

Litigators of the Week: J&J's Team at Orrick Knocks Out a 9-Digit Talc Verdict in New York

By Ross Todd
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Last April an appellate team at **Orrick, Herrington & Sutcliffe** led by partners **Josh Rosenkranz**, **Bob Loeb** and **Naomi Scotten** landed the [top runner-up spot](#) for Litigator of the Week when they convinced a New Jersey appeals court to reverse a \$117 million talcum powder verdict against Johnson & Johnson and Imerys Talc America. New Jersey's Appellate Division found the trial judge shouldn't have allowed two plaintiffs' experts to testify at trial.

Fast forward a little more than a year and move the focus across the Hudson River: This week the Orrick appellate team scored another reversal for J&J. New York's Appellate Department, First Division on Tuesday knocked out a [\\$120 million damages](#) award in a case brought on behalf of a Brooklyn woman who claimed J&J's baby powder caused her cancer. The Manhattan appellate court found there wasn't adequate evidence that the amount of asbestos the plaintiff claims she was exposed to was sufficient to cause her to develop mesothelioma.

Litigation Daily: Who was your client and what was at stake?

Naomi Scotten: The clients are Johnson & Johnson and Johnson & Johnson Consumer Inc. (the latter of which was split into new Johnson & Johnson Consumer Inc. and LTL). Plaintiffs' lawyers have filed thousands of talc cases across the country—hundreds in New York alone. This was the first J&J talc case that went to trial in New York. Plaintiffs won a staggering \$325 million jury verdict based on the astounding claim that J&J's talc causes cancer because it is contaminated with asbestos, even though the talc was routinely tested for decades by premier laboratories. Plaintiffs persuaded the jury with an outlandish conspiracy theory and deeply flawed expert testimony that flouted basic scientific norms to find asbestos contamination where there was none. That included expert testimony insisting, with no scientific basis, that the trace amounts that other experts purported to find in J&J's talc were enough to cause cancer.

What was at stake was and is massive. Without an appellate reversal, this enormous judgment would have established a playbook for the plaintiffs' bar in New York and nationally. A full reversal, holding that there was inadequate proof of causation, profoundly changes that dynamic. Right now, the



Courtesy photos

(L-R) Josh Rosenkranz, Bob Loeb and Naomi Scotten partner, of Orrick, Herrington & Sutcliffe.

LTL bankruptcy judge is in the process of assessing the value of similar claims. A ruling from a key appellate court in New York that the evidence just was not enough even to get to a jury will be very helpful in that claim assessment process.

When were you brought in on this particular matter for J&J?

Bob Loeb: Because the stakes were so high, J&J brought us in early. We had already been representing J&J in connection with other talc cases. In this case, we consulted with the trial team on strategy and issue preservation while the trial was ongoing. Once the \$325 million verdict came in, we collaborated with trial counsel on the post-trial motions, especially focusing on punitive damages. Based on that motion, the trial court reduced the award to \$120 million. We then led the appeal, still closely collaborating with trial counsel, seeking to wipe out the remainder of the judgment.

That collaborative model is a key to the success of our mass tort appeals—and any high-stakes appeal. We work right alongside trial counsel to maximize issue preservation and minimize any award, dividing our labors across the whole docket depending upon the stakes of the case and its potential impact on the full range of cases.

Who was on your team and how did you divide the work?

Josh Rosenkranz: I argued the case and was deeply involved in the strategy and briefing. In addition, appellate partners Bob Loeb and Naomi Scotten, who have been leaders on our J&J talc cases, played critical roles. Bob was on the case from the start. He consulted with the trial team on issue preservation, attended the post-trial motion hearing, was critical to

plotting a path to victory, and provided substantive input on the briefs. Naomi led the team's efforts to analyze appealable issues and develop a briefing strategy, and meticulously ensured that each argument was properly developed and supported.

Associates **Geoff Shaw, Upnit Bhatti, Paul Meyer, Siobhan Atkins** and **Zachary Hennessee** also made important contributions to the briefs and oral argument prep.

But "the team" also included local counsel at **Patterson Belknap** who were true partners in this venture, and an extraordinary group of in-house lawyers, who pored over every brief and attended countless hours of debate and prep sessions.

This week's ruling marks the second time in a little over a year that you've gotten an appellate ruling for J&J knocking out a nine-digit talc verdict. New Jersey's Appellate Division last year found the trial judge in a separate case should not have allowed two plaintiffs' experts to testify at trial and reversed a \$117 million verdict. How much of what happened here paralleled your work in the New Jersey case?

Scotten: We have been laying the foundation for these rulings for years, and it's very gratifying that both the New York and New Jersey appellate courts have rejected plaintiffs' deeply flawed cases—each knocking out a different, but critical, pillar.

In both cases, it was critical on appeal to paint clear, compelling themes and find simple ways to explain why plaintiffs' narratives and expert testimony were so flawed. In New Jersey, we were able to convince the appellate court that the verdict was based on a house of cards—on the absurd proposition that non-asbestos was the same as asbestos. We built on that momentum in New York. The win in New York was a true home run—a flat out reversal without the chance for retrial, holding that even if all of that expert testimony was admissible, it doesn't matter because plaintiffs did not establish that J&J's talc caused the plaintiff's cancer. This basic point has been at the core of our briefs for years, and we are thrilled that the New York appellate court recognized it.

With the bankruptcy involving J&J talc liabilities still pending on appeal, what happens next here?

Loeb: The parties and bankruptcy court agreed that this case should be exempted from the bankruptcy stay. Thus, the bankruptcy does not directly affect this case. This case will follow the normal course of New York appeals without regard to the bankruptcy.

What are the impacts of the Appellate Divisions' ruling if the talc cases remain in bankruptcy? And how does that change if the bankruptcy court's ruling is overturned?

Loeb: We expect the Third Circuit to uphold the bankruptcy court's sound ruling, and anticipate that LTL's bankruptcy will move forward. Regardless of how that bankruptcy appeal plays out, however, these New York and New Jersey appellate rulings should have significant ramifications. If the bankruptcy proceeds as expected, then these rulings will help inform

the judge who is in the process of valuing these talc claims. And if the bankruptcy court ruling is reversed, the Appellate Division causation ruling here will establish the legal rule going forward for all New York cases, and be persuasive to courts in other states.

Josh, you've got a long list of notable appellate reversals under your belt at this point. Do you have some sort of universal approach when you're brought into a case where your client took a big hit at the trial court? Or is each appeal its own beast?

Rosenkranz: Every appeal is certainly its own beast. But there are a few approaches that are common to all the big appeals I lead. First, you never reverse a big jury trial verdict, unless you succeed in leaving the court with the unsettling feeling that the verdict is a true injustice. And to do that, you need to go beyond any legal errors and explain what the case is really about. I spend a lot of time listening. Listening to trial counsel. Listening to the clients. All with a view toward learning about our story, and how the other side managed to distort it. I make sure to weave that narrative throughout the brief. Second, legal and factual complexity is your enemy when you're trying to overturn a big verdict. We need to be in the weeds to understand every nuance of the case, but at the end of the day, the brief and oral argument need to get out of the weeds. There is no substitute for common sense when addressing an appellate court. Third, collaboration is key—not digging in because you think you have the right answer, but being truly open to the ideas of all members of the broad team as you're thinking through strategy, the briefing, and the oral argument prep. Fourth, there is no substitute for deep preparation for oral argument. I feel it is my job to know the record cold and to prepare for, and workshop answers to, every hard question that might come up.

What will you remember most about this matter?

Rosenkranz: Of course, I'll remember how gratifying it has been to enable such a busy appellate court to engage with a three-month trial record. It's so easy for a court to throw up its hands when it has a record as big as ours. And paring the issues down and simplifying the record to the point where the court was comfortable reversing on sufficiency grounds is extremely satisfying.

I'll also remember the remarkable collaboration that led to this result. Co-counsel was great about looping us in from the start, and they continued to provide invaluable input as the appeal progressed. Working closely with such knowledgeable folks allowed us to do our best and most efficient work—and it was a lot of fun to get to know one another. The same is true of the client, whose brilliant attorneys have been with us every step of the way. They engaged deeply with strategic decisions, provided thoughtful feedback, and gave us the discretion to make some hard choices along the way. It has been a true partnership, and there's no doubt in my mind that it contributed significantly to the outcome in this case.