Talc Litigation Update 2024

No Longer a Novel Cause of Action

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Amanda R. Cachaldora, Esq., MG+M The Law Firm, Miami, FL
John D. Cosmich, Esq., Cosmich Simmons & Brown PLLC, Jackson, MS
Olivia Kelly, Esq., Simmons Hanly Conroy, New York, NY

Filings have exploded from only dozens per year to a current track of 400+.

- Claims with exposure to ACPs
- Secondary exposure claims
- Products with no release data

Focus of this session

- **Overview of Proving Asbestos Content**
- **Establishing Significant Causation**
- **Litigating Talc Mesos**

Overview of Proving Asbestos Content

Literature from Mine Sources

- Does Not Support Their Contention
- Great Variability ***Between*** Mines
- Great Variability ***Within*** Mines

Objection!

At Best:

Some samples from some mines **MIGHT** have low level contamination.

But:

No way to tie any source to any container

Change in Focus

Initial

Heavy focus of defense was on "Some But Not All"

Now

Plaintiffs argue that essentially all talc used in cosmetic talcum powder products is contaminated

Establishing Causation

Occupational exposure to cosmetic talc and mesothelioma in barbers, hairdressers, and cosmetologists: A systematic review of the epidemiology

Ryan C Lewis [1], Sierra J Smith [2], Callan F Krevanko [3], Ethan D Hall [4], Eric W Miller [4], Evan M Beckett [5], Jennifer S Pierce [2]

Toxicology Industrial Health, 2023 Oct.

Literature screening was performed independently twice, the results of which were summarized and tabulated and underwent a review for their accuracy. A total of 12 studies met our inclusion criteria, including three cohort, six case-control, and three proportionate mortality/registration studies. The data from these studies were collected in 13 European and North American countries, spanning more than 50 years. We supplemented this review with queries of occupational mortality databases that are managed by the Washington State Department of Health and NIOSH for 26 U.S. states. Most findings were null and if statistically significant, nearly all showed an inverse relationship, indicative of a protective effect of these occupations on mesothelioma risk. Overall, the epidemiological evidence does not support an increased risk of mesothelioma for these occupations.

Assessment of worst-case potential airborne asbestos exposure associated with the use of cosmetic talc: application of an exponential decay model

E W Miller [1], E M Beckett [2], B Roberts [3], D Cheatham [4], A Abelmann [4], J S Pierce [4]

Environmental Monitoring and Assessment, 2023 Dec. 14

In this analysis, estimates and measurements of airborne asbestos fiber concentrations associated with cosmetic talc use from 10 published studies were used as inputs to an exponential decay model to estimate "worst-case" exposure during and following application. The resulting geometric mean 30-min time-weighted average (TWA) concentrations were 0.006 f/cc for both puff and shaker application, for diapering, 0.0001 f/cc (adult applying baby powder) and 0.0002 f/cc (infant), and for makeup application, 0.0005 f/cc.

Hamilton v. Publix Super Markets, Inc., Case. No. 19-CA-9136 (Order) (March 2023) Order Denying Motion for Summary Judgment

"[Plaintiffs' expert] testified that in her opinion to a reasonable degree of medical certainty, Plaintiff's alleged exposure to asbestos-contaminated cosmetic talcum powder products … Substantially contributed to cause her mesothelioma. [Defendant's expert] opines that it did not.

[The movant] elected to move for summary judgment prior to challenging Plaintiff's experts."

Weiss v. Albertsons Co., 2023 WL 452969 (Ariz.Super.) (Trial Order) (June 2023)
Order Granting Motion for Summary Judgment

Trial Court precluded aspects of certain Plaintiffs' experts' testimony.

Ruling: "Plaintiffs' failure to demonstrate that the asbestos in talc caused Mr. Weiss' mesothelioma is fatal to plaintiffs' claims for negligence and gross negligence. Summary judgment is granted on those claims."

Raso v. Avon Products, Inc., 2023 WL 5957074 (Sup. Ct., N.Y. Cty., Sept. 2023) (Trial Order) Order Denying Motion for Summary Judgment and Applying New York Law

Trial court denied summary judgment dismissing the complaint in its entirety, finding that there are triable issues of fact regarding causation, design defect, and punitive damages.

"A reasonable juror could determine that plaintiff was exposed to asbestos from defendant['s] cosmetic talcum powder, whether such exposure was a substantial cause of plaintiff's disease, and whether punitive damages should apply to defect['s] conduct regarding safer alternatives."

New York Orders Denying Motions *in Limine* to Preclude Plaintiff's Causation Experts Based on Purportedly Insufficient Causation Opinions And, Or Alternatively, for A *Frye* Hearing

"Defendant's motion to preclude [Plaintiff's expert] is denied. [Plaintiff's expert] will be subject to cross-examination at the time of trial in front of a jury."

Soifer v. ALL Acquisition Corporation, LLC, et al., Oct. 11, 2023, at 34:9-11.

"At this point, I've heard enough, and I am not prepared to exclude [Plaintiff's expert's] testimony At present. So, your motion [is] denied."

Cardillo v. American Int'l. Industries, et al., Dec. 19, 2023, at 64:21-23.

Sason v. Dykes Lumber Co., 221 A.D.3d 491 (1st Dep't 2023)

"[Plaintiff's medical causation expert] opined that decedent's approximate exposure range exceeded The known causative levels for mesothelioma. In reaching his opinion, [the expert] relied on [industrial hygienist's] report, which cited simulation studies that demonstrated that decedent's work [with defendant's type of product] would have released toxic concentrations of asbestos fibers into his breathing zone. These studies satisfy the scientific expression requirements articulated by the Court of Appeals in *Nemeth*."

1. Quantitative estimate of plaintiff's cumulative asbestos exposure

2. Levels shown to fall within range of asbestos fiber exposures found by epidemiological studies to entail very high "odds ratios" as to mesothelioma, and made plaintiff about 8, 22, or 47 times more likely to develop mesothelioma than if he had been in a lower-risk group

3. Medical doctor explained that the intensity of plaintiff's exposure to asbestos overcame body's defenses and allowed fibers to enter lungs

"This testimony, taken together, articulated a "scientific expression of [plaintiff]'s exposure level" (*Parker v. Mobile Oil Corp.*, 7 N.Y.3d 434, 449 [2006]) and met the standard for establishing specific causation set forth in *Nemeth* (*see, e.g. Sason v. Dykes Lbr. Co., Inc.*, 221 A.D.3d 491, 492 [1st Dep't 2023])."

Seen v 84 Lumber Company, et al., _ AD3d _ (1st Dep't 2024) – Appeal Pending (Argued March 7, 2024)

Decedent was exposed to asbestos from Kaiser Gypsum's joint compound made with Canadian chrysotile, and later industrial talc supplied from Upstate New York. Defendant appeals from the jury verdict, arguing, *inter alia*, Plaintiff's causation experts' opinions are legally insufficient.

Trial court denied motion for judgment not withstanding verdict, finding that the facts and circumstances of Seen "differ significantly" from *Nemeth*.

Litigating the Mesos

Plaintiff's Case

Talc Used in Cosmetic Talcum Powder Products Have Been Proven To Be Contaminated with Asbestos

Mesothelioma Is a Signature Disease

All Fiber Types Can Cause Mesothelioma

Litigating the Mesos

Plaintiff's Case

No Known Safe Level of Exposure To Asbestos

Epidemiology Does Apply!

Defendants, Through The CTFA, Were Part Of Developing And Adopting A Deficient Test Method

Litigating the Mesos

Plaintiff's Case

Defendants Had Actual or Constructive Knowledge of the Following:

- **Asbestos Was in Their Talc**
- **The Asbestos Could Cause Mesothelioma**
- **The Tests Being Conducted Were Designed Not to Find It**

There Was Nothing to Prevent Defendants From:

- **Warning**
- **Testing The Talc**
- **Using Alternatives To Talc**

Litigating the Mesos

Defendant's Case

- All Asbestos-Related Diseases are Dose Related
- State of the Art
- Defendants Insisted on Asbestos-Free Talc
- Received COAs and Assurances
- Never Was Told a Supply or End Product Had Asbestos In It
- No Reports That a Consumer Ever Got Sick Form Using Its Products Or Other Cosmetic Talc Products While It Made It
- Still No Support For That Today

Litigating the Mesos

Defendant's Case

- FDA Reported that Multiple Times
- Asbestos Disease Appears First in The Most Heavily Exposed
- Miners/Millers Studied for Decades – No Mesothelioma
- Production Workers – No Mesothelioma
- Plaintiffs Testing Is Not Science
- What They Identify Is Not Asbestos
- It Was Caused By…
- Or All Cancers Can Occur Spontaneously

Makeup is the Next Frontier

Pending Updates on Talc Testing Methods

- ASTM
- USP

- WHITE PAPER

Upcoming Trials
What to Expect

Michele Carbone – New Results

Asbestos: Risk Assessment, Epidemiology, and Health Effects

Edited By:

Michele Carbone

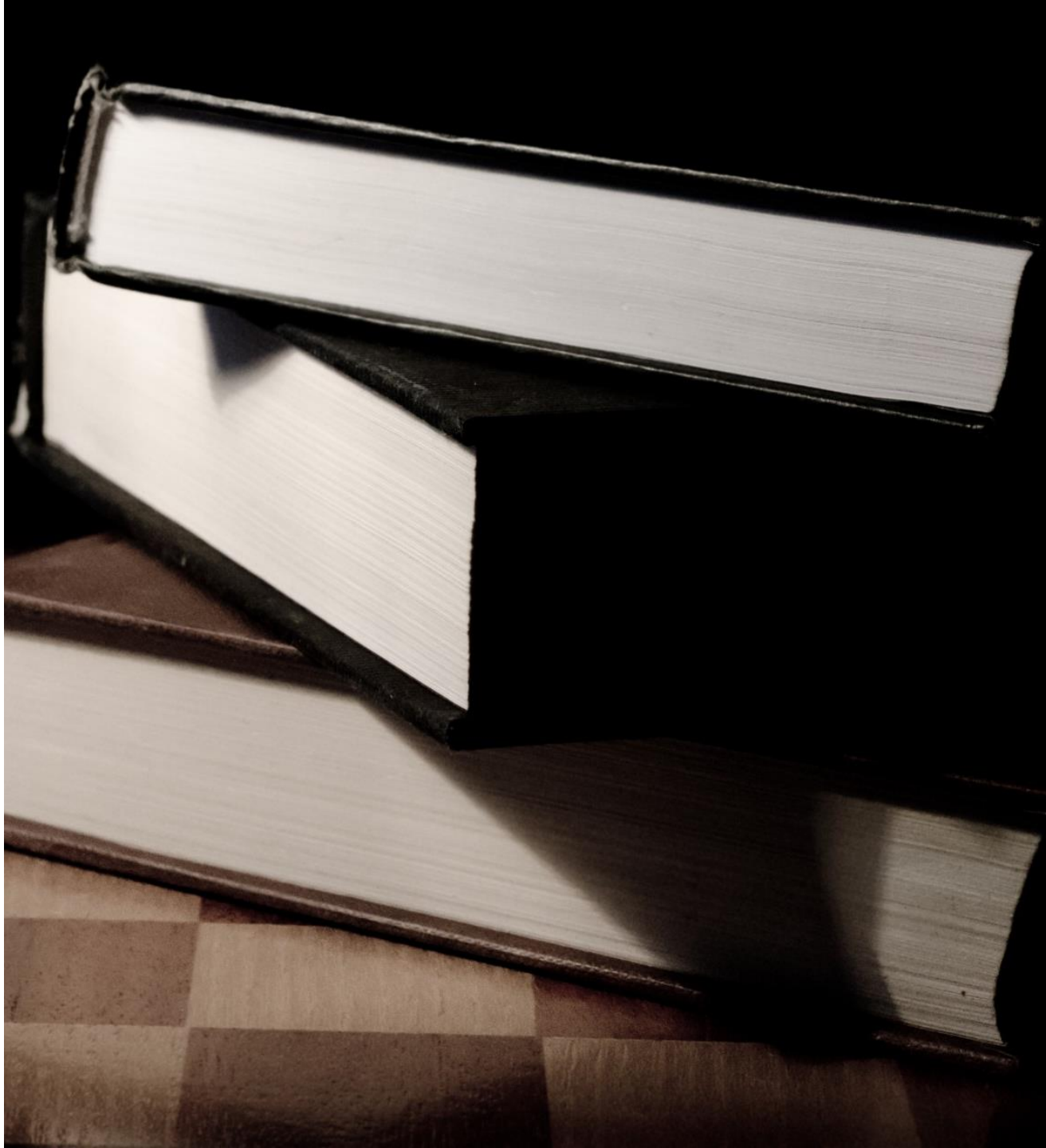
Ronald Dodson

Harvey Pass

Haining Yang

eBook will be published:

August 20, 2024



THANK YOU

Amanda R. Cachaldora, Esq., MG+M The Law Firm, Miami, FL
John D. Cosmich, Esq., Cosmich Simmons & Brown PLLC, Jackson, MS
Olivia Kelly, Esq., Simmons Hanly Conroy, New York, NY