

THE NEXT ASBESTOS: THE SMOKING LUNG CANCER CLAIM

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



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

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

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

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

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

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

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

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

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



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

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

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

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

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

ENDNOTES

- i. Steven B. Markowitz, M.D., Dr.P.H., et al., *Asbestos, Asbestosis, Smoking and Lung Cancer: New Findings from the North American Insulator Cohort*, American Journal of Respiratory and Critical Care Medicine, Vol. 188, No. 1 (2013), pp. 90-96. (available online at <http://www.atsjournals.org/doi/abs/10.1164/rccm.201302-0257OC#UyMWp87t3IU>)
- ii. J. Conrad Metcalf, et al., "Asbestos-Related Lung Cancer: Medical and Scientific Consensus Versus Imaginative Lawyering." Columns: Asbestos, November 2013 (Harris Martin Pub.).
- iii. Id.
- iv. "The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General" Executive Summary, U.S. Department of Health and Human Services, 2014 (available online at <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/>).
- v. Id.
- vi. *L.I. Representative Faces Treatment for Lung Cancer*, N.Y. Times, June 4, 2013, at A21 (available online at <http://www.nytimes.com/2013/06/04/nyregion/mccarthy-long-island-representative-to-undergo-lung-cancer-treatment.html>)
- vii. Joe Nocera, *The Asbestos Scam*, N.Y. Times, Dec. 2, 2013, at A21 (available online at <http://www.nytimes.com/2013/12/03/opinion/nocera-the-asbestos-scam.html>)
- viii. Id.
- ix. Joe Nocera, *The Asbestos Scam, Part 2*, N.Y. Times, Jan. 13, 2014, at A27 (available online at <http://www.nytimes.com/2014/01/14/opinion/nocera-the-asbestos-scam-part-2.html>)
- x. *Asbestos*, Am. Cancer Society (available at <http://www.cancer.org/cancer/cancercauses/othercarcinogens/intheworkplace/asbestos>) ("These fibers may irritate the cells in the lung or pleura and eventually cause lung cancer or mesothelioma.")
- xi. "The Health Consequences of Smoking," supra.

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