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‘Junk Litigation Opinions’: J&J’s Talc Liabilities Subsidiary Sues Plaintiff Experts For Disparaging Talcum Powders

by Eileen Francis

What ails J&J in litigation concerning the alleged role of its Johnson’s Baby Powder and other talcum products in plaintiffs’ mesothelioma – ie, “tactics to pollute the scientific literature” – is a growing systemic problem, according to the firm’s wholly owned indirect subsidiary LTL Management.

Johnson & Johnson says four doctors serving as expert witnesses for plaintiffs in litigation alleging its talc-containing products caused mesothelioma knowingly made false statements that disparaged the safety of its talcum powder products and harmed the company’s interests.

LTL Management LLC – the wholly owned indirect subsidiary which the Johnson’s Baby Powder manufacturer created in October 2021 to take its cosmetic talc injury claims into bankruptcy – is suing the doctors in the US District Court for the District of New Jersey, alleging injurious falsehood/product disparagement, fraud, and violation of the Lanham Act.

Its complaint against Theresa Swain Emory, a pathologist affiliated with Peninsula Pathology Associated in Newport New, VA, John Coulter Maddox, a pathologist from Newport News, VA, and New Hampshire-based pulmonologist and pathologist Richard Lawrence Kradin was filed on 7 July, roughly a month after a similar suit against Jacqueline Moline, a New York-based occupational medicine specialist.

In both cases, LTL seeks damages, injunctive relief – including retraction or correction of articles the plaintiffs authored and production of unsealed records – and attorneys’ fees and costs.

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> *"LTL has suffered, and continues to suffer, actual and special damages, including ... lost profits on the sale of Johnson's Baby Powder caused by the widespread dissemination of the article; increased fees to defend and resolve talc claims; and other expenses."*

The suits come as the New Brunswick-based company is making a second attempt in the US Bankruptcy Court for the District of New Jersey to resolve disputes in which some 60,000 reported litigants allege they developed mesothelioma or other cancer after being exposed to asbestos in Johnson's Baby Powder and/or Shower to Shower products. This time, the firm is proposing an $8.9bn settlement as part of its insolvency plan. (Also see "*J&J Has Kenvue IPO Roadshow In One Lane, Potentially Long Road For Talc Litigation In Other*" - HBW Insight, 1 May, 2023.)

Central to the complaint against Emory, et al., is the so-called *"Emory article"* published in June 2020, which examined 75 individuals with malignant mesothelioma "whose only known exposure to asbestos was repeated exposures to cosmetic talcum powders" and concluded that mesotheliomas can develop following such exposures. The names of the 75 patients were not disclosed, and the defendants have actively sought to conceal their identities, according to LTL.

LTL says it now is "irrefutable" that all 75 individuals in the article are plaintiffs in litigation in which at least one of the authors served as an expert witness on behalf of plaintiffs' counsel.

The Emory article purported to build on a study of 33 mesothelioma cases that Moline *published* in the Journal of Occupational and Environmental Medicine in January 2020, which similarly stated that the patients had no known asbestos exposure other than cosmetic talcum powder. That one suffers from similar issues, according to LTL.

The Emory article has been widely cited – including in testimony or court disclosures from nine other plaintiff experts in at least 41 cosmetic talc-mesothelioma cases against LTL – since its publication in the American Journal of Industrial Medicine, where Moline and Kradin serve as contributing editors. LTL says that while the article underwent peer review, the reviewers had no more access to underlying documentation than anyone else, and thus could not verify the accuracy of the article's central claims.

It's a systemic problem, according to LTL. "The Emory article demonstrates Plaintiffs' experts'

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tactics to pollute the scientific literature. They publish their junk litigation opinions in scientific journals. They use their credentials to instill their publications with false credibility. They then build from that fraudulent foundation by citing to each other's work, which manufactures a 'body of literature' to present to judges and juries with the veneer of scientific legitimacy. And they actively resist attempts to make public the information that would reveal the deceit. In return, they are handsomely compensated for their disparagement of the products that are the target of the plaintiffs' bar," LTL says.

The firm adds, "This trend is on a steep upward trajectory, with increased litigation financing fueling extensive lawyer advertising that solicits large volumes of claimants regardless of merit."

It's a lucrative business for expert witnesses. According to LTL, Kradin for example is paid between $250,000 and $400,000 per year – around 40% of his total income – and in aggregate has received more than $3m for his work as a talc expert, almost exclusively on behalf of plaintiffs.

Alternative Asbestos Exposures

LTL says it is difficult to match individuals in the Emory article to litigation plaintiffs because of the omission of identifying information. Despite that limitation, LTL says it has become evident that at least six individuals in the article are plaintiffs with documented alternative exposures to asbestos.

It provides the example of Stephen Lanzo, who was included in both the Moline and Emory studies, though the latter purported to be a collection of "additional" cases not covered by Moline. Lanzo filed suit against LTL in 2016, and information uncovered in court proceedings show that crocidolite asbestos fibers – which the authors noted is generally found in industrial asbestos products, not cosmetic talc – were discovered by plaintiff's and defendant's experts in analyzed tissue from Lanzo, contrary to the authors' claims that the only asbestos types found in his tissue were anthophyllite and tremolite.

Moreover, Lanzo had potential exposures to asbestos from two sources other than Johnson's Baby Powder. According to court documents, 60 linear feet of exposed asbestos pipe were removed from Lanzo's basement, which doubled as a family room where he spent time. Lanzo also could have been exposed to asbestos at multiple points in his schooling. For example, "the school district removed 200 square feet of friable asbestos from the ground-floor lobby [of Lanzo's high school] from 1989-1992—meaning some of the asbestos was removed during Mr. Lanzo's junior and senior year," LTL says.

LTL believes the identity of another case in the Emory article to be Pauline Citizen, a plaintiff who sued LTL, other cosmetic talc defendants and non-talc defendants allegedly responsible for her mesothelioma.

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“Ms. Citizen’s own *complaint* alleges exposure from two non-talc sources: asbestos brought home from both her mother’s and father’s occupations. The complaint named as defendants her parents’ employers and companies alleged to have supplied those employers with asbestos,” LTL says.

The firm also points to a case in a North Carolina federal court which it says undermined the premise of the Emory and Moline articles. The plaintiff in that case, North Carolina resident Betty Bell and her estate, sued her previous employer, American International Industries, Inc., for her exposure to asbestos in the workplace. LTL says Bell is one of the Moline article’s subjects “whose only known exposure to asbestos was repeated exposures to cosmetic talcum powders.”

In other instances, plaintiffs believed to be subjects in the defendants’ articles were potentially exposed to asbestos through demolition-based construction work or asbestos-containing cigarettes, court records show.

LTL argues that the Emory article’s authors and Moline were intimately familiar with the case histories of the individuals referenced in their articles based on their role as plaintiffs’ experts in the underlying tort cases in which those individuals had asserted claims against LTL and others.

“When the Authors published their statements in the public domain, to the scientific community, and in various courts across the country, they knew that the premise of their position – that they conducted a ‘study’ of 75 mesothelioma patients whose sole exposure to asbestos was through talc powder – was false or recklessly ignored available information demonstrating its falsity,” the J&J subsidiary says.

It notes that Moline “received accolades, speaking opportunities, and acclaim for her self-proclaimed novel and disruptive study.” Meanwhile, “her disparaging statements provided a foundation for the mass tort asbestos plaintiffs’ bar’s baseless claims against LTL, which richly compensated her with millions of dollars of fees to act as their ‘expert’ and mouthpiece.’”

Suffering

The doctors’ disparagement of Johnson’s and Shower to Shower talcum powders for “their own aggrandizement” harmed LTL, the company says. “The sales volume and profits from Johnson’s baby Powder declined in 2019 and again in 2020. And an ever-increasing percentage of Johnson’s Baby Powder sales was the corn starch-based version compared to the talc-based version,” it says.

J&J first discontinued talc-based Johnson’s Baby Powder in the US and Canada before committing in August 2022 to ending sales of the product globally in 2023. (Also see "*J&J Pulls Plug On Talc Across Its Baby Powder Portfolio, Shifts To Cornstarch-Based Products*" - HBW Insight, 14 Aug, 2022.)

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LTL says it has spent millions in fees paid to attorneys, expert witnesses and other professionals to investigate, respond to, defend against, and otherwise counteract the authors' false statements, which also increased the value of settlements with plaintiffs.

"LTL has suffered, and continues to suffer, actual and special damages, including, without limitation, lost profits on the sale of Johnson's Baby Powder caused by the widespread dissemination of the article; increased fees to defend and resolve talc claims; and other expenses."

'Ethical Obligations'

On 7 June, LTL asked the New Jersey federal court for limited expedited discovery in order to obtain a fully unredacted version of a five-page document that identifies the 33 individuals in Moline's article.

Moline's counsel opposed the motion on 20 June, calling it baseless and arguing that it does not meet the legal standard for such requests, namely the "Notaro test." The Notaro standard requires the party seeking expedited discovery to demonstrate the threat of irreparable harm, a probability of success on the merits, a connection between the expedited discovery and the avoidance of irreparable harm, and evidence that the harm from denying expedited discovery outweighs the harm from granting it. According to Moline, LTL does not meet any prong of that test.

She further contends that LTL fails to satisfy "even the inapplicable good-cause standard it cites. The cases on which it relies all involve expedited discovery that was necessary to prosecute those cases. Here, there is no such need. … LTL's supposed 'need' for the document is no different than the 'need' of any litigant to obtain discovery it believes will prove its claims."

Moline says she should have opportunity to request the dismissal of claims that seek to impose liability on her for a scientific conclusion that is not actionable as a matter of law.

Also, the negative consequences that would result from producing the patient identities sought by LTL are considerable, according to the defendant. "Dr. Moline and her employer, Northwell Health, Inc. … are bound by federal health and privacy regulations, professional standards, and ethical obligations to maintain the study participants' anonymity. The chilling effect on medical researchers would be profound," Moline's counsel says.

Speaking with Reuters, University of Southern California Gould School of Law professor Adam Zimmerman characterized LTL's suit as "aggressive." Per Zimmerman, "[i]t sends a message that the gloves are off."

David Logan, professor emeritus and former dean of Roger Williams School of Law, noted in a 14

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July email to HBW Insight that defendants in product liability cases typically focus on rebutting causation evidence. In his view, J&J is taking a "certainly rare, if not unprecedented" step, "turning the tables here by opening a new front in this battle with the plaintiffs' bar."

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