

# NEW JERSEY DEFENSE

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## President's Message

*Michele G. Haas, Esq.*



Time flies when you're having fun! I realize that my presidency will quickly be coming to a close this June. I invite everyone to come to our 48<sup>th</sup> Annual Convention, which is being held at the luxurious Hyatt Chesapeake Resort & Spa from June 26-29, 2014 in Cambridge, Maryland. We are finalizing details for some great and informative programming as well as our ever entertaining Cocktail Reception and President's Reception. Get ready to take over the reigns Mario Delano! We will also be availing ourselves of the pools and golf course! In addition to the Convention, we also have two seminars scheduled for the spring. On May 7, 2014, the Premises Liability Committee, which is chaired by Jeff Maziarz (Hoagland, Longo, Moran, Dunst & Doukas, L.L.P.) and Theresa Giamanco (Bennett, Bricklin & Saltzberg, L.L.C.), will

be presenting a seminar at Hoagland Longo in the afternoon. More details to follow. Additionally, our ADR Committee, chaired by Michael Malia (Pringle, Quinn & Anzano), will be presenting an engaging seminar on the evening of May 22, 2014 entitled "Issues and Approaches to Mediation" featuring the Honorable Joel R. Rosen (ret.) as the key note speaker. This seminar will be held at The Mansion in Voorhees and will provide dinner as well as 2.0 CLE credits. I also want to thank Steve Banks (Dempster & Haddix) for his assistance in setting up this program. As a resident of South Jersey, I am excited to see NJDA holding this seminar in Voorhees. Keep an eye out for our seminar flyers!

As for what we've been doing, NJDA was proud to be a co-sponsor of the New Jersey State Bar Association's Fourth Annual Diversity Summit, which was held on February 20, 2014 at the New Jersey Law Center in New Brunswick. Mark Saloman (Proskauer Rose) and I were invited to attend a Specialty Bar luncheon with the NJSBA Executive Committee immediately preceding the Summit. There was stimulating conversation and debate regarding bringing together the many voices of the legal profession to advance our mutual goal of creating more opportunity for lawyers of diverse backgrounds in the legal community. Over the last few months, I also had the honor of participating with a group of very distinguished judges, legislators, attorneys and other professionals in the Working Group for Business Litigation created by Chief Justice Stuart Rabner to address the needs of the parties involved in business litigation and examine current practices. We have recently submitted our report to the Chief Justice. Hopefully, you've also visited NJDA's website recently to see that we have been diligently working on updating it. I would like to thank our Secretary/Treasurer, Greg McGroarty, for all of the hard work that he has put into this undertaking. And if you're reading this, I would also like to thank our President-Elect and current New Jersey Defense editor Mario Delano and Nicole Cernigliaro for working diligently to create a new look for our publication. Of course, my thanks also go out to the contributors of the articles that I hope you will read!



*"NJDA was proud to be a co-sponsor of the New Jersey State Bar Association's Fourth Annual Diversity Summit..."*



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# UNCOVERING FRAUD IN THE REFERRAL RELATIONSHIP

*Michael A. Malia, Esq., LL.M.\**



This article relies upon evidence obtained via subpoena in a civil action in New Jersey to illustrate how a plaintiff’s lawyer’s referral relationship with a treating provider can conceal an insidious fraud. To uncover such veiled fraudulent activity, discovery into the referral relationship between plaintiff’s counsel and the treating provider must be allowed in appropriate circumstances, as uniquely permitted in a Florida appellate case.

## *I. Two Separate Hidden Complex Fraud Schemes: Dr. X and Dr. Y.*

Recent discovery in a civil action brought under the New Jersey Insurance Fraud Prevention Act has led to the production of evidence from a now closed undercover criminal investigation by the FBI and the Office of the Insurance Fraud Prosecutor (OIFP). That evidence revealed two independent schemes by healthcare providers to finance the direct mail solicitation efforts of personal injury attorneys in exchange for the lawyers’ referrals of the solicited clients to the providers’ facilities. These two healthcare providers are referred to as “Dr. X” and “Dr. Y”.

Dr. X was arrested and convicted of paying runners for client referrals through a personal injury attorney, who Dr. X thought was a trusted gatekeeper. In fact, he was a confidential witness (hereafter “CW”) who secretly taped their conversations on behalf of the FBI and OIFP. These taped conversations revealed Dr. X’s efforts to reduce his reliance on runners – and lessen his risk of arrest – by engineering a plan to develop and finance direct mail solicitation schemes in the names of multiple participating law firms directed at those involved in automobile accidents. Relying upon police reports obtained through OPRA requests filed with local police departments, Dr. X used two young men – one who was a law student at the time – to send out these elaborate solicitation mail packages on behalf of multiple law firms in an effort to encourage the recipients to contact the participating law firm for legal representation in connection with their accident. Once these individuals retained one of the participating law firms, they were immediately referred to Dr. X’s offices for treatment. Dr. X bragged to the CW that he sent packages on behalf of multiple law firms to the same accident victims because it increased his odds that the person would choose one of his participating law firms and that he would receive the referral, “You know it was my idea to set them up this way... Cause I said the more people you send them out and they all come to me... That’s why my numbers are so good.”

Dr. X discussed the amount of cases that the marketing scheme was generating for one attorney alone, “It would blow your mind. I mean, he’s generating forty cases a month... Well, I have [blank] offices but still... But he’s generating probably five, six patients for each office, a month... I mean, that’s, that’s plenty to chew on.” Dr. X also discussed the immediate success of another participating attorney, “... They just got his package together... I was away for a week... and I came back and it was like five people.”

In the FBI/OIFP taped conversations, Dr. X also explained the mechanics of the scheme to the CW and why it was such a worthwhile investment:

**Dr. X** Oh, I tried to set him up with this. You know how much this costs? To set up? How

much do you think it costs to set up?

CW What, are you talking per

Dr. X No, just the whole thing. Basically, once you set it up then the expenses kind of get paid for.

CW Mm-hmm.

Dr. X Whatever it is that I take care of him for. But, the initial expense to set this up with, with, you know, getting the, the, you know, the, the leg work done and

CW Mm-hmm.

Dr. X all the, all the bull----. Everything like that. And, getting the first mailing out, okay, because I take care of the first, like

CW Mm-hmm.

Dr. X huge mailing, you know? So, it's about twelve thousand dollars.

CW Yeah, I couldn't imagine. Right.

Dr. X You know?

CW Right.

Dr. X Which is not, you know?

CW It's not terrible.

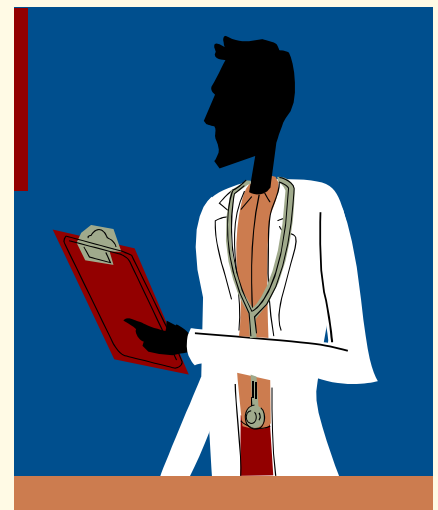
Dr. X It's a great investment.

CW Mm-hmm.

Dr. X Think about it.

CW It, it is, yeah.

Dr. X I get two cases. It pays for itself.



Dr. X told the CW about a conversation with another attorney about the scheme, “So, I set him up with everything. And I said to him, the only thing I ask of you, I said, I’ll take all the expense, I’ll take care of everything. I’ll set you up. I said, it’s going to bring a lot of business to you.” In exchange, Dr. X demanded complete loyalty from any participating attorney, “I said, the only thing I ask of you is that I just want you to send me all your work... Which is about five or seven a month...I said, just be, be true to me.”

Dr. X also explained to the CW that each participating attorney was required to pay \$1,000 per month to his marketing guys, which he explained was necessary to make the solicitation scheme look legitimate:

But they have to have something on the books...Because otherwise this whole thing doesn't make any sense...And if push comes to shove they got to be able to say, hey, you know, yeah, I'm the marketing guy. That's what I do. It's perfectly legal. We're allowed to send these things out. It's no problem...You know what I mean? But, if all of a sudden there's no, there's no income from you. Because they're actually soliciting the lawyer, then what, it doesn't make any sense. The whole thing doesn't make any sense. You know?...

Dr. X's scheme was not unique. A separate FBI/OIFP investigation involving the same confidential witness

revealed a remarkably similar scheme with another doctor, Dr. Y:

**Dr. Y** Yeah. He screwed - we were doing mailings with him--

**CW** -- a young guy? He would have to be a young guy.

**Dr. Y** Yeah. He wanted to do mailings like [Attorney] did mailings and stuff, so we did mailings with him.

**CW** Right.

**Dr. Y** He cried he had no money. We - me, [Dr. Z and John Doe] we foot the whole bill to do printings with his picture on it. We do everything.

**CW** Uh-huh.

**Dr. Y** We say let's even try to do this a little better, let's do - let's do Federal Express. We do that. You know, the bill's \$40,000 in one month for that. We're paying for the staff that he supposedly has doing the mailings, when you know they only do it for ten minutes in the morning.

**CW** Uh-huh.

**Dr. Y** they they're doing his work in this office anyway. But, all right, we eat that.

**CW** That's very expensive.

**Dr. Y** Yeah. So then we - one day we're sitting there and I'm like I don't trust this guy.

**CW** Right.

**Dr. Y** I have [John Doe] call with the accent. I'm in an accident. I'm in Newark. He sends him to a guy in f - - - - - in Montclair.

**CW** You're kidding.

**Dr. Y** And [John Doe] goes no, no, no, I want to be in Newark. I want to stay where I live. No, no, no, it's fine, we'll send a car. You're going over to that guy.

**Dr. Y** I said how could you do that to me? How could you do that to me, when we footed all these bills? How could you do that? But he did.

**CW** And what did he say? You caught him with his hand in the cookie jar?

**Dr. Y** No, no, no, he was - and this was the funny part, he tried to say that they took his name because it was a false name, and they said well, we couldn't find a police report or that we - because I guess they put the name into the computer to punch a mailing label our to put on, like they didn't find it. And I said [Attorney], you were supposed to be giving me any patient that came through your door anyway.

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**Dr. Y** I was spending the whole expense. All he was using was his name.

**Dr. Y** We were paying for everything because you were crying you had no money. I said even if it was a guy that walked in off the street that said I was injured, where do I go, that should have been to me, because look what I was doing for you. And so we took - like on the phone well, I got your package. I was in a car accident. It was on my friend's kitchen table, he was in an accident, I saw your letter I liked it.



Dr. X and Dr. Y, who never met, subsidized two completely unconnected, but similar lawyer solicitation schemes. Not surprisingly, both Dr. X and Dr. Y's marketing agreements with lawyers led to a high number of referrals of personal injury clients represented by the lawyers participating in the schemes. Although Dr. X and Dr. Y were subsequently both arrested, discovery directed at the referral relationships between Dr. X, Dr. Y and the participating lawyers could have uncovered the fraud much earlier.

A recent Florida appellate case has permitted discovery into the referral relationships between attorneys and healthcare providers. Discovery into referral relationships in New Jersey personal injury actions could prove invaluable for insurers in uncovering evidence of financial bias on the part of treating providers, as well as for advancing fraud investigations by insurers.

## ***II. The Florida Appellate Court Opens the Door to Referral Relationship Discovery Directly from Plaintiff's Counsel.***

In Steinger, Iscoe & Greene v. GEICO, 103 So. 3d 200 (Fla. Dist. Ct. App. 4th Dist. 2012), the court held that if a treating physician has a financially beneficial relationship with a law firm, the jury is entitled to know the extent of the financial connections between the doctor and the law firm. The existence of referral arrangements is clearly a permissible ground for impeachment of the doctor. Moreover, if a referral relationship is shown to exist between a plaintiff law firm and the treating provider, then discovery from the law firm regarding the extent of the relationship may be calculated to lead to the discovery of admissible evidence.

The GEICO case arises out of a claim for uninsured motorist (UM) coverage. During discovery, GEICO filed a motion to compel answers to interrogatories after the plaintiff objected to its standard expert interrogatories. The trial court granted the defense motion. After a series of motions and hearings, GEICO sought to obtain documents and depose the plaintiff's law firm's office manager relating to the nature and extent of the relationship between the law firm and the treating physicians, who the plaintiff admitted would provide expert opinions.

GEICO sought information about the financial dealings between the law firm and health care providers, including: (1) all records of payments by the firm to the four medical providers; (2) all "Letters of Protection" to those providers; (3) all phone records between the firm and the four providers; and (4) all deposition and trial transcripts of those individuals or entities in the firm's possession. The firm moved for a protective order, arguing invasion of the privacy of non-party patients, as well as a violation of the attorney-client privilege of the firm's former clients. The firm also argued that the volume of production of the documents would be burdensome and expensive, requiring manual review of thousands of files. The trial court denied the firm's motion as to categories one, two and four, but allowed the firm to redact client names in cases where there was no lawsuit or a settlement. Any documents subject to privilege objections were to be produced under seal with a privilege log provided to the court. The firm appealed.

The appellate court framed the two significant issues as: (1) when is a treating physician an expert subject to expert interrogatories; and (2) when does the nature of the relationship between a law firm and treating physician raise the spectre of financial bias sufficient to warrant discovery from the law firm and discovery beyond that



generally allowed from an expert. The court found that a treating physician, like any other witness, is subject to impeachment based on bias, resulting in permissible discovery. As for uncovering bias, the court saw no meaningful distinction between a treating physician witness who provides an expert opinion and retained experts. While there are Florida statutes imposing limitations on financial bias discovery from expert witnesses, the court found that it cannot be used as a shield to prevent discovery of relevant information from a material witness, such as a treating physician. The trial courts have discretion to order additional discovery where relevant to a discrete issue in a case, while balancing

the need for discovery against the burden placed upon the witness. Also, the court was confronted with a discovery request to a non-party law firm. The Florida discovery rules, similar to New Jersey, generally allow a party broad discovery regarding “any matter, not privileged, that is relevant to the subject matter of the pending action”. Similarly, the discovery need not be admissible, but must be “reasonably calculated to lead to the discovery of admissible evidence”. The court found that where there is a preliminary showing that the plaintiff was referred to the doctor by the lawyer, directly or through a third party, or vice versa, the defendant is entitled to discover information regarding the extent of the relationship between the law firm and doctor. The court found the circumstances analogous to a Florida Supreme Court case and the reasoning persuasive:

The more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing. A jury is entitled to know the extent of the financial connection between the party and the witness, and the cumulative amount a party has paid an expert during their relationship. A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship.

Any limitation on this inquiry has the potential for thwarting the truth-seeking function of the trial process. . . . [W]e take "a strong stand against charades in trials." To limit this discovery would potentially leave the jury with a false impression concerning the extent of the relationship between the witness and the party by allowing a party to present a witness as an independent witness when, in fact, there has been an extensive financial relationship between the party and the expert. This limitation thus has the potential for undermining the truth-seeking function and fairness of the trial.

The appellate court could not tell from the record whether GEICO established the existence of a referral relationship between the medical providers and law firm. Thus, the matter was remanded to the trial court for proceedings consistent with the opinion.

### ***III. Conclusion.***

The fraudulent solicitation and referral schemes described by Dr. X and Dr. Y arise from a paradox in how lawyer and healthcare providers profit from automobile injury claims. Lawyers are in the best position to obtain and refer a prospective automobile accident client to a provider, but typically, will not derive a fee from their

representation for at least two years or more. Providers treating PIP patients, however, start making money almost immediately after receiving the referral and usually make much more. The solicitation and referral schemes employed by Dr. X and Dr. Y are one way – albeit a fraudulent one – to overcome the lawyer/provider revenue paradox.

As the Florida court held in GEICO, carriers in New Jersey should be permitted to seek discovery from plaintiff law firms who have referral relationships with particular providers to unmask arrangements such as provider financed legal marketing agreements. This type of discovery serves a twofold purpose. Preliminarily, it is necessary to establish positional bias, which is highly relevant and reasonably calculated to lead to the discovery of admissible evidence in a personal injury lawsuit. Additionally, the information obtained will assist carriers in conducting more efficient SIU investigations.

\* Michael A. Malia, Esq.,LL.M.,

Michael, Of Counsel with the law firm Pringle Quinn Anzano, PC, handles insurance and healthcare fraud litigation. He is certified by the Supreme Court of New Jersey as a civil trial attorney. Mr. Malia is the Chair of the ADR Committee for the New Jersey Defense Association; and can be reached at (732) 280-2400 or mmalia@pringle-quinn.co.

## Upcoming Seminars:

### Premises Liability Seminar

**May 7, 2014 4:00 pm - 6:00 pm**

at the law offices of  
Hoagland Longo Moran Dunst & Doukas  
40 Paterson Street, New Brunswick, NJ  
2 NJ CLE Credits

### ADR Seminar featuring

**Hon. Joel B. Rosen (Ret.)**

**May 22, 2014 6:00 pm - 8:00 pm**

includes dinner and cash bar  
at The Mansion, 3000 Main Street, Voorhees, NJ  
2 NJ CLE Credits



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- Noelle Robinson – Law Student
- John Shea – Kent & McBride



# STATUTE OF LIMITATIONS APPLIES TO SPILL ACT CONTRIBUTION CLAIMS

*Joanne Vos, Esq. and Heather A. Pierce, Esq.\**



At long last, the Court has determined that a statute of limitations does, in fact, apply to contribution claims brought under the New Jersey Spill Compensation & Control Act (the "Spill Act"). Prior to this determination, parties responsible for conducting a cleanup were not specifically subject to any limitations period when asserting claims against other responsible parties for their fair share of cleanup costs. The Appellate Division's opinion in Morristown Associates v. Grant Oil Company, 432 N.J.Super 287 (App.



Div. 2013) establishes that such claims for contribution under the Spill Act are subject to the six (6) year property damage statute of limitations. Failure to bring these claims within the appropriate statutory period could foreclose them forever.

In Morristown Associates, Plaintiff, the owner of a shopping center, brought Spill Act contribution claims against certain heating oil companies and prior owners of a dry cleaning business that operated in the shopping center, for their fair share of the costs associated with the remediation of contamination caused by a leaking underground storage tank ("UST"). The facts leading up to the assertion of Plaintiff's contribution claim are as follows: Plaintiff purchased the shopping center in 1979. Prior to Plaintiff's acquisition of the property, one of the tenants, a dry cleaning company, installed a 1,000 gallon heating oil UST beneath its leasehold. Beginning in 1999 and occurring through 2002, various heating oil delivery companies overfilled the UST, delivering more than 1,000 gallons of heating oil thereby surpassing its capacity. Plaintiff alleged that it was unaware of the existence of the dry cleaner's UST until 2003, at which time a neighboring property owner advised Plaintiff that heating oil had migrated onto its property from Plaintiff's property. Plaintiff alleged that it had relied upon a 1993 environmental audit which was completed as part of a refinance, and which failed to reveal the existence of any USTs upon the property, apparently in error. Plaintiff acknowledged that in 1999, it had become aware of and remediated contamination that had been caused by a discharge from a UST that was located elsewhere upon the property (i.e., not the dry cleaner's UST). In short, Plaintiff's realization in 1999 that that the 1993 environmental audit was not reliable should have put Plaintiff on notice that other USTs might have been located upon the property, including the dry cleaner's UST.

Ultimately, Plaintiff remediated the contamination that was caused by the dry cleaner's UST and in 2006, Plaintiff filed a complaint for Spill Act contribution, seeking to recover its cleanup costs from the other parties responsible for the discharges, including the dry cleaner and the heating oil delivery companies ("Defendants").

In response to the complaint, Defendants filed for summary judgment arguing that since the discharges from the dry cleaner's UST began in 1999, Plaintiff's 2006 claims for contribution were barred by the six (6) year statute of limitations applicable to property damage. The trial court agreed with Defendants and dismissed Plaintiff's complaint. On appeal, Plaintiff argued that no statute of limitations applied to its contribution claims because (1) its statutory claims for contribution under N.J.S.A. 58:10-23.11(f)(2) were based upon the Defendants' strict liability for the contamination; (2) the Legislature intended that contribution be available regardless of when the contamination occurred; and (3) the only defenses available to a private Spill Act claim for contribution are the statutory defenses refer-

enced at N.J.S.A. 58:10-23.11(g)(d), none of which include a limitations period. The Appellate Division took the opportunity to squarely address the issue of whether a Spill Act contribution claim is subject to a statute of limitations and if so, which one.

In its decision, the Appellate Division notes that only one of its own decisions, an unpublished opinion that was delivered in 1999, addressed the very issue. In that case, it was determined that based upon the language of the Spill Act, no statute of limitations applied. However, in Morristown Associates, the Court opted to embrace an approach which has been taken by the federal courts in similar cases (i.e., where a statute is silent on limitations, a limitations period for a similar or like cause of action is applied). In light of the nature of Plaintiff's claim and the damage to the property, the Court held that the general six (6) year statute of limitations for property damage is applicable to Spill Act contribution claims.

Additionally, the Court found that the "discovery rule" set forth in Lopez v. Swyer, 62 N.J. 267 (1973), is also applicable to a Spill Act claim for contribution such that the limitations period does not begin to accrue until "the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." The Morristown Associates Court applied the discovery rule and found that certain evidence should have put Plaintiff on adequate notice that the dry cleaner's UST existed. Such evidence included: the property manager's knowledge of the leaking UST in 1999; the property manager's knowledge of certain pipes protruding from the dry cleaner's leasehold, which would indicate the existence of a UST; that the environmental audit upon which Plaintiff relied was known to be incorrect as of 1999 since it failed to reveal the existence of that UST; and, most importantly, the fact that oil had been delivered to the property on numerous occasions between 1999 and 2002. Based upon all of this evidence, the Court opined that Plaintiff should have discovered the existence of the dry cleaner's UST no later than 1999 and thus, the applicable limitations period of six (6) years began accruing at that time. Having been filed in 2006, or, seven (7) years after the time when Plaintiff should have discovered the dry cleaner's UST, Plaintiff's contribution claim was out of time.

In summary, Morristown Associates removes any remaining doubt that contribution claims brought under the Spill Act are subject to the six (6) year property damage statute of limitations. However, the question of *when* that limitations period begins to accrue is highly fact-sensitive since the analysis is subject to the discovery rule. Remediating parties should pinpoint the identification of other parties that are potentially responsible for a cleanup and assert claims for their fair share of the costs as early in the process as possible, in an effort to preserve contribution claims. Whether or not the applicable statute of limitations will be deemed to have accrued will depend upon certain evidence, including the types of the discharges at issue and when the parties became aware, or *should have become aware*, of certain facts related to the discharges.

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# THE NEXT ASBESTOS: THE SMOKING LUNG CANCER CLAIM

**Marc S. Gaffrey, Esq. and Katherine Blok, Esq.\***



Asbestos litigation in New Jersey is nearly 40 years old and I personally have litigated these claims for 26 of those years. Over that period the changes in the litigation have been remarkable, and what we continue to present to juries today has very few similarities to my first asbestos trial in 1988. Gone are the mass filings of questionable unimpaired claims out of manufacturing facilities and union halls. Gone are the more than 85 millers, minors and manufacturers of asbestos fiber, thermo insulation and mill products



that have gone bankrupt (some of which have created trusts to reimburse ill claimants. Yet, the claims keep coming and Plaintiffs' attorneys are still finding new creative avenues to assert claims, both viable and questionable, against companies that have remote, at best, historic connection to asbestos.

The most recent, and perhaps the most disturbing new trend is the filing of claims on behalf of individuals suffering from lung cancer, upper respiratory cancers and gastro-intestinal tract cancers who have a very significant history of tobacco usage, and minimal, at best, exposure to asbestos. The claims are filed under the guise that there is a synergy (increased risk) between the stimuli of cigarette smoking and asbestos exposure.

Plaintiff's firms continue to advertise heavily on television and in publications for new asbestos exposure claimants. Some solely target mesothelioma patients (where the claims can result in multi-million dollar settlements or verdicts), however, you may note that there is a recent push toward the lung cancer victims who also smoked. There is a niche, untapped market for these asbestos-related lung cancer claims. Television advertisements emphasize that current and former smokers are not exempt from making claims.

What practitioners refer to as "smoking lung cancers" are supported by recent scientific literature, in particular the 2013 article by Stephen Markowitz, et al.<sup>i</sup>, which found that asbestos exposure without an associate diagnosis of asbestosis (a non-malignant asbestos disease) increases the risk of lung cancer among non-smokers. Specifically, there is a "relative risk" associated with asbestos exposure and a "relative risk" associated with cigarette smoking. When the two factors exist in an individual the relative risks are added together to increase the likelihood of the exposed individual to develop cancer. Asbestosis further increases the risk for lung cancer and the relative risk is "super additive". The higher risk of lung cancer associated with a diagnosis of asbestosis is likely the result of higher exposure to asbestos fibers; asbestosis is a surrogate for high levels of asbestos exposure.<sup>ii</sup> Asbestos is a complete carcinogen, meaning that it can cause a malignant tumor without the presence of another tumor-promoting agent.<sup>iii</sup>

Though the science does not dispute that asbestos is a carcinogen and an independent cause of lung cancer, it is also undisputed that smoking is the number one cause of lung cancer in the United States. Earlier this year the United States Surgeon General released the 50th anniversary edition of its landmark report on the health effects of smoking. In *The Health Consequences of Smoking—50 Years of Progress*, the Surgeon General reports that more than 6.5 million Americans have died prematurely due to smoking-related cancers since 1965.<sup>iv</sup> Cigarette smokers

**ENDNOTES ON PAGE 17**

today smoke fewer cigarettes than their mid-1960s counterparts, yet they have a higher risk for developing lung cancer and chronic obstructive pulmonary disease (COPD) than did smokers in the mid-1960s. Between 2005 and 2009, more than 87 percent of all lung cancer deaths and 61 percent of all deaths due to pulmonary disease were attributed to direct and secondhand exposure to cigarette smoke. Lung cancer is the most common cancer killer among men and women. In addition to lung cancer, smoking exacerbated chronic lung diseases, like COPD, also referred to as chronic bronchitis.<sup>v</sup>

In the face of these incontrovertible facts, lung cancer patients who assert medical causation of their disease solely due to asbestos are, understandably, met with a healthy dose of skepticism. One of the more high profile targets of this skepticism of late has been former U.S. Representative Carolyn McCarthy of New York, previously known for her advocacy of gun control policies following the death of her husband in the 1993 Long Island Rail Road shooting. (Her son was also injured by the gunman.) She was diagnosed with lung cancer in June 2013.

McCarthy smoked a pack of cigarettes daily for most of her adult life, only quitting at the time of her lung cancer diagnosis. Though nearly 90 percent of all lung cancers are caused by cigarette smoking, a well known New York firm filed suit on behalf of McCarthy, alleging that her disease was related to asbestos.<sup>vii</sup>

In response to the news of columnist Joe Nocera wrote two columns criticizing the endless search for viable. Nocera stipulates that asbestos can be bringing “tens of thousands of bogus cases.” bankrupt, “the asbestos lawyers came up victims who had some exposure to asbestos. in volume.” Nocera quotes Peter Kelso of Bates White Economic Consulting, who says there is no new science to justify the surge in litigation; the only explanation is economic incentives. Citing McCarthy’s litigation, in which she claims take home exposure in her childhood home from her father and brother, who worked as boilermakers, Nocera criticizes the clam that McCarthy’s bystander exposure to asbestos was causal connection of her lung cancer.<sup>viii</sup> “Though McCarthy certainly deserves our sympathy as she fights cancer, it is hard to see her lawsuit as anything by an underserved money grab,” he writes.<sup>ix</sup>



of all lung cancers are caused by cigarette smoking, a well known New York firm filed suit on behalf of McCarthy, alleging that her disease was related to asbestos.<sup>vii</sup>

McCarthy’s suit, *New York Times* entitled “The Asbestos Scam,” in which he defendants in asbestos litigation. Though deadly, he criticizes the plaintiff’s bar for With traditional asbestos defendants now with a new tactic: finding lung cancer All of a sudden, lung cancer cases exploded

Regardless of one’s opinion about the science linking asbestos to lung cancer, the link exists.<sup>x</sup> Our duty as defense attorneys is to zealously advocate that a plaintiff’s exposure to asbestos was insufficient to cause lung cancer and that the plaintiff’s smoking was the actual cause. Pointing to statistics is useful – the current Surgeon General’s statistic is that 87 percent of all lung cancers are caused by smoking<sup>xi</sup> is highly persuasive to a jury acclimated to the fact that smoking has a negative and often severe impacts human health, however, as with all personal injury lawsuits, medical experts are crucial to a successful defense.

In the early decades of asbestos litigation when most claims involved non-malignancies, expert pulmonologists were crucial to both the defense and prosecution of asbestos claims. The value of a pulmonologist is rooted in the need to determine if the plaintiff experienced sufficient exposure to asbestos to justify a medical



diagnosis of asbestosis. This was less of an issue with the rise of mesothelioma claims, since it is uncontroverted that asbestos is the only cause of mesothelioma. As a result, pulmonologists were not used as frequently. But with the recent increase in asbestos-related lung cancer claims, pulmonologists and B-readers are again vital in order to interpret X-rays, pulmonary function tests and other diagnostic tools.

What are we to expect in the future with this ever changing litigation? Who knows! Asbestos continues to be mined in the United States, Canada, Asia and Africa. It is still used in industry pursuant to strict OSHA and NIOSH standards in the U.S., but far less oversight in other countries. And of most concern, it still exists in hundreds of thousands of buildings constructed prior to 1971. An actuary recently told me that he expects asbestos related diseases to manifest themselves until the year 2056. I expect creative attorneys to continue to find novel ways to seek compensation for their ill clients, and in turn, continue to thrive financially in the trenches of the legal battlefield.

## ENDNOTES

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# **WILLINGBORO MALL, LTD. V. 240/242 FRANKLIN AVENUE LLC (A-62-11) (069082) DECIDED 8/15/13**

***Erik Anderson, Esq.\****



## **Is the case really settled?**

It happens. You spend all day at a mediation session, it's well past 7:00 pm, settlement terms in principal have been reached. The mediator, attorneys and parties want to go home. To speed their departure the attorneys agree to circulate a draft Release with the settlement terms the following day. Everyone goes home. The next day a proposed Release is circulated, one party objects and claims the terms memorialized in the agreement were not agreed to at the mediation and there is no settlement. Is the case settled? Will a motion to enforce settlement be successful? Under the Supreme Court's ruling in Willingboro Mall, LTD v. 240/242 Franklin Avenue, LLC, 215 N.J. 242 (2013), the answer is now "NO."

In the matter of Willingboro Mall, LTD v. 240/242 Franklin Avenue, LLC, the New Jersey Supreme Court was called upon to examine whether a settlement was achieved at a mediation despite the session concluding without a written and signed settlement agreement being generated. Ultimately, the court held that going forward, "if the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed by the parties before the mediation comes to a close."

This case involves a commercial dispute that stemmed from the sale of property by Willingboro Mall, Ltd. (Willingboro), the owner of the Willingboro Mall, to 240/242 Franklin Avenue LLC (Franklin) in February 2005. To secure part of Franklin's obligations, the parties executed a promissory note and mortgage on the property. Willingboro later filed a mortgage foreclosure action. Franklin denied that it defaulted on the note. The court subsequently referred this matter to nonbinding mediation.

On November 6, 2007, a retired Superior Court Judge conducted the mediation session. Willingboro's manager and attorney appeared on behalf of the Willingboro. During the session Franklin offered \$100,000 to Willingboro in exchange for settlement of all claims and for a discharge of the mortgage. On behalf of Willingboro, the manager orally accepted the offer in the presence of the mediator who presented the terms of the proposed settlement. The manager also affirmed that he gave his attorney authority to enter into the settlement. The terms of the settlement were not reduced to writing before the conclusion of the mediation.

On November 9<sup>th</sup>, Franklin forwarded a letter to the court and Willingboro's counsel announcing that the case had been "successfully settled." The letter also set forth the terms of the settlement. On November 20<sup>th</sup>, Franklin's attorney sent a separate letter to counsel for Willingboro stating he held the \$100,000 in his attorney trust account to fund the settlement. On November 30<sup>th</sup>, Willingboro's attorney advised Franklin's attorney that Willingboro rejected the settlement terms.

In December, Franklin filed a motion to enforce the settlement agreement. Franklin attached certifications from its attorney and the mediator that revealed communications made between the parties during the mediation. The

*(Continued on page 15)*

mediator stated in his certification that the parties voluntarily entered into a binding settlement agreement and that the settlement terms were accurately memorialized in Franklin’s letter to the court.

Willingboro did not waive the mediation privilege nor consent to the mediator submitting his certification, however, Willingboro did not move to dismiss the motion based on violations of the mediation communication privilege. Instead, in opposition to the motion, Willingboro requested an evidentiary hearing, the taking of discovery and filed a Certification of its manager who averred that he reluctantly agreed to take part in the mediation and that he was told it was “nonbinding.”

During discovery taken in connection with the motion to enforce settlement, five witnesses were deposed including the mediator, Willingboro’s manager and Willingboro’s attorney. After the close of discovery, a four day evidentiary hearing was conducted. The Judge presiding over the hearing found that a binding settlement agreement was reached. The Appellate Division affirmed the trial court’s enforcement of the settlement agreement.

The New Jersey Supreme Court granted Willingboro’s petition for certification. Willingboro raised two issues: (1) whether R.1:40-4(i) requires a settlement agreement reached at mediation to be reduced to writing and signed at the time of mediation; and (2) whether Willingboro waived the mediation communication privilege.

In reviewing this matter, the court noted that R. 1:40-4(i) provides that “if [a] mediation results in the parties’ total or partial agreement, it shall be reduced in writing and a copy thereof furnished to each party.” Further, the court recognized that a publication prepared by the Civil Practice Division states that a document memorializing the terms of a settlement must be signed by all parties.

In this case, the writing memorializing the terms of the settlement was forwarded by Franklin after the mediation and never signed by Willingboro. Accordingly, Willingboro argued that the purported settlement should not be enforced. Franklin countered by noting that nothing in R. 1:40-4(i) requires the written settlement agreement resulting from the mediation be created or tendered on the actual day of the mediation. Willingboro also argued that it did not waive the mediation communication privilege by presenting evidence in opposition to the motion to enforce the oral agreement. Willingboro noted that the mediation communication privilege had “already been destroyed by Franklin’s disclosures to the court through the mediator certification.” Thus, Willingboro’s response was simply a defensive measure and should not have been taken as a waiver.

The Supreme Court noted that R. 1:40-4(d) provides: “unless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator or other participant in the mediation may disclose any mediation communication to anyone who is not a participant in the mediation.” The purpose of the rule is that without assurance of confidentiality, participants will be unwilling to enter into candid and unrestrained

***“...if settlement at a mediation is achieved its terms must be memorialized in writing, signed by the parties and signed by the mediator.”***

communication. In addition, the New Jersey Mediation Act (N.J.S.A. 2A:23C-1 et. seq.) and the Rules of Evidence (N.J.R.E. 519) confer a privilege on mediation communications.

The Court noted that there are limited exceptions to the privilege which include a signed writing exception which allows a settlement agreement reduced to writing and adopted by the parties to be admitted into evidence to prove the validity of the agreement. R.1:40-4(i) provides that “if there is an agreement, it shall be reduced to writing and a copy thereof furnished to each party.”

The Court noted that the second exception to the mediation communication privilege is waiver. Pursuant to statute and case law, the waiver must be express. The Court concluded that the certifications filed by Franklin’s attorney and the mediator in support of Franklin’s motion to enforce the oral agreement disclosed privileged mediation communications. Despite the fact that Franklin violated the mediation communication privilege, Willingboro did not timely move to strike or suppress the disclosure of the mediation communications. Instead, Willingboro proceeded to litigate whether it had in fact entered into a binding oral settlement agreement. Willingboro breached the mediation communication privilege by appending to its opposition papers the manager’s certification. Thus, Willingboro expressly waived the mediation communication privilege in responding to the motion.

Ultimately, in this case, the Court held that settlement agreement was enforceable, however, in order to avoid these issues in the future, the Court concluded: “if the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed by the parties before the mediation comes to a close.”

Going forward, if settlement at a mediation is achieved its terms must be memorialized in writing, signed by the parties and signed by the mediator. Further, it is advisable to include language in the term sheet which states that the mediation communication privilege is waived for the purpose of enforcing the settlement. Failing to do so will result in an unenforceable settlement agreement. In those complex cases where it is not possible to memorialize settlement terms in one sitting, the parties should reconvene with the mediator and parties so that the terms can be set forth and signed.

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# LITTLE LEAGUE

*BRIAN O'TOOLE, ESQ.*

The average American male believes he is capable of coaching his children in any number of sports. Never mind the fact that during our youth, our choices were limited to football, basketball and baseball. It is my observation that of all the sports, all American males believe they are experts in baseball and can skillfully coach it. Because of this, there is no shortage of volunteers to serve on the various Boards that administer the Little League. After having been invited to become a Board member back in the 80's, I attended my first and last meeting. It seems the majority of the meeting was spent in arguments between the team managers as to how players would be drafted. Each manager would have an idea as to how the rules should be utilized to benefit his team. One manager thought that since the biggest and best player in the draft lived next door to him, he should be allowed to draft him so his son could go to all the games with him and it would ease the burden on that player's single mom. How thoughtful! In any event, I was unable to get away cleanly, so I volunteered to be an assistant-coach. It's important to know that you should never, ever volunteer to be "The Coach". Having that "Asst" in front of your title allows you to agree with that irate parent whose child didn't play enough. I would routinely say "You make a good point" and then direct that parent to "The Coach".

My first assistant coach assignment was T-Ball. I firmly believe the person who invented T-Ball had other hobbies such as watching grass grow or paint dry. Since six and seven year olds really have no business trying to play baseball, they are allowed to hit the ball off a tee, which seems surprisingly simple. Unfortunately, many of the youngsters either completely whiff or hit the tee. Couple this with the fact that the entire opposition team is playing the field, you are confronted with the exciting proposition of watching a ball go ten feet or less and then get thrown all over the infield and outfield. I have personally witnessed more inside the infield home runs than I care to mention. But no description of T-Ball would be complete without my mentioning the Ryan twins. These two little girls would only go onto the field if they could hold hands and skip and that's exactly what they did.

To add to the interest, every player gets to bat in each inning. Although the games are only three innings, all 12 to 15 players on each team bat every inning. Probably the only positive factor is that a T-Ball game makes your weekend seem so much longer. While the average game length is probably no more than two hours, we're talking a really mean two hours! One mother actually knitted a sweater during a game.

And then there are the parents who have no official designation and watch the action from the deep right field corner. You will normally see a cooler or two and they are consuming liquids from the tell-tale red plastic cups. My personal research suggests these beverages are rarely iced tea or lemonade. To also enhance the quietude of a T-Ball game, there are always family pets present who routinely break away and enter the field of play, increasing the number of crying ballplayers.

From those families who actually survive T-Ball, they graduate to the minor and major leagues. There are drafts that take place in these leagues. One manager I assisted would go to the draft with notes and spread sheets he would then lay out in front of us. After telling him that I thought he had lost his grip, I explained to him that there were only a handful of really good players and everyone knew who they were anyway. The rest of our roster should be filled out by the players who just wanted to have fun and their parents knew it. We didn't win many games, but we smiled a lot.

One other requirement I had was that everyone had to sing "Take me out to the ballgame" after the game. It was always my belief that while not everyone could hit a home run or make a great defensive play, everyone could sing the song. I can't tell you how many kids and parents come up to me all these years later and remember how we sang the song. It continues to be a great source of satisfaction to me, knowing in some small way, I enhanced their childhood memories.

**Play Ball!**





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