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Asbestos

# Baseless Lung Cancer Filings Delaying And Depleting Compensation Resources For Legitimate Asbestos Claims: The Need For Medical And Exposure Criteria

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**A commentary article reprinted from the January 25, 2023 issue of Mealey's Litigation Report: Asbestos**

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# Commentary

## Baseless Lung Cancer Filings Delaying And Depleting Compensation Resources For Legitimate Asbestos Claims: The Need For Medical And Exposure Criteria

**By**
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In recent years, there is a significant and troubling surge of asbestos lawsuits filed by people who develop lung cancer (typically heavy smokers) with little or no legitimate asbestos exposure. While all historical data shows that asbestos-related claims should be trending down, these lung cancer filings are spiking for the simple reason they are not related to asbestos. These baseless claims significantly burden on our court system and consume tremendous resources and funds otherwise available to provide reasonable compensation to those people who have legitimate asbestos related injuries.

There are compelling public policy reasons and historical precedent for establishing threshold medical and exposure criteria for lung cancer claims that strike the right balance between permitting meritorious claims to proceed and curtailing those that simply lack factual or medical support. In this article, we explore the historical evolution of asbestos-related lung cancer cases, the recent trends of lung cancer filings, some of the key reasons how these suspect lung cancer claims have slowly crept into our legal system, how this overburdens our court system and delays justice for claimants with meritorious claims, and, finally, why limiting or delaying prosecution of baseless lung cancer claims is the solution.

### I. History of Asbestos-Related Lung Cancer Claims

Mesothelioma is a signature disease associated with asbestos exposure. Exposure coupled with a confirmed mesothelioma diagnosis, in most cases, establishes a definitive causal connection and supports a potential claim for compensation. By contrast, causally connecting asbestos exposure to general lung cancer is more difficult and complex, in part, because of the myriad potential causes of lung cancer, the lack of a consensus on the scientific community on certain causation issues and the varying degrees of claimed asbestos exposure.

Over the years, asbestos-related lung claims stemmed from heavy occupational exposure to asbestos, coupled with an underlying asbestos-related condition such as asbestosis or bilateral pleural plaques. These two factors provided the foundation for recognizing that asbestos exposure potentially contributed to the lung cancer. However, in recent years these claims have dramatically shifted toward lung cancer filings with little or no occupational asbestos exposure and absolutely no underlying medical foundation to causally connect asbestos exposure and lung cancer.

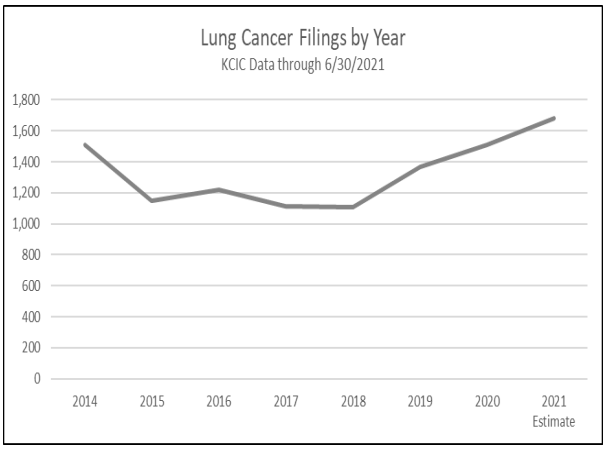
### II. Alarming Trends in Lung Cancer Filings

Across the country, there has been a startling increase in lawsuits where plaintiffs are claiming that their lung cancers are asbestos-related. This trend is at direct odds

with what one would expect in asbestos litigation. In the 1970s and 1980s, asbestos was eliminated from most products in the United States. Moreover, federal regulation of asbestos during this time substantially reduced and eventually eliminated asbestos exposure scenarios in our country. As a result, through the passage of time one would expect the occurrence of asbestos-related diseases to trend downwards and eventually tail off. However, with respect to lung cancer filings, the opposite is true.

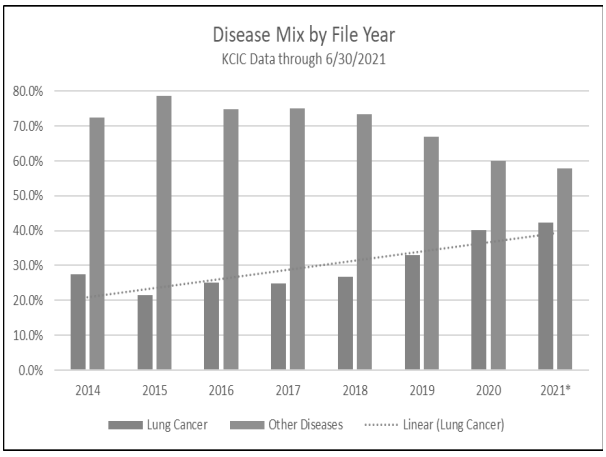
Lung cancer lawsuits have increased from just under 1,200 in 2015 to almost 1,700 cases in 2021, with the steepest increase in the last four years. See Table 1.[1]

Table 1.




By stark contrast, mesothelioma lawsuits in the past seven years are trending downwards, consistent with the elimination of asbestos and anticipated latency period. However, during the same that same time period, lung cancer lawsuits are dramatically on the rise. See Table 2.[2]

Table 2.




The only plausible explanation for the increase is that a substantial number of these lung cancer claims are simply not attributable to asbestos exposure. This makes sense because there has been a shift away from lung cancer cases of heavy occupational exposure with underlying asbestosis. Instead, the pervasive pattern has been claimants with little or no occupational asbestos exposure (low level and brief exposures) and no underlying asbestosis, coupled with heavy smoking histories.

## III. No Medical Foundation for Many Lung Cancer Claims

There is little scientific debate that heavy occupational exposure with underlying asbestosis is sufficient to attribute a lung cancer to asbestos exposure. Historically, the development of asbestosis is associated with heavy exposure to asbestos, not typically low level brief exposures. However, over the years, scientists have considered other hypotheses on the possible connection between asbestos exposure and lung cancer, such as: (1) what if there is heavy occupational asbestos exposure, sufficient to cause asbestosis, but no pathological finding of asbestosis?; and (2) what if there is non-occupational asbestos exposure not considered capable of causing asbestosis and no pathological finding of asbestosis?

Whether asbestosis is a precondition to the development of an asbestos-related lung cancer has been studied for decades with conflicting and inconclusive evidence of any causal connection. Since 1990, there have been over 40 published studies and papers on this issue, with no general consensus. Of particular interest, in 2005 *Hessel* et al., three eminently qualified epidemiologists conducted a systematic review of the literature on this topic. Upon undertaking this research, the three authors had different views: one believed that asbestosis was a necessary precondition, the second did not require it and the third author had no opinion. After extensive analysis of all prior studies to that date, the three authors agreed that there was no definitive answer and that epidemiology may not be able to answer the question: "[t]he scientific question of whether or not asbestos-related lung cancer in man arises only in the presence of pulmonary fibrosis may be unanswerable epidemiologically. Microscopic evidence of fibrosis is a great deal more sensitive in detecting asbestosis than chest radiography or even

high resolution computed tomography (HRCT). Even HRCT scans may fail to detect fibrosis evident on microscopic examination, and fibrosis may have causes other than asbestos."[3]

Since 2005, there continues to be conflicting studies and papers on the issue. In cases where there is significant occupational exposure, some studies suggest that a finding of asbestosis is not necessarily a precondition to attributing lung cancer to asbestos exposure: "epidemiological data obtained in recent years, demonstrate that cumulative asbestos exposure at the workplace is significantly associated with an increased risk of lung cancer, even in the absence of radiographic evidence of asbestosis" and that "[a]sbestosis is not a prerequisite to carcinogenesis."[4] By contrast, *Zhong* et al. found in 2008: "[a]sbestosis is an independent risk factor for lung cancer among Chinese workers exposed to chrysotile, [and] the risk increases with the increasing profusion of opacities of [the] lung."[5] In 2012, *Henderson* and *Leigh* noted that not all heavily exposed subject develop asbestosis, supporting the hypothesis that exposure capable of causing asbestosis may be causative of lung cancer even in the absence of a finding of asbestosis as an underlying condition. In 2014, *Geyer* commented: "Asbestosis still remains an unambiguous marker of a tissue burden sufficient to increase the risk of developing lung cancer and indicates that an individual's tissues are susceptible to the pathologic effects of that tissue burden."[6] Similarly, Ross commented: "even among those most heavily exposed to asbestos, if there is an increased risk of lung cancer among smokers without evidence of asbestosis, it is quite small and not the primary risk factor" (p. 115). In 2015, *Markowitz* et al. claimed: "it is clear that asbestos exposure in the absence of asbestosis raises the risk of lung cancer, and the added presence of asbestosis further raises the lung cancer risk."[7] This study has been heavily criticized based on the quality of the underlying data, as well as the fact that Dr. Markowitz has been a plaintiff expert in asbestos litigation for decades.

Presently, there is no consensus in the scientific community that a lung cancer can be causally related to asbestos exposure without a finding of underlying asbestosis. In cases of heavy occupational exposure, there appears to be more support for that hypothesis. However, in cases where there is limited non-occupational asbestos exposure and no underlying asbestosis, there is weak support for a causal connection, especially in heavy smokers. And it is this particular scenario where there have been a proliferation of scientifically unsupported claims of asbestos exposure, which explains the increased filings across the country.

## IV. Impact on Court System and Available Compensation

Asbestos-related litigation has been described as a "tangled web of interrelated problems," including an alarming trend of objectively less deserving plaintiffs prevailing on claims at the expense of those more severely harmed.[8] "The volume of asbestos claims threatened to overwhelm our court system. Despite hopes and expectations to the contrary, the flood of claims continues unabated. Plaintiffs' claims advance like a perpetually 'unrolling carpet. At any moment … some are filed, some are resolved and some are yet to come.'"[9] Over the years, "[t]here has been a dramatic increase in the total and rate of filing of asbestos lawsuits and claims. Particularly noticeable is the involvement of more peripheral players-plaintiffs who are asymptomatic, those less seriously injured, and defendants who were not major manufacturers or distributors of asbestos."[10]

By the early 2000s, up to 80 percent of asbestos claims were paid to plaintiffs categorized as "unimpaired."[11] This trend continues today over 20 years later, as the rate of lung cancer filings nationwide has risen considerably, although total asbestos-related claims have remained consistent.[12] The ill effects of this increased volume of lung cancer filings are both costly and multitudinous.

Not only does an influx in filings bog down an already swamped court system, but it also enables forum shopping with the effort to find the friendliest jurisdiction. Forum shopping proves to have vaster consequences as the inconsistencies in the treatment of asbestos cases undermines any attempt at grassroots reform.[13] In addition, compensation for plaintiffs without mesothelioma ultimately reduces the damages pool available for those with the disease. Moreover, when settlements result in defendants paying enormous sums, countless defendants move ever closer to bankruptcy. "Future plaintiffs are perhaps the biggest losers of all, as each bankruptcy filing by

an asbestos defendant or its insurer reduces the pool of assets from which they can seek compensation."[14]

## V. Limiting Lung Cancer Claims in the Bankruptcy Courts

Establishing medical criteria for lung cancer claims in asbestos litigation in nothing new, but dates back to the 1990s when Johns-Manville Corporation established a bankruptcy trust through which asbestos exposure victims could pursue fair and reasonable compensation. At the outset, in 1995, the Manville Trust required at least 15 years of occupational asbestos exposure and proof of an underlying medically-proven asbestos-related disease (asbestosis, interstitial lung disease or bilateral pleural disease). The Manville Trust provided reduced compensation for a lung cancer claim that was not supported by an underlying asbestos-related condition.

In 2002, the Manville Trust eligibility requirements were modified as a result of a surge of claims that were rapidly depleting the funds available to compensate asbestos victims. As a result, the Trust eliminated any scheduled compensation for lung cancer claims that were unsupported by a medically-established underlying asbestos-related condition, even if the claimant had significant occupational exposure to asbestos.[15] The bankruptcy court that approved this modified plan stated: "In view of the need to protect relatively blameless defendants and to insure adequate compensation for the more seriously injured, as well as to protect integrity of the process, more stringent medical standards seem warranted."

## VI. Eight States Have Adopted Medical Threshold Criteria

Early attempts to limit asbestos claims date back to 1986 where in *Lohrmann v. Pittsburgh Corning Corp.*, the court applied a "substantial factor" test modeled after that found in the *Restatement (Second) of Torts.*[16] The court constructed its own rule to determine whether a defendant's actions were a "substantial factor" in causing plaintiff's damages known as the "frequency, regularity and proximity" test. The court ruled "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."[17] Although the appellate court affirmed the use of the "frequency, regularity and proximity" test, courts around the country soon realized the standard was tremendously flawed. Critics argued that *Lohrmann* was not based upon scientific fact and was ambiguous. This ambiguity resulted in the application of subjective definitions to the terms "frequent, regular, and [close] proximity."

As a result, legislatures gravitated toward a more objective medical criteria for limiting asbestos claims. Eight states already enacted asbestos-specific statutes that delineate prerequisites for pursuing asbestos-related cancer claims other than mesothelioma. In Ohio, Florida, Texas, Kansas, South Carolina, Georgia, Oklahoma and North Dakota each respective state statute establishes that a plaintiff cannot succeed on a lung cancer claim without presenting prima facie evidence in the form of physician reports, evidence of elapsed time, and evidence of occupational exposure, among others. Further, each state requires a diagnosis by a "competent," "qualified," or "board-certified in pulmonary medicine, occupational medicine, internal medicine, oncology, or pathology," as part of the aforementioned *prima facie* evidence. The particular specialty of such competent, qualified, or board-certified physician is also necessary to prevent the sham mass asbestos screenings employed in the past.[18]

In addition, a number of statutes also require "a conclusion by a qualified physician that the exposed person's medical findings and impairment were not more probably the result of the causes other than the exposed person's employment and medical history. *A conclusion that the medical findings and impairment are consistent or compatible with exposure to asbestos does not meet the requirements of this subsection.*"[19] Previously, a doctor's opinion that a plaintiff's condition was "consistent with asbestosis" was sufficient to bring a claim. However, "[a] statement that an X-ray is 'consistent with asbestosis' is not a medically sufficient diagnosis…Diagnoses that result from incomplete medical investigation may be unreliable and may be inappropriate for use in determining eligibility for compensation."[20] The issue of such leniency is compounded by the fact that courts rarely recognize "consistent with" diagnoses in matters other than asbestos litigation.[21] Moreover, there are countless other conditions that can create lung im-

aging that is "consistent with asbestosis," including old age, smoking history, obesity, lupus, and silicosis, among others.[22] The existence of an evidentiary medical standard would combat plaintiffs with lung damage unassociated with asbestos exposure. Such the ultimate goal of this legislation is to guarantee only legitimate claims are compensated, said medical standard is essential.

Perhaps even more crucially, all eight states require a competent medical authority to consider the individual's smoking history prior to determining whether asbestos was the proximate cause of their cancer diagnosis. This differs tremendously from the "health screening" strategies of old, where unqualified individuals hastily determined if a worker could become a "litigant." Instead of relying on arbitrary chest x-ray and pulmonary function test results, mandating a thorough physician opinion would certainly help eliminate meritless claims. These statutes also require evidence sufficient to demonstrate that at least ten years have elapsed from the plaintiff's first exposure to her diagnosis date.

An additional advantage of these specific statutes is their ability to eliminate the ambiguity of prior strategies. Ohio and Florida specify that the exposed person must have "handled raw asbestos fibers [or] fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process, altered, repaired, or otherwise worked with an asbestos-containing product…"[23] The Ohio statute additionally specifies "evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years," as a definitive requirement. An established numerical value prevents inconsistent definitions from erroneously deciding cases.

As defendants soon found themselves involved in tens of thousands of cases nationwide, they often had no other choice than to settle with plaintiffs with both malignant and non-malignant conditions. The sheer volume of cases resulted in defendants preferring to resolve a matter prior to dedicating resources and capital toward the litigation process. As such, "[d]espite the considerable if not overwhelming evidence that tens of thousands meritless claims are being presented annually to scores of asbestos defendants, many of these defendants are nonetheless constrained under the operation of the civil justice system to pay these claims."[24] Such resolution can hardly be considered "justice" at all.

While the efficient resolution of claims may seem beneficial (although to varying extents) to all parties involved, defendants largely disagree. This quick resolution also results in an enormous percentage of plaintiffs prevailing on less than legitimate claims. Understandably, the swift settlement process provides defendants no opportunity to examine critical evidence. However, closer evaluation after the fact reveals countless claims were "unsupportable."[25] Such unsupportable claims succeed in hefty settlements because of a low threshold or lack thereof in medical requirements. Thus, the establishment of an evidentiary medical threshold is imperative.

## VII. The Need for Medical and Exposure Criteria

The end goal is to provide access to our courts for those claimants who have asbestos related lung cancer injuries, supported by occupational asbestos exposure and confirmation of an underlying asbestos related condition such as asbestosis. At the same time, there must be a mechanism in place to weed out those claims that do not qualify or, at a minimum, to place them on a deferred docket so that properly supported claims are prioritized. This can be accomplished either through legislative reform efforts similar to those discussed above or through the Court's inherent discretion to control its docket.

For example, in New York City, the NYCAL Case Management Order prioritizes claims of living versus deceased plaintiffs. In Pennsylvania, nonmalignant claims are placed on a deferred docket as well, preserving for the claimant any Statute of Limitations. In lung cancer cases, any filed complaints where the plaintiff does not have some minimum period of occupational asbestos exposure and medical confirmation of an underlying asbestos-related condition would be placed on a deferred docket until such time as the plaintiff can meet that criteria. Alternatively, any claims that do not meet this threshold would be deprioritized in favor of mesothelioma cases and those lung cancer filings that do meet the threshold criteria. Such a system fairly balances access to an already overburdened court system, preserves compensation funding for asbestos victims, and will safeguard

against baseless claims being pursued that are not truly related to asbestos exposure.

## Endnotes

1. KCIC Consulting, data, July 8, 2021.
2. KCIC Consulting, data, July 8, 2021.
3. Hessel et al., *Asbestos, Asbestosis, and Lung Cancer: A Critical Assessment of the Epidemiological Evidence*, Thorax Journal, 2005, p. 436.
4. Ameille et al., *Asbestos-related cancer risk in patients with asbestosis or pleural plaques*, Revue des Maladies Respiratoires, Volume 28, Issue 6, June 2011, pp. e13-e14.
5. *Zhong* et al., Cancer Mortality and Asbestosis Among Workers in an Asbestos Plant in Chongqing, China, Biomedical and Environmental Sciences, Volume 21, Issue 3, February 2008, pp. 205-211.
6. *Geyer*, American Journal of Respiratory and Critical Care Medicine, Volume 189 Number 1, January 2014, p. 116.
7. Markowitz et. al, Asbestos, Asbestosis, Smoking, and Lung Cancer: New Findings From the North American Insulator Cohort, Am J Respir Crit Care Med, 2013 Jul 1, p. 339.
8. Reeves, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 VAND. L. REV. 1949, 1951-52 (2003).
9. *Findley v. Trs. Of the Manville Pers. Injury Settlement Trust*, 237 F. Supp. 2d 297 (E.D.N.Y. 2002).
10. *Id.*
11. Reeves, *supra* note 1, at 1952.
12. KCIC Consulting, data July 8, 2021.
13. Reeves, *supra* note 1, at 1954.
14. Reeves, *supra* note 1, at 1958.
15. Under the *Erie* doctrine, the Bankruptcy Court could not outright prevent a claimant from pursuing compensation from the Trust, which permitted a claim to be specifically considered. However, the Trust system was designed to streamline compensation by providing scheduled values based on meeting the eligibility requirements, which guaranteed a set sum. The elimination of a scheduled value for these unsupported lung cancer claims is a prime example of a societal decision to shift compensation away from unsupported claim in favor making additional compensation available to meritorious claims.
16. *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986).
17. *Id.* at 1162-63.
18. Brickman, *On the Theory Class's Theory of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 66 (2003).
19. § 774.204(2)(h) Fla. Stat. Ann.
20. Brickman, *supra* note 8, at 59 n. 69; *see also* Aff. Of Dr. Robert Steiner re: Medical Standards of Care for Diagnosing Asbestos-Related Dieases, Mot. For Case Mgmt Order Concerning Litigation Screening at 2, 4, In re: Asbestos Prods. Liability Litig. (No. VI), Civ. Action Nos. MDL 875 (E.D. Pa. 2001).
21. Brickman, *supra* note 8, at 61 n. 78.
22. *Id.* at 62.
23. Ohio Rev. Code § 2307.92(C)(c)(ii).
24. Brickman, *supra* note 8, at 57 n. 65
25. Id., Babcock & Wilcox Memorandum, *supra* note 12, at 32. ■

**MEALEY'S LITIGATION REPORT: ASBESTOS**
*edited by Bryan Redding*
**The Report** is produced twice monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397