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## Product Liability Cases To Watch In 2017

By **Emily Field**

Law360, New York (January 2, 2017, 1:03 PM EST) -- Product liability attorneys will be watching to see whether the U.S. Supreme Court takes up Bristol-Myers Squibb's challenge to a California high court ruling on personal jurisdiction and whether the high court will decide to undo a Second Circuit ruling that unraveled GM's bankruptcy shield from ignition switch liability.

Also on attorneys' radar is litigation over claims that Johnson & Johnson talcum powder products caused cancer in women. Juries this past year delivered eye-popping multimillion-dollar verdicts for the plaintiffs in several of these cases, and attorneys anticipate that the fights over the powder have only just begun.

Here, Law360 takes a look at what will grab product liability attorneys' attention in 2017.

### **BMS at the High Court**

Bristol-Myers Squibb Co. in October **asked the high court** to inform California that nonresidents can't pursue suits over alleged injuries from the drugmaker's Plavix in Golden State courts, as basing jurisdiction on the tenuous ties to California cited by the plaintiffs is "not how jurisdiction works."

Bristol-Myers said in its petition that the California Supreme Court's split ruling allowing nearly 600 nonresidents to sue the drug company in the state's friendly venue was based on a loose blend of contacts the drug company has in the state rather than on anything connected to the litigation at hand.

Those claims would be exactly the same if the pharmaceutical giant had "no contact whatsoever" with the state, Bristol-Myers said. The company's unrelated operations in California, which aren't tied to its blood-thinner drug, can't be enough to allow people who don't even live in California to sue the company there, Bristol-Myers argued.

"If the Supreme Court takes that case, that's going to be one of the most significant decisions of the year for product liability practitioners," Peter Goss of Blackwell Burke PA said. "It's a real opportunity for the court to address litigation tourism in a meaningful way if they take it. Everyone is going to be watching that one."

In its own published ruling, the California state high court said that given the company's extensive contacts with California — such as its marketing and distribution of the drug, as well as research and development facilities located there — the state courts have specific personal jurisdiction over the nonresidents' claims.

The California Supreme Court upheld a lower court's ruling that although the company's business contacts in the state weren't sufficient to invoke general jurisdiction, which enables a court to exercise jurisdiction over a defendant no matter the subject of the litigation, state courts have specific personal jurisdiction over the company in light of the nature of the action and the company's activities in California.

A court may have specific jurisdiction when the litigation in question arises out of obligations that

are connected to a company's activities in that state, the high court said.

Bristol-Myers is represented by Neal Kumar Katyal, Jessica L. Ellsworth, Frederick Liu, Sean Marotta and Mitchell P. Reich of Hogan Lovells, and Anand Agneshwar and Daniel S. Pariser of Arnold & Porter LLP.

It wasn't immediately clear who would represent the plaintiffs at the U.S. Supreme Court.

The case is Bristol-Myers Squibb Co. Superior Court of California for the County of San Francisco et al., case number 16-466, before the U.S. Supreme Court.

### **J&J Talc Litigation**

There were big wins in 2016 for plaintiffs alleging that J&J talcum powder caused their cancer, and attorneys this year will be waiting to see if the trend continues with similar blockbuster verdicts or if the tide is about to turn.

"J&J is due for a win — they've taken some hard hits on the talc cases," Goss said. "I'm thinking in 2017 it will find a way to turn the corner on some of their litigation. I would not be surprised to see a defense verdict in one of their cases because they're due."

The cases center on women's use of J&J's product on their vaginal area. The plaintiffs argue that the talc traveled to their ovaries and accumulated there, causing cancer, and that J&J had long known about this danger but failed to warn consumers.

The first 2016 trial, which took place in St. Louis, concerned the ovarian cancer death of Jacqueline Fox; in February, the jury awarded her estate \$72 million.

Following that verdict, plaintiff Gloria Ristesund was awarded \$55 million in May, including \$50 million in punitive damages against J&J and its subsidiary Johnson & Johnson Consumer Inc. And a third Missouri jury in October hit J&J and its talc supplier with a **\$70 million verdict** that includes \$65 million in punitive damages.

Outside of Missouri, the Judicial Panel on Multidistrict Litigation in October **centralized lawsuits** alleging Johnson & Johnson's talcum powder products cause ovarian and uterine cancer in New Jersey federal court. Some 900 women are also suing the company in California state court in litigation filed in September.

"Those cases are starting to pop up all over the country," said Don Migliori of Motley Rice LLC, noting that some of the newer suits include claims against distributors like Walgreens.

### **GM's Appeal of Second Circuit Bankruptcy Ruling**

Another case that attorneys are watching at the high court level is General Motors' **appeal of the Second Circuit ruling** that struck down bankruptcy decisions that shielded General Motors from liability related to ignition switch defects.

GM argues that the appeals court undermined a crucial liability-shedding provision of the bankruptcy process.

If the Supreme Court decides to take up the case, GM will try to persuade the justices that its 2009 bankruptcy sale, which ended Old GM and birthed New GM, extinguished the claims forever.

Those seeking to hold New GM liable include people injured in accidents and representatives of people killed prior to the bankruptcy sale as well as those seeking to hold New GM liable for economic losses tied to the defects.

GM did not reveal the ignition switch issue during the bankruptcy; the company began recalling cars because of the defect in February 2014, more than a decade after the switches went into production. The timing of the disclosure by GM effectively denied plaintiffs the right to weigh in on the sale and so they cannot be bound by the provisions of the sale order that shield the company

from litigation, the Second Circuit said.

The company has settled more than 1,000 lawsuits over the issue, with hundreds still pending in New York federal court as a second round of bellwether trials is set to begin in July.

GM is represented by Paul Clement, Erin Murphy, Michael Lieberman, Matthew Rowen, Richard Godfrey and Andrew Bloomer of Kirkland & Ellis LLP, and Arthur Steinberg, Merritt McAlister, Edward Ripley and Scott Davidson of King & Spalding LLP.

Various plaintiffs' groups are represented by William Weintraub of Goodwin Procter LLP, Steve W. Berman of Hagens Berman Sobol Shapiro LLP, Alexander H. Schmidt of Wolf Haldenstein Adler Freeman & Herz LLP, and Georgetown Law Professor Gary Peller.

The case is General Motors LLC v. Celestine Elliott et al., case number not yet available, in the U.S. Supreme Court.

### **NHL Concussion Claims**

The proposed class action brought by ex-hockey players claiming the National Hockey League failed to warn them of the known risks of head trauma is one of a number of similar suits brought by former athletes in other sports.

But one interesting wrinkle in this suit is the allegation that the NHL tacitly condoned players fighting each other, potentially increasing the risk of head trauma, noted Tonya Newman of Neal Gerber & Eisenberg LLP.

"One of the questions is what impact does the culture of the NHL have?" Newman said. "It makes games more interesting to some to see fights."

The players recently asked a Minnesota federal court to certify a class of players who qualify for medical monitoring, as well as those who have already been diagnosed with neurological problems.

In a redacted motion, the retired players say that each member of the classes has been hurt by the league's hiding of the long-term risks of head impacts and is at an increased risk of developing a neurological disease, disorder or condition. According to one expert's opinion, the average NHL player sustains around one to three damaging blows to the head each game — hard enough to cause permanent damage to white matter in the brain — as a conservative number, the players said.

All the proposed classes comprise retired NHL athletes; there are currently 5,100 ex-players, most of whom are still living, the players said.

And numerous studies have shown that concussion and head trauma victims — including former athletes — are significantly more likely to suffer from depression, suicidality, the progressive degenerative brain diseases known as chronic traumatic encephalopathy and dementia, the players said.

The medical monitoring program proposed by the ex-players would involve a comprehensive history and neurological examination, blood tests for pituitary function, a neuropsychological examination and an MRI, according to the motion.

Lead counsel includes attorneys from Zimmerman Reed LLP, Robbins Geller Rudman & Dowd LLP and Silverman Thompson Slutkin & White LLC. Liaison counsel is from Bassford Remele.

The NHL is represented by Daniel J. Connolly, Joseph M. Price, Linda S. Svitak and Aaron D. Van Oort of Faegre Baker Daniels, John H. Beisner, Jessica D. Miller, Shepard Goldfein, James A. Keyte, Michael H. Menitove, Matthew M. Martino and Geoffrey M. Wyatt of Skadden Arps Slate Meagher & Flom LLP, and Joseph Baumgarten and Adam M. Lupion of Proskauer Rose LLP.

The U.S. teams are represented by Christopher J. Schmidt, Kenneth J. Mallin, Timothy J. Hasken,

Lawrence G. Scarborough and Jonathan B. Potts of Bryan Cave LLP.

The case is In re: National Hockey League Players' Concussion Injury Litigation, case number 0:14-md-02551, in the U.S. District Court for the District of Minnesota.

### **Zoloft Expert Ruling at the Third Circuit**

Attorneys will also be watching arguments before the Third Circuit over whether a federal judge erred concerning the testimony of a statistician and granting Pfizer summary judgment in more than 300 cases claiming Zoloft caused babies' heart defects.

Pfizer has said that data overwhelmingly belies the expert's opinion.

U.S. District Judge Cynthia Rufe didn't misstep in excluding testimony by statistician Nicholas Jewell, arguing that the FDA has studied Zoloft's safety for decades and that it is one of the better-studied antidepressants for use by pregnant women, according to Pfizer. No regulatory agency, published study or professional organization states that Zoloft causes cardiac birth defects, the pharmaceutical giant said in an opposition brief.

Judge Rufe had found that Jewell had relied too much on studies that drew from the same data set and ignored a newer study that provided a better, contradictory analysis.

The judge in April granted summary judgment to Pfizer in the cases, effectively ending the drugmaker's sojourn in a major multidistrict litigation.

The consumers' appeal centers on the ruling on Jewell's testimony. They argue that Judge Rufe erred by failing to assess the reliability of Jewell's opinions against the methods in the field, according to Pfizer.

"It will be interesting to see how it plays out before the Third Circuit," Newman said.

The MDL was consolidated in April 2012. The parents of affected children said that preclinical studies and published studies show that Pfizer knew Zoloft caused birth defects. A suit filed by Shannon Long, one of the first in the MDL, alleges that as a result of her taking Zoloft while pregnant, her daughter was born with Tetralogy of Fallot, a rare congenital heart defect.

The consumers are represented by David C. Frederick, Derek T. Ho and Hilary P. Gerzhoy of Kellogg Huber Hansen Todd Evans & Figel PLLC, Mark P. Robinson Jr. of Robinson Calcagnie Inc., and Dianne M. West of Nastlaw LLC.

Pfizer is represented by Mark Cheffo, Sheila L. Birnbaum, Jonathan Tam and Bert L. Wolff of Quinn Emanuel Urquhart & Sullivan LLP, and Robert C. Heim and Judy L. Leone of Dechert LLP.

The case is In Re: Zoloft, case number 16-2247, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Kat Greene, Brandon Lowrey, Dani Kass and Cara Salvatore. Editing by Jack Karp.