

MINNESOTA

COMPLIMENTARY

Defense

FALL 2016



**TALC AND OVARIAN CANCER: A
PRODUCTS LIABILITY
POWDER KEG?**

**AMENDED RULE 5.04,
WHAT IS IT GOOD FOR?**

**IT CAN BE DONE: A PRIMER FOR
DIVERSE ATTORNEY RECRUITMENT,
RETENTION, AND PROMOTION
EFFORTS IN SMALL AND MID-SIZED
FIRMS**

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TALC AND OVARIAN CANCER: A PRODUCTS LIABILITY POWDER KEG?

BY ELIZABETH SORENSON BROTTEN, LIND, JENSEN, SULLIVAN & PETERSON, P.A.

In recent years, women have begun asserting products liability claims against Johnson & Johnson and other defendants associated with talcum powder, claiming that their use of the product has caused them to develop ovarian cancer. In the first half of 2016, these claims gained significant traction when jurors in St. Louis, MO returned eight-figure verdicts against Johnson & Johnson. Verdicts of this magnitude have not only grabbed headlines in the national media, but have also spurred additional talcum powder litigation throughout the country. Sometimes referred to as “the next asbestos litigation,” talcum powder is undoubtedly of growing significance in toxic torts and products liability litigation in jurisdictions nationwide, including Minnesota.

OVARIAN CANCER OVERVIEW

The American Cancer Society estimates that, in 2016, over 22,000 women will receive a new diagnosis of ovarian cancer. American Cancer Society, Cancer Statistics Center, available at <http://www.cancer.net/cancer-types/ovarian-cancer/statistics> (last visited September 23, 2016). Often diagnosed only after it has already spread, ovarian cancer is a particularly fatal form of cancer. In 2016, over 14,000 women will die due to ovarian cancer. *Id.* Only 46% of women diagnosed with the disease survive five years from the date of diagnosis, while the number drops to just 35% 10 years after diagnosis. *Id.*

There are several recognized risk factors for the development of ovarian cancer, including family history, a history of breast cancer or mutations in the ovarian cancer susceptibility genes BRCA1 and BRCA2, smoking history, and use of fertility drugs, estrogen, or hormone therapy, among others. According to the theories advanced by plaintiffs’ counsel in ovarian cancer litigation, use of talcum powder for feminine hygiene purposes is also a risk factor for the development of ovarian cancer.

TALC OVERVIEW

Talcum powder is made from the mineral talc, a magnesium silicate. U.S. Geological Survey, *Talc and Pyrophyllite Statistics & Information*, available at: <http://minerals.usgs.gov/minerals/pubs/commodity/talc/> (last visited September 23, 2016). It is mined from the earth in several states, with the largest production occurring in Montana. U.S. Geological Survey, *Mineral Commodity Study, Talc & Pyrophyllite at 164-65*, available at <http://minerals.usgs.gov/minerals/pubs/commodity/talc/mcs-2016-talc.pdf> (last visited September 23, 2016). It is known for its ability to absorb odors and moisture, making it a standard ingredient in several cosmetic and personal care products, including baby powder, talcum powder, and facial powder. It has a wide variety of other end-uses, including in the manufacture of ceramics, paints, chewing gum, and candy. *Id.*

When addressing litigation involving talc, it is important to distinguish between talc that contains asbestos and talc that is asbestos-free. In asbestos litigation, talc contaminated with asbestos is increasingly alleged to be the cause of pleural mesothelioma, cancer of the lining of the lung. In ovarian cancer, plaintiffs allege that it is the very talc itself, uncontaminated by asbestos, that causes the malignancy.

PLAINTIFFS’ CLAIMS

Plaintiffs who claim that they developed ovarian cancer as a result of their use of talcum-based products for feminine hygiene purposes generally allege causes of action in strict liability for failure to warn, negligence, breach of express and implied warranties, negligent misrepresentation, concealment, and fraud. Plaintiffs’ litigation themes generally focus on the fact that talcum-based products have been marketed as safe, particularly for use on infants. Plaintiffs claim that, as a result of scientific studies published in the

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early 1970s and 1980s, companies supplying raw talc or participating in the manufacture and sale of talcum-based products should have known of the unreasonably dangerous and carcinogenic nature of talcum powder when used for feminine hygiene purposes.

To date, the scope of the defendants facing talc-related ovarian cancer claims has been relatively limited. Johnson & Johnson has been the primary target of the litigation. Other common defendants include Imerys Talc (the supplier of talc to Johnson & Johnson), the Personal Care Products Council (the leading trade association for cosmetic and personal care products), as well as retailers of the products. In California, drug stores Rite-Aid and Sav-On Drugs, as well as grocery store chain Gelson's Supermarket, have faced claims for the negligent sale of talcum-based products. In the future, it is likely that additional talcum-based product manufacturers, talc suppliers, and retailers and others in the chain of distribution will face claims.

THE SCIENCE

While the litigation alleging a link between talcum powder use and ovarian cancer is recent, the concern about potential health effects of talcum powder use is not. As early as 1971, some studies linked talcum-based products to ovarian cancer. The first published study to suggest an association between talc and ovarian cancer was published in 1971 by Dr. W.J. Henderson. Henderson, et al., *Talc and Carcinoma of the Ovary and Cervix, J. Obstetrics & Gyn. Br. Commonwealth*. 1971; 78(3): 266-72. Talc initially gained the interest of researchers due to its chemical similarity to asbestos. In his study, Dr. Henderson examined the tissue of 13 patients who had been diagnosed with ovarian cancer, and found talc deeply embedded in the tumor tissue in 10 cases. *Id.* at 266-68. Dr. Henderson concluded although it was impossible to identify talc as the cause of cancer based on his observations, "the possibility that talc may be related to other predisposing factors should not be disregarded and further investigations are obviously required." *Id.*

In 1982, Dr. Daniel Cramer, an epidemiologist at Brigham & Women's Hospital in Boston, Massachusetts published the first epidemiologic study on the potential link between talcum powder use and ovarian cancer. Cramer DW, et al. *Ovarian Cancer and Talc: A Case Control Study. Cancer*. 1982; 50:372-76. Dr. Cramer assessed opportunities for talc exposure in 215 women with ovarian cancer and 215 women in a control group from the general population. He found a 92% increased risk of ovarian cancer in women who used talcum powder for hygiene purposes. *Id.* Plaintiffs' counsel point to evidence that Johnson & Johnson was aware of Dr. Cramer's research and his recommendation that Johnson & Johnson begin to provide warnings regarding the potential link between talcum powder use and ovarian cancer in support of their claims.

Dr. Cramer now serves as the leading causation expert for plaintiffs in ovarian cancer litigation. Defense experts criticize Dr. Cramer's control group studies as prone to bias because women are asked to recall how much or how often they used a talcum-based product decades earlier. Other suggest that Dr. Cramer's studies could be more rigorous and suggest the use of prospective cohort studies, which would assess exposure at the start of an investigation and follow participants over time to see if they develop the disease.

Other scientists maintain that the link between talcum powder and ovarian cancer is not conclusive. Results from other research have been mixed, with some studies showing an association between talc and ovarian cancers, and others not. A 2014 study found no connection between talcum powder use and ovarian cancer. Wentzensen N. & Wacholder S, *Editorial: Talc Use & Ovarian Cancer: Epidemiology between a Rock and a Hard Place*, J. N'tl Cancer Institute; 106(9)1-2. Many agencies have cited these mixed scientific results as a reason to not take further action. The one exception is the International Agency for Research on Cancer (IARC) at the World Health Organization. The IARC has classified cosmetic talc used for feminine hygiene purposes as "possibly carcinogenic to humans." WHO IARC, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Vol. 93, Carbon Black, Titanium Dioxide, and Talc* (2010) at 422. In reaching this conclusion, the IARC noted that "many case-control studies of ovarian cancer found a modest, but unusually consistent, excess in risk, although the impact of bias and potential confounding could not be ruled out." *Id.* Of note, the IARC's category of products that are also "possibly carcinogenic to humans" also includes coffee, red meat, and aloe vera.

In early 2016, Dr. Cramer published the results from his most recent study. The study asked 2,041 women with ovarian cancer, and 2,100 without it, about their talcum powder use. Dr. Cramer concluded that genital talc use was associated with an elevated risk of ovarian cancer. Cramer D, et al., *The Association between Talc Use & Ovarian Cancer: A Retrospective Case-Control Study in Two U.S. States*, *Epidemiology* 27(3):335. Those who routinely used talc for feminine hygiene purposes were found to have a 33 percent increased risk of ovarian cancer. *Id.*

The American Cancer Society has concluded that if there is an increased risk of developing ovarian cancer from the use of talcum-based products, the increased risk is likely to be small. American Cancer Society, *Talcum Powder & Cancer*, available at <http://www.cancer.org/cancer/cancercauses/othercarcinogens/athome/talcum-powder-and-cancer> (last visited September 23, 2016). But given the conflicting research results, the ACS has advised that those who are concerned about using talcum powder "may want to avoid or limit their use of consumer products that contain it." *Id.*

To establish a conclusive link between talcum powder use and the development of ovarian cancer would require the use of a clinical trial, whereby a group is deliberately exposed to a potentially cancer-causing agent. Obviously, such a study cannot be performed on humans given ethical concerns.

Ultimately, additional research is likely necessary to assess whether ovarian cancer can be attributed to use of talcum powder. This uncertainty in causation provides counsel defending ovarian cancer claims with an opportunity to challenge the admissibility of expert testimony offered by plaintiffs' counsel. Defendants in talcum-powder litigation in New Jersey were recently successful in challenging plaintiffs' expert testimony that the use of talc-based products can cause ovarian cancer. In *Carl v. Johnson & Johnson, et al.*, Case No. ATL-L-6546-14 (Superior Ct. N.J.: Atlantic Cty), the court not only excluded plaintiffs' causation experts, but also dismissed plaintiffs' cases in their entirety. The *Carl* court conducted an extensive review of the backgrounds and opinions of plaintiffs' and defendants' expert witnesses, as well as an exhaustive review of the scientific literature regarding talcum powder and ovarian cancer. The court, in its 55-page decision, criticized plaintiffs' experts' failure to explain "just how it is that talc-based powder supposedly causes cancer in the ovaries, or for that matter any part of the human anatomy." Order, *Carl v. Johnson & Johnson, et al.*, Case No. ATL-L-6546-14 (Sept. 2, 2016 Superior Ct. N.J.: Atlantic Cty). Ultimately, the court concluded that the plaintiffs' experts' "areas of scientific inquiry, reasoning, and methodology are slanted away from objective science and towards advocacy." *Id.* at 33.

The *Carl* decision on the admissibility of expert opinions provides excellent ammunition to defense counsel facing claims across the country. But in jurisdictions where courts are prone to admit all expert testimony and permit the jury to "sort it out," there is significant risk for defense counsel, as illustrated by past verdicts.

THE VERDICTS

The first case in the country in which a plaintiff alleged that she developed ovarian cancer as a result of her use of talcum powder was filed in federal court in South Dakota in October 2013. *Berg v. Johnson & Johnson, et al.*, Case No. 4:09-cv-04179 (D. S.D.) Fifty-six-year-old plaintiff Deanne Berg was diagnosed with ovarian cancer in 2007, at the age of 49. She alleged that her use of Johnson & Johnson's talcum based Baby Powder and Shower to Shower products on a daily basis from the ages of 16 to 48 caused her cancer. After a two-week trial, in October 2013, the jury found in favor of Johnson & Johnson on Berg's strict liability failure-to-warn claim, but against Johnson & Johnson on the negligence claim, finding that it had failed to properly warn of the ovarian cancer risk. Interestingly, despite finding for Berg on her negligence claims, the jury did not award Berg any

damages. Berg's post-trial challenge to the jury's finding of zero damages was not successful. But Berg's case played an important role in the development of the litigation by paving the way for additional case filings in other jurisdictions across the country. To date, two of those cases have resulted in significant verdicts for the plaintiffs.

The second ovarian cancer case was tried to a jury in the City of St. Louis Circuit Court in February 2016. Jacqueline Fox's case was part of a class action suit commenced by 65 plaintiffs from around the country against Johnson & Johnson, Johnson & Johnson's consumer products subsidiary, Imerys Talc, and the Personal Care Products Council. *Hogans, et al. v. Johnson & Johnson, et al.*, Case No. 1422-CC09012 (City of St. Louis Circuit Ct., MO.). As part of its management of the multiple-plaintiff case, the court required plaintiffs' counsel and defendants' counsel to each select an initial case to proceed to trial. Fox's case was selected by plaintiffs' counsel.

Fox, who was from Birmingham, AL, died at the age of 62 due to ovarian cancer. She had used Johnson & Johnson's Baby Powder and Shower to Shower products for feminine hygiene purposes for over 35 years, and her family members alleged that her use of these talcum-based products caused her to develop ovarian cancer. After a three-week trial, the jury found Johnson & Johnson liable for fraud, negligence, and conspiracy. The jury found that Imerys was not liable. The jury awarded Fox's heirs a staggering \$10 million in compensatory damages and \$62 million in punitive damages.

Three months later, the third ovarian cancer case — brought by plaintiff Gloria Ristesund — went to trial. Ristesund's case, which was also part of the *Hogans* multi-plaintiff class action in the St. Louis Circuit Court, was selected by defense counsel to be the second case in that jurisdiction to go to trial. Sixty-two-year-old Ristesund is from Sioux Falls, S.D. Not surprisingly, given the *Berg* jury's zero damages finding, her attorneys chose to commence her action in St. Louis rather than in South Dakota. Ristesund claimed that she developed ovarian cancer as a result of her use of Johnson & Johnson's talcum-based products for over 40 years. She was diagnosed in 2011 and was in remission at the time of her trial. The jury returned a \$55 million verdict against Johnson & Johnson and its subsidiary, Johnson & Johnson Consumer Companies, consisting of \$5 million in compensatory damages and \$50 million in punitive damages. Imerys, the sole other defendant remaining at trial, received a defense verdict. Following the verdict, Johnson & Johnson filed alternative motions for remittitur of damages or for amendment of the judgment. The court denied both motions. Johnson & Johnson filed a notice of appeal, and at the same time requested a stay in several other cases. The court has refused to stay any cases during the appeal, which remains pending.

ADDITIONAL CLAIMS

Not surprisingly, the *Fox* and *Ristesund* verdicts have spurred additional claims against Johnson & Johnson in multiple jurisdictions. Before the verdicts, ovarian cancer cases were pending in only a handful of jurisdictions. Since May 2016, cases have been filed in state and federal courts in over 20 states. The vast majority of these claims are in Missouri, where nearly 1,000 cases are pending. Nearly 200 cases are pending in New Jersey, while California also has a rapidly growing docket and anticipates as many as 2,000 filings.

Courts in these jurisdictions have adopted various approaches, similar to those commonly used in asbestos litigation, to manage their large and growing dockets of ovarian cancer plaintiffs. Multidistrict litigation is one possible approach for managing the growing number of claims in federal court. The creation of MDL No. 2738, *In Re Johnson & Johnson Talcum Powder Marketing, Sales Practices, and Products Liability Litigation*, which would result in the transfer of cases in federal court for coordinated pretrial proceedings, is currently under consideration by the Judicial Panel on Multidistrict Litigation. Plaintiffs have suggested the Southern District of Illinois as the transferee forum, while the various defendants in the litigation have suggested the District of New Jersey and the Western District of Oklahoma.

State courts with large numbers of claims have also developed strategies for managing their dockets. California has created a coordinated docket, centralized with one judge in one court, to manage its growing volume of cases. In New Jersey, all claims involving the use of talcum-based powder products for feminine hygiene purposes have been assigned to one county for centralized case management.

MINNESOTA'S FIRST CLAIM

Although one Minnesota resident has asserted that her ovarian cancer was caused by her use of talcum-based products as part of the multi-plaintiff lawsuit pending in St. Louis, no case had been brought in Minnesota until very recently. The first such claim was filed in federal court in Minnesota on September 2, 2016. See Complaint in *Johnson v. Johnson & Johnson, et al.*, Case No. (D. Minn. Sept. 2, 2016). Deborah Johnson, the plaintiff, has brought the case on behalf of her deceased sister, Pamela Woods, against both Johnson & Johnson and its consumer products subsidiary. *Id.* Johnson alleges that Woods used Johnson & Johnson Baby Powder and Shower to Shower for nearly her entire adult life, and that as a direct result of her use of these products, she developed ovarian cancer. *Id.* Woods was diagnosed in 2011 and died in 2013. *Id.* Johnson alleges causes of action for strict liability for failure to warn, strict liability for design and/or manufacturing defect, negligence, breach of express and

implied warranties, negligent and intentional misrepresentation, fraudulent concealment, and violation of the Minnesota Consumer Fraud Act. The future activity of the *Johnson* case in Minnesota depends largely on whether an MDL is created for claims pending in federal court.

To date, no cases have been filed in state courts in Minnesota, but given the activity nationwide, we can anticipate that such claims may be filed against both manufacturers and retailers of talcum-based products. Should a large number of claims be filed in Minnesota state courts, it is likely that the supreme court would consolidate cases in one court, with one trial judge and one or more settlement judges, as it has done in asbestos litigation. A centralized and consolidated docket is generally preferable for both plaintiffs and defendants in mass and toxic tort litigation, because it leads to more consistent application of the law and more predictable results. Furthermore, the assigned judge, with the input of both plaintiffs and defense counsel, can create a workable case management order governing the discovery, pretrial, and trial procedures in the cases. Often, the court and the parties familiar with the litigation are able to craft litigation-specific procedures that may operate more efficiently and effectively in this type of specialized litigation.

CONCLUSION

The science evaluating the potential association between talcum-powder use and ovarian cancer is continuing to develop. Meanwhile, the large plaintiffs verdicts to date, along with the large number of potential plaintiffs, will continue to spur additional litigation. While the litigation is just beginning in Minnesota, based on activity in the rest of the country, we can expect that such claims will become increasingly common in our state.

ARBITRATIONS

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