

## Top Product Liability Cases Of 2020: Midyear Review

By **Emily Field**

*Law360 (August 3, 2020, 8:03 PM EDT)* -- Bayer's multibillion-dollar settlements over its weedkiller Roundup, herbicide dicamba and allegations over waterway contamination, as well as a \$186 million verdict in favor of consumers who claimed that Johnson & Johnson talc products caused their cancer made Law360's list of the top product liability cases so far this year.

Also making the list are a decision by the Illinois Supreme Court that barred out-of-state plaintiffs from bringing claims over Bayer's Essure birth control device and a ruling by the Sixth Circuit that narrowed the discretion of the Ohio federal judge overseeing the opioid multidistrict litigation.

### Landmark Bayer Settlements

Bayer AG in June announced a trio of settlements totaling \$11.22 billion to end claims over its Roundup weedkiller, herbicide dicamba and its alleged contamination of U.S. waterways.

The deal resolves the bulk of roughly 125,000 claims in sprawling multidistrict litigation over whether Roundup causes non-Hodgkin's lymphoma, a form of cancer.

It includes between \$8.8 billion and \$9.6 billion to resolve current Roundup litigation — including for plaintiffs who have hired attorneys but have not yet filed claims in court — and makes an allowance for the 25% of pending claims that are still being negotiated, according to Bayer.

However, one group of plaintiffs, led by Robert Ramirez, withdrew its support for a \$1.25 billion settlement that sought to end current and future claims from proposed class members who had been diagnosed with cancer allegedly linked to the weedkiller or who hadn't been diagnosed yet.

The withdrawal came after U.S. District Judge Vince Chhabria expressed skepticism about whether it is appropriate to handle claims in such a manner. The judge said the constitutionality and lawfulness of the settlement is in doubt, as it supplants judges and juries with a panel of scientists in determining if Roundup causes cancer.

In the waterways settlement, Bayer agreed to pay \$820 million to settle allegations brought by the city of Long Beach, California, and a slew of other local governments that claim they face increased costs due to Monsanto's contamination.

According to Bayer, about \$650 million will be paid to a class of about 2,500 local governments including Long Beach, Oakland and Los Angeles County to resolve PCB-related allegations. Bayer also reached agreements totaling \$170 million with Washington, D.C., New Mexico and Washington state over allegations similar to those brought by the local governments, according to the company.

And in the third settlement, Bayer said it would pay up to \$400 million to settle litigation with soybean farmers and others over claims the weedkiller dicamba ruined their crops.

The settlement applies mainly to soybean farmers, who make up most of the plaintiffs in multidistrict litigation in which farmers claim that dicamba applied by neighboring farms growing dicamba-resistant crops vaporized, drifted over and hurt their non-resistant crops.

The cases are Long Beach et al. v. Monsanto Co. et al., case number 2:16-cv-03493, in the U.S. District Court for the Central District of California; and Bader Farms Inc. et al. v. Monsanto Co. et al., case number 1:16-cv-00299, and In re: Dicamba Herbicides Litigation, case number 1:18-md-02820, in the U.S. District Court for the Eastern District of Missouri.

The MDL is In re: Roundup Products Liability Litigation, case number 3:16-md-02741, in the U.S. District Court for the Northern District of California.

### **Illinois Supreme Court Boots Out-of-State Plaintiffs**

Illinois' top court in June said the claims of more than 150 nonresidents of the Prairie State must be axed from a pair of lawsuits accusing Bayer of defectively manufacturing and marketing Essure, a permanent birth control device.

The nonresident plaintiffs identified "no jurisdictionally relevant links" between their claims and Illinois, the justices found in a 7-0 opinion, reversing circuit and appellate courts that had allowed those claims over the birth control device to go forward.

The U.S. Supreme Court's landmark Bristol-Myers Squibb v. Superior Court ruling "forecloses" the nonresidents' contention that their allegations about Bayer's Essure-related Illinois activities are enough to link their specific claims to Nichole Hamby's and Christy Rios' Essure lawsuits, the Illinois Supreme Court held.

In that case, the U.S. high court ruled that a group of plaintiffs couldn't sue Bristol-Myers Squibb in California over injuries allegedly tied to the company's Plavix blood thinner because they neither lived in the state nor suffered their alleged injuries there.

The Illinois ruling may be one of the year's most important developments in product liability litigation, James Beck of Reed Smith LLP said.

"There is no other alternative because Illinois does not recognize general jurisdiction by registration to do business, that's already been decided, and now they don't recognize out-of-state plaintiffs who allege things that any plaintiff anywhere could allege as a contact," Beck said. "You have to essentially allege that you were injured there or bought the product there or if you had surgery there, so that's a big change."

The consolidated case is Christy Rios et al. v. Bayer Corp. et al., case number 125020, and Nichole

Hamby et al. v. Bayer Corp. et al., case number 125021, before the Supreme Court of the State of Illinois.

### **J&J Stops Talc Sales After Multimillion-Dollar Verdicts**

Johnson & Johnson was pummeled in February with \$186 million in combined punitive damages at a New Jersey state trial over claims that the pharmaceutical giant knowingly sold baby powder containing asbestos and hid that from the public with reckless indifference to the consequences.

Following a separate jury's \$37.3 million compensatory damages verdict last year, a new panel issued punitive verdicts worth \$750 million, later reduced by the judge. The jury found that the company acted maliciously or in wanton and willful disregard of the rights of four people who were found to have developed mesothelioma from using the baby powder.

The jury issued separate verdicts totaling \$187.5 million for each of the four mesothelioma victims.

Superior Court Judge Ana C. Viscomi reduced each punitive award in accordance with state law to make it five times the amount of the respective compensatory verdict. She awarded \$36.25 million for Douglas Barden and his wife; \$47.25 million for David Etheridge and his wife; \$73.5 million for D'Angela McNeill-George; and \$29.5 million for Will Ronning and his wife. Ronning died after the compensatory trial ended in September.

Also in February, a Miami jury ordered J&J to pay a Florida woman \$9 million after finding the company caused the woman's mesothelioma by exposing her to asbestos in its baby powder.

The plaintiff's attorney, Marc Kunen of The Ferraro Law Firm, said it's the first such verdict in Florida.

The jury said J&J had been negligent and sold a defective product, and awarded plaintiff Blanca Moure-Cabrera \$3 million for past medical expenses, plus \$6 million for past and future pain and suffering.

Additionally, in multidistrict litigation in New Jersey over allegations that J&J's talc causes ovarian cancer, U.S. District Judge Freda L. Wolfson largely rejected the company's attempts to bar plaintiffs' experts from testifying that J&J's baby powder contains asbestos, opening a path to trials in the MDL, which contains thousands of cases.

Judge Wolfson ruled that most of the experts met the Daubert standard requiring such testimony to have sufficient scientific support.

"We were able to put together a strong defense and the court agreed," said Don Migliori of Motley Rice LLC, which represents plaintiffs in the MDL. "Within just a couple weeks of the court issuing a ruling saying that the claims go forward under the Daubert challenge, J&J did the right thing and stopped selling its talcum powder."

In May, J&J announced it would stop selling talc-based products in the U.S. and Canada, citing a decline in consumer demand and "misinformation" about the safety of the products.

J&J said that as part of an assessment of its portfolio due to the coronavirus pandemic, the company stopped shipping hundreds of items in the U.S. and Canada in March in order to prioritize products in high demand and allow for social distancing in its facilities.

The company said it would continue to defend its talc products in court, citing decades of scientific studies by medical experts around the world that it says support their safety.

The cases are *Barden et al. v. Brenntag North America et al.*, case number L-1809-17; *Etheridge et al. v. Brenntag North America et al.*, case number L-0932-17; *McNeill-George v. Brenntag North America et al.*, case number L-7049-16; and *Ronning et al. v. Brenntag North America et al.*, case number L-6040-17, in the Superior Court of the State of New Jersey, County of Middlesex and *Moure-Cabrera v. Cyprus Amax Minerals Co. et al.*, case number 2019-000727-CA-01, in the Circuit Court of the 11th Judicial District in and for Miami-Dade County, Florida.

### **Sixth Circuit Sharply Limits Opioid Claims Against Pharmacies**

The Sixth Circuit in April said that key bellwether cases against CVS, Walgreens and other pharmacy giants can't include dispensing allegations because those claims were added too late, a major move in the sprawling multidistrict litigation over the deadly opioid epidemic.

The appeals court unanimously granted a writ of mandamus from the pharmacy chains and found that U.S. District Judge Dan Aaron Polster improperly allowed two Ohio counties to amend their complaints with retail dispensing allegations even though they had "expressly disavowed" them at one point long ago.

His decision to grant the counties leave to amend their complaints was "plainly incorrect" as a matter of law, the panel wrote.

The decision means that a bellwether trial set for November will primarily focus on how the actions of pharmacies as wholesale opioid distributors affected the northern Ohio counties of Summit and Cuyahoga. The pharmacy defendants also include Rite-Aid and Walmart.

"Judges have a lot of discretion, and I think you see judges who are trying to come up with creative ways to make the MDLs more useful, but the amount of discretion that they have is sometimes unclear," Andrew Kaplan of Crowell & Moring LLP said. "I think the Sixth Circuit decision, which rejected some of the district court's management tools, if you will, in the opioid MDL was one of the first signs I think we've seen of appellate courts trying to define the limits of the MDL discretion for MDL judges."

The appeal is *In re: CVS Pharmacy Inc. et al.*, case number 20-3075, in the U.S. Court of Appeals for the Sixth Circuit.

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 Kelly Duncan and Alanna Weissman.