

Asbestos

Show Me The Money

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Introduction

Over the last year prominent members of the plaintiffs' bar have asserted that the average recovery by mesothelioma claimants across the country is about \$6 million. This is a dramatic increase over the average \$900,000 per mesothelioma claim in 2000 as estimated by the Rand Corporation. With the volume of asbestos cases filed every year, the \$6 million average recovery would result in \$20 billion of total expenditures on asbestos litigation. So where is all the money? It should show up in public company filings, settlement data, and plaintiff law firm revenues. We have examined these sources and find no evidence that the true total is that high. Instead this evidence indicates that the actual amount is between \$1.0 million and \$1.4 million.

The true total recovery for mesothelioma claims has become increasingly relevant with the emergence of well-funded 524(g) trusts. Companies such as USG, Owens Corning, and Halliburton have established 524(g) trusts which pay asbestos claims on their behalf and remove the companies from the traditional tort system. Combined, such trusts

possess more than \$30 billion in assets and will pay about \$1.0 million in compensation to the average mesothelioma claimant.¹ If the average mesothelioma recovery across all defendants is \$6 million, \$1.0 million in payments by the 524(g) trusts will be less than 20% of the total that claimants will receive. Alternatively, if the average mesothelioma recovery across all defendants is between \$1.0 million and \$1.4 million, then \$1.0 million in payments by the 524(g) trusts is sufficient to cover most of the average tort value of mesothelioma claims.

The true average total recovery for mesothelioma claims is not readily available since no one person or entity has access to all the required information. Plaintiff law firms only know what their claimants receive; they do not know what claimants of other plaintiff law firms attain. Defendant companies only know what they pay each claimant; they do not know what other defendants paid that same plaintiff. Insurance companies observe a patchwork quilt of information. Moreover, none of these parties sees it as being in its interest to reveal this information to others.

Though the actual amount of all mesothelioma settlements is not known by any one person or entity, much is known publicly that can be used to test the plaintiff bar's assertion. First, if average recoveries per mesothelioma claim across the country were \$6 million, total annual payments by defendants would be about \$20 billion per year.

That expenditure level would leave a visible trail because public companies often disclose the total amount they spend on resolving asbestos claims. In fact, however, the observed trail is substantially smaller.

Second, naming and settlement data confirm that an average mesothelioma recovery of \$6 million is not credible. A mesothelioma claimant typically receives payments from 20 to 30 defendants. That claimant will be paid \$600,000 from a target defendant, receive another \$100,000 each from 3 to 5 more defendants, and receive \$15,000 from each of another 10 to 20 defendants. Claims for the remaining defendants named will be resolved without payment. Thus the total recovery of the typical mesothelioma claimant will be between \$1.0 million and \$1.4 million.

Third, at \$6 million per mesothelioma claimant, the revenue of plaintiff law firms would be about \$4.5 billion per year, with 20 plaintiff law firms each having revenues of more than \$130 million per year. This is contradicted by published estimates of the revenue of the top plaintiff law firms. Only seven asbestos plaintiff law firms have revenue exceeding \$50 million per year and not one has asbestos revenues of more than \$130 million per year.

Finally, the plaintiff bar's reliance on average verdict awards to support their \$6 million assertion is a red herring. Based on this logic, the typical other cancer claim is more valuable than the typical mesothelioma claim. The average verdict amount for other cancer claims from 2001 to 2006 was \$11.3 million. This is higher than the \$7.5 million average mesothelioma verdict. In contrast to the higher average verdict amount, it is well known that the typical other cancer settlement is about 10% of the typical mesothelioma settlement.

The following provides more details that support our conclusion. Publicly available data do not provide an exact answer, but do make it clear that average mesothelioma recoveries in total are far less than the \$6 million asserted by some. The correct amount is between \$1.0 million and \$1.4 million. On this basis it is clear that the newly formed bankruptcy trusts will have the assets to cover most of the average tort value of mesothelioma claims.

Where Is The \$20 Billion Yearly Defendant Asbestos Expenditure?

If the plaintiffs' bar is correct that the average mesothelioma claim recovers \$6 million, then defendants collectively pay about \$20 billion per year in asbestos litigation. This outcome is not credible.

Recently, the tort system has seen about 1,800 mesothelioma claims each year. Suppose that the average recovery for each of these claims was the asserted \$6 million. This would mean that the total annual indemnity payments to mesothelioma claims would be about \$11 billion (\$6 million times 1,800 claims). Adding only 50 cents of defense expenditure for each dollar of indemnity (low in our experience for current defendants) results in \$16 billion of defendant expenditures. Assuming that mesothelioma accounts for 80% of total expenditures, defendants collectively would pay \$20 billion per year in asbestos litigation.

Currently, the largest asbestos defendants (excluding bankruptcy trusts) pay less than \$200 million annually. Moreover, only a handful of these large defendants exist. Most defendants pay far less than this per year. Exhibit 1 shows the average 2004 to 2006 annual asbestos-related expenditures of the largest publicly traded defendants, as reported in their 10-Ks. Even well known defendants such as Foster Wheeler paid less than \$100 million in 2006. To reach \$20 billion would require 200 defendants on the scale of Foster Wheeler. A review of companies named on asbestos personal injury complaints makes it clear that this is not possible.

See Exhibit 1: Recent Annual Payments By Large Solvent Asbestos Defendants

Naming And Settlement Patterns

Naming and settlement data confirm that an average mesothelioma recovery of \$6 million is not credible. Instead, these data clearly demonstrate that the total recovery of the typical mesothelioma claimant will be between \$1.0 million and \$1.4 million.

The typical mesothelioma claim names fewer than 50 defendants and receives payment from 20 to 30 of those defendants.³ For each plaintiff to recover \$6 million, defendants would need to average \$250,000 per settlement. Some would pay less and some would pay more, but the average settlement across all defendants

Exhibit 1: Recent annual payments by large solvent asbestos defendants

Company	Annual expenditures
Georgia Pacific (based on 2004 data only ⁱⁱ)	Less than \$200 million
Union Carbide	\$185 million
Owens Illinois	\$175 million
EnPro	\$125 million
Foster Wheeler	\$90 million
CertainTeed	\$60 million
Crane	\$50 million
Ashland	\$45 million
Crown Holdings	\$30 million
Goodyear	\$20 million

must be this amount to reach a total of \$6 million. In our experience, even the largest defendants pay much less than \$250,000 per mesothelioma claimant, rarely exceeding \$100,000. On average defendants pay about \$50,000 per mesothelioma claim resolved, accounting for both settlements and dismissals.

The typical defendant faces 4 categories of claims. The first group contains the worst cases, that is, those cases where the defendant is the main target. Defendants resolve these claims at an average payment of \$600,000. Typically this group accounts for about 3% of claims a company receives. Another 15% of claims pose significant litigation risk and are paid between \$50,000 and \$250,000. This second group receives on average \$100,000 per claim and the group accounts for 40% of a company's payment. Neither the average amount paid nor the percent of claims in each of these two groups has changed much over the past decade.

What has changed is the number of claims a defendant is resolving without payment. During the 1990s, defendants resolved about 10% of mesothelioma claims without payment and paid 70% of claims less than \$50,000. Today, defendants resolve about 40% of mesothelioma claims without payment. Correspondingly, the number of claims a defendant pays less than \$50,000 has dropped from 70% to 40%. Though the share of resolutions has changed between these two categories, the average payment has not.

Paid claims receiving less than \$50,000 have averaged about \$15,000 throughout the last decade.

Combining the naming pattern of the typical claimant and the settlement pattern of the typical defendant provides compelling evidence of what the typical claimant receives. A mesothelioma claimant typically receives payments from 20 to 30 defendants. That claimant will be paid \$600,000 from a target defendant and receive another \$100,000 each from 3 to 5 more defendants. The claimant will also receive \$15,000 from each of another 10 to 20 defendants. Claims for the remaining defendants named will be resolved without payment. Thus the total recovery of the typical mesothelioma claimant will be between \$1.0 million and \$1.4 million.

Plaintiff law firm revenues belie their assertion that they recover \$6 million for the average mesothelioma claim. The *American Lawyer* reports that only a few of the plaintiff law firms that specialize in asbestos litigation exceeded \$50 million in revenue for 2003. Further, the "highest-grossing plaintiffs firms generate revenue of less than \$150 million in a typical year, and that's counting the \$20 to \$30 million a year that seven of these firms receive from the tobacco litigation."⁴ That is, the most any law firm could have in asbestos-related revenue is \$130 million and it is likely much less. These findings on total revenues are much too low if mesothelioma claimants recover \$6 million.

At a \$6 million recovery level and assuming contingency fees and expenses are 35% of recoveries, the average mesothelioma claim would generate \$2 million in revenue for the law firm representing the plaintiff. In total, asbestos litigation would generate annual revenues over \$4.5 billion for plaintiff law firms. At that rate, over 20 plaintiff law firms would have more than \$130 million in annual revenues and more than 30 would have revenues exceeding \$50 million.

In order for the actual revenues of plaintiff law firms to align with the mesothelioma recoveries, the average mesothelioma recovery would need to be between \$1 million and \$1.4 million. At this recovery level, there would be about seven plaintiff law firms with average annual revenues of \$50 million or more, consistent with the *American Lawyer* report.

Average Verdict Awards Are A Red Herring

A small number of asbestos cases see trial and even fewer result in a plaintiff verdict. These cases are not representative of the typical asbestos matter. If plaintiff verdicts were representative, then they would indicate that the typical other cancer claim is more valuable than the typical mesothelioma claim. The average verdict amount for other cancer claims from 2001 to 2006 was \$11.3 million. This is more than the \$7.5 million average mesothelioma verdict. In contrast to the higher average verdict amount, it is well known that the typical other cancer settlement is about 10% of the typical mesothelioma settlement. Further, the 524(g) trusts pay much less to other cancer claimants than they pay to mesothelioma claimants. For example, the scheduled value for other cancer claims in the Owens Corning Trust, USG Trust, and proposed FMO Trust is 8% of the scheduled value for mesothelioma. These facts illustrate just how inappropriate it is to use average verdict amounts to proxy for the total average recoveries for asbestos claimants.

See Exhibit 2: Plaintiff Verdicts From 2001 To 2006

The economic incentives facing plaintiff law firms explain the observed patterns in verdict awards both across diseases and through time. In order for a trial to be an economically viable option, the expected award⁵ must exceed the litigation costs. Thus, if the odds of a plaintiff verdict decrease, plaintiffs must anticipate larger awards should they prevail in order to make it worthwhile to try cases in the face of the additional risk.

The verdict data strongly reflect this economic selection concerning which cases are tried. Over the past six years, only five out of approximately 2,000 other cancer claims have been tried to a plaintiff verdict. During this same period, mesothelioma claims were about five times more likely to reach a plaintiff verdict (137 plaintiff verdicts out of approximately 10,000 cases). It is accepted generally that defendant companies possess more defenses against other cancer claims and are more likely to prevail against these claims at trial relative to mesothelioma claims. Predictably, plaintiff law firms are less likely to try other cancer claims, are less likely to prevail even on the claims they try, and receive larger awards when they win.

Recently, it has become more difficult to obtain a mesothelioma plaintiff verdict than it used to be. One cause is that most of the marquee asbestos defendants, such as the insulation contracting companies, exited the tort system via bankruptcy. Additionally, many states enacted legislative or judicial changes that resulted in a more defense-friendly litigation environment. As a result of these changes, the number of plaintiff verdicts has fallen in half. Through 2002, there were about 30 plaintiff verdicts per year; from 2003 to 2006 there were only about 15 per year.

Exhibit 2: Plaintiff verdicts from 2001 to 2006

Characteristic	Mesothelioma	Lung cancer	Other cancer	Non-malignant
Average amount	\$7,460,000	\$3,760,000	\$11,340,000	\$3,290,000
Median amount	\$4,010,000	\$3,040,000	\$3,400,000	\$590,000
Count	137	30	5	31

See Exhibit 3: Mesothelioma Verdicts From 1997 To 2006

As was illustrated with other cancer verdicts above, the increased selectivity exercised by law firms regarding which cases to try resulted in higher awards when they win. This outcome is expected under a more defense-friendly litigation environment and does not represent an increase in the value of a typical mesothelioma claim. To interpret the rise in average plaintiff awards as evidence that mesothelioma claims in general have increased in value would repeat the erroneous logic that higher verdict awards for other cancer claims means that the typical other cancer claim is more valuable than the typical mesothelioma claim.

Verdict Awards Corroborate Our Findings

Accounting for the selectivity that distinguishes plaintiff verdicts from typical mesothelioma claims corroborates our findings that mesothelioma claims recover between

\$1.0 million and \$1.4 million on average. We reach this conclusion by accounting for factors that cause verdicts to overstate typical plaintiff recoveries: plaintiff verdicts frequently settle for less than the original award, plaintiff law firms select more carefully which claimants they take to trial, and going to trial incurs substantial litigation costs and risks a defense verdict.

First, plaintiff verdicts are appealed regularly and settled for less than the original verdict amount. In our experience, verdicts are settled, on average, for about half of the original award, which reduces the \$7.5 million award to about \$3.75 million settlement. Small awards tend to settle for more than half of the initial amount and large awards settle for less than half of the original award. For example, in March 2003 U.S. Steel was dealt a \$250 million verdict in Madison County — \$50 million compensatory and \$200 million punitive. U.S. Steel reached a post-verdict settlement for substantially less than the compensatory award.

Exhibit 3: Mesothelioma verdicts from 1997 to 2006

Year	Count of verdicts			Average plaintiff verdict	Median
	Plaintiff	Defense	Total		
1997	37	15	52	\$4,510,000	\$1,850,000
1998	27	8	35	\$2,070,000	\$900,000
1999	22	8	30	\$3,810,000	\$2,270,000
2000	25	9	34	\$5,300,000	\$4,460,000
2001	51	17	68	\$7,310,000	\$4,440,000
2002	24	8	32	\$7,790,000	\$2,880,000
2003	14	10	24	\$8,370,000	\$5,950,000
2004	16	6	22	\$6,310,000	\$4,480,000
2005	17	14	31	\$7,140,000	\$4,540,000
2006	15	13	28	\$8,150,000	\$5,000,000
Total	248	108	356	\$5,890,000	\$3,500,000

Second, accounting for differences in both the age and jurisdiction of the typical claimant reduces the representative post-verdict settlement from \$3.75 million to \$2.5 million. Whereas 40% of plaintiff verdicts involve a claimant 60 years of age or less, only 15% of mesothelioma claimants are this young. This difference is important because the average verdict of claimants over 60 is only 40% of the average amount awarded to the younger claimants.⁶ Similarly, whereas 40% of plaintiff verdicts are from California and New York, these two states only account for 20% of claimants. This difference is important because the average plaintiff verdict in these two states is nearly twice as high as the rest of the country.

Third, to try the case, the plaintiff incurs substantial litigation costs and risks a defense verdict, which would result in zero recovery. The plaintiff will only bear the trial costs if the prospects of winning are high enough. The outcome of past trials provides some indication of the odds of a plaintiff verdict, though we need to take into account once again the economic selection that affects which cases plaintiff law firms try. Historically, plaintiffs prevailed in 75% of mesothelioma cases tried to verdict from 1997 to 2002, falling to 65% for the two years 2003 and 2004, and dropping to 55% of cases since then. This pattern is consistent with an improving defense environment and the fact that current solvent defendants face less risk of losing a verdict than recently bankrupt defendants did while solvent.

Because of the economic selection that affects which cases are tried, the odds of the plaintiff winning the average case will be less than the historical success rate and the average expected trial recovery will be less than \$2.5 million. Consider that only a small percentage of cases can be tried and that trials are one of the ways plaintiff law firms demonstrate their ability to achieve a good outcome to potential clients. Plaintiff law firms will choose to try only those cases involving a sympathetic plaintiff with jury appeal. Thus, cases that are tried are more likely to receive a plaintiff verdict than the average case.

In summary, the average plaintiff can expect to receive less than \$2.5 million if he prevails at trial. This is risky, as the defendants may win and have been increasingly successful over the last few years. The settlement patterns indicate mesothelioma claimants receive \$1 million to \$1.4 million. This is what you would expect to see if the chances of a plaintiff ver-

dict are on average no more than about 50%, which is consistent with the outcome of recent trials and the economic incentives of plaintiff law firms in selecting which cases to try. If the odds were much better, then settlements would be higher and vice versa.

Conclusion

While direct evidence is not available, it is clear that mesothelioma claimants receive between \$1.0 million and \$1.4 million on average across the country, not \$6 million as asserted by some members of the plaintiffs' bar. The typical mesothelioma plaintiff sues a few dozen defendants. Only a few defendants face any significant risk on their own, but all face the prospect of paying a share of the verdict should the plaintiff prevail if they have not previously settled. Consequently, though many defendants are dismissed, 10 to 20 will settle for \$15,000 on average. The few with any real risk collectively pay about \$1 million. If the total were much above this, settlement and naming patterns would be much different, plaintiff law firms would make much more money, and public company SEC 10-K and 10-Q filings of defendants would show much higher expenses.

Endnotes

1. Charles E. Bates and Charles H. Mullin, "Having Your Tort and Eating It Too?," MEALEY'S Asbestos Bankruptcy Report 6, no. 4 (2006): 1-5.
2. Georgia Pacific became private in 2005. Its last 10-Q statement as a public company indicates that its asbestos payments, as is the case for the other largest asbestos defendants, have been declining in recent years.
3. The same defendant frequently appears on a case caption under multiple names, which inflates the number of "named" entities relative to the number of actual defendants in the matter.
4. Alison Frankel, "Sweet Sixteen," *Litigation 2004/A* supplement to *The American Lawyer and Corporate Counsel*, 2004
5. The expected award is the average verdict amount should the plaintiff prevail reduced by the probability that the defendant will prevail.

6. The average age of an individual diagnosed with mesothelioma is 75, the average age of a mesothelioma claimant is 71, and the average age of a claimant involved in a plaintiff verdict is 64. On average, a 71-year old claim recovers less than 75% as much as a 64-year old claimant. ■

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