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Product Liability Cases To Watch In 2014

By **Greg Ryan**

Law360, New York (January 01, 2014, 10:08 AM ET) -- The U.S. Supreme Court has the opportunity to radically reshape product defect class actions and personal injury lawsuits against medical device manufacturers in 2014, with lower courts poised to tackle the viability of generic-drug design defect claims and popular food-mislabeling allegations.

The next 12 months could also have a significant impact on product liability lawsuits brought by the government, with a big decision expected in relation to federal agencies' ability to target corporate executives in their personal capacity.

Washing Machine Defect Litigation

Like a pair of dirty khakis on the permanent press cycle, the lawsuits against Whirlpool Corp. and Sears Roebuck & Co. over their front-loading washing machines keep going around and around.

In 2012, the Sixth and Seventh circuits backed class certification in two suits accusing Whirlpool and Sears, respectively, of making and selling washers that accumulate mold. In the spring of 2013, the Supreme Court instructed the circuit courts to reconsider their decisions in light of its Comcast Corp. v. Behrend ruling, in which the high court held that common issues did not predominate on the issue of damages in an antitrust class action.

On remand, the circuit courts again backed certification, ruling that the Supreme Court's classwide damages holding in Comcast does not apply to the two washer cases. The companies petitioned the Supreme Court to review the new rulings in October.

The stakes are just as high for manufacturers and consumers as they were the first time around, if not higher. The circuit court rulings allow consumers to be part of the class even if the alleged mold defect hasn't manifested itself in their washers, Steptoe & Johnson LLP partner Jennifer Quinn-Barabanov said.

“It creates the possibility that every time a manufacturer makes a product, they can be sued by every purchaser of the product, not just those who had a problem with it,” she said.

The plaintiffs in the cases are represented by Lieff Cabraser Heimann & Bernstein LLP.

Whirlpool and Sears are represented by Mayer Brown LLP, Nelson Mullins Riley & Scarborough LLP and Wheeler Trigg O'Donnell LLP. Whirlpool is also represented by Vorys Sater Seymour and Pease LLP.

The cases are Sears Roebuck & Co. v. Butler et al., case number 13-430; and Whirlpool Corp. v. Glazer et al., case number 13-431; in the U.S. Supreme Court.

Post-Bartlett Design Defect Claims

When the Supreme Court ruled in Mutual Pharmaceutical Co. Inc. v. Bartlett in June that federal law preempts design defect claims against generic-drug manufacturers, the defense bar rejoiced. The decision made it that much harder to pursue generics makers over injuries caused by their products.

Buried in a footnote in the majority's ruling, however, was the provision that the holding doesn't address design defect allegations “that parallel the federal misbranding statute.”

“It really left open the only possibility of a design defect claim” against generics makers, Bowman and Brooke LLP partner Randall Christian said of the footnote. “Every other avenue's been shut down that plaintiffs have pursued.”

Among the first plaintiffs to try the new avenue are users of generic versions of the painkillers Darvocet and Darvon, in the Sixth Circuit. The plaintiffs are attempting to overturn the dismissal of their claims that painkillers made by a host of generics makers, including Teva Pharmaceuticals USA, caused severe heart injuries.

The plaintiffs built an October brief around the holding in the footnote, arguing that the drugs were misbranded under federal law because they were ineffective and dangerous when used as directed by their labeling.

The plaintiffs are represented by the Center for Constitutional Litigation PC, Wright & Schulte LLC and Nast Law LLC, among others.

The generic-drug makers are represented separately by Quinn Emanuel Urquhart & Sullivan LLP, Greenberg Traurig LLP and Shook Hardy & Bacon LLP, among others.

The case is Miller v. Eli Lilly & Co. et al., case number 12-5929, in the U.S. Court of Appeals for the Sixth Circuit.

Medtronic v. Stengel

When the Supreme Court has tackled medical product liability issues in the past few years, it has done so in drug-related cases such as Bartlett. A medical device injury dispute may get the spotlight in 2014, however.

Medtronic Inc. petitioned the Supreme Court in May to review the Ninth Circuit's ruling that federal law does not preempt a man's claim that the company failed to warn him of a pain pump's risks, leading to

his paralysis. According to the appeals court, the claim that Medtronic acted negligently by failing to report the device's risks to the U.S. Food and Drug Administration parallels its federal-law duty.

The ruling raises questions about just which device-related claims are preempted. The Supreme Court ruled in its landmark 2001 decision Buckman Co. v. Plaintiffs' Legal Committee that claims that a company defrauded the FDA while seeking approval for a device conflict with federal law.

The high court asked the U.S. solicitor general in October to weigh in on the dispute. It has not yet decided whether it will take up the case.

Medtronic is represented by Gibson Dunn and Reed Smith LLP.

The plaintiff is represented by Haralson Miller Pitt Feldman & McAnally PLC.

The case is Medtronic Inc. v. Stengel et ux., case number 12-1351, in the U.S. Supreme Court.

“All-Natural” Food Labeling Class Actions

One district judge's action in 2013 will have repercussions for an entire class of litigation in 2014.

In July, U.S. District Judge Yvonne Gonzalez Rogers stayed a proposed class action accusing Gruma Corp. of falsely labeling its tortilla chips as “natural,” asking the FDA to determine whether the term applies to food containing genetically modified ingredients. Afterward, other judges followed suit and put similar actions on hold. Like other food labeling actions, “natural” suits have grown popular in recent years.

Attorneys are watching closely to see whether the FDA weighs in by Judge Gonzalez Rogers' Jan. 11 deadline. If the FDA indicates it will devise a rule regarding whether products with genetically modified ingredients can be labeled as "natural," pending suits over use of the term could be dismissed or stayed, according to Faegre Baker Daniels LLP partner Sarah Brew. If the FDA issues guidance or a policy statement, it may help food manufacturers defend the suits, she said.

If, however, the FDA declines to weigh in, juries would determine when the term could be used, and “food companies would continue to deal with the uncertainty and lack of predictability in deciding whether to call products 'natural,'” she said.

The plaintiff is represented by Milstein & Adelman LLP, The Law Offices of Howard W. Rubenstein PA and the Law Office of L. DeWayne Layfield.

Gruma is represented by Thompson & Knight LLP.

The case is Cox v. Gruma Corp. et al., case number 4:12-cv-06502, in the U.S. District Court for the Northern District of California.

CPSC Suit Against Buckyballs Maker CEO

The U.S. Consumer Product Safety Commission took an unprecedented step in 2013 when it sought to

hold Craig Zucker, the CEO of the company behind the magnet set Buckyballs, personally liable for alleged defects in the products.

An administrative law judge has already held that the agency could add Zucker as a defendant in an already-filed complaint against the company. Attorneys for product manufacturers are anxious to see whether Zucker will ultimately be held liable for the alleged defects, an outcome they say could encourage agencies to target executives. They'll also be watching Zucker's countersuit against the CPSC claiming that the agency is not authorized by law to sue him.

Zucker is represented by Mayer Brown LLP and Hyman Phelps & McNamara PC.

The case is In the matter of Maxfield and Oberton Holdings LLC, Zen Magnets LLC and Star Networks USA LLC; case Nos. 12-1, 12-2 and 13-2; before the U.S. Consumer Product Safety Commission.

--Editing by John Quinn.