

Lung Cancer Asbestos Update: Recent Trends, Defenses, and Strategies

The National Forum for
Environmental and Toxic Tort
Issues Conference

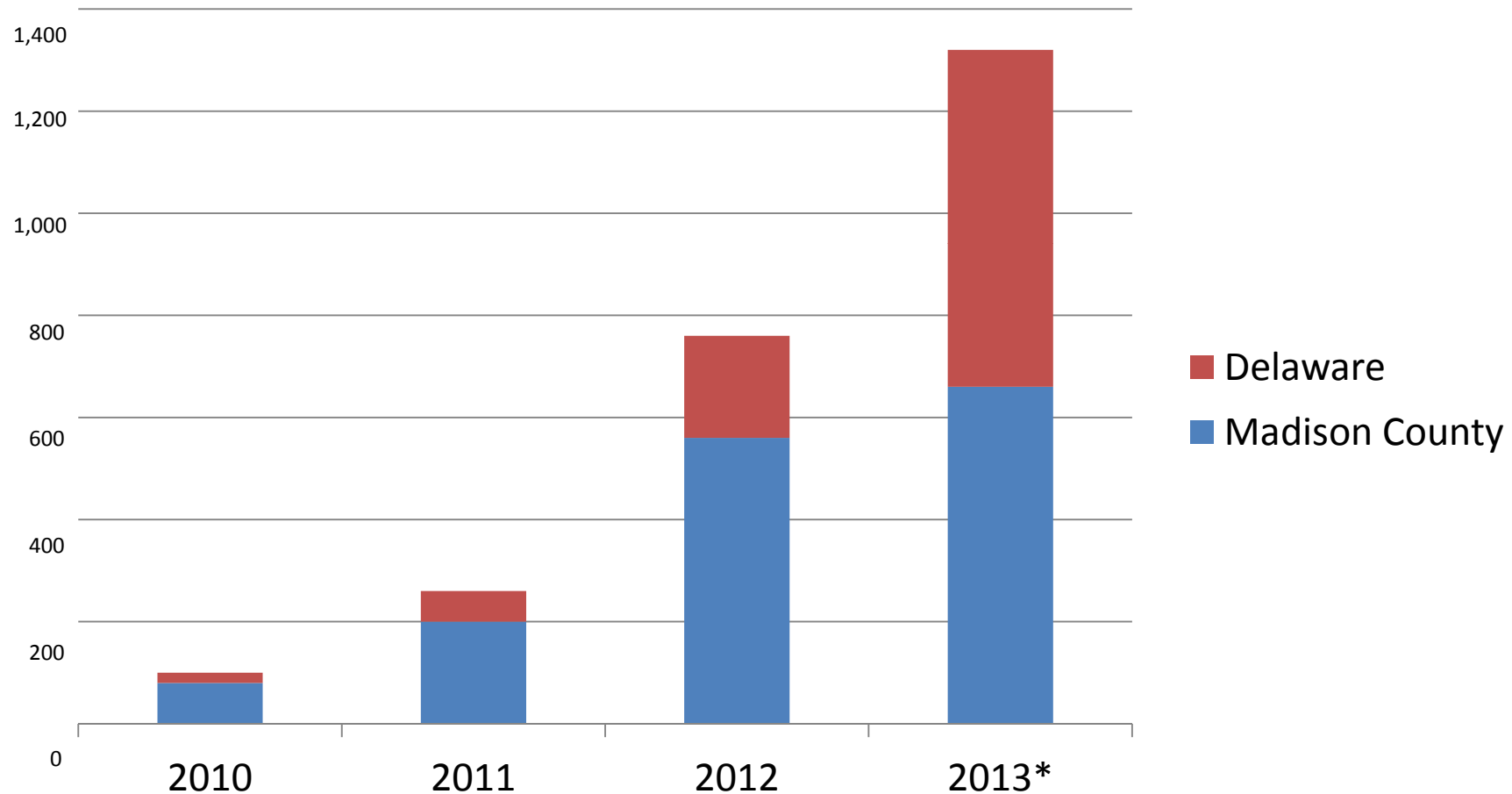
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The logo for Dinsmore, featuring the word "Dinsmore" in a serif font. The "D" is brown, and the "insmore" is blue. The letter "o" has a small blue triangle above it.

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The Growing Trend in Lung Cancer Filings



**2013 is annualized with data through Q3 for Delaware and through Q2 for Madison County
MEALEY's Asbestos Bankruptcy Report, Vol. 13, #4 (November 2013)*

Lung Cancer: A Case of Asbestos?

- Smoking is estimated to be a contributing factor in **90%** of lung cancer cases
- Occupational carcinogen exposures, including **asbestos**, uranium, and coke are estimated to contribute to **9-15%** of cases
- Radon exposure is estimated to contribute to **10%** of cases
- General outdoor pollution is estimated to contribute to **1-2%** of cases



Overview: Lung-Cancer Related Asbestos Trials 2012-2014

- **9 trials from 2012-2014**

- **6 Defense Verdicts**

- 5 of the cases involved Plaintiffs who were smokers



- **3 Plaintiff Verdicts**

- 2 of the cases were consolidated cases with more than one Plaintiff
 - 2 of the cases assessed 50% or more to Plaintiff's negligence
 - 2 of the cases resulted in initial awards in excess of \$2M

Defense Verdicts (2012-2014)

- Defense Theory: Insufficient product identification and Plaintiff's extensive smoking history
 - 2013, California
 - Plaintiff smoked two packs of cigarettes a day for over 50 years



- Defense Theory: insignificant exposure to Defendant's products; expert opined Plaintiff had unique gene mutation
 - 2013, Florida
 - Plaintiff was a non-smoker
- Defense Theory: Product was not a substantial factor
 - 2013, New York
 - Plaintiff was a cigarette smoker
 - Jury determined that Plaintiff *did* suffer exposure to Defendant's asbestos but not a substantial factor in Plaintiff's disease

Defense Verdicts Cont'd (2012-2014)

- Defense Theory: Plaintiff smoked cigarettes; none of the gaskets the Plaintiff was exposed originated with the Defendant; any exposure to asbestos from gaskets was de minimus
 - 2013, Pennsylvania
 - Plaintiff 85% liable for his lung cancer; Defendant 15% liable
 - Plaintiff's liability completely negated the liability of Defendant
- Defense Theory: Plaintiff never exposed to Defendant's product; Plaintiff never showed evidence of pneumoconiosis; Plaintiff smoked two to three packs of cigarettes per day for over 40 years
 - 2014, Illinois
- Defense Theory: Plaintiff smoked cigarettes; Plaintiff exposed to secondhand smoke
 - 2014, Illinois
 - 70% of responsibility of disease was Plaintiff's use of cigarettes; 10% due to secondhand smoke; 20% to co-workers working with asbestos at other job sites

Plaintiff Verdicts (2012-2014)



- Verdict: 2.1M
 - Illinois, 2014
 - 2 Consolidated cases (1 was lung cancer)
 - Lung cancer plaintiff awarded \$768,00 which was reduced to \$384,000 after finding plaintiff was 50% negligent due to his own cigarette smoking
- Verdict: \$250,000
 - Illinois, 2013
 - Assessed 20% to defendant and 80% to plaintiff- defendant paid \$50,000 to plaintiff
 - Defense: Plaintiff had two competing cancers at time of death, had other risk factors for lung cancer including rheumatoid arthritis and the use of immuno-suppressant drugs to treat the condition, and smoked for many years

Plaintiff Verdicts (2012-2014) Cont'd

- Verdict: \$190M
 - 2013, New York
 - 5 consolidated cases; 2 were lung cancer. The 2 lung cancer plaintiffs received \$90M in total
 - Plaintiff's counsel claimed that the Defendants had distributed literature that acknowledged they manufactured asbestos but provided no warnings of its danger



Search ID: mban1276
“We find the defendant guilty. I mean, why else would he go out and hire the best lawyer in town?”

Maryland: Contributory Negligence & Apportionment of Damages

- Verdict: \$9.6M (reduced to \$4M)
 - 2013, Maryland
 - 4 consolidated cases (all were lung cancer)
 - Maryland Court of Appeals (highest court) held that apportionment of damages was not appropriate because the injury was not reasonably divisible
 - Maryland Law grounded in contributory negligence
 - Apportionment of damages is appropriate only where the injury is reasonably divisible among multiple cases; when indivisible, any tortfeasor whose conduct was a substantial factor would be legally responsible for the entirety of damages
 - In this case, while Plaintiff had added to injury by smoking a pack of cigarettes per day for over thirty years, the injury was synergistic and thus, indivisible
 - In Maryland, Apportionment has never been applied to asbestos litigation context



Review



- Asbestos-related lung cancer claims on the rise
 - Rise can be contributed by willingness of trusts to pay non-Mesothelioma claims which has created an economic incentive for mass non-malignant screenings and lung cancer recruitment
- Unlike Mesothelioma which has strong casual links to asbestos exposure, lung cancer comes from a variety of risk factors
 - However Plaintiffs are frequently arguing the alleged “synergistic” effect that increases the risk of lung cancer when smoking combined with asbestos exposure
- Be wary of contributory negligence states that will not apportion indivisible damages to Plaintiff

Questions?

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