Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

J&J Seeks High Court Holy Grail: A Cap On Punitive Damages

By **Cara Salvatore**

Law360 (March 23, 2021, 9:39 PM EDT) -- If the U.S. Supreme Court reviews Johnson & Johnson's $2.1 billion loss to cancer patients who blamed the company's talcum powder for their illness, the case could be a chance to place new constraints on juries' power to award punitive damages — a change high on the corporate defense bar's wish list for decades.

The high court hasn't considered a punitive damages case in 12 years, although it heard a string of them in the late 1990s and 2000s without creating any broad, line-in-the-sand caps. J&J believes it has the right case to rekindle the justices' interest: the injury litigation known as Ingham in which 22 ovarian cancer patients and surviving spouses won $2.1 billion, $1.6 billion of it punitive damages, from a St. Louis Circuit Court jury.

"I think it's plausible that they could dive back into the pool," said Evan Tager of Mayer Brown LLP, a corporate defense appellate specialist closely following Ingham. During a failed bid for Missouri Supreme Court certiorari, he authored an amicus brief for the U.S. Chamber of Commerce supporting J&J.

"It's a mass tort case, and the court really hasn't provided enough guidance on what the limits of punishment should be in cases where there are going to be potentially multiple juries looking at the same conduct," Tager said, calling the case "a uniquely good vehicle" for review.

The plaintiffs' bar thinks the exact opposite. Robert Peck of the Center for Constitutional Litigation, a plaintiffs' appellate lawyer who has argued punitive damages cases before the high court, says the justices aren't interested in adjusting numbers in individual cases and that punitive damages are rare to begin with.

Talc litigation is not only one of the biggest mass torts, it's also famous for the eye-popping verdicts it has generated, including a $417 million verdict in California, a $117 million verdict in New Jersey and a $72 million verdict in Missouri separate from Ingham.

Tager said large punitive damage awards over and over for the same underlying conduct don't feel fair to businesses. Not only that, many of the big talc verdicts were overturned on appeal, suggesting they weren't fair to begin with, defense attorneys say.

A Missouri appeals court cut the original $4.7 billion Ingham verdict by more than half, but left alone the

jury's finding that asbestos and other carcinogens in J&J's talc products caused the women's cancers. In November, the state's high court refused to take up J&J's appeal, leading the company to petition the U.S. Supreme Court to hear the case.

J&J insists the Ingham outcome violates the due process clause of the 14th Amendment. "If the Due Process Clause means anything," J&J wrote in its petition for certiorari, "it means that a defendant cannot be deprived of billions of dollars without a fair trial."

The Ingham plaintiffs' reply brief is due May 5.

Named plaintiff Gail Ingham died while the case was pending, but others in the group are in long-term remission. Some observers of product liability law have questioned whether it's fair to group plaintiffs with different outcomes, saying that alone can stoke higher punitive damages.

"Some of the problems with punitive damages are especially apparent in the products liability context," said Jill Lens, a professor at the University of Arkansas School of Law. "So the idea of multiple plaintiffs suing and multiple damages awards, and the idea that they're repetitive, it's easy to see that in a products liability case."

For that reason, Lens said, "Generally, products liability cases are good test cases for punitive damages."

According to Tager, the multiplaintiff nature of the trial and a question about jurisdiction strengthen the case for the Supreme Court granting cert and making new law on punitive damages.

Combined, the circumstances allowed a "lightning bolt" level of damages against J&J that, even if rare, shouldn't be among the possible range of outcomes, Tager said.

The corporate defense bar has been hoping for a long time that the Supreme Court would institute a hard cap by way of a 1:1 maximum ratio of punitive damages to compensatory damages. In the Ingham case, J&J is asking the court to find, at a minimum, that the punitive damages exceeded the compensatory damages enough to violate due process. Of course, the high court can always go further — or do nothing — if it sees fit.

In the years the Supreme Court was taking that string of punitive damages cases, the justices gestured in the direction of such a ratio. In State Farm v. Campbell, the court mentioned a 1:1 ratio, but only as a guideline, not a hard limit. That case touched only on economic damages, not on physical injury.

A few years later, in a punitive damages case over the Exxon Valdez oil spill in Alaska, the Supreme Court instituted a hard 1:1 ratio cap. But that was a maritime law case, and the rule applies only to maritime cases.

The last time the court looked at punitive damages was a case called Philip Morris in 2009, when observers thought the court might finally apply a binding 1:1 ratio to nonmaritime cases and injury cases to boot. But the massive shift didn't happen. The court greeted the defense bar's arguments with a shrug, granting plaintiffs who had won almost $80 million against the cigarette company a rare DIG, or "dismissed as improvidently granted," finding that cert to consider reducing the award shouldn't have been granted.

"The court just didn't seem interested anymore in dealing with what they created," Lens said.

The turnover on the high court bench in the 12 years since makes it difficult to predict whether the court will bite anew. Justices Sonia Sotomayor, Elena Kagan, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett have never heard a punitive damages case while on the court.

Peck, the plaintiffs' lawyer who argued the 2009 Philip Morris case before the high court, said Ingham simply isn't worth the justices' attention. The Supreme Court wants to resolve open questions of law, he said, not decide repeatedly what counts as an obscene number.

"The court generally doesn't deal with outlier problems. They're looking for something that really requires some sort of harmony and uniformity across courts," Peck said. "So an outlier case appeals to them basically as only a court of error. And that's one thing they adamantly insist they are not: They are not a court of error."

Plus, punitive damages are actually rare, Peck said. And when they are granted, they are usually not much higher than compensatory damages. He cited a federal Bureau of Justice Statistics study that found punitive damages are awarded in roughly 5% of cases where compensatory damages are awarded.

The lawyer representing the Ingham plaintiffs in the high court, Thomas Goldstein of Goldstein & Russell PC, told Law360 that the Supreme Court in recent years has frequently rejected petitions asking for consideration of large punitive damages.

"We expect this one to be no different," Goldstein said. "The lower courts have been faithfully applying the law governing punitive damages to very diverse cases."

Regardless, outcomes like the talc verdicts and the verdicts seen in the Roundup herbicide litigation can give rise to the perception that verdicts are getting larger on average, whether that's the case or not. Lens said that may stoke the legal community's interest in punitive damages.

"I do think there's probably more of an interest in it right now, the more Johnson & Johnson verdicts we get," she said.

J&J is represented by Neal Katyal of Hogan Lovells.

The Ingham plaintiffs are represented by Thomas Goldstein of Goldstein & Russell PC.

The case is Johnson & Johnson et al., Petitioners, v. Gail L. Ingham et al., case number 20-1223, in the U.S. Supreme Court.

--Additional reporting by Bill Wichert. Editing by Jill Coffey.