

The National Forum for Environmental & Toxic Tort Issues (FETTI) Spring 2017 Case Law Update Newsletter

In 2001, the Midwestern Environmental Claims Association (“MECA”) changed its name to **The National Forum for Environmental & Toxic Tort Issues** (“FETTI”) in order to better describe its origins and purpose. FETTI was created by the environmental sector of the insurance industry – specifically for the industry. It is dedicated to the professional development of its members in a cost-effective environment. Membership is open to individuals, companies and firms actively engaged in the adjustment, settlement and defense of casualty or property claims arising out of environmental damage or exposure to toxic substances.

Each year our organization convenes in Chicago to host a world-class seminar on a broad range of environmental issues with nationally recognized speakers.

FETTI will convene once again from October 4-6, 2017 in Chicago at the Union League Club.

In an effort to update the FETTI membership, the following summaries consist of recent environmental and toxic tort case law updates.

COSMETIC TALC PRODUCTS AT THE CORE OF TWO EMERGING MASS TORT LITIGATIONS

*Goldberg Segalla
Joseph J. Welter
(716) 566-5457*

jwelter@goldbergsegalla.com

Mass tort litigation is high stakes big business in this country. With increasing regularity, plaintiffs’ attorneys are digging deeper and formulating creative liability theories in an effort to corner the market on the next mass tort. Cosmetic talc is the latest product in the cross-hairs of those who are attempting to label talc as dangerous. In a double-barreled shotgun approach, cosmetic talc has come under attack as allegedly causing ovarian cancer and asbestos-related diseases. While these are two distinct types of claims, they have placed the cosmetic talc industry at the center of two emerging mass torts in this country.

How is it that cosmetic products on the market for over 100 years are only now becoming the focus of plaintiffs’ claims? The answer is different for the asbestos/talc and talc/ovarian cancer cases.

The Asbestos/Talc Litigation

Asbestos litigation in the United States has evolved over the last 40 years in ways that many of us could never have imagined. At its inception, the focus was on the “big dusties,” those companies that manufactured predominantly insulation products containing large amounts of amphibole asbestos that were used in industrial settings. As these and other companies filed for bankruptcy, we have seen wave after wave of new theories against product manufacturers, distributors, contractors and retailers related to products containing smaller amounts of chrysotile

asbestos with claims of exposure under vastly different scenarios. Many of these companies have also since filed for bankruptcy. Cosmetic talc is simply the next wave of this seemingly never-ending mass tort litigation.

What makes this latest focus interesting is that the hypothesis of talc products being potentially contaminated with asbestos is nothing new. Industrial talc mines, contaminated with asbestos, have been in the scientific literature for decades and have been the focus of asbestos claims, predominantly in industrial and commercial settings. In the early 1970s, attention was shifted to cosmetic talc products (from different mines) as to whether the same impurities existed. In 1971, New York University conducted testing of cosmetic talc products for asbestos content, which indicated evidence of chrysotile and tremolite on some of the samples. Eventually, an industry standard was developed to test cosmetic talc products for asbestos content based on technology as it existed at the time. As the technology improved so did testing for asbestos content, which resulted in cosmetic talc products free of any claimed asbestos impurities arguably by the 1980s. Consequently, the asbestos/talc claims generally relate to use of cosmetic talc products prior to 1980, which raises the question as to why we have not seen these claims sooner. One answer is the lower hanging fruit theory, where plaintiffs with more traditional asbestos exposure had no compelling interest in joining talc defendants. Suing cosmetic talc manufacturers did not necessarily increase the value of the case and would only lead to protracted litigation.

With the evolution of asbestos mass tort litigation, and some cases with no identifiable asbestos exposure, claims against talc manufacturers started to be sued. This has led to a variety of verdicts over the last three years in New York, New Jersey and California. In 2013, a New Jersey jury awarded a plaintiff \$1.6 million in the take-home exposure case of *Kaenzig v. Whittaker Clark & Daniels*, against Whittaker Clark & Daniels (“WC&D”), where the plaintiff claimed exposure from her father’s clothes. This verdict was affirmed on appeal. In the following year, a New York jury awarded \$7 million to the estate of a woman who used various talc powder products every day for decades.

In 2015, a New Jersey jury returned a defense verdict on plaintiff’s design defect and failure to warn claims in *Fishbain v. Shulton, Inc. and Whittaker Clark & Daniels*. Out in California in 2015, there was a different result when a jury found Colgate-Palmolive 95 percent liable and awarded \$13 million in damages in *Judith and John Winkel v. Calavaras Asbestos Ltd.*

Moving into 2016, we continued to see varied results. In *Panzarella v. Lorrillard Tobacco Company*, WC&D obtained a defense verdict based on a warning theory in New Jersey again. Similarly, in *Peter LaMonica v. Colgate-Palmolive*, another California case, plaintiff claimed exposure to a Mennen shave talc product. The jury returned a defense verdict in favor of Colgate-Palmolive. However, in *Philip John Depoian v. Whittaker Clark & Daniels*, plaintiff allegedly encountered talc products at his father’s barber shop and in his own personal use. Whittaker Clark & Daniels was found 30 percent liable and the jury awarded \$18 million in damages.

While these cases are more defensible than a traditional asbestos case, they will continue to be pursued as long as a plaintiff can get to a jury and have a chance to recover substantial damages. There is no sign of these cases going away anytime soon.

Talc/Ovarian Cancer Litigation

The talc and ovarian cancer cases have a very different genesis. Starting in the 1970s, scientists started to study whether use of cosmetic talcum powder in the perineal area was associated with ovarian cancer. The hypothesis was that cosmetic talcum powder would migrate up the vaginal tract to the ovaries, leading to inflammation and the development of cancerous tumors. In subsequent decades, scientific studies were mixed.

Does the Science Support a Causal Connection?

Some smaller studies suggested a possible association between cosmetic talc and ovarian cancer. In a 1982 report by Dr. Daniel Cramer, plaintiff's chief causation expert in these cases, conducted a study that suggested "a significant association between talc and ovarian cancer" with a relative risk factor of 1.85 (i.e., an 85% increased risk). Similar retrospective case-control studies found relative risk factors of 1.3 (Green, et al., 1997), 1.4 (Chang, et al., 1997; Gertig et al., 2000), 1.5 (Harlow, et al., 1992; Ness, et al., 2000) and 1.6 (Crook, et al., 1997; Cramer, et al., 1999). In one of the later articles, Dr. Cramer and his colleagues went on to "estimate that avoidance of talc in genital hygiene might reduce the occurrence of a highly lethal form of cancer by at least 10%" (Cramer, et al., 1999). Six additional meta-analyses, which largely rely on these original studies, also concluded an increased risk (between 24% and 70%) of ovarian cancer with perineal talc use.

These studies, relied on by plaintiffs in these cases, have come under heavy scrutiny because they lacked methodological reliability based on recall bias, failure to account for confounding factors and inconsistent findings. Given the small sample sizes of a few hundred participants in these studies, the confidence intervals suggest that relative risks may actually be closer to 1.0 (i.e., no association), and the actual incidence of ovarian cancer is so small (1.4%), that an increased risk of even the most generous finding (85%) results in an incidence rate of 2.6%, only slightly above the general population.

On the other hand, there are more methodologically reliable scientific studies involving larger groups of women showing there is no increased risk of developing ovarian cancer through use of cosmetic talcum powder. These include three prospective cohort studies, following tens of thousands of women who initially did not have ovarian cancer over several decades. Though approximately half of the women reported contemporaneous talcum powder use, the incidence of ovarian cancer at the end of the studies were no greater for women who used talc than those who didn't, and incidences in both groups were consistent with the general population (Gertig, et al., 2000; Gates, et al., 2010 (a follow-up of Gertig); Houghton, et al., 2014; Gonzalez, et al., 2016).

It is precisely because of these larger studies, coupled with the problems of the smaller, less reliable studies, that have caused the Food and Drug Administration, the Center for Disease Control, the National Cancer Institute, the National Toxicology Program, the U.S. Department of Health and Human Services, the American Conference of Industrial Hygienists, the American Cancer Society, and a host of healthcare associations, to conclude that the current scientific literature does not support the conclusion that perineal use of cosmetic talcum powder causes ovarian cancer.

In light of the seemingly lack of any reliable scientific support, the obvious question is why are these cases being placed in suit and, at least in St. Louis, going to a jury? The answer lies in the court's willingness and ability to properly scrutinize the reliability of the plaintiffs' expert medical causation opinions under *Daubert* and *Frye*. To date, we have seen disparate results in New Jersey and St. Louis.

New Jersey Rejects Plaintiffs' Causation Theory

In *Carl v. Johnson & Johnson*, Judge Nelson C. Johnson conducted a *Kemp* hearing (New Jersey's equivalent to a *Daubert* hearing), in which he heard testimony from 9 expert witnesses over 7 days and considered over 100 treatises before issuing a 33-page decision with 5 appendices. The court considered the scientific reliability of opinions from two epidemiology/medical experts in connection with cases brought by two women who developed ovarian cancer after using talc products. These two experts, Drs. Daniel Cramer and Graham Colditz, offered expert opinions that use of talc in the perineal area increases the relative risk of and causes ovarian cancer.

From a legal perspective, the court defined the issue as follows: "Have Plaintiffs shown that their experts' theories of causation are sufficiently reliable as being based on a sound, adequately-founded scientific methodology, *to wit*, that they are based upon methods upon which experts in their field would reasonably rely in forming their own (possibly different) opinions about the cause(s) of each of Plaintiffs' ovarian cancers?" The court concluded that neither of plaintiffs' general causation experts adhered to an accepted methodology.

With respect to Dr. Colditz, the court found that "he has failed to make a systematic review of the scientific literature and has ignored the rudiments of the scientific method in arriving at his conclusion." Similarly, the court precluded Dr. Cramer: "His opinions rely on an incomplete/irregular methodology unlike anything upon which his peers would rely, and appear to be grounded only in his instincts and personal predilections. In short, the mingling of various risk factors and the purported 'synergy' between talc and other health conditions is highly speculative and does not conform to any methodology utilized in the scientific community."

The court placed particular reliance on the testimony of defendants' expert Dr. John Godleski who explained that at a cellular level, talc is not capable of altering cells in the ovaries, which means the presence of talc plays no role in the development of any cancer. Plaintiffs' experts' failure to address how cancer is formed at a cellular level, coupled with these experts' inability to point to anything in the scientific literature that actually explains how talc causes tumors to form in the ovaries was critical to the court's decision.

In St. Louis, the Courts Let the Jury Decide

In 2016 and into 2017, the courts in St. Louis have denied the defendants' motion to preclude plaintiffs' medical causation experts under the *Frye* standard and allowed the cases to proceed to trial. The exorbitant verdicts in the past year have placed talc/ovarian cancer on the national radar and have led to a flood of litigation.

In February 2016, in *Fox v. Johnson & Johnson*, Case No. 1422-CC09012-01, Missouri Circuit Court, St. Louis, plaintiff commenced an action claiming use of Shower to Shower allegedly caused her to develop ovarian cancer. Plaintiff died at the age of 62. The jury found against two Johnson & Johnson companies and awarded \$10 million in compensatory damages and \$62 million in punitive damages. The talc supplier obtained a defense verdict.

In May 2016, in *Ristesund v. Johnson & Johnson*, Case No. 1422-CC09012, Missouri Circuit Court, St. Louis, a jury awarded plaintiff \$5 million in compensatory damages and \$50 million in punitive damages against the same two Johnson & Johnson companies. Again, the talc supplier obtained a defense verdict.

In October 2016, in *Giannechini v. Johnson & Johnson*, 1422-CC09012-01, Missouri Circuit Court, St. Louis, the jury awarded plaintiff \$575,000 in economic damages and \$2.5 million in pain and suffering. The jury found Johnson & Johnson 90 percent negligent and the talc supplier 10 percent responsible. Jury also awarded plaintiff \$67.5 million in punitive damages, \$65 million against Johnson & Johnson and \$2 million against the talc supplier.

On March 3, 2017, a fourth talc/ovarian cancer case, *Daniels, v. Johnson & Johnson et al.*, Case No. 1422-CC09326-01, Missouri Circuit Court, St. Louis went to verdict. However, the jury found in favor of Johnson & Johnson and the talc supplier. In this case, plaintiff alleged her 36-year use of Johnson & Johnson baby powder led to her 2013 diagnosis of ovarian cancer. The majority of the jury did not find the link between the talc and cancer strong enough to warrant Johnson & Johnson having warnings on the talc product.

Since the first St. Louis verdict, we have seen thousands of cases brought around the country. There is a multidistrict litigation pending the District Court of New Jersey. The first of many cases in California are scheduled for trial in July 2017, with *Daubert* hearings in June. The fifth case is proceeding to trial in St. Louis in April 2017. Meanwhile, the mentioned cases out of St. Louis and New Jersey are on appeal in what has become a high stakes battle over cosmetic talcum powder and its ability to cause ovarian cancer.

The Takeaway

Predicting the emergence of the next mass tort litigation is as much an art as it is a science. Keeping abreast of evolving scientific studies and early litigation trends are keys to seeing what is on the horizon. In the case of cosmetic talc, the convergence of two very different types of claims involving distinct injuries and diseases has created the opportunity for plaintiffs' lawyers to simply identify this as "talc litigation" and create the misperception that the cosmetic talc industry is bad. The reality is that these are scientifically weak claims that create havoc for defendants. A comprehensive and aggressive science-based defense strategy, along with a long-term commitment to fight the battle, is imperative to defeating these claims.

ILLINOIS ASBESTOS LITIGATION LIKELY TO FEEL THE EFFECTS OF INDIANA'S EXPANSION OF PREMISES LIABILITY LAW IN ASBESTOS CLAIMS

Matushek Nilles LLC
Michael D. Martinez
(312) 750-1215
mdmartinez@matushek.com

2016 proved to be a watershed year for Indiana asbestos litigation, with the invalidation of the state's product liability statute of repose essentially reopening Indiana courts to asbestos actions against product manufacturers. A less discussed ramification of the decision in *Myers v. Crouse-Hinds Div. of Cooper Indus.*, 53 N.E.3d 1160 (Ind. 2016) has been its effect on Illinois asbestos litigation, as product manufacturer defendants in Cook, Madison and McLean County can no longer obtain summary judgment pursuant to the Indiana statute of repose via a choice of law motion in the large number of cases filed in Illinois courts by Indiana residents seeking compensation for injuries caused by Indiana-based asbestos exposures. Similarly, a less-heralded Indiana appellate decision arising from the same underlying *Myers* case which redefines the ambit of premises liability in Indiana asbestos cases may ultimately prove to have its greatest practical impact in Illinois courts, given the sheer number of cases affected.

In *Myers v. Bremen Casting, Inc.*, 61 N.E.3d 1205 (Ind. Ct. App. 2016), the Indiana Court of Appeals significantly expanded the scope of premises liability in Indiana asbestos cases by narrowing the general rule of non-liability for the negligence of independent contractors first applied to asbestos claims in *Roberts v. PSI Energy, Inc.*, 829 N.E.2d 943 (Ind. 2005). In reversing summary judgment for two premises defendants, the court distinguished *Roberts* because of differences in the respective risks inherent in the insulator and electrician trades, and essentially limited the defense to situations where the plaintiff's own work caused his asbestos exposure on the premises.

In *Roberts*, an ACandS insulator sued PSI Energy, Inc. under theories of vicarious liability and premises liability for injuries caused by asbestos exposure on PSI's premises. Roberts argued PSI was liable for the negligence of its independent contractors under the non-delegable duty doctrine, which provides five exceptions to the general rule of non-liability for the negligence of independent contractors, including: (1) where the contract requires the performance of intrinsically dangerous work; and (2) where the act to be performed will probably cause injury to others unless due precaution is taken. The *Roberts* court rejected the plaintiff's vicarious liability argument, finding the non-delegable duty doctrine did not apply because asbestos was not "intrinsically dangerous" (since there was evidence proper precautions could have minimized Roberts' risk of exposure), and rejected the plaintiff's "due precaution" argument because Roberts, as an insulator, was injured by the very condition he was employed to address on PSI's premises. Accordingly, the facts did not establish PSI created a risk greater than the routine and predictable hazards generally associated with Roberts' occupation as an insulator.

Since *Roberts*, virtually all premises defendants, including those at issue in *Myers*, have sought to analogize claims filed against them to *Roberts*, regardless of the nature of the individual claimant's specific trade. Yet *Myers* marks the first time an appellate court has distinguished *Roberts* based on the difference in risks inherent in the plaintiff's trade. Because Roberts' job was to install and maintain asbestos insulation, he was injured by the very condition he was employed to address; and the risk of him being exposed to asbestos was always the same,

regardless of the location of his work. Therefore, PSI could not be held liable for failing to take different precautions than those generally taken by asbestos insulators.

In contrast, Myers' employer was hired to perform electrical work, not asbestos work, and the evidence showed that Myers typically worked with electrical components and equipment, as opposed to asbestos insulation. Further, there was insufficient evidence to indicate Myers' risk of being exposed to asbestos was common among electricians or across workplaces, and there was no evidence he was injured by the very condition he was employed to address. Thus, the court rejected the defendants' argument that the asbestos work being conducted on the premises did not create a peculiar risk of harm to those not hired to perform asbestos work, such as Mr. Myers, and held the “due precaution” exception to the general rule of non-liability was available to Myers.

While *Roberts* remains good law in Indiana, the *Myers* court has significantly limited its reach by narrowing the scope of the general rule of non-liability for the negligence of independent contractors in asbestos cases to situations where the plaintiff's only asbestos exposures on the premises were caused by a condition he/she was employed to address, and situations where the plaintiff's potential for such exposure was always the same, regardless of the location of his/her work, such that the premises owner cannot be held liable for failing to take different precautions other than those generally taken by those in the plaintiff's trade.

Although Indiana asbestos filings have risen since the statute of repose was overturned, the numbers still pale in comparison to the amount of cases filed per year in Illinois – which includes a significant number of cases filed by Indiana residents alleging Indiana-based exposures, particularly in Cook County. Accordingly, it appears inevitable that the expansion of premises liability in *Myers* will inspire the Illinois plaintiffs' bar to challenge the scope of the general rule of nonliability for the negligence of independent contractors first applied in the asbestos context in *Gregory v. Beazer East*, 892 N.E.2d 563 (Ill. App. Ct. 2008).

Gregory is the only published decision bearing on premises liability in Illinois asbestos actions and its fact pattern is substantially analogous to that of *Roberts* in that both actions involve claims filed by union tradesmen alleging asbestos exposure while working as independent contractors at industrial work sites. In finding no duty owed by the premises owner in *Gregory*, the First District Appellate Court focused exclusively on the amount of control, or lack thereof, exercised by the subject premises owner with respect to the work of its independent contractor, which employed Gregory, despite evidence Gregory was exposed to asbestos insulation that predated his work at the site. See 892 N.E.2d at 184, n.4. In contrast, the extent of control exercised by the premises owner over the work of its independent contractor was a non-issue in *Myers*, with the court instead focusing on whether exposure to asbestos materials was a risk inherent in the plaintiff's trade or “peculiar” to the subject work site for an electrician such as Myers.

Given the fact most witnesses in asbestos cases will readily concede they received all of their work directives from their employer (and not the premises owner) at industrial work sites, the more fluid risk-based approach to premises liability established by the *Myers* court opens up many more paths to liability in asbestos cases than the rigid “control” analysis relied upon in *Gregory*. Accordingly, given the ever-increasing stream of premises claims filed by non-insulator plaintiffs in Illinois courts, it is only a matter of time before the plaintiffs' bar seeks to convince an Illinois appellate court to adopt the more expansive, risk-based approach to premises liability established in *Myers*.

Nonetheless, Illinois defense counsel can take solace in the fact *Myers* serves as a roadmap for how to properly work up non-insulator premises actions to avoid being on the losing-end of establishing plaintiff-friendly law in Illinois like *Myers*. This can be accomplished by eliciting sufficient facts in discovery showing that the plaintiff’s potential for the type of alleged exposure was always the same, regardless of the location of their work, such that the subject premises owner did not create any “peculiar” risk of asbestos exposure for the plaintiff and cannot be liable for failing to take different precautions other than those generally taken by those in the plaintiff’s trade.

HOW WILL OSHA’S CRYSTALLINE SILICA RULE AFFECT CONSTRUCTION AND GENERAL INDUSTRY EMPLOYERS?

HeplerBroom, LLC

Jennifer M. Martin

(217) 993-6074

jmartin@heplerbroom.com

Melissa S. Brown

(217) 993-6077

melissa.brown@heplerbroom.com

Crystalline silica (“silica”) is a mineral found in materials used in industrial products and at construction sites, such as sand, concrete, stone and mortar. Silica is also used in the manufacture of glass, pottery, ceramics, bricks, concrete and artificial stone. Medical studies have concluded that inhalation of silica can cause silicosis, a lung disease marked by scarring of the lungs, and increases the risk of lung cancer, COPD and kidney disease. Exposure to silica is widespread in the construction and maritime industries, and in numerous general industry sectors including, but not limited to, foundries, railroads, fracking, and manufacture of glass, concrete, asphalt, and artificial stone products.

Federal regulations governing silica exposure have been in place since 1971 when the Occupational Safety and Health Administration (“OSHA”) set permissible exposure limits (“PELs”) for silica exposure in general industry and construction/shipyards. However, the final silica rule published by OSHA on March 25, 2016 (81 FR 16286) significantly increases the protections in place for employees exposed to silica in the workplace, and imposes new and substantial obligations on employers.

The final silica rule, which was effective on June 23, 2016, creates two separate standards addressing occupational exposure to silica – one for exposure in general industry and maritime, and another for exposure in the construction industry. The two separate standards were promulgated in order to accommodate the different activities, exposures, and conditions within the two sectors. OSHA estimates that 2.3 million workers annually are exposed to silica in the workplace, and approximately 2 million of these workers are in the construction industry. OSHA also estimates that implementation of the final silica rule will prevent over 640 fatalities and over 900 moderate-to-severe silicosis cases annually, and that the cost to implement the final rule will be \$1 billion annually.

Requirements Imposed by the New Regulations

The most significant change of the final silica rule is the revised PEL for silica. The prior PELs for silica were equivalent to approximately 100 micrograms of silica per cubic meter of air ($\mu\text{g}/\text{m}^3$) for general industry and $250 \mu\text{g}/\text{m}^3$ for construction and shipyards. OSHA set the new silica PEL at $50 \mu\text{g}/\text{m}^3$ as an 8-hour time-weighted average for *all* industries covered by the new regulations. Therefore, under the new rule, exposure to silica over an 8-hour work shift can fluctuate, but the average exposure must not exceed $50 \mu\text{g}/\text{m}^3$. While OSHA believes there is still significant risk with the new $50 \mu\text{g}/\text{m}^3$ PEL, OSHA concluded that it was the lowest level of exposure that was technologically feasible.

Although the PEL is the same for both general industry and the construction industry under the new regulations, the approach to compliance differs significantly. For both, the general industry/maritime and construction rules, the applicability of the final silica rule is triggered by worker exposure to silica at or above a $25 \mu\text{g}/\text{m}^3$ “action level,” averaged over an 8-hour day. However, in response to numerous comments from the construction industry, OSHA adopted Table 1 of the new rule which identifies applicable engineering controls and work practices for 18 common construction tasks. As one example, Table 1 requires employees using handheld power saws (any blade diameter) to use a saw equipped with an integrated water delivery system that continuously feeds water to the blade, and to operate and maintain the saw in accordance with the manufacturer’s instructions for minimizing dust emissions. Construction employers who properly implement the applicable controls listed in Table 1 for a specific task are not required to perform a silica exposure assessment and are not subject to the silica PEL for that task. However, if the employer does not properly implement the controls in Table 1, the silica PEL applies for that task and the employer must assess and limit its employees’ silica exposure in accordance with the PEL.

By contrast, employers who are potentially subject to the general industry/maritime rule must perform an exposure assessment using either a performance option or scheduled monitoring option. The performance option is based on any combination of air monitoring data or objective data that is sufficient to accurately characterize employee exposure. The scheduled monitoring option provides a more structured approach and requires initial monitoring to determine employee exposure. Under either approach, the employer must assess the exposure of each employee who is or may reasonably be expected to be exposed to silica at or above the $25 \mu\text{g}/\text{m}^3$ action level. If the action level is triggered, employers must meet the PEL and demonstrate compliance.

In some circumstances, employers are required to supplement the controls with respiratory protection. For example, Table 1 provides that construction employees using a handheld power saw must comply with the respiratory protection requirements when using the tool indoors, or outdoors for more than four hours in a shift. The final silica rule also requires that medical surveillance be made available to employees who are required to wear a respirator for 30 or more days per year or who are exposed to silica above the PEL for 30 or more days per year (and beginning on June 23, 2020, medical surveillance must be offered to employees exposed above the action level for 30 or more days per year). The results of medical surveillance are to be provided to the employee only, although the employer will receive the physician or licensed health care professional’s recommended limitations on respirator use.

Sometimes a task in general industry or maritime may be the same as a task performed in the construction industry. In certain circumstances, the final silica rule allows employers in general industry and maritime to comply with the standard for construction. Thus, if the engineering and work practices in Table 1 are implemented for that task, the PEL does not apply. However, the task performed must be indistinguishable from the construction task and must not be performed regularly in the same environment and conditions.

The final silica rule requires employers in general industry, maritime, and construction to develop a written exposure control plan. The written plan must describe the methods used to identify and control workplace exposures. Under the construction standard, a designated individual who is capable of identifying silica hazards and who possesses the authority to take corrective measures must implement the exposure control plan.

The final silica rule also requires employers in general industry and maritime to establish “regulated areas” in order to limit access to areas where exposure to silica exceeds the PEL. The standard for construction does not include a requirement for regulated areas, but the written exposure control plan must include procedures to restrict access to work areas, whenever necessary, to minimize exposure to silica.

The new regulations establish a hierarchy of controls that employers must implement to reduce and maintain exposure to silica to levels below the PEL. The primary means of reducing exposure are engineering and work practice controls.

Deadlines for Employers to Comply

All obligations for compliance under the general industry and maritime standard commence on June 23, 2018 (two years after the effective date of the rule), with two exceptions. For hydraulic fracturing operations, the obligation for engineering controls commences five years after the effective date. Also, the requirement for employers to offer medical surveillance commences 2 years after the effective date (June 23, 2018) for employees exposed above the PEL for 30 or more days per year, and 4 years after the effective date (June 23, 2020) for those exposed at or above the action level for 30 or more days per year.

All obligations for compliance under the construction standard commence on June 23, 2017 (one year after the effective date), with one exception. The requirements for laboratory analysis commence two years after the effective date. (OSHA anticipates that most construction employers will forego the exposure assessment process and comply with the Table 1 control methods.)

Enforcement of the Final Silica Rule

Commenters to the silica rule also called on OSHA to include a separate enforcement mechanism for employer retaliation if an employee accepts medical surveillance. Despite criticism of the enforcement options available under Section 11(c) of the OSH Act (29 U.S.C. § 660(c)), which prohibits discrimination against an employee for exercising rights afforded by the OSH Act and regulations, OSHA declined to include any separate enforcement option.

OSHA's new civil penalty policy took effect in August 2016, and increased the maximum penalties for most violations from \$7,000 per violation to \$12,471 per violation (and made the same adjustment to daily penalties imposed for failure to abate a violation). Maximum penalties for willful or repeated violations have also been increased from \$70,000 to \$124,709 per violation. Any violations of the new silica regulations will be subject to the increased penalty amounts.

In the preamble and guidance documents addressing the final silica rule, OSHA encourages employers to take advantage of OSHA's On-Site Consultation Program, which provides free and confidential consultation services to small and medium-sized businesses. For construction and manufacturing operations with questions about the applicability of the new silica rule, this may be an opportune time to take advantage of this program (www.osha.gov/dcsp/smallbusiness).

Status of the Final Silica Rule

Numerous petitions for review of the final silica rule have been filed. Groups representing employers and manufacturers believe that compliance with the previous silica standard is sufficient and that the new regulations are unnecessary. These groups also argue the economic and technical feasibility of the requirements under the new regulations, stating that the new rule places undue burdens and irreparable harm on manufacturers. On the other hand, petitions for review filed by labor groups seek a more stringent standard with stronger medical surveillance and protections for workers.

In addition to legal challenges, industry groups have met with lawmakers to attempt to mount a challenge to the new regulations. The groups have urged lawmakers to support language that would prohibit funding the implementation of the final silica rule until additional studies are completed. At this point, the compliance deadlines are unchanged. However, employers should monitor these challenges as their outcomes may have an effect on the final regulations.

Conclusion

The recently enacted regulations governing exposure to respirable crystalline silica significantly increase the protections afforded to employees. Whether or not these protections are necessary, or technically or economically feasible, is still up for debate. Nevertheless, employers in general industry, maritime, and construction should closely examine the new regulations in preparation for the upcoming June 23, 2017 and June 23, 2018 compliance deadlines.

FLORIDA SUPREME COURT REJECTS DAUBERT STATUTE

Hawkins Parnell Thackston & Young LLP

Evelyn Fletcher Davis

(404) 614-7571

edavis@hptylaw.com

Todd C. Alley

(404) 614-7523

talley@hptylaw.com

The *Daubert* standard for admission of expert testimony at trial is now on life-support in Florida after a 4-2 ruling by the Florida Supreme Court on February 16th. The Court declined to adopt the statute enacted by the Florida Legislature in 2013, which amended the Florida Rules of Evidence to make the *Daubert* standard the applicable standard for expert testimony, “to the extent procedural.”

In 2013, the Florida Legislature enacted HB7015, the amendment to replace the *Frye* rule with the *Daubert* standard. The *Frye* standard for admissibility of expert testimony, which had previously been in use in Florida and dates back to the 1923 federal case of *Frye v. United States*, requires a trial judge only to determine whether expert testimony relies upon principles that have gained “general acceptance” in the particular expert’s field and then leaves it up to the jury to determine what weight to give the expert testimony in the same way the jury weighs all other evidence. It is considered an easier standard with which to gain admittance of expert testimony and is favored by plaintiffs’ attorneys. The *Daubert* standard, so-called as it resulted from the 1993 United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, requires the trial court to act as a “gatekeeper” to prevent junk science and unsupported opinions from coming before a jury. The trial court must undertake a three-part test in determining whether expert testimony can be admitted: whether the testimony is “based upon sufficient facts or data;” whether it is the “product of reliable principles and methods;” and whether a witness has “applied the principles and methods reliably to the facts of the case.” The more restrictive *Daubert* standard, favored by the defense bar, and businesses, has been in use in the federal courts and over two-thirds of the states since 1993.

Despite its wide acceptance, the United States Supreme Court’s *Daubert* standard was not adopted by Florida courts until the Florida Legislature took action in 2013. The *Daubert* amendment was supported by Florida Governor Rick Scott, but immediately opposed by the plaintiffs’ bar who challenged the amendment through the Florida Bar’s Code and Evidence Rules Committee. Following fierce debate among Florida lawyers that generated hundreds of comments, the Code and Evidence Rules Committee voted 16-14 against the *Daubert* standard, and following further debate the Florida Bar Board of Governors in late 2015, voted 33-9 to recommend to the Florida Supreme Court that the Court not adopt the *Daubert* statute to the extent it was procedural. That recommendation came before the Florida Supreme Court in 2016, and the Court heard arguments from parties in favor of and in opposition to the amendment.

In announcing its decision not to adopt the *Daubert* standard, the four liberal justices on the Florida Supreme Court gave as their only reason for doing so that it had “grave constitutional concerns” about the *Daubert* standard, including that it may undermine the right to a jury trial and deny access to courts. Conservative justices, in their dissent, noted that the federal courts and

most states have been using the *Daubert* standard for years with no such constitutional issues. “Has the entire federal court system for the last 23 years as well as 36 states denied parties’ rights to a jury trial and access to courts? Do only Florida and a few other states have a constitutionally sound standard for the admissibility of expert testimony? Of course not.”

The impact of this decision, in the short term, remains to be seen. Defense counsel will likely continue to argue that the *Daubert* standard should be applied, and Plaintiffs’ counsel that the courts should revert back to the *Frye* standard. Ultimately there must be an adverse decision on the use of the *Daubert* standard for one party or another that results in an appeal and, through the appellate process, reaches the Florida Supreme Court for determination on the merits of the issue. The litigation will concern the issue of whether the amendment is substantive or procedural. One issue that may alter any future outcome on the issue of the *Daubert* standard’s application in Florida is further appointments to the Florida Supreme Court by conservative Governor Rick Scott, which may swing the tide on the bench from its current split of four liberal justices and three conservative justices.

The matter is *In re: Amendments to the Florida Evidence Code, case number SC16-181, in the Supreme Court of the State of Florida.*