

The Top Product Liability Cases Of 2015: Midyear Report

By **Sindhu Sundar**

Law360, New York (July 29, 2015, 2:02 PM ET) -- A New Jersey judge departed from his predecessor in dismissing hundreds of suits in the consolidated Accutane litigation, General Motors Co. secured a Chapter 11 shield from certain ignition switch liability suits, and asbestos plaintiffs in New York City won a decision that will aid their fight for punitive damages.

Here, Law360 looks at the year's most significant product liability cases so far.

In re: Accutane Litigation

Judge Nelson Johnson, who took over as the mass torts judge in Atlantic County last year following Judge Carol Higbee's move to the Appellate Division, issued significant rulings this year in the consolidated litigation over Hoffmann-La Roche Ltd.'s acne medication Accutane.

In February, he rejected the testimony of the plaintiffs' gastroenterology expert Arthur Kornbluth and biostatistics expert David Madigan, ruling in a biting opinion that they were "cherry-picking evidence." The experts had testified in support of plaintiffs' claims that the drug can cause Crohn's disease, a condition that can cause painful inflammation along the gastrointestinal tract.

The parties agreed in May that the decision effectively ends roughly 2,000 suits. In April, Judge Johnson also found that Roche's post-2002 Accutane warnings were adequate, and earlier this month he tossed more than 500 suits as a result.

"Judge Higbee had ruled on some similar issues in the past and come out the other way, so its interesting to see Judge Johnson take an independent path and look at the evidence anew," said Alan Klein of Duane Morris LLP.

Judge Higbee had previously found that the question of whether a label is adequate is a factual matter that a jury can address. Judge Johnson's consideration of Roche's post-2002 label indicated he believed a label could be so clear and unambiguous that it could be found to be adequate as a matter of law.

The plaintiffs are represented by David Buchanan of Seeger Weiss LLP and Mary Jane Bass of Beggs & Lane RLLP.

Roche is represented by Michelle Bufano of Gibbons PC, Paul Schmidt of Covington & Burling LLP, and Russ Hewit of Dughi Hewit & Domalewski PC.

The consolidated litigation is In re: Accutane Litigation, case number 271, in the Superior Court of New Jersey in Atlantic County.

In re: Motors Liquidation Co. et al.

U.S. Bankruptcy Judge Robert Gerber in New York issued a highly anticipated **decision** in April, when he found that GM's Chapter 11 protections from its July 2009 reorganization still applied, and shielded it from many liability suits over its faulty ignition switches.

The ruling, which prevented plaintiffs from suing the company for its pre-bankruptcy actions, deals a blow to some 140 personal injury plaintiffs in a consolidated complaint before him, but the lead plaintiffs attorney in the parallel MDL, Robert Hilliard of Hilliard Munoz Gonzales LLP, has said that the ruling doesn't hurt the more than 1,000 personal injury and wrongful death plaintiffs before U.S. District Judge Jesse Furman in cases involving accidents that happened after the GM sale order.

But the ruling has a significant impact beyond the GM litigation, attorneys say.

"This was a very important ruling, not just for GM but for all defendants or debtors who seek to reorganize through the protections of the bankruptcy court," Thomas Regan of LeClairRyan said. "The ruling isn't novel, but it is important in that it followed existing case law and existing Bankruptcy Code law, despite the size of the companies that were going into and out of the bankruptcy."

Large companies face higher stakes in such cases because the universe of potential creditors seeking recoveries is usually much larger as well, according to Regan.

"When you're talking about that type of scale, there's always the danger that someone is going to find a way to chip away at those protections," Regan said. "When you have a company this large that is seeking the protection of bankruptcy court, and seeking against this many creditors, there is some potential that the court will craft a solution so that it is not a blanket protection. But in this case, the court refused to do that."

The economic loss plaintiffs are represented by Edward S. Weisfelner, David J. Molton, May Orenstein, Howard S. Steel and Rebecca L. Fordon of Brown Rudnick LLP, and Sander L. Esserman of Stutzman Bromberg Esserman & Plifka APC. The pre-sale accident victim plaintiffs are represented by William P. Weintraub, Eamonn O'Hagan and Gregory W. Fox of Goodwin Procter LLP.

GM is represented by Arthur Steinberg and Scott Davidson of King & Spalding LLP, and Richard C. Godfrey and Andrew B. Bloomer of Kirkland & Ellis LLP.

The case is In re: Motors Liquidation Co. et al., case number 1:09-bk-50026, in the U.S. Bankruptcy Court for the Southern District of New York.

In re: New York City Asbestos Litigation

A New York state appeals court issued a key ruling earlier this month that the lower court judge previously overseeing the New York City asbestos litigation had the authority to allow plaintiffs to seek punitive damages in the litigation, a point of major controversy in the decades-old case.

The appellate court found that New York Supreme Court Judge Sherry Klein Heitler, who was previously overseeing the litigation, had the authority to modify a decades-old case management order to allow asbestos injury plaintiffs to seek punitive damages in the litigation.

Now, Manhattan Supreme Court Administrative Judge Peter Moulton, who is overseeing the litigation since Judge Heitler's retirement, must decide how to let plaintiffs seek punitive damages, if at all. The appellate court also found that defendants should have sufficient notice of such claims, and rejected Judge Heitler's holding that plaintiffs can make those claims after the evidentiary phase at trial.

"The ruling offers some insight on the protocol to give defendants earlier notice, and an opportunity to seek discovery and assemble evidence," said David Lutz of Bowman and Brooke LLP.

The appellants are represented by Pillsbury Winthrop Shaw Pittman LLP, Darger Errante Yavitz & Blau LLP, K&L Gates LLP, Malaby & Bradley LLC, and McDermott Will & Emery LLP, among other firms.

The appellees are represented by Alani Golanski of Weitz & Luxenberg PC, and Robert Komitor of Levy Konigsberg LLP.

The case is In re: New York City Asbestos Litigation, case number 40000/88, in the Supreme Court of the State of New York, New York County.

Nancy Cooper et al. v. Takeda Pharmaceuticals America Inc. et al.

A California state appeals court ruled earlier this month that a plaintiffs expert in a case against Takeda Pharmaceutical Co. Ltd. over the alleged bladder cancer risks of its diabetes drug Actos used an adequate analysis to support his conclusion.

The ruling, which reinstated a \$6.5 million award to Jack Cooper, a 79-year old man with terminal bladder cancer, and his wife, Nancy Cooper, is unpublished, but attorneys have said it is nevertheless likely to be influential in helping plaintiffs fight challenges to expert testimony.

In this case, a lower court had rejected the plaintiffs expert's use of the differential analysis technique, a method by which an expert assesses the likelihood that a particular factor caused an injury, compared with other possible causes. But the appeals court found that the method was adequate, and that the expert did not have to rule out all other potential causes of bladder cancer besides Actos.

"I think this case underscores a trend we've been seeing in the last few years, where defense lawyers had persuaded their clients that they should try every case, in our experience," said Mark Chalos of plaintiffs firm Lieff Cabraser Heimann & Bernstein LLP.

"We hear these companies and their lawyers beating their chest about going to trial, and to a certain extent, we think these companies have been sold a bill of goods by their lawyers," he said.

The plaintiffs are represented by Stuart B. Esner of Esner Chang & Boyer, and Michael J. Miller, Nancy Miller and Timothy Litzenburg of the Miller Firm and Jeffrey A. Travers.

The defendants are represented by Catherine Valerio Barrad of Sidley Austin LLP.

The case is Nancy Cooper et al. v. Takeda Pharmaceuticals America Inc. et al., case number B250163, in

the Court of Appeal of the State of California, Second Appellate District, Division Three.

Abutahoun et al. v. Dow Chemical Co.

The Texas Supreme Court in May found that a 2003 state law generally shields premises owners from liability for injuries to independent contractors' employees, in a decision that interprets the state statute for the first time.

The ruling upheld a judgment for Dow that tossed a jury's finding that the company was liable for \$2.64 million in damages to the family of Robert Wayne Henderson, who died from mesothelioma, which he allegedly developed through his exposure to asbestos products while working for Dow contractor Win-Way Industries Inc.

"Asbestos litigation has involved a constant search for new defendants, and plaintiffs have been suing premises owners for many years now, if not decades," Lutz said. "In Texas, those claims now require a higher burden even when the exposure may have occurred as a result of premises owner's alleged activities."

The Henderson family is represented by Denyse F. Clancy, John Langdoc and Christine Tamer of Baron & Budd PC.

Dow is represented by Macey Reasoner Stokes and Amy Pharr Hefley of Baker Botts LLP and David P. Herrick of Herrick & Associates PC.

The case is Abutahoun et al. v. Dow Chemical Co., case number 13-0175, in the Supreme Court of the State of Texas.

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