Data, Preparation, and Innovation

By Jonathan Terrell, President of KCIC

Asbestos Litigation Best Practices and Statistics

Asbestos personal injury claims were once described as the "Energizer Bunny of toxic torts." As we move into the second half of 2016, there appears to be a very slight glimmer of hope for an improving situation for defendant companies. The data for 2015 and the first half of 2016 show a modest overall decrease in filings, as well as judicial developments and innovation in the management of asbestos liabilities, albeit with no real prospect for an end to the asbestos litigation business.

Through our regular consulting practice, KCIC's 2015 data show over 9,000 defendant company namings were included in asbestos-related litigation on 5,320 complaints. An average of 66 defendant companies were named per complaint. Even allowing for some duplication, simple math shows us that for complaints filed in 2015, over 250,000 initial actions had to be taken; *i.e.*, the complaint had to be assigned to defense counsel, a file opened, and the complaint answered. Most of these complaints required additional defensive actions before reaching a settlement, dismissal, or verdict. This represents an enormous tax on corporate America, and a major distraction for any corporation defending itself in asbestos-related litigation.

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defendant companies are still spending as much money as ever defending themselves. Filing rates for mesothelioma, lung cancer, and other serious cancers have not fallen, and settlement values, especially for mesothelioma, have dramatically increased over the period. To illustrate the strong financial incentives behind the asbestos litigation business, one need only look at the widespread and increasing purchase of advertising for mesothelioma and lung cancer cases on radio and TV stations and internet browsers.

This article is written with an in-house counsel audience in mind. While the readers of *In-House Defense Quarterly* are mainly lawyers, I am a not a lawyer, but an accountant by training and a management consultant by profession. For 20 years, I have dealt with the realities of asbestos litigation on a daily basis, both from the vantage point of an insurance company executive, and in the course of my work as a consultant working with defendant companies. I hope that you find my perspectives interesting and helpful.

Statistics

2015 Data

As part of its claims administration business, KCIC processes thousands of asbestos personal injury complaints on its proprietary Ligado platform. There is no national asbestos registry for asbestos-related filings, so the total population of filings is unknown. However, based on comparisons we have made with other known datasets for particular jurisdictions and defendants, we estimate that our database captures at least 90 percent of the total asbestos filings in the United States, and likely more.

From this dataset, we are able to support the "very slight glimmer of hope" referenced in the opening paragraph, in that 2015 saw a decrease in overall asbestos filings of about four percent across all diseases. In our dataset, total lawsuit filings were 5,320 in 2015 versus 5,552 in 2014. Total filings for the first half of 2016 were 2,142 as of August 1. The most significant decline was with lung cancer claims, which dropped 24 percent (1,150 versus 1,507), mainly as a result of the cancer filing surge in 2014 from the Napoli firm, which disappeared in 2015.

Mesothelioma filings—the main economic driver of these lawsuits—decreased by about five percent (2,287 versus 2,412). Surprisingly, non-malignant claims increased by about 24 percent (1,338 versus 1,079) due to an unusual and significant amount of late 2015 filings served in 2016 in Middlesex, MA, Baltimore City, MD, and Newport News, VA.

> While the nature of the litigation has somewhat changed over the last ten years—in particular the sharp drop in the number of complaints for non-cancer disease types—defendant companies are still spending as much money as ever in defending themselves.

Madison County, IL, continued to be the epicenter of asbestos filings with 47 percent of mesothelioma filings and 22 percent of all filings in 2015. The top 15 jurisdictions for asbestos filings remained essentially the same and represented just under 83 percent of total filings. Put another way, 4,397 of the 5,320 total filings in 2015 were filed in the top 15 jurisdictions. The next closest jurisdiction after Madison County was Baltimore City, with only 13 percent of total 2015 filings. The rest are a long way behind. The concentration of litigation in Madison County is quite marked.

Jurisdiction is not the only concentration observed in the data. The top 10 plaintiff firms made 60 percent of the 2015 filings. The top plaintiff firms were mostly consistent from 2014 to 2015. See Table 1.

When looking at the defendants named in 2015, essentially the same defendants appeared at the top of the list in 2014. The most named defendant was named on approximately 87 percent of all the 2015 complaints. The tenth most named company was named on 56 percent of the complaints. The top 10 defendants represent less than one percent of the total defendant company population, yet at least one of them was named on 95 percent of the 2015 lawsuits. As mentioned previously, a staggering number of defendants—over 9,000—were named on 2015 complaints. On average, each complaint named 66 defendants. Even allowing for some duplicate namings, over 250,000 answers would have been due for the 5,320 complaints filed in 2015.

The story—sometimes referred to as the collective action problem—is one of great concentrations, as well as great diversity. A few plaintiff firms file most of the complaints, overwhelmingly in Madison County, and a few major defendants are named on most of them. But lots and lots of companies are dragged into these actions as more peripheral players.

Comparison with RAND Report (2005)

"The more things change, the more they stay the same." It is interesting to compare and contrast these statistics on asbestos litigation with those of the early 2000s. The Rand Institute for Civil Justice has researched and issued a number of monographs on the subject of asbestos litigation, including its 2005 monograph "Asbestos Litigation." Observations in it include:

Table 1

Top 10 Plaintiff Firms	
Law Offices Of Peter G. Angelos, PC	643
Gori, Julian & Associates, PC	478
Weitz & Luxenberg PC	439
Simmons Hanly Conroy	384
The Ferraro Law Firm	286
Maune Raichle Hartley French & Mudd, LLC	233
Goldberg, Persky & White, PC	225
Cooney And Conway	179
The Law Offices Of Paul A. Weykamp	160
The Law Offices Of Peter T. Nicholl	149
Grand Total of asbestos filings	**3,176**

- An estimate that 55,116 complaints with an identified disease were filed in 2002 (they exclude claims that do not identify a disease type). This compares with 4,930 in our 2015 data (after normalizing for claimants that do not include a disease type). Mesothelioma claims comprised 1,856 of the 2002 complaints identifying a disease type (three percent) versus 2,287 of KCIC's 2015 data (46 percent).
- An estimate that at least 8,400 entities had been named as asbestos defendants through 2002. This compares with our estimate of over 9,000 in 2015 alone.
- The concentration of plaintiff representation began soon after asbestos litigation geared up in the 1970s, noting that in 2000, just ten firms represented nearly half of all asbestos filings. Our data shows that such concentration has continued and increased. According to our data, the top ten firms represented 60 percent of filings in 2015.
- Throughout the history of asbestos litigation, a small number of jurisdictions have accounted for the bulk of litigation, but the areas of concentration have changed over time. In the early 2000s, Mississippi and Texas were the jurisdictions of choice. Those have now shifted to Illinois and Maryland.

So the dynamic noted—few plaintiff firms filing claims against many defendants, concentrated in a few jurisdictions—has not changed since the early 2000s. What has dramatically changed is that the number of non-malignant claims has dropped off considerably, while the number of mesothelioma claims, which drive the largest settlements, has increased.

Baseline Best Practices

Get a Handle on Your Data

Mass tort litigation, such as asbestos personal injury claims, so often starts in a small way: first a few claims, then a few more, then a steady stream, and then sometimes a flood. Perhaps record keeping starts informally, then a spreadsheet, then defense counsel has a database, then defense counsel changes. Or, the primary insurance carriers may be handling the whole show, and policyholders are only too relieved that it is out of sight and, more importantly, out of cash flow.

Unfortunately, it is extremely common for a day of reckoning to arrive. We frequently work with companies that have their claims history and defense history located in a series of unconnected databases, spreadsheets, insurance company loss runs, and filing cabinets. Some data may already be lost forever. Often it's a mess.

Why is this data so important?

> Madison County, Illinois, continued to be the epicenter of asbestos filings with 48% of mesothelioma filings and 25% of all filings in 2015. The top 15 jurisdictions for asbestos filings remained essentially the same and represented just under 82% of total filings. Put another way, 3,653 of the 4,465 total filings in 2015 were filed in the top 15 jurisdictions

- Without a comprehensive claims and defense cost database, it can be very difficult to prove to excess insurers that underlying insurance policies are exhausted.
- It may be difficult or impossible to put together a reliable estimate or forecast of future liabilities.
- Settlement strategies are often guesswork without claim and defense data, including the ability to see average settlement values by disease type, by jurisdiction, and by plaintiff firm.

I strongly urge more recent defendants to set up a claims and defense cost database as early as possible in their claims experience. For more seasoned defendants, the work involved might be more extensive, requiring research and consolidation from multiple sources. Perfection is not the object; getting it roughly right is still very helpful, and the sooner you start, the easier it will be.

Get a Handle on Your Insurance

I could write a whole paper on this subject alone. Historic, comprehensive general liability insurance policies have the potential to substantially offset the out-of-pocket expenses of a defendant in asbestos-related litigation. Steps involved in getting a handle on insurance include:

- Locating the policies or secondary evidence;
- Researching any gaps or missing coverage;
- Analyzing the policies to determine the scope of coverage they afford;
- Analyzing the coverage for insurer insolvencies, insurer M&A activity, notice provisions, etc.;
- Giving notice to carriers in accordance with the policy language; and
- Negotiating with carriers to contribute to defense and indemnity expenses.

Hiring specialist coverage counsel and consultants will almost always be worthwhile in this endeavor.

Embrace Technology

So many defendants are frustrated by their inability to get real-time, accurate reporting. Defendants stumble under the sheer weight of managing an asbestos docket, with overwhelming email volume and so many interested parties. But twenty-first century technology can make this a whole lot easier. Platforms in which all sources of data, uses of data, and users of data are housed in one comprehensive program can make the logistics of managing the docket transformational. It's like buying your socks on Amazon in two minutes rather than trudging out to the department store in the snow!

Litigation and Settlement Strategy

I am not about to start doling out advice about defense strategy in the DRI forum.

As previously disclosed, I am a non-lawyer bringing a non-lawyerly perspective. Some of what follows is too obvious for words, and I only make the observations because I have seen too many companies get it horribly wrong.

The defendants that I see, that make the most success of managing their asbestos litigation, do not adopt a purely settlement or purely defense strategy, but a combination of the two. What does that look like?

- Even if you have no intention of, or cannot afford to go to trial, work up your defenses anyway.
- Hire trial counsel, who may be separate from your NCC, and have a trial team ready to go to trial anywhere, anytime. Even if you never try a case, these steps will save you settlement dollars.
- This one is really obvious, but do not go to trial if you have not worked up your defenses and do not have a trial team ready to perform. You may end up being a top-tier defendant forever.
- Engage with insurers on trial strategy, but make your own risk assessments. The downside risk of going to an adverse verdict may be the policy limit for an insurer, but could mean bankruptcy for a defendant. The risks are not equivalent.
- Develop a system to identify high-risk cases, (for example, cancer claims with strong product ID) and settle them early. Sometimes a separate claims negotiator who has the job of cultivating cooperative relationships with plaintiffs can be helpful in this regard.
- Leverage your data. Have at hand all of your previous settlement data for each plaintiff. Many plaintiffs are guided by your established settlement values. Be prepared to explain unique facts about outliers.

Take Care of Your Local Counsel Network

As noted above, a defendant that has a defense provided by its primary carrier may have little to do with the payment arrangements for those lawyers. As excess coverage is accessed, these defendants will most definitely have a more direct role. A fairly common dynamic is for several cost-sharing arrangements, formal or informal, to be negotiated between different carrier groups in the insurance program, with the defendant commonly also absorbing a share.

While this may work well for the defendant company, it can cause a significant cash flow problem for defense firms. By the time defense costs are submitted, analyzed, approved, allocated, and billed to carriers, audited by carriers, and paid by the carriers, many months can elapse. In my experience, delays of six to twelve months are not uncommon.

> The most named defendant was named on approximately 89% of all the 2015 complaints. The tenth most named company was named on 61% of the complaints. The top 10 defendants represent less than 1% of the total defendant company population, yet at least one of them was named on 99% of the 2015 lawsuits.

My advice to defendant companies is to be prepared to put some of their financial skin in the game to ameliorate this cash flow pressure in their defense network. Law firms are not corporations with capital structures, but partnerships in which large receivables can cause difficulties personally to the partners, as well as between partners.

While this suggestion may be surprising to defendant companies, my opinion is that in the overall context of managing asbestos litigation, the amounts required are not necessarily large, and they generate very significant goodwill in the defense network. When you are in what can be "bet the company" litigation, you want your lawyer well-disposed and giving you the royal treatment.

Manage Plaintiff Settlements Efficiently

The notion of establishing a good working relationship with the plaintiffs' bar may be an unpalatable thought in some circles. Many industry participants believe that defendants can achieve lower settlements and get out of cases more easily when they have that kind of relationship. Remember, asbestos litigation is a business. Plaintiffs' lawyers want to get paid, and paid quickly. When that does not happen, and motions to enforce start flying around, no one wins.

Insurance companies have fairly standard documentation that they require to support a settlement payment, and defendants without insurance maintain similar documentation requirements. The process for documenting a settlement for payment can be quite unnecessarily disorganized, with documents flowing from plaintiff to defense counsel to NCC, etc. Often, it is unclear what is lacking to complete the file, time is wasted, and frustration levels increase.

Some firms are offering products that leverage technology to facilitate this process. But whatever process flow you are comfortable with, having a specific point person on settlement documentation, who can quickly and easily interact with plaintiffs' counsel to complete the files, is helpful.

In a related point to the one made in the previous section, being prepared to fund settlements in advance of insurance recoveries, and thereby getting plaintiffs paid quickly, should be, in my opinion, seriously considered—not only to avoid Motions to Enforce, but because the resulting goodwill is helpful in improving the management of asbestos liabilities.

Document the File with Your Claims Handling Experience

As will be discussed more extensively in the next section in the context of Berkshire Hathaway, the interests of insurance companies and those of defendants are not necessarily aligned. The relationship between an insurer and the defendant is governed

by the insurance contract—typically, many insurance contracts. Areas in which disagreements may occur include:

- Who gets to choose defense counsel?
- What are reasonable billing rates?
- How much is a reasonable settlement value?
- What are the risks of going to trial?
- What does "assistance and cooperation" mean?
- Are all defense costs reimbursable?

Disagreements between policyholders and insurers are commonplace, but most often, mutually satisfactory compromises can be reached. However, with the consolidation that has occurred in the insurance industry and the increasing prevalence of so-called "run-off specialists," the aggressiveness of claims handling experienced by many policyholders has significantly increased. Whether the level of aggressiveness reaches the level of bad faith conduct is a legal question and is fact driven.

It is, however, vital to document the file with your claims handling experience to give the option of filing a future bad faith action. Documentation would include:

- Send billing and all correspondence to insurers by courier or certified mail and keep receipts.
- Keep copies of all emails and other correspondence from carriers.
- Prepare a timeline of all requests for settlement authority, responses, and dates of payment.
- Where several carriers are part of the same authority request, track their responses in a way that easily allows for them to be compared at a later date.
- Keep note of all audit deductions.
- Investigate audit deductions and seek to resubmit with additional explanation; also note responses.
- Keep evidence of course of conduct before a change in claims administrator.

Legal Developments

Berkshire Hathaway and Retroactive Reinsurance

Through a series of transactions using a financial instrument known as retroactive reinsurance, Berkshire Hathaway, through its insurance subsidiary, National Indemnity, has amassed the largest concentration asbestos-related liabilities in the industry and in history. Claims administration for all these deals is delegated to another Berkshire entity, Resolute. This extreme concentration of financial risk and claims handling authority at a single entity is the single biggest legal development in the asbestos litigation area in the last several years.

I strongly urge more recent defendants to set up a claims and defense cost database as early as possible in their claims experience. For more seasoned defendants, the work involved might be more extensive, requiring research and consolidation from multiple sources. Perfection is not the object; getting it roughly right is still very helpful, and the sooner you start, the easier it will be.

Defendant companies with coverage placed with a diverse portfolio of insurance companies, including Lloyds of London, AIG, Commercial Union, Continental Insurance, and Liberty Mutual, now have their claims adjusted by a single entity, Resolute—and often by a single claims adjuster. This enormous market power is changing the face of asbestos litigation for defense firms, defendants, and plaintiffs.

I have written about this subject more extensively elsewhere, but will simply observe here that what is in the best interests of a defendant company and what is in the best interests of Berkshire Hathaway are not always the same, and circumspection is the name of the game for defendant companies in this new market dynamic.

Garlock

The controversial case involving the bankruptcy reorganization of Garlock Sealing Technologies has received much attention. Ostensibly, it takes a helpful position on claims estimation—to the effect that average settlement values in the pre-bankruptcy years are not a reliable predictor for estimating future liabilities. This was due to the systematic, abusive, non-disclosure by plaintiffs of exposure information. It highlights the lack of a sensible interface between the two systems in which plaintiffs can seek relief: the tort system and the bankruptcy trusts, which operate more like distant cousins, not really on speaking terms.

While the extent of plaintiff abuse through strategic timing and non-disclosure had received attention, it was not until Garlock that the extent of it was really nailed. The very detailed discovery ordered by Judge Hodges in that case demonstrated the widespread practice of submitting numerous bankruptcy trust claims, exposure to which had not been disclosed, *after* reaching settlement with Garlock.

The effects of this landmark ruling continue to resound, but it is still too early to see the full effect. (The industrial manufacturer, John Crane Inc., filed racketeering lawsuits in June against two plaintiffs' firms accusing them of fabricating false histories for their clients. John Crane discloses that it learned of the alleged actions to conceal evidence in the Garlock bankruptcy proceedings.) Both trial court judges and bankruptcy judges have been put on notice about the potential for fraudulent practices in their asbestos cases.

The findings in Garlock were corroborated by research by the RAND Institute for Civil Justice. The report "Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases," by Lloyd

Dixon and Geoffrey McGovern, is right on point with the issues raised in Garlock. Their research produces empirical evidence demonstrating that identification of exposure to products by plaintiffs mysteriously disappears from the discovery record once the company responsible for those products files for bankruptcy. In other words, the fraudulent behavior of plaintiffs called out in Garlock is supported by RAND's latest research.

The study compared the rate at which plaintiffs identified exposure to a company's products before and after the company's bankruptcy. To address this issue empirically, they examined how often the products of 43 companies that went bankrupt between 1998 and 2010 were identified in mesothelioma cases brought by two sets of plaintiffs with similar exposure histories: 47 plaintiffs who worked at the Brooklyn Naval Shipyard in New York between 1940 and 1949, and 39 plaintiffs who joined the Navy between 1950 and 1954 and were stationed at West Coast bases or on ships that were serviced on the West Coast.

Some of the conclusions:

- From making a claim through interrogatories and depositions, plaintiffs are less likely to identify exposure to products of a bankrupt firm than of a solvent one.
- As a result, more fault is assigned to solvent defendants, who are likely to pay more than if evidence of exposure is developed.
- Plaintiffs then sue the bankruptcy trusts of the insolvent firms not named in the tort case.
- Plaintiffs end up receiving more in total compensation from the solvents and trusts combined.
- Defendants don't pursue evidence during discovery because evidence gathering is too difficult and expensive.

Two congressional bills have jumped into this space, the Furthering Asbestos Claims Transparency Act of 2015 and the Reducing Exposure to Asbestos Database Act of 2015.

As will be discussed further in the "Innovations" section, defendants are exploring new ways to include the potential for bankruptcy trust offsets in their trial and settlement strategy. The most innovative are utilizing tools to facilitate the collection of prima facie evidence of exposure to products that are compensated from the bankruptcy trusts during the deposition stage of discovery.

Innovations

As the Energizer Bunny of toxic torts bangs away on its drum, defendant companies have been innovating to reduce and make the cost of asbestos litigation more predictable.

Bankruptcy Offsets

As highlighted above regarding Garlock, the issue of the availability of settlements from the post-bankruptcy trusts is a hot-button issue. To be able to go into litigation or settlement with a predictable view of what trust dollars might be available can be very advantageous, and several companies are promoting tools that are designed to do just that.

Even more useful are the tools being developed by some defendants—designed to assist defense counsel in taking more targeted depositions. These tools, based on a plaintiff's work history, trade, and product exposure, facilitate questioning that establishes prima facie evidence of the potential for a trust claim. This is a lot more powerful than a simple theoretical offset. And there is really no wrong answer. An affirmative answer can be used to reduce the defendant's share, and a negative answer can be noted for a potential later claim if it comes to light that a post-settlement filing was made against the relevant bankruptcy trust.

KCIC has found that the judicious deployment of database technology in this area enables reports of potential offsets to be generated in real-time, and offers defense attorneys an easy tool for targeting their deposition questioning.

Plaintiffs Portals

KCIC has pioneered the use of Plaintiffs Portals, through which settlement documentation can be directly uploaded to our platform, and missing documentation can be transparently identified. Given the familiarity plaintiff firms have with accessing the bankruptcy trusts, they are capable and willing to use a well-designed portal to document a settlement. These products save money and time for everyone, facilitating a better working relationship between defendant and plaintiff firms, and also are helpful in securing an insurance recovery, as settlement documentation is a hot-button issue for insurers.

Inventory and Long-term Settlement Arrangements

While not an innovation, we are seeing defendant companies more often negotiate inventory settlements with the major plaintiff firms on a periodic or annual basis. These can take a variety of forms. They may be resolved without the filing of a complaint; an annual payment may be negotiated, and then cases that fit agreed criteria are selected for the inventory; or other approaches. This minimizes the costs of litigation for both parties and can help in keeping unhelpful facts out of discovery.

Single Defense Firm

Some defendant companies are abandoning the traditional model of an NCC and a network of local defense firms in each relevant jurisdiction. Instead, they are contracting with a single NCC that either undertakes the totality of their defense work itself, or subcontracts with chosen local firms, as it deems necessary. These arrangements are often on fixed-fee arrangements, sometimes on long-term contracts. The advantages to the defendant of such an approach are lower overall defense costs, predictability of costs, and a consistent strategy throughout the jurisdictions. The advantage to the defense firm that wins the contract is the ability to plan a long-term defense strategy and predictability of fee income.

Conclusion

There are no silver bullets to surviving in the jungle of asbestos litigation. However, we are seeing both significant legal developments and more innovation than in many previous years, which will doubtless have an important impact. The most successful defendant companies are utilizing data to their advantage, preparing for both litigation and settlement, and are embracing and driving innovation in the management of this most intractable of torts.