

# Asbestos

## **The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes In Exposure Allegations From 1991-2010**

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# Commentary

## The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes In Exposure Allegations From 1991-2010

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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. © 2012 by Marc C. Scarcella, Peter R. Kelso and Joseph Cagnoli, Jr. Responses are welcome.]*

### Introduction

Over the past two decades, asbestos litigation has undergone a succession of pivotal changes. Each change led to new claiming and settlement patterns that altered the legal and financial circumstances of asbestos plaintiffs and defendants. One of the most significant changes was the "Bankruptcy Wave" that began in 2000 and ended with dozens of primary asbestos defendants filing for bankruptcy reorganization ("Reorganized Defendants").<sup>1</sup> Since asbestos lawsuits are stayed during the reorganization process, a substantial source of plaintiff compensation associated with these primary defendants exited the tort system.<sup>2</sup> This marked a significant shift in asbestos litigation as plaintiff attorneys were faced with having to fill the void in compensation left behind by these Reorganized Defendants.

Prior to the Bankruptcy Wave, asbestos lawsuits were centered on the thermal insulation products and industrial settings that most scientific literature considered to present the highest excess exposure risk.<sup>3</sup> In turn, defendants responsible for the manufacturing and

distribution of such products were considered the most culpable sources of plaintiff compensation. Even after the largest manufacturer of asbestos-containing thermal insulation products, Johns-Manville, filed for bankruptcy protection in 1982, dozens of other thermal insulation defendants such as Owens-Corning, Fibreboard, and Pittsburgh Corning remained and continued to be primary sources of compensation.<sup>4</sup> However, following the bankruptcies of those frontline defendants during the Bankruptcy Wave, plaintiff attorneys shifted their litigation strategy away from the traditional thermal insulation defendants and towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products, and residential construction products.

As a result, these peripheral and new defendants experienced a dramatic increase in both the number of lawsuits in which they were named, the frequency in which their products and operations were identified as sources of asbestos exposure, and the overall settlement demands that plaintiff attorneys were seeking. Conversely, the primary thermal insulation defendants that filed for bankruptcy reorganization all but disappeared from the litigation and rarely are identified in cases today. To study the extent of this shift in allegations from traditional defendants to peripheral defendants, we examined the Philadelphia Court of Common Pleas asbestos docket through a sample of mesothelioma cases from 1991 to 2010.<sup>5</sup>

**Replacing Primary Defendants With Peripheral And New Defendants**

The Bankruptcy Wave had a dramatic impact on the claiming behavior in asbestos lawsuits. Prior to the Bankruptcy Wave, the naming patterns, exposure allegations and compensation to plaintiffs were relatively consistent with defendant manufacturing and distribution market share of asbestos-containing products. After the Bankruptcy Wave, however, plaintiff attorneys refocused their litigation strategy on defendants who previously had only been peripheral sources of plaintiff compensation, in addition to developing exposure cases against a new group of defendants who were rarely, if ever, named prior to 2000. Typically, one would think that when a majority of defendants in a tort exit the litigation through bankruptcy reorganization the defendant pool is reduced and the number of defendants named in future lawsuits decreases. However following the Bankruptcy Wave in asbestos litigation, the opposite was true.

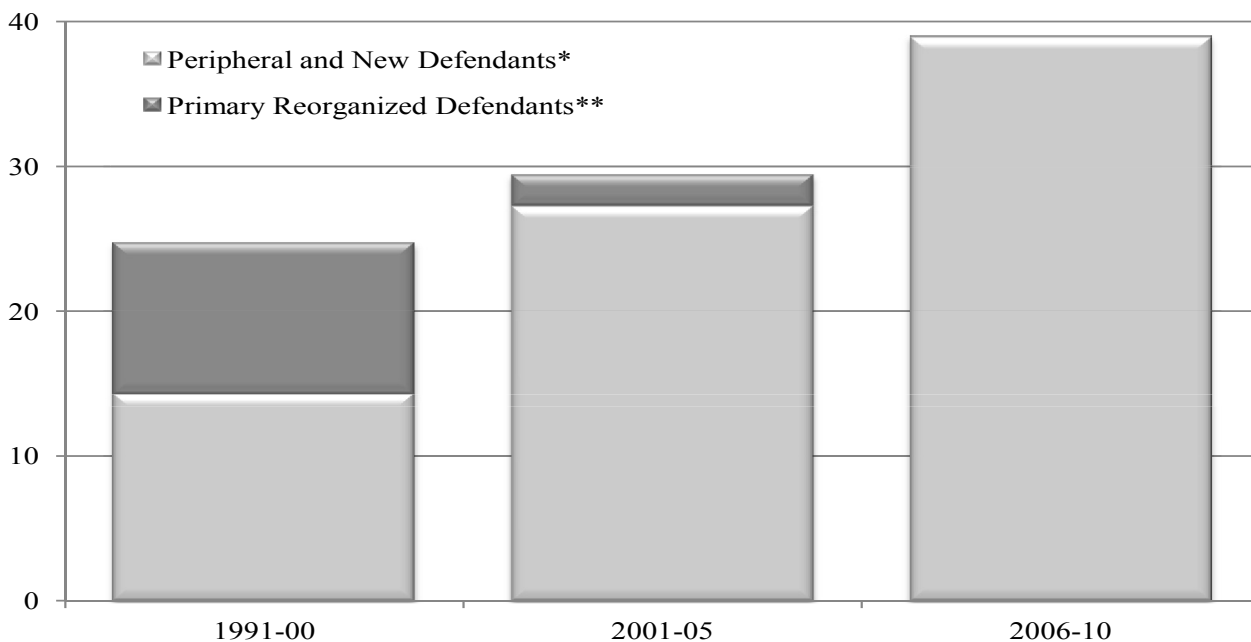
Exhibit 1 summarizes the naming patterns from our sample. On average, 25 defendants were named on a mesothelioma lawsuit filed between 1991 and 2000, 10 of which eventually filed for bankruptcy reorganization by 2004. Between 2006 and 2010, the average number of defendants named on a complaint rose to nearly 40, with virtually no Reorganized Defendants being

named. This suggests that plaintiff attorneys are pursuing cases against 2.5 peripheral or new defendants for every Reorganized Defendant they previously named.

The fact that plaintiff attorneys are no longer naming Reorganized Defendants on asbestos lawsuits is not surprising. When an asbestos defendant files for bankruptcy protection, they typically reorganize under section 524(g) of the bankruptcy code. In addition to placing a stay on claims against the defendant during the pendency of the reorganization process, all current and future asbestos claims are eventually channeled to a personal-injury trust following bankruptcy confirmation.<sup>6</sup> These trusts assume the legal responsibility of the Reorganized Defendant's asbestos-related liability and, in turn, are funded with assets intended to pay compensable claims.

Unlike the tort system, asbestos trusts are designed to process, qualify, and pay claims through an administrative process that does not require litigation. As a result, even the asbestos trusts that now stand in the shoes of those Reorganized Defendants will rarely, if ever, be named in a lawsuit. Effectively, the bankruptcy reorganization process has created a dual compensation system where plaintiffs may be independently compensated by both administrative trust payments and by tort-based settlements.

**Exhibit 1: Lawsuit naming patterns**



\*Includes peripheral defendants that eventually filed for bankruptcy after 2004

\*\*Includes defendants that filed for bankruptcy reorganization by 2004

**The Dual Compensation System**

The discussion surrounding the asbestos trust compensation system and its lack of transparency to the tort system has been the focus of academic, judicial, and legislative debates across the country in recent years.<sup>7</sup> Even though asbestos bankruptcy reorganizations and resulting trust funds have been around for decades, it has only been in the past few years that the trust system as a whole has become a substantial source of plaintiff compensation. That is because the bankruptcy reorganization process itself can take several years to reach confirmation. Furthermore, establishing an operational trust to begin processing, reviewing, and paying claims has taken from six months to multiple years following confirmation. As a result, many trusts established to stand in the shoes of Reorganized Defendants did not start compensating claimants until the late 2000s. Exhibit 2 shows the growth of the trust system over time and the assets earmarked for pending but not yet confirmed 524(g) reorganization plans.

As asbestos trust assets have grown over time, so have payments to asbestos claimants. Between 2006 and 2011, the trust system distributed over \$14 billion in claim payments. As these trust payments have increased, so have questions regarding the lack of

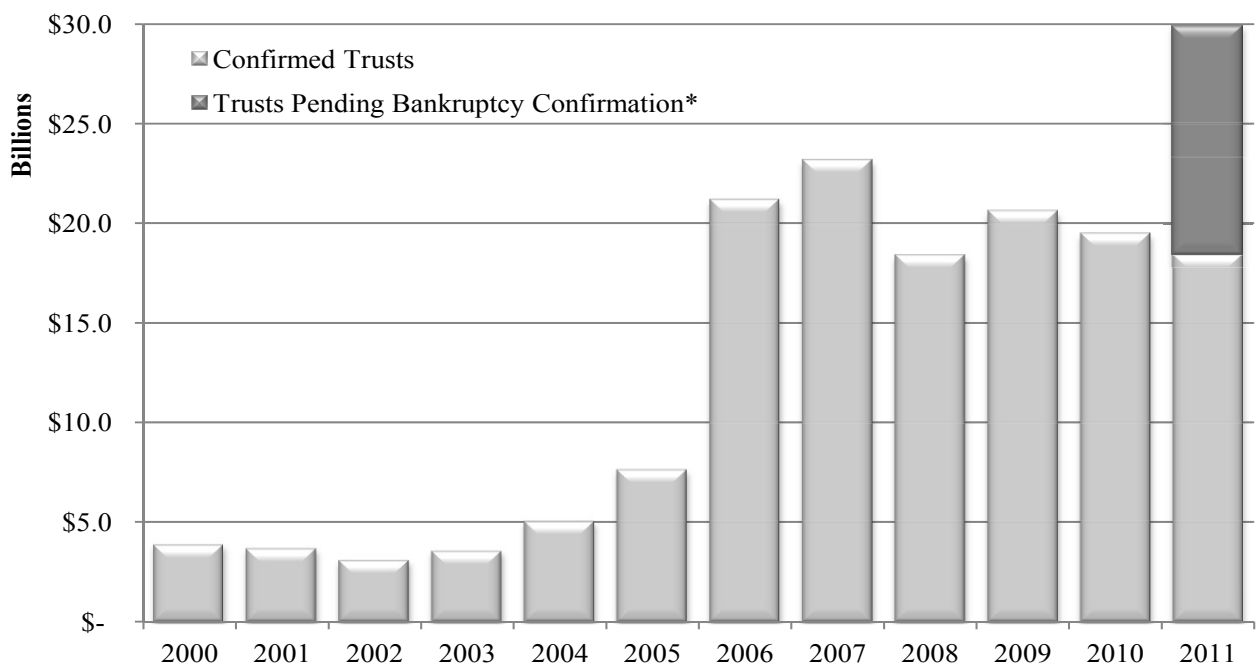
transparency between the trust and tort compensation systems.

1. At what rate are plaintiffs filing asbestos trust claims in addition to their tort claim?
2. For those trust claims that are being filed, are the exposure allegations and evidence submitted in support of the trust claims consistent with the allegations and disclosures in the tort claim?
3. Are the characteristics of a claimants' exposure profile predicated on the defendants that are currently in the tort system?

**Industrial Exposure Patterns**

To assess if the exposure profiles of plaintiffs today are similar to plaintiffs in the pre-Bankruptcy Wave period of the 1990s, we first looked to see what percentage of plaintiffs within our sample could allege exposures at industrial work sites where thermal insulation products were likely to be present. The types of sites we considered include shipyards, ships, refineries, steel mills, and power plants. The sample data suggest that prior to the Bankruptcy Wave roughly 77% of all plaintiffs had

**Exhibit 2: Trust yearend assets<sup>8</sup>**



*\*Estimated present value of proposed funding based on bankruptcy disclosures*

**Exhibit 3: Percent of plaintiffs with industrial exposures**

Potential exposures	1991-00	2001-05	2006-10
<b>Total plaintiffs with potential exposures to industrial sites</b>	<b>77%</b>	<b>72%</b>	<b>72%</b>
- in high exposure occupations	46%	34%	51%
- in other occupations	31%	38%	21%

some potential exposures linked to an industrial work site. Since the Bankruptcy Wave, this percentage has only dropped slightly to approximately 72% of plaintiffs.

Moreover, a majority of the plaintiffs that once worked at these industrial sites did so in a high-exposure occupation. In fact, the sample data between 2006 and 2010 suggest that the level of plaintiffs working in high-exposure occupations in industrial settings has actually increased slightly from the pre-Bankruptcy Wave period. The types of occupations we considered include insulators, boiler/firemen, pipefitters, machinists, iron workers, or general asbestos workers. Exhibit 3 summarizes these findings.

In addition to analyzing the location and nature of potential exposures to thermal insulation products, we also looked to see if the years of potential exposure have changed with more recent filings. Exhibit 4 shows that even as the plaintiff population has aged over time with an increasing level of exposure in the 1970s, a majority of exposures at these industrial sites still occur during the 1950s and 1960s. Prior to the Bankruptcy Wave, roughly 59% of the industrial exposures occurred between 1950 and 1969. More recently, for cases filed between 2006 and 2010, the percent of industrial exposures that occurred between 1950 and 1969 decreased only marginally to approximately 57%.

These findings are consistent with the epidemiological literature that commenced with the seminal work of Dr. William J. Nicholson in 1982.<sup>8</sup> Dr. Nicholson's epidemiological studies demonstrate that the exposure history of individuals diagnosed with mesothelioma will change, but that those changes will occur slowly over decades and remain strongly linked to industrial exposure. In essence, the asbestos exposure that workers received in the 1940s through the 1960s caused almost all occupationally induced mesothelioma. Conditional

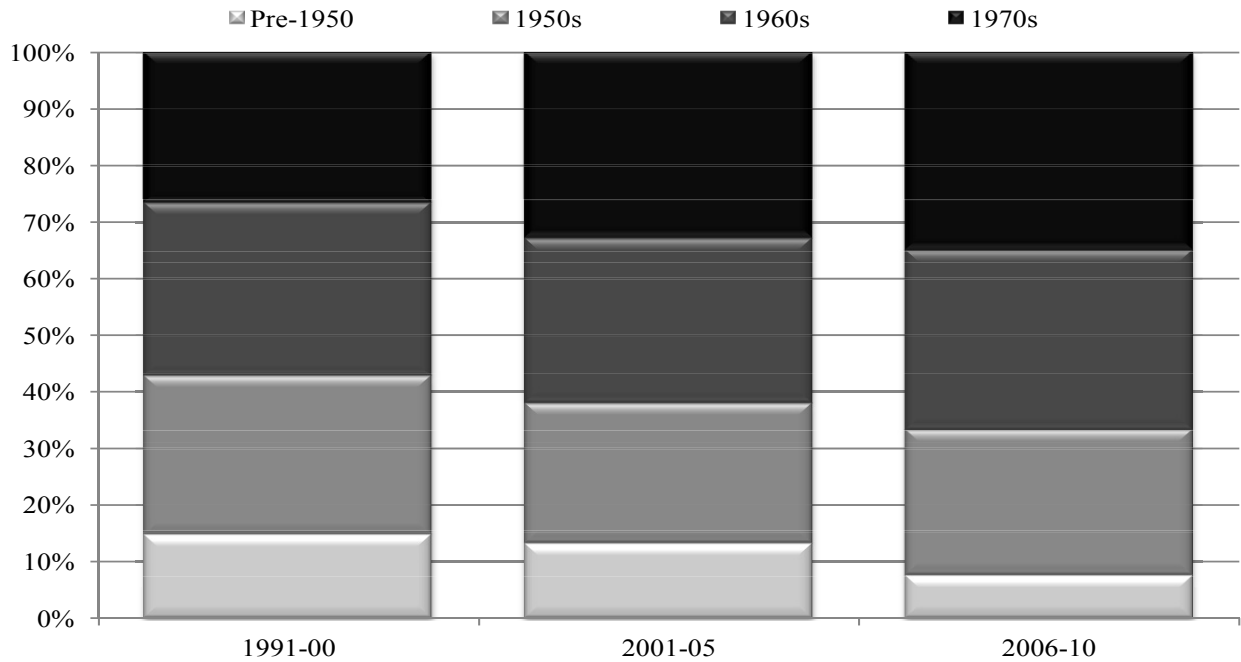
on their exposure history, if and when individual workers develop mesothelioma is a matter of chance. As a result, epidemiology demonstrates that the exposure history of individuals with occupationally induced mesothelioma today is essentially the same as the exposure history of individuals with occupationally induced mesothelioma in the 1990s.

**Shift In Alleged Product Exposure**

As primary thermal insulation defendants exited the tort system, the economic incentive for plaintiff attorneys and their clients to discuss them in lawsuits diminished. Our sample analysis indicates that the number of peripheral and new defendants positively identified during plaintiff deposition has increased significantly while the number of Reorganized Defendants identified has declined. Prior to the Bankruptcy Wave, deponents identified approximately 15 defendants on average, of which over 50% were primary thermal insulation or refractory defendants that eventually filed for bankruptcy reorganization. After the Bankruptcy Wave, deponents identified about 25 defendants of which only 15% are primary Reorganized Defendants. This suggests that three peripheral or new defendants are identified in deposition testimony today for every primary Reorganized Defendant identified prior to the Bankruptcy Wave. Exhibit 5 summarizes these trends.

This shift away from Reorganized Defendants has resulted in a dramatic decline in the number of times thermal insulation products are identified in deposition testimony or other case documents. Exhibit 6 shows how the identification of thermal insulation and refractory products has declined since the 1990s as the defendants responsible for a majority of the manufacturing and distribution of those products have filed for bankruptcy.<sup>9</sup> This is despite the fact that the plaintiff population has not experienced a decline in potential exposures in industrial settings where these products

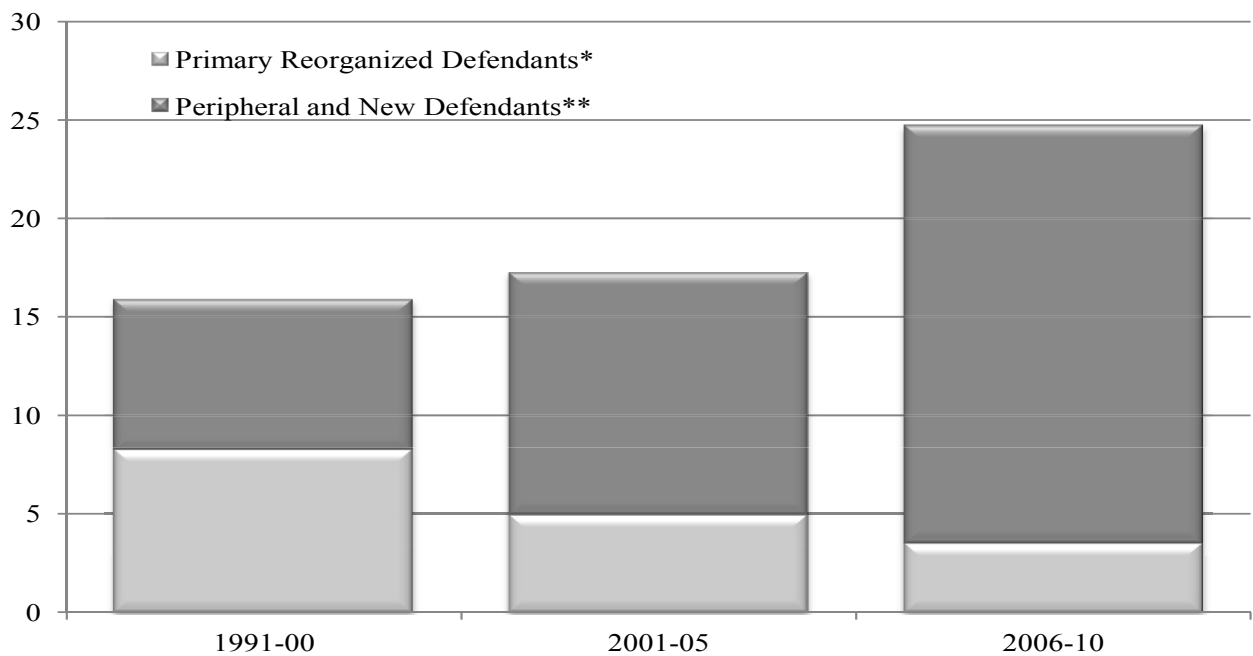
**Exhibit 4: Years of exposure from industrial work sites**



were present. Prior to the Bankruptcy Wave, over one-third of all products identified were thermal insulation

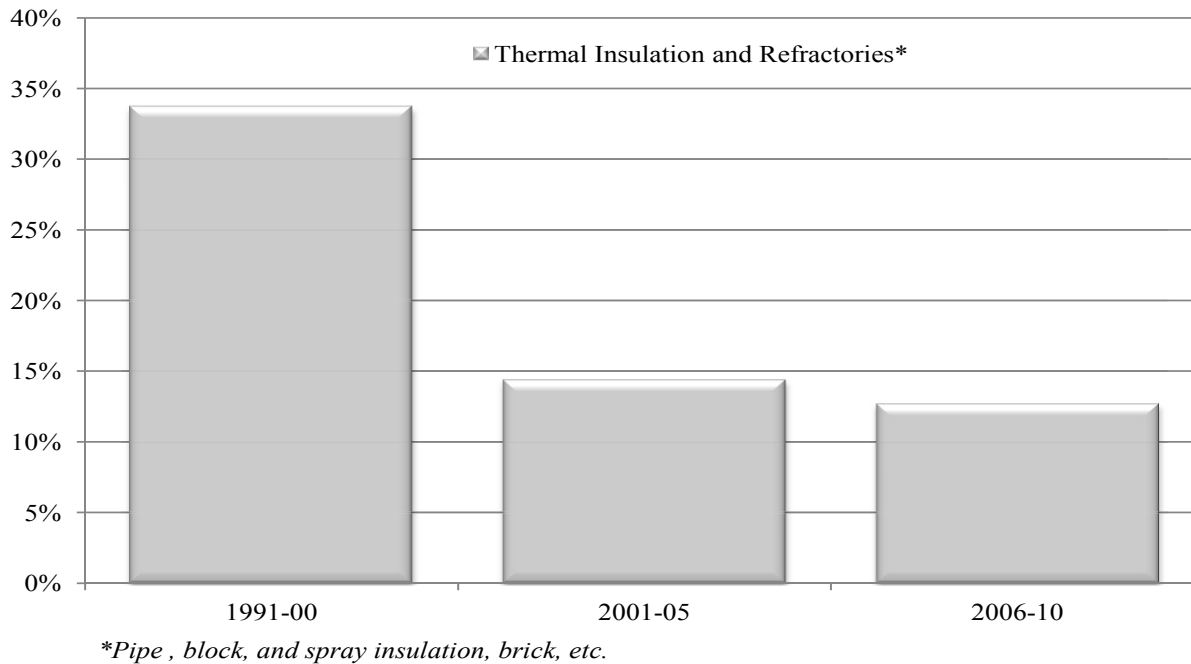
or refractory products. That fell to less than 15% between 2006 and 2010.

**Exhibit 5: Product manufacturers and distributors identified in deposition testimony**



\*Includes defendants filing for bankruptcy reorganization by 2004

\*\*Includes peripheral defendants that filed for bankruptcy after 2004

**Exhibit 6: Alleged exposure to thermal insulation and refractory products****The Rise Of Alternative Alleged Exposures**

It is clear from the data that the identification of thermal insulation defendants declined substantially since the Bankruptcy Wave. As such, the litigation shifted away from the thermal insulation defendants and towards exposures related to the products of the peripheral and new defendants, even though the exposure history of the majority of plaintiffs in this later period was unchanged relative to earlier plaintiffs; they still worked at sites (frequently the same sites during the same time periods as earlier plaintiffs) where thermal insulation products were present.

A case study on a Philadelphia plaintiff who filed a non-malignant claim in 1981 and subsequently filed a malignant mesothelioma case in 2010 is a prime example of this overall shift in identification patterns. In 1981, the plaintiff alleged exposure to asbestos through his work as an insulator for 30 years at a Philadelphia oil refinery and named 9 defendants in the complaint. Six of those defendants manufactured thermal insulation products and eventually filed for bankruptcy reorganization. The other three defendants were distributors who supplied insulation materials to the plaintiff's job site.<sup>10</sup> In addition to the thermal insulation defendants named in the complaint, the plaintiff

also identified over 50 thermal insulation products manufactured by the now Reorganized Defendants and another 40 products that were distributed to the refinery by the insulation supplier defendants. In this case, the plaintiff clearly alleged that his three decades working with insulation products at the refinery caused his asbestos-related disease.

However, the 2010 case complaint and allegations of exposure look much different. In the new complaint, the plaintiff now names over 40 defendants and none of the original defendants on the 1981 complaint. The complaint and deposition testimony acknowledge the plaintiff's previous insulation work yet, despite no new alleged exposures since the original complaint was filed in 1981, the focus of the 2010 case now concentrated on the plaintiff's weekend automotive work and potential exposure to asbestos from home construction products. In addition to the new defendants named, the new exposure allegations introduced no less than 12 products not previously identified and alleged exposure to an array of new, non-thermal insulation products such as brakes, gaskets, pumps, roofing, caulk and other construction products.

The sample data show that this particular example is more likely the rule rather than the exception. We



found that plaintiff depositions today focus less on thermal insulation and more on alternative products such as pumps, valves, and gaskets that also would have been encountered in traditional industrial settings. In addition, alleged exposure has increased in the construction and automotive trades, as well as residential do-it-yourself (“DIY”) home repair, remodeling, and shade-tree automotive maintenance.. Exhibit 7 shows this increasing trend towards non-industrial alleged exposures that implicate a new group of defendants.

Much like the case study, a majority of these plaintiffs alleging an increased level of alternative exposures still worked in the same industrial setting during the same time periods as earlier plaintiffs. For example, Exhibit 8 summarizes the percent of plaintiffs in our sample that i) have potential industrial exposures, ii) allege alternative residential DIY or shade tree automotive repair, or iii) allege both.

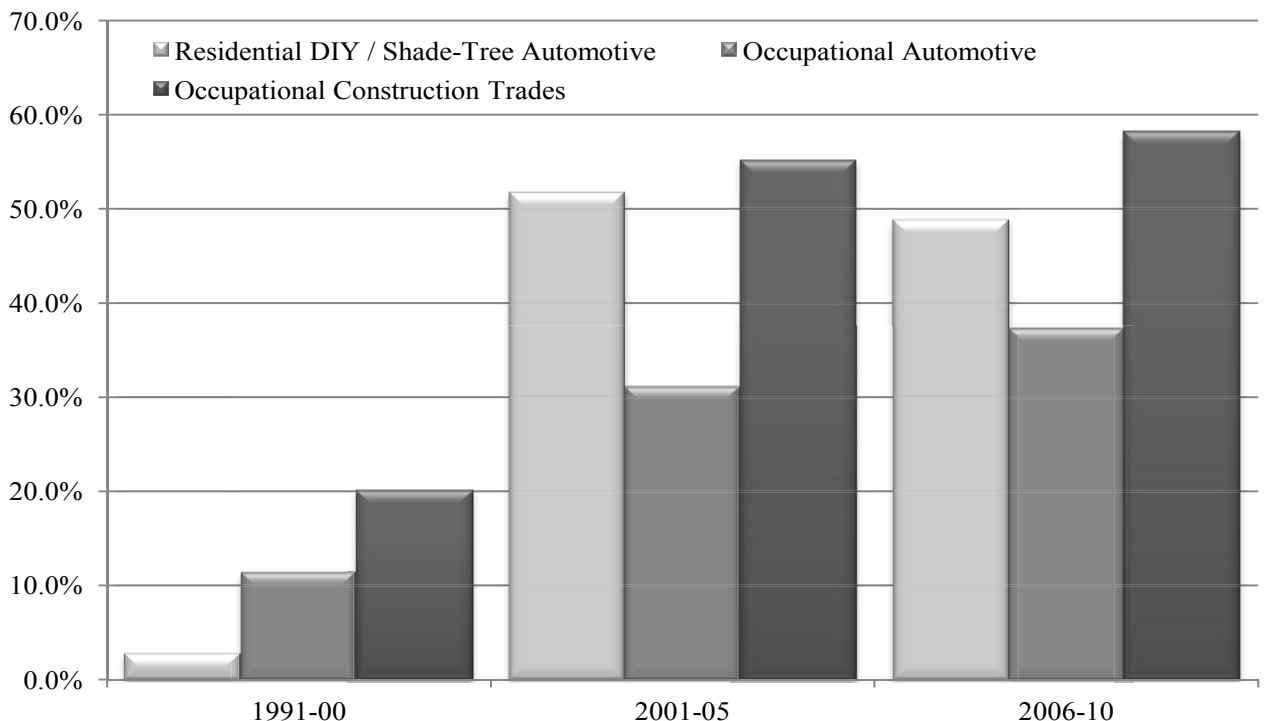
The sample analysis suggests that the mesothelioma plaintiff population in the Philadelphia Court of Common Pleas has maintained a consistent level of potential industrial exposures. However, the affirmative identification of thermal insulation products and those manufacturers and distributors associated with such products has

declined significantly, as the focus of the litigation shifted to alternative exposures and defendants. For most plaintiff attorneys and their clients, there is little economic incentive to build cases against primary thermal insulation defendants since almost all of them have undergone bankruptcy reorganizations. Given the high rate of industrial exposures, however, it is likely that plaintiffs still collect significant payments from the asbestos trusts that have replaced these Reorganized Defendants.

**Industrial Exposures And Trust Claims**

Asbestos trusts are designed to pay claims expeditiously and with minimal administrative and transactional costs. To accomplish this, most trusts have established presumptive medical and exposure criteria to quickly determine if a claim qualifies for payment. According to trust documents, claimants must demonstrate meaningful and credible exposure to asbestos-containing products manufactured, produced, distributed, sold, fabricated, installed, released, maintained, repaired, replaced, removed, or handled by the Reorganized Defendant. The trusts generally deem specific product identification through testimony by the plaintiff, plaintiff’s family members, or plaintiff’s co-workers sufficient to satisfy this requirement.

**Exhibit 7: Alleged alternative exposures**



**Exhibit 8: Percent of plaintiffs with industrial and non-occupational residential exposures**

Potential exposures	1991-00	2001-05	2006-10
Industrial sites	77%	72%	72%
Residential DIY / shade tree auto	3%	52%	49%
Both Industrial and residential DIY/ shade tree auto	3%	31%	35%

For many trusts, claimants can also support exposure allegations by working at a job site that appears on an Approved Site List. These Approved Site Lists are compiled through corporate records and plaintiff testimony and include locations where the Reorganized Defendant's products or operations were allegedly present for a specified period of time. In effect, these Approved Site Lists act as a proxy for co-worker testimony to further expedite the review process.

Plaintiffs can establish product exposure by being at one of these locations at a time when the predecessor company's asbestos-containing products or operations were also allegedly present. Not all trusts have Approved Site Lists, and those Approved Site Lists that do exist can have sites appended periodically. In addition to Approved Site Lists, certain trusts also provide an Approved Industry List of approved occupations and/or industries where the Reorganized Defendants' products or operations were presumed to be present.

To supplement the alleged product exposures in our sample, we compared the work histories of each plaintiff with a case filed after 2000 to the Approved Site Lists or Approved Industry Lists for those trusts that have one. Exhibit 9 summarizes the impact supplemental matches to trust Approved Sites and Industries can have on raising the profile of Reorganized Defendants in the absence of affirmative product identification in the tort case disclosures.

Exhibit 10 shows how consistent the results of the supplemental trust claim analysis are with pre-Bankruptcy Wave product identification patterns. Prior to the Bankruptcy Wave, the cases in our sample identified, on average, over eight thermal insulation or refractory defendants that eventually filed for bankruptcy reorganization by 2004. This number dropped between 2001 and 2005 to an average of five, and then to less than four between 2006 and 2010. However, when supplemented with Approved Site and Industry List

**Exhibit 9: Percent of 2006-2010 sample cases with links to select Reorganized Defendants**

Bankrupt Defendant	Percent of 2006-10 sample cases	
	With affirmative Product ID	Supplemented with Trust Approved Site / Industry Matches
Babcock & Wilcox	16%	72%
Fibreboard	5%	67%
Owens Corning	33%	65%
United States Gypsum	12%	60%
Armstrong World Industries	33%	53%
G-I	23%	53%
Combustion Engineering	5%	44%
<b>Average</b>	<b>18%</b>	<b>59%</b>

matches, the plaintiffs in the cases filed post-2000 would qualify for compensation from 10 trusts on average.

**The Asbestos Trust Waiting Game**

As evidenced in the sample data, there is a systemic shift away from Reorganized Defendant product identification. It is no longer in a plaintiff attorney's economic interest to build or concentrate a case against those Reorganized Defendants in the tort system. Rather, it is in the plaintiff attorney's economic interest to build a case in state court against the peripheral and new defendants and subsequently seek asbestos trust claim payments once they have reached settlement with a number of tort defendants. The timing and lack of transparency in this dual claim and compensation system can affect the way liability is allocated among the remaining defendants. If exposures to Reorganized Defendant products are not being disclosed in the tort case, then the relative liability risk increases for peripheral and new defendants.

To date, traditional discovery has been difficult for defendants in Philadelphia to use as an effective tool to ascertain asbestos trust claim forms and allegations of exposure to those Reorganized Defendant products.

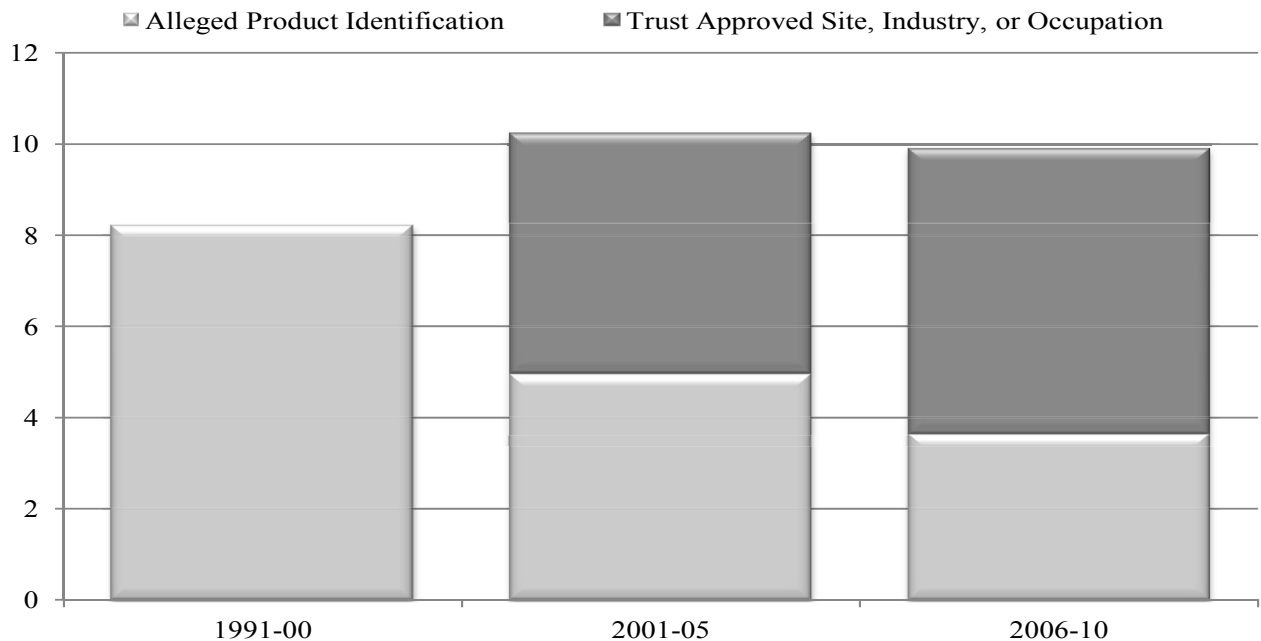
This is due, in part, because most asbestos trusts have a three year statute of limitations from diagnosis to trust claim filing that allows a window for tort recovery prior to trust claim filing. So when discovery is conducted by defendants requesting disclosure of trust claim forms and the corresponding exposure allegations, no such evidence exists.

Exhibit 11 summarizes our findings from two cases in the sample where asbestos claim forms were produced that serve as prime examples of the delay that is occurring between tort filing and trust claim disclosures.

**Case Study 1**

The first case study represents a plaintiff with significant occupational exposure in industrial settings during years of heavy thermal insulation use. Consistent with our findings across the 2006-2010 sample, the case documents only identified two Reorganized Defendants even though the plaintiff worked in an occupational setting where thermal insulation product exposure would be expected. In this particular case, while exposures against Reorganized Defendants were not the focus of the product identification and exposure allegations, one could easily bridge the information gap and

**Exhibit 10: Reorganized Defendant product ID when supplemented with Trust Approved Sites, Industries, and Occupations\***



\*Only includes those defendants that filed for bankruptcy prior to 2005

build a case to allocate liability to those parties through the use of trust Approved Sites and Industries. In fact, the exposure sites for the plaintiff would qualify for compensation from 20 trusts based upon Approved Site and Industry matches alone.

Eventually, evidence of asbestos trust claims were disclosed two-and-a-half years after the lawsuit was filed, and nearly a year-and-a-half after the claims were actually filed with the trusts. And when the trust filings were disclosed they included claim forms for only 6 of the 20 trusts for which the plaintiff was eligible. This supports the theory that the plaintiff attorney may have had little economic incentive to actively pursue qualifying trust payments during the pendency of the lawsuit. If pursuing trust compensation was a priority, then 20 claims would have been pursued instead of just 6, and the plaintiff could have received over \$500,000 in trust payments.<sup>11</sup>

### Case Study 2

The second case study represents a different and less common type of plaintiff, with only a mix of occupational and non-occupational residential construction

and remodeling exposures that didn't begin until the mid to late 1970s, when many asbestos-containing products had already been phased out of the market. In this instance, the case documents did disclose the use of products from six Reorganized Defendants such as flooring, wallboards, and compounds. Despite not having any industrial exposures, it was eventually disclosed that 11 trust claim forms had been filed on behalf of the plaintiff.

Given the non-industrial nature of the exposures, none of the trust claim forms in the second case could be supported by matches to Approved Sites or Industries. Rather, the alleged exposures in these trust claim forms were predicated on specific product identification that was not otherwise disclosed in earlier interrogatories or depositions. Prior to these trust claims being disclosed only two months before trial, the active defendants in the case had no way of assuming or establishing the potential exposures to these 11 Reorganized Defendants.

The significant delay in disclosing asbestos trust claim filings and corresponding exposure allegations until just before trial is an issue at the heart of a number of

### Exhibit 11: Case studies on trust filing lags

Findings	Case Study 1	Case Study 2
Lawsuit filing date	February 2008	January 2009
Trial group	November 2010	November 2010
# of named defendants	54	39
General exposure history	Laborer and machine operator for 30 years (1950s-70s) at industrial sites ( <i>refineries, steel mills, power plants, shipyards</i> )	Residential construction / repair on personal and investment properties beginning in the mid to late 1970s
# of Bankrupt defendants identified*	2	6
# of Trust claims disclosed in discovery	6	11
Date trust claims were filed**	May - June 2009	October 2009 – March 2010
Date trust claims were disclosed	September 2010	September 2010
Lag from lawsuit to trust claim filing	15-16 months	10-15 months
Lag from lawsuit to trust claim disclosure	31 months	21 months
# of Potential trust claims not disclosed***	14	1

\* Defendants bankrupt by lawsuit filing date

\*\* Two of the six trust claim forms did not disclose the trust filing date for Case Study 1

\*\*\* Based on product ID testimony and matches to trust Approved Site and Industry Lists

current state and federal legislative proposals aimed at increasing transparency between the trust and tort systems.<sup>12</sup> When trust claims are not pursued or disclosed until late in the tort proceedings, if at all, it creates an information asymmetry that places active defendants at a significant disadvantage when negotiating settlements in the tort system. If trust claims are not pursued in a timely manner, it conceals critical information regarding both sources of potential plaintiff compensation, as well as exposures to the products of the Reorganized Defendants that are no longer being named on the lawsuits because of their bankruptcies. As a result, the defendants and the court do not have the full information regarding the plaintiff's complete and unbiased exposure history, making it impossible to properly defend the case and allocate liability, respectively.

### **Establishing Liability To Reorganized Defendants In Philadelphia**

Defense and plaintiff attorneys negotiate settlements based on litigation risk factors. For defendants, knowing if claims are being pursued against alternative sources of compensation based on exposures to other company products and operations greatly influences their assessment of what they will likely have to pay if the case goes to trial. In the absence of this information, defendants are put in a position of agreeing to higher than appropriate settlements because the uncertainty surrounding potential trust claims naturally increases their litigation risk. Cases that do reach verdict similarly put the court and jury in an uncertain position. If information regarding exposure to Reorganized Defendant products has been withheld or concealed from the court, a jury cannot properly allocate liability against those culpable parties.

New legislation in Pennsylvania and changes to procedural rules in the Philadelphia Court has increased the economic incentive for current defendants to identify the liability share of Reorganized Defendants. The elimination of involuntary bifurcation earlier this year and the passage of the Fair Share Act in 2011 changed the paradigm of how liability is allocated in Philadelphia asbestos cases.<sup>13</sup> The Fair Share Act transitions the state's traditional joint and several liability rules to a system more in line with proportional liability and raises the threshold to 60 %the amount of liability for any one defendant to be jointly and severally responsible for the full judgment.

Even with the current rules in place, however, defendants in Philadelphia still face challenges assigning liability to bankruptcy trusts and getting a plaintiff's exposure to Reorganized Defendants' products considered by a jury. While providing evidence of exposure to Reorganized Defendants' products under the Fair Share Act should limit the risk of active tort defendants being held jointly and several liable, those defendants are still absent the corresponding mechanism that would allow the jury to allocate liability to bankruptcy trusts.<sup>14</sup> In order for the jury to consider and allocate liability among the full complement of potentially responsible parties, the court would need to establish procedures to ensure that trust claim forms and corresponding exposure evidence are disclosed early in tort proceedings and have the ability to place the bankruptcy trusts of the Reorganized Defendants on the verdict form.<sup>15</sup> The sample data suggests that until such rules are instituted, the allocation of liability in the Philadelphia Court will be influenced by the disclosure, or lack thereof, of trust claim forms and the associated allegations of exposure to Reorganized Defendants.

### **Conclusion**

The results from the study of the Philadelphia asbestos docket indicate that while exposures to thermal insulation products remain prevalent among today's plaintiff population, the identification of exposure to those products is greatly diminished compared to claims filed prior to the Bankruptcy Wave that had comparable (or even identical) exposure histories. Despite tens of billions of dollars in asbestos trusts currently available to pay the several shares of liability for Reorganized Defendants, including \$14 billion in payments that have been made between 2006-2011, the current bankruptcy rules and lack of transparency in the asbestos trust system have prevented current defendants from discovering the extent of exposure plaintiffs received from the products of Reorganized Defendants. As a result of this incomplete disclosure, current tort defendants overpay on numerous cases.

The dramatic decline of identification to the products of Reorganized Defendants since the Bankruptcy Wave is likely not unique to the Philadelphia Court. Given the widespread distribution of products by many of the Reorganized Defendants and the national scope of the current litigation, the economic incentives for plaintiff attorneys to concentrate on alternative asbestos

products is the same in Philadelphia as it is in New York, Baltimore, San Francisco or any other docket that manages a substantial number of asbestos claims. It may fluctuate between jurisdictions but it would not be surprising if the decline in identification to Reorganized Defendants found in Philadelphia is just as pronounced or possibly even more dramatic in other asbestos dockets around the country.

The enormity of the recent asbestos liability transfer from traditional to peripheral defendant in a joint and several tort is unprecedented. As a result, the longest running mass tort in U.S. history has left an enormous legal and economic burden in its wake for many of the once-peripheral and new defendants that continue to litigate asbestos claims in the tort system. Recent state and federal legislative and judicial reforms have sought to create more transparency in the asbestos trust system so state courts such as the Philadelphia Court of Common Pleas will have the knowledge about a plaintiff's full exposure history during the pendency of the tort case and can allocate liability responsibly between tort and Reorganized Defendants.

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## Endnotes

1. The companies that filed for Chapter 11 protection during the Bankruptcy Wave included AC&S, Armstrong World Industries, USG, Owens Corning/Fibreboard, Federal-Mogul, G-I Holdings, Combustion Engineering, etc. . . For a detailed list of all the Bankruptcy Wave debtors see Mark D. Plevin et al., *Where Are They Now, Part Four: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, 6:4 Mealey's Asbestos Bankr. Rep. (Feb. 2007).
2. William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 Norton J. Bankr. L. & Prac. 257 (2008); Expert testimony of Dr. Mark Peterson, November 13, 2003 in the matter *In re: Western Asbestos Company; Western MacArthur Company; and Mac Arthur Company*, Chapter 11 Bankruptcy No. 02-46284 through 02-46286 (United States Bankruptcy Court for the Northern District of California Oakland Division): pg. 745 ln. 11 – pg. 745 ln. 20.
3. U.S. Environmental Protection Agency, <http://www.epa.gov/iris/subst/0371.htm>.
4. <http://www.asbestos.com/products/construction/insulation.php>.
5. We collected information on nearly 250 mesothelioma cases filed in the Philadelphia Court of Common Pleas between 1991 and 2010. We limited the analysis sample to the 107 cases with deposition testimony, and product identification of at least 5 asbestos-containing products. This effectively removed from our analysis sample any cases where the only depositions available were for medical professionals or family members lacking extensive knowledge of the diagnosed party's product exposure history.
6. 11 U.S.C. Section 524(g)(2)(B)(i)(1); 11 U.S.C. Section 524(g)(2)(B)(ii)(V).
7. *Furthering Asbestos Claim Transparency (FACT) Act of 2012*, H.R. 4369, 112th Cong. § 2 (2012), Managers Package, September 21, 2012.
8. Nicholson, William J., Perkel, George, Selikoff, Irving J. "Occupational exposure to asbestos: Population at risk and projected mortality – 1980-2030," *American Journal of Medicine*, Vol. 3, Issue 3, 1982.
9. Exhibit 7 only includes product identification that is accompanied by a product manufacturer distributor, or contractor.
10. In a cross-complaint by Johns-Manville, 3 other now-bankrupt thermal insulation defendants were brought into the suit.
11. Potential recoveries based on published trust average values or equivalent when available. If not available, the Scheduled Value or equivalent was used instead.
12. Ohio House Bill 380, 127th General Assembly; *Supra* 7.
13. The Pennsylvania legislature passed the Fair Share Act (Pa.C.S. § 7102) on June 28, 2011 - applies to asbestos cases filed after its enactment; Hon. John W. Herron issued General Court Regulation No. 2012-01 on Feb. 15, 2012.
14. Mark A. Behrens. "Pennsylvania Moves Forward with Considering Asbestos Trust Recoveries when

Calculating Tort System Awards.” Mealeys Asbestos Litigation Report, Vol. 26, Issue 15, Sept. 7, 2011.

15. The Montgomery County, Pennsylvania Court of Common Pleas and the Kanawha County Circuit Court in West Virginia passed Case Management Orders in 2010 mandating the disclosure of trust

claim forms at least 120 days before trial; *Rose A. Thibeault, et al. v. Allis Chalmers Corp. Product Liability Trust*, No. 07-27545, (Pa. Comm. Pls., Montgomery Co.), Feb. 26, 2010; *In re Asbestos Personal Injury Litigation*, Civil Action No. 03-C-9600 (Cir. Ct. Kanawha County, W.V.), May 14, 2010. ■







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