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# Asbestos Bankruptcy Report

## **Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts: The Economic Incentives Behind The New Recruitment Of Lung Cancer Cases**

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# Commentary

## Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts: The Economic Incentives Behind The New Recruitment Of Lung Cancer Cases

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*[Editor's Note: Marc C. Scarcella and Peter R. Kelso, Managers at the Washington, DC office of Bates White Economic Consulting. Joseph Cagnoli, Jr., Shareholder in the Philadelphia office of Segal McCambridge Singer & Mahoney, Ltd. The views of the authors do not reflect the opinions of their respective firms, their clients, or Mealey's Publications. © 2013 by Marc C. Scarcella, Peter R. Kelso and Joseph Cagnoli, Jr. Responses are welcome.]*

### Introduction

In recent years the number of lung cancer lawsuits against asbestos defendants in the U.S. tort system has increased dramatically in key jurisdictions. While the current lung cancer filing rates have yet to match the totals from their previous spike in the late-1990s and early-2000s, this recent rise in filings present two key questions; why are lung cancer case filings on the rise, and how long will the trend continue?

Unlike mesothelioma filings patterns, the number of lung cancer lawsuits filed against asbestos defendants in a given period is difficult to predict through the science of exposure and incidence of disease. Over time, the rate of lawsuits filed for mesothelioma has been reasonably consistent with estimates of national incidence. This correlation between incidence and lawsuits allows researchers to predict future claiming patterns through epidemiological models based on occupational exposure to asbestos.<sup>1</sup> On the other hand, the claiming patterns for alleged asbestos-related lung cancer lawsuits have experienced dramatic shifts over time despite a consistent level of

national incidence. Such fluctuations suggest that the level of lung cancer lawsuits in the asbestos tort is not dependant on the availability of potential cases, but rather the changing economic incentives for plaintiff law firms to recruit lung cancer cases.

The following commentary will explore the economic incentives behind past and present lung cancer filing trends in the asbestos tort system and will show that the availability of 524(g) asbestos bankruptcy trust funds has:

- increased the economic incentives for plaintiff law firms to directly recruit current lung cancer claimants through television and internet marketing campaigns, and
- prompted a new wave of non-malignant screenings, which historically have indirectly recruited volumes of lung cancer claims as well.

This commentary will conclude with a discussion on attorney advertising and the legal and economic impact these increased lung cancer filings may have on defendants that are currently litigating claims in the tort system, including:

- the pressure to settle meritless or nuisance cases in order to avoid spending multiples on litigation costs, and
- the reduced setoffs that current and future mesothelioma claims will receive from 524(g) trusts as a result of asset depletion by payments to lung cancer and non-malignant claims.

To illustrate the rapid rise of lung cancer claims in the tort system, Exhibit 1 shows the recent increase in lung cancer filings in Madison County, Illinois and Delaware. While these two jurisdictions represent the most extreme examples of this increasing trend, other prominent asbestos jurisdictions such as Philadelphia, New York City (NYCAL), and California have experienced an increasing level of lung cancer filings as well.

**Viability And Value Of Lung Cancer Claims In The Asbestos Tort System**

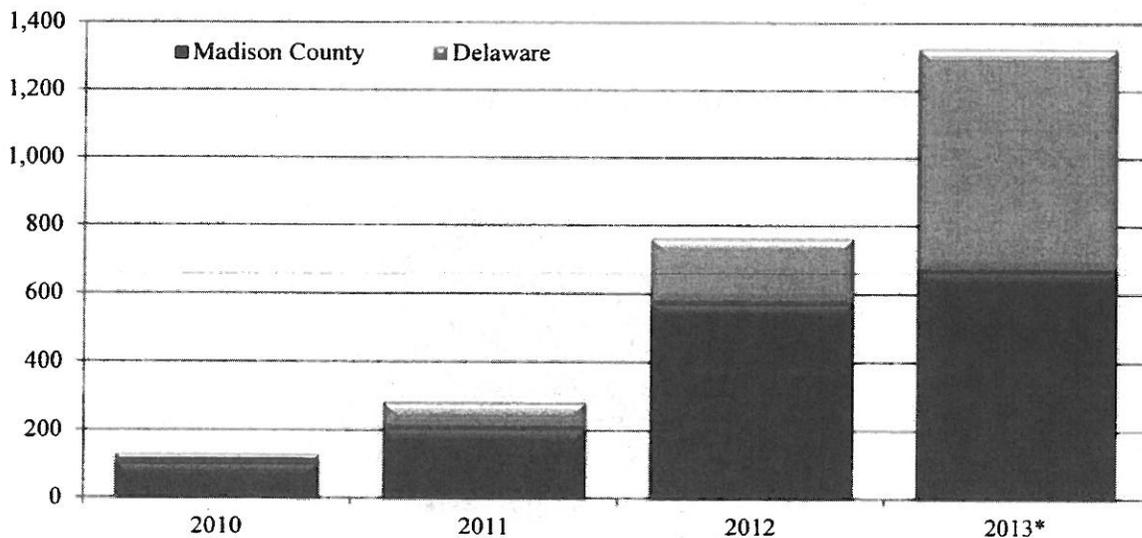
Historically, the value of asbestos claims in the tort system has been a function of both quality and quantity. In general terms, the measure of quality arises from 1) the medical severity and physical impairment of the injury, and 2) the evidentiary strength establishing a causal link between the injury and asbestos exposure. For a signature disease such as mesothelioma, the quality of the claim is often obvious. The terminal nature and level of physical impairment of these cases is significant, and even with recent epidemiological studies exploring alternative causation, it is still widely accepted that asbestos exposure is the primary cause of the disease. As a result, mesothelioma cases command the highest settlements from asbestos defendants relative to other claims. The only limitation to bringing mesothelioma cases in the tort system is the finite number of annual diagnoses. According to

estimates by the Surveillance, Epidemiology, and End Results Program (SEER), there are approximately 3,000 diagnosis of mesothelioma each year in the United States.<sup>3</sup>

On the opposite side of the severity spectrum are non-malignant conditions such as pleural plaques and pleural thickening. There is little dispute that these conditions cause little to no impairment unless progressed to a rare, severe level. As such, these cases command little to no value in the tort system when litigated on individual merit. However, the quantity of individuals occupationally exposed to asbestos that could show even minimal levels of pleural scarring or thickening is significant. According to asbestos claim data from the Manville Personal Injury Settlement Trust (Manville Trust), over 500,000 non-malignant claims were filed from 1988 through 2001. So while the severity and corresponding quality of these cases are minimal, the quantity can be substantial; and as we discuss later in this commentary there can be value in quantity, especially when the recruitment cost per claim is low.

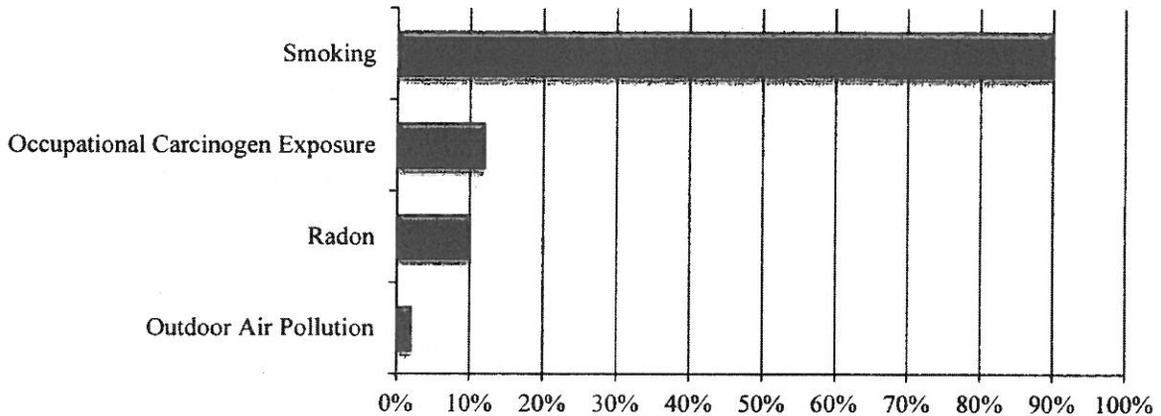
For lung cancer cases the severity and level of impairment is significant, but the overall quality of the claim against asbestos defendants is often tenuous. Unlike mesothelioma diagnoses that have strong causal links to asbestos exposure, lung cancer can be caused in part

**Exhibit 1: Lung Cancer Filings in Madison County and Delaware<sup>2</sup>**



\*2013 is annualized with data through Q3 for Delaware and through Q2 for Madison County

**Exhibit 2: Estimated Attributable Portion of Lung Cancer Cases by Cause<sup>6</sup>**

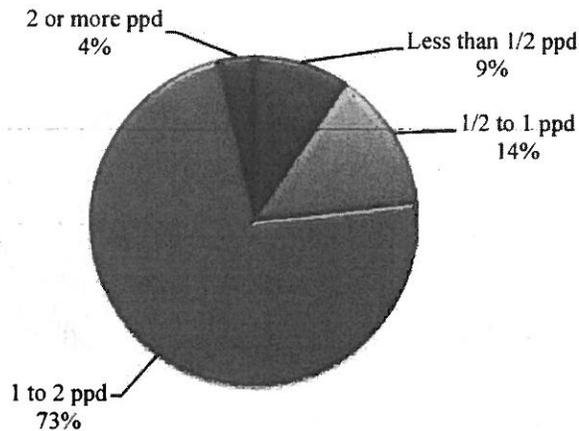


by a number of risk factors, the most prevalent of which is smoking. Smoking is estimated to be a contributing factor in 90% of lung cancer cases.<sup>4</sup> Alternative risk factors such as occupational carcinogen exposures, including asbestos, uranium and coke (*an important fuel in the manufacture of iron in smelters, blast furnaces, and foundries*) are estimated to contribute to 9-15% of cases, while radon exposure and general outdoor air pollution are estimated to contribute to 10% and 1-2% of cases respectively.<sup>5</sup>

Given these general causal estimates, it is not surprising that an overwhelming majority of alleged asbestos-related lung cancer cases involve current and former smokers. According to Manville Trust data as of 2002, roughly 90% of lung cancer claimants disclosed

a history of smoking.<sup>7</sup> Of the 90%, only 10% claimed to have at least 15 years of smoking cessation, thus leaving smoking as a significant contributing factor in more than 80% of cases.<sup>8</sup> For the remaining 20% of the cases, cigarette smoke likely remained a contributing factor due to second-hand exposure. More recently, we reviewed a sample of lung cancer cases filed in the Philadelphia Court of Common Pleas and found that over 75% disclosed a history of smoking and less than 3% affirmatively denied ever smoking at all.<sup>9</sup> Of the cases that disclosed a smoking history, over 75% smoked at least 1 pack per day, the average smoking duration was 39 years, and nearly 20% were still smoking at the time the lawsuit against asbestos defendants was filed. Exhibit 3 summarizes data from this sample.

**Exhibit 3: Number of cigarette packs smoked per day (ppd)**



As a result of this overlap between smoking and alleged asbestos exposure, a majority of lung cancer claims filed in the tort system against asbestos defendants historically have had limited or no value when litigated on their individual merits. To counter the notion that asbestos exposure should not be considered a causal factor in the case of an individual with significant smoking history, plaintiff law firms have made arguments based on an alleged "synergistic" effect that increases the risk of lung cancer when smoking is combined with asbestos exposure.<sup>10</sup> Much of this argument is predicated on the scientific theory that smoking weakens the human body's internal defenses to ward off and express harmful toxins as they enter the respiratory system.<sup>11</sup> According to this hypothesis, the cilia or protective fibers in the throat are damaged by smoking therefore allowing more foreign contaminants, including asbestos fibers, to filter down the air passageway and into the lungs.<sup>12</sup> However, various scientific studies have failed to reach a consensus on the level of excess risk, if any, that exists due to this alleged "synergistic" effect.<sup>13</sup> In fact, defendants have refuted this argument by pointing to the fact that there is no definitive evidence that a synergy actually exists between smoking and asbestos exposure.<sup>14</sup>

### **The Historical Impact Of Non-Malignant Screenings On Lung Cancer Filings**

The mass recruitment of asbestos claims is not a new phenomenon. Plaintiff law firms have always been extremely active and competitive in their search for potential asbestos claimants. In the relatively early days of asbestos litigation, solicitation or "screening" by asbestos plaintiff firms often utilized union and employment records to identify workers who may have been exposed to asbestos at a given worksite. This information was often used in conjunction with mobile screening vans in which representatives from plaintiff law firms would arrive at industrial worksites or union halls along with doctors or b-readers to medically screen workers in order to conclude if a potential asbestos claim existed. These early methods of plaintiff recruitment produced the first waves of asbestos claimants throughout the 1980s and ultimately led to the massive explosion of non-malignant claim filings in the 1990s and early 2000s.

The plaintiff bar's economic incentive for building up inventories of non-malignant claims through mass

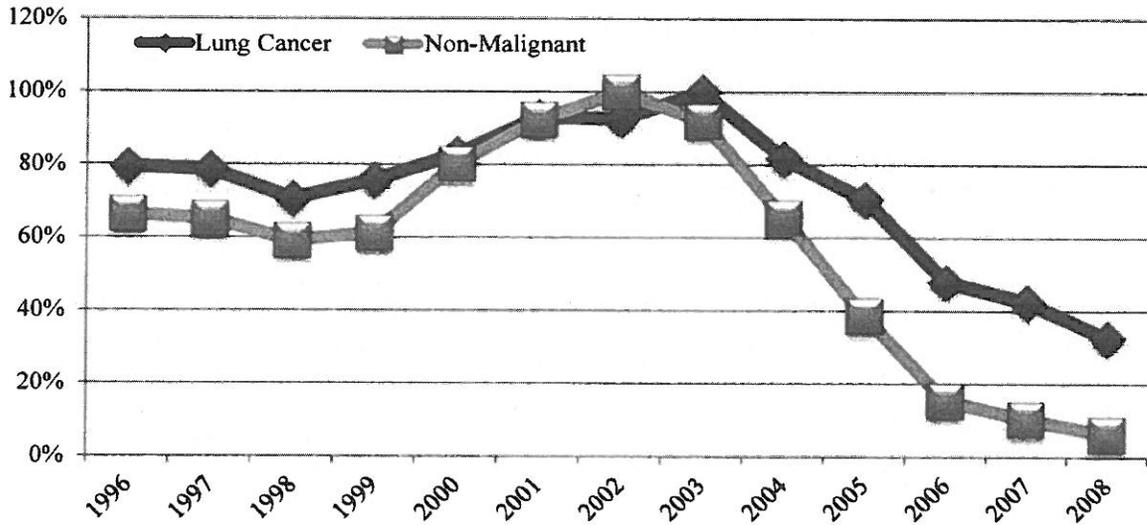
screening operations has been well researched by academic and legal scholars.<sup>15</sup> The most obvious benefit of building up large inventories of non-malignant claims was the settlement leverage gained in the tort system through claim quantity (*rather than quality*). One less obvious but equally significant benefit was the indirect recruitment of potential lung cancer cases during on-site screenings at factories, plants, and union halls.<sup>16</sup> In turn, lung cancer claims experienced a significant increase in filing rates during the 1990s as a byproduct of the non-malignant screening wave. Exhibit 4 illustrates the positive correlation between non-malignant and lung cancer tort filings during the 1990s and early 2000s. Though lung cancer filing rates did not drop as severely as non-malignancies in the mid to late 2000s the data suggests that the end of the screening era led to a significant reduction in lung cancer lawsuits.

Once recruited through non-malignant screenings, lung cancer cases could inexpensively be filed in the asbestos tort system and paid as part of inventory group settlements with individual defendants. The dynamic of group settlements allowed plaintiff law firms to bundle weaker cases such as unimpaired non-malignant and smoking lung cancer claims with higher value mesothelioma cases. Despite the likelihood of prevailing against the less meritorious cases at trial, most defendants chose to settle because the cost to litigate such a volume of cases would far exceed the cost of settling with large inventory groups. Moreover, by agreeing to group settlements defendants avoided the cost and trial risk of litigating the bundled mesothelioma cases.

During the peak years of non-malignant screenings, settlement facilities such as the Center for Claim Resolution (CCR) often resolved a large volume of cases through group settlements.<sup>17</sup> In fact, G-I Holdings, a former CCR defendant, resolved 160,000 cases as part of group settlements with more than 250 cases per group.<sup>18</sup> As illustrated in Exhibit 5, the group settlement dynamic resulted in the CCR paying out nearly two-thirds of total indemnity in the late 1990s to non-mesothelioma cases that otherwise would have had limited value if litigated on individual merit.

Then in the mid-2000s the viability and value of non-malignant claims in the tort system changed when inactive dockets for unimpaired cases were

**Exhibit 4: Annual ratio to peak filings for Lung Cancer and Non-Malignant Claims**



Source: Based on a 3-year moving average on a sample of national case filing data

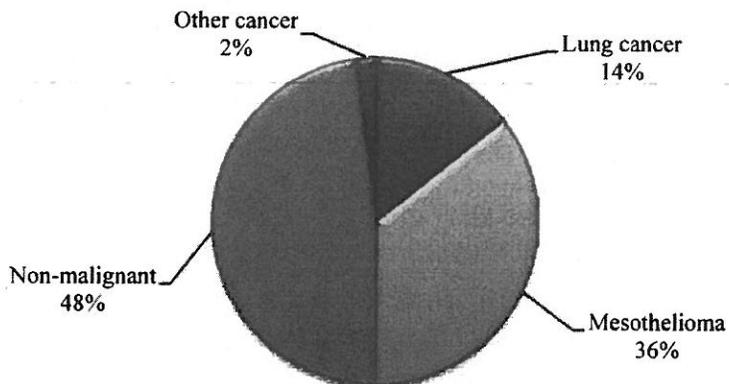
adopted in many asbestos jurisdictions. Restricting non-malignant claims from active dockets removed the volume that plaintiff law firms had used to leverage group settlements. In turn, it all but eliminated the economic incentive to continue non-malignant screenings, which had a profound impact on lung cancer filings. In the absence of non-malignant screenings plaintiff law firms were no longer benefiting from the indirect recruitment of lung cancer cases. In order to maintain the quantity of lung cancers cases in the tort system, plaintiff law firms would have had to recruit them directly. However, without the ability to bundle the smoking lung cancer cases as part of

inventory group settlements, the value of recruiting these cases did not outweigh the costs. If it had, then lung cancer filing rates would not have dropped so dramatically following the end of the non-malignant screening era. As a result of the reduction in non-malignant and lung cancer cases, the focus of the litigation shifted almost exclusively to mesothelioma lawsuits.

**The Emergence Of Bankruptcy Trusts As A Substantial Source Of Compensation**

As our previous commentaries have detailed, one of the most significant changes the asbestos litigation has undergone in recent years is the growth of the

**Exhibit 5: CCR indemnity payments between 1997 and 1999<sup>19</sup>**



asbestos bankruptcy trust system.<sup>20</sup> Companies that are forced into bankruptcy as a result of significant asbestos litigation costs can reorganize under Section 524(g) of the U.S. bankruptcy code. Corporate reorganizations under 524(g) involve the creation of personal injury trusts intended to assume the legal responsibility of the debtor's asbestos-related liability following bankruptcy plan confirmation. In each case the debtor funds the trust with assets and in exchange all current and future asbestos-related lawsuits against the debtor are channeled to the trust. Between 2000 and 2003, dozens of primary asbestos defendants filed for bankruptcy protection. Following years of bankruptcy proceedings many of the most prominent defendants in this group emerged between 2006 and 2009 with confirmed plans of reorganization that funded trusts with nearly \$20 billion.<sup>21</sup>

In general, trusts are designed to administer payments to compensable claims through a non-litigious process that is based mainly on a set of presumptive qualification criteria. The procedures that determine the payment an individual claim will receive are outlined for each trust in documents typically titled Trust Distribution Procedures ("TDP").<sup>22</sup> These procedures describe the processes by which claims are reviewed, qualified, and paid if compensable. A TDP will provide a list of compensable disease categories that may range from malignant asbestos-related injuries such as mesothelioma to less severe non-malignant respiratory conditions such as asbestosis and pleural plaques.

The compensable disease categories and corresponding settlement values are intended to compensate claimants based on the relative values for substantially similar claims in the tort system.<sup>23</sup> However, for many trusts the comparative tort values are often based on the debtor's settlement history in the tort system during the years immediately prior to bankruptcy, making trust compensation criteria and settlement values static relative to a tort system that is constantly evolving as a result of judicial and legislative reform. An example of this shifting legal environment is the aforementioned wave of non-malignant claims that flooded the tort system in the 1990s and early 2000s. During that period nearly 90% of claims paid in the tort system were for non-malignant claims, constituting roughly 50% of claim payments.<sup>24</sup> This historical payment distribution is in stark contrast to the current tort system that has seen payments to non-malignant

claims get reduced to 2% of total settlements in recent years as a result of inactive docket tort reform.<sup>25</sup>

Yet despite the shifting litigation environment in the tort system the trust system remains antiquated in its interpretation and payment of compensable claims. As we detailed earlier in the commentary, the historical value associated with most non-malignant and lung cancer claims in the asbestos tort was predicated on quantity, not quality. The sheer volume of these tenuous claims in the tort system during the 1990s and early 2000s resulted in settlements from asbestos defendants whose alternative would have been to spend multiples more to litigate and prove the meritless nature of these claims. If assessed on an individual basis, most of these claims would have commanded little to no recovery from asbestos defendants. And though trust procedures intend for claims to be reviewed and qualified on an individual basis, the criteria and payment amounts they apply are modeled after characteristics of claims that were paid as part of inventory group settlements, as opposed to individual assessment. As a result, asbestos bankruptcy trusts today are spending considerable resources to pay claims that have little to no compensability in the current tort system. This raises questions about the appropriateness of trust payment and qualification criteria relative to the current tort system, and whether or not amendments need to be made to trust procedures to better comport to the contemporary litigation environment.

### **The Trust System's Willingness To Pay Tenuous Claims**

Trusts typically provide two processes under which a claim can be qualified and paid. The first process is often referred to as "Expedited Review" and is based on claims meeting a minimum set of presumptive medical and exposure criteria. Claims that qualify for payment and file under Expedited Review will receive a scheduled amount that is not negotiated. Alternatively, many trusts offer an "Individual Review" option allowing for claim amounts up to a published maximum. Factors that determine the actual amount an Individual Review claim receives may include, but are not limited to, age at diagnosis, jurisdiction, and settlement history of the claimant's counsel.<sup>26</sup> Exhibit 6 summarizes the Expedited Review payment criteria that most TDPs have adopted for lung cancer and non-malignant claims with either moderate or no impairment.

**Exhibit 6: Trust payment qualification criteria<sup>27</sup>**

Disease categories	Presumptive Medical and Exposure Criteria <i>(some variations)</i>
<b>Lung Cancer I</b>	(1) Primary lung cancer plus underlying Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure, (3) 5-years Significant Occupational Exposure, and (4) medical causation statement.
<b>Other Cancer</b>	(1) Diagnosis of a primary colo-rectal, laryngeal, esophageal, pharyngeal, or stomach cancer, plus underlying Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure, (3) 5-years Significant Occupational Exposure, and (4) medical causation statement.
<b>Asbestosis/Pleural II</b> <i>(considered "Moderately Impaired" for purposes of this paper)</i>	(1) Bilateral Asbestos-Related Nonmalignant Disease plus a PFT less than 80% of normal, with (2) six months product exposure, (3) 5-years Significant Occupational Exposure, and (4) medical causation statement.
<b>Asbestosis/Pleural III</b> <i>(considered "Unimpaired" for purposes of this paper)</i>	(1) Bilateral Asbestos-Related Nonmalignant Disease, (2) six months product exposure, and (3) 5-years asbestos exposure.

The criteria in Exhibit 6 reveal four points of particular note:

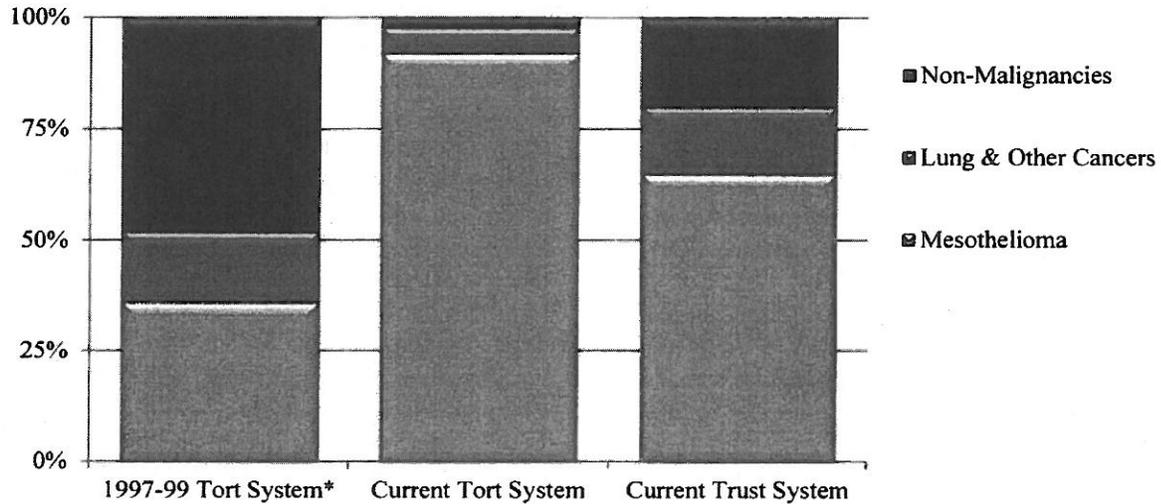
- **Smoking history is not required:** The lung cancer category does not require any disclosure of smoking history for Expedited Review.
- **Underlying asbestosis can be supported by minimal medical evidence:** The qualifying definition of "Bilateral Asbestos-Related Nonmalignant Disease" can be simply met through evidence of bilateral interstitial fibrosis, bilateral pleural plaques, bilateral pleural thickening, or bilateral pleural calcification. An acceptable diagnosis can come from (i) an X-ray reading from a qualified b-reader, (ii) pathology, or (iii) an X-ray or CT scan read by a Qualified Physician, which is a defined TDP term that includes board-certified pulmonologists, radiologists, or physicians specializing in occupational or internal medicine.
- **Significant Occupational Exposure is more inclusive than it sounds:** The qualifying definition of Significant Occupational Exposure may include 20 industries and nearly 2,000 combinations of industries and occupations where asbestos exposure was likely.<sup>28</sup>
- **The trusts have a low standard for the definition of non-smoker:** If a lung cancer claimant

is a "non-smoker" then he or she can pursue a higher payment under Individual Review. However, the TDP definition of "non-smoker" includes a claimant that has at least 12-years of smoking cessation prior to the diagnosis of lung cancer regardless of the number of pack years the claimant had smoked. Based on this trust standard, of the former smokers in the sample of Philadelphia cases we reviewed, nearly 40% would be considered "non-smokers" despite accumulating a significant number of smoking pack years.

Given the low qualification standards established by these TDP criteria, it is not surprising that trust claim payments have exceeded \$15 billion since 2006.<sup>29</sup> And while mesothelioma claims constitute over 90% of current tort indemnity payments,<sup>30</sup> limited trust disclosures suggest that only two-thirds of current trust payments go to mesothelioma claims.<sup>31</sup> The remaining payments go to compensating claimants with other injuries or conditions, including smoking lung cancers and non-malignancies with moderate or no impairment. Exhibit 7 illustrates the difference in claim payment distribution between the trust and tort system.

Most TDPs contain payment collars that cap the maximum amount of annual claim payments that

**Exhibit 7: Trust and tort system distribution of claim payments by disease**



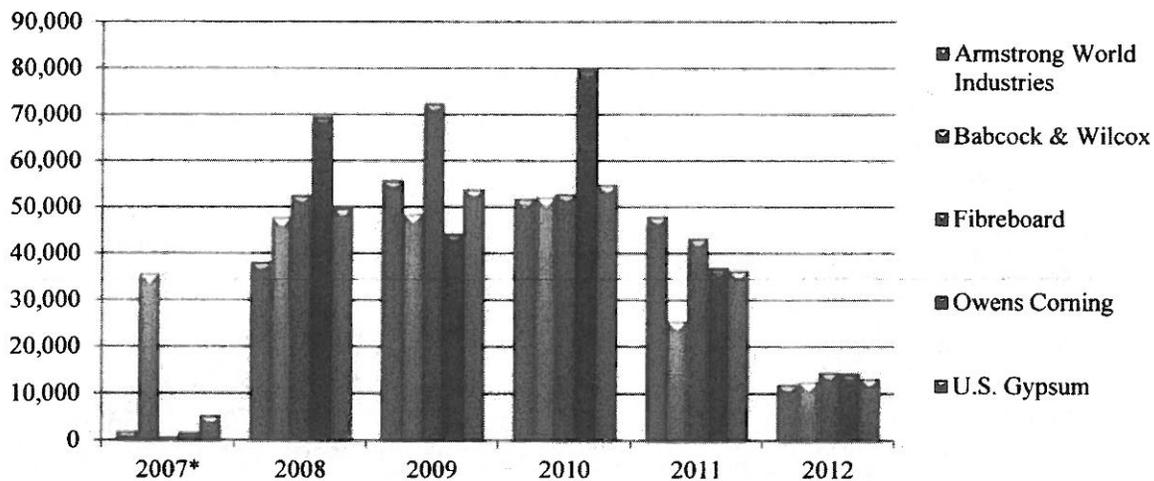
\*Based on CCR data summarized in Exhibit 5

can go to moderately or unimpaired non-malignancies, which will prevent the trust system from reverting back to the payment distributions of the late 1990s and early 2000s in the tort system.<sup>32</sup> However, the willingness of trusts to pay non-mesothelioma claims has once again created an economic incentive for mass non-malignant screenings and lung cancer recruitment.

**Trust Data Indicates That Non-Malignant Screenings Are Back**

As previously mentioned, bankruptcy trusts under section 524(g) assume the legal responsibility of resolving present and future claims, which included large inventories of unresolved cases that were filed against the reorganized defendants prior to or during the bankruptcy proceedings. In turn, once operational,

**Exhibit 8: Number of claims paid by select trusts that were confirmed in 2006**



\*The Babcock & Wilcox bankruptcy was confirmed in January 2006, allowing the trust to establish its operations and begin paying a significant number of claims in 2007. The other four bankruptcies were not confirmed until the second half of 2006.

these trusts are often inundated with legacy claims that require resolution. In fact, following the bankruptcy plan confirmation of a number of prominent defendants between 2006 and 2010, the trust system paid out \$12 billion in claim payments, including a peak of \$3.9 billion in 2009 alone.<sup>33</sup> As illustrated in Exhibit 8, large trusts such as Armstrong World Industries, Babcock & Wilcox, Owens Corning, Fibreboard, and U.S. Gypsum each cleared significant pending claim inventories between 2008 and 2011.

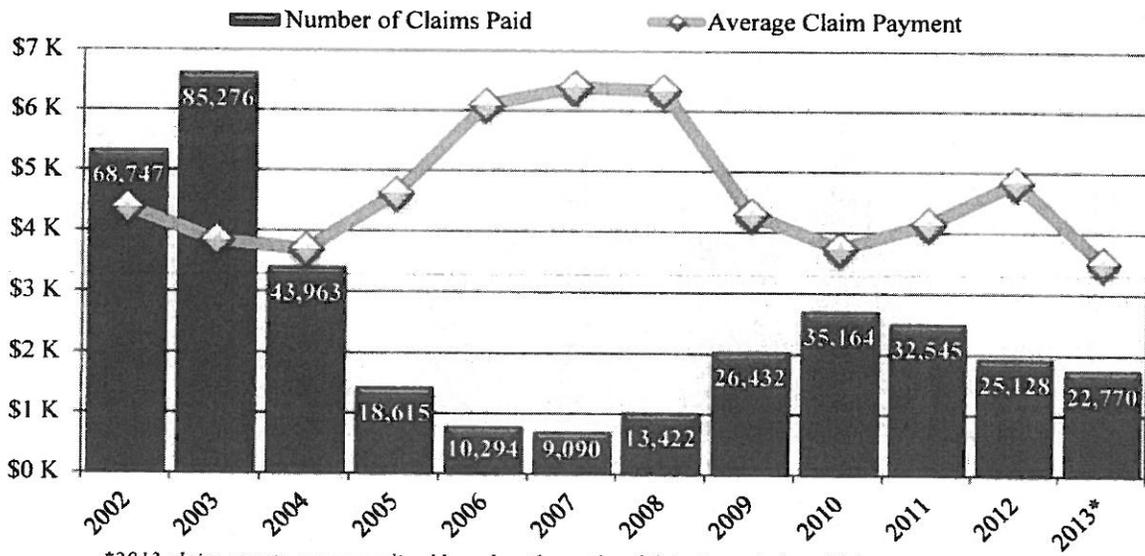
As claim inventories have been paid down, the incentive has increased for plaintiff law firms to recruit new claims through screening operations and advertising. Even after paying down an average of 50,000 claims per year between 2008 and 2011, the five trusts identified in Exhibit 8 each received 23,000 to 26,000 new claim filings in 2012 (note in Exhibit 8, each of these five trusts paid 12,000 to 15,000 claims in 2012). With less than 3,000 new diagnoses of mesothelioma each year in the United States, this data indicates that more than 20,000 non-mesothelioma claims were recruited and filed in 2012 against the trust system.<sup>34</sup>

The annual data from the five example trusts in Exhibit 8 are consistent with the annual disclosures from

the Manville Trust. First established in 1988, the Manville Trust is the longest-standing asbestos bankruptcy trust and was processing and paying claims throughout the first non-malignant wave. Exhibit 9 summarizes the claims paid and corresponding payment data disclosed in the Manville Trust annual reports since 2002.<sup>35</sup> Not surprisingly, average claim payments were lowest between 2002 and 2004 during the peak of the non-malignant screening wave. In 2003 alone, the trust paid out over 85,000 claims at an average of less than \$4,000 per claim based on a 7.5% Payment Percentage (see endnote 33 for more detail). By 2005, inactive dockets in the tort system began to disincentivize the culling of non-malignant claims and the number of filings against the Manville Trust dropped to nearly 20% of the 2003 peak. In turn, as the number of claims paid decreased, the corresponding average amount each claim received increased as the trust paid a higher proportion of malignant cases.

Then in 2009 the number of claims paid began to increase and the corresponding average claim payments dropped to levels last experienced in the early 2000s. Between 2009 and 2012 the Manville Trust paid an average of nearly 30,000 claims per year, and unlike newly established trusts, the Manville Trust

**Exhibit 9: Average claim payment amount from the Manville Trust**



\*2013 claim counts are annualized based on 6-months of data through June 30th

did not have a substantial inventory of pending claims. In fact, any residual inventory claims were encouraged to file when the Manville Trust modified its statute of limitations (SOL) provision in 2010.<sup>36</sup> As a result, the number of claims paid in 2010 and 2011 exceeded 30,000 in each year as the last remaining legacy claims were filed and processed. However, prior to any notice of the SOL modification, the Manville Trust paid 26,000 claims in 2009; claims that were likely recruited by new screening operations that are once again profitable now that there are tens of billions of dollars available from newly established trusts. Moreover, if the modified SOL provision prompted plaintiff law firms to file any remaining inventory, it would suggest that 25,000 claims filed in 2012 were the result of new solicitation. In fact, in 2012 nearly 60% of the claims paid by the Manville Trust came from either Ohio, Texas, Virginia, Alabama, Mississippi, Maryland, Georgia, or South Carolina with an average payment of only \$2,400 per claim relative to the \$26,250 that the trust pays to mesothelioma claims. Given that this group were some of the more active states during the non-malignant screening wave of the 1990s and early 2000s, it is reasonable to assume that non-malignant screenings are back.

#### **The Profitability Of Non-Malignant Screenings In The Trust Era**

The solicitation of claimants by asbestos plaintiff firms is predicated on the proposition that the contingency fees derived from the claim resolution will produce a profit net of recruitment costs. Asbestos plaintiff firms have historically been successful in this exercise by filing large volumes of claims in the tort system, and taking advantage of the state court case consolidation rules in asbestos dockets. The bundling of cases involving various disease classes, where quantity often trumped quality, gave plaintiff firms leverage over an entire portfolio of claims and forced defendants to make economic decisions to resolve asbestos cases that were outside the boundaries of a defendant's legal liability. That paradigm was the catalyst for the successful mass recruitment of non-malignant claims during the 1990s and early 2000s, and remains the catalyst for screenings today. The only difference today is that the economic incentive for the mass recruitment of

non-malignant claims is driven by trust compensation as opposed to tort compensation.

In September 2011, Professor Lester Brickman testified on the topic of trust compensation and the economic incentive such funds have provided plaintiff law firms to once again engage in mass screening operations. In written testimony submitted to a U.S. House Judiciary Subcommittee, Professor Brickman estimated that mass screening operations would cost plaintiff law firms approximately \$500 to \$1,500 per claimant.<sup>37</sup> He also estimated the administrative cost of preparing and filing trust submissions to be \$1,000 per claimant, a cost that can be maximized through joint trust facilities that allow firms to file against multiple trusts with a single submission.<sup>38</sup> Further aiding in the efficiency and profitability of filing a high volume of non-malignant claims against multiple trusts is the fact that a significant majority of all active trusts represent the causal shares of companies that were once engaged in the manufacturing, distribution, or installation of thermal insulation products for industrial and commercial use. Given that the population of non-malignant claims is recruited through screening operations at union halls and industrial worksites, it is reasonable to expect that a single claimant will recover from at least twenty trusts.<sup>39</sup> In fact, we quantified the potential net recovery from fifteen trust payments that most, if not all, non-malignant claims could reasonably qualify through occupational exposure in industrial or commercial settings. Exhibit 10 summarizes the compensation either a moderately or unimpaired non-malignant claim could receive from the fifteen trusts. In addition, we calculated a weighted average payment per recruited non-malignant claim based on a conservative assumption that for every moderately impaired claim recruited through screening operations, two unimpaired claims will be recruited.<sup>40</sup>

The weighted average net recovery from a recruited non-malignant claim is nearly \$12,000 from the fifteen trusts summarized in Exhibit 10. There are, however, other available trusts. Specifically, there are over thirty additional active trusts that represent companies that either had a smaller distribution of products and operations, a regional distribution

**Exhibit 10: Net Expedited Review payment to non-malignant claims from select trusts**

Trust	Moderately Impaired Claim Payments	Unimpaired Claim Payments	Weighted Average Claim Payments
DII (Harbison-Walker)	\$2,563	\$1,353	\$1,760
Combustion Engineering	\$2,112	\$792	\$1,230
Manville	\$1,875	\$900	\$1,230
Armstrong World Industries	\$1,940	\$740	\$1,140
OCF (Owens Corning)	\$1,672	\$704	\$1,030
U.S. Gypsum	\$1,660	\$525	\$900
Kaiser Aluminum and Chemical	\$1,698	\$245	\$730
DII (Halliburton)	\$854	\$392	\$550
OCF (Fibreboard)	\$874	\$342	\$520
Babcock & Wilcox	\$750	\$375	\$500
Federal Mogul (Turner & Newall)	\$762	\$342	\$480
Celotex	\$690	\$350	\$460
Eagle-Picher <sup>41</sup>	\$400	\$400	\$400
G-I Holdings (GAF)	\$614	\$194	\$330
AC&S	\$434	\$173	\$260
<b>Total</b>	<b>\$18,898</b>	<b>\$7,827</b>	<b>\$11,520</b>

of products and operations, or otherwise had a more limited exposure profile.<sup>42</sup> Even if plaintiff law firms only collect an average of 25% more across the other thirty active trusts, the weighted average recovery is \$15,000. If a plaintiff law firm equipped to conduct mass screenings successfully recruits 1,000 new cases a year it would yield \$15 million in claim payments for moderately and unimpaired non-malignant cases.

Further assume that for every successful recruitment of 1,000 moderately or unimpaired non-malignant cases, screening operations yield just 10 severely disabled asbestotic cases, and 40 smoking lung cancer cases.<sup>43</sup> A claimant that qualifies for payment from just the fifteen trusts identified in Exhibit 10 will receive approximately \$72,000<sup>44</sup> from Expedited Review for a severely disabling asbestos claim, and approximately \$85,000 from Expedited Review for a smoking lung cancer claim. Even if plaintiff law firms

only collect an average of 25% more across the other thirty active trusts, the total recovery would be \$91,250 for a severely disabled asbestosis claimant and \$106,250 for a smoking lung cancer claimant. That represents more than an additional \$5 million in claim payments as a result of screening operations.

Plaintiff law firms typically charge contingency fees as high as 33% or 40% of recoveries in tort cases, but some trusts cap the attorney contingency fee at 25%.<sup>45</sup> Exhibit 11 summarizes the potential profits for claims recruited through mass screenings. At 1,000 moderately or unimpaired non-malignant cases, 10 severely disabled asbestosis cases, and 40 smoking lung cancer cases, a plaintiff law firm could generate profits of \$3M to \$6M annually depending on their contingency fee arrangement.

Even in today's litigation environment where moderately and unimpaired non-malignant cases have little

**Exhibit 11: Profitability of mass screenings under three contingency fee scenarios**

Assumptions	40% Attorney Fee	33% Attorney Fee	25% Attorney Fee
Claim payments for 1,000 moderately or unimpaired claimants	\$15.0 M	\$15.0 M	\$15.0 M
Claim payments for 10 severely disabled asbestosis claimants	\$0.9 M	\$0.9 M	\$0.9 M
Claim payments for 40 smoking lung cancer claimants	\$4.3 M	\$4.3 M	\$4.3 M
<b>Total claim payments</b>	<b>\$20.2 M</b>	<b>\$20.2 M</b>	<b>\$20.2 M</b>
<b>Plaintiff law firm contingency fee revenue</b>	<b>\$8.1 M</b>	<b>\$6.7 M</b>	<b>\$5.1 M</b>
Less screening cost per claimant (\$500-\$1,500 per claimant)	(\$1.0 M)	(\$1.0 M)	(\$1.0 M)
Less cost of filing claims against the trusts (\$1,000 per claimant)	(\$1.0 M)	(\$1.0 M)	(\$1.0 M)
Less additional filing costs for lung cancers (\$2,500 per claimant) <sup>46</sup>	(\$0.1 M)	(\$0.1 M)	(\$0.1 M)
<b>Plaintiff law firm net profit</b>	<b>\$6.0 M</b>	<b>\$4.6 M</b>	<b>\$3.0 M</b>

to no value in the tort system, the money available from the trust system is enough to keep screening operations profitable. However, not every plaintiff law firm has the professional resources and infrastructure to facilitate a mass screening operation.<sup>47</sup> As a result, many plaintiff law firms have become more sophisticated in their outreach as claim recruitment has moved into the digital age.

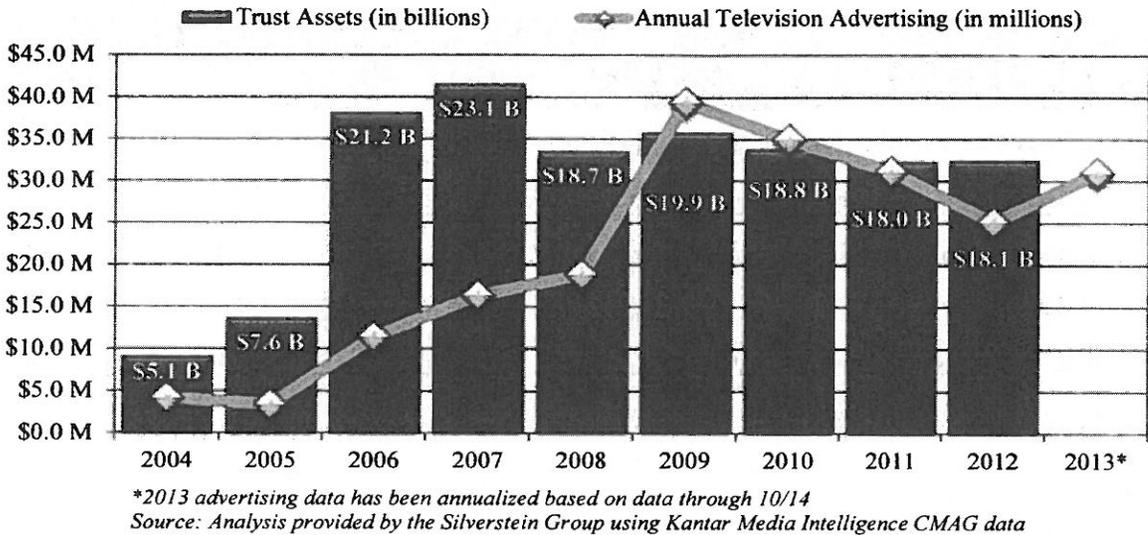
**From Madison Avenue To Madison County**

With a blitz of advertising on television, the internet, and social networking sites, plaintiff law firms have been using digital mass-media to saturate the public's awareness of asbestos litigation and the potential compensation from bankruptcy trusts. Moving from late-night cable television to prime-time programming, its rare today when a television viewer can make it through an entire program without witnessing at least one advertisement that targets potential asbestos claimants. Given the economic incentive presented by billions of dollars in bankruptcy trust assets, it is not surprising then that plaintiff law firms dramatically increased their advertising efforts during the late 2000s. Exhibit 12 illustrates the dramatic growth of asbestos television advertising from 2004-2013 as tens of billions of dollars of assets flooded the trust system.<sup>48</sup> Since 2009, plaintiff law firms have spent an average of over \$30 million a year in television commercials.<sup>49</sup> Moreover, it is estimated that plaintiff law firms

spend an estimated \$50 million on internet keyword advertising.<sup>50</sup>

Accompanying the overall increase in annual television advertising since 2004 is the increasing level of national outreach. As illustrated in Exhibit 13, asbestos claim advertising was, at one time, largely regional with plaintiff law firms targeting their local markets where they filed most of their cases. In contrast, beginning in 2007 the concentration of plaintiff law firm television advertisement shifted from local and regional cable programming to national cable and network broadcasts. This move towards claim recruitment on a broader, national scale was due in large part to the changing legal landscape in certain prominent jurisdictions. Tort reform in states like Texas motivated plaintiff law firms to seek out new venues to bring claims, and in turn provided an economic incentive to advertise outside of their traditional local markets. Further accentuating this trend was the increase in asbestos trust assets available to pay claimants. With bankruptcy trusts operating under the auspices of federal law, the filing of trust claims are not limited to any one state or regional jurisdiction, thus providing even more incentive for plaintiff law firms to expand their outreach to potential claimants on a national scale. In fact, since 2011 67% of television advertising dollars were spent on national spots, compared to 56% between 2007 and 2010, and just 26% between 2004 and 2006.

**Exhibit 12: Trust claim assets compared to asbestos television advertising**

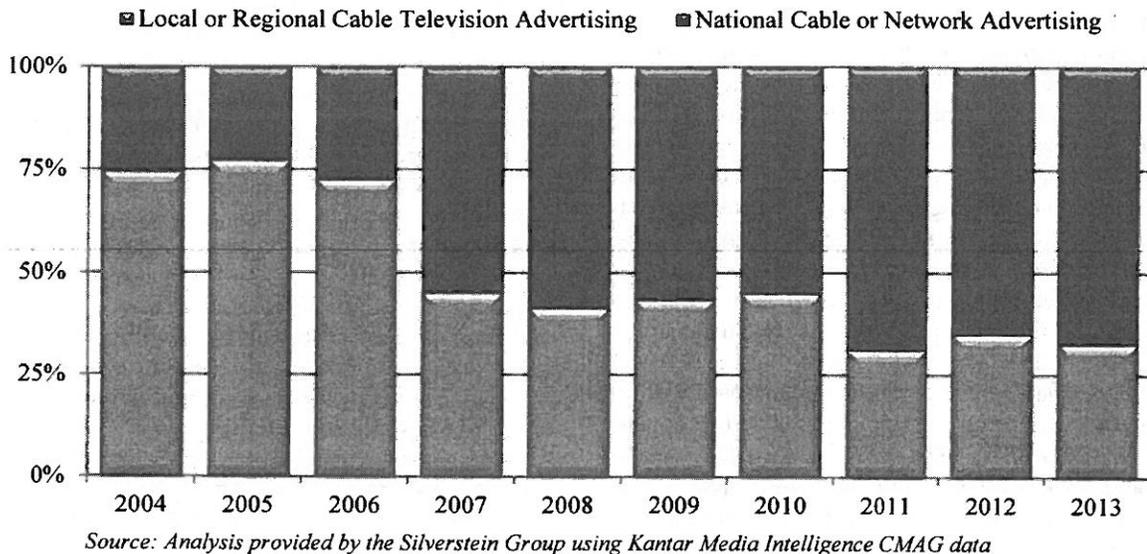


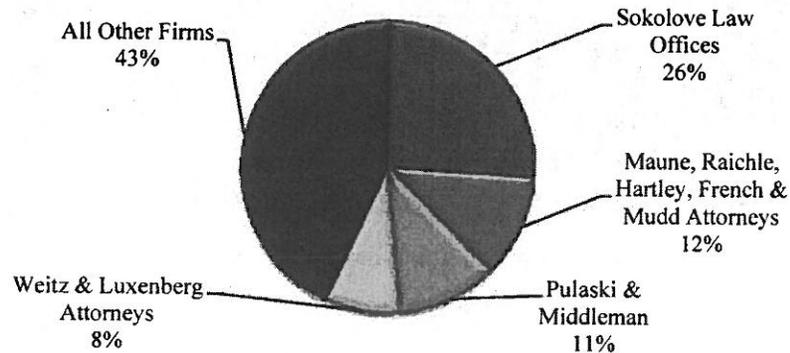
Analysis provided by The Silverstein Group using Kantar Media Intelligence CMAG data, reveal the plaintiff law firms that have made the largest television advertising investment in recent years. Since 2009, when annual television advertising for asbestos doubled to over \$22 million, the four plaintiff law firms with the highest spend levels are (1) Sokolove Law Offices, (2) Maune, Raichle, Hartley, French & Mudd Attorneys, (3) Pulaski & Middleman, and (4) Weitz & Luxenberg Attorneys. These four law firms

accounted for over 50% of total asbestos television advertising spend since 2009, and each appear to have a presence on a national scale. Exhibit 14 summarizes this data.

A third noteworthy trend in asbestos claim recruitment that likely stems from the nationalization of the litigation and the availability of trust compensation is the growth and emergence of “feeder” firms. Feeder or referral firms are law firms or other marketing

**Exhibit 13: Distribution of regional and national television advertisement**



**Exhibit 14: Asbestos television advertising by law firm since 2009**

companies that recruit claimants through television and internet advertising campaigns, but ultimately refer the cases to litigation firms in exchange for a fee. The utilization of feeder firms allow regional law firms the ability to canvass a larger population of potential claimants, and depending on venue rules, enables them to file the claims in their local jurisdiction. For example, a jurisdiction such as Madison County, Illinois has relatively loose venue rules. As such, firms that historically file in Madison County have an economic incentive to utilize feeder firms to recruit potential claims on a national scale. In regards to bankruptcy trusts, the feeder firms may choose to retain the authority to file trust claims on behalf of the plaintiff, even if they are not actually filing and litigating the lawsuit in the tort system. This bifurcation of the tort lawsuit and the corresponding trust claims can further complicate the ability for tort defendants to obtain a reasonable level of transparency. With a heightened interest on the issue of trust transparency in recent years, tort defendants have become more aggressive in leveraging their judicial rights to the disclosure and discovery of any trust claims and corresponding allegations of exposure. By having the feeder firm maintain the authority to make trust claims, the litigating plaintiff firm can *legitimately* assert that they have not filed any trust claims on behalf of their client. This plausible deniability allows plaintiff firms to sidestep judicial mandates on trust claim discovery.<sup>51</sup>

While internet and television advertising campaigns are still dominated by a focus on mesothelioma claims, another growing trend in asbestos advertising is the number of internet sites and television commercials targeted specifically at lung cancer cases. As a result of the trust system's willingness to pay smoking

lung cancer claims, it has provided an economic incentive to directly market to this population of potential clients.<sup>52</sup> Moreover, in many of the television and internet ads targeted at lung cancer claimants, reference to asbestos exposure is often suppressed or even absent from the advertisement. For example, the internet advertisement presented in Exhibit 15 emphasizes that there is \$30 billion in "federal dollars" to pay lung cancer claims, but fails to make reference to asbestos. By focusing on the term "lung cancer trust" and eliminating any reference to asbestos, ads of this type can successfully broadcast to a larger population of individuals with lung cancer who may not be aware of any past asbestos exposure. With quantity at a premium, the more calls plaintiff law firms receive from individuals with lung cancer the more potential claimants they can cull.

#### Impact Of Current Lung Cancer Cases In The Tort System

Since 2006 the asbestos bankruptcy trust system has paid out more than \$15 billion in claim payments, establishing itself as a significant, alternative source of claimant compensation relative to the tort system.<sup>53</sup> And while mesothelioma claims constitute over 90% of current tort indemnity payments,<sup>54</sup> limited trust disclosures suggest that only two-thirds of current trust payments go to mesothelioma claims.<sup>55</sup> The remaining payments go to compensating claimants with other injuries or conditions, including smoking lung cancer claimants and moderately to unimpaired non-malignant claimants. In fact, we have estimated that since 2009 nearly \$1.2 billion in trust claim payments have been made to lung cancer claimants.<sup>56</sup> With plaintiff counsel receiving contingency fees of at least 25% of trust payments, the high cost of internet and television

**Exhibit 15: Lung Cancer Trust Fund Internet Site**

**Lung Cancer Trust Fund Claim Assistance**

As Congress considers The Lung Cancer Mortality Reduction Act of 2009, United States Bankruptcy Courts have approved new Compensation Trust Funds, with initial funding of over \$30 Billion, to help people diagnosed with lung cancer. These Compensation Funds are available upon qualification.

A lung cancer diagnosis is costly both emotionally and financially. Families often experience rising medical bills, out of pocket expenses, lost wages and loss of benefits which can destroy a lifetime of hard work. Don't use your own valuable resources when other financial options may be available for you and your loved ones.

Trust Fund claim assistance is available through attorney supervised Certified Trust Claims Filers at [REDACTED] Law Firm, and is handled on a "no win, no fee" basis with no out-of-pocket cost to you. Even if you were diagnosed years ago, you may be eligible for these funds, but windows of eligibility for some funds will close within the year. Please call 1-800-[REDACTED] for more information.

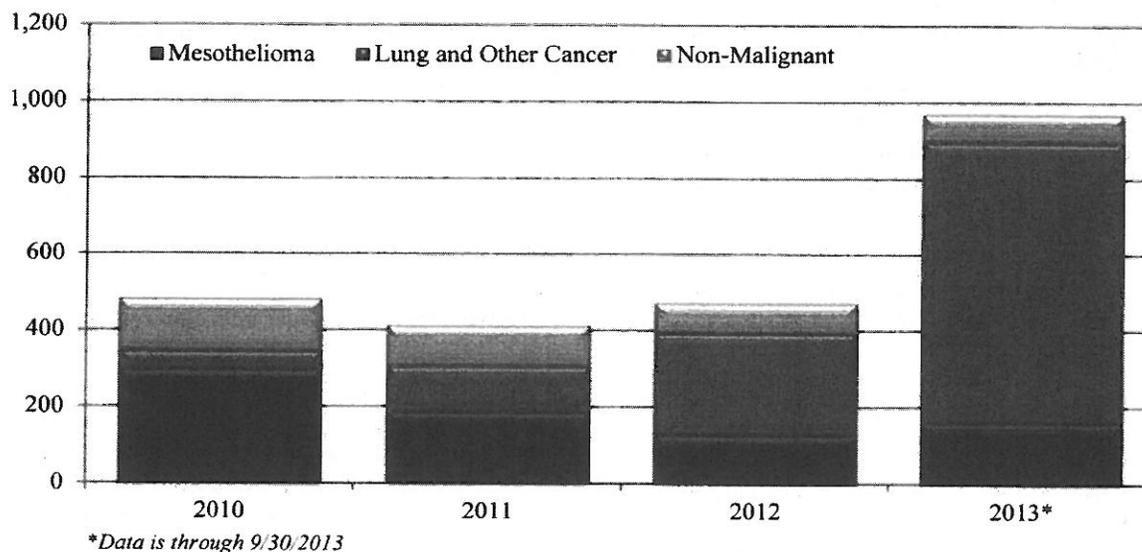
advertising is easily offset.<sup>57</sup> With recruitment costs more than covered by trust recoveries, the residual expense to plaintiff law firms for filing these lung cancer claims in the tort system is marginal.

Unlike most non-malignant cases, lung cancer lawsuits are not relegated to inactive dockets in the tort system. The standards established by inactive dockets are based on medical severity thresholds that lung cancer cases can easily satisfy. In turn, lung cancer cases can obtain active docket trial settings even if significant smoking history and other factors suggest a tenuous causal connection to asbestos exposure. Without a necessary mechanism for jurisdictions to filter inactive docket claims based on a causation standard, there is nothing preventing plaintiff law firms from bringing mass quantities of meritless lung cancer cases against asbestos defendants. If lung cancer lawsuit inventories continue to build in the tort system, plaintiff law firms may once again be in position to negotiate group settlements by leveraging volumes of less meritorious claims. Exhibit 16 illustrates the growing inventory of lung cancer cases on the active Delaware docket.

In addition to established jurisdictions such as Delaware and Madison County, emerging jurisdictions in Southern California are experiencing similar increases. Since 2010, the annual number of lung cancer lawsuits filed in Los Angeles, Orange, and San Diego counties has nearly doubled based on annualized data through September of 2013.<sup>58</sup> With

limited judicial resources and corresponding trial settings an influx of lung cancer filings could build in Southern California dockets, creating significant claim backlogs. Even if most of the lung cancer cases present little to no trial risk, the high cost of defending each lawsuit may force defendants to settle, which in turn increases the economic incentive for further lung cancer filings by opportunistic plaintiff firms. Currently, the plaintiff firm spearheading the resurgence of lung cancer filings in the asbestos tort system is Napoli, Bern, Ripka, Shkolnik, LLP ("NBRS"). NBRS is responsible for an overwhelming majority of lung cancer filings in both Delaware and Madison County, Illinois, and their recruitment strategy appears to be a combination of their own internet marketing supplemented by relationships with feeder firms. Given their national outreach to potential claimants, jurisdictions such as Madison County and Delaware become ideal settings for mass filings given their relatively loose venue rules. Furthermore, concentrating as many filings as possible in a limited number of jurisdictions will allow NBRS to better leverage volume settlement deals with defendants.

Though lung cancer recruitment and corresponding lawsuits may never match the volume of non-malignant filings that were brought in the 1990s and early 2000s, even a few thousand lung cancer cases per year could be enough to exert significant settlement pressure on defendants. With trust payments providing the seed money for plaintiff firms to engage in lung cancer recruitment, coupled with over 200,000 new

**Exhibit 16: Active inventory of cases on Delaware docket by disease**

lung cancer diagnoses each year in the United States, the recruitment of lung cancer claims and subsequent tort filings may continue to rise for the foreseeable future.<sup>59</sup> However, while the availability of trust payments was the impetus for the recent rise in lung cancer filings, the future claims brought in the tort system may exceed even those compensable by trust standards. As illustrated earlier in Exhibit 15, the focus of lung cancer recruitment through internet and television advertising is not limited to asbestos-related exposures. Plaintiff law firms are trying to cast the largest net possible to reach the broadest market of potential lung cancer claimants.

As outlined in Exhibit 6, lung cancer claims looking to qualify under most trust criteria will need to show a minimum of bi-lateral pleural thickening plus 5-years of occupational exposure in one of nearly 2,000 industry and occupation combinations. However, only 2-years of occupational exposure must have occurred prior to 1983, meaning that anyone occupationally exposed for the first time prior to 1981 with bi-lateral pleural thickening may be eligible for trust payments. While the potential claimant pool that meets these trust criteria will still be substantial for years to come, the real danger to asbestos tort defendants is the potential increase in cases that are even less credible than those paid by the trusts. For example, the recent, high-profile lawsuit filed by Weitz & Luxenberg in NYCAL on behalf of U.S. Congresswoman Carolyn

McCarthy represents a case that may be valueless even by the low bar set by trust criteria.<sup>60</sup>

Representative McCarthy alleges secondary exposure to asbestos through her father and brothers who worked as boilermakers at New York shipyards and power plants.<sup>61</sup> These industrial exposure sites alone will qualify Representative McCarthy for at least 15 trust payments, since most trusts will compensate for secondary, take-home exposures.<sup>62</sup> However, most trusts also require secondary, take-home exposures to be qualified under the Individual Review process described earlier in the commentary.<sup>63</sup> While the Expedited Review process typically *does not* consider the smoking history of the claimant when valuing the claim, smoking does play a critical role in the valuation of lung cancer claims under Individual Review, especially if the claimant lacks evidence of bi-lateral pleural disease. For example, the TDP for the Babcock & Wilcox Company Asbestos PI Settlement Trust discloses the following:

*"[Lung Cancer 1] claims that show no evidence of either an underlying Bilateral Asbestos-Related Non-malignant Disease or Significant Occupational Exposure may be individually evaluated, although it is not expected that such claims will be treated as having any significant value, especially if the claimant is also a Smoker. In any event, no presumption of validity will be available for any claims in this category."*<sup>64</sup>

Given that Representative McCarthy smoked for over 30 years, and as recently as May 2013 when she was diagnosed with lung cancer,<sup>65</sup> any trust claim qualified under Individual Review may have little to no value. Despite this fact, Representative McCarthy is pursuing a lawsuit in the tort system against dozens of asbestos defendants. As articulated in November 11, 2013 commentary in the Policy & Politics section of Bloomberg Business Week:

*"Weitz & Luxenberg is probably calculating that the defendants are more likely to settle rather than spend a lot of money skirmishing in court."<sup>66</sup>*

If the strategy comes down to leveraging volume, then why wouldn't opportunistic plaintiff law firms flood the courts with as many lung cancer filings as possible, regardless of merit? Once the claimant has been recruited, the initial costs to file the tort cases are marginal, and asbestos defendants will feel more pressure to settle with each additional case that is placed on an active tort docket. The asymmetry in litigation costs that substantially favor plaintiff law firms place defendants at a significant disadvantage in the tort system, and lead to nuisance settlements simply to avoid further defense costs. The impact of this asymmetry is exacerbated when defendants are faced with a large quantity of cases. This was the business model used by plaintiff law firms during the non-malignant screening era in the 1990s and early 2000s, and it is perpetuated today through smoking lung cancer lawsuits with tenuous links to asbestos exposure.

### Conclusion

The data and trends we have analyzed as part of this commentary raise several issues that both the state and federal judiciary, as well as legislators, should be aware of as lung cancer lawsuits begin to inundate courts around the country. Moreover, the analysis further highlights the significant impact that asbestos trusts can have on the tort system, and raises questions regarding both trust transparency and the appropriateness of bankruptcy trust payment qualification criteria. The antiquated nature of trust procedures create a static compensation system that is disconnected from ongoing judicial and legislative reform in the tort system. The trust system's continuing willingness to pay moderately to unimpaired non-malignant claims, as well as smoking lung cancer claims, creates a market for recruitment that not only leads to the settlement of meritless claims against defendants in the tort system, but also depletes a finite pool of trust assets at the

expense of current and future mesothelioma claimants. As previously noted, we have estimated that only 65% of current trust assets go to paying mesothelioma claimants, and if lung cancer and non-malignant recruitment continues, the amount of trust funds that go to mesothelioma claims in the future will further decrease. In fact, since 2008 the average net payment to trust claimants has already been reduced by 30%, and this trend will likely continue as trust assets are depleted by less meritorious claims.<sup>67</sup>

Ultimately, the recent rise of lung cancer filings in the tort system against asbestos defendants is not based on medicine or science but on the economic incentives created by payments from 524(g) bankruptcy trusts. Faced with the prospect that the biggest mass tort in U.S. history has largely dwindled down to 2,500 to 3,000 mesothelioma cases per year, the dramatic increase in the recruitment of lung cancer cases is simply an attempt by plaintiff law firms to tap into a much larger pool of potential claimants and extend the litigation. If left unchecked, the expansion of the asbestos tort to non-mesothelioma claimants will once again usurp assets for truly deserving claims and place an even greater pressure on remaining tort defendants to pick up an indemnification share that is well beyond any reasonable level of legal liability.

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### Endnotes

1. W.J. Nicholson *et al.*, Occupational Exposure to Asbestos: Population at Risk and Projected Mortality, 1980-2030.
2. For Madison County we were able to collect aggregate claim filing statistics for each year through June 30, 2013. Over the period we were able to collect disease level statistics for over 80% of filings. To estimate the annual number of filings for lung cancer cases we calculated the percent of lung cancer filings to the total filings observed in each year from the disease specific statistics and applied that rate to the aggregate filing statistics.
3. The Surveillance, Epidemiology, and End Results (SEER) Program of the National Cancer Institute.

4. Alberg AJ, Samet JM. Epidemiology of Lung Cancer. *Chest*. 2003;123:21-49.
5. Ibid, American Lung Association, Lung Cancer Fact Sheet, <http://www.lung.org/lung-disease/lung-cancer/resources/facts-figures/lung-cancer-fact-sheet.html>.
6. The sum of these estimated contributions exceeds 100% as a result of interactions between exposures.
7. Manville Personal Injury Settlement Trust, Full Data Extract as of January 2002. As of 2002 the Manville Personal Injury Settlement Trust had received approximately 30,000 lung cancer claims. Of the 30,000 cases smoking data was available for approximately 9,000.
8. Ibid.
9. We reviewed smoking disclosure data for 147 lung cancer cases filed in the Philadelphia Court of Common Pleas between 2010 and 2013.
10. Erren TC, Jacobsen M, Piekarski C. Synergy between asbestos and smoking on lung cancer risks, *Epidemiology* 1999;10:405-11.
11. Agency for Toxic Substances and Disease Registry. Cigarette Smoking, Asbestos Exposure, and Your Health.
12. Smoking and Vulnerability to Disease, <http://www.lung-cancer.com/vulnerability.html>.
13. Asbestos Lung Cancer, Criticism of the Helsinki Criteria, <http://www.asbestos.com/cancer/lung-cancer>.
14. Placitella, Chris. Defense perspective on the state of Mesothelioma asbestos litigation, January 2, 2013, Mesothelioma Legal Blog.
15. Written Statement of Lester Brickman before the Subcommittee on Commercial and Administrative Law of the U.S. House of Representatives Committee on the Judiciary, July 21, 2004.
16. Ibid, 9-10.
17. The CCR was a group of 21 asbestos defendants.
18. G-I Holdings Settlements Involving 250 or More Claims, Exhibit D to the Supplemental Affidavit of Letitia Chambers, in re: G-I Holdings, Inc., et al., in the United States Bankruptcy Court of New Jersey, Case Nos. 01-30135 (RG) and 01-38790 (RG), (2004).
19. CCR claim data.
20. Scarcella, Marc C. and Peter R. Kelso. "Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance." Mealey's Asbestos Bankruptcy Report 12, no. 11 (2013).
21. Ibid, Exhibit 2.
22. Some trusts refer to their procedures as Claim Resolution Procedures ("CRP").
23. Combustion Engineering 524(g) Asbestos PI Trust, First Amended and Restated Asbestos PI Trust Distribution Procedures (effective September 16, 2009), Section 2.1 Asbestos PI Trust Goals: *"The goal of the Asbestos PI Trust is to treat all claimants equitably. The TDP furthers that goal by setting forth procedures for processing TDP Claims and paying generally on an impartial, first-in-first-out ("FIFO") basis, with the intention of paying all holders of TDP Determined Claims over time as equivalent a share as possible of the value of their claims based on historical values for substantially similar claims in the tort system."*
24. *Supra* 19.
25. Biggs, Jennifer L., "Casualty Loss Reserve Seminar, LOB-6: State of the Risk Transfer Market for Asbestos" presentation given on September 16, 2011 in Las Vegas, Nevada.
26. *Supra* 23, Section 5.3(b)(2).
27. Amended and Restated Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures, pg. 11-12.
28. Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust, Significant Occupational Exposure List: [http://www.armstrongworldasbestos.com/files/RevisedSOEList12\\_2011.xls](http://www.armstrongworldasbestos.com/files/RevisedSOEList12_2011.xls).

29. *Supra* 20, Exhibit 2.
30. *Supra* 25.
31. *Supra* 20, Exhibits 8 and 9.
32. *Ibid*, Exhibit 7.
33. *Ibid*, Exhibit 2.
34. *Supra* 3.
35. Manville Personal Injury Settlement Trust Account of Trustees for years ending 2002-2012 and January 1, 2013 through June 30, 2013. Payments by the trust from 2002 through 2007 were made at Payment Percentage of 5%. For example, if a mesothelioma claim was valued at \$350,000 then the net payment would be \$17,500. In 2008 the trust increased the Payment Percentage to 7.5%. Therefore for comparison purposes we have applied a 7.5% Payment Percentage to pre-2008 payments in our analysis.
36. Manville Trust Distribution Process Revised – Statute of Limitations Provision Modified.
37. Written Statement of Professor Lester Brickman before the Subcommittee on the Constitution of the U.S. House of Representatives Committee on the Judiciary, Hearing on: *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy and the legal system*, September 9, 2011, pg. 23.
38. *Ibid*, pg. 32.
39. *Ibid*, pg. 30.
40. Manville Personal Injury Settlement Trust, Full Data Extract as of January 2002 yields a ratio of 181% of unimpaired to moderately impaired non-malignancies. DII Industries Asbestos PI Trust is one of the few trusts that disclose disease level summary statistics in an annual report. Between 2007 and 2012, the trust paid 54,198 “Asbestos/Pleural Disease Level II” claims and 24,998 “Asbestos/Pleural Disease Level III” for a ratio of 217%. The DII trust data also shows that between 2007 and 2012 the ratio of “Severe Asbestosis Level IV” claims to the sum of “Asbestos/Pleural Disease Level II” and “Asbestos/Pleural Disease Level III” is 1%.
41. The Eagle Picher Claim Resolution Procedures disclose a single category for Non-Malignant claims with a discounted cash payment of \$400.
42. A&I Corporation, A-Best, Amatex, API, Inc., ARTRA, ASARCO, EJ Bartells, Burns and Roe, C. E. Thurston & Sons, Christy Refractories, Congoleum, Durabla, H. K. Porter, Hercules Chemical, J.T. Thorpe (CA), JT Thorpe (TX), Keene, Leslie Controls, ABB Lummus, General Motors, National Gypsum, NARCO, Plibrico, Porter Hayden, Raytech, Shook & Fletcher, Swan, THAN, Thorpe Insulation, U.S. Mineral, UNR, Urex, and Western Asbestos/Western MacArthur.
43. National case filing data show that an average of 3,500 lung cancer cases were filed annually during the 10 years between 1994 and 2003 when non-malignant screenings were most prevalent. Relative to non-malignant filings that average 45,000 cases annually, this represented 8% filing ratio. This data also show that during the 5 years between 2004 and 2008 nearly 1,700 lung cancer cases were still being filed even after the non-malignant screening era temporarily ended. For purposes of this commentary we assume that 1,700 of the 3,500 that were filed annually between 1994 and 2003 were not solicited through mass screenings, leaving a 4% filing ratio for lung cancer claims relative to non-malignancies recruited through screenings. For severely disabled asbestosis claims we have used limited disease level summary statistics provided in the DII Industries, LLC Asbestos PI Trust annual report disclosures to estimate the level of claiming relative to moderately or unimpaired non-malignant claims.
44. The Celotex trust does not have a Discounted Cash Payment (i.e. Expedited Review) for disabling asbestos so the Individual Review average amount was applied in this analysis.
45. Manville Personal Injury Settlement Trust 2002 Trust Distribution Process, Section J stipulates a maximum counsel contingency fee of 25%. Similar disclosures by the JT Thorpe Settlement Trust, the Western MacArthur Settlement Trust, and the

- Keene Creditors Trust stipulate 25% as well. Not all trusts disclose fee caps and some disclosures allow for a maximum of 33%.
46. Assumes there may be residual costs for additional medical retrieval and causal statements.
  47. Manville Personal Injury Settlement Trust, Full Data Extract as of January 2002. As of 2002, only fifteen plaintiff law firms had generated more than 10,000 claims against the Manville Trust, and less than 5% of the firms (~70) accounted for 80% of the total number of claims filed.
  48. *Supra* 20, Exhibit 1.
  49. Analysis provided by the Silverstein Group using Kantar Media Intelligence CMAG data, <http://www.silversteingroup.net>.
  50. The Plaintiff's Bar Goes Digital: An Analysis of the Digital Marketing Efforts of Plaintiffs' Attorneys & Litigation Firms, prepared for the Institute for Legal Reform by New Media Strategies, January 2012.
  51. Barnes and Crisafi v. Georgia Pacific, Nos. MID-L-5018-08 & MID-L-316-09 (AS), N.J. Super Ct., Middlesex Co., June 12, 2012; Montgomery v. Foster Wheeler, No. 09C-11-217-ASB, Del. Super Ct., Nov. 6, 2011; Brassfield v. Alcoa, Inc., No. 2005-61841, Texas Harris County District Ct., Nov. 22, 2006: "In regards to the lack of disclosure of trust claim submissions during discovery Mr. Moody testified that no communication had been made regarding those trust claim forms with the other plaintiff firm retained in the case."
  52. See for example, internet domain [www.lungcancer-trust.com](http://www.lungcancer-trust.com) or [www.lungcancercompensation.com](http://www.lungcancercompensation.com).
  53. *Supra* 20, Exhibit 2.
  54. *Supra* 25.
  55. *Supra* 20, Exhibit s 8 and 9.
  56. *Ibid*.
  57. *Supra* 45.
  58. Data based on public lawsuit filings from Los Angeles, Orange, and San Diego counties.
  59. American Lung Association, Lung Cancer Fact Sheet (<http://www.lung.org/lung-disease/lung-cancer/resources/facts-figures/lung-cancer-fact-sheet.html>), "During 2012, an estimated 226,160 new cases of lung cancer were expected to be diagnosed, representing almost 14 percent of all cancer diagnoses."
  60. Carolyn McCarthy vs. A.O. Smith Water Products, Co., et al (Index No.: 190417/2013), Case Complaint.
  61. *Ibid*, Plaintiff's Responses to Defendant's Fourth Amended Standard Set of Interrogatories and Request for Production of Documents.
  62. A review of work sites for Representative McCarthy's father produced matches to approved site or industry lists for 12 trusts. In addition, it is my experience that exposures of this nature will qualify for additional claims against trusts such as Manville and Celotex. Any additional product identification provided by Representative McCarthy's family members would likely lead to even more compensable trust claims.
  63. Federal-Mogul Asbestos Personal Injury Trust Proof of Claim Form, Part 4: Exposure to an Occupationally Exposed Person: "If a claimant alleges an asbestos-related disease resulting solely or in part from exposure to an occupationally exposed person, such as a family member, the claimant must seek Individual Review of his or her claim pursuant to Sections 5.3(a)(2) and 5.5 of the Trust Distribution Procedures."
  64. The Babcock & Wilcox Company Asbestos PI Settlement Trust Distribution Procedures (revised October 27, 2011), pg. 30.
  65. *Supra* 61.
  66. "The Smoking Congresswoman and Her Asbestos Lawsuit" article in Bloomberg Business Week, Politics & Policy section, November 11, 2013. <http://www.businessweek.com/articles/2013-11-11/smoker-carolyn-mccarthy-should-withdraw-her-asbestos-related-lawsuit>.
  67. *Supra* 20, Exhibit 6. ■

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