

# CONSTRUCTION LAW AND LITIGATION

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## IN THIS ISSUE

*The full impact of COVID-19 is yet to be felt, as building owners and designers now grapple with making the spaces we occupy safe. With comparisons to “sick building syndrome” an easy analogy, full compliance with all regulatory and advisory guidance is essential to avoid potential liabilities.*

## A Recurrence of Sick Buildings in the Age of COVID

### ABOUT THE AUTHOR



**William S. Thomas** is a co-founder and member of Gausnell, O’Keefe & Thomas, LLC, in St. Louis, Missouri where he focuses his practice on handling matters involving the construction process, from up-front contract reviews, commercial litigation, professional liability defense and trial work. He has represented owners, contractors, subcontractors, architects, engineers, land surveyors and landscape architects in all phases of construction claims. He also handles product liability claims, other general commercial disputes and general liability claims. He is licensed to practice law in Missouri and Illinois, the Federal Court of Claims, and several Federal Courts. He is a past president of the Lawyers Association of St. Louis, the local trial bar. Bill is involved in many professional organizations, including the IADC, and the Missouri Organization of Defense Lawyers, the Defense Research Institute and its Construction Law Committee, Product Liability Committee, and Building Products - Substantive Litigation Group, and Professional Liability Committee, where he served on the Steering Committee, and Design Professional Subcommittee. Bill is an associate member of the ASCE and the AIA and is a Fellow of the Construction Lawyers Society of America. He is recognized by U.S. News - Best Lawyers as a Best Lawyer in Construction Law. He is a frequent lecturer and writer on a number of issues, from product liability to construction. He can be reached at [wthomas@gotlawstl.com](mailto:wthomas@gotlawstl.com).

### ABOUT THE COMMITTEE

The Construction Law and Litigation Committee consists of lawyers who represent general contractors, design/build firms, subcontractors, construction lenders, architects, engineers and owners. The Committee provides an opportunity to keep up to date on the latest developments in construction law, as well as a good networking and referral source for experienced construction litigators throughout the country. Members can also obtain information on liability and damage experts with e-mail inquiries to the Committee. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

*How many of us, back in the days when we would actually sit in our office and think such things, ever thought to ourselves, "I wonder where the air coming in here has been?" Or, like me, could never seem to get the air temperature just right. I once had an office that periodically showered black soot or some such deleterious material all over my desk from the vent above. Now that we are venturing back into the office or classroom or large public buildings like courthouses in larger numbers, we are left to wonder whether anything has been done to improve the quality of the indoor air we breathe.*

#### **Wall Street Journal Article Highlights Importance of Indoor Air Quality**

A recent article in the Wall Street Journal highlights a looming issue facing owners, landlords, operators and designers of a whole host of commercial and institutional real estate: how do you prevent the spread of COVID-19 or other airborne pollutants, particulates and viruses, and does it require a totally new way of looking at ventilation and HVAC operation and design? In fact, the subtitle to the article suggests: "Reopening schools and businesses should upgrade air systems, open windows and take other measures to ensure clean air, scientists say." (Read the entire article, "Key to Preventing COVID-19 Indoors: Ventilation," at: <https://www.wsj.com/articles/key-to-preventing-covid-19-indoors-ventilation-11598953607>)

Recently, the nation's leading membership organization on building ventilation and conditioning design and construction, the American Society of Heating, Refrigerating and Air-Conditioning Engineers, (ASHRAE), recommended extensive measures be undertaken to assess whether buildings of all types are ready to address the concerns of this new environment where a virus is spread so easily through the air. (See ASHRAE's Building Readiness and Building Guides for all different types of structures, owners and operators here:

<https://www.ashrae.org/file%20library/technical%20resources/covid-19/ashrae-covid19-infographic-.pdf>).

#### **ASHRAE Recommends Rigorous Review of HVAC Systems**

Before we return to our old way of doing things, ASHRAE recommends our familiar haunts get a once over. Implementation of measures to address air quality concerns requires first a thorough and detailed review of existing HVAC components, systems, controls and automation systems. These investigations should be performed by competent "building readiness teams," made up of properly licensed and qualified professionals, contractors and maintenance and operations personnel with knowledge of the systems involved. Together, this team will prepare a survey of existing equipment and operating routines, and develop an appropriate mitigation strategy and readiness plan for the specific building, uses and equipment in issue. ASHRAE sets out on its website the detailed steps property owners

and managers should undertake to address our current crisis.

As you might imagine, simply increasing “ventilation” as suggested by the WSJ article is not easily achieved in buildings in most US climates, as humid, hot or cold outside air needs to be treated and conditioned in such a way that the capacity of the installed HVAC systems can handle. Increasing outside air volume, the number of exchanges or cycles, opening windows, installing fans and filters, cleaning coils, all could be required for the system to operate in such a way as to minimize opportunity for a mass infection event, and maximize internal air comfort and quality. But, with so little data, it is uncertain at this time the exact nature of a building’s contributions to the spread of the virus.

### **Case Studies Show Importance of Air Quality for Confined Spaces**

ASHRAE did provide an interesting case study from an exemplar call center on the 11<sup>th</sup> floor of a commercial office building, which experienced a mass exposure event. As you can see from the blue seats below, 94 of 216 employees on the floor were infected, with the majority on one side of the office. While the exact number of people infected by respiratory droplets or airborne exposure versus tactile transmission from door handles, shared amenities, elevator buttons etc. is unknown, it seems likely sharing an enclosed space and the same air for prolonged periods increases the chances of exposure and ultimately infection. (The investigators of this case study noted that only 3 other building

occupants on different floors were infected, and they could not conclude if their exposures were as a result of some other event or this cluster, whether in a common space or through the building’s HVAC systems).



Figure 2. Floor plan of the 11th floor of building X, site of a coronavirus disease outbreak, Seoul, South Korea, 2020. Blue coloring indicates the seating places of persons with confirmed cases.

(See: <https://www.ashrae.org/technical-resources/commercial>)

### **Cases on “Sick Buildings” Provide Guidance for Potential Liabilities**

Sick building syndrome and building-related illnesses are not a new phenomenon. They manifest in a complex mix of symptoms, such as minor respiratory irritations, asthma, neurotoxic effects, gastrointestinal disturbance, skin dryness, or sensitivity to smell, among other conditions, by occupants in office and public buildings, schools and hospitals. Studies on large office buildings all over the world substantiate the phenomena. The accumulated effects of a number of factors, such as indoor environmental quality, building characteristics, building dampness, and activities of occupants impact these

conditions. Building-related illnesses may be unavoidable as modern office and institutional buildings are designed to be airtight, energy-saving, limiting of natural ventilation and with its HVAC system re-circulating versus replacing fresh air. Susceptible populations will necessarily be impacted by one or more of these operating conditions. Legitimate or illegitimate health impacts of this cycle has resulted in increased litigation over the conditions building occupants encounter.

Typically, the parties involved with the sale, design, construction or operation of a building are targeted in claims relating to sick building syndrome. This can also include developers, architects, engineers, project managers, general contractors and their subcontractors, involved with the design and construction of the building. Also, the manufacturers, dealers, and distributors of HVAC products can be sued. The cases are difficult and expensive to prove, but come down to a battle of the medical and scientific experts, and whether they can prove a but-for causal link of the symptomology experienced to some material defect or operational issue with the building which led to an exposure event. With COVID-19, that proof may be much easier than previously encountered with more traditional “sick building” symptomology.

### **Missouri Case Sheds Light on Risk Building Owners Face**

COVID-19 injects an interesting new pathogen into the sick building syndrome body of cases. Not surprisingly, there has been an explosion

of exemplar lawsuits all over the country (although a majority of them relate to COVID exposure in penal institutions or other facilities or for occupations deemed “essential,” where employees or inmates are forced to occupy the spaces in issue). A recent decision in Missouri brought these types of claims into focus here in the “Show Me” state. The case of *Rural Community Workers Alliance v. Smithfield Foods*, 2020 U.S. Dist. LEXIS 78793 (Mo. Ct. App. 2020), addressed the issue of exposure to COVID in a rural Milan, Missouri meat packing plant, and highlighted the Missouri Court of Appeals’ reluctance to grant a TRO for claims surrounding the potential environmental unsafety of their place of employment.

In the case, the workers collective filed suit against the plant claiming it was not taking adequate steps to prevent transmission of the COVID-19 virus, despite implementation of OSHA and Department of Homeland Security “critical infrastructure” procedures aimed at preventing workplace exposure and community spread. The suit sought a temporary restraining order, and a preliminary injunction to force the employer to provide expansive enhancements to its policies and procedures to address workers’ safety concerns. While none of the requested changes appear to have been aimed directly at the plant’s HVAC or ventilation systems, the employees were seeking enhanced social distancing protocols, physical barriers and additional personal protective equipment and sanitizing measures be provided.

As an initial matter, the Court found the suit was preempted by OSHA/USDA's Federal jurisdiction. Those agencies provide an administrative procedure claimants must first exhaust before turning to the courts. The Court also noted plaintiffs failed to establish an immediate threat of irreparable harm in that there were no confirmed COVID cases, and also noted, "unfortunately, no one can guarantee health for essential workers—even the general public—in the middle of this global pandemic." Significantly, the Court noted the employer had taken a number of measures to prevent spread of the virus and protect employee health.

Significant to the "sick building" analysis, the Court found plaintiffs failed to show they were likely to succeed on their safe workplace claims, stating:

Under Missouri law, Plaintiffs must prove that Smithfield negligently breached its duty to provide a safe place to work and that such negligence was the direct and proximate cause of the Plaintiffs injuries. *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010). As discussed, Smithfield has taken substantial steps to reduce the potential for COVID-19 exposure at the Plant and appears to the Court to be complying with the Joint Guidance regarding the same. Thus, Plaintiffs are not substantially likely to prove Smithfield breached any duty.

More importantly, however, Plaintiffs have not alleged they have suffered any

injury, only that they may suffer an injury in the future. A potential injury is insufficient to state a claim of the breach of the duty to provide a safe workplace under Missouri law.

Instructive in the ruling is the Court's acknowledgement that the employer had taken "significant measures," "substantial steps," and appeared to be in compliance with OSHA, Homeland Security and other guidance documents for addressing spread of the virus. Coupled with its pessimism about being able to prove a causal connection between exposure and the workplace, the Court denied the requests for injunctive relief.

### Conclusion

The lessons of these cases serve as an outline to our clients on how to avoid workplace exposure claims. It is imperative building owners and managers are following all local, regional and national guidance documents, put in place to protect employees from the spread of the virus. It is also incumbent on them to undertake the rigorous recommendations of ASHRAE for reopening and continued operation and maintenance of their buildings and associated HVAC systems.

As the case study above seems to portend, a mass exposure event in the office environment may not be all that hard for some hired gun indoor air quality expert to make to a jury.

The future of these claims is yet to be seen, particularly with many office, public and

institutional buildings at only a fraction of their pre-pandemic capacity. However, it is clear that lawsuits for COVID exposure in the office environment are here, and we should be prepared to address them. Essential to a successful defense will be the rigor that building and business owners use to implement and police procedures to keep their tenants and employees safe in this time of national emergency. Much remains to be done before buildings can be safely reopened,

and owners are prepared and secure in the knowledge they can defend the inevitable claims to come.

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