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Product Liability Cases To Watch: Midyear Review

By **Emily Field**

Law360 (August 1, 2022, 8:48 PM EDT) -- More trials are expected to start over claims that drug companies fueled the opioid crisis, and e-cigarette giant Juul is set to face trial in multidistrict litigation over allegations it misrepresented the safety of its wares.

Litigation over so-called forever chemicals continues to grow as well, including claims brought by states and consumers.

Here is Law360's list of product liability cases to watch for the rest of the year.

Opioid Trials March On

Once paused for COVID-19, opioid trials now continue apace across the country with seemingly no end in sight.

Just before closing arguments in July in a San Francisco bellwether case, Walgreens became the last defendant standing when the city struck settlements worth about \$58 million with drugmakers Allergan and Teva Pharmaceuticals.

Walgreens said during its **closing arguments** that the city didn't show any evidence the chain's pharmacists dispensed medically inappropriate drugs — a "fatal flaw" in the case against it. U.S. District Judge Charles R. Breyer, who presided over the trial, is now mulling whether Walgreens should be held liable for the city's drug abuse problem.

San Francisco City Attorney David Chiu is seeking compensation from Walgreens to deal with the crisis he says resulted from the prescription opioids that flooded the city's streets and subsequently drove demand for illicit fentanyl and heroin.

The case is City and County of San Francisco et al. v. Purdue Pharma LP et al., case number 3:18-cv-07591, in the U.S. District Court for the Northern District of California. 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.

Although a date hasn't been set yet for the damages phase in the state of New York and two Long Island counties' suit against Teva, that phase of the litigation is likely to happen later this year.

Following a six-month trial, a New York state court jury found on **Dec. 30** that Teva was responsible for creating a public nuisance in Suffolk and Nassau counties, which had tried their case alongside the New York Attorney General's Office. The jury said the state bore 10% of the responsibility for the opioid crisis, while Teva and its entities were responsible for the rest. The jury also found that drug distributor Anda Inc., which is owned by Teva USA, contributed to the crisis in the counties; the state did not name Anda in its suit.

The verdict was the second from a jury in extensive opioid litigation across the country. Teva USA could be on the hook for billions in damages — far more than what was paid by other drug companies that settled before or during the trial.

"We are extremely pleased that through our efforts to aggressively litigate against the opioid industry, we have brought change and needed compensation to our communities," Hunter Shkolnik of Napoli Shkolnik PLLC, counsel for Nassau County, said in a July email. "We will not rest until everyone

is brought to justice."

Teva recently announced a nearly **\$5 billion settlement** in principle to end opioid claims brought by other states, cities and Native American tribes. In the announcement, Teva said that it is not engaged in any ongoing trials, with the "possible" exception of the damages phase in New York and that the parties are engaged in settlement talks.

Other upcoming opioid trials include New Hampshire's case against Johnson & Johnson in Merrimack County Superior Court, scheduled to start in September. The Granite State opted out of a national settlement with the drugmaker.

The state of Washington is headed to trial against J&J in September, also having chosen not to take part in the deal.

First Juul Trial Starts This Fall

The first trial in the sprawling multidistrict litigation over allegations that Juul deceptively marketed its vaping products to minors will kick off in California federal court in November with a case brought by San Francisco Unified School District.

Juul and Altria are battling claims that they stoked a youth vaping epidemic by misleading the public on the safety of e-cigarettes. Plaintiffs in the MDL claim that the e-cigarettes were designed to give users higher doses of nicotine than traditional cigarettes.

There are more than 3,000 suits **in the MDL**, including personal injury suits and claims brought by school districts, government entities and tribes.

In addition to the MDL, over a dozen state attorneys generals have sued Juul over its advertising practices. There is also consolidated litigation in California state court.

PFAS Litigation Continues as Regulators Tighten Limits

Claims over "forever chemicals" continue to be one of the fastest growing areas in toxic torts, as regulators continue to take action on per- and polyfluoroalkyl substances, or PFAS.

"The PFAS space really seems to be beyond what we have seen for any other chemical," said Alexandra Cunningham of Hunton Andrews Kurth LLP.

PFAS, which have thousands of uses from firefighting foam to food packaging to cosmetics, are nicknamed forever chemicals for their longevity in the human body and the environment. The chemicals have been found all over the country, setting off litigation against their major **manufacturers**, including 3M Co., DuPont de Nemours Inc., Tyco Fire Products LP and Chemours Co.

If ingested over a safe standard, PFAS can pose a cancer risk and affect the liver, immune system and fetuses during pregnancy, according to the U.S. Environmental Protection Agency, which drastically **lowered the allowed levels** for PFAS in drinking water earlier this summer.

One MDL in South Carolina federal court alleges that firefighting foam, called aqueous film forming foam, made by various manufacturers has contaminated drinking water. AFFF has been linked to a variety of health problems, such as high blood pressure and thyroid disease, according to court documents.

Other recent suits include a **proposed class action** filed in June in New Jersey alleging that L'Oreal didn't warn customers about the chemicals' presence in its waterproof mascara and an April suit over the packaging for **Burger King's Whoppers**.

Pa. Supreme Court Weighs Industry Standard Defense

The Pennsylvania Supreme Court is mulling **whether or not** a manufacturer can use as a defense in strict liability suits that it was simply following product standards its industry peers have set, reviewing a precedential ruling by a lower court.

In June, the justices said that they would evaluate a decision that affirmed a \$2.5 million jury award for contractor Michael Sullivan, who sued manufacturer Werner Co. and retailer Lowe's Cos. Inc. over his injuries from a 2015 scaffolding collapse. The ruling found that the industry standard defense can't be used in strict liability cases.

The state Superior Court's decision held that a manufacturer can be held liable for a dangerous or unsafe product under the state high court's 2014 ruling in *Tincher v. Omega Flex*, whether or not the manufacturer complied with industry and government standards. The Superior Court called the manufacturer's conduct "irrelevant" as to whether a product is defective.

In appealing the verdict, Werner and Lowe's said the decision in *Tincher* to undo the state's strict separation between negligence and strict liability claims meant the industry standards defense should have been allowed.

"The Supreme Court is going to decide whether government and industry standards [defense] is admissible in a strict liability case," James Beck of Reed Smith LLP. "In most states in the union, that is the rule, but Pennsylvania is one that has long been an outlier. That case is something that bears watching."

The suit brought by Sullivan alleged that the locking pins on Werner's scaffolding could rotate out of position while in use, causing the platform to collapse. For their part, Werner and Lowe's argued that the design of the locking pins is the same as other scaffolding equipment, but the trial court didn't allow them to introduce that as evidence.

Ex-Ice Cream CEO Faces Criminal Trial

Jury selection in the federal government's case against the onetime CEO of ice cream company Blue Bell, which was at the center of a listeria outbreak that killed three people and sickened 10, started Monday.

The executive, Paul Kruse, faces six charges of wire fraud and a count of conspiracy to commit wire fraud over his alleged role in misleading Blue Bell customers about the outbreak. On July 27, the judge overseeing the case rejected Kruse's attempt to escape the **charges**.

"[It's] a very unique situation where a CEO of a company can end up going to jail or for conduct that took place on his watch," said Paul Benson of Michael Best & Friedrich LLP, who represents food companies.

The last similar trial was in 2014 over a salmonella outbreak that caused nine deaths and made 700 people ill. Two former Peanut Corporation of America executives, brothers Michael and Stewart Parnell, were convicted in Georgia federal court of fraud, conspiracy and obstruction of justice for enabling the sale of contaminated peanut products.

Even though Texas officials told Blue Bell in February 2015 that two ice cream products had tested positive for listeria, the company didn't alert the public or issue a recall, instead telling its delivery drivers to remove those products from the stores, according to the federal government.

Two weeks later, another product tested positive for listeria. The ice cream was finally recalled in March 2015 following the discovery of listeria at another plant in Oklahoma.

Five years later, the Texas ice cream maker agreed to plead guilty to two misdemeanor counts of distributing adulterated ice cream products and to pay a criminal fine and forfeiture totaling \$17.25 million. Blue Bell also agreed to pay \$2.1 million to resolve civil False Claims Act allegations related to the contaminated products being sold to federal facilities.

One key issue at trial is likely to be whether Blue Bell was too slow to order a recall, with the government apparently planning to argue that Kruse did not want to order one because it would mean publicly announcing the listeria results, according to Kruse's pretrial filings.

"This argument is doubly wrong: Blue Bell had no legal duty to initiate a recall unless directed to do

so by the FDA, which never happened, and neither Blue Bell nor (more importantly for these purposes) Kruse owed a duty of disclosure to Blue Bell's customers," Kruse said in a July 8 filing.

The case is USA v. Kruse, case number 1:20-cr-00249, in the U.S. District Court for the Western District of Texas.

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