



CLM Annual Meeting  
Orlando Florida

**Let's Talk Talc**

**I. The Science Behind talc litigation: Epidemiology, Toxicology, Theories of Causation, and Scientific Agency's Positions on Talc**

**What is Talc**

Talc is a naturally occurring mineral that has long been mined for commercial use. It is extracted as a pure mineral and from soft talc-containing rocks. Talc is used in a variety of personal products including cosmetics, food, pharmaceuticals, and baby/body powder. It is also used in plastics, rubber and other industrial applications. Personal care products containing talcum powder have been used for personal hygiene by adults and children for many years. Such products have recently become the subject of multiple lawsuits alleging the talc in the products is harmful to consumers.

**Ovarian Cancer vs. Mesothelioma**

Long before the onset of litigation, multiple studies were conducted to determine if talc/talcum powder was harmful to consumers. Talc has been implicated in causing ovarian cancer and pulmonary mesotheliomas in several product liability claims. Use of talcum powder in the perineal area, either baby powder or after shower powders, has been targeted as a risk factor and ovarian cancer. Similarly, inhalation of talcum powder has been alleged to be a risk factor for mesothelioma. Several observational case-control studies conducted over the last 30 years have suggested a weak causal association between talcum powder products and ovarian cancer, however, large prospective cohort studies have not shown an association. Based on what is known about the toxicology of talc, the conclusions from the case-control and prospective studies of talcum powder, and the occupational studies with talc, the existence of a causal association between talcum powder and ovarian cancer and/or mesothelioma is equivocal.

**Theories of how talc can be carcinogenic**

Over the last several decades, some scientific studies have suggested a possible association between the use of powders containing talc and an increased risk of ovarian cancer. However, these studies have not conclusively demonstrated if such a link exists or conclusively demonstrated a viable toxicological mechanism. In the talc and ovarian cancer litigation, the

plaintiffs' theory is that use of talcum powder products by women in the perineal area led to talc migrating up the vaginal tract, causing inflammation in the ovaries and leading to the development of tumors. In addition, concerns about the potential contamination of talc with asbestos have been raised since the 1970s. Scientific research indicates that pure talc does not cause mesothelioma; however, it is alleged that inhalation exposure to talc contaminated with asbestos and asbestiform minerals can lead to the development of mesothelioma.

### **Scientific Agency's Positions on Talc**

There are several regulatory agencies and scientific organizations that have evaluated the safety of talc over the last several decades. The positions of the International Agency for Research on Cancer (IARC), US Food and Drug Administration (USFDA), National Toxicology Program (NTP), Cosmetic Ingredient Review Panel (CIR), American Cancer Society (ACS), and Centers for Disease Control (CDC) will be discussed.

## **II. Talc Litigation**

### **Pre-trial tactics and Discovery**

Trial strategy begins with the summons and complaint. Starting with requests for documents and depositions the litigation team must determine what is needed to undermine how plaintiff's claims. Determining the pattern of use of the product by the plaintiff can assist with identifying the occurrence trigger and determine how long and much of the product was used. You may also need to identify the product (s) used by the plaintiff. Determining other risk factors the plaintiff may have, can also assist in convincing the jury there are other reasons for the plaintiff's symptoms. A large portion of the current claims involve the development of ovarian cancer as a result of talc use. Recently, there have been additional claims that talc use caused the plaintiff to develop pulmonary mesothelioma. Initially these plaintiffs were male but there have been a few female plaintiffs who have made the same allegations

### **Dispositive Motions**

Preparing for dispositive motions begins in discovery. Consideration for moving for dismissal via summary judgment or testing the plaintiff's evidentiary strength via a Frye/Daubert motion should be given. Restricting the plaintiff's evidence or expert testimony can assist during trial or aid in pre-trial motions or hearings. Experts in the fields of Toxicology, Epidemiology, Industrial Hygiene as well as State of the Art Experts have been used by the plaintiff and defense bars to support or defend against pre-trial motions or during trial

### **Building Blocks of the Plaintiff's Case**

Talc claims have been heard in various jurisdictions, yet many of the same experts and evidentiary proof is used by the plaintiffs' attorneys. Deconstructing the plaintiff's case by studying the expert testimony, reviewing the documents produced during discovery and understanding rulings in other jurisdictions can give the defense a step up during litigation.

## **Understanding Causation**

The biggest hurdle for defendants to overcome, can be causation. The testimony given by plaintiff's experts is appealing to juries and maybe difficult to overcome Utilizing experts who are equally persuasive on the issue of causation is a valuable tool to undermine the sympathy created by the plaintiff. Presenting an equally powerful alternative theory to the alleged damages can help a jury think twice during deliberations. When seeking to use or preclude scientific literature to support pre-trial motions or during trial, local jurisdictional rules should be evaluated. Reviewing literature relied upon by plaintiff's experts can be a useful tool during an evidential hearing or cross examination. One tactic which may used by plaintiffs is to publish or show provocative excerpts from literature to the jury during expert testimony. This is often precluded by the Court and the defense should be prepared to cut it off quickly .

## **Settlement vs. Trial: the ultimate strategy**

At some point a discussion about the ultimate disposition of the case will be held. Corporate clients often fear adverse publicity when large verdicts are awarded and are loathe to settle and set a precedent for future claims. The pros and cons of settlement and proceeding to trial must be carefully reviewed with the client

## **III. The X Factor - The Appellate Courts**

### **The Latest Verdicts**

Despite the headlines, jury awards have been mixed. Some have given multimillion dollar awards to plaintiffs and other have sided with defendants. Although we can not get into the mind of the jury, we will look at jurisdictional differences and the types of damages awarded. Juries which find for the plaintiff tend to award significant amounts for punitive damages perhaps to " penalize " the corporate defendants for a perceived failure to warn or to send a message that corporate defendants have a duty to protect the public.

### **Impact of the Supreme Court decision: Bristol-Myers Squibb v. Superior Court**

The Bristol Myer decision held that in order for a State Court to exercise specific jurisdiction, the suit must arise out of or be related the defendant's contacts with the forum. This decision has been the basis for overturning multiple verdicts. The vagaries of the decision and how it will affect the strategy for future claims will be discussed

### **Recent Appellate Decisions**

Apart from the Bristol Meyers decision, multiple Appellate Courts have weighed in on the issues inherent in the talc litigation. The precedential value of these and other decisions can be useful as strategy during trial or at settlement discussions

## **Preparing The Record**

Along with acquiring evidence during discovery and preparing for trial, defendants must think about a possible appeal. Since many of the verdicts (both for and against the plaintiff) are subject to an Appeal, decisions made during trial can affect the ultimate result. Appellate strategy should also be considered as the case proceeds

## **IV. Insurance Considerations: Evaluating Exposure**

### **Policy Triggers**

Evaluation of policy language can determine what triggers an occurrence. Since plaintiffs allege talc use over many years the claim can implicate multiple policies. Trigger of Coverage determines what policies will respond to for long tail claims. Occurrence policies are triggered when bodily injury occurred during the policy period. Many states employ a continuous trigger standard (for asbestos) based upon the theory that asbestos related diseases are progressive. Since asbestos contaminated talc has been at the forefront of most of the claims, all these must be considered when evaluating coverage

### **Statute of Limitations**

Each jurisdiction have different statute of limitations which control individual claims Plaintiffs have utilized State and Federal Courts to bring claims depending in part on their perceived friendliness of the specific venue. Since plaintiffs allege long time use of talc caused their injury the specific statute must be analyzed to determine the specific statutes must be evaluated to determine if the claim is viable. Loss allocation must be considered as well. If multiple policies are triggered – the states are split as how the loss is allocated over the policies.

### **Other Statutory Issues**

Many states have enacted reviver statutes to address claims deemed untimely under the statute of limitations. Under the reviver statute, the time to file a claim is extended and generally starts to run when the injury is discovered. These have been enacted in response to various long tail claims and may be applicable to talc claims. Innocent seller statutes allow a truly innocent seller or distributor to obtain a dismissal and can be helpful to the defense if all the parameters are met...

### **Policy Exclusions**

Suits against industrial talc defendants often claim the causative agent is asbestos contaminated talc. Policies with asbestos exclusions can be useful in some cases. However ovarian cancer claims arguably may not involve asbestos contamination and the exclusion may not apply.