

# Asbestos

## Raising the Bar in Asbestos Litigation

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# Strange Bedfellows: DACA, Asbestos, the EPA, and a Reply to ‘Dangerous Denial’

*A Reply from Mark G. Zellmer of Husch Blackwell LLP*

*Author bio on page 8*

The June 2020 commentary in this journal, “Chrysotile and the EPA: Part of a Continuing Saga,” posited that the U.S. Environmental Protection Agency (EPA) proposed a ban on the few remaining uses of asbestos without an appropriate basis. An article in the August issue of this journal responded under the title, “Dangerous Denial.”<sup>1</sup>

This new commentary, a reply to the August “Dangerous Denial” article, will discuss the following:

- Some further insight into the law governing administrative decisions;
- Scientific positions that the August article did not address;
- Statements on chrysotile by various organizations cited in the August article;
- Low dose exposure causing cancer as an unproven myth;
- Avoidance of the merits of the argument on chrysotile; and
- Claims of an even higher potency for chrysotile than the EPA *Draft*.

## *The “DACA” Decision*

For an article on a legal issue, the August article cites no law on the key topic, to-wit: whether the EPA has established a basis for its intended regulation. Interestingly, in the “DACA” decision by the U.S. Supreme Court,<sup>2</sup> our nation’s

highest court has provided further precedent on what record a federal agency must create as a basis to promulgate further regulation on a subject. In 2017, the current administration commenced a phase-out of the prior administration’s DACA program, which allowed certain immigrant minors to remain in the United States despite their undocumented status. Under the Administrative Procedures Act, certain organizations, including the Regents of the University of California, brought legal action to stop the phase-out. The Supreme Court agreed that the action by the current administration was arbitrary and capricious and lacked a legally expressed rationale for its action.<sup>3</sup>

In doing so, the high court held that the administrative agency, when rescinding earlier policy, must consider “alternatives that are within the ambit of existing policy.”<sup>4</sup> Applied to the EPA’s *Draft Evaluation of Asbestos*, the EPA must consider the efficacy of its current policy. In 2003, the EPA found that chrysotile had a carcinogenic potency that was a small fraction of amphibole asbestos.<sup>5</sup> In its 2020 *Draft*, the EPA found that chrysotile now has essentially the equivalent potency of amphiboles. Certainly, in its *Draft*, the EPA presented numerous calculations of risk, but utterly failed to consider whether there was some continuing occurrence of death or disease from asbestos exposure due to some gap in the present system of regulation. This is par-

ticularly important. As discussed at length in the June article, the EPA’s *Draft Evaluation of Asbestos* provided absolutely no evidence of any death, or even disease, from the types of uses of asbestos described in the *Draft*.

## *Omissions from the August 2020 Article*

The June 2020 article argued extensively that the EPA failed to justify its findings based on death or disease from the current types of use of asbestos. The June article compared that lack of evidence to EPA’s findings of death and disease due to Libby amphibole asbestos which the EPA found to be only 1 percent more potent than chrysotile asbestos. Despite this centerpiece argument in the June article, the August response, like the EPA’s *Draft*, provided no evidence of death or disease occurring from alleged exposures of current types of uses of asbestos. This is not the only omission of the August article. None of the following flaws found in the EPA’s *Draft*, all explicitly raised in the June article, were discussed in the August “Dangerous Denial” article:

- The EPA took its findings from only two epidemiological studies of chrysotile despite the availability of many other such studies.
- The EPA took its findings on lung cancer from one study and its

findings on mesothelioma from another study.

- The EPA selected the highest risk number for mesothelioma from one study and the highest risk number for lung cancer from a different study.
- Despite the differences in the risk profiles of mesothelioma and lung cancer from asbestos exposure, the EPA merely added the risk of lung cancer to the risk of mesothelioma rather than using a more sophisticated and appropriate determination of risk.
- To determine the risk of lung cancer from asbestos exposure, the EPA relied on an epidemiological study of lung cancer that failed to control properly for cigarette smoking.
  - For the determination of the risk of mesothelioma, the study upon which the EPA relied inflated the number of cases of mesothelioma by including pleural cancer not diagnosed as mesothelioma.
- Based only on guesswork about peritoneal mesothelioma cases that are missed during diagnosis, the EPA used a multiplier to inflate further the number of cases of mesothelioma in determining the risk of mesothelioma.
  - The EPA ignored that cases of mesothelioma and lung cancer in epidemiological studies occurring in association with chrysotile exposure only occurred at high levels of exposure found in mining, milling, and manufacturing operations.
    - The EPA ignored all evidence that chrysotile exposure does not cause peritoneal mesothelioma with extraordinarily few cases of peritoneal mesothelioma found in association with chrysotile expo-

**“Certainly, in its Draft, the EPA presented numerous calculations of risk, but utterly failed to consider whether there was some continuing occurrence of death or disease from asbestos exposure due to some gap in the present system of regulation.**

sure as studied in all epidemiology.

- The one epidemiological study on which the EPA based its risk estimate of mesothelioma from chrysotile had uncontrolled confounding factors, including amphibole exposure of the subjects.
  - The EPA did not analyze or even mention that chrysotile is less respirable and less bio-persistent in the human lungs than amphiboles.

Both the EPA and the August article ignore these problems. In fact, the August article is an attempt to support the EPA’s findings with a mere page-and-half of text and a meager 17 footnotes, most of those citing literally no scientific literature. So, what are the contentions raised in the August article?

### ***Incomplete Explanation of Findings by Various Organizations***

The August article cites the EPA, OSHA, and WHO/IARC as organizations finding that chrysotile asbestos is carcinogenic.<sup>6</sup> This tells only a small part of the story.

### ***EPA***

Prior to the *Draft Evaluation of Asbestos* in 2020, the EPA recognized that chrysotile asbestos is substantially less carcinogenic than amphiboles:

- Chrysotile asbestos is only “0.0013 times” as carcinogenic as amphibole asbestos with the “possibility that pure chrysotile is non-potent for causing mesothelioma.”<sup>7</sup>
- Participants in the EPA Peer Consultation Workshop “unanimously” agreed that chrysotile is “two orders of magnitude” less potent than amphiboles.<sup>8</sup>

### ***OSHA***

OSHA reviewed cohorts of different types of asbestos exposure finding that occurrence of mesothelioma was the following:

- For crocidolite, 1.26-16 percent of subjects contracting mesothelioma;
- For amosite alone and amosite/chrysotile with less than 0.1 percent crocidolite, 2.7-7.7

**“If plaintiff attorneys and their experts really supported this view, they would demand a ban on bacon. Indeed, according to the WHO/IARC, bacon is a Class I carcinogen just like asbestos. In its Draft, the EPA found only 750 tons of chrysotile asbestos still in use per year in the United States. By comparison, Americans consumed 46,000 tons of bacon in 2019.”**

percent of subjects contracting mesothelioma;<sup>9</sup>

- For chrysotile only, 0-0.5 percent of subjects contracting mesothelioma.<sup>10</sup>

### WHO/IARC

The World Health Organization and the International Agency for Research on Cancer classify all asbestos as a Class 1 proven human carcinogen. What WHO and IARC do not provide is any indication of the cumulative exposure that is required to cause cancer. Placing a substance in Class 1 does not provide the degree of carcinogenicity. In fact, the WHO avoids answering the question regarding the relative potency of chrysotile.<sup>11</sup> On the other hand, medical doctors and scientists publishing under the auspices of the World Health Organization and the International Agency for Research on Cancer have answered this question opining that “commercial amphibole asbestos (amosite and crocidolite) is 2-3 orders of magnitude more carcinogenic than chrysotile.”<sup>12</sup>

The August 2020 article, like plaintiff attorneys and their experts in litigation, turned to the old claim that there is no safe threshold<sup>13</sup> and that exceedingly small, vanishingly small, amounts of asbestos or other carcinogenic substances will cause cancer. Today, this claim that any dose of asbestos exposure will cause mesothelioma or lung cancer has often been rejected in the courts.<sup>14</sup> If plaintiff attorneys and their experts really supported this view, they would demand a ban on bacon. Indeed, according to the WHO/IARC, bacon is a Class 1 carcinogen just like asbestos.<sup>15</sup> In its *Draft*, the EPA found only 750 tons of chrysotile asbestos still in use per year in the United States. By comparison, Americans consumed 46,000 tons of bacon in 2019.<sup>16</sup>

### *The Low Dose Myth*

To bolster a claim that very small amounts of asbestos will cause cancer, the August article cites the work of Dr. Markowitz, who in turn cites epidemiological studies by Iwatsubo, Rodelsperger, Offermans, and Lacourt. Supposedly, these studies find that low doses of

asbestos exposure cause mesothelioma;<sup>17</sup> however, these studies cited by Markowitz do not make any examination of chrysotile exposure alone and give no opinion that chrysotile alone will cause mesothelioma at low amounts of exposure. Furthermore, prior articles in this journal by the author of the present article have commented that these epidemiological studies are subject to bias, fail to reveal facts forming the basis for statistical analysis, use unreliable methods, and reach inaccurate and unsupported conclusions, especially when compared to other, widely accepted epidemiological studies.<sup>18</sup>

The August article also cites the Kanarek article from 2011.<sup>19</sup> Dr. Kanarek provided no data on the cumulative doses of chrysotile asbestos exposure associated with mesothelioma. On the other hand, the doses which Kanarek discussed are clearly quite high. Studies cited in the Kanarek paper relate to mining, milling and manufacturing operations. Even more pertinent to the issue of dose is the occurrence of cases of asbestosis among the subjects of the cited studies.<sup>20</sup> The additional citation to Lemen in the August article is also not helpful on the issue of the dose of chrysotile required to cause mesothelioma. Dr. Lemen only advocated that chrysotile is carcinogenic and admitted that the “exact potency of chrysotile, per dose needed to cause mesothelioma, . . . remains controversial and has been discussed elsewhere.”<sup>21</sup>

This myth of low levels of carcinogens causing cancer began with the study of the effects of radiation decades ago. It is now widely accepted that the human body can withstand a certain amount of radiation from occupational exposure or otherwise.<sup>22</sup> This myth of exposure to chemicals and minerals causing cancer at low exposures survives at least in part due to its value of promoting recoveries in lawsuits brought by plaintiff attorneys.

### *Misquotes, Misdirection and Ad Hominem Attacks*

Failing to address the actual merits of the June article, the August article presents several gambits.

The August article seriously misquotes the June article as follows: a “policy of protecting the public . . . is not sensible and certainly not science.”<sup>23</sup> The ellipses in the quotation should be the dead giveaway. In fact, to create this misquotation, the August article quotes a phrase from one paragraph and joins it in the same sentence with a phrase from the next paragraph. Here are the two full paragraphs which will give the reader a full sense of the liberties taken in the August article:

The question then arises why did the EPA take the higher number from each study rather than using an average or some other method? The EPA clearly uses safety factors when it sets limits of release for toxic substances in its regulations. It could attempt to justify its choice of study results to calculate chrysotile risk on the basis of safety factors, i.e. select the higher numbers with a policy of protecting the public.

This is not sensible and certainly not science. At best, it confuses science with public policy. Safety factors should be applied after, not before, risk is appropriately determined. By selecting only the higher numbers, EPA is not determining an accurate mathematical representation of the risk of chrysotile.

The pronoun “this” at the start of the second quoted paragraph in no possible way referred to the word “policy” as its antecedent in the first quoted paragraph. No one could realistically think that the author of the June article intended to argue that policies that actually protect the public are not “sensible.” Seriously,

who would argue that? These two quoted paragraphs explain that the EPA may have engaged in a backward process of evaluation, i.e. it allowed policy to influence its scientific determination of risk, rather than deciding policy based upon the science. Initially, the EPA should make a scientific determination of risk. Policy must not determine or influence the science. Then, having an accurate determination of risk, the EPA should apply policy to set a standard, to the extent needed, to protect the public. Simply, the August article substituted a misquotation for an actual argument on the merits.

That is not all. The August article misdirects the reading audience with references to “racial justice” and “COVID-19.”<sup>24</sup> Again, seriously, what is the relevance of those references in a scientific discussion of the risk or lack of risk of chrysotile asbestos? No one can seriously think that the EPA should somehow defend its *Draft Evaluation of Asbestos* using claims about racial justice and COVID-19.<sup>25</sup>

This is not the only misdirection. The August article refers to the June article as the product of the “well-funded” defense bar.<sup>26</sup> No client corporation or insurance company was asked to pay for or in fact paid for any of the time to research and write the June article or the present article. The EPA’s risk calculation of chrysotile asbestos is wrong. That should be reason enough. Any complaint about being well-funded should be directed to plaintiff attorneys. In this endeavor, the plaintiff’s bar appears to be in some sort of common interest with the EPA. Whether from taxes or borrowing, no one in America has access to more money than the U.S. government.

Finally, the August article contains several ad hominem attacks. The thinking of the author of the June article is labelled as “irrational” and “irresponsible” and fraught with “ignorance.” The criticism of the EPA by the author of the June article is claimed to be “at worst, disin-

genuous.”<sup>27</sup> Such hyperbole is needed only when avoiding the real merits of a position.

This is not a matter of “thin skin,” but, rather, a demonstration of the need to resort to this language and these tactics. It begs for an answer to a question — why the need to write in this manner if the merits are on your side.

### *A Final, Extraordinary Claim*

At the end, the August article posits that the EPA’s *Draft Evaluation of Asbestos* is “not perfect” and “actually understates the ability of chrysotile to cause cancer.”<sup>28</sup>

This claim in the August article must be understood in the context of the EPA’s *Draft*. The EPA found that chrysotile was almost equally carcinogenic with some amphiboles. If the EPA has undercalculated the risk of chrysotile, that means that chrysotile is more carcinogenic than amphiboles. This is an unprecedented statement. The article gives no explanation, scientific or otherwise, regarding why such a conclusion should be reached. The only citation for this extraordinary statement is footnote 17 referring to a letter from a plaintiff attorney to the EPA Administrator. Apparently, this claim in the August article is an effort to make an outrageous claim to garner support for the lesser claim which could only be considered reasonable by comparison.

### *Conclusion*

This article, as well as the June article, provides ample evidence of a miscalculation of the risk of chrysotile by the EPA. With no evidence of death or disease from the type of uses of asbestos today and with chrysotile asbestos in use at levels today comparatively so much lower than before, anyone would be entitled to wonder why the EPA and plaintiff attorneys would care so much about this issue. It does not seem to be a real effort to save lives as there is no evidence that anyone is dying from these uses. It must

be more than what it appears. With the EPA finding made final, even though not based on good science, plaintiff attorneys would be given a weapon to make unfair attacks upon defendants and their experts.

### Endnotes

<sup>1</sup> Blouin, D. et al. "Dangerous Denial: Illogical Defense Bar Commentary Ignores Well-Established Science that Chrysotile Asbestos Kills." *Asbestos Columns*. (HarrisMartin: August 2020) at 4.

<sup>2</sup> *Department of Homeland Security v. Regents of the University of California*, 591 U.S. \_\_\_\_ (2020). "DACA" means the "Deferred Action for Childhood Arrivals."

<sup>3</sup> These organizations also brought the action for lack of notice and comment. The current administration also argued that the action by the prior administration was unconstitutional. Neither point is the issue here.

<sup>4</sup> *Id.*

<sup>5</sup> EPA. *Final Draft: Technical Support Document for a Protocol to Assess Asbestos Related Risk* (October 2003) at 1.4.

<sup>6</sup> This article does not admit that chrysotile causes mesothelioma. It is also not intended to settle whether chrysotile does not cause mesothelioma or causes mesothelioma only at very highest cumulative exposure.

<sup>7</sup> EPA. *Final Draft: Technical Support Document*, *supra*.

<sup>8</sup> ERG. *Report of the Peer Consultation Workshop to Discuss a Proposed Protocol to Assess Asbestos-Related Risk*. (EPA Contract No. 68-C-98-148: 2003) at viii (meaning 100 times less potent).

<sup>9</sup> No one has ever explained how chrysotile allegedly contributes to increased risk when combined with amosite.

<sup>10</sup> 51 *Federal Register* 22612 (1986).

<sup>11</sup> World Health Organization. *Chrysotile Asbestos*. (2014) at 9.

<sup>12</sup> Galateau-Salle, F. et al. *World Health Organization Classification of Tumours of the Lung, Thymus and Heart*. (International Agency for Research on Cancer, Lyon: 2015) at 156.

<sup>13</sup> More accurately, their claim is that there is no known safe threshold

<sup>14</sup> For example, see *Betz v. Pneumo Abex*, 44 A.3d 27 (Pa. 2012).

<sup>15</sup> <https://www.cancer.org/latest-news/world-health-organization-says-processed-meat-causes-cancer.html>.

<sup>16</sup>

<https://www.statista.com/statistics/282269/us-households-amounts-of-bacon-consumed-trend/>

<sup>17</sup> Markowitz, S. "Asbestos Related Lung Cancer and Malignant Mesothelioma of the Pleura: Selected Current Issues." *Seminars in Respiratory and Critical Care Medicine*. Vol 36, No. 3 (2105) at 335.

<sup>18</sup> Zellmer, M. "Are the Low Dose Asbestos Exposure Studies Unreliable?" *COLUMNS - Asbestos*. (HarrisMartin: March 2011) at 4-10; Zellmer, M. "Any Exposure Above Background: Is It Really Causative?" *COLUMNS - Asbestos*. (HarrisMartin: February 2015) at 4-10.

<sup>19</sup> Kanarek, M. "Mesothelioma from Chrysotile Asbestos: Update." *AEP*. Vol. 21, No. 9 (Sept. 2011) at 688-697.

<sup>20</sup> *Id.* at 695. Asbestosis occurs from high cumulative exposure, 25 f/cc-yrs of amphiboles, 100 f/cc-yrs for long fiber chrysotile.

<sup>21</sup> Lemen, R. "Chrysotile Asbestos as a Cause of Mesothelioma: Application of the Hill Causation Model." *Journal of Occupational and Environmental Health*. Vol. 10, No. 2 (April/June, 2004) at 233, 237.

<sup>22</sup> <https://radiopaedia.org/articles/dose-limits>. International Commission on Radiological Protection: 20 mSv a year, averaged over defined periods of 5 years with no single year >50 mSv.

<sup>23</sup> Blouin, *supra*. To be specific, this alleged quotation is found in the third paragraph on page one of the June article starting on the 17<sup>th</sup> line of the third column.

<sup>24</sup> Blouin, *supra.*, at 4, 5.

<sup>25</sup> On the other hand, the August article cites and relies upon the pronouncements of the World Health Organization. Blouin, *supra.* at 4. The misstatements and mishandling on COVID-19 by the WHO suggest that reliance on that organization is perilous.

<sup>26</sup> Blouin, *supra.*

<sup>27</sup> Blouin, *supra.*

<sup>28</sup> Blouin, *supra.* at 5. (emphasis in the original)

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