

Johnson & Johnson Beats Back Shareholder Lawsuit Tied to Asbestos

By Charles Toutant

A shareholder suit over Johnson & Johnson's sale of talc products that allegedly contain asbestos fibers was dismissed by a New Jersey federal judge.

U.S. District Chief Judge Freda Wolfson of the District of New Jersey dismissed the lawsuit Sept. 27 without prejudice based on the plaintiff's failure to make a presuit demand on Johnson & Johnson's board of directors, a violation of the New Jersey Business Corporation Act. She rejected the claims of plaintiff Marc Hirschfeld that such a gesture would be futile and that the circumstances are subject to a futility exception to the court rule that was the basis of the demand requirement before the statute was enacted.

Hirschfeld claimed that Johnson & Johnson board members breached their fiduciary duties by failing to stop the company's sale of talc-based body powders after learning of research linking the products to ovarian



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cancer, and of tests indicating Johnson & Johnson's talc contained asbestos or asbestos-like fibers.

The shareholder suit relies on the same factual underpinnings that are involved in thousands of suits brought against Johnson & Johnson over its baby powder. According to the suit, Johnson & Johnson has known as early as 1971 of tests that indicated that talc used in some of its products contained asbestos or asbestos-like fibers.

And since 1982, the suit says, Johnson & Johnson has known of studies finding a woman's repeated use of talc-related

powders for feminine hygiene significantly increases her risk of developing ovarian cancer. Despite this knowledge, Johnson & Johnson continues to sell its talc products and disavows the presence of asbestos in its products or that there is any link between talc usage and ovarian cancer, the suit claims.

Hirschfeld filed his suit in October 2018. The suit names Johnson & Johnson and 11 individual board members as defendants.

Several months before Hirschfeld filed, another stockholder made a demand on the board with regard to the issue raised in

Hirschfeld's suit, the company said in court papers. In response to that demand letter, the company retained Debra Wong Yang of Gibson, Dunn & Crutcher in October 2018 to analyze the facts surrounding allegations, as well as any other demands or shareholder suits raising similar issues. It's unclear whether that report has been completed, and J&J did not respond to a question about it.

Although Rule 23.1 of the Federal Rules of Civil Procedure provides the vehicle for addressing the adequacy of a shareholder complaint, the substantive requirements are a matter of state law since that's what provides the basis for board members' powers, Wolfson said.

Before the NJBCA, courts evaluated the adequacy of presuit demand pleadings under Rule 4:32-5 of the New Jersey Rules of Court, which "codified the common law requirement that a derivative suit plaintiff plead with particularity either his efforts to induce board members to take the desired remedial action, or the reasons why such efforts would have been useless," Wolfson wrote.

Hirschfeld said a futility exception in Rule 4:32-5, which has not been repealed, remains a viable option. But Wolfson rejected that argument for two reasons. First, the court rule is a procedural rule rather than a source of substantive law. The Supreme Court's rule-making power is

limited to practice, procedure and administration, and substantive law is the exclusive domain of the Legislature. Wolfson cited case law dictating that in areas of substantive law, court rules yield to legislation.

Keith Miller of Robinson Miller in Newark, who represented Johnson & Johnson along with attorneys from Sidley Austin, did respond to a request for comment. **Erik Haas of Patterson Belknap Webb & Tyler in New York** and Edwin Chociey Jr. of Riker Danzig Scherer Hyland Perretti in Morristown, who represented the board, and Karina Kosharsky of Kirby McInerney in New York, representing plaintiff Hirschfeld, also did not return calls. ■