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J&J Loses Bid to Send Talc Case, Set for First Phila. Trial, to Federal Court

U.S. District Judge Mark Kearney of the Eastern District of Pennsylvania on Tuesday remanded the case to the Philadelphia Court of Common Pleas, denying arguments from the pharmaceutical giant that the case needed to be sent to bankruptcy court in Delaware.

By Max Mitchell | June 12, 2019

A federal judge has rejected Johnson & Johnson's efforts to [remove to federal court](https://www.law.com/thelegalintelligencer/2019/05/13/talc-plaintiffs-begin-fighting-mass-removal-in-wake-of-imerys-bankruptcy-402-42021/) (<https://www.law.com/thelegalintelligencer/2019/05/13/talc-plaintiffs-begin-fighting-mass-removal-in-wake-of-imerys-bankruptcy-402-42021/>) a lawsuit that is set to be the first (<https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/10/24/talc-case-heads-to-phila-state-court/>) talc-related case to come before a Philadelphia jury.



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U.S. District Judge Mark Kearney of the Eastern District of Pennsylvania on Tuesday remanded the case *Kleiner v. Rite Aid* to the Philadelphia Court of Common Pleas, denying arguments from the pharmaceutical giant that the case needed to be sent to bankruptcy court in Delaware.

J&J, which has been [slammed](https://www.law.com/therecorder/2019/03/13/california-jury-hits-johnson-johnson-with-29m-talc-verdict/) with [verdicts](https://www.law.com/nationallawjournal/2018/07/13/will-the-4-7-billion-talc-verdict-hold-up-on-appeal/) as high as \$4.7 billion [over its talc products](https://www.law.com/2018/12/19/judge-upholds-4-7-billion-talc-verdict-citing-jjs-reprehensible-conduct/), had argued that indemnifications and shared insurance it has with its talc supplier, Imerys, meant that thousands of talc cases needed to be handled in federal bankruptcy court because, earlier this year, Imerys filed for bankruptcy.

Kearney, however, in a 14-page opinion, agreed with the plaintiff, Ellen Kleiner, that her case linking talcum powder to her ovarian cancer was not sufficiently “related to” the pending bankruptcy, since any indemnification enforcement would need to be pursued through separate litigation.

“Johnson & Johnson emphasizes the initial sentences of the indemnification clauses providing for indemnification. But it fails to account for the glaring qualifications of those obligations,” Kearney said, noting language in their agreements that say Imerys does not need to indemnify J&J for liabilities arising from its own acts or omissions. “This qualified language does not evince the parties’ intent to extend automatic indemnity where Johnson & Johnson’s own acts or omissions are the subject of litigation. ... [I]ts claim can only be vindicated through a second lawsuit.”

Kleiner is being represented by Nancy Winkler and Todd Schoenhaus from Eisenberg, Rothweiler, Winkler, Eisenberg, & Jeck, as well as Ted Meadows of Beasley Allen. In an emailed statement, Winkler noted previous attempts by J&J to remove the case to federal court, and said that, with this ruling, there should be no more delays.

“We are so pleased that Mrs. Kleiner will be able to move forward to trial before a jury in the Philadelphia Court of Common Pleas and obtain justice,” Winkler said. “We hope that other judges in the Eastern District and across the country follow Judge Kearney and numerous other judges who have remanded cases, and remand the cases of these brave women to state court so their cases can be tried without delay.”

A message to J&J’s press office was not immediately returned Wednesday morning.

Kleiner’s case is one of 2,400 lawsuits from across the country that J&J removed to federal court in April, citing the Chapter 11 bankruptcy that Imerys Talc America filed in February. Imerys is J&J’s exclusive supplier of talc.

In its efforts to remove the cases to federal courts, J&J pointed to the federal bankruptcy statute, which, J&J said, gives the Delaware federal court the authority to determine the proper venue for civil claims “related to” Imerys’ bankruptcy. Because its contracts with Imerys contained indemnifications and the supplier also sought to claim J&J’s insurance for expenses incurred in defending the talc cases, the entire talc litigation, J&J contended, should be considered “related to” bankruptcy, since Imerys’ pool of available assets could also be affected.

Plaintiffs successfully pushed back against defense bids to remove the cases.

In his opinion, Kearney said U.S. District Judge Arthur Schwab of the Western District of Pennsylvania recently granted a similar motion to remand to state court (<https://images.law.com/contrib/content/uploads/documents/402/44121/Kaufman-v.-Jl.pdf>).

“Johnson & Johnson has not shown our ‘related-to’ jurisdiction over the Kleiners’ long pending product liability case set for trial in January 2020,” Kearney said.