

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

OCTOBER 2021

IN THIS ISSUE

Subject to a never-ending barrage of lawsuits stemming from allegations that Johnson & Johnson's talcum-based baby powder products contained harmful materials, such as asbestos, and that Johnson & Johnson (J&J) hid the information while continuing to market and sell, will talc claims now follow the paths of claims against Johns Manville, GM, and others? This article discusses the status of the chapter 11 filing of the J&J spin-off and the likely future of talc claims within the legal system.

Talc-Asbestos Claims Against Johnson & Johnson May Proceed for Now; Status of J&J Subsidiary Created to Hold Liabilities Being Weighed

ABOUT THE AUTHORS



Stephanie A. Fox is a director of Maron Marvel Bradley Anderson & Tardy, LLC in Wilmington, Delaware, and Philadelphia, Pennsylvania, and chair of the firm's Business and Commercial Litigation Practice Group. As a trial and appellate counsel, she focuses her practice on general business and commercial disputes and the defense of toxic tort matters. She can be reached at saf@maronmarvel.com.



Donald R. Kinsley is a director of Maron Marvel Bradley Anderson & Tardy, LLC in Wilmington, Delaware, who concentrates his practice on representing major corporations and individuals in state and federal court, in complex cases involving products liability, toxic tort, construction, commercial, personal injury and employment cases, among others. He can be reached at DRK@maronmarvel.com.

ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Stephanie A. Fox
Vice Chair of Newsletters
Maron Marvel Bradley Anderson & Tardy LLC
saf@maronmarvel.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

In a recent decision, U.S. Bankruptcy Judge J. Craig Whitley has allowed talc suits against Johnson & Johnson (J&J) to proceed pending a hearing in early November. However, he granted a temporary restraining order blocking the 38,000 talc injury claims against the subsidiary set up by J&J to hold talc-related debts, and Johnson & Johnson Consumer Inc. (JJCI).

This past July, Reuters reported that J&J was exploring opportunities to divest its mounting talc liabilities using chapter 11 bankruptcy. Although J&J itself, one of the world's biggest pharma companies with an estimated worth of more than \$420 billion in market cap, did not declare bankruptcy, it moved one step closer to such divestiture when, on Oct. 12, 2021, it utilized a Texas law that allows liabilities to be separated from assets into a new entity. J&J had set up a subsidiary, LTL Management, LLC (LTL), solely for the purpose of holding all talc-related debts and, if necessary, paying out on talc-related liabilities. Most of these claims allege that cosmetic talc causes ovarian cancer and mesothelioma. This maneuver has been used previously by several companies facing asbestos-related litigation as a shield from Chapter 11 proceedings.

Two days later, on Oct. 14, 2021, LTL filed for voluntary chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the Western District of North Carolina. The Court filings suggest that this move is intended to resolve

all claims related to cosmetic talc in a manner that is equitable to all parties, including any current and future claimants. J&J and its other affiliates have not filed for bankruptcy protection and will continue to operate their businesses as usual.

In connection with the chapter 11 filing of LTL, J&J has agreed to provide funding to LTL to pay obligations determined by the Court and will also establish a \$2 billion trust to aid in this process. In addition, LTL has been allocated certain royalty revenue streams from J&J with an estimated present value of more than \$350 million. If approved by the Bankruptcy Court, these monies will be available to current and future plaintiffs. The final determination of an appropriate amount to resolve all current and future claims will ultimately be decided by the Bankruptcy Court. Of note, while LTL pursues the creation of an equitable claims process and funding of a trust for payout of all claims through the chapter 11 process, J&J sought to have all cosmetic talc cases stayed against it, as well as LTL, pending the outcome of the chapter 11 proceedings.

In court filings, J&J stated that chapter 11 was necessary because had J&J not engaged in the new subsidiary's chapter 11, the payouts "would not have been tenable." J&J reported that as the lawsuits have mounted, growing to nearly 40,000 claims, J&J has spent almost \$1 billion in defense costs over the last five years. Settlements and jury-awarded payments, meanwhile, have

reached as high as \$3.5 billion. “[T]he costs associated with the continued litigation of the claims for decades to come would have been simply unsustainable,” the filing read. “The status quo therefore was untenable, and this chapter 11 case is necessary to appropriately assess, resolve, and administer these claims in an efficient and equitable manner.”

On Oct. 22, 2021, Judge Whitley declined to block talc suits against J&J, stating he would consider in early November extending the chapter 11 stay of litigation to J&J. However, he granted a temporary restraining order blocking the 38,000 talc injury claims against LTL (as the filing debtor) and JJCI which ceased to exist through the merger transaction earlier this month.

Under the ruling, the claims against parent company J&J can proceed until a preliminary injunction hearing scheduled for November 4th because Judge Whitley said he did not have sufficient evidence that the company had an identity of interest with LTL and JJCI, or, that it did not have its own independent liability for the talc injury claims. “I don’t know whose liabilities these are, but the evidence presented today gives me grave concerns that these may be independent liabilities of the Johnson & Johnson company that were not subject to the divisional merger and were not brought into these bankruptcy cases,” Judge Whitley said.

J&J created LTL as part of a “Texas two-step” strategy where the company completed a series of corporate transactions that resulted in a subsidiary being split in two, a

practice allowed under Texas corporate laws. J&J took the former JJCI subsidiary, which held the talc liabilities, and split it into *New JJCI* which received the assets of the prior JJCI — and LTL, which was burdened with the company’s talc liabilities. LTL was then converted into a North Carolina LLC and, thereafter, commenced the bankruptcy case in Charlotte.

Judge Whitley stated that J&J executed these transactions through its old JJCI subsidiary, so the ultimate parent is not automatically entitled to the protections of the stay triggered by the chapter 11 filing, while the old JJCI would, since it was the immediate parent through which the divisive merger was completed.

The debtor, LTL, offered testimony through its chief legal officer at the hearing about how J&J had handled talc liabilities over the previous several decades, saying that the old JJCI entity had historically covered legal expenses and adverse judgments related to the thousands of claims that its baby powder products caused ovarian cancer or mesothelioma. These costs had been covered by JJCI since 1979, he said, when J&J initially transferred the talc assets to JJCI and were paid regardless of whether J&J itself was named as a defendant. LTL’s representative also testified, however, that there was no contemporaneous documentary evidence of the 1979 agreements, therefore the court was unable to determine if J&J held any individual liability related to talc claims.



J&J has referred to the nearly 40,000 lawsuits filed against it as an “unrelenting assault” by greedy lawyers, while plaintiffs’ lawyers call J&J’s bankruptcy filing a “gimmick” that “is as despicable as it is brazen” and “an unconscionable abuse of the legal system.” In the weeks leading up to the chapter 11 filing, lawyers representing women with cancer claims asked multiple judges to forbid J&J from executing such a maneuver, only to be turned down.

And if the question of a stay for J&J is not enough, in a motion filed late on Oct. 25, 2021, the bankruptcy administrator for the Western District of North Carolina said the interests of justice would best be served by sending the chapter 11 case of LTL to New Jersey where thousands of talc injury claims are pending in a federal multidistrict litigation and where the strongest connection for the debtor exists. The court will consider this motion at a hearing scheduled for Nov. 10, 2021.

Given the enormity of the possible claims and liabilities at issue, future rulings will be closely watched and reported.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

SEPTEMBER 2021

[State of Play of Pending Climate Litigation at European Level](#)

Sylvie Gallage-Alwis, Stephanie Eaton, and Inès Zaoui

MAY 2021

[Talc Verdict Overturned as Appellate Court Finds Experts' Opinions Lacking](#)

Alyson Walker Lotman and Michael L. Fox

APRIL 2021

[Is Pennsylvania Chipping Away at Your Fair Share?](#)

[Superior Court Panel Deems Fair Share Act Inapplicable When Plaintiff is Not Contributorily Negligent](#)

Stephanie A. Fox and Joseph G. Grady

MARCH 2021

[Supreme Court to Again Consider the Interplay Between a CERCLA Cost Recovery and Contribution Action](#)

Jeffrey Karp and Edward Mahaffey

FEBRUARY 2021

[The Intersection of Religious Rights and Environmental Claims](#)

Jim Shelton

JANUARY 2021

[A Matter of Trust:](#)

[North Dakota's Asbestos Bankruptcy Trust Transparency Act's Disclosure Requirements Survive Constitutional Challenge](#)

Elizabeth Sorenson Brotten

DECEMBER 2020

[Over-naming in Ohio Asbestos Litigation: A Legislative Solution is Needed](#)

Laura Kingsley Hong and Mary Margaret Gay

NOVEMBER 2020

[Pentagon Faces Quandary in Adequately Addressing PFAS-Contaminated Water Resources at Hundreds of Bases and Surrounding Communities](#)

Jeffrey M. Karp and Edward Mahaffey

OCTOBER 2020

[Anxiety to Develop a Disease in the Future: A New Toxic Tort Trend](#)

Sylvie Gallage-Alwis and Deborah Azerraf

SEPTEMBER 2020

[The Flint Water Crisis – is \\$600 Million Enough?](#)

Stephanie A. Fox