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Johnson & Johnson v. Ingham: Ideal Opportunity for SCOTUS to Address Due-Process Limits on Claim Consolidation

by Gregory S. Chernack

The talc litigation and the courts in Missouri have provided plaintiffs and their counsel with a veritable feast. Pick a jurisdiction that is recognized as one of the most plaintiff friendly in the United States (the City of St. Louis) and allow for a 22-plaintiff trial with plaintiffs from all over the nation despite virtually all of them lacking any connection with Missouri. And for the cherry on top, permit a massive award of punitive damages. The result: A judgment against Johnson & Johnson (J&J) for over $2 billion in the case of *Johnson & Johnson v. Ingham*.

Earlier this month, J&J filed a petition for certiorari on three issues: (1) whether consolidating so many plaintiffs into a single trial constitutes a due process violation, (2) whether the punitive damages award violates due process, and (3) whether personal jurisdiction exists over J&J for most of the claims. The first of these issues – one the Court has never directly addressed – is ripe for review.

The facts of what occurred readily demonstrate the severe prejudice J&J suffered in allowing a trial with so many plaintiffs. The 22 plaintiffs, women who alleged their use of J&J products caused them to develop ovarian cancer, sued under the laws of a dozen different states. The differences among the plaintiffs were manifold: they had used the products for different lengths of time and for different ways; they all had different risk factors for developing cancer; they had wildly divergent outcomes with some having been in remission for years and others dying from their disease. Nonetheless, the court (over J&J's objection) allowed the mass trial to proceed. The jury instructions lasted 5 hours. And when the jury returned with its verdict, it awarded each plaintiff – despite the different outcomes of their disease – an identical award of $25 million in compensatory damages. The court of appeals found no problem with trying all of these plaintiffs together, upholding the compensatory damage award (except for two plaintiffs for whom the court found no jurisdiction), and the Missouri Supreme Court declined to hear the case.

Over the past several decades, the Supreme Court and Congress have addressed abuses in class actions. Among other things, the Court has recognized the problem of combining plaintiffs when the underlying facts have significant differences and how class actions prevented an individualized determination of each plaintiff's claims. What the Missouri courts have done here is permit an end run around these limitations on class action litigation but allowing for what can be even more troubling – allowing for large groups of plaintiffs to participate in a single trial.

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The prejudice is obvious. The jury engages in a simplistic – and logically and scientifically fallacious – methodology of concluding that a product must be causing the injury because of the presence of so many plaintiffs experiencing the same injury under very different circumstances. An attempt to understand the science is invariably buried in the avalanche of sympathy understandably engendered for the plaintiffs. Further, the stronger claims buttress the weaker ones as jurors become overwhelmed with the facts surrounding each individual plaintiff as well as the various laws at issue. That is exactly what transpired here, with the jury awarding large and identical damages awards to plaintiffs whose cancer had been in remission years as to those who were deceased. This case encapsulates all the problems with permitting a single trial to resolve so many claims.

Over the past several decades, a number of federal courts of appeals have held that due process concerns trump convenience in permitting multi-plaintiff trials. The paramount concern is—as these courts have held it must be—individualized justice. As the Second Circuit explained: "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of towering mass litigation." *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993). Indeed, another Missouri court understood this problem perfectly: "[T]he question of improper joinder . . . raises serious questions of due process. There is a risk of confusion of the evidence and the law applicable to each Plaintiff." *Ellis v. DePuy Orthopaedics, Inc.*, No. 1116-CV27794, slip op. at 4 (Mo. Cir. Ct. Jackson Cnty. Feb. 9, 2012). That these problems can be cured by jury instructions, as the Missouri Court of Appeals concluded in this case, is nothing more than a fiction.

Even the Missouri legislature recognized the problems with what occurred in this case. Less than a year after the jury reached its verdict, a new joinder statute was enacted that among other things preclude joinder in cases such as this one. As the law now states, "claims arising out of separate purchases of the same product or service, or separate incidents involving the same product or services shall not satisfy this section." 507.040 RSMo. Many Missouri courts had been willing to conclude that merely alleging the same product and same injury were sufficient to permit joinder; that should no longer be the case. Yet even with this new statute, courts in Missouri are still permitting large multi-plaintiff trials as the statute has limited retroactivity and plaintiffs lawyers and some courts are looking for ways around it.

The massive prejudice engendered by such multi-plaintiff trials is obvious. Although states may try to legislate to prevent the problem, that will not stop plaintiffs lawyers and many judges (particularly in plaintiff friendly jurisdictions) from attempting to work around such statutes. Only by recognizing the fundamental unfairness of such a procedure (as many courts have) can the Supreme Court end this practice. *Johnson & Johnson v. Ingham* presents an ideal vehicle to do so.

