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Issue 2, 2020

● **Welcome**

Welcome to 2020's second edition of *Product Lines*, our e-newsletter that focuses on toxic torts and product liability issues.

For this edition, we are reporting on several important and timely legal issues. As you will see, we strive to make these e-blasts both informative and valuable by having our attorneys comment on WHY these issues are important and how they could affect your business.

As always, if you have a particular topic you would like to hear more about, please let us know. Thank you for reading.

The [Toxic Tort Litigation](#) and [Product Liability Litigation](#) Practice Groups

● **AstraZeneca Gets Protection from Future Product Liability Claims for COVID Vaccine**

"With 25 companies testing their vaccine candidates on humans and getting ready to immunize hundred millions of people once the products are shown to work, the question of who pays for any claims for damages in case of side effects has been a tricky point in supply negotiations."

Why this is important: As numerous countries work out indemnification details for pharmaceutical companies searching for a COVID-19 vaccine, the United States has invoked the 2005 Public Readiness and Emergency Preparedness Act ("PREP Act") to protect pharmaceutical companies from future state and federal product liability claims in relation to any COVID-19 vaccine. In a declaration effective February 4, 2020, the Secretary of Health and Human Services invoked the PREP Act and declared COVID-19 to be a public health emergency warranting liability protections for covered countermeasures. The goal of the PREP Act in providing immunity is to incentivize the development, manufacture, distribution, administration, and use of covered countermeasures during public health emergency. While the PREP Act provides immunity from most civil suits, AstraZeneca and other pharmaceutical companies covered by the Act are not immune from injunctive relief, federal agency enforcement actions, or civil actions alleging death or serious injuries caused by willful misconduct. In addition, individuals who die or suffer serious injuries may be eligible to receive compensation through the Countermeasures Injury Compensation Program of the Health Resources and

● **NJ Supreme Court: Express Misrepresentation Consumer Fraud Act Claims & Product Liability Claims May Coexist**

"In the case on certification from the Third Circuit, the New Jersey Supreme Court ruled that claims for express or affirmative misrepresentations under New Jersey's Consumer Fraud Act (NJCFCA) may be brought simultaneously with claims under the New Jersey Product Liability Act (NJPLA)."

Why this is important: In *Fike*, Sun Chemical had filed a single claim under the NJCFCA relating to Fike's alleged oral and written misrepresentations about a fire suppression system. Fike moved for summary judgment, arguing that Sun Chemical's claim was governed not by the NJCFCA, but by the NJPLA. The Third Circuit then certified a question to the Supreme Court, regarding whether tort-based claims that could be plead under the NJPLA could also (or instead) be plead under the NJCFCA. The Supreme Court answered affirmatively, ruling that the NJPLA did not prohibit suit filed under the NJCFCA for deceptive, fraudulent, misleading, and other commercial practices in the sale of a product. Prior to this decision, the New Jersey Supreme Court had not offered specific clarification on the interplay between the state's consumer fraud act and product liability act, which both concern product safety. --- [Tai Shadrack Kluemper](#)

● **E-Commerce Retailers Face Major Risks from the Climate Impact and Toxicity of Their Products**

"In order to mitigate reputational and liability risks that are increasing amidst the global pandemic, the report calls for more transparency about the products sold on e-commerce platforms, as well as focused efforts on reducing their climate impacts and toxicity."

Why this is important: A new report by the Environmental Defense Fund ("EDF") suggests that, in order to shield itself from liability risks, e-commerce retailers must now be acutely aware of how they display certain types of information on their products. As a result of major increases to e-commerce spending, particularly as a result of the COVID-19 pandemic, the EDF warns that consumers expect e-commerce retailers to clearly disclose the environmental benefits of their products, verify the safety of their products, and take action to combat climate change through sourcing, manufacturing, and other processes. According to the report, taking steps to meet consumers' expectations will allow retailers to stay ahead of the e-commerce game. --- [Megan W. Mullins](#)

● **FDA's 'Do-Not-Use' List of Hand Sanitizers Grows - Again - to More than 135 Brands to Avoid**

"The agency, since mid-June, has been alerting consumers to hand sanitizers it has identified that either contain the toxic methanol, also known as wood alcohol, were found to be 'subpotent' or contained 'microbial contamination.'"

Why this is important: The FDA expanded the list of hand sanitizers meriting warning with well over 100 brands on the list. On a related note, the makers of the popular Purell hand sanitizer settled one of several class actions over its product's labeling and efficacy. This is important as it signals that products being sold to consumers to aid in virus prevention or containment are likely to come under increased scrutiny by watchdog

groups and others. Other parties within the supply chain may also be targeted. --- [Clifford F. Kinney Jr.](#)

● **Ikea Hit with Class Action Suit Over Deadly Dressers and Accused of 'Feeble' Recall Effort**

"It accuses the retailer of not taking back all recalled products, as required, and of offering consumers store credit instead of refunds."

Why this is important: Ikea, the low-cost furniture retailer known for selling ready-to-assemble furniture, is facing yet another proposed class action lawsuit relating to its allegedly tip-prone dressers that have been credited with killing nine children and injuring dozens more. Ikea has already paid out at least \$96 million in settlements, and in 2016, it issued a recall covering dozens of models of dressers dating back to 1985. While this new lawsuit includes allegations regarding the dangers and defects posed by the dressers, it also includes allegations that Ikea's 2016 recall was "feeble and ineffective" and that Ikea has failed to do enough to notify buyers and get the allegedly defective dressers out of homes. The plaintiffs allege that Ikea failed to directly notify customers who purchased the dressers, refused to take back all recalled dressers, and offered customers store credit rather than refunds, despite having agreed that each customer was entitled to a full refund. Whether the case can proceed as a class action will largely depend on whether Ikea systematically designed the 2016 recall to be inconvenient or discourage participation. If the alleged mishandling of the 2016 recall was the result of failings at the individual store level, however, it will be harder for plaintiffs to demonstrate commonality among all proposed class members sufficient to warrant class certification. Either way, the lawsuit provides a cautionary tale to retailers about the need to design effective recall procedures and ensure that those procedures are appropriately implemented across all of its locations. --- [Joseph A. "Jay" Ford](#)

● **Bayer Sets Aside Nearly \$1.4B for Potential Essure Settlements**

"As of July 24, Bayer faced U.S. lawsuits from roughly 32,000 Essure users claiming device-related injuries including hysterectomy, perforation, pain, bleeding, weight gain, nickel sensitivity, depression and unwanted pregnancy, according to the company."

Why this is important: Bayer currently faces liability in nearly 32,000 lawsuits for its Essure birth control device, which plaintiffs claim causes injuries including hysterectomy, perforation, pain, bleeding and weight gain. Recently, Bayer set aside \$1.4 billion in reserves for litigation and related settlements. This is significant in that Bayer seemingly takes seriously the threat these lawsuits present and is actively trying to manage and resolve them. --- [Bryan S. Neft](#)

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If you have any toxic tort or product liability questions, please feel free to contact our [Toxic Tort Practice Group](#) or our [Product Liability Litigation Practice Group](#).



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