



THE TALC LITIGATION IN THE UNITED STATES

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TALC AND THE TALC LITIGATION

The Advertisements



What is Talc?

- Talc is a clay mineral comprised of hydrated magnesium silicate.
- Talc is the softest naturally occurring mineral in the world.
- Talc is used in many consumer and industrial products.
- Talc in powdered form is widely used as baby powder.
- Talc deposits are often found extremely close in proximity to asbestos deposits, causing cross contamination.
- Johnson & Johnson gets its talc from mines in Italy and Vermont.

The Products Containing Talc

- Johnson's Baby Powder by Johnson & Johnson
- Shower to Shower by Johnson & Johnson
- Baby Magic Powder



The Medical Conditions Alleged to Be Caused by Talc

Ovarian Cancer

- Plaintiffs allege that ovarian cancer in women is caused by repeated use of talcum that enters the ovaries through the vagina.

Mesothelioma

- Caused by the talcum powder becoming airborne during normal application.
- The mesothelioma is caused by the asbestos alleged to be contained in the talc.
- However, some researchers have found that talc has a chemical similarity to asbestos. Like asbestos, talc is a silicate mineral having a crystalline structure. When ingested, these minerals have been known to cause irritation, leading to the chronic inflammation that can lead to the formation of cancerous tumors.

Studies Supporting the Link Between Talc and Cancer

- Over the past five decades, nearly 40 papers have been published in medical journals studying a potential link between talcum powder and ovarian cancer.
- The first of these was published in 1971 in *The Journal of Obstetrics and Gynaecology of the British Commonwealth*, and discussed a small study revealing that talc particles had been found in 75% of the ovarian and cervical tumors removed from 13 women.
- In 1999, the American Cancer Society recommended that women use corn starch-based products, and not talc-based products, for the genital area.
- In 2006, the International Agency for Research on Cancer classified genital talcum powder use as possibly carcinogenic to humans.

Studies Supporting the Link Between Talc and Cancer

- A 2017 study published in the *European Journal of Cancer Prevention* discovered a “weak but statistically significant association between genital use of talc and ovarian cancer” - although it also noted that there were problems with differences between the studies analyzed that could have affected results.
- A 2018 study in *Epidemiology* reported “a consistent association between perineal talc use and ovarian cancer,” with some variation based on the type of study and ovarian cancer subtype.
- According to the *International Journal of Gynecological Cancer*, frequent talcum powder use on the female genital area increases the risk of cancer by 30% to 60%.
- Dr. Daniel Cramer at Harvard Medical School has rendered the opinion that thousands of women get ovarian cancer each year from Talcum powder use.
- There have been no recalls of any talc-based products as a result of ovarian cancer. Talcum powder is not a product regulated by the Food and Drug Administration.

Who Are The Plaintiffs?

- Women with ovarian cancer or mesothelioma.
- Men with mesothelioma.
- All allege that their illness was caused by their use of and exposure to talcum powder products.
- They seek non-economic damages for their past and future pain and suffering.
- They seek economic damages in the form of past and future lost wages, unpaid medical bills, and future healthcare costs.
- The Estates of deceased plaintiffs seek damages for the pecuniary loss created by the death of the plaintiff, in the form of lost income, loss of advice and counselling services, loss of companionship, and loss of household services.

Who Are The Defendants?

- Johnson & Johnson
- Colgate-Palmolive
- Imerys Talc America (now filed for bankruptcy)
- Whittaker, Clark & Daniels
- Vanderbilt Minerals



The Plaintiffs' Allegations Against the Defendants

- The manufacturers of talcum powder products failed to warn users of talc of the increased risks of ovarian cancer and mesothelioma when using the products.
- The talcum powder lawsuits claim that Johnson & Johnson knew more than 40 years ago that there is a link between using the products and ovarian cancer and mesothelioma.
- Despite knowing of this causal link, Johnson & Johnson intentionally made the decision not to warn that the powder could cause cancer by entering the lungs or the vagina after being applied for personal hygiene.
- Despite knowing of the causal link, Johnson & Johnson refused to change its formula to use safer ingredients, such as cornstarch.

The Positions of Johnson & Johnson

- Talc is safe, as shown for years by the best tests available.
- There is no asbestos contained in its products.
- Peter Bicks, Esq., outside litigation counsel for J&J, issued a statement that “the scientific consensus is that the talc used in talc-based body powders does not cause cancer, regardless of what is in that talc.”
- J&J expert geologist Matthew Sanchez of RJ Lee Group, Inc. testified at a trial in St. Louis that: “I have not found asbestos in any of the current or modern Johnson & Johnson talc products.”
- In August 2019, on behalf of Johnson & Johnson, expert epidemiologist Gregory Diette of Johns Hopkins University School of Medicine testified to a jury in New Jersey that there is no credible scientific studies supporting a link between talc and mesothelioma.
- Diette cited research showing a link between the “high concentration” of dust in the Vermont and Italy mines that serve as J&J’s talc sources to dust-related diseases like talcosis.
- However, none of the miners and millers evaluated decades after they worked for the mines and mills had developed mesothelioma.
- One study involved 392 miners employed for at least a year at the Vermont mine between 1942 and 1969. The research revealed no cases of mesothelioma.

The Positions of Johnson & Johnson

- Four other studies spanning from 1976 to 2017 evaluated the effects of dust exposure on thousands of employees at the Italy mine. The research showed that none of the employees had developed mesothelioma despite the high concentration of dust in the mines.
- Diette testified that he is not aware of any study, government agency or medical association that endorsed the idea that talcum powder causes mesothelioma.
- J&J attacks the plaintiffs' primary expert witness William Longo, who claims to have found asbestos in J&J talc samples. J&J criticizes his testing, claiming that its talc samples were unreliable, having been collected from relatives of plaintiffs' lawyers, a museum, and even E-Bay. J&J also claims that Longo lied about his history of test results, conveniently omitting years of tests that showed no asbestos in the products.
- J&J is successfully fighting verdicts on jurisdictional grounds, relying upon the holdings of the United States Supreme Court in the cases of *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) and *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773 (2018). The rulings in those two cases fundamentally limit the jurisdictions where a defendant that conducts business nationwide can be sued. For claims that do not arise out of the defendant's direct contact with the state where the lawsuit was filed, a defendant (like J&J) can be sued only in the state where it is incorporated or the state in which it maintains its headquarters (for J&J - New Jersey).

History of Talc Litigation in the United States

- The first lawsuit against Johnson & Johnson alleging that talcum powder caused ovarian cancer was filed in 2009 in the case of *Deanne Berg v. Johnson & Johnson*, et al. J&J tried to settle this case, but the offer was rejected and the case went to trial. Berg obtained a favourable verdict on the issue of liability, but the jury did not award her any damages.
- The first large verdicts against J&J were awarded in 2016. Those verdicts led to the current onslaught of talc litigation.
- In February 2017, J&J won its first defense verdict.
- In recent Securities and Exchange Commission filings, J&J reported that presently there are approximately 14,500 lawsuits pending against it relating to its talc-based products.

History of Talc Litigation in the United States

- The lawsuits are brought both in State and Federal courts. A large percentage of the State court cases are venued in Missouri, New Jersey and California.
- The Federal court cases have been consolidated for purposes of pre-trial discovery and motion practice in the multidistrict litigation (“MDL”) venued in New Jersey Federal court. As of July 2019, there were 12,461 lawsuits pending in the MDL against J&J and its supplier Imerys Talc.
- In 2019, J&J attempted to remove all state court cases in which Imerys Talc America is a defendant to Federal court in Delaware on the grounds that all of these cases are related to Imerys Talc America’s ongoing bankruptcy proceedings in Delaware Federal court. This effort is being rejected by the courts.
- In July 2019, the U.S. Justice Department launched a criminal investigation to determine if J&J purposefully misled the public about the presence of asbestos in its talcum powder products.

Class Actions

- There are no traditional class actions against the talc defendants made up of large groups of plaintiffs afflicted with ovarian cancer or mesothelioma.
- **April 2014:** California Talc Class Action - Mona Estrada claimed J&J failed to warn about the cancer risk of its talc products. She had not suffered any personal injury, but rather claimed she would not have regularly bought Johnson's Baby Powder for the past 60+ years had she known of the adverse health effects. A California federal judge moved the case to the MDL in New Jersey. Then, a New Jersey judge dismissed Estrada's claim in 2017 on the grounds that Estrada did not suffer an actual injury.
- **September 2015:** Illinois Talc Class Action - Barbara Mihalich filed a class action suit claiming J&J profited unjustly from its talcum products. She alleged that "everyone who bought Baby Powder should get their money back because of the health risk . . ." The case was transferred to the New Jersey MDL in October 2016.
- **February 2018:** New Jersey Federal Class Action - Investors filed a class action lawsuit against J&J. They accused the company of failing to disclose that its talcum powder products carried risks of ovarian cancer and mesothelioma.
- **June 2018:** Missouri Class Action - Cynthia Gibson, Heidi Amiro, Lois Arnstein and other plaintiffs filed a class action lawsuit against J&J. The lawsuit claims exposure to talc, asbestos and other carcinogens in Johnson's Baby Powder and Shower to Shower led to ovarian cancer, and that J&J failed to warn of the cancer risk. This case has been stayed.

Notable Verdicts Against Johnson & Johnson

- ***Donna Olson v. Johnson & Johnson, et al.***, New York, May 2019. A Manhattan jury awarded plaintiff Donna Olson and her husband Robert \$25 million in compensatory damages, and \$300,000 in punitive damages. Olson alleged that her daily use of J&J's Baby Powder and Shower to Shower products from 1953 through 2015 had caused her to contract mesothelioma. After the verdict, the plaintiff's attorney stated that "the internal J&J documents that the jury saw, once more laid bare the shocking truth of decades of cover-up, deception and concealment by J&J of the asbestos found in talc baby powder. *This verdict is presently on appeal.*
- ***Teresa Levitt v. Johnson & Johnson, et al.***, California, March 2019. A Los Angeles County jury awarded \$30 million to the plaintiff who had been diagnosed with mesothelioma which the jury found was caused by the use of Johnson & Johnson talcum powder. *This verdict is presently on appeal.*
- ***22 Women v. Johnson & Johnson***, Missouri, July 2018. A St. Louis jury awarded \$4.14 billion in punitive damages and \$550 million in compensatory damages to 22 plaintiff women who alleged that J&J's talc products contributed to their ovarian cancer. Six of the plaintiffs had died from their cancer, and the remaining had contracted cancer and were present in the courtroom. *In December 2018, a motion to vacate this verdict was denied. Importantly, the trial court found that "substantial evidence was adduced at trial of particularly reprehensible conduct on the part of the defendants, including that defendants knew of the presence of asbestos in products that they knowingly targeted for sale to mothers and babies, knew of the damages these products caused, and misrepresented the safety of these products for decades."* *The verdict and this ruling are presently on appeal.*

Notable Verdicts Against Johnson & Johnson

- ***Joanne Anderson v. Johnson & Johnson***, California, May 2018. A Los Angeles jury awarded 21.7 million in compensatory damages and \$4 million in punitive damages to the 68 year old plaintiff who had mesothelioma. The plaintiff claimed that frequent use of Johnson's Baby Powder caused her to contract the disease. J&J was required to pay two-thirds of the award, while the other third was allocated to Honeywell, Imerys and other talc suppliers. *This verdict is presently on appeal.*
- ***Stephen Lanzo v. Johnson & Johnson, et al.***, New Jersey, April 2018. A New Jersey jury awarded \$80 million in punitive damages and \$37 million in compensatory damages to investment banker Stephen Lanzo who claimed he contracted mesothelioma after more than 30 years of using Johnson's Baby Powder and Shower-to-Shower products. He alleged that these products contained asbestos. *This verdict was sustained on appeal.*
- ***Eva Echevarria v. Johnson & Johnson, et al.***, California, August 2017. A California jury awarded \$417 million to the plaintiff who alleged to have contracted ovarian cancer from continuous use of J&J's talcum powder products. *This verdict was subsequently overturned by the trial judge. The judgment reversing the decision was affirmed on appeal on various grounds, including jurisdictional grounds and that the causation evidence was in significant conflict.*
- ***Lois Slemp v. Johnson & Johnson, et al.***, Missouri, May 2017. A St. Louis jury awarded \$110 million to the 62 year old plaintiff who alleged that her regular use of Johnson's Baby Powder and Shower-to-Shower products over a 40-year span caused her to develop ovarian cancer, which then spread to her liver. The allegation was that the Baby Powder contained asbestos. Of this award, \$105 million was for punitive damages. *This verdict was sustained by the trial judge in a post-trial motion. The Court held that the jurisdictional argument did not apply because a Missouri company, PTI Union LLC, had manufactured, labeled and packaged J&J talcum powder products. The verdict and the post-trial ruling are on appeal.*

Notable Verdicts Against Johnson & Johnson

- *Deborah Giannecchini v. Johnson & Johnson, et al.*, Missouri, October 2016. A St. Louis jury awarded \$70 million to the plaintiff who claimed to have developed ovarian cancer after many years of using Johnson's Baby Powder. *This verdict was reversed on appeal on jurisdictional grounds.*
- *Gloria Ristesund v. Johnson & Johnson, et al.*, Missouri, May 2016. A St. Louis jury awarded \$55 million to the plaintiff who alleged to have contracted ovarian cancer after using Johnson's Baby Powder and Shower-to-Shower Powder on her pelvic area for decades. \$50 million of this award was for punitive damages. *This verdict was overturned on appeal on jurisdictional grounds.*
- *Jacqueline Fox v. Johnson & Johnson, et al.*, Missouri, February 2016. The jury awarded the plaintiff \$72 million. The plaintiff (from Alabama) had passed away in 2015 after using Johnson's Baby Powder for 35 years. Her attorneys persuaded the jury that J&J knew about studies linking its products to ovarian cancer and failed to warn its customers about the dangers. *A Missouri appellate court reversed the verdict, deciding the case should not have been tried in Missouri. The Missouri Supreme Court subsequently refused to take the case.*

Defense Verdicts

- ***Donna Hayes v. Johnson & Johnson and Colgate-Palmolive, et al.***, Kentucky, August 2019. The jury deliberated for less than an hour and found in favor of the defendants, rejecting the plaintiff's claim that she developed mesothelioma by inhaling asbestos contained in J&J's Baby Powder and Colgate's Cashmere Bouquet. The defendants were able to successfully argue that their products do not contain asbestos, and that the plaintiff's mesothelioma was the result of exposure to asbestos from various garages where her husband worked over many years as a mechanic.
- ***Beth-Anee Johnson v. Johnson & Johnson, et al.***, South Carolina, May 2019. A Richland County jury took three hours to find that J&J was not responsible for the plaintiff's mesothelioma through her use of Baby Powder, rejecting her claims that J&J had been hiding the existence of asbestos in its baby powder for decades.
- ***Robert Blinkinsop v. Johnson & Johnson, et al.***, California, April 2019. A jury in Long Beach rejected a lawsuit brought by the 65-year-old plaintiff who claimed that J&J Baby Powder was contaminated with asbestos and caused his mesothelioma. The plaintiff had used Baby Powder for personal hygiene from 1977 to 1994. The jury unanimously ruled that Baby Powder does not contain asbestos and was not the cause of the plaintiff's disease. Following the verdict, a J&J spokesperson stated that the jury's verdict "is aligned to the decades of clinical evidence and scientific studies by medical experts around the world that support the safety of Johnson's Baby Powder."

Defense Verdicts

- ***Ricardo Rimondi v. Johnson & Johnson, et al.***, New Jersey, March 2019. After just 30 minutes of deliberations, the jury found in favor of J&J as to claims brought by the plaintiff who alleged that his lifetime exposure to Johnson's Baby Powder and Shower to Shower caused him to contract mesothelioma. The plaintiff's allegations that the J&J products contained asbestos were rejected by the jury.
- ***Rosalind Henry v. Johnson & Johnson, et al.***, New Jersey, November 2018. The jury found the J&J's baby powder and other talc products do not contain asbestos and did not cause the plaintiff's mesothelioma.

Punitive Damages and The 2018 Reuters Exposé

- To support an award for punitive damages, the jury must find that the plaintiff's injury, loss or harm were caused by the defendant's acts or omissions, and either (1) the defendant's conduct was malicious, or (2) the defendant acted in a wanton and wilful disregard for the plaintiff's rights. *Model Civil Jury Charge 8.62.*
- Malicious conduct is intentional wrong-doing in the sense of an evil-minded act. *Model Civil Jury Charge 8.62.*
- Wilful or wanton conduct is a deliberate act or omission with knowledge of a high degree of probability of harm to another who foreseeably might be harmed by that act or omission and reckless indifference to the consequence of the act or omission. *Model Civil Jury Charge 8.62*
- In determining whether to award punitive damages, the jury is instructed to consider: “(1) the likelihood, at the relevant time, that serious harm would arise from the defendant's conduct; (2) the defendant's awareness or reckless disregard of the likelihood that such serious harm would arise from the defendant's conduct; (3) consider the conduct of the defendant upon learning that its initial conduct would likely cause harm, and; (4) consider the duration of the conduct or any concealment of that conduct by the defendant.” *Model Civil Jury Charge 8.62.*
- Burden of proof for punitive damages is by “clear and convincing evidence” - the evidence leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.
- In December 2018, Reuters released an investigative report entitled “*Johnson & Johnson knew for decades that asbestos lurked in its Baby Powder.*”

Punitive Damages and The 2018 Reuters Exposé

- This report was based on internal J&J documents examined by Reuters which purportedly showed that J&J's powder was sometimes tainted with carcinogenic asbestos and that J&J kept that information from regulators and the public.
- Reuters examination of the documents showed that from at least 1971 to the early 2000s, J&J's raw talc and finished powders sometimes tested positive for small amounts of asbestos, and that company executives, mine managers, scientists, doctors and lawyers fretted over the problem and how to address it while failing to disclose it to regulators or the public.
- The documents allegedly also depict successful efforts to influence U.S. regulators' plans to limit asbestos in cosmetic talc products and scientific research on the health effects of talc.
- The earliest mentions of tainted J&J talc that Reuters found come from 1957 and 1958 reports by a consulting lab. They describe contaminants in talc from J&J's Italian supplier as fibrous and "acicular," or needle-like, tremolite. That is one of the six minerals that in their naturally occurring fibrous form are classified as asbestos.
- At various times from the 1950s into the early 2000s, reports by scientists at J&J, outside labs and J&J's suppliers yielded similar findings. The reports identify contaminants in talc and finished powder products as asbestos or describe them in terms typically applied to asbestos.

Punitive Damages and The 2018 Reuters Exposé

- According to Reuters, in 1976, J&J assured the U.S. Food and Drug Administration that no asbestos was detected in any sample of talc produced between December 1972 and October 1973. J&J did not tell the FDA that at least three tests by three different labs from 1972 to 1975 had found asbestos in its talc - in one case at levels reported as “rather high.”
- Documents reviewed by Reuters purportedly demonstrate that as the years went on, J&J had more testing evidence of the existence of asbestos in its talc products, and did nothing to advise regulators, or warn its customers or its shareholders. At the same time, J&J executives and scientists voiced concern about the potential risks and exposure to J&J.
- J&J has dismissed the Reuters report, calling it nothing more than a conspiracy theory. J&J maintains that its baby powder is and has always been asbestos free. It emphasizes that repeated tests of the powder never found asbestos and that it has cooperated fully and openly with the FDA and other global regulators.

The High Stakes *Daubert* Hearing

- Johnson & Johnson recently went for the knockout blow by filing a *Daubert* motion against the plaintiffs in the Multi-District Litigation in Federal Court in New Jersey.
- In 1993, the United States Supreme Court set the standard for the validity and ultimate admissibility of expert testimony in the case of *Daubert v. Merrell Dow Pharmaceuticals*.
- The *Daubert* guidelines consist of five factors to be considered by the court facing challenges to the validity of proffered expert testimony:
 1. Whether the theory or technique in question can be and has been tested.
 2. Whether it has been subjected to peer review and publication.
 3. Its known or potential error rate.
 4. The existence and maintenance of standards controlling its operation.
 5. Whether it has attracted widespread acceptance within a relevant scientific community.

The High Stakes *Daubert* Hearing

- These criteria are intended to prevent unreliable or “junk science” from being heard as evidence in the expert’s substantive testimony.
- The *Daubert* hearing was conducted from July 22 to July 31 before United States District Court Judge Freda Wolfson. Judge Wolfson heard from 8 expert witnesses - 5 presented by the plaintiffs and 3 presented by J&J.
- Johnson & Johnson is challenging the scientific principles of the plaintiffs’ expert witnesses and arguing that these experts cannot prove that J&J’s products cause ovarian cancer or mesothelioma.
- J&J’s *Daubert* motion seeks, among other things, the following:
 1. Exclusion of Plaintiffs’ experts’ opinions that perineal talcum powder use can cause ovarian cancer as being without valid and accepted scientific support.
 2. Exclusion of Plaintiffs’ experts’ opinions that: (1) talc can travel or be transported from the external perineum to the fallopian tubes or ovaries; (2) talc causes chronic inflammation in the ovaries; and (3) such inflammation causes ovarian cancer.
 3. Exclusion of Plaintiffs’ experts’ opinions that Baby Powder and Shower to Shower contain trace amounts of asbestos as being based on unscientific methodology developed for litigation purposes.
 4. Exclusion of Plaintiffs’ experts’ opinions that Baby Powder and Shower to Shower may be contaminated with some unspecified amount of chromium, cobalt or nickel and that these metals, fibrous talc or fragrance ingredients could cause ovarian cancer, as there is no scientific support for same.
 5. Exclusion of certain experts on the grounds that they are unqualified to render the opinions proffered.

The High Stakes *Daubert* Hearing

- If J&J prevails, all of Plaintiffs' 22 experts will be excluded from testifying. If these experts are excluded, the plaintiffs will not be able to meet their burden of proof and will be unable to proceed with their cases. That would mean the dismissal of 11,000 cases against J&J in the Multi-District Litigation.
- If the experts are disqualified in the Multi-District Litigation, similar motions will quickly follow in the State court cases, with similar results and dismissals expected.
- If the Court determines that the plaintiffs have sufficiently reliable evidence about the link between talcum powder and cancer to proceed to trial, it is expected that a small group of "bellwether" cases will be set for trial in the United States District Court for the District of New Jersey.
- Judge Wolfson is in the process of preparing her decision.
- John's prediction



**POTENTIAL COVERAGE ISSUES AND
POTENTIAL CONCERNS FOR
UNDERWRITERS**

Potential Insurance Coverage Issues

There are a number of potential coverage issues that arise out of claims involving exposure to talcum powder products allegedly causing cancer/mesothelioma, including:

- Is there an occurrence/expected or intended
- Number of occurrences
- Trigger of coverage
- Allocation
- Application of policy provisions/exclusions

Potential Insurance Coverage Issues

Is there an “occurrence”?

- **Definition:** CGL policies define “occurrence” as “an accident including continuous or repeated exposure to substantially the same general harmful conditions.”
- Where an “occurrence” is defined as an accident, an insurance company may “preclude coverage for insureds whose conduct is intentionally wrongful.” *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165(1992).
- In determining if an action by the insured is intentional, and thus not covered by the policy, courts have held that “the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury.” *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165(1992).
- In determining whether the sale, manufacture, release or exposure to hazardous substances was an act that the wrongdoer knew or should have known would cause injury, courts have evaluated what the wrongdoer knew about the hazardous nature of the substance and when the wrongdoer knew it.
- In *Owens-Illinois, Inc. v. United Ins, Co.*, 264 N.J.Super. 460 (App. Div. 1993), the Appellate Division found the lower court’s finding of summary judgment in the insured’s favor inappropriate where the record showed the insured may have been aware of the dangers of asbestos because of studies it commissioned regarding such dangers and where the insured subsequently attempted to limit worker exposure.
- Here, it is alleged that Johnson & Johnson intentionally concealed information about the long-term risks of use of its talc-based products.

Potential Insurance Coverage Issues

Number of occurrences

- The “cause test” - the number of occurrences for the purpose of applying coverage limitations is determined by referring to the cause or causes of the injury and not the number of injuries or claims. This is the majority view.
- In New Jersey, courts hold that where a single cause resulted in injuries to more than one person, if those injuries are so closely linked in time and space as to be deemed by the average person as a single event, there is but one occurrence. *Bomba v. State Farm Fire and Cas. Co.*, 379 N.J. Super. 589 (App. Div. 2005).
- A battleground will be identifying the cause of the injury.
- The “effect test” - courts examine the number of injuries, or effects, of the insured’s act to determine the number of occurrences. The focus is on the number of injuries resulting from the act, not the number of acts performed by the insured. This is the minority view.
- The determination of the number of occurrences may have a significant impact upon available policy limits.
- If all claims arising from the manufacture or distribution of talc arise from a single “occurrence,” there may be only a single per occurrence limit available per policy period. By contrast, if each claimant constitutes a separate “occurrence” there could be greater limits available (particularly if a policy does not contain an aggregate limit).
- The number of occurrences at issue also impacts the insured’s obligation to satisfy self-insured retentions or deductibles, which often are applied on a per occurrence basis.

Potential Insurance Coverage Issues

Trigger of coverage

- **“Continuous trigger”** - coverage is triggered under every policy in effect from the time of the first exposure to the contaminant or hazardous substance through manifestation of any injury caused by the contaminant or hazardous substance (e.g., New Jersey and California).
- **“Injury-in-fact”** - no coverage exists unless it is shown by the claimant that actual body injury occurred during the policy period. It is the claimant’s burden to establish injury within a specific policy period (e.g., New York).
- **“Exposure”** - coverage is triggered during those policy periods in which the plaintiff is actually exposed to the allegedly harmful product.
- **“Manifestation”** - coverage is triggered during the policy period in which the bodily injury becomes reasonably capable of medical diagnosis.

Potential Insurance Coverage Issues

Allocation among multiple policies

Allocation: The method of determining which policies, to what extent, and in which sequence, are liable for the policyholder's damages. There is no uniform approach among the States. The determination of the appropriate allocation approach may be contingent upon policy language.

- **“Pro Rata” Approach** - Each insurer shall bear a share of liability directly proportionate to its time on the risk and the insured may be held liable for periods of no insurance or insolvent insurance.
- **“Carter-Wallace” Approach** - Liability is allocated based upon time on risk as well as amount of limits in each year. Policy years with greater limits available will be given a larger allocation percentage. (New Jersey)
- **“All Sums” Approach** - An insurer chosen by the policyholder will be fully liable, up to the policy limits, for the entire sum of damages (all sums) owed by the policyholder during a particular policy period, subject to the right of contribution against other implicated insurers.

Potential Insurance Coverage Issues

Application of relevant policy provisions/exclusions

The Products Exclusion: There is no coverage for claims made by the insured “on account of Personal Injuries or Property Damage resulting from the failure of the Insured’s products or work completed by or for the Insured to perform the function or serve the purpose intended by the Insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any Insured, but this exclusion (i) does not apply to Personal Injury or Property Damage resulting from the active malfunctioning of such products or work.

- Very few courts have examined this exclusion in the context of asbestos claims, but the ones that have addressed the issue have concluded that the Products Exclusion does not apply to claims of injury resulting from use of products containing asbestos.
- *Maryland Cas. Co. v. W.R. Grace & Co.*, 794 F. Supp. 1206 (S.D.N.Y. 1991) - claims for bodily injury arising out of exposure to asbestos or asbestos-containing products manufactured or sold by the insured do not fall within the scope of this exclusion because they do not fail to perform their intended function.
- In the talc cases, the plaintiffs are not claiming that the talc-based products failed to perform the function or serve the purpose for which they were purchased - treat raw skin, provide a fresh scent, etc.

Asbestos Exclusion - bars coverage for bodily injury caused by products containing asbestos.

- Most post-1986 policies contain this exclusion.
- Pre-1986 policies generally do not feature this exclusion.



THE JURY SYSTEM IN THE UNITED STATES AND ITS ROLE IN VERDICTS

Jury Trials in the United States

- Who are the jurors?
- How are the jurors selected?
- Jury Voir Dire.
- How many jurors hear the case?
- The role of the jury.
- Jurors are instructed “to decide the case fairly and impartially, without sympathy, passion, bias or prejudice. You are to decide the case based solely upon the evidence that you find believable and in accordance with the law” that the Judge outlines.
- Burden of proof - “preponderance of the evidence.”

- What types of compensatory damages can a jury award??
 1. Past and future lost wages
 2. Past and future medical bills
 3. Past and future life care costs
 4. Pecuniary losses in a death case
 5. Non-economic pain and suffering damages

Jury Trials in the United States

- How does a jury calculate pain and suffering damages??
- The “time unit rule.”

Plaintiff’s statistical life expectancy is approximately 35 years. With that life expectancy, the time unit rule could produce the following results:

@\$5.00/hour	@10.00/hour	@\$50.00/hour	@100.00/hour
x 35 years	x 35 years	x 35 years	x 35 years
x 365 days/year	x 365 days/year	x 365 days/year	x 365 days/year
x 24 hours/day	x 24 hours/day	x 24 hours/day	x 24 hours/day
= \$1,533,000	= \$3,066,000	= \$15,330,000	= \$30,660,000

Some additional time unit rule calculations at the following time unit levels:

\$100 per hour	\$30.7 million
\$250 per hour	\$76.7 million
\$400 per hour	\$153.3 million
\$1,000 per day	\$12.8 million
\$5,000 per day	\$63.9 million
\$10,000 per day	\$127.8 million