

## Expert Analysis

# Property And Casualty Insurers Face A Genomics Revolution

By **David Schwartz and William Wilt**

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In a February 2018 monthly briefing, Assured Research warned: “Insurers need to get on board with the scientific revolution or risk being run over by sophisticated and well-funded plaintiff counsel using science as their spearhead.”

It’s not too late for insurers to engage in a scientific awakening, but the time to act is now. Whereas in February the scientific revolution was coming, it has since arrived.

### What Changed in Less Than One Year?

The Nobel Prize in medicine was awarded to two scientists who laid the foundation for immunotherapy treatments that empower the body’s own immune system to attack cancer cells.

Why is this relevant? Because the understanding is spreading that there is no “one cancer,” but rather different genetic subtypes of every cancer type. And yet, well-funded plaintiffs attorneys have won massive awards in civil litigation in which many individuals are joined (i.e., grouping multiple parties into one lawsuit) and in general treated as homogeneous, but then some genomic “susceptibility” arguments are invoked on behalf of some of the individuals.

In July, a court in Missouri awarded \$4.7 billion to lead plaintiff Gail Ingham and 21 others using just such courtroom tactics. Attorneys argued that some of the plaintiffs had a genetic susceptibility to ovarian cancer that was triggered by talcum powder which the plaintiffs alleged contained asbestos.

And there have been others. Innovative Science Solutions has counted 23 verdicts in talcum powder litigation since 2015 (with a total of more than \$7 billion damages awarded). But that is just one type of personal injury litigation where genomics could play a critical role in determining fault (or lack thereof) and in creating a fairer civil litigation system.

### The Terrible Troika: Third-Party Litigation Finance, Social Inflation, Weaponizing Science

The title of this section overstates our case and our loyalties which, some might reasonably assume, are on the side of property and casualty insurers. They aren’t. We see the expansion of scientific and medical research in the courtroom as an incredible opportunity to make the civil litigation system fairer and more efficient — compensating those who were unjustly harmed by the negligent parties in a reasonable time frame and at a reasonable cost.

If the negligent party is indemnified by a property and casualty liability policy, then indemnification should be triggered. But if the individual’s bodily harm wasn’t the result of



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exposure to a toxin or the act or product of the insured, no liability should be found.

We fear that several recent trends — all the subject of our research — are converging in a dynamic fashion but with a predictable outcome: Property and casualty insurers will pay more claims and face larger liability claims.

We offer no data, no charts or graphs to back our concerns. We ask only that readers consider:

- Trends in third-party litigation finance: The economic model of law firms is changing as third-party litigation becomes an established asset class, with billions of dollars of professionally managed money flowing to plaintiffs firms. In short, law firms have the working capital to properly research cases and advertise for plaintiffs, and the incentive to seek the highest return on their investment with less fear that the holiday season bonus will disappear.
- Trends in social inflation: We've regularly documented the rise in legal advertising, and with a plaintiff-friendly (re)interpretation of laws governing liability insurance just released by the American Law Institute, we think social inflation is back.
- Weaponizing science: In the section following we offer a specific example of how genomics was co-opted and oversimplified to the advantage of plaintiffs alleging bodily harm from exposure to talcum powder.

### **How Is Science Being Co-Opted?**

The \$4.7 billion jury verdict against Johnson & Johnson is illustrative. Based on information and belief, the legal team for the 22 plaintiffs used a genetic susceptibility argument to plant a seed of doubt in the minds of the jurors as to some plaintiffs. That seed of doubt helped lead them to conclude that but for the plaintiffs' exposure to asbestos-contaminated talcum powder, some would not have developed ovarian cancer. The argument may be especially useful to a plaintiff who has "exposures" well below the exposure levels ordinarily viewed as causative.

In a legal argument relying on genetic susceptibility, the plaintiffs attorney will seek to establish that one or more plaintiffs have a genetic susceptibility to ovarian cancer (in this case) and that exposure to the toxin (asbestos in talcum powder) pushed them over the cliff toward developing the cancer.

The eggshell plaintiff doctrine says that the frailty or sensitivity of a victim cannot be used as a defense by the party alleged to have committed the tort. In this case, the women had ovarian cancer — genetic susceptibility or not. But if genomics been used to establish there was no genetic susceptibility, alternative causes of ovarian cancer might have been more seriously considered.

Our understanding is that genomic testing of these 22 women might have showed which, if any, carried a genetic susceptibility to develop ovarian cancer. Moreover, it might have shown that some had a genetically inherited predisposition (coupled with other lifestyle choices) as the actual cause of their ovarian cancer.

## Where Next? Don't Get Hung up on Asbestos and Mesotheliomas

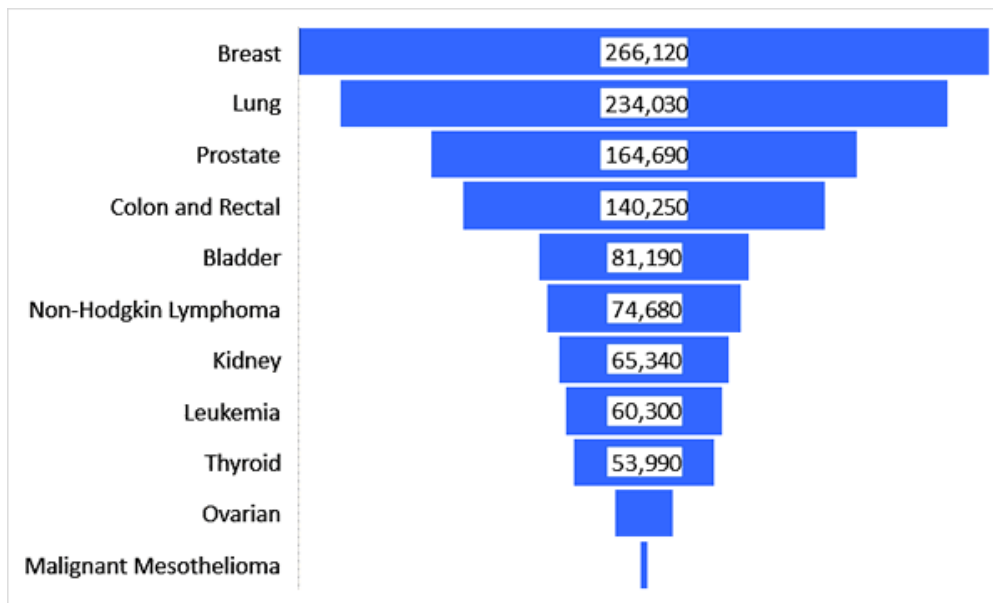
We acknowledge that our exhortations are never heard by insurance professionals who check out once they read the words asbestos or mesothelioma. "That's Berkshire's problem" is the thought many will have had.

It's not that easy! Consider our observation that money from third-party litigation finance is flowing into the legal industry. In turn, managers of that money will seek the highest return from the broadest pools of potential litigants. Now consider that there are a bit more than 3,000 malignant mesothelioma cases diagnosed each year, but some 22,000 ovarian cancer cases.

That's a big increase in the number of potential plaintiffs. And the chart below shows that 22,000 annual ovarian cancers pale in comparison to other forms of cancer diagnoses.

Not all cancers have a toxin as their potential origin. But some do ... or might. Remember the recent case of the groundskeeper in California whose alleged exposure to Monsanto's Roundup product caused his non-Hodgkin lymphoma? While the original verdict was reduced to \$78M from \$289M initially, a California judge upheld the jury's findings. More claims have already followed.

**Figure 1: Estimated New Cancer Cases Diagnosed Annually in the U.S.**



Assured Research. Source: American Cancer Society, 2018. Not all cancer types shown.

## Why Should Property and Casualty Insurers Engage?

We'll conclude with a quote from ToxicoGenomica's "Litigator's Guide to Using Genomics in a Toxic Tort Case":

Genomic data and genomic technologies can be applied to toxic tort and personal injury cases in ways that may assist both plaintiffs and

defendants in uncovering the truth about the underlying causes of disease.

And if using the best scientific methods available to find "the truth" isn't a sufficient motivating factor, property and casualty insurers should consider that well-funded plaintiffs firms will use science as the tip of their spearhead to find the soft underbelly of insurers' outdated legal defenses — if property and casualty companies allow that to happen.

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