

COSMETIC TALC LITIGATION: TWO EMERGING AND DISTINCT MASS TORTS

By: Joseph J. Welter and Jason A. Botticelli, *Goldberg Segalla*, Buffalo, NY

Cosmetic talcum powder products have been on the market in the United States for over 100 years. However, it is only within the last few years that a battle over the potential harmful effects of these products has come to the forefront of toxic tort litigation. While there are actually two distinct types of claims, plaintiffs' lawyers have branded them as simply "talc litigation." The cases garnering more of the attention relate to the hypothesis that use of talcum powder in the perineal area causes ovarian cancer. The other cases are based on the theory that inhalation of cosmetic talc contaminated with asbestos causes more traditional asbestos-related diseases. Sifting through the nature and nuances of these different claims is critical to understanding how they will impact both plaintiffs and talc manufacturers across the country.

COSMETIC TALC AND HOW IT IS REGULATED

Talc is a naturally occurring mineral, mined from the earth, composed of magnesium, silicon, oxygen, and hydrogen. Chemically, talc is a hydrous magnesium silicate. Cosmetic-grade talc is used as an ingredient in personal care products to absorb moisture, prevent caking, make facial makeup opaque or improve the feel of a product. Talc is also used in foods such as rice, chewing gum and tablets. The use of talc in cosmetic products is regulated by the Food and Drug Administration ("FDA"). Under the Federal Food, Drug and Cosmetic Act ("FDCA"), cosmetic products and ingredients, with the exceptions of color additives, do not have to undergo FDA review or approval before they go on the market. However, cosmetics must be properly labeled, and they must be safe for use by consumers under labeled or customary conditions of use. The legal responsibility for the labeling and safety of the products and their ingredients falls on the cosmetic companies. The law does not require the companies to share their safety information with the FDA. The FDA does monitor for potential safety problems with cosmetics on the market and takes action when necessary to protect the public. Before such action is taken, there needs to be sound scientific data to show that a product is harmful under its intended use.

<https://www.fda.gov/CosmeticsProductsIngredients/Ingredients/ucm293184.htm>

THE TALC AND OVARIAN CANCER CLAIMS

Ovarian cancer makes up three percent of all cancers in women. It is the fifth leading cause of cancer-related death among women in the United States and causes more deaths than any other female reproductive system cancer. The disease has a high mortality rate, reflecting the lack of early symptoms and a lack of effective screening tests. Often ovarian cancer is diagnosed at an advanced stage, after the disease has spread beyond the ovary. In 2014, it was estimated that nearly 22,000 women would be diagnosed with ovarian cancer in the United States, and approximately 14,000 would die of the disease. What causes ovarian cancer is largely unknown. <http://www.cancer.gov/research/progress/snapshots/ovarian>

Scientific studies about the potential link between talcum powder products and ovarian cancer arguably date back into the 1970s. This link has been studied over the last four decades with no established scientific causal connection between talc and ovarian cancer. According to the FDA, the Center for Disease Control, the National Cancer Institute, the National Toxicology Program, the U.S. Department of Health and Human Services, the American Conference of Industrial Hygienists and the American Cancer Society, and a host of healthcare associations, current scientific literature does not support the conclusion that perineal use of cosmetic talcum powder causes ovarian cancer.

Nevertheless, cases were filed in various jurisdictions against Johnson & Johnson, the manufacturer of talcum powder products, as well as talc suppliers. Plaintiffs' hypothesis is that extended use of talcum powder products by women in the perineal area results in talc migrating up the vaginal tract, causing inflammation in the ovaries and leading to the development of cancerous tumors. Johnson & Johnson mounted a series of defenses, including that there is no established scientific causal connection between talc and ovarian cancer, talc cannot migrate up the vaginal tract, talc does not cause inflammation, and talc is not capable of causing genetic mutations that lead to cancer.

In 2013, the case of *Berg v. Johnson & Johnson*, Case No. 4:09-cv-04179, U.S. District Court for the

Continued on page 17

DON'T MAKE THEIR MISTAKE...

Continued from page 6

of the claims-in-process exclusion rendered the coverage illusory.

Whereas an *occurrence* policy protects the insured against the financial consequence of an accident or other liability creating-event that occurs during the policy period, no matter when the claim is made—it might be many years later—a *claims-made* policy protects the insured against the financial consequences of a legal claim asserted against him during the policy period. Given that there must be some interval between a wrongful act and the claim arising out of it, a claims-made policy might *seem* illusory if its coverage were confined to claims made during the policy period arising out of wrongs also committed during that period *and* the period was extremely short. Yet there would be nothing exploitive about such limited coverage if the insurance premium were correspondingly small, and in fact it is commonplace for insurers of claims-made policies to limit retroactive coverage by specifying a cut-off date, such as the date of the first claims-made policy issued by the insurer to the insured, so that claims based on occurrences before that date are excluded from coverage. For protection against old occurrences the insured must look to his occurrence policies. Claims-made policies that lack retroactive

coverage are attractive mainly to new entities ... or young professionals just beginning their careers. They don't need retroactive coverage.

[Truck Ins. Exch. v. Ashland Oil, Inc., 951 F.2d 787, 790 \(7th Cir. 1992\).](#)

Because neither Atlantic policy had a retroactive date, the policies covered bodily injury or property damage that only both occurred and resulted in a claim during that same one-year policy period. In other words, the 2009 policy only covered bodily injury and property damage that arose and resulted in a claim being asserted during the one-year policy period. The same was true for the 2010 policy as it only covered bodily injury and property damage that arose and resulted in a claim being asserted during the one-year period. The 2010 policy did not even use the 2009 policy inception date as its retroactive date. Had the Garcias argued that application of the claims-in-process exclusion rendered the coverage illusory, they may have been able to survive Atlantic's motion for summary judgment.

4. The takeaway.

Before you buy commercial real estate, make sure you consider conducting environmental due diligence and your insurance needs. The time to find out whether your \$100,000 property will require a \$1,000,000 cleanup is before you close. ⚖️

COSMETIC TALC LITIGATION:...

Continued from page 7

District of South Dakota proceeded to trial. The jury found against Johnson & Johnson on a failure to warn claim, but did not find proximate cause between plaintiff's use of talcum powder and her ovarian cancer. However, in 2016, the talc/ovarian cancer litigation stepped onto the national mass tort stage in a big way. Three juries in St. Louis handed down verdicts of \$72 million, \$55 million and \$70 million against two Johnson & Johnson companies and, in one cases, the talc supplier.

In [Fox v. Johnson & Johnson](#), Case No. 1422-CC09012-01, Missouri Circuit Court, St. Louis, plaintiff commenced an action claiming use of Shower to Shower allegedly caused her to develop ovarian

cancer. Plaintiff died at the age of 62. After the court denied the defendants' motions to preclude plaintiff's medical causation experts under *Frye*, the case proceeded to trial. In February 2016, the jury found against two Johnson & Johnson companies and awarded \$10 million in compensatory damages and \$62 million in punitive damages. The talc supplier obtained a defense verdict.

In May 2016, a second case went to trial in St. Louis. In [Ristesund v. Johnson & Johnson, Case No. 1422-CC09012, 2016 WL 2941589](#), Missouri Circuit Court, St. Louis, a jury awarded plaintiff \$5 million in compensatory damages and \$50 million in punitive damages against the same two Johnson & Johnson companies. Again, the talc supplier obtained a defense verdict.

In October 2016, the third case went to verdict. In *Giannechini v. Johnson & Johnson*, 1422-CC09012-01, Missouri Circuit Court, St. Louis, the jury awarded plaintiff \$575,000 in economic damages and \$2.5 million in pain and suffering. The jury found Johnson & Johnson 90 percent negligent and the talc supplier 10 percent responsible. Jury also awarded plaintiff \$67.5 million in punitive damages, \$65 million against Johnson & Johnson and \$2 million against the talc supplier.

A fourth talc/ovarian cancer case out of the *Swann, et al. v. Johnson & Johnson et al.*, Case No. 1422-CC09326-01, Missouri Circuit Court, St. Louis went to verdict on March 3, 2017, but with a different result from the previous St. Louis cases. The jury found in favor of Johnson & Johnson and the talc supplier. In this case, plaintiff alleged her 36 year use of Johnson & Johnson baby powder led to her 2013 diagnosis of ovarian cancer. The majority of the jury did not find the link between the talc and cancer strong enough to warrant Johnson & Johnson having warnings on the talc product.

Meanwhile, in 2016 in New Jersey state court, a very different scenario unfolded from the beginning. The first of many talc/ovarian cancer cases filed in New Jersey's Multi-County Litigation progressed toward trial. Defendants moved for and were granted a *Kemp* hearing (New Jersey's equivalent of a *Daubert* hearing) to determine whether plaintiffs' medical causation experts' opinions should be precluded. In *Carl v. Johnson & Johnson*, ATL-L-6546-14, CA No.: 300 (MCL) New Jersey Superior Court (2016), Judge Nelson C. Johnson heard testimony from nine expert witnesses over seven days and considered over 100 treatises before issuing a 33 page decision with five appendices. The Court considered the scientific reliability of opinions from two epidemiology/medical experts in connection with cases brought by two women who developed ovarian cancer after using talc products. These two experts, Drs. Daniel Cramer and Graham Colditz, offered expert opinions that use of talc in the perineal area increases the relative risk of and causes ovarian cancer. In rejecting these opinions, the court described the scientific method as containing the "building blocks" relevant to talc and ovarian cancer: "[T]he scientific method is the systematic pursuit of knowledge. This pursuit consists of those principles and procedures involved in the recognition and formulation of a problem, the collection of data through observation and experimentation, and the articulation and testing

of a hypothesis by which to resolve the problem, and hopefully gain new knowledge useful to society." According to Judge Johnson, "[t]he key is consistent adherence to the scientific method."

From a legal perspective, the court defined the issue as follows: "Have Plaintiffs shown that their experts' theories of causation are sufficiently reliable as being based on a sound, adequately-founded scientific methodology, to wit, that they are based upon methods upon which experts in their field would reasonable rely in forming their own (possibly different) opinions about the cause(s) of each of Plaintiffs' ovarian cancers?"

The court concluded that neither of plaintiffs' general causation experts adhered to an accepted methodology. With respect to Dr. Colditz, the court found that "he has failed to make a systematic review of the scientific literature and has ignored the rudiments of the scientific method in arriving at his conclusion." Similarly, the court precluded Dr. Cramer: "His opinions rely on an incomplete/irregular methodology unlike anything upon which his peers would rely, and appear to be grounded only in his instincts and personal predilections. In short, the mingling of various risk factors and the purported 'synergy' between talc and other health conditions is highly speculative and does not conform to any methodology utilized in the scientific community."

The court placed particular reliance on the testimony of defendants' expert Dr. John Godleski who explained that at a cellular level, talc is not capable of altering cells in the ovaries, which means the presence of talc plays no role in the development of any cancer. Plaintiffs' experts' failure to address how cancer is formed at a cellular level, coupled with these experts' inability to point to anything in the scientific literature that actually explains how talc causes tumors to form in the ovaries was critical to the court's decision.

The verdicts in St. Louis led to a flurry of case filings, both in state and federal court. There are thousands of cases pending in St. Louis, hundreds consolidated in California, still many in New Jersey and a smattering of cases in other states around the country. In federal court, there were over 50 cases brought, including three class actions, which has led to the creation of a Multi-District Litigation in the District Court of New Jersey. Both the St. Louis plaintiffs' verdicts and the New Jersey decision are on appeal. Meanwhile, the products remain on the market. There is little doubt this litigation is not going anywhere anytime soon.

THE ASBESTOS-CONTAMINATED TALC CLAIMS

Asbestos-contaminated talc claims have been around for many years. These cases predominantly stem from a plaintiff's inhalation of industrial-grade talc from mines that were allegedly contaminated with asbestos. These plaintiffs claim occupational exposure in industrial talc plants or in connection with building materials containing talc. What is new is the effort to expand this theory to cosmetic talc products. Plaintiffs' emerging theory is that use of cosmetic talcum powder products were contaminated with asbestos and inhalation of dust from those products led to traditional asbestos-related diseases such as mesothelioma, lung cancer and asbestosis.

These cosmetic asbestos-contaminated talc cases have a number of nuances that separate them from the traditional asbestos case. In a traditional asbestos case, asbestos is typically used for a purpose, such as a binding or fireproofing agent. In those cases, the question is when did the manufacturers know the hazards of asbestos and did they timely warn or remove asbestos from their product. By contrast, in the asbestos-contaminated talc cases, asbestos was not purposefully incorporated into the cosmetic talc products, but instead was an unintended impurity. In those cases, the questions relate to precautions taken to test the talc and take measures to eliminate the alleged impurity.

Moreover, in a traditional asbestos case, asbestos content can usually be determined from a product manufacturer's formulas or product packaging. By contrast, since asbestos was not an intended ingredient, proof of asbestos content is more difficult. This challenge is further compounded by the fact that not all cosmetic-grade talc mines were necessarily contaminated. Different batches of talc from the same mines have been tested and show that not all talc contained asbestos as an impurity. This is significant because a plaintiff must now trace the actual used product from the container to where it was manufactured, to what talc was used, to who supplied the talc, and to what mine it came from in order to establish asbestos content.

Despite these difficulties, cosmetic asbestos-contaminated talc litigation is on the rise. The emergence of the new litigation opens up an entirely new pool of plaintiffs and defendants. Over the last several years, a number of cases have gone to trial in New Jersey, California and New York.

In the 2013 New Jersey take-home exposure case of *Kaenzig v. Whittaker Clark & Daniels*, plaintiff's father worked as a warehouse supervisor and manager at Shulton, Inc. Whittaker Clark & Daniels ("WC&D"), among others, supplied talc to Shulton for use in the manufacturing of cosmetic talc powder products. Plaintiff claimed exposure to asbestos dust from his father's work clothes between 1967 and 1975. A jury awarded a verdict of \$1.6 million, \$1.4 million for pain and suffering, and \$200,000 for loss of consortium. The verdict was affirmed on appeal. Since the *Kaenzig* case, there have been two defense verdicts in New Jersey. In *Fishbain v. Shulton, Inc. and Whittaker Clark & Daniels*, Plaintiff, a 60 year-old diagnosed with mesothelioma, claimed exposure to talc products from the 1950s to the 1970s. In 2015, a jury returned a defense verdict on plaintiff's design defect and failure to warn claims. In 2016, in *Panzarella v. Lorillard Tobacco Company*, Whittaker Clark & Daniels, a talc supplier, obtained a defense verdict based on a warning theory.

California has seen varying results. In *Peter LaMonica v. Colgate-Palmolive*, plaintiff claimed exposure to a Mennen shave talc product (Colgate-Palmolive was successor to Mennen). The jury returned a defense verdict in favor of Colgate-Palmolive. The jury found that while plaintiff did come into contact with the Mennen product, it did not expose him to asbestos. Different results occurred in two other cases. In the 2015 case of *Judith and John Winkel v. Calavaras Asbestos Ltd., et al.*, plaintiff, Judith Winkel, allegedly was exposed to asbestos from using Colgate-Palmolive Co.'s Cashmere Bouquet talcum powder. Colgate-Palmolive was found 95 percent liable and the jury awarded \$13 million in damages. In the 2016 case of *Philip John Depoian v. Whittaker Clark & Daniels*, plaintiff allegedly encountered talc products at his father's barber shop and in his own personal use. Whittaker Clark & Daniels was found 30 percent liable and the jury awarded \$18 million in damages.

In New York, in *Estate of Joan Robusto v. Whittaker Clark & Daniels*, decedent died at the age of 76 from mesothelioma. Decedent used various talc powder products every day for decades. The jury found Whittaker Clark & Daniels negligent for failing to warn consumers of the dangers and that its products were a substantial factor in the decedent's death and awarded \$7 million in past pain and suffering to decedent's estate.

THE FUTURE OF TALC LITIGATION

Cosmetic talc/ovarian cancer cases and asbestos-contaminated talc cases have both independently emerged onto the toxic tort stage and all indications are that they are going nowhere anytime soon. Plaintiff lawyers are investing heavily in the litigation in light of the huge verdicts in both types of cases. At the same time, cosmetic talc manufacturers are digging in for the long haul. While some suggest the convergence of these two litigations have allowed them to feed off one another and gain traction, they are on distinctly different paths.

The asbestos-contaminated talc cases relate to products that were on the market in the 1960s, 1970s and arguably 1980s. These cases will run their course, no different than the typical asbestos case. The cosmetic asbestos-contaminated talc cases are more defensible, which likely means more cases will be

tried. On the other hand, the plaintiff pool seems to be relatively narrow. In the final analysis, there is nothing talc manufacturers can do today other than to manage the litigation to its eventual conclusion.

On the other hand, the talc and ovarian cancer litigation is a very different story. The products have been on the market for years and are still in the stores today. The FDA has taken no action to suggest the products should be recalled or warnings be added. The talc manufacturers are defending their products. How this litigation will evolve may depend on further scientific research. It may also depend on how the appellate courts rule in Missouri, New Jersey and other venues, which could take years. With a potential plaintiff pool of 22,000 women being diagnosed with ovarian cancer each year, all indications are that this litigation may be in its infancy.



ababooks.org . . . the source you trust for practical legal information.

Features of the Store Include

- E-Products
- Special Discounts, Promotions, and Offers
- Advanced Search Capabilities
- New Books and Future Releases
- Best Sellers
- Podcasts
- Special Offers
- Magazines, Journals, and Newsletters
- Cutting-Edge CLE in Convenient Formats

Visit the **ABA Web Store** at www.ababooks.org

Over 150,000 customers have purchased products from our ABA Web Store. This is what they have to say:

"The site is easily manageable."

"I found just what I needed and obtained it quickly! Thanks."

"This is one of my favorite online resources for legal materials."

"Brings everything that is important to my practice to my fingertips!"