

Asbestos

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Commentary

Looking Further Behind The Curtain: Examples Of Mesothelioma Claim Stories Derived From A Limited Dataset From The Garlock Chapter 11 Case, And Some Resulting Questions

By
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[Editor's Note: Kirk T. Hartley is a lawyer (LSP Group LLC), and has represented various different defendants in asbestos litigation at times dating back to 1984. Mr. Hartley also has been involved in multiple commercial lawsuits related to underlying asbestos litigation. Mr. Hartley is a Director of a national consulting firm (Gnarus Advisors LLC) that provides consulting services related to underlying asbestos litigation. Mr. Hartley is an unpaid director for a not-for-profit entity (Triage Cancer) that provides information to persons facing cancer. Mr. Hartley also provides unpaid advocacy for persons with cancer facing situations in which insurance companies have denied payments for or access to treatments for cancer, and for efforts by groups seeking to obtain better outcomes for persons facing cancer. Additional specifics are available at the "about" section of Mr. Hartley's blog (www.GlobalTort.com), or by e-mail request to the author at khartley@lspgrp.com. Any commentary or opinions do not reflect the opinions of LSP, Gnarus, or LexisNexis, Mealey's. Copyright © 2015 by Kirk T. Hartley. Responses are welcome.]

Short Stories and Questions

Sometimes we learn more through a few short stories than from analyzing massive quantities of data. And, asking good questions about stories also is important for distinguishing between fact and fiction. This commentary seeks to use both concepts to foster more critical thinking about the variability of mesothelioma recoveries in the tort system and the trust system. The stories below show that some particular underlying lawsuits and trust claims produced very different outcomes by some very different paths. And, some of the data may be

seen as providing some insights into the wide range of payments for mesothelioma cases.

As to the mesothelioma claiming stories, this commentary reports the visible parts of only some of the many short stories that can be derived from a dataset drawn from a spreadsheet from the mesothelioma estimation trial in the Garlock chapter 11 case. The spreadsheet summarizes data from 845 mesothelioma cases. Set out immediately below is one example of a short story drawn from the dataset. Also pointed out immediately below are examples of some of the many questions that may flow from one or more of the 845 short stories.

Galiher Derobertis & Ono

The dataset reports 3 mesothelioma cases handled by the Galiher firm. The firm has the highest tort system recovery shown in the dataset, with a reported \$12.6 million recovered from 16 tort system payors in the Barney Rio case (claim no. 72915).

On reading the short story above, one wonders: what did Mr. Rio do for work, and when? How old was he when the mesothelioma became known; was he a younger person with large economic losses? Did he serve on a Navy ship? Did he have several dependents? Was the mesothelioma peritoneal or pleural? Was there a trial, or an imminent trial date? Which defendants paid, and how much per defendant? Were there later trust system recoveries, and if so, what were the specifics of the trust system recoveries?

Answers to those questions cannot be found in the spreadsheet that provided the source data. Instead, the spreadsheet

collects only a very limited amount of information about each claimant. As to demographics, the datasheet provides only the name of the case, two different claim tracking numbers, and the name of a plaintiff firm involved as counsel for the plaintiff. As to values, the spreadsheet shows the total number of tort system payors, and the total amount paid, and the number of and total amount of trust system recoveries. The spreadsheet - and the source data sheets - do not identify payors, do not provide any work history, and do not provide information on the jurisdiction in which suit was filed.

Further Specifics and Background on Garlock Datasheet

The mesothelioma claiming stories are drawn from the spreadsheet titled "Total Recovery Data" for 845 mesothelioma cases drawn from the "PIQ" dataset of mesotheliomas that were explored through discovery and questionnaires in the Garlock chapter 11 case. The dataset set is shown in a publicly available Adobe (.pdf) version of a spreadsheet apparently generated by persons acting for the Debtors. The spreadsheet is part of the data made public after a sealing order was lifted from the Garlock chapter 11 trial proceedings.¹

As explained in the recent *Looking Behind the Curtain* paper by Abelman, Kelso and Scarcella, the further background is as follows:

"PIQ Data: Approximately 4,000 responses to the mesothelioma Personal Injury Questionnaire ("PIQ") submitted by plaintiff law firms representing Garlock claimants, plus more than 30,000 supporting documents including deposition testimony, work histories, named defendants' information, and trust claim disclosures.

Total Recovery Data: 845 pending mesothelioma claimants subject to the PIQ were asked to provide a Supplemental Settlement Payment Questionnaire, which included information on the total number and amount of trust payments and the total number and amount of payments received from tort defendants or other settling parties."

After the Garlock trial record was unsealed, the parties went through various processes to compile data and documents from the trial, and make most of them publicly available. Ultimately, Legal Newline

reported on the unsealing developments,² and then published at least much of the material online at: legalnewline.com/garlock. On reaching that location, a user can scroll through a list of available materials to find a menu item for "databases." The spreadsheet is in that section, and in particular is located at: [2013.02.01 Total recoveries data Redacted.xlsx.pdf](#). That "spreadsheet," however, actually is not a "live" Excel file, and instead is a .pdf file of a spreadsheet. The pdf image file is difficult to read due to poor printing that does not produce a nice outcome when run through OCR. However, at least much of the data can be figured out and cleaned up, and source data can be checked, with significant effort.³

Further Caveats About the Dataset

The stories and numbers herein are provided with the caveat that the dataset plainly is limited and imperfect. The limitations begin with the fact that the dataset represents only a very small subset of all national mesothelioma cases over many years. The data also is now relatively "old." There also are some obvious data problems or omissions for particular cases; examples are provided below.⁴

Another limitation is the dataset does not reveal the method used to attribute a particular case to a particular plaintiff law firm. For example, in any given asbestos case, there in fact may be a "national" plaintiffs counsel and a "local" plaintiffs counsel. The dataset, however, only shows one plaintiff firm for each case, and does not on its face reveal what if any process was used to investigate whether multiple plaintiff firms were involved in a particular case.

Another limitation is that the dataset provides only a "snapshot" of recoveries as of a moment in time. The dataset shows some persons received very large amounts of money from many asbestos trusts, but others received very little if any money through the trust system. It is impossible to determine from the dataset whether a lack of trust system recoveries represents the ultimate final outcome of claiming for that person, or whether the data instead simply presents a misleading "snapshot" before trust claiming occurred in any meaningful way for that particular person. One also cannot see the years in which the trust claims were submitted, and whether the person happened to claim shortly before or after a large reduction in the payment percentage for one or more trusts. The

dataset also does not reveal the timing of trust system claiming versus tort system claiming, and/or trial dates.

Examples of Interesting Stories

The short stories set out below are only a few of the 845 cases described in the dataset. The stories are interesting because they suggest the variability of claiming outcomes and claiming patterns for mesothelioma cases. Objectively, the dataset reflects a wide range of outcomes across different cases. In some instances, the tort systems recoveries are exponentially greater than trust system recoveries. For others, the exact opposite is true. And, for all of the claims, it is impossible to know - from the spreadsheet - whether later claims were or were not filed with one or more trusts or whether monies were recovered. Looking at the short stories and dataset as a whole, one can conclude that it is difficult (or perhaps impossible) to identify a truly "typical" or "representative" outcome for trust and tort system claims arising from a mesothelioma. Moreover, as noted earlier, the entire dataset itself is quite limited and consists of data that is now relatively "old."

Numbers of Cases Reported for Each Plaintiff Firm

The dataset shows some disparate and surprising numbers in terms of the number of cases reported for a particular plaintiff firm. For example, the dataset attributes 74 cases to the Simmons Browder firm (a/ka/ Simmons Cooper), a well known plaintiff's firm that some see as one of the largest mesothelioma case filers in the nation. On the other hand, the dataset attributes 127 cases to the Lanier Law Firm. The disparity seems odd in view of the typical understanding of the two firms in terms of the relative number of cases filed each year in the tort system. One wonders how this outcome occurred; there are multiple plausible explanations, but the datasheet does not provide answers.

Big Picture Observations on Overall Numbers of Trust Claims

The dataset shows 30 as the highest number of trust fund recoveries obtained in a single case. It is the Joseph Maguire case (claim no. 65986) filed by Brent Coon & Associates. The 30 recoveries are listed as totaling \$662,000.

452 cases are reported to have achieved only from 1 up to 9 trust recoveries. But of course the dataset does not explain where those 452 cases stand in terms of progress through the tort system and the trust system.

A total of 30 cases are shown as achieving 20 or more trust recoveries. One might have expected more, or less, such cases, depending on what one assumes about trust system recoveries.

Big Picture Observations on Tort System Recoveries

Two cases tied for the lead in terms of the largest number of reported tort system recoveries, with both cases showing recoveries from 72 payors. The cases are the John Murphy case (claim no. 70195) filed by Cooney & Conway, and the Richard Cotirell case (claim no. 14295) filed by Zamler Mellen & Shiffman. The aggregate recoveries are very different. The dataset shows tort system recoveries of \$3.9 million for Mr. Murphy and \$244,000 for Mr. Cotirell.

Of all the cases in the dataset, 17 are reported to have resulted in tort system recoveries between \$3 million and \$4 million.

The Lanier Law Firm is reported to have recovered \$7 million from 4 tort system payors in the Ronald Killbrough case (claim no. 105736).

20 cases are reported as achieving tort system recoveries that were only between \$1,000 and \$10,000. These all appear, however, to be relatively immature cases because they show between 1 and 3 tort system recoveries. But the dataset cannot demonstrate the truth or falsity of the "immature case" hypothesis.

7 cases are reported as achieving tort system recoveries from between 40 and 49 tort system defendants. For the 7 cases, the total amounts recovered range from a high of \$2.1 million to a low of \$203,000.

1 case is reported to have resulted in recoveries of \$4.97 million from 26 tort system payors, but \$0 trust fund recoveries. The case is Elodie Granier Rome (claim no. 97246) filed by the Roussel & Clement firm.

Big Picture Observations on Disparate Recoveries Between the Tort and Trust Systems

Some of the cases show significant numbers for trust system recoveries but relatively little from the tort system. For example, Michie Hamleti Lowry Rasmussen & Tweel is listed as counsel for the Ruby Link case (claim no. 90773). The case is reported to have

achieved \$502,000 of trust system recoveries from 22 trusts, but only \$5600 of tort system recoveries from 2 defendants.

Similarly, the Dennis Landis case (claim no. 78306) is a case that reportedly achieved \$527,000 in trust system recoveries from 11 trusts, but only 1 tort system recovery for \$6,500.

A relatively different result is shown in the Elman Lansdowne case (claim no. 98168) filed by the Shein Law Center. For that case, the dataset shows \$2.5 million of trust system recoveries from 13 trusts, and \$244,000 of tort system recoveries from 11 tort system payors.

Another case with a large range between systems is the Rubert Minton case (claim no. 94276) filed by Patten Wornom Hatten & Diamonstein. The dataset shows \$0 trust system recoveries and \$2.4 million of tort system recoveries from 18 payors.

There also is an additional story on the Minton case, and one wonders how the datasheet story relates to the larger story, which involved trial and subsequent appeals and a remand. Specifically, in March, 2011, a jury returned a \$25 million verdict for the Mintons, involving Mr. Mintons work on repair operations for ships at Newport News Shipbuilding. (Bert Minton v. Exxon Mobil Corp., No. CL0901505F-15, Va. Cir., Newport News). Mealey's reported the jury award consisted of \$12 million in compensatory damages, \$12.5 million in punitive damages and \$430,961 in medical damages, plus interest. As reported by Mealey's, the case was filed under the Longshore and Harbor Workers' Compensation Act (LHWC), and claimed exposure while employed as a repair supervisor on 17 commercial Exxon vessels at Newport News Shipbuilding from 1966 to 1977. During the three-week trial, Exxon argued that under the LHWC, the duty to protect the workers fell to the shipyard and not the ships' owner, sources said. On post-trial motions, the punitive damages verdict was reduced to \$5 million. Then, In January 2013, the Virginia Supreme Court vacated the award and remanded for a new trial. Plaintiff sought certiorari to the Supreme Court of the United States, but did not succeed.

A search of the cases cited in this article by the editor of the Mealey's Litigation Report: Asbestos, suggests the Minton case is the lone one to go to trial.

A broad range also is shown in a case that resulted in \$105,000 of trust system recoveries from 6 trusts, as contrasted to \$3.5 million of tort system recoveries from 19 tort system payors. The case is shown as filed by Gallihier Derobertis & Ono on behalf of Ernest Sakamoto (claim no. 72908).

Another broad range is reported in the Robert Fogarty case (claim no. 112178) filed by Wilentz Goldman & Spitzer. For that case, the dataset shows 0 trust system recoveries and tort system recoveries of \$2.6 million from 20 tort system payors.

Baggett McCall Burgis Watson & Gaughan

One case appears for the Louisiana based Baggett firm, which is the Floyd LeBouef case (claim no. 58735). The case shows a \$950,000 tort system recovery from 1 defendant, and \$164,000 recovered in the trust system from 5 trusts. An obvious question is why one payor paid so much.

Baron & Budd

For Baron & Budd, 37 cases are shown. But there is no monetary recovery data for any of the cases.

Belluck & Fox

There are 21 case entries for Belluck & Fox, but 7 case entries do not contain any data on monetary recoveries. The highest listed tort system recovery is \$2.8 million in the Sidney Goldstein case (claim no. 60530) from 22 tort system defendants. An additional \$317,000 was recovered for Mr. Goldstein from 14 trusts.

At the low end, the Edward Seier case (claim no. 60240) showed a \$10,000 tort system recovery from 1 defendant, and no trust system recoveries. Presumably this matter was relatively 'young,' but one cannot confirm that from the dataset.

Bevan & Associates

Ten cases are shown for the Bevan firm. Two cases are at the high end and show tort system recoveries of \$760,000 and \$458,000. The low end of the tort system recovery is listed at \$0. On the trust system side, the low end is \$0 and the high end is a \$339,000 recovery.

On specific cases, the high end recovery is about \$474,000 in the Robert Zgangar case (claim no. 61278), which shows a \$328,000 tort system recovery

from 15 defendants, and a \$146,000 trust system recovery from 6 trusts. The Charles Gilchrist case (claim no. 61803) shows a tort system recovery of \$458,000 from 6 defendants, and a trust system recovery of \$94,000.

Interestingly, the Jerome Glueck case (claim no. 61704) shows \$105,000 recovered in the trust system from 7 trusts, and only \$32,500 recovered in the tort system from 3 defendants. Thus, at least for this case, it may be that trust system recoveries were attempted before a tort suit was filed. Other explanations also are possible.

Brayton Purcell

13 cases were originally attributed to Brayton Purcell, but notes in the dataset suggest the firm only actually represented 11 of the claimants. One wonders how/why that disparity exists. For the remaining 11 cases, there are some interesting variations. For example, in the Judith D. Black case (claim no. 63784), the data shows a \$3.3 million tort system recovery from 7 defendants, and \$27,000 recovered from 2 trusts.

At a lower level, the data shows a \$707,000 tort system recovery from 13 payors and a \$585,000 trust system recovery from 17 trusts in the Raymond C. Cronin case (claim no. 64156).

Brookman Rosenberg Brown & Sadler

The dataset shows 10 cases by this firm with a wide range of recoveries. The lowest recovery is for the Hendrik Koek case (claim no. 66679). For that case, the spreadsheet shows \$0 trust recoveries and \$90,000 of tort system recoveries from two payors.

At the high end, the spreadsheet shows a recovery of just over \$5 million for Larry Bell (claim no. 66815). That recovery is comprised of \$4.48 million recovered from 19 tort system defendants, and \$557,000 recovered from 14 trusts.

Interesting comparisons can be made between the \$5 million recovery for Mr. Bell (immediately above), and the recovery reported in the William Geist case (claim no. 66792). Both cases showed a relatively similar trust system recovery amount of between \$400,000 and \$557,000. But the cases show a very different tort system recovery for Mr. Geist than for Mr. Bell. According

to the spreadsheet, Mr. Geist was paid \$1.99 million by 29 tort system payors. Thus, Mr. Geist received about \$2.48 million less in the tort system than did Mr. Bell (paid over \$5 million), despite recoveries for Mr. Geist from 29 defendants instead of only 19 payors to Mr. Bell. It would be interesting to explore in detail the reasons for the differences.

Cooney & Conway

The dataset presents information for 34 Cooney & Conway cases. The largest listed tort system recovery shows \$3.9 million from 72 payors in the John Murphy case. An additional \$674,000 was recovered from 20 trusts for Mr. Murphy.

Gori Julian & Associates

The dataset reports on 44 cases for the Gori Julian firm. For non-zero cases, the highest reported tort system recovery is \$2.3 million from 30 tort system payors, and the lowest recovery was \$6,500 from 1 tort system defendant. The latter case could be very "young" within the tort system, but the dataset does not explain the situation.

Harowitz & Tigerman LLP

The dataset reports on 4 cases attributed to the Harowitz & Tigerman firm. The highest reported tort system recovery was \$3.0 million from 34 tort system defendants and the lowest reported tort system recovery was \$686,000 from 21 tort system defendants. The firm's trust recoveries ranged from a high of \$584,000 from 17 trusts to a low of \$170,000 from one trust.

Hobson & Bradley

The Hobson & Bradley firm is listed for 3 cases. According to the data, the recovery in the Charlie Burgess case (claim no. 81252) was \$1.8 million from 7 tort system defendants, and \$224,000 from 7 trusts.

Kaiser Gornick

The Kaiser Gornick firm is shown as counsel for 17 cases. The outcomes include a \$2 million recovery from 11 tort system defendants, and \$376,000 from 13 trusts, in the Michael English case (claim no. 86943).

Karst & Von Oiste

The Karst & Von Oiste firm is in the dataset for 1 case. The entry shows \$4 million recovered from 4 tort system defendants, and \$26,000 recovered from 1 trust.

Kazan McClain

One case is reported for the Kazan McClain firm. It is the Timothy Barker case (claim no. 82334) which is listed as resulting in \$1.9 million of tort system recoveries from 10 defendants, and \$1.1 million of trust system recoveries from 11 trusts.

Waters & Kraus

The Waters & Kraus firm is shown as counsel for 15 cases in the dataset, but the dataset presents recovery numbers for only 13 of the cases. Case entries for Waters & Kraus are interesting for some relatively high value tort system recoveries from a relatively small number of payors. Of particular note, the dataset reports the firm obtained a tort system recovery of over \$5 million from 7 defendants, and \$275,000 from 5 trusts, in the Tammy Thornton case (claim no. 83010)

A Closing Comment

One can hope the short stories above will prompt further discussions about and interest in the variability of outcomes for mesothelioma cases. Plainly there are variations, but public discussions too often are limited to averages. And, discussions about the underlying asbestos litigation numbers also are often inhibited by confidentiality orders, and/or claimed or perceived client concerns about secrecy.

Endnotes

1. See generally, Ableman, Kelso & Scarcella A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of

Evidentiary Abuse Against Crane Co., 15 Mealey's Asbestos Bankruptcy Report #4 (Nov. 2015).

2. See J. Karmasek, Legal NewsLine, Previously sealed Garlock bankruptcy record now available online (May 2015) (online at <http://legalnewsline.com/stories/510550767-previously-sealed-garlock-bankruptcy-record-now-available-online>).
3. The online data apparently includes an image file for each of the 845 "Supplemental Settlement Payment Questionnaires" that provided the source data for the datasheet. Finding the source document is laborious because the source documents are not in alphabetic order. For some claimants, there are documents with image file names suggesting the image files include either revised questionnaire answers, and/or supplemental information provided (apparently) in connection with answering the questionnaire.
4. The dataset in the .pdf image file plainly includes a small number of errors in either the original reporting of and/or later recording of data. For example, for some cases, the dataset shows \$XX of trust system recoveries, but the case entry does not list the number of trusts that made a payment. An example is the Roland Shetler case (claim no. 82051), for which the report shows total trust recoveries of \$961,000, but does not state the number of trust funds from which the recoveries were achieved. The .pdf image file also contained a few typos, various slight differences in the names of plaintiff law firms, and other minor flaws or errors of that sort. ■

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