

## J&J, Imerys Beat \$117M Talc Verdicts Over Flawed Testimony

By **Bill Wichert**

*Law360 (April 28, 2021, 5:17 PM EDT)* -- Johnson & Johnson and Imerys Talc America on Wednesday wiped away verdicts totaling \$117 million in damages over claims J&J's talcum powder products contained asbestos and caused a man's mesothelioma, after a New Jersey appeals court found that his experts' improper testimony warranted new trials.

Slightly more than three years after jurors sided with Stephen Lanzo III and his wife, a three-judge appellate panel nixed the verdicts and ordered new trials after concluding that Superior Court Judge Ana C. Viscomi was wrong to allow James Webber and Dr. Jacqueline Moline to testify during the trial that non-asbestiform minerals could cause mesothelioma.

The experts did not back up that testimony, which was particularly concerning given that a defense expert acknowledged on the witness stand that there were "non-asbestiform amphiboles" in some of the talc used in the pharmaceutical giant's baby powder, according to the published panel opinion by Appellate Division Judge Joseph L. Yannotti.

"If the jury believed Webber's and Moline's testimony that those non-asbestiform minerals could cause mesothelioma, it may have concluded that the asbestiform/non-asbestiform distinction did not matter and that defendants had essentially admitted that some [J&J baby powder] contained cancer-causing amphiboles," Judge Yannotti wrote.

The decision is a big victory for J&J and Imerys in litigation across the country over claims that purportedly asbestos-containing talc supplied by Imerys or its predecessors and used in J&J products have left consumers cancer-stricken.

J&J told Law360 on Wednesday in a statement that the panel's "careful opinion is consistent with decades of independent scientific testing confirming our talc is safe, does not contain asbestos and does not cause cancer."

"The court struck at the core strategy of the plaintiffs' bar, concluding that paid experts are not allowed to present junk science that purports to find asbestos where there is none. These unproven theories have been the centerpiece of the talc litigation, and today's opinion marks an important rejection of that approach," the company said. "We deeply sympathize with anyone suffering from cancer, which is why the facts are so important."

Imerys said Wednesday in a statement that it is "very pleased by the appellate court's decision to reverse the verdict in the case," and that it "stands by the integrity and safety of our products."

One of the Lanzas' attorneys, Moshe Maimon of Levy Konigsberg LLP, on Wednesday said they would ask the New Jersey Supreme Court to take on the case.

"We are disappointed by the panel's decision. Since this case was tried in 2018, investigative journalists have published about the asbestos in J&J talc, the [U.S. Food and Drug Administration] found asbestos in off-the-shelf baby powder, additional scientific studies linking talcum powder usage to mesothelioma were published and the product was taken off the U.S. market," he said in a statement.

At the end of a more than two-month trial, jurors found in April 2018 that Johnson & Johnson Consumer Inc. products including its baby powder contained asbestos, and that Lanzo's exposure to the toxic mineral in the products between 1972 and 2003 played a substantial role in his contracting mesothelioma.

The jury ultimately awarded compensatory damages totaling \$37 million and \$80 million in combined punitive damages.

But the panel threw out the verdicts on appeals from J&J and Imerys and ordered new, separate trials against the companies. It largely relied on the state Supreme Court's 2018 landmark decision in Accutane, which outlined the "gatekeeping" role that trial courts must play in evaluating the admissibility of expert testimony.

Judge Viscomi failed to perform that analysis in permitting Webber and Moline to testify that non-asbestiform cleavage fragments of certain minerals may cause mesothelioma, the panel said. The judge "did not assess the methodology, or the underlying data used by the two experts to form their opinions," the panel said.

On the witness stand, Webber and Moline each fell short in supporting those claims, the panel said.

Webber, for example, "did not identify any data underlying his opinion" and "did not demonstrate that any of the authorities he relied on would be reasonably relied on by other experts in his field to reach an opinion regarding causation," it said.

Moline testified there has been "published literature showing that non-asbestiform amphiboles cause mesothelioma, and that there have been studies of groups exposed to non-asbestiform minerals that show elevated rates of mesothelioma," but she did not "identify any other specific literature or studies supporting those claims during her testimony," the panel said.

Permitting such testimony was not harmless error in light of the testimony from defense expert Matthew Sanchez, as well as testimony from another plaintiffs' expert, William Longo, who claimed that testing under his supervision found asbestos in certain "'vintage'" samples of J&J talc products, the panel said.

"Longo's testimony shows that he made no attempt to distinguish between asbestiform and non-asbestiform amphiboles for the single fibers he detected in the vintage samples," it said.

Opening and closing remarks by the plaintiffs' counsel at the trial also came under scrutiny. For example,

an attorney for Lanzo "argued in his opening statement that non-asbestiform fibers could cause asbestos-related disease," the panel said.

"The trial court's admission of Webber's and Moline's opinions that non-asbestiform amphiboles could cause mesothelioma was clearly capable of producing an unjust result in light of Longo's and Sanchez's testimony and plaintiffs' counsel's repeated arguments echoing their unsupported views," the panel said.

Besides the testimony from Webber and Moline, the panel examined how Judge Viscomi instructed jurors that they could draw an adverse inference against Imerys in connection with certain missing evidence. The judge said any inference "'would be as to defendant Imerys only and no other defendant in this case."

The panel concluded that the instruction was justified with respect to Imerys but "unduly prejudicial" to J&J.

"We are convinced, however, that once the jury was permitted to draw an adverse inference that Imerys' talc was contaminated with asbestos, it would be difficult, if not impossible, for the jury not to make the same finding as to JJCI," the panel said. "We therefore conclude that the trial court erred by failing to sever the claims against JJCI and Imerys."

Judges Joseph L. Yannotti, Michael J. Haas and Hany Mawla sat on the panel for the Appellate Division.

The Lanzas are represented by Moshe Maimon of Levy Konigsberg LLP and Denyse F. Clancy of Kazan McClain Satterley & Greenwood.

J&J is represented by E. Joshua Rosenkranz, Robert M. Loeb, Paul David Meyer and Naomi J. Scotten of Orrick Herrington & Sutcliffe LLP and John C. Garde of McCarter & English LLP.

Imerys is represented by Roman Martinez and Elana Nightingale Dawson of Latham & Watkins LLP and Cindy Nan Vogelmann of Chasan Lamparello Mallon & Cappuzzo PC.

The cases are Lanzo et al. v. Cyprus Amax Minerals Co. et al., case numbers A-005711-17 and A-005717-17, in the Superior Court of the State of New Jersey, Appellate Division.

--Editing by Adam LoBelia.