

Asbestos

The Claiming Game

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Commentary

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Introduction

Recently funded 524(g) asbestos settlement trusts are having a profound impact on asbestos litigation. Our previous paper, *The Naming Game*, illustrated the extent of this impact on naming patterns and plaintiff compensation in Alameda County, California. We found that as primary asbestos defendants began filing for bankruptcy earlier this decade, the remaining solvent defendants were named with increasing frequency and forced to pay the several share of their reorganizing codefendants. However, even as the 524(g) settlement trusts began to compensate claimants on behalf of the reorganized codefendants, the lack of transparency between the trust and tort systems has prevented solvent defendants from returning to their appropriate several shares. As a result, a dual compensation system has developed where trust and tort settlements are made independent of one another.

The Naming Game showed that mesothelioma plaintiffs in Alameda County will receive on average \$1.2 million from active and emerging 524(g) settlement

trusts.¹ This average settlement amount was calculated by assuming that the rate in which reorganized defendants were historically named in the tort system would translate into claiming rates against their 524(g) settlement trusts. Clearly these average naming patterns may differ depending on the specific profiles of each plaintiff. In fact, we would expect that plaintiffs with different industries, occupations, regions, or exposure periods would likely name defendants at different rates, and as such the expected settlements from the trusts would vary as well. Here we present a case study of work histories of four actual mesothelioma plaintiffs in Alameda County to illustrate the impact of an individual's exposure profile on the expected range of 524(g) trust settlements. We found that one of the plaintiffs with a limited duration and industry of exposure could receive as little as \$400,000. In contrast, two other plaintiffs in our case study with more extensive and diverse occupational exposure could receive as much as \$1.6 million.

Although we predict substantially different recovery amounts for the plaintiffs in our case study, this understates the full extent of the difference that will exist between claims presented to the trusts. The actual value for each 524(g) settlement trust claim depends on additional factors such as plaintiff's age, jurisdiction, and settlement history of the

plaintiff's counsel. We will examine the impact of these additional factors of trust settlement in a subsequent paper.

Background

Over the past decade asbestos litigation has driven dozens of defendants into bankruptcy reorganization. The remaining solvent defendants have since been faced with the burden of indemnifying plaintiffs in full due to the joint and several liability rules that govern the asbestos tort. As a result, while their former co-defendants go through the process of Chapter 11 reorganization, these solvent defendants pay well above their equitable share of liability in the tort system. Many of these asbestos-related bankruptcy reorganizations have since established 524(g) settlement trusts designed to cover the reorganized defendants' share of present and future asbestos liability. Exhibit 1 shows that the trust system has been funded with tens of billions of dollars since 2005, assets sufficient to fully cover the former tort liability share of the reorganized defendants.² However, solvent defendants do not know how much individual plaintiffs are receiving or will receive from 524(g) settlement trusts in the future. This lack of transparency between the tort and trust systems prevents solvent defendants from returning to their appropriate several shares. As a result, solvent defendants continue to pay well above their historical liability share while plaintiffs double collect, once from tort settlements and then again from the asbestos trust settlements.

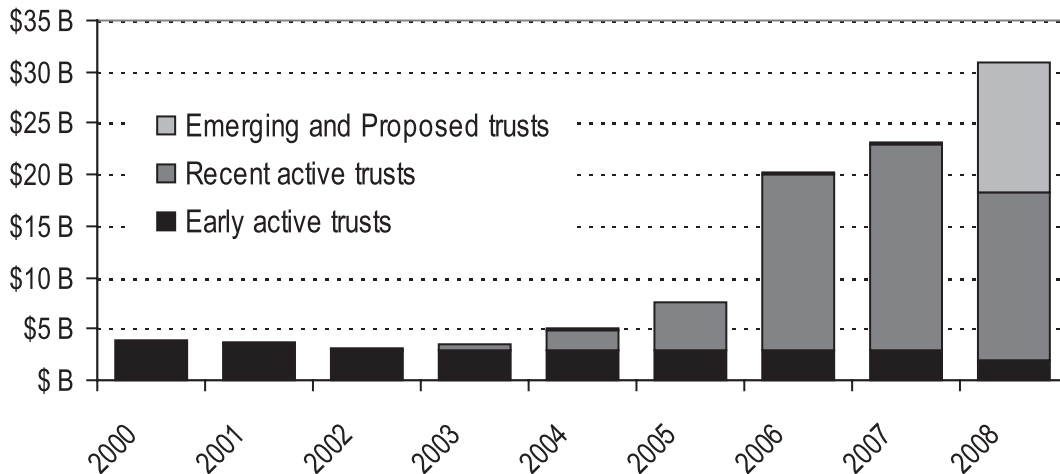
Trust Qualification Criteria And Valuation

Bankruptcy trusts under 524(g) are designed to settle 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. The resolution procedures developed to govern this process are often standardized across trusts allowing plaintiff attorneys to utilize the same claims material for multiple trust submissions, thus minimizing their filing costs per claim. Our review of Trust Distribution Procedures ("TDP"), claim filing instructions, and claim forms have shown that for mesothelioma claimants the minimum medical and exposure criteria are similar if not identical across 524(g) settlement trusts.

A diagnosis of mesothelioma can be supported by a physical exam or pathology report, accompanied by proof of at least 10 years of latency from the time the claimant was first exposed to asbestos to the time of diagnosis. Criteria for mesothelioma typically does not require any significant duration of exposure to a defendant's asbestos-containing products. Demonstrating even minimal levels of exposure through work history and testimony by the plaintiff, plaintiff family members, or plaintiff co-workers is often enough to qualify for payment.

Exposure can be established by specific product identification, exposure to operations, or work history at a job site for those trusts that offer an Approved

Exhibit 1: Trust year end asset balances



Site list. These Approved Site Lists include locations where the defendant's products were present for a specified period of time. The purpose of these lists is to expedite the review process by allowing claimants to validate their assertion of defendant product exposure by establishing a presence at one of these sites.

We find that the basic information provided in a plaintiff's work history is often enough to demonstrate that a plaintiff can qualify for payments from numerous 524(g) settlement trusts. For the cases presented here, we establish the likelihood that the plaintiffs' work histories will meet the presumptive criteria that 524(g) settlement trusts use for determining the compensability of a claim. First, we match the specific locations reported in the plaintiff's work history to those active 524(g) settlement trusts that provide an Approved Site List of premises. For those 524(g) settlement trusts that offer this option, if a plaintiff can establish a presence at one of the Approved Sites it will satisfy the presumptive exposure requirement of the trust. Not all 524(g) settlement trusts have Approved Site lists and even those that do exist are not complete as more sites are added periodically. To account for this, we then supplement our Approved Site List matches with historical tort naming patterns in Alameda County for plaintiffs with the same occupational exposure to asbestos as the plaintiffs in our case studies. This establishes the likelihood for satisfying the presumptive criteria for other active and emerging trusts. Finally, we quantify the range of settlements for each active and emerging trust based on values predetermined in the individual TDPs.

524(g) trust claims are settled based on specified values that differ by disease severity. Typically, trusts will offer Scheduled Values based on minimum presumptive medical and exposure criteria. Alternatively, if a claimant chooses to pursue additional compensation many trusts will offer an individualized review option allowing for claim values up to a published Maximum Value. For most trusts, individual review settlement amounts are further constrained by the requirement that the average value of all claims compensated by the trust equal a specified Average Value. In practice this means that very few claims will receive the Maximum Amount and that most claims submitted for individual review will qualify for a claim

value near, albeit somewhat higher than the specified Average Value.

Trusts that are unable to pay claimants 100% of the specified claim value will establish a Payment Percentage that reduces the specified TDP values by a fixed percentage. This is common as the specified Average Values of the TDP are usually multiples of the reorganized defendant's historical average indemnity payment. The reasons for this are beyond the scope of this paper. Moreover, even after the reduction of the specified claim values by the Payment Percentage, the resulting trust settlement values are often larger than the amount the reorganized defendant paid historically for tort settlements. For example, United States Gypsum Asbestos Personal Injury Settlement Trust specifies an average value of \$225,000 per qualifying mesothelioma claim and pays 45% for a net settlement of \$101,250. This is vastly more than the \$30,000 average payment made by the company on mesothelioma tort claims in the years leading up to bankruptcy reorganization.³ The results presented below are the net cash payment amounts after accounting for the reduction of the specified 524(g) settlement trust values by the Payment Percentage for each trust.

Case Study Profiles And Results

The plaintiffs in our case study were chosen because they represent typical, though distinct combinations of occupation, industry, region of exposure, and period of exposure. The first plaintiff is typical of an individual with only a limited potential exposure to asbestos. His only claimed source of asbestos exposure is during his employment as a boilerman in the U.S. Navy between 1950 and 1953 ("Navy Boilerman"). During this time he served aboard two ships, one of which we identified as being ported at the Long Beach Naval Shipyard briefly in 1950 and then again for an extended period of time beginning in November 1951. While naval and shipyard employment is quite common for Alameda County plaintiffs, the average naval and shipyard employment duration for such plaintiffs is over 15 years. Moreover, such plaintiffs usually claim additional exposure from 30 years of employment in industries and occupations unrelated to their naval and shipyard employment.⁴ As a result of having a limited work history relative to other plaintiffs, we estimate the Navy Boilerman in our case study would receive on average \$585,000 in

524(g) trust settlements. If he submitted his claim for expedited review from each trust, he would receive as little as \$420,000. Assuming his claim warranted a higher amount under an individualized review, then the average settlements from each trust would sum to about \$640,000.⁵ An individual such as this Navy Boilerman with his limited potential asbestos exposure will receive an amount from the 524(g) settlement trusts well below the \$1.2 million average we estimated in the *Naming Game*.

The second plaintiff claims exposure to asbestos at various California shipyards and aboard ships during his time in the U.S. Navy and then as a maritime engineer following his active duty ("Maritime Engineer"). The plaintiff claims that he was first exposed to asbestos from September 1950 to August 1953 while attending the California Maritime Academy, which included work aboard a ship. He served in the U.S. Navy until 1955 when he began a 30 year career as a maritime engineer working at various commercial shipyards in northern California and aboard over 50 ships. The Maritime Engineer is similar to the Navy Boilerman in that their claimed exposure to asbestos occurred in shipyards and on ships. However, the duration and region of employment were quite different. Unlike the Navy Boilerman, the Maritime Engineer worked at numerous shipyards in the San Francisco Bay area rather than just one shipyard in Long Beach. This not only increases his likelihood of exposure to northern California asbestos product distributors such as Western Asbestos and Plant Insulation, but the extended duration of his employment increases his likelihood of being exposed to the products of companies like AC&S that began asbestos product distribution in the 1960s. As a result of having a more extensive work history with potential for asbestos exposure as compared to the Navy Boilerman, we estimate this Maritime Engineer would receive on average \$975,000 in 524(g) trust settlements. If this Maritime Engineer selected expedited claim review from each trust, his settlement amount would be \$685,000. Assuming his claim warranted a higher amount under an individualized review, then the average settlements from each trust would sum to about \$1.1 million.

The third plaintiff claims exposure to asbestos during the 1960s while working as a pipefitter installing sprinkler systems in commercial and industrial sites

throughout northern California ("Pipefitter"). The specific job sites included hospitals and oil refineries, and his work was often conducted during the construction phase of each facility. The Pipefitter was not only exposed to those asbestos products encountered regularly as part of his trade but also worked in close proximity to a variety of other asbestos products used by tradesmen in the construction industry as well as products present in refineries. This type of work history increases the likelihood that the plaintiff was exposed to products manufactured by North American Refractories Co., A.P. Green, Quigley and Harbison-Walker. As a result of being exposed to such a broad range of trades and products, we estimate this Pipefitter would receive on average \$1.4 million in 524(g) trust settlements. If he filed his claim for expedited review from each trust, he would receive \$950,000. Assuming his claim warranted a higher amount under an individualized review, then the average settlements from each trust will sum to about \$1.6 million.

The fourth plaintiff served in the U.S. Navy and then as an iron worker at commercial and industrial sites that included refineries and steel mills ("Iron Worker"). He began his naval service in 1954 at a training facility in Illinois and then spent three years on a ship that was ported for a time at both the Philadelphia and Boston naval shipyards. In 1957, he was stationed in Monterey, California where he served aboard ships until 1963 when he began his post-naval career as an iron worker in northern California. Unlike the Navy Boilerman and Maritime Engineer, his naval service was not limited to facilities in California. Moreover, while the majority of his post-naval career was spent as an iron worker in the San Francisco Bay area, he did spend a short amount of time working at a steel mill in Chicago, Illinois. As a result of his broad employment in various industries and regions outside of California, we estimate this Iron Worker would receive \$1.4 million in 524(g) trust settlements. If he filed his claim for expedited review from each trust, he would receive \$985,000. Assuming his claim warranted a higher amount under an individualized review, then the average settlements from each trust will sum to about \$1.6 million.

Exhibit 2 summarizes the range of trust settlements for each plaintiff, net of any applicable payment percentage.

Exhibit 2: 524(g) trust settlements based on TDP Values

TDP Valuation	Navy Boilerman	Maritime Engineer	Pipefitter	Iron Worker
Scheduled Value	\$420,000	\$685,000	\$950,000	\$985,000
Average Value	\$585,000	\$975,000	\$1,400,000	\$1,425,000
Estimated Average IR Value*	\$640,000	\$1,070,000	\$1,595,000	\$1,615,000
Maximum Value	\$1,830,000	\$3,120,000	\$4,695,000	\$4,585,000

*For purposes of estimating the expected payment amount for claims submitted for individual review, we assume 60% of mesothelioma claims will be filed for individual review for each trust with that option

Basis For Claiming

As discussed earlier in this paper, most 524(g) settlement trusts provide claimants two options for validating their alleged exposure to the reorganized defendant's asbestos products or operations. One option is to have worked at a location that can be found on the trust's Approved Site List. The size of these site lists vary by trust and are as small as few

hundred sites ranging to upwards of 40,000 sites. For this study we matched the plaintiffs' exposure history at specific sites and ships to over 20 Approved Site Lists. We found through our case study that all four plaintiffs had an occupational link to Approved Sites for large national manufacturers of asbestos products such as Owens Corning, Fibreboard, and Babcock and Wilcox. We also found that three of the four

Exhibit 3: 524(g) trust settlements based on Approved Site List matches

524(g) trusts matched on Approved Site	Navy Boilerman	Maritime Engineer	Pipefitter	Iron Worker
A-Best	No Site Match	No Site Match	No Site Match	\$5,250
ABB Lummus (design and construction)	No Site Match	No Site Match	\$60,000	No Site Match
Babcock & Wilcox	\$18,000	\$18,000	\$18,000	\$18,000
Combustion Engineering	\$46,000	\$46,000	\$46,000	\$46,000
DII Industries (Halliburton)	\$40,000	No Site Match	\$40,000	\$40,000
DII Industries (Harbison-Walker)	No Site Match	No Site Match	No Site Match	\$95,500
Eagle Picher	\$6,500	No Site Match	\$6,500	\$6,500
Fibreboard	\$19,750	\$19,750	\$19,750	\$19,750
J.T. Thorpe (CA)	No Site Match	\$62,250	\$62,250	\$62,250
Kaiser Aluminum & Chemical	No Site Match	\$41,000	No Site Match	No Site Match
Keene	\$1,500	No Site Match	\$1,500	\$1,500
Owens Corning	\$27,000	\$27,000	\$27,000	\$27,000
Plibrico	No Site Match	No Site Match	No Site Match	\$36,250
U.S. Gypsum	No Site Match	No Site Match	\$101,250	\$101,250
Western MacArthur/Western Asbestos	No Site Match	\$230,750	\$230,750	\$230,750
Total	\$160,000	\$445,000	\$615,000	\$690,000

matched to Approved Sites for regional product distributors and contractors Western Asbestos and J.T. Thorpe and Sons. Exhibit 3 summarizes the Approved Site List match for each plaintiff as well as the Average Value settlement from each 524(g) trust.⁶

A second option claimants have for validating their alleged exposure to a reorganized defendant's asbestos products or operations is through affidavit identifying the location, industry, occupation, and period in which the exposure to asbestos occurred.⁷ To further support this assertion the claimant may be asked to

provide a detailed work history as well. For purposes of this case study, we use tort naming patterns as a proxy for potential exposure to the products and operations of reorganized defendants. More specifically, we examined the naming patterns in the three years prior to each reorganized defendant's bankruptcy petition date for plaintiffs with employment histories similar to those of our four case study plaintiffs. This approach allowed us to quantify the likelihood of each plaintiff's claim against 524(g) settlement trusts that did not match on Approved Site List. Exhibit 4 summarizes the naming patterns for plaintiffs similar to our four case studies against confirmed 524(g) settlement trusts that are actively processing and paying claims ("Active Trusts").

This supplemental analysis of naming patterns yields additional Average Value settlements of approximately \$135,000 for the Navy Boilerman, \$155,000 for the Maritime Engineer, \$165,000 for the Pipefitter, and \$135,000 for the Iron Worker from Active Trusts.

In addition to payments from Active Trusts, our analysis of naming patterns suggests that the plaintiffs in our case studies could receive settlements from future 524(g) settlement trusts that are either currently pending confirmation, confirmed but are not yet processing claims for payment, or have yet to establish initial liquidation procedures ("Pending Trusts").^{8, 9} Exhibit 5 summarizes the naming patterns for plaintiffs similar to our four case studies against Pending Trusts.

Exhibit 4: Naming probability for Active Trusts

Defendant	Navy Boilerman	Maritime Engineer	Pipefitter	Iron Worker
ABB Lummus (design and construction)	0%	0%	Site List	0%
A-Best	0%	0%	0%	Site List
AC&S	0%	50%	100%	100%
AMATEX	0%	0%	0%	0%
Armstrong World Industries	88%	100%	75%	100%
ARTRA	0%	0%	17%	33%
Babcock & Wilcox	Site List	Site List	Site List	Site List
Celotex	100%	100%	100%	100%
Combustion Engineering	Site List	Site List	Site List	Site List
DII Industries (Halliburton)	Site List	100%	Site List	Site List
DII Industries (Harbison-Walker)	0%	0%	50%	Site List
Eagle Picher	Site List	100%	Site List	Site List
EJ Bartells	38%	33%	8%	20%
Fibreboard	Site List	Site List	Site List	Site List
HK Porter	0%	0%	100%	0%
J.T. Thorpe (CA)	71%	Site List	Site List	Site List
Kaiser Aluminum & Chemical	0%	Site List	50%	100%
Keene	Site List	100%	Site List	Site List
Manville	100%	100%	100%	100%
National Gypsum	17%	20%	29%	0%
Owens Corning	Site List	Site List	Site List	Site List
Plibrico	0%	0%	17%	Site List
Raymark / Raytech	72%	100%	62%	67%
Shook & Fletcher	0%	0%	0%	0%
U.S. Gypsum	17%	20%	Site List	Site List
Western MacArthur/Western Asbestos	0%	Site List	Site List	Site List

Exhibit 5: Naming probability for Pending Trusts

Defendant	Navy Boilerman	Maritime Engineer	Pipefitter	Iron Worker
AP Green	0%	0%	67%	100%
ASARCO	90%	56%	71%	67%
Congoleum	0%	0%	67%	73%
Federal Mogul (Flexitallic)	100%	70%	86%	67%
Federal Mogul (Turner & Newall)	0%	100%	100%	100%
Flintkote	86%	100%	80%	93%
G-I Holdings (GAF)	100%	100%	100%	100%
North American Refractories (NARCO)	0%	0%	33%	67%
Pittsburgh Corning	0%	67%	58%	80%
Plant Insulation	0%	92%	100%	86%
Quigley	0%	0%	100%	73%
TH Agriculture Nutrition (THAN)	0%	24%	57%	21%
Thorpe Insulation	67%	0%	0%	0%
US Mineral	0%	0%	0%	0%
WR Grace	0%	0%	29%	0%

As illustrated in Exhibit 1, this group of Pending Trusts accounts for roughly 40% of 524(g) assets committed or proposed through 2008. Our analysis of these naming patterns yields additional Average Value settlements of approximately \$290,000 for the Navy Boilerman, \$375,000 for the Maritime Engineer, \$620,000 for the Pipefitter, and \$600,000 for the Iron Worker. The average settlement from Pending Trusts across all four plaintiffs is 43% of the total

of all 524(g) settlements. Exhibit 6 summarizes the Average Value settlements for each plaintiff.

Conclusion

The findings presented in this paper further highlight the results concluded in *The Naming Game* where we showed that the 524(g) trust settlements for typical mesothelioma claims filed in Alameda County will average \$1.2 million. Here we show that this amount

Exhibit 6: 524(g) trust settlements based on TDP Average Values

Basis for claiming	Navy Boilerman	Maritime Engineer	Pipefitter	Iron Worker
Active trusts matched on Approved Sites	\$160,000	\$445,000	\$615,000	\$690,000
Additional active trusts based on naming patterns	\$135,000	\$155,000	\$165,000	\$135,000
Additional emerging trusts based on naming patterns	\$290,000	\$375,000	\$620,000	\$600,000
Total plaintiff settlements from 524(g) trusts	\$585,000	\$975,000	\$1,400,000	\$1,425,000

can be quite different for claimants with different work histories, based on the payment qualification criteria of the 524(g) settlement trusts.

Moreover, the estimated recoveries calculated in this paper do not provide the full extent of the differences in how much individuals will receive from the 524(g)

settlement trusts. Here, as well as *The Naming Game*, our estimates are based on TDP Average Values for a mesothelioma claim. If we were to simulate the individualized review process offered by many 524(g) settlement trusts then the actual amount recovered for plaintiffs even with work histories similar to the four plaintiffs in our case study could be different, and in

some unusual circumstances potentially much higher, than what we estimate here. The factors considered by these trusts during individualized review include, but are not limited too (1) age at diagnosis, (2) settlement and verdict history of the plaintiff's law firm, and (3) settlement and verdict history for all plaintiff law firms in the claimant's jurisdiction. These factors are used to determine whether or not the characteristics of an individual claim differ from the presumptive criteria and to what degree the claimant should be paid relative to an average claimant. We will examine the impact of these additional factors of trust settlement in a subsequent paper.

Endnotes

1. Charles E. Bates, Charles H. Mullin and Rachel Marquardt, "The Naming Game" *MEALEY'S Litigation Report: Asbestos* 24, no. 15 (2009): 1-7.
2. Charles E. Bates and Charles H. Mullin, "Show Me The Money" *MEALEY'S Litigation Report: Asbestos* 22, no. 21 (2007): 1-7.
3. Charles E. Bates and Charles H. Mullin, "Having Your Tort and Eating It Too" *MEALEY'S Asbestos Bankruptcy Report* (2006): 1-5.
4. Of the over 700 Alameda cases we reviewed, 30% claimed exposure from naval and shipyard employment. Of these approximately 300 cases, 80% claimed exposure from working 30 years in industries and occupations unrelated to their naval and shipyard employment.
5. For purposes of estimating the expected payment amount for claims submitted for individual review, we assume 60% of mesothelioma claims will be filed for individual review for each trust with that option.
6. Trust Average Value or equivalent was used whenever available. If not available, the Scheduled Value or equivalent was used instead.
7. For deceased claimants, an affidavit or other sworn statement made by a family member or former co-worker would be sufficient.
8. Initial liquidation procedures include TDP disease valuation as well as the initial trust Payment Percentage.
9. For those Pending Trusts that do not have initial liquidation procedures the average settlement parameters from trusts with established liquidation procedures were applied. ■

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