

Product Liability Cases To Watch In 2020: Midyear Review

By **Emily Field**

Law360 (July 17, 2020, 7:00 PM EDT) -- Among upcoming product liability cases in the rest of 2020 are oral arguments this fall before the U.S. Supreme Court involving jurisdiction questions in automaker Ford's challenges to a pair of defect suits, as well as an expected rise in suits related to COVID-19 claims.

Additionally, two bellwether trials are scheduled to be held this fall in West Virginia and Ohio federal courts in the opioid multidistrict litigation, where counties will face off with pharmacies and drug distributors over claims that the companies stoked the national opioid epidemic. And a suit against Ikea over furniture that can tip over and injure or kill children raises issues of whether it's possible to successfully challenge how a recall was carried out.

Here are Law360's cases to watch for the rest of the year:

Ford Challenges State Court Jurisdiction

The Supreme Court in October will hear arguments over two cases brought in Montana and Minnesota state court stemming from 2015 crashes involving Ford Motor Co. vehicles.

Ford contends that it designed, assembled and sold the vehicles outside those states and that the company doesn't have strong enough links to either jurisdiction to justify it being sued there for state-based product defect, negligence and other claims. The vehicles involved in both instances were bought secondhand.

The automaker argued that the decisions flouted the standard set by the high court in 2017 in *Bristol-Myers Squibb v. Superior Court of California*. That decision established that the due process clause of the Fourteenth Amendment requires both that the defendant have "purposefully availed itself of the privilege of conducting activities within the forum state" and that the plaintiff's claim "'arise out of or relate to' the defendant's forum conduct."

In its petition, Ford said that Montana's and Minnesota's high courts enabled a "jurisdictional free-for-all" by allowing the plaintiffs' suits to advance in their states. According to Ford, those decisions cleared a path for companies hit with defect claims to be unfairly hauled into state courts based on tenuous connections or even no connections at all.

In the Minnesota case, Adam Bandemer was a passenger in a 1994 Crown Victoria when the driver rear-

ended a snowplow and the car ended up in a ditch. He alleged in his state court suit that the passenger-side air bag didn't deploy and that he suffered a severe brain injury, according to Ford's petition.

The Montana case involves a wrongful death suit brought by the estate of Markkaya Jean Gullett, who died in 2015 in a rollover crash of a Ford Explorer.

The plaintiffs have argued that the Supreme Court already made clear in 1980 in *World-Wide Volkswagen v. Woodson* that when a company places a defective product into the stream of commerce with the purpose of serving a particular forum, the company is subject to personal jurisdiction for the resulting injuries in that forum.

"The impact of these decisions could be pretty wide-ranging," said Andrew Kaplan of Crowell & Moring LLP. "If the stream-of-commerce theory is validated, it could greatly increase jurisdictions in which defendants could be sued for purposes of product liability cases."

Otherwise, people who buy used cars and are then injured will find it difficult to bring suit in their own states.

The cases are *Ford Motor Co. v. Montana Eighth Judicial District Court et al.*, case number 19-368, and *Ford Motor Co. v. Adam Bandemer*, case number 19-369, in the Supreme Court of the United States.

COVID-19 Could Usher in Wave of Hand Sanitizer Litigation

Before the coronavirus outbreak was declared a global pandemic, the U.S. Food and Drug Administration slapped the maker of Purell with a warning letter telling it to stop marketing the hand sanitizer as reducing or preventing diseases, including the Ebola virus and the flu.

Shortly after, Purell maker Gojo Industries Inc. was sued in New York federal court by consumers seeking to represent a nationwide class claiming the Ohio-based company violated consumer protection laws by marketing its Healthcare Advanced Hand Sanitizer product line as effective for reducing the spread of viruses.

"The recent outbreak of the fatal coronavirus has prompted increased demand for the products," plaintiff Magdiela Gonzalez said in the suit.

Another hand sanitizer company, Vi-Jon, was also sued in California federal court accusing it of falsely claiming that its hand sanitizer Germ-X can fight off the coronavirus. The consumers pointed to advertisements for Germ-X that either explicitly say the sanitizer counteracts coronavirus and other communicable viruses or imply "this misrepresentation with the use of wording, images, and links."

"There's been a lot of government activity regarding claims associated with the efficacy of sanitizer products in killing the [novel coronavirus]," said Alexandra Cunningham of Hunton Andrews Kurth LLP. "I think as the year goes on we're going to see those move into additional consumer cases, and potentially even in the realm of personal injury-type claims where someone suggests that hand sanitizers or masks or [personal protective equipment] did not provide the protection that they were supposed to and as a result they ended up with the virus."

Cunningham noted that the federal PREP Act may provide immunity for hand sanitizer manufacturers. The law authorizes the U.S. Department of Health and Human Services secretary to declare immunity

from liability for countermeasures to disease during a public health emergency.

The cases are *Marinovich v. Gojo Indus. Inc.*, case number 3:20-cv-747, in the U.S. District Court for the Northern District of California, *Aleisa v. Gojo Indus. Inc.*, case number 2:20-cv-1045, in the U.S. District Court for the Central District of California, *Jurkiewicz v. Gojo Industries Inc.*, case number 5:20-cv-279, in the U.S. District Court for the Northern District of Ohio, *Miller v. Gojo Industries Inc.*, case number 4:20-cv-562, in the U.S. District Court for the Northern District of Ohio and *Gonzalez et al. v. Gojo Industries Inc.*, case number 1:20-cv-00888, in the U.S. District Court for the Southern District of New York.

Testing the Thoroughness of Product Recalls

Ikea US Retail LLC is facing a proposed class action in Pennsylvania federal court alleging it carried out a "feeble" recall of dressers that are prone to tipping over and have resulted in injuries to and deaths of children.

Parents Diana and John Dukich said in May that Ikea sold dressers that are front-heavy and unstable and were recalled in 2016 and 2017. However, Ikea's recall efforts have been weak and most buyers of the dressers didn't receive notice of the recall, the Dukichs said.

And instead of providing cash refunds for the dressers as promised, many consumers instead received Ikea gift cards, according to the complaint.

The Dukichs seek to represent a class of consumers who bought the dressers included in the recall, and allege Ikea violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

"There are lots of instances where litigation gets spawned because there was a recall, but there haven't been that many cases, at least that I'm aware of, where the recall itself has been the subject of the litigation," Paul Benson of Michael Best & Friedrich LLP said. "This Ikea case does [challenge the recall itself], and I'm curious as to whether or not that's going to start a trend of people retroactively, with the benefit of hindsight, looking at how the recall was done and whether or not it should have done better."

Following the deaths of six children and nearly 30 injuries, Ikea in June 2016 started recalling 29 million chests and dressers that have the propensity to tip over and trap children underneath. In January, Feldman Shepherd Wohlgeleir Tanner Weinstock Dodig LLP announced that the firm and the furniture maker had reached a \$46 million deal with one family, which they believe is the largest wrongful death settlement for a child in U.S. history.

The case is *Dukich et al. v. Ikea US Retail LLC et al.*, case number 2:20-cv-02182, in the U.S. District Court for the Eastern District of Pennsylvania.

Opioid Bellwether Trials Heating Up

A bench trial before U.S. District Judge David A. Faber is set to begin Oct. 19 in West Virginia federal court, pitting Cabell County and the City of Huntington against drug distributors McKesson Corp., AmerisourceBergen and Cardinal Health Inc., which are accused of fueling the opioid crisis by failing to flag suspicious opioid orders.

"While these are small cities and small counties relative to the national problem, these two places were the epicenter of the dumping of pills far beyond the number of people in the population, so it's a really

important story to be told," said Don Migliori of Motley Rice LLC, who represents the plaintiffs in the litigation.

The first bellwether trial was narrowly averted last fall with an eleventh-hour deal worth \$260 million between Teva Pharmaceutical Industries Ltd., Cardinal Health, McKesson and AmerisourceBergen and the Ohio counties of Cuyahoga and Summit.

It's an important case because it's a continuation of that first bellwether trial, Migliori said, and it reflects a shift in targeting pharmacies in the opioid litigation.

"[The deal] did not precipitate what we had hoped would be a national global resolution, which is still very much out there, and this is the next shot in going after them in the MDL," Migliori said.

Another bellwether trial is scheduled for Nov. 19, with Ohio's Cuyahoga and Summit Counties bringing claims over the wholesale distribution activities of pharmacies. The claims in that case were narrowed after the Sixth Circuit in April ruled the trial can't examine dispensing allegations because they were added too late.

While other bellwether trials in the MDL are heating up, the Ohio counties' case against the pharmacies is the most advanced. Since the claims are limited to allegations that the pharmacies distributed excessive supplies of opioids to their branches until 2014, the Sixth Circuit's ruling means the question of whether pharmacies can be held liable for improperly filling painkiller prescriptions won't be tested for some time.

The cases are County of Cuyahoga v. Purdue Pharma LP et al., case number 1:17-op-45004, County of Summit et al. v. Purdue Pharma LP et al., case number 1:18-op-45090, City of Huntington v. AmerisourceBergen Drug Corp. et al., case number 3:17-cv-01362, and Cabell County Commission v. AmerisourceBergen Drug Corp. et al., case number 3:17-cv-01665, in the U.S. District Court for the Southern District of West Virginia.

The MDL is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Editing by Alanna Weissman and Brian Baresch.