

Top Product Liability Cases Of 2023: Midyear Review

By **Emily Field**

Law360 (July 11, 2023, 2:36 PM EDT) -- A recent U.S. Supreme Court opinion that expanded states' jurisdiction over out-of-state companies, billions of dollars in settlements over so-called "forever" chemicals, and a verdict over Tesla's autopilot technology are among the top product liability cases so far in 2023.

Here is Law360's list of product liability highlights for the first half of the year.

High Court Widens General Personal Jurisdiction

The Supreme Court in late June disappointed the defense bar by allowing companies to be sued in states where they have only registered to do business in reviving a suit brought by a Virginian against the Norfolk Southern Railway in Pennsylvania, even though his alleged injuries happened in other places.

Robert Mallory had sued his former employer, Norfolk Southern, over alleged exposure to toxic chemicals on the job in Virginia and Ohio. However, he wanted the case to be pursued in Pennsylvania on the grounds that the railroad had registered to do business in the state and that gave its courts jurisdiction over the dispute.

In late 2021, the state's high court tossed the case and struck down Pennsylvania's so-called long-arm statute, which gave its courts jurisdiction over any out-of-state corporation that had registered there. The court held that such statutes violated a defendant's due process rights. The U.S. Supreme Court agreed to hear the case in April 2022.

Even though the underlying case didn't involve product liability claims, the 5-4 ruling was significant, because it broadened general personal jurisdiction, which the high court last addressed in 2014's *Daimler AG v. Bauman* and 2011's *Goodyear Dunlop Tires Operations SA v. Brown*. Those rulings said that corporate defendants are subject to general jurisdiction in a state if their affiliations with the state are substantial enough to render them "essentially at home in the forum state."

Here, the majority held that its 1917 decision in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.* allowed states to have "registration by consent" laws, where an out-of-state company can be subjected to that state's jurisdiction despite how much business the company actually carries out there.

While decisions like *Daimler*, *Bristol-Myers Squibb Co. v. Superior Court* and *Ford Motor Co. v. Montana*

Eighth Judicial District over the past 10 years have clarified personal jurisdiction, the Mallory decision creates uncertainty for companies, according to Andrew Pincus of Mayer Brown LLP, adding that there will inevitably be increased personal jurisdiction litigation.

"But exactly how significant the decision will be is quite unclear, because defendants retain several powerful arguments against Mallory-type general jurisdiction," Pincus said. "To begin with, how many states will interpret their laws to require consent to general personal jurisdiction as a condition to doing business? Even prior to Mallory, for example, New York's highest court held that New York's foreign business registration law does not require such consent."

The case is *Mallory v. Norfolk Southern Railway Co.*, case number 21-1168, in the U.S. Supreme Court.

3M and Others Ink PFAS Deals

The **largest settlement** over drinking water in U.S. history at \$12.5 billion was announced in June by 3M and the plaintiffs' attorneys representing public water systems across the country who alleged contamination from so-called "forever chemicals" leached from firefighting foam.

Litigation over per- and polyfluoroalkyl substances, or PFAS chemicals, has rapidly grown over the past several years. Nicknamed for their tendency to persist in the environment and the human body, the chemicals are useful for their water-resistant properties and are found in a broad range of products from nonstick pans to food packaging, but have been shown to lead to health problems and possibly cancer.

The first bellwether trial in the litigation had been paused several weeks earlier, when the federal judge overseeing the litigation had been informed that a deal was in the works.

Just before 3M announced its deal, chemical companies DuPont, Chemours, and Corteva reached a **settlement** worth more than \$1.1 billion with water companies across the country in the South Carolina MDL.

"There have been a number of these settlements that have sort of accelerated in pace," Eric Larson of Morris Manning & Martin LLP said. "The companies that are involved in this litigation have identified now as an opportunity to dispense with a number of these lawsuits."

The multidistrict litigation is *In Re: Aqueous Film-Forming Foams Products Liability Litigation*, case number 2:18-mn-02873, in the U.S. District Court for the District of South Carolina.

Bankruptcy Strategies in MDL Tested

In **early June**, an Indiana federal judge tossed the bankruptcy case of a 3M subsidiary that the manufacturer had filed to address more than 230,000 claims over allegedly faulty combat earplugs, finding that the bankruptcy didn't serve a valid purpose for reorganization.

Since Aearo Technologies is financially healthy, with what's effectively unlimited backing from 3M, on top of the fact that neither company faces looming financial challenges, Aearo doesn't have a real need for Chapter 11, U.S. Bankruptcy Judge Jeffrey J. Graham said.

While potential damages in the litigation over faulty Combat Arms Earplugs v2, or CAEv2 could run into

the trillions, as counsel in the MDL have argued, that's just a lawyer's guess, the judge said. Meanwhile, it's too early to tell whether Aearo or 3M is at risk of liquidation, the judge said.

For one, bellwether verdicts from the MDL are being appealed, and it is unknown whether the companies will ultimately face any liability under a government contractor defense, because the earplugs were sold to the military, Judge Graham said.

3M had filed for Chapter 11 bankruptcy for Aearo and six related companies in July 2022, hoping to spin off liability for claims of hearing loss and medical issues related to CAEv2, as well as thousands of claims over allegedly faulty respirators. 3M had proposed a \$1 billion trust to pay out on those claims.

Claimants had told the bankruptcy court that the Aearo case should be dismissed, because it hadn't been filed in good faith. Rather, it had gained a tactical advantage in underlying multidistrict litigation, after jurors had awarded nearly \$300 million in damages in 13 bellwether trials.

They also argued that Aearo's bid for bankruptcy protection had relied heavily on no longer valid bankruptcy court rulings that had allowed a Texas Two-Step by Johnson & Johnson, spinning off its talc-related liabilities, stemming from cancers linked to baby powder, into the newly created LTL Management LLC.

However, the Third Circuit ruled in January that LTL Management's bankruptcy was filed in bad faith, because the company was not in financial distress and had substantial backing from J&J for costs associated with talc liability. Since then, J&J has filed for another **Chapter 11**, this time with a proposed \$8.9 billion settlement that the company believes a majority of claimants will sign on to.

"I think that the J&J bankruptcy ruling obviously played a role in the 3M Aearo ruling," Tonya Newman of Neal Gerber & Eisenberg LLP said. "At the beginning of the year ... it occurred to me that if you start to see really big MDLs like [3M], then you may have some creative use of the bankruptcy code as a way of trying to shield the company's liability. It seems to me that these two decisions may have put that to rest."

The 3M case is In re: Aearo Technologies LLC et al., case number 1:22-bk-02890, in the U.S. Bankruptcy Court for the Southern District of Indiana. The MDL is In re: 3M Combat Arms Earplug Products Liability Litigation, case number 3:19-md-02885, in the U.S. District Court for the Northern District of Florida. The J&J case is In re: LTL Management LLC, case number 3:23-bk-12825, in the U.S. Bankruptcy Court for the District of New Jersey.

Tesla Scores Win in Calif. Trial

In **April**, one of the first cases over Tesla's autopilot function to go to trial resulted in a verdict for the tech company when a California jury cleared it of wrongdoing in a suit alleging that the systems in a 2016 Model S malfunctioned and caused injuries in a crash.

A Los Angeles County Superior Court jury in Glendale, California, found that the autopilot and airbag systems on plaintiff Justine Hsu's car did not fail and that Tesla Inc. did not make a false statement of fact to Hsu. Additionally, the jury found that Tesla did not intentionally fail to disclose a fact that Hsu did not know and could not have reasonably discovered.

Hsu alleged in her 2020 complaint that she chose to lease the Model S because of Tesla's marketing that

its vehicles were the safest cars on the market and that the autopilot eliminates the risk that the driver will be injured. But on July 19, 2019, during stop-and-go traffic while driving at about 25 to 30 miles per hour, the Tesla abruptly veered into the center median on a street in Arcadia, California, Hsu alleged.

The airbags deployed, breaking her jaw and causing multiple injuries to her face, hands and feet, Hsu claimed.

Before trial, Tesla argued that drivers are told not to rely on the autopilot feature and not to use it on urban streets or on roads where conditions are constantly changing. The electric automotive manufacturer also argued that drivers are also told to stay alert at all times.

There was also evidence that Hsu had her hands off the steering wheel for almost 90 seconds while she was looking at something in her hand at the time of the crash, said Michael Carey of Dykema Gossett PLLC, which represented Tesla at trial.

"We still should continue to hold drivers responsible for the operations of their vehicles, even when they use it [advanced driver-assistance] technologies," Carey said. "That was the primary theme for our trial."

The case is Justine Hsu v. Tesla Inc. et al., case number 20STCV18473, in the Superior Court for the State of California, County of Los Angeles.

--Editing by Nicole Bleier.