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MEMORANDUM IN SUPPORT OF BANNING ASBESTOS INCLUDING TALC PRODUCTS

Introduction

Asbestos is a deadly toxin that kills roughly 12,000 to 15,000 Americans a year¹. While asbestos has been prohibited for manufacture and use for a limited number of products in the United States, it is still not banned. Moreover, asbestos has been more recently discovered in tiny particles in talc powders and cosmetics, which until recent litigation, was something that companies have been able to keep secret from the public. These new developments make the need to ban asbestos all the more urgent.

In the last Congress, legislation to ban asbestos was introduced in both the House and the Senate to amend the Toxic Substances Control Act (“TSCA”). (See S.717 and H.R. 1603 – Alan Reinstein Ban Asbestos Now Act of 2019)². The bill came close to House passage. While this legislation was an important step, the original language in the bill had a glaring omission that, if not fixed, could have consequences in the area of cosmetics and talc. A savings clause amendment was added to address the problem. However, once that fix was made, opposition grew, and the bill died. We urge congress to try again to ban asbestos, and to ensure that manufacturers of talc products cannot use imprecise bill language to escape responsibility for ensuring their products are asbestos free.

Why asbestos should be banned in the United States

Asbestos is the only well-established cause of mesothelioma, an incurable rare cancer of the lining of the lungs and other organs. In addition, asbestos exposure is linked to lung cancer, ovarian cancer, and asbestosis, which makes breathing extremely painful. The exact death toll from asbestos exposure remains unknown because asbestos-related deaths are not precisely reported by public health authorities, but studies conducted by the Environmental Working Group (“EWG”) have found that asbestos kills at least 12,000 Americans each year.³

¹Asbestos kills 12,000-15,000 people per year in the U.S., EWG Action Fund, Asbestos Nation
<http://www.asbestosnation.org/facts/asbestos-kills-12000-15000-people-per-year-in-the-u-s/>

² Hearing on “Ban Asbestos Now: Taking Action to Save Lives and Livelihoods, Wednesday, May 8, 2019,
<https://energycommerce.house.gov/committee-activity/hearings/hearing-on-ban-asbestos-now-taking-action-to-save-lives-and-livelihoods>

³Asbestos kills 12,000-15,000 people per year in the U.S., EWG Action Fund, Asbestos Nation
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Asbestos has been primarily used in the textile and building construction industry. More recently, asbestos has been discovered in talc, which is present in many of our cosmetics today. Talc is obtained from mines that may also contain asbestos. This explains why removing asbestos to purify talc is extremely difficult and why asbestos exposure is still a critical problem today.

In 2018, Johnson & Johnson (“J&J”), the producer of the nation’s most widely used talc-containing baby powder, lost major litigation which began to shed light on how J&J has known for more than 40 years that asbestos has contaminated their talc products, yet failed to disclose it. Major cosmetics companies like Chanel have also come under scrutiny for marketing talc powders tainted with asbestos.⁴ Had it not been for recent litigation by sick plaintiffs and their attorneys, these companies would have escaped liability and would continue to hide the presence of asbestos in their products from regulators and the public.

One way these companies have been able to escape responsibility for selling talc with asbestos is poor testing methods. While there is general agreement in the United States that there is not a safe level of asbestos exposure and that this exposure leads to the development of cancers and other life-threatening diseases, the way asbestos is tested in products has not changed in almost 50 years. While the Cosmetic, Toiletry, and Fragrance Association began voluntary testing of asbestos on talc raw minerals in 1976, these testing methods have “long-recognized shortcomings in specificity and sensitivity”⁵ for detecting asbestos. An FDA report from 2020 states:

Importantly, testing methods pertaining to asbestos in articles of commerce were developed for analyzing “bulk materials” containing at least 1% asbestos as an intentional ingredient by weight or in settings where asbestos was known to be present (*e.g.* mines, mills, factories, schools, and other settings). Published methods for analysis of bulk materials were not intended to determine the presence of asbestos in products at less than 1% concentration. In contrast, the likely amount present when asbestos is a contaminant or impurity in talc or talc-containing consumer products might be orders of magnitude below 1%.

What we support

We support legislation that reforms TSCA to ban asbestos in consumer products. But in banning asbestos, the language must ensure that companies cannot escape their responsibilities by relying on less rigorous testing standards used now to determine if asbestos is in a product. We support the amendment that was added to the bill, as follows:

“The prohibitions, requirements, and definitions in the amendment made by this section shall—

⁴ Exclusive: Chanel, Revlon, L’Oreal Pivoting Away from Talc in Some Products, June 9, 2020, <https://www.reuters.com/article/us-chanel-talc-powder-exclusive-idUSKBN23G0GK>

⁵ Executive Summary, Preliminary Recommendations on Testing for Asbestos in Talc and Consumer Products Containing Talc, January 6, 2020, <https://www.fda.gov/media/134005/download>

- (1) apply only to chemical substances as defined in section 3(2) of the Toxic Substances Control Act (15 U.S.C. 2602(2)); and
- (2) have no effect on the prohibitions, requirements, or definitions relating to asbestos for any other purpose, including—
 - (A) defining asbestos for purposes of regulating cosmetics under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); and
 - (B) determining whether a cosmetic contains asbestos either as an ingredient or as an accessory mineral to an ingredient such as talc.⁶

What do opponents say

There is nearly universal support for an asbestos ban. However, opponents of the savings clause amendment claim that adding such a provision is not necessary, would increase litigation, and is an example of trial lawyers holding up liability protections that give businesses certainty.⁷ However, the concern for the potential for more litigation in fact reflects how harmful the cosmetic industry has been in regard to the use of talc in their products. This industry has a history of covering up the existence of asbestos in their talc powders. This amendment will ensure the cover-ups will end. Consumers have the right to bring a claim to demonstrate that ovarian cancer, lung cancer, mesothelioma and asbestosis are linked to the use of asbestos-laced talc products.

Expected supporters

It is expected that there would be widespread support to try again to pass legislation to ban asbestos, including by consumer, health, safety and environmental groups. Some environmental groups, such as the EWG, formed working groups to compile research and analysis that demonstrates the harmful impacts and death rates caused by asbestos in consumer products.

For more information, please contact student Megan Brandon, Megan.Brandon@law.nyls.edu or Executive Director of the Center for Justice & Democracy at New York Law School, Joanne Doroshow, joanned@centerjd.org.

⁶ H.R. 1603, <https://docs.house.gov/billsthisweek/20200928/BILLS-116hr1603-SUS.pdf>

⁷ Asbestos Ban Stalls in Congress Amid Partisan Fight, October 1, 2020, <https://thehill.com/policy/energy-environment/519234-house-democrats-blame-gop-as-asbestos-ban-stalls?rl=1>

APPENDIX: VICTIM STORIES

Gene “Randy” Backe

Gene “Randy” Backe” was diagnosed with mesothelioma in 2018 and died in 2020 as a result of secondhand asbestos exposure he suffered at the hand of the factory his father worked at. In Randy’s case, he claimed that his father’s company, Conwed, provided no warnings to its employees about the dangers of asbestos and did not take adequate safety precautions, which exposed Randy’s father to household asbestos. Randy’s father would come home from work covered in white dust and hung his work clothes alongside his family’s jackets. Little did Randy’s father know that this dust was the result of long-term asbestos exposure that would lead to his son’s death. If there had been a ban on asbestos, Randy would not have been a victim of secondhand asbestos exposure.⁸

Darlene Cooker

Darlene Cooker knew she was dying from mesothelioma but did not know why. Exposure to asbestos is the only known cause of mesothelioma, which means that mesothelioma victims are presumed to have been exposed to asbestos at some point in their lives. Darlene, a mother of two daughters in a small town in Texas did not know that the J&J baby powder she used on her daughters and on herself all her life was the culprit for the cause of mesothelioma and death. Her lawyers suspected talc was the cause of her disease because they knew it was mined from the same rock, but J&J denied it and any link to it, which is why she lost her case. As a result, in 1999, her lawyers were forced to drop the lawsuit because they did not have enough evidence. At the time, J&J was able to avoid handing over talc test results on their products, and now for the first time, twenty years later, J&J is being compelled to shared reports that demonstrate the company’s talc caused cancer in thousands of women.⁹

Gail L. Ingham

Gail L. Ingham used J&J’s baby powder for three decades, starting when she was 13 years old. In 1985 she discontinued its use when she was diagnosed with ovarian cancer - she had no indication that the baby powder was the cause.¹⁰ Because J&J had failed to warn their consumers that the talc in the baby powder contained asbestos, Gail, along with twenty-one other claimants suffered from ovarian cancer; half of them have already died. The court in Gail’s case determined that not only did J&J discuss the presence of asbestos in their talc for decades, but that they also avoided adopting accurate testing measures.¹¹ If more precise methods of testing for asbestos traces in talc had been required, Gail would not be suffering from ovarian cancer as a result of asbestos exposure.

⁸ <https://www.dglobe.com/news/crime-and-courts/6965275-Minnesota-factory-workers-feel-aftermath-of-asbestos-36-years-later>

⁹ <https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer/>

¹⁰ <https://www.drugwatch.com/featured/talc-ovarian-cancer-crisis/>

¹¹ <https://apnews.com/press-release/pr-newswire/617907a0ca30e735268b194183de59b6>