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Asbestos Bankruptcy Report

Response To Inselbuch And Sackett's Critique Of RAND Reports On Asbestos Trusts And Asbestos Litigation

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A commentary article reprinted from the October 2015 issue of Mealey's Asbestos Bankruptcy Report

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Commentary

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In a recent issue of *Mealey's Asbestos Bankruptcy Report*, Elihu Inselbuch and Andrew J. Sackett wrote a critique of three RAND studies on asbestos bankruptcy trusts and asbestos litigation.[1] Both attorneys are associated with Caplin & Drysdale, Chartered, a law firm that represents a number of trust advisory committees. Their critique is replete with inaccurate statements and misinterpretations. The RAND Corporation's mission is to help improve policy and decisionmaking through research and analysis. As a nonpartisan, nonprofit organization, RAND is widely respected for operating independent of political and commercial pressures. Quality and objectivity are our two core values. We feel it important to correct the inaccuracies in Inselbuch and Sackett's (I&S) critique so that the studies' findings can appropriately inform judicial and legislative decisionmaking relevant to asbestos litigation.

Overview of RAND's Findings

Since 2010, RAND has released three reports available for download free of charge on asbestos litigation with a focus on the increasing importance that asbestos bankruptcy trusts play in providing compensation for asbestos claimants. The first report (the 2010 Report[2]) provides a descriptive overview of asbestos compensation trusts—an administrative mechanism created pursuant to section 524(g) of the bankruptcy code. The 2010 report describes how the trusts are created, how they are organized and governed, and how they operate. It also compiles publicly available information on the assets, outlays, claim-approval criteria, and governing boards of the largest trusts. In 2011, we expanded this initial descriptive research, with a report (the 2011 Report[3]) motivated by interest in how the administrative trust mechanism interfaces with on-going tort litigation against solvent defendants facing asbestos personal injury claims. A core question was how tort cases take into consideration compensation paid by trusts and the evidence submitted in trust claim forms. Our conclusions highlighted the importance of the liability regime (several liability versus joint-and-several liability) and the identification of exposures to the products of bankrupt parties in determining plaintiff compensation and the amounts paid by solvent defendants.

Our third report (the 2015 Report[4]) examines the extent to which exposures to a firm's asbestos-containing products cease to be identified after the firm declares bankruptcy. More specifically, it examines

how bankruptcy affects the asbestos exposures identified in interrogatory answers and depositions in asbestos personal injury cases. The interrogatory answers we examine are typically prepared by plaintiffs' counsel (though they are signed by plaintiffs themselves), and the questions in the depositions we examine are typically asked by the defense and answered by the plaintiff, family members, or co-workers. We found that bankruptcy causes a sharp decline in the probability that a firm will be identified in answers to interrogatories, and that the effect occurs gradually over time. If the number of firms that are identified in interrogatory answers declines after bankruptcy, one might expect additional firms to be identified during depositions. However, we did not find an offsetting increase in the probability that firms are identified in depositions post-bankruptcy.

We solicited feedback from plaintiffs' attorneys, defendants, and defense attorneys on the empirical findings during the course of the research. Views on whether the findings were a cause for concern varied widely, and we reported both sides' interpretation of the findings. RAND, for its part, did not take sides in the debate but rather just reported the findings in order to inform legislative and judicial decision making.

I&S devote the bulk of their critique to our 2015 report, and we focus our attention on that part of their critique.

Inaccuracies in the Inselbuch and Sackett Critique of the 2015 Study

We group the inaccuracies in the I&S critique into three main categories: those pertaining to the study data, those pertaining to the analysis of the data, and those pertaining to the interpretation of the results. We discuss each in turn.

Study Data

We selected two sets of cases with similar exposure histories: 52 plaintiffs who worked at the Brooklyn Naval Shipyard (BNS) sometime between 1940 and 1949 and 48 plaintiffs who joined the Navy between 1950 and 1964 and were stationed at West Coast bases or on ships that were serviced on the West Coast (West Coast Navy—or WCN—cases).[5] A total of 100 cases were selected.

I&S assert that the cases included in our analysis "were supplied to RAND by defendants' law firms (most of whom were sponsors of the study) who selected them from their own thousands of case files."[6] In actuality, the RAND research team selected the cases in the analysis. I&S also assert that the study is "based on an analysis of a non-random sample"[7] of cases and "[a]s RAND concedes, neither tiny group of cases was randomly selected."[8] We selected the cases from a very large database of asbestos claims maintained by a large asbestos claims service provider. Claims meeting the work history criteria were categorized by year of filing (for 1995 through 2010). We sought to select five cases for each filing year for each set of cases. In most instances we selected every case available for a filing year, but when more cases were available than needed, we randomly selected cases.

I&S assert that "RAND based its ultimate analysis and conclusions on the Brooklyn Navy Yard cases on nineteen cases and its ultimate analysis and conclusions on the West Coast Navy cases on thirty cases."[9] Our analysis of the effect of bankruptcy on the firms identified in interrogatory answers is based on 76 cases—38 BNS cases and 38 WCN cases (76 out of the 100 selected). We were unable to obtain interrogatory answers for the remaining 24 cases. Our analysis of depositions was based on the 59 cases for which we were able to obtain one or more depositions. One part of our analysis is based on cases for which we were able to obtain both interrogatory answers and depositions. I&S are correct that there were 49 such cases, but our ultimate analysis and conclusions are not based only on this subset.[10]

Analysis of Study Data

The analysis of the data was done using statistical techniques that control for difference across plaintiffs and difference across the firms that went bankrupt over the period. I&S argue that "[o]ther variables, such as occupation and whether the plaintiff is alive or dead were not considered."[11] These other variables were in fact considered. First, we selected plaintiffs who had important features of their exposure histories in common. Second, the fixed-effects statistical models used in the analysis control for plaintiff difference such as occupation and whether deceased. As we said in our report, even if we had the occupation data (and it is often not quite as easy to assign occupation categories to plaintiffs as I&S imply), we would not be

able to include that variable in the statistical models because it would be redundant with the fixed effects.[12]

I&S assert that our analysis was "rigged" because in the draft of the report we analyzed the effects of bankruptcy on the parties named in complaints.[13] We fully understood that bankruptcy plan injunctions prohibit a plaintiff from suing either the reorganized debtor or the bankruptcy trust. In the draft, we were using the effect of bankruptcy on the defendants named in complaints as a base case and then examining to what extent the firms identified in interrogatory answers and depositions offset the decline in the defendants named in complaints. To avoid any confusion, we removed the analysis of the complaint data from the body of the final report. However, we do still reference the results for complaints in a footnote in the final report to put the results for interrogatory answers and depositions in context.[14]

I&S conclude that our 2015 study is based on the assumption that "plaintiffs know the identity of all the manufacturers of the asbestos-containing products to which they were exposed decades earlier."[15] First, we make no such assumption in our analysis. We report the numerical findings on the effect of bankruptcy on the probability that a firm is identified in interrogatory answers and depositions—and those findings do not depend on assumption about what plaintiffs know. Second, we find that plaintiffs and their lawyers do identify firms in their interrogatory answers and depositions—an indication that they do know the identity of some manufacturers. The question the study addresses is how the manufacturers they recall changes after a firm has declared bankruptcy.

Finally, I&S assert that we dropped an "inconvenient finding" from the final report that appeared in the draft report, implying that we did so to slant our results.[16] The fact is that the finding appears in both the draft report and in the final report—all that changed is the terminology. We examine the frequency with which plaintiffs deny exposures to the products of bankrupt firms in depositions. In the final report, we state that plaintiffs in depositions "rarely denied or responded that they did not know or were unsure about the exposures" to the products of the firms analyzed in our study.[17] We referred to this frequency as the *denial rate* in the draft, but felt the term was unnecessary jargon and dropped it from the final report. The conclusions and supporting data remain in the final report.[18]

Interpretation of the Statistical Analysis

Our findings show a substantial, statistically significant decline in the probability that that a firm will be identified in interrogatory answers and in interrogatory answers and deposition combined for the BNS cases. I&S assert that the findings for the WCN cases do not agree with those for the BNS cases ("the two samples do not agree").[19] In fact, the pattern of declines for the WCN cases is very similar to those for the BNS cases. Due to the smaller sample size, however, the results do not have the same level of statistical significance. In the report, we also calculate the declines when the two sets of cases are combined. The declines are substantial and statistically significant.

I&S also write that "the RAND authors qualify their work, noting . . . that the 2015 Report's results are 'non-representative.' "[20] Nowhere in the report do we use the term "non-representative". What we do say is that the "results cannot be automatically extrapolated to other states with different liability regimes, to states with different requirements for showing that exposure contributes to injury, and to other exposure histories in which maritime law does not apply."[21] We do believe that our findings provide evidence that the probability that a firm will be identified falls post-bankruptcy in New York and California courts for these types of exposures. Scientific confidence is built through multiple studies that come to similar conclusions. No one study is dispositive. We compared our findings to other similar investigations that have been done.[22] Additional work in other states and with other types of exposures would further increase confidence in the generalizability of the findings.

I&S assert that "[t]he 2015 Report claims to conclude statistically that plaintiffs. . . . deliberately fail to identify bankrupt companies" and that plaintiffs "deliberately lie."[23] In fact, we offer several potential explanations for the gradual decline in identification probabilities after bankruptcy, and deliberate lies by the injured party is not one of them.[24] As I&S point out, the findings on the frequency that plaintiffs deny exposures in depositions do not suggest any pattern of deliberate lies by plaintiffs. We do raise the possibility that the drop in the identification rate in interrogatory answers is due to strategic

behavior by plaintiff attorneys. Recall that interrogatory answers are typically completed by plaintiff's lawyers or paralegals. Several of the plaintiffs' attorneys with whom we spoke during the course of the study thought it was appropriate for plaintiffs to focus on the solvent defendants that remain in the case and that from the plaintiffs' perspective there was no reason to proactively identify other sources of exposure.[25]

We conclude the 2015 Report by providing plaintiff and defendant perspectives on whether the findings are a cause for concern. I&S claim that we assume that "the identification of these asbestos manufacturers, while known to the plaintiffs, is unavailable to the defendants."[26] No such assumption is needed or made in our analysis. In fact, we report the plaintiff-attorney observation that defendants can use a variety of approaches to introduce exposure evidence and that despite a drop in product identification post-bankruptcy in interrogatory answers and depositions, all exposures may end up being identified if the case proceeds to verdict.[27]

Our approach is to report the numbers and to provide the arguments on both sides about whether the findings are a cause for concern. We do not take a position in the debate, but rather provide empirical evidence that should help elected officials, judges, and lawyers decide whether the situation merits a policy response.

Study Release Dates, Funding, and Review

I&S emphasize that study publication dates "occurred concurrently with the asbestos defendants' efforts to seek favorable federal and state legislation"[28] and repeatedly point out that the studies were funded in part by defendants and insurers. With regard to the first point, the 2015 study took much longer than expected due to difficulties finding and coding documents, and the publication date was over a year later than originally proposed. We moved as quickly as we could to complete and release the study without regard to legislative developments or judicial decisions.

Turning to the funding issue, it is of course relevant to identify the source of funding for a study, but funding source alone is not enough to conclude that study findings should be discounted. RAND has accepted funding from interested parties for research on important public policy issues for decades and understands the real and perceived bias that can come with such funding. In response, RAND imposes strong safeguards designed to prevent real bias from occurring and to mitigate any appearance thereof. These safeguards include diversifying funding sources, convening advisory boards with broad representation, and subjecting all research to a rigorous quality assurance process that includes independent peer review.

The three asbestos studies were funded by asbestos defendants and insurers and by the RAND Institute for Civil Justice (ICJ). The ICJ receives contributions from parties associated with the plaintiffs' side as well as from insurers, corporations, foundations, individuals, and government agencies. In addition, a wide range of interests are represented on the ICJ Board of Overseers, including judges, academics, plaintiffs' attorneys, businesses, and insurers.[29]

All three reports were subject to thorough peer review. Each draft was circulated to two formal peer-reviewers and concurrently to the ICJ Board of Overseers and a broad range of external stakeholders and experts on the topic, including Elihu Inselbuch. All comments were carefully weighed and the report revised in response. A RAND quality assurance coordinator affirmed that the authors adequately responded to the comments and met RAND's standards for high-quality research before the report was published.[30]

The importance of the peer review process to objective research raises concerns about the conduct of I&S in writing their critique. I&S repeatedly cite drafts that were circulated to them on a confidential basis. They were instructed via electronic correspondence that the drafts were not to be cited or distributed. The drafts themselves were clear on this point—for example, the first page of the 2015 draft states in large, bold lettering, "Not Cleared for Open Publication," along with the following text:

> This document has not been formally reviewed, edited, or cleared for public release. It may not be cited, quoted, reproduced or transmitted without the permission of the RAND Corporation.[31]

Furthermore, each page of the draft report contains the following language: "Not Cleared for Open Publication. Do Not Circulate or Quote."

Drafts that are circulated for review are often considered confidential.[32] The purpose of this is not to hide

information from the public or from parties who will not be pleased with the findings. Rather, the purpose is to ensure that information that has not yet gone through rigorous review does not inappropriately influence decisions.

Despite repeated requests that they not cite the draft reports, I&S chose to do so. Such behavior has a chilling effect on the peer-review process by discouraging researchers from seeking input from some stakeholders. The stakeholders whose input is no longer solicited may be toughest critics, and the absence of these voices may make it more difficult to produce reliable, objective research. By citing confidential draft reports, I&S are undermining the peer-review process.

Endnotes

1. Inselbuch, Elihu and Andrew J. Sackett, "A Critique of RAND's Three Reports on Asbestos Trusts And Asbestos Litigation", *MEALEY'S Asbestos Bankruptcy Report*, Vol. 15, #2, September 2015.

2. Dixon, Lloyd, Geoffrey McGovern, and Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, Santa Monica, Calif: RAND Corporation, TR-872-ICJ, 2010. As of October 1, 2015: http://www.rand.org/pubs/technical_reports/TR872.html.

3. Dixon, Lloyd and Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, Santa Monica, Calif: RAND Corporation, MG-1104-ICJ, 2011. As of October 1, 2015: http://www.rand.org/pubs/monographs/MG1104.html.

4. Dixon, Lloyd and Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases*, Santa Monica, Calif: RAND Corporation, RR-907-ICJ, 2015. As of October 1, 2015: http://www.rand.org/pubs/research_reports/RR907.html.

5. Dixon and McGovern, 2015, p. 15.

6. Inselbuch and Sackett, 2015, p. 31.

7. Inselbuch and Sackett, 2015, p. 28.

8. Inselbuch and Sackett, 2015, p. 31.

9. Inselbuch and Sackett, 2015, pp. 30-31.

10. Dixon and McGovern, 2015, p. 22.

11. Inselbuch and Sackett, 2015, p. 32.

12. Dixon and McGovern, 2015, p. 27, fn. 2.

13. Inselbuch and Sackett, 2015, p. 32.

14. Dixon and McGovern, 2015, p. 31, fn. 5.

15. Inselbuch and Sackett, 2015, p. 30.

16. Inselbuch and Sackett, 2015, p. 32.

17. Dixon and McGovern, 2015, p. 36.

18. Dixon and McGovern, 2015, p. 36, referring to data in Table 3.6.

19. Inselbuch and Sackett, 2015, p. 32.

20. Inselbuch and Sackett, 2015, p. 33.

21. Dixon and McGovern, 2015, p. 38.

22. Dixon and McGovern, 2015, pp. 9-10.

23. Inselbuch and Sackett, 2015, p. 28 and p. 32.

24. Dixon and McGovern, 2015, p. 31.

25. Dixon and McGovern, 2015, p. 38.

26. Inselbuch and Sackett, 2015, p. 30.

27. Dixon and McGovern, 2015, p. 38.

28. Inselbuch and Sackett, 2015, p. 29.

29. See http://www.rand.org/jie/research/civil-justice/about/overseers.html.

30. RAND Corporation (2015) *Standards for High-Quality Research and Analysis*, 1-2, "Every RAND report, article, database, and presentation is carefully peer-reviewed before its public release . . . RAND's

standards for high-quality research and analysis articulate long-standing RAND concepts and values regarding the characteristics of high-quality studies. They are important tools for everyone involved in conducting, managing, and evaluating RAND's research—the research teams, research managers, and peer reviewers." http://www.rand.org/content/dam/rand/pubs/corporate_pubs/CP400/CP413-2015-05/RAND_CP413-2015-05.pdf.

31. Lloyd Dixon and Geoffrey McGovern, *The Effect of Bankruptcy on Product Identification in Asbestos Personal Injury Cases*, draft report, RAND Institute for Civil Justice, RR-907-ICJ, at cover page, November 2014.

32. *Responsible Authorship and Peer Review: Responsible Conduct of Research*, Columbia Center for New Media Teaching and Learning (CCNMTL), Columbia University, IV., E., "Confidentiality: Material under review is privileged information and should not be shared with anyone outside the review process unless doing so is necessary and is approved by the editor or funding agency. If a reviewer is unsure about confidentiality questions, he or she should ask the appropriate party." http://ccnmtl.columbia.edu/projects/rcr/rcr_authorship/foundation/#4 Also see Rockwell, Sara, Ph.D., *Ethics of Peer Review: A Guide for Manuscript Reviewers*, 5, " . . .manuscripts under review are considered confidential documents. By agreeing to review a manuscript, the reviewer assumes an obligation to keep the data in confidence and not to use it for his/her own benefit." The Office of Research Integrity, U.S. Department of Health & Human Services, http://ori.hhs.gov/sites/default/files/prethics.pdf. ■

MEALEY'S: ASBESTOS BANKRUPTCY REPORT
edited by Emerson Heffner
The Report is produced monthly by

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Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1537-2065