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\$72 million verdict may just be the start of talcum powder litigation

PRODUCT LIABILITY

■ **Court:** St. Louis Circuit Court

■ **Case Number/Date:** 1422-CC09012-01/Feb. 22, 2016

■ **Caption:** Jacqueline Fox v. Johnson and Johnson Consumer Companies Inc.; Imerys Talc America Inc.

■ **Plaintiffs' Attorneys:** James Onder, Stephanie Rados and Wylie Blair, Onder Law Firm, St. Louis; Allen Smith, The Smith Law Firm, Ridgeland, Mississippi; Ted Meadows, Jere Beasley and Danielle Mason, Beasley, Allen, Crow, Methvin, Portis & Miles, Montgomery, Alabama; Timothy W. Porter, Porter & Malouf, Jackson, Mississippi

■ **Defendants' Attorney:** Gerard T. Noce, Beth A. Bauer, HeplerBroom, St. Louis, Edwardsville; Mark Hegarty, Gene Williams, Scott James and Kathleen Frazier, Shook, Hardy & Book, Houston, Kansas City (for Johnson & Johnson); Mary Anne Mellow, Sandberg Phoenix & von Gontard, St. Louis; Nancy Erfle and Mike Klatt, Gordon & Rees; Portland, Austin (For Imerys Talc America)

By CATHERINE MARTIN

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When attorney Allen Smith spent time in a South Dakota courtroom a few years ago representing a woman who had ovarian cancer allegedly linked to talcum powder use, he said it was “very much a David versus Goliath situation.”

Smith and one other attorney represented the plaintiff, while 20 to 30 corporate lawyers represented defendant Johnson & Johnson, Smith said. The verdict went to the defense.

In another talcum powder case in St. Louis last week, the plaintiff's team was on more equal footing with dozens of lawyers on each side, including Smith on the plaintiff's side.

In that case, the jury came back with a \$72 million verdict on behalf of a woman who died from ovarian cancer her attorneys said was caused by using Johnson & Johnson products, including its baby powder.

Attorneys involved say the verdict could be the start of a landslide, with more than 1,000 cases over talcum already filed in St. Louis.

“The real issue is, is this going to turn into an asbestos situation, where cases go on for 20 or 30 years, or is Johnson & Johnson going to do the right thing and admit the product is a problem?” said Jim Onder, a St. Louis attorney from Onder Law who also represented the plaintiffs in the case.

“It's too early to tell,” he added.

Johnson & Johnson is firmly standing by its products.

“The talc used in all our global products is carefully selected and meets the highest quality, purity and compliance standards,” Carol Goodrich, director of corporate media relations, said in a statement sent in response to an interview request. “The recent U.S. verdict goes against

decades of sound science proving the safety of talc as a cosmetic ingredient in multiple products, and while we sympathize with the family of the plaintiff, we strongly disagree with the outcome.”

Smith and Onder, however, said the company's own internal documents were crucial in the case.

Evidence included a memo from a Johnson & Johnson medical consultant saying, “anybody who denies risks” between “hygienic” talc use and ovarian cancer will be publicly perceived in the same light as those who denied a link between smoking cigarettes and cancer.”

Documentation of talcum in ovarian tissue dates all the way back to a study in the 1970s, Onder said.

Other studies followed and Onder said the overall consensus showed a 35 percent increase of ovarian cancer in women who used talcum powder, but he stressed that includes anyone who ever used it, even if it was only once.

When limiting the study to those who used it daily, and eliminating individuals who already were at a higher risk, it can be anywhere between a 200 to 500 percent increased risk of ovarian cancer, Onder said.

“The bottom line is, Johnson & Johnson knew since the '70s or the '80s it increased the risk of cancer. It got to the point where there were too many studies out there and it was too overwhelming to deny,” Onder said.

The documents show the company intentionally created confusion at the regulatory level and consumer level “to hide the truth from the public,” Onder said. Documents also indicate the company was talking about litigation risks and punitive damage exposure they would have with lawsuits more than 30 years ago, he said.

In Johnson & Johnson's motion for a directed verdict, the company said the conspiracy claim is based on the company “expressing to various agencies their scientific view — which was then and still is the view of the medical community — that there is insufficient evidence to conclude that talc-based body powder causes ovarian cancer.”

“Expressing such opinions on matters of science is lawful and proper, and there is no evidence that by engaging in matters of scientific discussion Defendants conspired to accomplish an unlawful end or to accomplish a lawful end by unlawful means,” the motion states.

Experts, including doctors, testified on both sides of the case.

More to come

The documents are one of the main differences between the St. Louis case and the one in South Dakota, Smith said.

“We didn't have the totality of the documents, or know the conspiracy story as well as it developed in this trial,” Smith said.

The other difference was the plaintiffs.

The St. Louis case involved more than 60 plaintiffs, including some in St. Louis and New Jersey, where Johnson & Johnson is based. With the New Jersey plaintiffs, there isn't diversity so the case couldn't be removed to federal court, and with the plaintiffs in St. Louis it became a matter of permissive joinder, Onder said.

The woman who became the main plaintiff in the St. Louis case, Jacqueline Fox of Birmingham, Alabama, was diagnosed with Stage 3 ovarian cancer and died last year.

The plaintiff in the South Dakota case was diagnosed

with Stage 1 ovarian cancer and was five years post-diagnosis, doing well.

In the next case, a defense-pick case set to go to trial in April, the plaintiff was diagnosed with Stage 1 ovarian cancer and is in recovery, but the attorneys are optimistic about the case, and others going forward, after the \$72 million verdict last week.

“We knew we had a very strong case going in. Getting a jury to reaffirm that helps,” Onder said. “I think even in the next trial, the defense pick, we're very, very optimistic just because the liability is so egregious.”

After the April trial, the lawyers have cases set to go to trial in July and September, followed by a slew of cases in 2017, including an Illinois consumer class action case. Smith has also been hired by Mississippi's attorney general in a Consumer Protection Act case set for February in 2017.

In total, more than 1,000 cases are on file in St. Louis and about 200 are on file in New Jersey, where Johnson & Johnson is based.

At this point, Onder said the plan is to take each of those cases to trial, which could mean the litigation stretches out over decades.

“That's a definite possibility,” he said.

More cases will likely continued to be filed in the meantime, he said, pointing to one of the plaintiff's expert witnesses that said about 1,500 women a year die of ovarian cancer caused by talc.

Appeal questions

Major plaintiffs firms from all over the country have already contacted Onder to discuss the possibility of taking on these cases, he said. But Onder isn't convinced that talc-specific firms, like asbestos firms, will come into their own.

Smith said he anticipates that future verdicts would be in similar dollar amounts, because of the suffering that comes with ovarian cancer, including many surgeries.

Kimberly Norwood, a Washington University law professor who teaches product liability, said it's impossible to put a price tag on any future plaintiff's verdicts.

In this case, the amount included \$10 million in actual damages and \$62 million in punitive damages. Norwood said she thinks the punitive damages will be overturned on appeal because it's outside of the normal ratios looked out when assessing compensatory damages.

“They have grounds to challenge that amount is too high,” she said.

Norwood does think the jury's verdict indicates more plaintiffs' verdicts coming down the pipeline in these cases, but she thinks comparing it to asbestos cases may be a stretch.

“I don't think anything is like asbestos. Cigarettes haven't even reached that level,” she said.

The “huge” judgment in the case may, however, send a message to the company and have them contemplating if it wants to try each of the filed cases or opt instead to settle.

The number of cases means a lot of time and lawyers' fees, but if consumers hear the company is settling, it could prompt additional lawsuits to pop up.

“Really, they will have to crunch the numbers,” Norwood said.

The Associated Press contributed to this report. MO