Crowell & Moring's Falvey Talks Safety And Internet Of Things

By **Emily Field**

Law360 (May 17, 2019, 5:11 PM EDT) -- Crowell & Moring LLP partner Cheryl Falvey, a former general counsel for the U.S. Consumer Product Safety Commission, spoke to Law360 about what she's watching these days on the product liability front, including the thorny issues cropping up around the "internet of things."

Cheryl Falvey

Falvey joined the firm in 2012 after serving with the CPSC for four years. During that time, the Consumer Product Safety Improvement Act of 2008 was passed, mandating the creation of a consumer complaint database. Now she's keeping an eye on the opioid litigation and issues with software defects that may pose consumer safety and privacy risks.

This interview has been edited for length and clarity.

What product liability trends are you watching?

There's a lot happening in the product liability space. I think the thing I'm watching the most carefully right now are theories of liability and who's responsible. So what I mean by that are state attorneys general and plaintiffs lawyers who are looking to extend liability beyond the manufacturer to retailers and others in the distribution chain by some interesting theories — for example, what's happening in the opioid litigation where they're involving retailer pharmacies in cases.

It does seem like everyone is watching the opioid cases these days.

Right, and that's because the parties and who's responsible present really novel issues. Whenever we see the boundaries of product liability expanding, that's something that we want to watch.

The other trend is software defect law. So many products are expanding in exciting new technologies, and when software is incorporated into a product, it creates the potential for both safety and security issues. A very important aspect of our practice is advising companies on how to navigate these technological changes and make sure products are safe and we don't have product liability risks on top of all the other concerns we have about privacy and cybersecurity.

What other cases are you watching?

I could answer, "So many." I'm very interested in the chemical litigation and what's happening on the Roundup verdicts. I think that's something that any product liability litigator has to be watching right now.

Also the whole grounding of the Boeing airplanes based on the software defect. What does that mean for autonomous vehicles? Other consumer products that are driven by software? If there is a safety issue, how is that going to be handled? Is software a product and do the laws need to change there? Are they changed enough in the case law or do we need congressional action? So it's interesting that these litigations present so many issues across chemicals, software, drugs and pharmaceuticals.

What was your experience like as the CPSC's general counsel?

That was a really exciting time to be the general counsel because we were implementing the reauthorization statute called the Consumer Product Safety Improvement Act. That statue had so many implications across a variety of industries, from toys to ATVs. I think I learned a lot about the unintended consequences of really well-intentioned regulatory efforts and how long it takes for companies to adapt to new regulatory requirements and making sure their products that are made overseas come into compliance with new regulations.

It gave me a really good appreciation of how the laws, when they evolve, impact industry. The other aspect of the job that was just as interesting was being a part of a big organization and advising that government agency like a business on its own legal requirements.

One of the things that the reauthorization bill required the commission to do was build a consumer facing database publicly available on the internet. Dealing with navigating that launch and making sure it worked and that we got the right product for what the government was paying for, that it wasn't going to be hackable and we were protecting the privacy of the data we were collecting and had all the right processes in place to know what we were collecting and keep it private. All of that was a really exciting part of the job and gave me a better insight into how our clients are faced with enormous organizational issues to tackle.

What CPSC policies would you like to see changed or made clearer?

I do think — sticking with software defects — the commission hasn't issued any guidance on the internet of things and connected products. A commissioner has, out of his individual office, but we haven't seen any commission-wide guidance or policy issued with regard to that. It would be helpful to know, at least have some guidance from the commission, on what their expectations are for those products. We've seen some out of FDA [Food and Drug Administration] on medical devices. We've seen some out of [National Highway Traffic Safety Administration] on the guidances with regard to autonomous vehicles. So we can advise clients in the consumer products space by analogy as to what we're seeing out of those other agencies. But it would be helpful to see the CPSC step up in that area.

I know that there is a lot going on on those issues at the commission right now so I expect we'll see that in the coming months.

Is there anything in particular you'd like to see in that type of guidance?

What their expectations are for manufacturers with regard to security of the products and the performance standards that would be expected as reasonable for design purposes, so that we have some clarity as to a baseline standard of what's reasonable for a given type of product. Is it different for ATVs and bicycles than it might be for a refrigerator?

That would be because those products may present different risk cases in terms of hazard. The failure of an electric bike based on the software presents a different safety risk than perhaps the safety risk embedded in a home appliance. The home appliance may present more privacy issues than safety issues, depending on the malfunction, and so having some guidance from the commission on that would be helpful.

We've seen litigation in Texas and in California and New Mexico with people saying that because there was a defect someone was able to enter my home. That presents a safety risk. It's not the same safety risk of, "If the software fails, my car isn't going to perceive the lane change correctly." But those issues are real. That software can present a safety issue — whether by hacking or simply by malfunction — the more we've computerized the operation of consumer products.

That is the most exciting thing in our practice. It's also the most scary.

It does seem like everything these days does have software attached to it.

Exactly. In our practice, one of the busiest times of the year is right after the holidays. So many products are first given at the holiday time, and in early January we start to see how products are functioning. It used to be that we would be really worried about the safety implications of those products, children who've received those products being hurt. We'd watch for that and brace for that and make sure we had all of our compliance systems ready for that. Now we have to be ready for: The toy, can it be hacked? Is the language it's speaking sounding like profanity? All types of new issues that are one step away from safety but equally important to the brand, so we're watching that really.

What case are you most proud of?

Well, you're always proud of cases that you win. I have on my desk a Lucite replica of a jury verdict form where we did a bellwether trial. This was a trial of 10 plaintiffs and each plaintiff had their own line in the jury verdict form and the damages were zero. That case involved chemical exposures from an explosion at a refinery.

I would say that I'm most proud of the clients that we service that put safety first, that come to us and are attracted to me and my firm because they know that we do put consumer safety first and we're going to help them mitigate and minimize their litigation risks. That's a priority here. I think I'm probably the most proud of that.

--Editing by Jill Coffey.