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Bartlett Tops Early List Of Top Products Rulings For 2013

By **Greg Ryan**

Law360, New York (June 28, 2013, 8:38 PM ET) -- The first half of 2013 proved to be a busy six months in product liability, with defendants picking up a pair of gargantuan wins before the U.S. Supreme Court and plaintiffs notching far-reaching victories against corporate titans such as Johnson & Johnson and Philip Morris USA Inc. at the state level.

Companies have had the upper hand before the nation's highest court so far this year, garnering two especially favorable rulings related to generic-drug injury suits and foreign-based mass torts. The rulings leave plaintiffs in those areas of litigation with little recourse against manufacturers.

The plaintiffs bar has met with some success elsewhere, however, including in two major state supreme court decisions concerning tobacco manufacturers' liability for smoking-related diseases and brand-name drugmakers' liability for generic-drug injuries. Because neither of those rulings has been cemented quite yet, however, the cases promise fireworks far beyond the upcoming July Fourth holiday.

Supreme Court Decimates Generics Suits

The most closely watched product liability case of 2013 was concluded just days ago, when the Supreme Court found in favor of Mutual Pharmaceutical Co. Inc. and ruled that design defect claims against generic-drug makers are preempted by federal law.

The decision comes on top of the court's Pliva Inc. v. Mensing decision in 2011, in which it held that failure-to-warn claims against generics makers are preempted. The two rulings leave plaintiffs allegedly injured by generic drugs with very little room to bring suit against the companies.

Defense attorneys are already predicting that the decision could be used to defend against some claims involving not just generic drugs, but also other products including brand-name drugs.

“The majority's categorical rejection of the argument that when a product can't be redesigned, the manufacturer can comply with inconsistent state and federal obligations by exiting the market should protect both generic and brand companies from ill-conceived design defect claims,” Bowman and

Brooke LLP partner Randall Christian said.

Mutual is represented by Kirkland & Ellis LLP.

Plaintiff Karen Bartlett is represented by Kellogg Huber Hansen Todd Evans & Figel PLLC, Jensen & Associates PLLC and Shaheen & Gordon PA.

The case is Mutual Pharmaceutical Co. Inc. v. Bartlett, case No. 12-142, in the U.S. Supreme Court.

High Court Curbs Alien Tort Law

When the calendar flipped from 2012 to 2013, one of the most pressing questions on the minds of product liability attorneys was whether the Supreme Court would limit plaintiffs' ability to bring claims under the Alien Tort Statute, a law allowing international law violations to be brought in the U.S.

The answer **was a definitive "yes"** in a unanimous April opinion. Though the justices disagreed about the extent to which that ability was limited, the decision was undoubtedly a victory for companies fearful of torts centered in other countries. The court's main opinion, delivered by Chief Justice John Roberts and joined by three other justices, held there was no indication the ATS was meant to apply to actions on foreign soil.

"Kiobel has slammed the doors of federal courts shut on so-called foreign-cubed ATS cases, where the plaintiff, defendant and [site] of the purported international law violation are all foreign," Orrick Herrington & Sutcliffe LLP partner Laurie Strauch Weiss said.

The decision has already resulted the dismissal of multiple ATS cases, according to Weiss.

The plaintiffs are represented by Schonbrun DeSimone Seplow Harris Hoffman & Harrison LLP and Eaton & Van Winkle LLP.

Shell is represented by Quinn Emanuel Urquhart & Sullivan LLP and Cravath Swaine & Moore LLP.

The case is Kiobel et al. v. Royal Dutch Petroleum et al., case No. 10-1491, in the U.S. Supreme Court.

Supreme Court Remands Whirlpool Defect Cases

Two Supreme Court rulings this year were important not for the questions they answered, but for the questions they posed.

In April, the high court vacated a decision from the Sixth Circuit backing certification of a class of consumers suing Whirlpool Corp. over allegedly defective washing machines, and sent the case back to the appeals court for reconsideration in light of its Comcast Corp. v. Behrend decision. Two months later, it did the same to a similar class action against Sears Roebuck & Co. in the Seventh Circuit.

The high court held in the Comcast ruling that an antitrust class action should not have been certified because the plaintiffs hadn't shown that common issues predominated. What that means for the Whirlpool and Sears cases is something the parties will have to fight out, at either the circuit or district level.

“It pretty clearly sends the message that the Supreme Court believes that in light of Comcast, these cases are either wrongly decided or need to be substantially modified,” said Michael Best & Friedrich LLP attorney Paul Benson.

In briefings to the two courts, the plaintiffs have argued that Comcast does not invalidate the certification decisions.

The plaintiffs are represented by New York University professor Samuel Issacharoff, Lieff Cabraser Heimann & Bernstein LLP, Seeger Weiss LLP and Complex Litigation Group LLC.

Whirlpool and Sears are represented by Wheeler Trigg O'Donnell LLP and Mayer Brown LLP.

The cases are Whirlpool Corp. v. Glazer et al., case No. 12-322; Sears Roebuck & Co. v. Butler et al., case No. 12-1067; in the U.S. Supreme Court.

Eight-Digit Verdict In Vaginal Mesh Suit

One bright spot for plaintiffs in the first half of 2013 has been the $11.1 million in damages that a New Jersey jury imposed against Johnson & Johnson in February, in one of the first vaginal mesh lawsuits to go to trial nationwide. Johnson & Johnson, C.R. Bard Inc., Boston Scientific Corp. and Endo Pharmaceuticals unit American Medical Systems Holdings Inc. all face multidistrict litigation over injuries allegedly caused by their mesh products, in addition to suits in state courts.

“The verdict ... gives a good indication of what juries think of the cases — both the very intimate and horrible damages these women suffer, and the cavalier attitude taken by the manufacturers in pushing these untested products onto the market,” said Bill Curtis of The Curtis Law Group.

Endo has already started to pay out plaintiffs in the wake of the verdict. The company announced in June that it was forking over $54.4 million to settle an undisclosed number of lawsuits.

“I would not want to be a [vaginal mesh] manufacturer right now, looking at thousands of cases with potential exposure into the stratosphere,” Curtis said.

The plaintiff is represented by Mazie Slater Katz & Freeman LLC.

Johnson & Johnson is represented by Butler Snow O'Mara Stevens & Cannada PLLC and Riker Danzig Scherer Hyland & Perretti LLP.

The case is Gross v. Gynecare Inc., case No. Atl-L-6966-10, in New Jersey Superior Court, Atlantic County.

Alabama Court Endorses Innovator Liability

In a decision that shocked drug companies and defense attorneys, the Alabama Supreme Court **ruled in early January** that manufacturers of brand-name drugs can be held liable for injuries caused by their generic counterparts. Only two other courts in the country have held similarly, a club greatly outnumbered by the number of courts that have shot down the theory, known as innovator liability.

The ruling represents a beacon of hope for plaintiffs looking to recover for their alleged injuries in the face of Mensing and now Bartlett. But that hope may not be long-lived: The court granted a motion from defendants Pfizer Inc. and Schwarz Pharma Inc. to reconsider its decision, in a hearing set for September.

The plaintiffs are represented by Heninger Garrison Davis LLC.

Pfizer is represented by Bradley Arant Boult Cummings LLP.

Schwarz is represented by Mayer Brown LLP and McDowell Knight Roedder & Sledge LLC.

The case is Wyeth Inc. et al. v. Weeks et al., case No. 1101397, in the Alabama Supreme Court.

Florida High Court Favors Engle Plaintiffs

Philip Morris and fellow tobacco giants R.J. Reynolds Tobacco Co. and Liggett Group LLC have for years been attempting to escape the central finding of the Florida Supreme Court's landmark Engle ruling: that one jury's liability findings can apply in thousands of individual lawsuits against the companies. The manufacturers lost their highest-stakes attempt to dismantle the decision in March, when the state's high court ruled that the decision didn't violate their due process rights.

“The decision ... finally rejects, at the state court level at least, the one argument on which [Big Tobacco] had pinned its hopes for evading responsibility for its conduct in Florida,” said plaintiffs attorney John Mills of The Mills Firm PA.

However, the companies have at least one more opportunity to upend the massive litigation, which has saddled them with a considerable number of multimillion-dollar verdicts. The Eleventh Circuit is considering two consolidated appeals on the due process issue, with oral argument set for August.

The plaintiff is represented by the Law Office of Howard M. Acosta, The Whittemore Law Group PA, Bruce Howard Denson PA and Brannock & Humphries.

Philip Morris is represented by Shook Hardy & Bacon LLP, White & Case LLP, Carlton Fields PA, Boies Schiller & Flexner LLP and Mayer Brown LLP.

R.J. Reynolds is represented by Jones Day.

Liggett is represented by Clarke Silverglate PA and Kasowitz Benson Torres & Friedman LLP.

The case is Philip Morris USA Inc. et al. v. Douglas, case No. SC12-617, in the Supreme Court of Florida.

CPSC Targets Buckyballs Maker's CEO

Products makers — or, in this instance, the top executive at a products maker — suffered another defeat in May**,** when an administrative law judge ruled that the CEO of Buckyballs manufacturer Maxfield and Oberton Holdings LLC could be added in his personal capacity to a lawsuit brought by the U.S. Consumer Product Safety Commission. The agency is pursuing Maxfield over its refusal to recall the magnetic toys due to an alleged defect.

The decision marked the first time that the CPSC has sought to hold an executive personally responsible for carrying out his or her company's recall. Maxfield stopped doing business last year.

“It ups the ante tremendously,” said Charles Joern of Joern Law Firm. “Now, by definition, there's potential personal exposure of a CEO's assets, when previously the exposure and requirements and obligations were limited to the company itself.”

Another attorney, Alston & Bird LLP counsel Jenifer Keenan, said the decision could make executives less likely to deal directly with the CPSC.

Zucker sought to file an immediate appeal of the ruling, but the judge rejected the bid in June.

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 Elizabeth Bowen and Chris Yates.