

Talc Litigation and Insurance Implications

Is talc the elusive “next big thing” long sought by the plaintiffs’ bar? Recent verdicts against cosmetic talc defendants, including Johnson & Johnson (“J & J”), suggest that talc litigation, at a minimum, is a material threat to talc defendants and the insurance industry. In 2016, J & J and other defendants suffered three large verdicts for exposure to its baby powder in St. Louis, Mo.: \$72M, \$70M and \$55M. All three verdicts, in a jurisdiction considered favorable to asbestos plaintiffs, included substantial punitive damages. The plaintiffs in each of these cases alleged that exposure to talc contained in J&J’s baby powder caused them to contract ovarian cancer. Also in 2016, a Los Angeles jury awarded \$18M to a plaintiff who sued a cosmetic talc defendant alleging exposure to cosmetic talc cause the plaintiff to contract mesothelioma.

Assuming talc litigation is not going away any time soon, several questions are raised. Are all talc claims the same? What is the relationship between talc and asbestos, if any? What defendants are at risk in the talc litigation? What are the insurance implications of talc claims, and are they alike or different from asbestos and other long-tail coverage claims?

Background

There are two types of talc: industrial talc which is used most frequently in rubber, plastics and ceramics; and cosmetic talc which is of a higher grade and is used in conjunction

with products that involve direct human exposures such as cosmetics, pharmaceuticals and food additives.

Talc manufacturers and companies that have incorporated talc into their products have been, and continue to be, sued. Industrial talc defendants have been involved in litigation for decades. In lawsuits involving industrial talc, plaintiffs generally allege that the talc is contaminated with asbestos. The injuries alleged are mesothelioma, lung cancer and asbestosis. To date, there have been no claims against industrial talc defendants alleging that asbestos in the talc caused ovarian cancer. Industrial talc defendants have aggressively defended the cases brought against them and, although they have suffered some adverse verdicts, they have tried and won more cases than they have lost and generally have been successful limiting their liabilities.

Cosmetic talc cases fall into two distinct categories: 1) cosmetic talc alleged to cause ovarian cancer; and 2) cosmetic talc alleged to cause mesothelioma. The J & J verdicts were ovarian cancer cases. There was no claim that the talc was contaminated with asbestos.

While the J & J St. Louis verdicts received significant attention in the national media, cases alleging that asbestos-containing cosmetic talc caused an asbestos-related disease such mesothelioma have been percolating, and some recent notable verdicts have been obtained. In 2015, a Los Angeles jury awarded \$13M to a woman who alleged talcum powder sold by Colgate-Palmolive was contaminated with asbestos causing her to contract mesothelioma. As discussed below, these cases, if they take hold, could make cosmetic talc defendants targets by effectively substituting them for the liability shares of insolvent asbestos defendants. This scenario, in its most extreme iteration, could present an existential threat to cosmetic talc defendants and pockets of the insurance industry.

Cosmetic Talc Litigation – Ovarian Cancer

Cases alleging injury from cosmetic talc are relatively new, as best exemplified by the recent high-profile J & J verdicts. These cases did not depend on asbestos contamination, nor did they allege mesothelioma. Instead, they alleged that talc itself causes ovarian cancer. The ovarian cancer talc cases indeed represent an entirely new class of toxic product liability litigation. The approximately 14,000 ovarian cancer deaths a year, in conjunction with the widespread use of talc in everyday products such as baby powder, renders these cases a serious threat to certain defendants and their insurers.

According to the National Institute of Health, there are 22,280 new ovarian cancer diagnoses each year in the U.S. and 14,240 women die of the disease every year. This is seven times the number of annual mesothelioma diagnoses.

The American Cancer Society estimates that there are only 3,000 new mesothelioma diagnoses a year. And, mesothelioma lawsuit filings are essentially stable and not increasing. Like any other business, plaintiffs' firms are always looking to maintain and grow revenue. Litigation against cosmetic talc defendants alleging ovarian cancer offers a way to substantially increase their bottom line. Indeed, "do you have ovarian cancer?" and "did you use talcum powder?" ads are commonplace on television.

Because everyone can credibly claim exposure to cosmetic talc, the primary issue that will be litigated is the science underlying the causal connection between talc exposure and ovarian cancer. While plaintiffs prevailed in the St. Louis actions, Imerys Talc and J & J persuaded a New Jersey trial court in 2016 to dismiss with prejudice two ovarian cancer cases after granting their motions to bar expert testimony due to inadequate science

supporting their opinions. Apparently pressing their advantage, the defendants persuaded the federal talc MDL in New Jersey to conduct a “science day” in which the litigants would attempt to generally demonstrate that cosmetic talc does or does not cause ovarian cancer. The plaintiffs’ bar quickly responded with their own proposed “science day” in California state court, presumably where they perceive a jurisdictional advantage. The “science” of whether cosmetic talc causes ovarian cancer will be the field of battle on which the sustainability of these claims will live or die.

The sustainability of ovarian cancer talc cases will depend on how the courts resolve the science questions surrounding causation. This will depend in large part on the plaintiffs’ bar’s ability to persuade courts outside jurisdictions traditionally favorable to asbestos claimants of the merit of their claims.

Cosmetic Talc Cases Alleging Asbestos-Contamination

In addition to the emergence of ovarian cancer cases, cosmetic talc defendants are also at risk of becoming responsible for mesothelioma cases alleging that their products were contaminated with asbestos. If plaintiffs can meet their burden of proving asbestos contamination in their products, the issue of product identification will largely be moot due to the ubiquitous use of talc in everyday products to which any plaintiff can presumably credibly claim exposure.

Allegations of asbestos contamination in talc have a long and disputed history. The FDA launched an investigation in 2010 based on reports that talc from South Korea and China contained asbestos. After extensive testing of various U.S. consumer products, the FDA found no asbestos contamination in the products. However, it described its results as inconclusive and only “informative” because it was unable to secure samples from all of the

common talc suppliers.

The issue of whether cosmetic talc is contaminated by asbestos is disputed by the plaintiffs' bar. The cosmetic talc defendants present an attractive target, especially given the declining pool of solvent asbestos defendants. In addition, while mesothelioma case filings have been relatively flat, the expected decline of mesothelioma claims has failed to emerge.¹

If mesothelioma cases do trend upward, plaintiffs' lawyers will have additional incentive to identify new solvent defendants to satisfy the potential liabilities. Cosmetic talc defendants, generally not burdened by years of asbestos liabilities, make attractive defendants. In addition, because the traditional asbestos defendants that used and sold asbestos products have gone bankrupt, plaintiffs' lawyers have increasingly struggled to demonstrate proximate cause against individual defendants and have been forced to make ever-more tenuous arguments that even *de minimus* exposures to asbestos caused their clients' mesothelioma. The widespread use of cosmetic talc overcomes most traditional product identification, proximate cause defenses. Instead, the principal issue becomes only whether a particular product was contaminated with asbestos.

The plaintiffs' bar will attempt to meet its burden of demonstrating asbestos contamination in cosmetic talc by arguing that traditional testing methods are not precise enough to detect it at low levels and that there is no safe level of asbestos exposure. In previous cases, plaintiffs have employed experts to challenge defendants that maintained talc samples. As these cases are being litigated in the same jurisdictions that handle most asbestos cases, these allegations may be difficult for defendants to rebut.

¹ Actuaries at Willis Towers Watson and A.M. Best recently indicated that mesothelioma cases may increase in the future and that insurance reserves for asbestos generally should be raised.

Notable Cosmetic Talc/Asbestos Contamination Verdicts

Two recent verdicts for asbestos contamination demonstrate the risk to cosmetic talc defendants. In October 2016, a Los Angeles County jury awarded \$18M to Philip Depolian against Whittaker, Clark & Daniels finding it 30% responsible for his mesothelioma due to his alleged exposure to various cosmetic talc products used at his father's barbershops that contained asbestos. The jury apportioned liability against various cosmetic talc defendants that had settled and several other cosmetic talc product defendants that sold products including Old Spice, Clubman, Kings Men and Mennen Shave Talc.

In 2015, another Los Angeles jury awarded Judith Winkel \$13M against Colgate-Palmolive for mesothelioma allegedly caused by exposure to talc in its baby powder. The jury rejected Colgate and its experts' claims that the cosmetic talc at issue was not contaminated by asbestos and that the talc in question were non-fibrous "cleavage fragments" unlikely to be inhaled or embedded in the lungs. Although details of the trial are not readily verified, at least one report indicated that evidence presented at trial showed that the talc contained 20% asbestos fibers.

These cases are particularly important because the defendants were held responsible for cosmetic talc containing asbestos and for having caused mesothelioma and not ovarian cancer as in the J & J cases. Further, both juries found that the defendants acted with malice. However, the cases were confidentially settled before the respective punitive damage phases.

Overview Of Liability Implications

While the ovarian cancer cases have dominated the headlines, the cosmetic talc asbestos contamination cases may present the bigger risk to defendants. Thousands of companies used cosmetic talc in their products over the last hundred years. The entire population could claim exposure, especially to defendants that sold personal care products that could be ingested, inhaled or exposed via air-borne contact. Thus, if plaintiffs can satisfy their burden of proof that any particular defendant's product was contaminated with asbestos, the traditional product identification defense available to asbestos defendants will not be nearly the impediment as it is in traditional asbestos cases. The risk is that the cosmetic talc defendants become the defendant of last resort when a plaintiff has no other convincing credible sources of exposure to asbestos, especially when the likely source of exposure is a product sold by a bankrupt entity.

Insurance Implications

Cosmetic talc lawsuits allege bodily injury over a period of time, and are thus classic "long-tail" product liability claims implicating multiple policies in a defendant's historical liability coverage profile. Even if talc claims allege ovarian cancer rather than asbestos contamination, they still have a lot in common with asbestos claims. However, there are important potential differences with respect to trigger of coverage for ovarian cancer claims, the applicability of asbestos exclusions, whether talc claims might require a different allocation approach, and how fortuity and known loss issues might be resolved.

Trigger of Coverage: "Trigger of coverage" determines what policies must respond to a "long-tail" claim such as talc. "Occurrence" policies are triggered when bodily injury takes place during the policy period. For asbestos claims, most states employ some version

of a “continuous trigger” that implicates any policy on the risk from the date of first exposure until manifestation for a defense and indemnity duty.

Most states employ a “continuous trigger” for asbestos on the theory that asbestos-related diseases are progressive in nature. For several years, insurers have been challenging the science underlying the continuous trigger approach, arguing that the state of medical science has changed since the courts first adopted this approach. These insurers seek to move the trigger date closer to the manifestation of the plaintiff’s disease. Policyholders generally resist these efforts vigorously because it moves the trigger date into years in which asbestos exclusions were prevalent. These efforts have largely failed, to date, but the issue is still being aggressively pursued by some insurers.

Science of Cosmetic Talc Claims: While it may be difficult to challenge long-established trigger approaches if a talc claim involves a claim of asbestos contamination, ovarian cancer talc claims may require a new look at trigger issues because the underlying science of how talc exposure may cause ovarian cancer is different from how asbestos inhalation damages the respiratory system. Having learned from previous trigger battles in asbestos, the insurers are likely to challenge the science that the first exposure to cosmetic talc causes injury that can be associated with the development of ovarian cancer and characterized as “bodily injury” as required in their policies. They may seek out scientific opinion that ovarian cancer caused by cosmetic talc is not progressive in nature, and thus not warranting the imposition of a continuous trigger. And, generally, the insurers will likely

seek to limit the spread of potentially triggered policies to as few years as possible, and as close to the manifestation of the disease as possible.²

Exceptional advancements in the science of diagnosing and predicting cancer in just the last few years will provide plaintiffs, policyholders and insurers the opportunity to craft new trigger theories to their advantage and to circumvent past judicial decisions that were to their disadvantage. We have already seen the insurance industry using alleged advancements in asbestos science to attempt to limit the scope of historical “occurrence” policies. There is no insurance precedence with respect to trigger and talc ovarian cancer claims. Expect both sides to bring new experts and theories with respect to biologic and genomic issues, including molecular cancer experts opining about genetic alterations pre-existing before manifestation of a tumor. Resolution of these issues will be especially challenging because much less is known about females’ “defense systems” as opposed to airborne exposure through the lungs.

In sum, the science of ovarian cancer cosmetic talc claims is likely different from asbestos claims. After years of asbestos trigger battles, policyholders and their insurers will not underestimate the importance of these issues and will litigate them aggressively.

Potentially Larger Spread of Triggered Policies: Under existing trigger approaches, cosmetic talc claims – whether or not they involve asbestos contamination – may result in a generally longer spread of potentially triggered policies. Because plaintiffs will have an easy time in most cases demonstrating exposure to consumer products (e.g., for

² Policyholders generally resist these efforts because it increases the likelihood that claims-made policies or policies with significant self-insured-components will apply. This approach would also enable insurers to avoid talc claims going-forward because claims that manifest in the future can be excluded in current policies.

baby powder, theoretically from birth to present), both kinds of cosmetic talc claims generally would be characterized by earlier trigger inception *and* later trigger cessation dates. Thus, as long as the trigger approach is at least, in part, exposure-based, the spread of potentially triggered years may be far wider for cosmetic talc cases regardless of whether they allege asbestos contamination or not. It should be noted that to the extent a policyholder is in a jurisdiction which requires it to access all available years of insurance on a pro rata basis – including coverage with large SIR's, deductibles and retro's – more “insurance” could actually be a significant negative for policyholders.

Loss Allocation: To the extent applicable law calls for multiple triggered policies for a given talc claim, the issue of how coverage should be allocated among those policies remains. There is a split in how states approach loss allocation. In some jurisdictions, an insured can select one of the triggered policies to fully defend and indemnify it in a given claim based on the language found in many historical liability policies requiring an insurer to pay “all sums” on behalf of a policyholder. This approach allows a policyholder to target policies with the most favorable terms, thereby avoiding lost policy periods, insurer insolvencies and policies with large deductibles or SIR's.

Other jurisdictions employ a “pro rata” approach spreading the costs of defense and indemnity across all triggered policies. For asbestos cases, many pro rata jurisdictions do not force allocation to policy periods when available insurance is now insolvent, or to periods when the asbestos exclusion was prevalent in the marketplace.

There would appear no reason to divert from these approaches in asbestos-contamination talc cases. However, in ovarian cancer cases, the insured may not have applicable asbestos exclusions in its coverage profile to limit its coverage in later years.

Thus, in a pro rata jurisdiction, the insured may be forced to allocate to these policies regardless of whether they contain significant self-insured components.

The issue of whether and how to allocate to claims-made policies is another issue that will need to be resolved. Is a policy “available” when it is “claims-made”, but the claims-made reporting period is long expired? Is it fair to force an insured to assume responsibility for that period when it was difficult or impossible for it to have purchased anything but claims-made insurance but the claim was not brought until many years later thus triggering only its present-day claims-made coverage or its current “occurrence-based” coverage?

Asbestos Exclusions: Lawsuits against industrial talc defendants usually assert that the allegedly offending talc was contaminated with asbestos. Thus, the asbestos exclusion found in most general liability policies issued since the mid-1980’s is usually asserted by the insurers in such cases. Cosmetic talc cases alleging asbestos contamination are also likely to trigger the assertion of the asbestos-exclusion by the insurers. However, ovarian cancer talc claims do not involve any allegation of asbestos contamination, so they may not be barred by the exclusion. And, because the exclusion may not apply, ovarian cancer claims may implicate a far later set of available insurance policies than the typical asbestos claim.

Interestingly, in certain jurisdictions that spread the risk “pro-rata” to all triggered policies and recognize the “availability” doctrine, an insured may prefer the application of the asbestos exclusion to the extent that their later coverage had deductibles, SIR’s, fronting features, onerous claims-made provisions or insolvencies. An insured in one of these jurisdictions may actually prefer a hard cut-off that insulates it from these later and less robust policy years even though it reduces the overall limits available.

Fortuity: The standard complaints utilized in the St. Louis cases allege that J&J knew about the risks of ovarian cancer as early as 1971. The complaints allege that “nearly all” of 23 known epidemiologic studies on cosmetic talc reported an associated risk with ovarian cancer, and assert alleged instances in which J&J “knowingly released false information” about the safety of talc in coordination with the Cosmetic Toiletry and Fragrance Association. Media reports suggest that, in post-trial interviews, jurors indicated that these allegations were part of the motivation for the large punitive damages award.

It is likely that against this back-drop, the insurers will assert various “fortuity,” “known loss” and “expected and intended” defenses to coverage. Collectively, these defenses rest on the concept that a loss that is caused knowingly, or which the policyholder had sufficient knowledge to prevent. Such defenses have had limited success in pure asbestos cases, and are fact-intensive to prove.

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