

## Johnson & Johnson Seeks Supreme Court Certification in Talc Litigation Case

MARCH 8, 2021

On March 2, 2021, Johnson & Johnson (J&J) filed a petition with the Supreme Court of the United States in a final attempt to appeal one of the largest product liability verdicts ever in the United States. In the past decade, over 20,000 plaintiffs have filed suit against J&J claiming that the company's talcum powder caused ovarian cancer or mesothelioma. Almost all of the cases against the New Jersey-headquartered company have been brought in New Jersey, California, and Missouri, with St. Louis County being an especially fertile ground for plaintiff victories. The specific case at issue (*Ingham v. Johnson & Johnson*, No. 1522-CC10417 (Mo. Cir. Ct., 22d Judicial Cir.)) in this Supreme Court petition originated from a 2018 trial in St. Louis County that awarded \$4.69 billion to 22 women in a consolidated trial.

**Factual Background.** The *Ingham* trial court consolidated 22 plaintiffs (along with eight spouses), including 17 non-Missouri plaintiffs, who brought claims under 12 different state laws, into a single mass tort trial. This required five hours of jury instructions.

The consolidation meant trying plaintiffs together who had dissimilar talc product usage, risk factors, and ovarian cancer progression. Various plaintiffs used different talc products for different durations, meaning their exposure to talc differed. Additionally, some plaintiffs had a genetic predisposition for cancer such as a BRCA gene mutation that dramatically increases the likelihood of ovarian cancer, whereas other plaintiffs had no such risk factors. The cancer progression of among the plaintiffs also differed as the named plaintiff's ovarian cancer had been in remission for 32 years, whereas other plaintiffs had passed away.

The consolidation also influenced arguments regarding general causation. For example, plaintiffs' counsel urged the jury to infer general causation because all of the plaintiffs used J&J baby powder and all got cancer. In the end, the jury awarded each plaintiff the identical compensatory damages award of \$25 million based on roughly 20 minutes of deliberation per plaintiff. The jury also awarded \$3.15 billion in punitive damages against J&J and \$990 million against Johnson and Johnson Consumer Inc. (JJCI).

**Procedural History.** J&J appealed to the Eastern District of Missouri Appellate Court to overturn the verdict, because the trial court possessed no specific personal jurisdiction over 17 non-Missouri plaintiffs, violated J&J's due process rights by having a single mass tort trial of 22 plaintiffs from various states, and allowed plaintiffs' counsel to improperly state the causation standard during closing. Read our prior blog [here](#).

The appellate court ruled partially in favor of J&J and JJCI regarding the specific personal jurisdiction question. For J&J, the appellate court found that the trial court had no personal jurisdiction over all 17 non-Missouri plaintiffs, but for JJCI, the appellate court ruled that the trial court had personal jurisdiction over 15 of the 17 non-Missouri plaintiffs. The sole factual difference between J&J and JJCI was JJCI had a contract with a Missouri-based company called Phrama Tech who helped label a talc product called Shimmer. As a result, the appellate court found that the trial court had specific personal jurisdiction over 15 non-Missouri plaintiffs who claimed to buy Shimmer—the other two non-Missouri plaintiffs purchased no product with any connection to Missouri. In short, the appellate court believed this contract to label the product was sufficient to establish personal jurisdiction in Missouri.

As a result of this decision, the appellate court reduced the compensatory and punitive damages award to account for the plaintiffs that lacked jurisdiction. Read our prior blog [here](#). But in this process, the appellate court assumed for the purpose of calculating the ratio of punitive to compensatory damages ratio that J&J and JJCI, who had joint and several liability, would both pay for the entirety of the compensatory damages. This means that instead of determining how much each defendant would pay of compensatory damages then calculating the appropriate ratio for punitive damages, the court assumed both companies would pay the full amount of compensatory—thereby raising the upper limit accepted for punitive damages.

J&J requested the appellate court conduct a rehearing or transfer of the case to the Supreme Court of Missouri, both of which were denied. J&J subsequently filed an application to transfer directly with the Supreme Court of Missouri, which also was denied. This exhausted any appellate relief on the state level, leading J&J to petition the Supreme Court of the United States.

***Petition to the Supreme Court of United States.*** J&J’s petition brings three issues to the Supreme Court regarding (1) consolidation, (2) personal jurisdiction, and (3) punitive damages.

First, J&J claims that a mass tort trial violates its Fourteenth Amendment right to a fair trial. J&J noted that that several jurisdictions such as the Second and Fifth Circuits (along with the Supreme Courts of Texas, Iowa, and Mississippi) have rejected single mass tort trials as prejudicial to the defendants “given the maelstrom of facts, figures and witnesses.” Missouri and Alabama conversely claim that any prejudice can be cured through jury instructions. J&J highlights that the jury instructions cannot ameliorate the prejudice of having to argue specific causation for 22 plaintiffs under 12 state laws, and notes that the uniformity of the compensatory damages illustrates this prejudice.

Second, J&J argued that the Missouri court lacked personal jurisdiction over the non-Missouri plaintiffs. The issue here is similar to the question raised in another case recently granted a cert petition case (*Ford Motor Company v. Montana*). In that case, the Supreme Court will review the “arise out of or relate to” requirement for a state court to exercise specific personal jurisdiction over a nonresident defendant. J&J argues that the conduct of JJCI to contract with a bottler for talc in Missouri was not the proximate cause of any non-resident plaintiff’s injuries. And merely allowing “any link” in the chain of causation to lead to specific personal jurisdiction for non-resident plaintiffs permits a state to decide a claim without any legitimate interest in the claim.

Finally, J&J argues that the punitive damages award was unconstitutional, pointing out that state and federal courts are divided about the due process limitations of punitive damages—some mandate 1:1 ratios, others will allow 10:1 ratios, and others fall in between. J&J wants the Supreme Court to set the upper bound permissible for punitive damages under due process. J&J implies that the Supreme Court should set an upper bound of the ratio allowed by due process to be 1:1.

J&J also wants the Supreme Court to weigh in on the technical calculation of punitive damages in a joint and severally liable case. Specifically, J&J wants the Supreme Court to reject Missouri’s approach of calculating the ratio by assuming the defendant will pay the entire compensatory damages—in effect, doubling the potential amount of punitive damages. Instead, J&J proposes the rule adopted by the Eighth Circuit: the court determines each defendant’s share of the compensatory damages before calculating the punitive to compensatory ratio.

***Potential Impact of Granting Cert.*** The effect of consolidation of several plaintiffs into a single mass tort trial can materially affect specific and general causation strategy. For specific causation, there likely will be differences in the

level of exposure, risk factors, and illness progression. These need to be parsed out and analyzed separately, but in a large, consolidated trial, these nuances may get lost within the noise.

For general causation, plaintiffs and defendants often argue over the interpretation of scientific studies such as whether the sample size was large enough, whether there was a dose response, whether the study accounted for confounding factors, or whether the association was strong. The interpretation of these studies is often bolstered by regulatory and non-governmental agencies' reports. But the consolidation of several plaintiffs into one mass tort trial can allow a plaintiff to instead focus on the anecdotal "evidence" sitting in the courtroom: the allegations by many people who used the same product and happened to have the same illness.

With that in mind, the Supreme Court's decision on whether to grant cert, and a subsequent decision, could have lasting impact on the current risks and strategies for mass tort product liability litigation.

For any questions, please contact Matt Saxon, John Drosick, or your Winston relationship attorney. A link to the Johnson & Johnson cert petition may be found [here](#).

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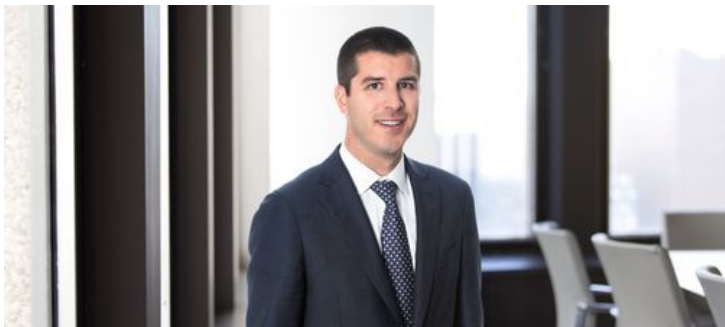
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