's wife. Additionally, this relationship was present because the likelihood of the employee's wife developing a disease was not remote, the magnitude of harm was great, and guarding against take-home exposures was not unduly burdensome when balanced against the nature of the risk. The *Simpkins* court did not address the Second District's decision in *Nelson* in its opinion. *Simpkins* is currently on appeal to the Illinois Supreme Court where oral argument was conducted on September 20, 2011.

There is no consensus yet in Illinois on whether a duty exists in take-home exposure cases, but the cases we have seen provide guidance for the future. As discussed above, courts in Illinois have decided cases involving employer defendants and premises defendants, along with cases where the dates of exposure have been particularly important. The Illinois Supreme Court's upcoming decision in *Simpkins* will have a significant impact on the future of litigation asserting liability for take-home asbestos exposure in Illinois. We will continue to monitor developments in this area going forward.

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## TOXIC TIDBITS

### Cell Phone Radiation Update

In the latest of a series of conflicting studies over the past five years, a new study recently published in the British journal BMJ found no link between long-term use of cell phones and increased risk of brain tumors. In what is being described as the "biggest ever" study on the subject, scientists in Denmark reviewed data on the entire Danish population age 30 and older and born in the country after 1925, which included nearly 360,000 cell phone users, over an 18-year period. After comparing rates of cancer of the brain and central nervous system between long-term cell phone users and non-users, they found no evidence of increased cancer risk, even

among people who had been using their phones for more than 13 years.

Previous research on the subject is extensive and conflicting. In 2006, for example, Swedish scientists announced that an hour of daily cell phone use over the course of a decade could increase a person's risk for developing brain cancer by as much as 240 percent. But earlier that same year, British researchers who collected data on cell phone users found no such link to any type of cancer. Previously this year, a World Health Organization panel officially classified cell phones as "possibly carcinogenic", the same category that includes the pesticide DDT and gasoline engine exhaust. A month later, however, Swiss researchers released results of a study that found that cell phone use did not pose a cancer threat to children, who are generally thought to be most at risk.

Cell phones emit radiofrequency energy (radio waves), a form of non-ionizing radiation similar to the kind microwave ovens give off, but different from the ionizing type emitted by X-rays and CT scans, which is known to be dangerous. Evidence shows that prolonged or frequent exposure to ionizing radiation causes DNA damage in cells, which can eventually lead to cancer, but research is not as conclusive about whether non-ionizing radiation has the same effect.

## 9/11 Dust Illnesses

In the ten years following the 9/11 terrorist attacks, first responders and others exposed to the dust and smoke associated with the ruins have blamed everything from skin rashes to cancer on the air they breathed at Ground Zero. Now a decade later, however, the list of illnesses even tentatively linked to the disaster is relatively short.

Although researchers have documented increased rates of asthma, and chronic sinus problems, cough, and heartburn, they have failed to find a link between exposure to the pulverized concrete, glass, and other building materials (including asbestos) that composed the dust and cancer. Recently, two new studies published in the medical journal The Lancet failed to find a significant increase in cancer, or other deadly illnesses, among people exposed to the dust.

Fire department researchers who studied cancer rates in 9,000 exposed firefighters with health records dating back to well before 9/11, found only four more cases of the illness than they would normally expect. Another study of 42,500 people in a World Trade Center health registry found that, so far, they have had a better mortality rate than the general public.

Cancer is not currently among the conditions covered by the James Zadroga 9/11 Health and Compensation Act, which was signed into law in January to provide health care and compensation for New Yorkers sickened by the dust from the World Trade Center attacks. Over 50,000 workers were exposed while responding to the incident as they rescued survivors, recovered victims, and cleaned or cleared the site and surrounding buildings.

## Genetic Predisposition to Malignant Mesothelioma

Malignant mesotheliomas are aggressive tumors that are resistant to current therapies and associated primarily with widespread commercial use of asbestos in the twentieth century. Approximately 27 million U.S. workers were exposed to asbestos from 1940 to 1979, and more thereafter. In the United States, mesothelioma results in approximately 3,000 deaths nationally per year. Despite asbestos abatement efforts, mesothelioma rates have remained stable in the United

States since 1994 and are expected to increase by 5–10% per year in Europe over the next 25 years. A marked increase in mesothelioma is predicted in developing countries, where asbestos usage is increasing exponentially.

As recently reported in Nature Genetics, Joseph R. Testa, et al., spent 14 years prospectively studying families with high incidence of mesothelioma to identify putative mesothelioma susceptibility genes. They focused on two U.S. mesothelioma families, one in Wisconsin and one in Louisiana, in which members were neither exposed to erionite (another mineral fiber believed to cause mesothelioma) nor had occupational exposure to asbestos, thus removing the confounding factor of heavy exposure to carcinogens known to cause a high incidence of mesothelioma. The family members developed various malignancies, although mesothelioma predominated.

Because only a small fraction of asbestos-exposed individuals develop malignant mesothelioma, and because mesothelioma clustering is observed in some families, Testa's group searched for genetic predisposing factors and discovered germline mutations in the gene encoding BRCA1 associated protein-1 (BAP1) in both families. The results identify a BAP1-related cancer syndrome that is characterized by mesothelioma and uveal melanoma and provide the first demonstration that germline alterations of genes influence the risk of mesothelioma. The resulting hypothesis is that when individuals with BAP1 mutations are exposed to asbestos, mesothelioma predominates. Alternatively, and more importantly to the asbestos defense community, BAP1 mutation alone may be sufficient to cause mesothelioma.

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