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Top Product Liability Cases Of 2024

By **Emily Field**

Law360 (December 20, 2024, 6:56 PM EST) -- Some of the top cases for product liability for 2024 include an Ohio Supreme Court ruling on opioids and public nuisance, baby formula trials and an appellate decision in Fosamax litigation.

Here's Law360's breakdown for the year:

Ohio Supreme Court Public Nuisance Ruling

In mid-December, the Ohio Supreme Court in a 5-2 **decision** found that the state's product liability law doesn't allow for public nuisance claims to be brought over the opioid crisis, in a challenge to a $650 million verdict won by two counties.

Even though the public health crisis has affected many people, the law doesn't hold that public nuisance can provide an answer for the issue, the court said. The panel had accepted a certified question about the law from the Sixth Circuit in a case brought by Trumbull County and Lake County, which had won the $650 million jury verdict.

The state's high court is only the second state court to weigh whether the opioid epidemic can be considered a public nuisance. In 2021, the Oklahoma Supreme Court overturned the first verdict in the opioid litigation when it found that a lower judge improperly expanded the state's public nuisance law to the manufacture and sales of legal products.

The ruling also has implications beyond the opioid litigation, as other public nuisance claims have been brought against other issues, such as climate change or PFAS chemicals, according to Alexandra Cunningham of Hunton Andrews Kurth LLP.

Per- and polyfluoroalkyl substances, commonly known as PFAS, are a group of chemicals that are used for their water-resistant properties and have raised concerns for health risks and environmental impacts. They are also called forever chemicals as they persist in the human body and the environment.

"To the extent that Ohio Supreme Court interpretation gets traction, and to the extent that other courts, federal courts may be inclined, or now maybe defendants are inclined to seek certification of those questions to state supreme courts really could change," Cunningham said.

There have been numerous tries to expand public nuisance law to cover what are "essentially" product nuisance claims, Cunningham said.

Baby Formula Trials

There have been a number of trials in the past year over claims that Abbott Laboratories' and Mead Johnson's dairy-based formula for preterm infants causes serious intestinal problems.

In **October**, the companies won a trial in St. Louis after a series of losses over claims that the formula causes necrotizing enterocolitis, or NEC. The family of the plaintiff had asked for $277 million in compensatory damages and $6 billion in punitive damages for the child, Kaine Whitfield, born in August 2017 at 27 weeks and 5 days' gestation and weighing 1,140 grams. Whitfield now has extreme and permanent challenges from short bowel syndrome, which prevents him from absorbing nutrients easily.

It was the first joint trial in the litigation across state and federal courts.

The companies have faced losses in initial trials over the formula, with an Illinois jury ordering Mead to pay $60 million in March and a Missouri jury ordering Abbott to pay $495 million in July.

"There is absolutely no warning about an increased risk of developing NEC when you're on, when these vulnerable babies are on premature formula versus human milk," Tor Hoerman of TorHoerman Law LLC, whose firm is involved in the litigation, told Law360. "No warning is given to parents."

E-Cig Appeal

In early **December**, the U.S. Supreme Court heard arguments by a manufacturer of e-cigarettes that the U.S. Food and Drug Administration made an unfair decision in rejecting applications for its flavored vaping products.

The FDA has been concerned for years over whether flavors appeal to minors, including during the first Trump administration. While there are arguments that e-cigarettes can help adult smokers quit, there has also been litigation brought against major companies like Altria and Juul over the vapes.

The case in question is an appeal from the agency over a Fifth Circuit 2024 decision in which the panel held that the FDA had acted capriciously and arbitrarily in rejecting an application from Wages and White Lion Investments LLC, known as Triton Distribution.

The high court seemed skeptical of the e-cigarette maker's arguments, however.

Justice Elena Kagan appeared to be dubious that flavors are better at getting people to quit conventional cigarettes.

"FDA has been completely upfront about this," Kagan said. "Blueberry vapes are very appealing to 16-year-olds, not to 40-year-olds."

Dennis Henigan of the Campaign For Tobacco-Free Kids, who sat in on the arguments, said that the Fifth Circuit's opinion is an "outlier."

"We have seven other federal appeals courts that have upheld similar orders in similar cases," Henigan said.

Third Circuit Fosamax Ruling

A September precedential **decision** by the Third Circuit found that an FDA letter that denied changes to the label of Merck's osteoporosis drug Fosamax does not count as a final agency action triggering federal preemption of state law "failure to warn" claims. The panel found that the claims are not preempted.

The panel said that a New Jersey federal judge erred in rejecting plaintiffs' state law claims since she didn't consider enough their arguments against preemption.

In the opinion, the panel cited the 2019 U.S. Supreme Court case Merck Sharp & Dohme v. Albrecht and reached the conclusion that the lower judge put too much weight on informal communications by the FDA and its amicus brief.

"With real respect for the thorough and thoughtful work the district court did in this complex case, we nonetheless conclude that it erred in its preemption analysis by giving too little weight to the required presumption against preemption," U.S. Circuit Judge Kent A. Jordan wrote in the panel's opinion. "Applying that presumption, and considering the record here, we conclude that plaintiffs' state law claims are not preempted."

James Beck at Reed Smith LLP disagreed with the opinion, saying that the panel "blatantly" misused presumption against preemption.

"The reason you normally have presumption is when you can't figure out what's going on and you want to go and have some outcome," Beck said. "This is basically using the presumption against finding any facts."

--Editing by Dave Trumbore.
