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For Plaintiffs Bar, Taking on J&J Means Battling a Shadow Foe

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Pay attention to mass torts litigation and it's hard not to notice a certain feedback loop between Johnson & Johnson's products liability docket and the tort reform agenda of the U.S. Chamber of Commerce.

The Chamber likes to use real-world stories of lawsuits run amok to fuel its advocacy, and it's got no shortage of examples, thanks to Johnson & Johnson. The group often points to J&J cases when it lobbies to tighten venue rules, limit plaintiffs bar advertising and curb third-party litigation funding.

Meanwhile J&J raises alarm bells about the very same issues in its court fights, echoing the Chamber's agenda and creating courtroom sideshows that air the group's pet issues but have little apparent effect in those suits.

And then there's John Beisner, chairman of the mass torts practice at Skadden, Arps, Slate, Meagher & Flom, who's a top lawyer to both.

While coordination between companies and trade associations is a common litigation and lobbying strategy, the J&J-Chamber ties are notable for their closeness, constancy and for being unusually reciprocal. Typically, it's an association that carries water for the industry but J&J is also a champion for the Chamber and boosts the organization's broader tort reform positions.

It can make it hard to tell where J&J's advocacy ends and the Chamber's begins. Whether the dynamic is intentionally choreographed or borne of aligned interests, plaintiffs lawyers going up against the New Jersey-based conglomerate have come to expect that Beisner's arguments in court will echo the Chamber's advocacy.

"They've got the same mouthpiece," said Texas plaintiffs attorney W. Mark Lanier. "They've got the same source of money, they've got commonality of directors, and they parrot the same mission."

Michael Krauss, a professor at George Mason University's Antonin Scalia Law School who teaches about legal ethics and torts, said the Chamber likely sees the flood of suits against Johnson & Johnson as a proxy for its tort reform fights. J&J is like the "canary in the coal mine" for the Chamber, said Krauss.

"If J&J gets crushed, a lot of its other members get crushed," he said. "The Chamber sees the

world the same way that Johnson & Johnson sees the world.”

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Beisner did not respond to a request for comment. But in an earlier interview, he denied the existence of any “special relationship.”

The Chamber files “numerous amicus briefs every year in support of a wide array of companies and comment on various things,” he said. Johnson & Johnson, he said, is “a member, but there are a lot of other members, hundreds of members.”

There’s no doubt the Chamber’s advocacy on behalf of one industry player can pay wider dividends. A significant win on tort reform this past year came in a fight for a different drugmaker, Bristol-Myers Squibb Co. Yet the U.S. Supreme Court’s decision in that case, [deemed a game-changer for mass torts](#), prompted a Missouri judge to immediately halt a talcum powder trial against J&J.

In addition to Beisner’s dual role, Johnson & Johnson general counsel Michael Ullmann was a board member of the Chamber’s Institute for Legal Reform as of 2015, according to the most recent publicly available information. Chamber officials refused to provide more recent data or confirm whether he was still a board member.

In an emailed statement, Harold H. Kim, executive vice president of the Chamber’s Institute for Legal Reform, said that the group “has advocated for reforms to the country’s civil justice system on behalf of the entire business community,” not just Johnson & Johnson. “Lawsuit abuse adversely affects our national economy and stifles innovation and job creation,” Kim wrote. “We will continue to be a voice for commonsense legal reforms.”

LITIGATION OVERDRIVE

Johnson & Johnson is fending off tens of thousands of products liability lawsuits over talcum powder products, its transvaginal mesh devices, hip implants and widely used prescription medications including antipsychotic Risperdal and blood thinner Xarelto. (A description of ongoing legal proceedings in the company’s most recent quarterly report filed with the U.S. Securities and Exchange Commission goes on for more than 10 pages.)

A host of law firms in addition to Beisner’s Skadden have been involved in those cases. Among them: Drinker Biddle & Reath and Shook, Hardy & Bacon.

“No company is facing as much mass tort litigation as Johnson & Johnson,” said Shanin Specter, of Philadelphia’s Kline & Specter, which has won jury verdicts against J&J over pelvic mesh and Risperdal. “They are facing over 100,000 product liability suits in 22 separate product lines.”

Many of those cases involve J&J subsidiaries, such as Janssen Pharmaceuticals Inc., Ethicon Inc. and DePuy Orthopaedics Inc. But Stephen Sheller, who has partnered with Kline & Specter on Risperdal trials, said they follow a predictable pattern: Litigation “to the nth degree.”

The Chamber is “just one more bullet in their gun,” he said.

“If they can get a nonprofit to do their bidding, and do their thing, it saves them a lot of money,” said Sheller, founding partner of Sheller PC in Philadelphia. “You can contribute to the nonprofit and deduct a lot of those expenses as contributions.”

The connection doesn’t go unnoticed by plaintiffs attorneys suing J&J. They said they often find themselves fighting broad policy arguments that go beyond just their case at hand.

Sheller said those peripheral legal fights, over issues such as third-party funding or attorney advertising, delay cases against J&J. They also find their way into court cases brought against other companies facing similar products liability litigation.

“A common denominator is John Beisner, and it would be no surprise then that you’ll see consistent arguments from the Chamber or other tort reform groups he’s involved with and J&J,” said Leigh O’Dell, a principal at Beasley, Allen, Crow, Methvin, Portis & Miles in Montgomery, Alabama, who is co-lead plaintiffs attorney in the federal talcum powder litigation against Johnson & Johnson.

“And you might argue that John and others that defend or represent J&J are involved in the strategy making, and that proliferates through defendants in pharmaceutical litigation.”

In February, Lanier cited the Chamber’s “intimate relationship” with Johnson & Johnson to argue that the Chamber and three other organizations should not be allowed to file amicus briefs before the U.S. Court of Appeals for the Fifth Circuit in the appeal of a \$502 million hip implant verdict.

Lanier claimed the groups were essentially alter egos of Johnson & Johnson, making their amicus filings a cheat to allow the company to bypass page limitations on its briefs. The Chamber was represented by Mayer Brown partner Andrew Pincus in its proposed amicus brief, and Beisner was on Johnson & Johnson’s appellate team.

A Fifth Circuit judge granted Lanier’s request as to the three other tort reform groups—two of which had Johnson & Johnson executives on their boards—but, without addressing its reasons, allowed the Chamber to file its brief.

Many of Lanier’s arguments about the overlap between the Chamber and J&J rested on Beisner, who serves “their common interests in litigation and legislative endeavors.” He also said that J&J historically had held leadership roles for both the Chamber and its affiliates, specifically referencing one executive who serves as the Chamber’s co-chairman of global health and the economy and one who is an advisory board member to the Chamber’s foundation. No Johnson & Johnson executives serve on the Chamber of Commerce board or the board of its litigation center, the division that handles amicus briefs.

WHO’S IN THE DRIVER’S SEAT?

A flood of litigation [over the blood thinner Xarelto](#), made by Johnson & Johnson subsidiary Janssen, could be seen as a case study in the synergistic interests and advocacy of J&J and the Chamber.

With more than 16,000 cases over Xarelto pending in federal court in New Orleans, the litigation has become the Chamber’s [poster child](#) in a fight to curb what it sees as rampant plaintiffs attorney advertising.

Last August when Lisa Rickard, president of the Institute for Legal Reform, [wrote an opinion article](#)

calling for more regulation of attorney ads, she cited a report funded by Janssen and co-authored by a Janssen employee and a consultant for Janssen.

The report, submitted to the U.S. Food and Drug Administration, found at least 30 people suffered strokes, heart attacks and other serious medical problems when they stopped taking Xarelto after seeing a lawsuit commercial. Two people died.

The report was also referenced by Virginia Republican U.S. Rep. Bob Goodlatte, chairman of the House Judiciary Committee and a Chamber ally on tort reform, during this year's [tort reform push](#) in the U.S. House of Representatives.

Later that month, the [report turned up again](#). This time it was referenced in Johnson & Johnson court filings ahead of the first Xarelto jury trial. Plaintiffs attorneys had filed motions to bar the defense from referring to TV ads concerning Xarelto. In an April 12 response, lawyers for Johnson & Johnson and Bayer cited the report in countering that complaints about the drug were "driven by pervasive and aggressive attorney advertising."

U.S. District Judge Eldon Fallon of the Eastern District of Louisiana granted the plaintiffs' requests, and the advertising issue never became part of the trial.

Another big issue for the Chamber, third-party litigation financing, has come up in cases against Johnson & Johnson. In Xarelto litigation pending in the Philadelphia Court of Common Pleas, lawyers for Bayer and Johnson & Johnson [filed a motion in April](#) that, if granted, would force plaintiffs attorneys to disclose litigation financing of their cases. Johnson & Johnson also [asked for that information](#) last year in federal cases over talcum powder, but U.S. District Judge Freda Wolfson in New Jersey denied the request.

Then there's Missouri, where Johnson & Johnson has suffered losses totaling more than \$300 million in suits over talcum powder and where the Chamber has aggressively [pushed bills](#) that would make it harder to bring products liability cases there.

The lawsuits allege Johnson & Johnson's baby powder and Shower to Shower products have caused women to get ovarian cancer. In its [first appeal](#), J&J's lawyers [criticized Missouri's standards](#) for allowing scientific experts at trial. They also challenged a jurisdictional rule that allowed out-of-state plaintiffs to join talcum powder cases in Missouri state court.

The Chamber has lobbied on both issues, and in late March, Missouri Gov. Eric Greitens, a Republican, signed a bill that would change the expert evidence standard.

The Chamber's Rickard immediately praised the move: "Missouri is turning the corner on legal reform," she said in a statement. The law becomes effective on Aug. 28.

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