

## J&J's 3-Deal Day Signals A Shift In Legal War Over Talc

By Daniel Siegal

*Law360 (March 29, 2019, 10:39 PM EDT)* -- Johnson & Johnson has fought tooth-and-nail against a wave of suits claiming its talcum powder products contain asbestos, but three Wednesday settlements are a sign the pharmaceutical giant now wants to keep at least some of the closely watched cases from going before a jury.

Even as it has been hit with billion-dollar verdicts, investor complaints and a government inquiry stemming from the thousands of suits alleging its baby powder causes cancer, J&J has held the line that its products are safe, and has refused to cut deals with plaintiffs.

But after reaching what appeared to be its first-ever asbestos-in-talc case settlement in December, the company on Wednesday struck a trio of confidential deals with three women who all alleged they got mesothelioma from using J&J's products. The deals ended an Oklahoma trial while the jury was deliberating, a California trial that had just started, and a New York case slated to go to trial next month.

While J&J said the settlements were "one-off" situations and it has no intention of seeking further deals, product liability attorneys and other watchers of the talc litigation say it's no surprise that the public company would start to try to keep the most potentially damaging cases out of the courtroom.

Jean Eggen, professor at Widener University Delaware Law School, said J&J's general refusal to settle talc cases reminds her of the approach taken by perhaps the most prominent mass tort defendants in U.S. history: big tobacco.

"I tend to think of the company the way I thought of the tobacco companies back in the day, before they settled anything," Eggen said. "That by hook or by crook they were going to fight every single case, every single individual, and they won most of the cases. But when they started losing some of the cases, they were more willing to open up and settle."



Johnson & Johnson settled three lawsuits over its baby powder, shown with other company products. (AP)

She said the settlements appear to be a shift in J&J's strategy, and that the company is now open to the possibility of settling a talc case depending on its unique facts.

"They scrutinize these cases very closely on an individual basis — what happened at trial, the sense they got from the jury — and are willing to settle individual cases right now but go forward with other cases," she said.

Interestingly, the deals came the same day the company scored a resounding victory in a talc case in New Jersey, where a jury needed less than an hour of deliberations after a monthlong trial to find that J&J's baby powder did not contain asbestos or cause a man's mesothelioma.

J&J touted this result in its Wednesday statement about the settlements, which emphasized the company's belief in the safety of its products, and painted the deals as one-off situations where settlement was reasonable.

"We do not have any organized program to settle Johnson's Baby Powder cases, nor are we planning a settlement program. Rather, we will continue to vigorously defend the safety of Johnson's Baby Powder in the courtroom."

Elizabeth Burch, a mass tort-focused professor at the University of Georgia School of Law, said J&J will likely try to identify the cases that pose the biggest risks — such as the 22-woman trial in St. Louis that resulted in a \$4.69 billion verdict last year — and target those for pretrial resolution.

"J&J can always strategically pull cases from the trial stream as we're seeing them do now," she said. "If they're wise they're settling the cases they're worried about losing, the ones that seem strongest."

Burch added that J&J has been feeling the pressure from these lawsuits in the boardroom as well as the courtroom. The company's stock price has dipped, and it is now facing shareholder litigation over its handling of the talc suits.

She said that once internal J&J documents that appeared to show it had found asbestos in its talc were made public following their use in trials, J&J gained added incentive to keep talc cases out of court, and out of the news.

"I think media reports do a really nice job of amplifying the pressure, and there's nothing more damning than a company's own documents to that effect," she said.

Duane Morris LLP partner Robert Kum, who specializes in defending mass torts, added that the sheer omnipresence of lawsuits about a specific product can change the calculus for the business involved.

"There used to be a time that conventional wisdom was that these big companies would try every single case, thinking they could wear down these plaintiffs firms," he said. "But the opposite seemed to happen: These companies started getting worn down, and even if they win most of the cases, most of them are publicly held companies. These trials are in the news, [and] it's not good for the shareholders."

Kum said that after Merck & Co. paid out more than \$1 billion in 2016 to settle claims it illegally marketed its painkiller Vioxx, its stock price actually went up.

Plaintiffs attorney James Morris of the Morris Law Firm said J&J is likely "getting tired of the verdicts and

the publicity that they generate."

The company revealed in a February regulatory filing that the U.S. Department of Justice, the U.S. Securities and Exchange Commission and U.S. Sen. Patty Murray, the top Democrat on the Senate health committee, had all sent subpoenas seeking records related to the asbestos allegations.

"I wouldn't be surprised to see them settle the mesothelioma cases because I think they've got a political problem there. I don't think it's just a product liability problem," Morris said.

Morris said that, unlike in the related wave of suits alleging talcum powder itself causes ovarian cancer, which is based on a scientific link that has not been universally accepted by the courts, decades of litigation have created a rock-solid link between asbestos exposure and mesothelioma. Thus, in cases alleging talc contains asbestos, J&J can't point to ambiguous scientific studies to sink verdicts on appeal.

Kum said that seeing a plaintiff with mesothelioma can predispose a jury to assume that they must have been exposed to asbestos somewhere — and if J&J can't offer an alternative theory on asbestos exposure, it might be easier to try to settle the case before it gets to the jury.

"Jurors want to know why," he said. "The reality is the jury always wants to know, so just saying, 'We don't know,' isn't enough."

Kum said that other potential asbestos exposures and other specific facts from each plaintiff's case will factor into J&J's calculus when it decides if a case is worth settling.

"I think every case gets evaluated differently. ... Part of it is the plaintiff's attorney," he said. "If you're dealing with a plaintiff's attorney who is demanding \$100 million in every case, you know you're going to trial."

This doesn't mean the settlements reached this week are the result of plaintiffs agreeing to take small enough deals, however, according to plaintiffs attorney Max Kennerly of Kennerly Loutey.

"Johnson & Johnson is not afraid of appealing something forever," Kennerly said. "It obviously indicates on J&J's side that they see some risk in this litigation. ... I think we can assume this was not a nuisance value [settlement]."

On Wednesday, Jessica Dean of Dean Omar Branham Shirley LLP, an attorney for the Oklahoma plaintiff, Sharon Pipes, told Law360 that while her client's settlement amount was confidential, "[J&J] paid our number, and we're super happy."

Kennerly said this week's deals are a sign that the first wave of bellwether talc trials are having their intended effect, and are giving both plaintiffs and J&J the information they need to start settling more cases.

"The dam is broken here," he said.

Even if J&J has decided to start settling particular cases alleging its talc contains asbestos, attorneys and experts alike agreed that a global settlement seems exceedingly unlikely.

Burch said that because mesothelioma usually appears decades after asbestos exposure, even if J&J

pulled all of its baby powder off the shelves today, it's no guarantee that it won't be facing more cases down the road.

And she noted that with mass torts related to pharmaceuticals, a defendant can agree to a new warning label so it won't face future cases — such as in the **\$775 million deal** Bayer and Janssen reached this week over their blood thinner Xarelto. But baby powder is an over-the-counter product, and a label saying it contains asbestos would likely tank its sales, according to Burch.

However, each time J&J loses a talc trial, the idea of settling will grow more and more attractive, Eggen said.

"Tobacco had a definite policy, and it went on for a long time ... and even when it appeared they might be losing some of the cases, they just would not change their approach," she said. "And then suddenly, it just became clear that they had to."

--Editing by Breda Lund and Kelly Duncan.