

# Avoiding the Next Lanzo:

## Some thoughts

*Most readers are familiar, at least to some extent, with the jury's verdict earlier this year in Lanzo v. Johnson & Johnson. In that case, a New Jersey state court jury awarded \$117 million in compensatory and punitive damages against J&J and Imerys after concluding that asbestos-contaminated talc, supplied by Imerys and used to make Johnson's Baby Powder, caused Mr. Lanzo's mesothelioma.*

The *Lanzo* verdict is one of several plaintiff verdicts over the past few years across the country in cases involving consumer use of a cosmetic talc powder product allegedly contaminated with asbestos. There have also been several defense verdicts during that time period as well.

The mix of plaintiff and defense verdicts indicates that this litigation is not yet a "mature tort" in the way that more "traditional" asbestos cases and claims might be viewed from a liability and/or valuation perspective. This is not to say, of course, that more "traditional" asbestos cases cannot be defended successfully. While many plaintiff's counsel will be tempted to champion *Lanzo* as the harbinger of a growing series of large verdicts and increasing settlements in such cases, defendants, as well as their insurers, should strive to isolate *Lanzo* (assuming the verdict survives the appellate process) as an aberrant high-water mark for plaintiffs that is not mirrored by repeat results.

At the outset, it is important to remember that in many traditional asbestos claims involving products that were intentionally designed and manufactured to contain asbestos, the state-of-the-art defense may not be available, and the defendant's



knowledge — or lack thereof — may be inadmissible. Moreover, because a traditional asbestos product was designed to contain asbestos, the uniformity of asbestos content means that exposure to the product means (assuming friability) exposure to the asbestos in the product. Product uniformity also allows a plaintiff's expert to opine more readily about dose — *i.e.*, that the amount of asbestos to which a particular plaintiff was exposed can reliably be said to have been a substantial or significant contributing cause of his or her asbestos-related disease.

In contrast, cosmetic talc powder products were not designed or formulated to contain asbestos; plaintiffs' claim is that the talc used to make the products was contaminated with asbestos. Thus, an individual plaintiff must prove that there actually was asbestos in the particular product containers that she or he actually used or was exposed to and that the amount of asbestos to which he or she was exposed was sufficient to raise the risk of causing his or her asbestos-related disease.

Absent a rare situation, it is unlikely that a plaintiff alleging that she or he developed an asbestos-related disease from use of or exposure to asbestos-contaminated talc powder will still have an actual container or containers years later. Accordingly, most plaintiffs will not be able to present direct evidence of exposure to an asbestos-contaminated talc powder product because they will be unable to provide any actual containers they used or were exposed to for expert testing and analysis.

Instead, the challenge for plaintiffs is to establish, through circumstantial evidence, that a particular plaintiff used any talcum powder product that actually contained asbestos in an amount sufficient to raise the risk of causing the asbestos-related disease (most often mesothelioma in these cases thus far) at issue. Plaintiffs have generally sought to do so using evidence from several sources, including historical literature regarding the alleged presence of asbestos in source mines, historical product testing results,

and expert testing of sample products or talc ores. Such proofs are heavily expert-dependent and, as a result, the defense of such claims must also rely heavily on expert testimony and analysis.

When challenging plaintiffs' historical evidence, including mine source literature discussing the alleged presence of asbestos found decades ago in various source mines as well as reported product testing results from the 1970s, questions for the defense to address include the lack of uniformity of results among the mines surveyed or products tested and the fact that the testing methods used — as well as the written reported results — did not reliably identify the asbestiform version of the underlying mineral (*i.e.*, a finding or reference to tremolite does not necessarily mean tremolite asbestos). Another important aspect is the dearth of epidemiology demonstrating any increased risk of asbestos-related disease among talc miner and millers. Similarly, with respect to plaintiffs' expert testing of sample products and/or talc ores, defendants should examine what methods the expert used, including whether the expert followed an appropriate methodology to identify the presence of asbestos in talc and whether that method was available at the time of the alleged exposure (which could be decades ago). This is important in assessing whether the expert's results are

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accurate and in showing the jury whether knowledge of any alleged risk was known or knowable by the defendant during the relevant time period of exposure.

Because these claims are based on alleged product contamination, the focus should not be on whether asbestos is dangerous or whether asbestos causes mesothelioma (or any other asbestos-related disease). Nor should the focus be on current medical knowledge and exposure levels or whether the plaintiff can present some evidence that some cosmetic talc products may have contained some unquantified amount of asbestos at some point in time. Rather, the focus should be on whether an individual plaintiff can show that he or she actually was exposed to a cosmetic talc powder product that actually contained a sufficient amount of asbestos to raise his or her risk of developing the asbestos-related disease at issue. This requires proof that it is

more likely than not that a particular product container used by the plaintiff actually contained asbestos, and that the asbestos presented a sufficient dosage to cause the plaintiff's disease. Focus should also be on the state of medical and scientific knowledge at the time of the alleged exposure. This may include whether the testing methods then available were capable of identifying the alleged presence of asbestos and whether whatever contamination level the plaintiff's expert claims to have identified now would have been considered high enough to require a warning back then.

Ultimately, it is possible to defend these cases successfully. To do so, defendants and their insurers should understand how these cases may differ from more traditional asbestos claims and should be prepared to mount an aggressive defense targeting the key challenges that plaintiffs in these cases must overcome. ●



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