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TRENDS AND ISSUES REGARDING TALC LITIGATION

Talc is in a myriad of consumer products including pigments, cosmetics, paint and joint compound. As a result, we are seeing an increase in claims relative to the diagnosis of lung disease and allegations regarding talc-containing product use. In addition, the ovarian cancer trials have made headlines and advertising regarding ovarian cancer related claims is on the rise. To date, claims fall into the following categories:

Cosmetic Talc

- Inhalation – mesothelioma & lung disease
- Application as a genital feminine hygiene product - ovarian and uterine cancer

Industrial Talc

- i. Inhalation – mesothelioma & lung disease

I. OVARIAN CANCER CASES

As it relates to ovarian cancer claims, the statistics regarding the diagnosis and stage of diagnosis of disease are significant. According to the American Cancer Society, estimates for ovarian cancer in the United States for 2016 are:

- About 22,280 women will receive a new diagnosis of ovarian cancer
- About 14,240 women will die from ovarian cancer each year

(www/cancer.org/cancer/ovariancancer/detailedguide)

According to the same website, the disease is more common in Caucasian women and typically diagnosed after the age of 63. Interestingly, however, according to the American Cancer Society, rates of diagnosis have fallen over the last 20 years.

According to the Plaintiffs in these cases, the first epidemiological study regarding the association between genital talc uses and ovarian cancer is the Cramer study published in 1982. That study was followed-up on in 1999. In his 1999 study, Dr. Cramer opined that if genital talc use was ceased, diagnosis of ovarian cancer would be reduced by 10%.

During the course of the ovarian cancer trials out of Missouri, Plaintiff then argued that had defendants taken the product off the market in 1999, 10% of the 14,000 ovarian cancer deaths would have been prevented.

At trial in the ovarian cancer cases, Plaintiff's focus was medical literature containing meta-analysis of the association between talc use and ovarian cancer. The following are examples of studies used by the Plaintiff, which they contend supports an association between ovarian cancer and genital talc use:

- i. *Genital Powder Use and Risk of Ovarian Cancer: A Pooled Analysis of 8,525 Cases and 9,859 Controls* – Terry, et. al.
 - o 20-30% increase risk
- ii. *Genital Talc Exposure and Risk of Ovarian Cancer* – Cramer, et. al.
 - o Consistent association between talc and ovarian cancer
 - o Recommends a warning on the product

The defense focus at trial has been to point to the large prospective studies in which historical talc use was canvassed at different times. By way of specific example, the defense looked to the following:

- ii. *Prospective Study of Talc Use and Ovarian Cancer*
 - o Dorota M. Gertig, et al. Journal of National Cancer Institute December 2, 1999

The Nurses Health Study was a prospective study of 121,700 female RNs in 11 states who were aged 30-55 years at enrollment in 1976. Talc use was polled in 1982 resulting in a 78,630 cohort. According to the authors' findings:

- iii. *“Our results provide little support for any substantial association between perineal talc use and ovarian cancer risk overall; however, perineal talc use may modestly increase the risk of invasive serous ovarian cancer.”*

Another focus by the defense was the Houghton study published in 2014 entitled, *Perineal Powder Use and Risk of Ovarian Cancer*. The study was a prospective study of 93,676 postmenopausal women finding no association between risk of perineal powder use and ovarian cancer. According to the defense, the strengths of this study include its large sample size, it was prospective in nature (meaning asked before diagnosis) and the study looked to duration of use of talc. (Houghton, SC, et. al. Journal of National Cancer Institute, September 10, 2014)

As everyone following the litigation is aware, the compensatory and punitive damages awarded in the ovarian cases were significant. The following summarizes the background and facts of several cases.

Missouri has emerged as the hotbed of talc litigation. There are consolidated cases which numerous plaintiffs, the vast majority of which do not reside in Missouri. The plaintiff chooses the first plaintiff case to be tried, the defense chooses the next one, and so on.

The *Ristesund* case (***Gloria Ristesund v. Johnson & Johnson, et al. (2016)***), an ovarian cancer case unrelated to asbestos, resulted in a plaintiff's verdict for \$55 million, consisting of \$5 million in compensatory damages for pain and suffering, and \$50 million in punitive damages. Plaintiff's attorneys were: Jere Beasley, Ted Meadows, David Dearing, Danielle Ward Mason, and Britany Scott of Beasley, Allen, Crow, Methvin, Portis & Miles; Stephanie Rados, James Onder, and W. Wylie Blair of Onder, Shelton, O'Leary & Peterson, and R. Allen Smith of the Smith Law Firm. In their closing statements, plaintiff's simply asked for a number that "would change behavior." After a 2.5 week trial, the jury deliberated just more than a full day before finding Johnson & Johnson liable. Imerys, Johnson & Johnson's talc supplier was also a defendant but received a full defense verdict. Plaintiff's counsel focused less on the sympathetic nature of the plaintiff, but on bad corporate documents, which resonated with the jury. Plaintiff's counsel argued that the corporate documents were inflammatory and were argued to show an indifference to potential issues with talc, and also were argued to show direct marketing to obese, African-American, and Hispanic women. The defendants argued that plaintiff's endometriosis, childlessness, and obesity caused her ovarian cancer, not the talc which she alleged she used for decades. The defendants also argued that an analysis of the affected ovary showed over 115 foreign bodies, only one of which was a talc fiber. The case was a "defense" pick, tried after the *Fox* case, which had been the plaintiff's pick. As with the majority of the plaintiffs in the consolidated group, Mrs. Ristesund lived in South Dakota, not Missouri.

Just several months earlier, the *Fox* case had been tried (***Jaqueline Fox v. Johnson & Johnson, et al. (2016)***) in the same circuit court of Missouri, 22nd Judicial Circuit, City of St. Louis. Like Mrs. Ristesund, plaintiff suffered from ovarian cancer. Plaintiff's attorneys were the same as in *Ristesund*. Plaintiff Jacqueline Fox, like most other plaintiffs in the group, had lived in Birmingham, Alabama, not Missouri. Mrs. Fox passed away from her ovarian cancer at age 62. She had contended that she used Johnson's Baby Powder and Shower to Shower power for feminine hygiene for more than 35 years. She contended that the powder was unreasonably dangerous and defective, a feasible alternative existed, and defendant knew of the dangers of talc but knowingly released false information regarding its health effects. Johnson & Johnson claimed that talc was an inherently safe raw material, the powder was not defective or unreasonably dangerous, there was no evidence that talc caused plaintiff's cancer, the FDA approved talc for inclusion in both drugs and food, and the FDA determined no warning label was necessary.

After a three-week trial, the jury deliberated only four hours before finding Johnson & Johnson liable for fraud, negligence, and conspiracy. The verdict was for \$72 million,

consisting of \$10 million in compensatory damages for pain and suffering, and \$62 million in punitive damages

This was the first U.S. jury to award damages for claims linking talc to ovarian cancer. Prior verdicts were in cases in which talc contamination with asbestos was alleged.

Plaintiff's experts included: Dr. John Godleski – pathology; Dr. Daniel Cramer – epidemiology; Dr. Roberta Ness - medical and public health; Dr. Graham Cold Itzhak - ovarian cancer expert; Curtis Omiecinski - molecular toxicology; and David Steinberg - regulatory expert.

Johnson & Johnson's experts included: Dr. Joshua Muscat- oncology; Dr. Robert Kerman - gynecologic pathology; Dr. Larry Copland - OB/GYN expert.

II. THE INHALATION CLAIMS

Inhalation claims involve a number of different types of products and grades of talc – including industrial and cosmetic talc. Epidemiology studies are a critical piece of each party's case in the talc litigation. Plaintiffs contend the miner and miller studies demonstrate an association between talc inhalation and mesothelioma and lung cancer. The defense disputes this claim, and posits the exposure was likely to commercial amphibole fibers.

The following are studies that Plaintiff sites to support an association:

The 2002 Hull Study involved talc miners in upstate New York. There were found to be eight histologically confirmed cases of mesothelioma, and an increased pleural mesothelioma mortality in Jefferson County. The New York talc miners without any evidence of commercial amphibole asbestos exposure developed mesothelioma. The study found that there should be increased public health attention.

In 2012, Finkelstein writes in support of Hull, and finds mesothelioma at a rate in excess of the general population, and fibers of tremolite and anthophyllite were detected in dust and lungs of the participants. The conclusion is that dust from New York state talc ores is capable of causing mesothelioma.

Example studies looked to by the defense to dispute an association between talc and mesothelioma include:

- i. *Mortality among Workers at a Talc Mining and Milling Facility* – Honda, 2002
- ii. *An Evaluation of the risks of lung cancer and mesothelioma from exposure to amphibole cleavage fragments* - Gamble & Gibbs, 2007

The verdicts regarding talc-related claims have been mixed. As of late, defendant, Colgate (a cosmetic talc grade defendant) has received two defense verdicts. The following is an outline of various verdicts across the country regarding inhalation-related claims.

The *Nosse* matter was brought by the Simmons firm in Los Angeles on behalf of a female asbestos-contamination pleural mesothelioma claim and tried in July 2016. Colgate-Palmolive (manufacturer of Cashmere Bouquet brand body powder) and supplier Safeway grocery stores were the last defendants at trial. Plaintiff alleged that she used talcum powder for more than 30 years while she was a dive instructor and wig shop owner, that the talc was contaminated with asbestos, and that she inhaled the talc powder dust during use enough to cause her mesothelioma. The defense argued that plaintiff's mesothelioma was spontaneous and that the talc was not contaminated by any appreciable asbestos. General asbestos-related experts were used by both sides. After only deliberating for three hours, the jury returned a defense verdict for both defendants.

The *Alfaro* matter was brought by the Lanier firm and tried in Los Angeles in July 2016. Colgate-Palmolive and Imerys were the last defendants at trial. Plaintiff was a 38-year-old female with both peritoneal and pleural mesothelioma. The defense argued latency issues and that plaintiff's mesothelioma was spontaneous, and that other more appreciable asbestos exposures were at fault. General asbestos experts were used by both sides. After a short deliberation, a defense verdict was reached by the jury.

The *Fishbain* matter was brought by the Levy Phillips firm and tried in New Jersey in November 2015. This too involved a female plaintiff alleging that the talcum powder she used was contaminated with asbestos and caused her mesothelioma. Whittaker, Clark & Daniels and Shulton, Inc. were the remaining defendants. The jury found no defect in the product at issue, and reached a defense verdict.

The *Winkel* matter was tried in Los Angeles against Colegate-Palmolive in 2015 by the Simon Greenstone Panatier Bartlett firm. 62 year old Judith Winkel alleged that her pleural mesothelioma was caused by her lifetime use of Cashmere Bouquet powder. After only two hours of deliberation, the jury found for the plaintiffs and awarded \$13 million in compensatory damages. They also found malice in Colgate's conduct of manufacturing and selling a product that has asbestos contamination and concluded that it knew that this was the case many years ago but failed to substitute another ingredient and failed to warn its customers of the potential for asbestos exposure, which triggered a separate trial to determine punitive damages. However, the parties reached a settlement before the second trial phase began.

The *Chisholm* matter was tried against R.T. Vanderbilt in 2015 in Schenectady County, New York, by the Levy Phillips firm. Plaintiffs claimed their 52-year-old decedent was exposed to asbestos-contaminated talc mined by the defendant which he worked with

during summers in high school when he was employed by a ceramics manufacturer. The defendant talc mine denied that there was asbestos in its talc. It is noted that the jury heard evidence that the defendant's talc had been tested and the decedent's lung tissue had likewise been tested through a digestion study and the same types of asbestos were found in both. After a short deliberation, the jury awarded plaintiffs \$10 million.

The *Oddo* matter was tried against Ford and Southern Talc in Louisiana in 2012. This wrongful death mesothelioma case was tried by plaintiffs' attorneys Landry & Swarr and involved a retired auto mechanic who claimed asbestos exposure from changing brakes and from driving on his own driveway in which he claimed that contaminated talc was included in the cement. The jury found that defendant Ford was 65% at fault and Southern Talc, a talc mine defendant, was 35% at fault. The jury awarded plaintiffs \$4.4 million.