

## Top Product Liability Cases Of 2018

By Emily Field

*Law360 (December 13, 2018, 2:57 PM EST)* -- A since-slashed \$289 million jury verdict in the first case to go to trial over claims that Monsanto's Roundup weedkiller causes cancer and a mix of verdicts in Johnson & Johnson topped the list of significant product liability cases of 2018.

A duo of rulings from the New Jersey Supreme Court in litigation over Accutane and gastrointestinal problems will also shape product liability litigation in the Garden State by changing the bar for expert testimony and labeling claims.

### **Johnson v. Monsanto Co.**

The first trial over claims that Monsanto's Roundup weedkiller caused cancer ended in a headline-grabbing \$289 million jury verdict in favor of a California school groundskeeper that was later shaved to \$78 million.

A California state jury in August unanimously found that Monsanto's weedkillers weren't safe and had a significant role in causing harm to DeWayne "Lee" Johnson. Additionally, the jury found that the agricultural giant had failed to adequately warn about the risks associated with Roundup and stronger Ranger Pro products and that the company acted with malice and oppression.

However, San Francisco County Superior Court Judge Suzanne Bolanos cut the \$250 million punitive damages award to \$39.25 million, equal to the amount awarded by the jury in compensatory damages, which brought the total award to \$78.5 million.

The U.S. Supreme Court held that punitive damages are limited by the 14th Amendment in its 2003 ruling in *State Farm Mutual Auto Insurance Co. v. Campbell*. The judge said in her Oct. 22 ruling that the appropriate ratio between compensatory and punitive damages is 1-to-1 where, as in this case, the compensatory damages are large and largely for noneconomic damages.

In that order, Judge Bolanos determined the jury's \$250 million punitive damages award must be reduced to \$39.25 million, the amount awarded in compensatory damages, which brought the total award to \$78.5 million.

Johnson accepted the reduced award in order to avoid a new trial. His 2016 suit claimed that Monsanto knew about the purported health risks associated with its weedkillers since at least the 1990s, when studies started to show a correlation between the herbicides and lymphoma.

Bayer AG, which acquired Monsanto in June, has said that it believes that the verdict and award are not supported either by the evidence at trial or by the law. It has filed a notice of appeal with the San Francisco Superior Court.

“I think that one will be interesting because, obviously, that was the first glyphosate trial to go to verdict, and a huge verdict at that, and so I think how that turns out has the potential to impact other cases,” Alexandra Cunningham of Hunton Andrews Kurth LLP said.

Bayer faces about 8,000 suits over glyphosate, the active ingredient in its Roundup products, in federal and state courts nationwide.

The case is Johnson v. Monsanto Co. et al., case number CGC16550128, in the Superior Court of the State of California, County of San Francisco.

### **New Jersey High Court Accutane Rulings**

A duo of rulings from the New Jersey Supreme Court in 2018 in Accutane litigation raised the bar for expert admissibility and for labeling claims in the state.

The most recent ruling in October ended more than 500 cases alleging F. Hoffmann-LaRoche Inc. didn't adequately warn of possible gastrointestinal side effects from its acne drug Accutane.

Since the warnings were approved by the U.S. Food and Drug Administration, the high court said that the 514 consumers from 44 states and the 18 from New Jersey had not overcome the state's rebuttable presumption of adequacy under its Products Liability Act. That presumption of adequacy affords pharmaceutical companies greater protection from product liability claims in New Jersey than in other jurisdictions.

Under New Jersey's law, drug label warnings approved by the FDA are presumed to be adequate, and plaintiffs have to clear a high bar to overcome the presumption. They either have to show that the drugmaker deliberately hid knowledge of a drug's harmful effects after it was approved or show “economically driven” manipulation of the regulatory process.

The other ruling, which the state high court handed down in August, axed more than 2,000 cases alleging that Accutane causes gastrointestinal problems. In that ruling, the New Jersey Supreme Court held that courts must assess the scientific reliability of evidence before it goes in front of a jury.

A trial court that had tossed out multidistrict litigation that was subsequently revived on appeal had properly fulfilled its role as a gatekeeper in excluding patients' experts who had opined on the association between Accutane and Crohn's disease, the high court said. The trial court had determined the experts were motivated by preconceived conclusions and not scientifically reliable methods, but a state appeals court later reinstated the cases upon finding that the trial court overstepped its bounds.

The high court directed the Garden State courts to consider the “Daubert standard” for the admissibility of expert testimony set forth in the 1993 U.S. Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals. Under that standard, courts must focus on an expert's methodology when deciding whether expert testimony is reliable.

“I think that those two cases, both separately and combined, are giving defendants a lot of ammunition in drug and device cases specifically in New Jersey,” Michelle Bufano of Patterson Belknap Webb & Tyler LLP said.

The consolidated litigation is In re: Accutane Litigation, case numbers 079933 and 079958, in the New Jersey Supreme Court.

ConAgra Grocery Products Co. et al. v. People of the State of California, case number 18-84, and The Sherwin-Williams Co. v. The People of California, case number 18-86, both in the Supreme Court of the United States

### **Talc Verdicts**

Following a gargantuan \$4.69 billion verdict in midsummer in a 22-plaintiff case alleging Johnson & Johnson talc products contained cancer-causing asbestos, the company was able to chalk up wins in other talc cases around the country.

In November, a South Carolina state jury reached a second mistrial in a suit claiming that a 30-year-old attorney's fatal mesothelioma was caused by alleged asbestos in Johnson & Johnson talcum powder products. Antoine Bostic was seeking \$63 million in compensatory damages from the company for selling allegedly asbestos-laden baby powder used by his late wife and law partner, Bertila Boyd-Bostic.

A California state jury this past fall found that while J&J's baby powder contained asbestos, it was not a substantial factor in causing a woman's malignant mesothelioma, and found in favor of the pharmaceutical giant.

And J&J scored another win in New Jersey state court in October when a jury found that a woman hadn't shown by a preponderance of evidence that she was exposed to asbestos in J&J baby powder, which she claimed played a role in her contracting mesothelioma.

“It's going interesting to see how these fare on appeal going forward, if there's still a split between plaintiffs and defense verdicts or whether they're going to become more aligned,” Georgia Lucier of Hunton Andrews Kurth LLP said.

The \$4.69 billion verdict in July was the largest by far in cases claiming that J&J talc products cause cancer. The verdict includes \$550 million in compensatory damages plus \$4.14 billion in punitive damages. At the time of the verdict, a J&J spokesperson said the company would pursue all available appellate remedies.

“The collection of talc verdicts have been noteworthy and the real question is whether they will hold up on appeal at the Missouri court of appeals,” Peter Goss of Blackwell Burke PA said. “I think there's a real question in Missouri about the fairness of having multiplaintiff trials and does that prejudice the jury against a defendant ... but the question is, is that prejudice outweighed by the court's latitude to try multiple plaintiffs at once as way of reducing the docket?”

The cases are Antoine Bostic v. Johnson & Johnson et al., case number 2017-CP-16-0400, in the Court of Common Pleas for the Fourth Judicial Circuit of South Carolina, Allen v. Brenntag North America Inc. et al., case number DR180132, in the Superior Court of the State of California, County of Humboldt, Rosalind Henry et al. v. Johnson & Johnson et al., case number L-1748-17, in the Superior Court of New

Jersey, County of Middlesex and Ingham v. Johnson & Johnson et al., case number 1522-CC10417, in the 22nd Judicial Circuit of Missouri.

--Editing by Pamela Wilkinson and Alanna Weissman.

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