# As Messy As A Baby's...Third Circuit Issues An Opinion In Baby Powder Appeal

October 11, 2018 | by Matheu Nunn

On September 6, 2018, the United States Court of Appeals for the Third Circuit published its decision in *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Litigation*, No. 17-2980, an appeal that asked the question: "Has a plaintiff—who has entirely consumed a product that has functioned for her as expected—suffered an economic injury solely because she now sincerely wishes that she had not purchased that product?" At first blush, the question presented by the appeal will likely elicits a resounding "no" from the reader. But, the appeal raised a question of law sufficient to warrant publication – and a dissent from Judge Fuentes.

The appellant, Ms. Estrada, asserted that she suffered economic damages from her purchase of Johnson & Johnson's Baby Powder. Estrada did not, however, assert that she suffered an injury (e.g. cancer) from her use of the powder or even the fear of contracting cancer from her use of the powder. Estrada also did not allege that the product—the powder—did not perform as advertised. Indeed, one can only surmise that Estrada—who used the entirety of the bottle—was left as dry and fresh as advertised by Johnson & Johnson. At this point, you must be asking the very question posed in the court's published decision "What, then, does Estrada allege?" Estrada alleged the mere act of purchasing the product gave rise to her cause of action because "had she been properly informed that using Baby Powder could lead to an increased risk of developing ovarian cancer, she would not have purchased the powder in the first place."

The court, citing to *Finkelman v. National Football League*, 810 F.3d 187 (3d Cir. 2016) (a case denying standing to a class who challenged an NFL ticketing policy that reserved tickets for League Insiders, which, in turn, resulted in Super Bowl tickets being priced higher than they would have been had the NFL offered to sell more tickets to the general public), and *Cottrell v. Alcon Laboratories*, 874 F.3d 154 (3d Cir. 2017) (a case finding standing for plaintiffs who claimed that their eye medication could only be dispensed from "unfairly" designed bottles that released drops larger than the human eye could

hold at one time), concluded that Estrada lacked standing because unlike the plaintiffs in *Cottrell* (who attempted to attribute a value to the wasted portion of the eye drops) Estrada failed to assert any economic damages. The court added that Estrada's actual argument, "that a consumer's purchase of a product based on the manufacturer's deceptive and unfair business practices constitutes injury-in-fact[,]" ignored the basis for the holding in *Cottrell, i.e.*, an allegation by plaintiffs based on an actual economic theory related to the "loss" of the "wasted" eye drops.

As noted above, Judge Fuentes dissented, noting that "the safety of the product—as a general proposition, not specifically as to Estrada herself—was an essential component of the benefit of Estrada's bargain." Therefore, because the safety of Johnson & Johnson misrepresented the safety of the powder—a key element—Judge Fuentes concluded that Estrada alleged injury-in-fact and standing under Article III.