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Asbestos

Non-Traditional Asbestos Litigation: New Products And Industries In The Crosshairs

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Commentary

Non-Traditional Asbestos Litigation: New Products And Industries In The Crosshairs

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In the early 1980s, when Johns-Manville and most of the other asbestos-containing product manufacturers went bankrupt, plaintiffs' firms looked for new targets and shifted their focus onto suppliers and equipment manufacturers alleging that they, too, were responsible to warn against the dangers of asbestos. Since that shift, the vast majority of asbestos cases involve a plaintiff diagnosed with a malignancy filing suit against suppliers and equipment manufacturers allegedly tied to his or her former place of employment or residence. Although there is no evidence to suggest that this strategy is nearing obsolescence, plaintiffs' firms are nonetheless constantly seeking out new potential targets, like the cosmetic talc industry, and new potential strategies, like bootstrapping non-asbestos toxic exposure claims to asbestos claims. Below, we explore each of these non-traditional asbestos litigation trends further.

Cosmetic Talc Cases

Talc, a naturally occurring mineral, has been used in cosmetics since at least the late nineteenth century, when manufacturers discovered its efficacy in battling diaper rash. Today, as for the past hundred years, it can be found in numerous cosmetic products, including deodorant, makeup and, obviously, baby powder. However, the same geologic conditions that form talc can also form another, more troubling mineral — asbestos. For this reason, some talc mines throughout the world contain some quantity of asbestos.

Although there is no evidence that traditional asbestos cases are on the decline, plaintiffs' attorneys are constantly looking for the next set of solvent defendants and a theory under which to pursue them. Because of the geological connection between talc and asbestos, the next target may not be found on jobsites, but in medicine cabinets.

Over the past year, two asbestos-contaminated cosmetic talc cases have been decided — one by a jury and the other by preclusion of key evidence. The results could not have been more different but, although a

trend cannot be discerned from only two cases, there is much we can learn about the possible future of cosmetic talc litigation.

New Jersey Jury Awards $1.6 Million In First Cosmetic Talc Verdict

Only one year ago, in November 2013, the nation's first plaintiff's verdict in a case involving alleged asbestos exposure through contaminated cosmetic talc was handed down in a Middlesex County, New Jersey Superior Court. Although the jury awarded the plaintiff a modest — relative to traditional mesothelioma verdicts — $1.6 million, the verdict could be viewed by the plaintiff's bar as a suggestion that cosmetic talc may be another front to pursue in the asbestos litigation.

The case, *Kaenzig v. Charles B. Chrystal, Inc.*, involved allegations that plaintiff had contracted peritoneal mesothelioma as a result of his exposure to asbestos-contaminated cosmetic talc brought home on his father's clothes each night. The plaintiff's father worked for a company that manufactured personal care products using talc from 1967 to 1975. The plaintiff named both his father's employer and the supplier of the talc in the suit, but the case proceeded to trial against only the supplier, as it was voluntarily discontinued as against the employer. The plaintiff further alleged that he and his family's personal use of various asbestos-contaminated talc products also caused him to be exposed.

Contaminated talc cases present challenges to plaintiffs that do not otherwise exist in traditional asbestos cases. First, the plaintiff has to prove an extra link in the causation chain beyond the traditional element of exposure to the complained-of substance — here, cosmetic talc. The plaintiff must go one step further and prove that the talc to which he was exposed was contaminated with asbestos. This can be especially difficult because, unlike insulation or gasket material that was intended to contain and benefitted from asbestos, the asbestos found in cosmetic talc was both unintended and virtually undetectable.

The second set of challenges presented to plaintiffs in contaminated talc cases relate to state–of-the-art evidence. Of course, we now know that some cosmetic talc is contaminated with asbestos. However, the likelihood of contamination depends completely on the mine from which the talc was extracted. So the question becomes from what date should a manufacturer be charged with that knowledge. Further, if a manufacturer knew that talc could sometimes be contaminated with trace amounts of asbestos, is that manufacturer also charged with the knowledge that trace amounts of asbestos create a risk to the users of its products? In traditional cases, we have spent years hashing these issues out. All of these questions will now need to be re-litigated in this new context.

The plaintiff in *Kaenzig* managed to clear both of these hurdles due to the case's unique set of circumstances. The plaintiff there did not merely allege that personal care products he had used in the past contained asbestos. Instead, his case was strengthened by the fact that his father worked in a manufacturing facility that had hundreds of thousands of pounds of talc come through it. Obviously, it is easier to convince a jury that those hundreds of thousands of pounds of talc contained some asbestos than it is to convince them that a specific cosmetic item used by the plaintiff did. In *Kaenzig*, the plaintiff only needed to prove the former.

New York Court Precludes Novel Asbestos Testing

Just across the Hudson River, and only a few months later, the New York City Asbestos Litigation court precluded a well-credentialed causation expert from offering testimony that the talc to which the plaintiffs were exposed was contaminated with asbestos. In *Bernard v. Colgate-Palmolive Company, et al.*, 984 N.Y.S.2d 633, 2013 N.Y. Slip. Op. 52269(U), three plaintiffs claimed that they had contracted mesothelioma as a result of their historic use of Cashmere Bouquet dusting powder, a talc powder product manufactured and sold by Colgate-Palmolive.

To prove that the talc used in Cashmere Bouquet was contaminated with asbestos, the plaintiffs sought to offer the testimony of Dr. James Millette based on his bulk sampling studies of product exemplars. Dr. Millette first used an EPA-accepted method of testing using polarized light microscopy ("PLM") that revealed no asbestos in any of the seven samples he tested. Dr. Millette then resorted to a novel method using transmission electron microscopy ("TEM"), which was essentially a modification of an accepted test used for sampling asbestos in the air. In doing his TEM testing, Dr. Millette reported trace numbers of

asbestos fibers in four of the seven samples. The defendants, however, sought to preclude this testimony on grounds that Dr. Millette's TEM sampling studies did not comport with generally accepted scientific methodology and, thus, lacked any scientific basis to satisfy the element of causation.

After an extensive *Frye* hearing, the court noted that there is no generally accepted method for confirming the presence of asbestos in talc through TEM testing and that Dr. Millette failed to disclose or describe his novel TEM testing method in his report or deposition testimony. In precluding Dr. Millette from offering any opinion that the talc he tested contained asbestos, the court held that the reliability of a novel scientific testing methodology can never be grounded on the reputation of the expert or the soundness of his conclusions, but rather must be grounded in the consensus of the scientific community. The court concluded that Dr. Millette's TEM method was grounded on a consensus of one, and therefore must be precluded.

The Future Of Cosmetic Talc Cases

Whether contaminated cosmetic talc cases will become a mainstay in asbestos litigation, and the direction that this subsection of the litigation will take, cannot be determined from only two cases. Plaintiffs' attorneys obviously hope that the *Kaenzig* case serves as a model in future cosmetic talc cases. But this may be wishful thinking, as the facts there are fairly unique: The plaintiff's father also worked in a cosmetic talc factory that used hundreds of thousands of pounds of talc during his time there, allowing him to more easily argue that some of that talc contained asbestos and that the exposure to the allegedly contaminated talc occurred post-FDA reports. More often than not, plaintiffs will be forced to test exemplar products and hope PLM testing demonstrates the existence of asbestos in order to prove the necessary extra link in the causation chain. If cosmetic talc cases are limited to take-home exposure of factory employees' families, then this area will likely never gain the steam necessary to justify the expense involved in developing litigation strategies and furthering testing methods.

The defense bar, on the other hand, will and should continue to challenge the testing methods used to substantiate these claims. Cosmetic talc cases do not involve mass quantities of asbestos. Rather, the cases will rely on the single fiber theory and experts will search product exemplars for just that — even a single fiber. From there, an argument will be made that one single fiber in a stick of deodorant or compact of cover-up is the cause of the plaintiff's disease. Defendants must challenge the plaintiffs' bar at each and every turn as the science progresses.

However, if more cases arise, more effort will be made to have the science catch up (or vice versa). The aforementioned Dr. Millette, with two colleagues, has already published a paper entitled "Asbestos in commercial cosmetic talcum powder as a cause of mesothelioma in women" in the *International Journal of Occupational Environmental Health* which employs what appears to be the exact methodology he used in the *Bernard* case. While this may be a coincidence, it may also be an effort to strengthen his method's credentials for the next time a *Frye* hearing comes along in a contaminated cosmetic talc case.

One thing is certain. If plaintiffs' attorneys have the clients and the tools — in the form of reports like we saw in *Kaenzig* or studies developed in the future — then the cases will be litigated. Just recently, in *Williams v. BASF Catalysts LLC*, No. 13-1089 (3d Cir. N.J. Sept. 3, 2014), the U.S. Court of Appeals for the Third Circuit revived a fraud case against a former BASF subsidiary that mined talc. The suit alleges that the subsidiary mined asbestos-contaminated talc until 1983 and that it and its lawyers systematically destroyed or hid evidence of this in order to avoid liability and encourage cheap settlements. The case will hinge on who knew what and when. Through discovery and investigation, much will be learned about what the specific subsidiary knew and when they knew it. Although this case deals with industrial talc, there is potential that much will be learned about when the industry as a whole became aware that its talc mines could be, and in some cases were, contaminated with asbestos. Both plaintiffs' and defense firms should monitor the case closely, as what is learned throughout could be critical in determining the future of asbestos-contaminated cosmetic talc litigation.

The Emergence Of Multiple Distinct Exposure Lung Cancer Cases

There is a clear increase of lung cancer-related lawsuit filings across the country, largely driven by plaintiff firms specifically targeting these types of cases. With approximately 200,000 new lung cancer cases diagnosed each

year in the United States, some view this as a potential pool of plaintiffs, although many of them may have had minimal potential asbestos exposure.

There seems to be an emergence, or reemergence, of a distinct type of case during which the plaintiffs affirmatively sue both asbestos defendants and defendants associated with other industrial toxins for different types of industrial exposures, alleging that each distinct exposure led to the development of cancer. For example, in addition to asbestos exposure, a plaintiff may also allege exposure to other industrial carcinogens such as coal tar or coke emissions. Whether you represent a defendant with asbestos ties, or ties to some other alleged toxic emission, the joint pursuit of these different exposures, along with the claim that they independently contributed to a plaintiff's lung cancer, adds a unique layer of complexity to the causation issues and has the potential to shift the dynamic of what otherwise would be a united defense effort to mount a successful causation defense.

Why Is This Happening?

There may be two explanations for these multiple exposure lung cancer claims. First, with the focus on lung cancer cases and a dwindling number of asbestos defendants, plaintiffs' attorneys have an incentive to pursue cases during which they affirmatively claim that a plaintiff's illness was caused by both asbestos and another industrial toxin. From a practical perspective, plaintiffs may be able to increase the collective value of a case by suing different types of defendants in one lawsuit and resolving them for relatively modest individual sums.

Second, by approaching the cases in this fashion, plaintiffs' attorneys can pursue exposure claims related to other non-asbestos toxins against new defendants in the asbestos-specific courts under the confines of the asbestos case management orders and the expedited trial protocols. This allows plaintiffs' attorneys to develop expertise in new toxic tort areas while litigating those cases in courts and before judges that they know and to fund their new litigation pursuits with settlements from asbestos defendants prone to settle. By adding new defendants with asbestos-free products to the asbestos docket, plaintiffs' counsel effectively force these companies to litigate complex exposure cases involving toxins for which the science on causation has yet to mature, permitting them to bypass the time and extensive discovery found outside the realm of the asbestos courts.

Can A Plaintiff Meet The Dual Causation Burden?

By combining claims of exposure to asbestos and other carcinogens, plaintiffs are locked into a strategy of offering expert testimony that both exposures were substantially contributing factors to a particular plaintiff's lung cancer. Few courts have addressed whether a plaintiff can affirmatively argue and prove that an alleged exposure-related injury can have two distinct causes. When addressing this issue, courts typically focus on whether the plaintiff's expert proof meets the standard for admissibility.

For example, in *Wills v. Amerada Hess Corp.*, 279 F.3d 32 (2d Cir. 2003), a plaintiff alleged that her husband's death from cancer was caused by exposure to toxic emissions, including benzene and polycyclic aromatic hydrocarbons (PAHs) aboard vessels owned and operated by the defendants. The court found that the plaintiff's expert's proffered testimony on causation was inadmissible because the plaintiff had not proffered evidence from which a reasonable jury could conclude that the decedent's cancer was even partially caused by his alleged exposure to toxins while aboard the defendants' ships. This finding was in part based on the fact that although the expert conceded that cigarette smoking and alcohol consumption were major risk factors for the development of the type of cancer suffered by the decedent, the expert failed to account for these variables in concluding that the decedent's cancer was caused by exposure to toxic chemicals such as benzene and PAHs.

The court also excluded the expert testimony in *Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814 (W.D. Tex. 2005). The plaintiffs, cancer patients, resided in or worked in an area where the defendants mined uranium. The plaintiffs alleged that their exposure to ionizing radiation from the uranium ore and its decay products caused their cancer, causing them to suffer from various different types of cancer. The plaintiffs' expert's opinion boiled down to a conclusion that once a person developed cancer, all possible causes of cancer in the person were, in fact, causes and were substantial contributing factors in that particular plaintiff's cancer development. The court reasoned that the fact that exposure to ionizing radiation from uranium might be a risk factor for cancer did not make it an actual cause simply because cancer developed. Thus, the court granted the defendants' motion to exclude the plaintiff's expert testimony

because it found that in generating his opinion on causation, the expert disregarded the available epidemiological evidence specific to uranium that failed to support a causal link.

How Should An Asbestos Defendant Defend A Multi-Exposure Claim?

In a typical smoking lung-cancer case, an asbestos defendant's primary strategy is to establish that a plaintiff's smoking caused his or her lung cancer and not exposure to asbestos, or alternatively, to apportion as large a percentage of responsibility as possible to smoking. An asbestos defendant may now face challenges from experts testifying for other industrial toxin defendants offering opinions that asbestos was the sole or primary cause of a plaintiff's lung cancer.

Vetting and selecting the right causation experts is paramount to the defense of such a case. Jointly undertaking a medical work-up probably is not an option when a case involves an asbestos defendant and defendants tied to other industrial toxins because their interests may diverge. For an asbestos defendant, retaining its standard go-to experts on causation likewise may not be an option if they are unable or unwilling to point to the other toxin as an alternative, if not sole, proximate cause of a plaintiff's injury.

Defense attorneys for asbestos defendants in these situations must be prepared to prove both general and specific causation affirmatively, meaning that a plaintiff was exposed to a quantifiable dose of the toxin that is alleged to have caused the injury, and for a quantifiable duration, such that the exposure was capable of causing that injury. *Parker v. Mobil Oil Corp*., 16 A.D. 3d 648 (2d Dep't. 2005). Moreover, any defense strategy must include a venue-specific analysis of the case law on the admissibility of expert testimony and the effect, if any, on a plaintiff's causation proof when by a plaintiff's own admission, an injury may have been caused by another toxin. In other words, does the fact that a plaintiff alleges that an injury was caused by two separate toxins affect the admissibility of the proffered expert proof and the ability to prove causation?

Is Severance The Answer?

Severance can serve as an effective tool to assist in apportioning liability to other entities, including increasing plaintiffs' litigation expenses and removing dual-exposure cases from asbestos-specific dockets. *In re: Eighth Judicial District Asbestos Litigation*, 106 A.D.3d 1453, 965 N.Y.S.2d 681 (4th Dept. 2013). Perhaps the greatest benefit of severance, if successful, is that it could allow defendants to apportion liability on alternative causation grounds to defendants that are not at the table to defend their products. With the benefit of an empty chair, and a plaintiff's complaint alleging that a particular injury was, in fact, caused by two separate, distinct toxins, a defendant may be able to undermine a plaintiff's causation argument effectively at trial.

Conclusion

Whether by developing new targets or new tactics, plaintiffs' firms will continue to cultivate novel approaches to asbestos litigation so long as there are clients to represent. The non-traditional approaches discussed here — the targeting of cosmetic talc companies and suing both asbestos and non-asbestos companies jointly in order to be afforded the benefits of the asbestos courts — are merely two examples of this. Although the future of both of these approaches is difficult to foretell, what is clear is that asbestos litigation, in both its traditional and non-traditional forms, will continue to evolve and is very likely here to stay.

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