

Key New Jersey Cases To Watch In 2018

By Jeannie O'Sullivan

Law360, New York (January 1, 2018, 3:04 PM EST) -- High-profile New Jersey cases are poised for key developments in 2018, when the U.S. Supreme Court may decide on the state's bid to legalize sports betting and the Third Circuit ponders appeals by former public officials facing prison for their roles in the infamous George Washington Bridge lane closures.

On the state level, New Jersey's high court will tackle Hoffmann-La Roche Ltd.'s attempt to reinstate trial court victories in litigation over its acne drug Accutane, while other pharmaceutical companies continue to defend the state's civil suits targeting their marketing of opioid drugs like OxyContin.

Here are four key legal battles likely to captivate Garden State attorneys over the next year.

Ex-Officials Fight 'Bridgegate' Convictions

While Gov. Chris Christie will be leaving office in January, the saga continues in the George Washington Bridge lane-closure scandal that plagued his administration. Onetime public officials William E. Baroni Jr. and Bridget Anne Kelly have appealed their convictions on charges that they orchestrated the traffic jam at the heart of the case for political reasons.

Baroni, a former executive at the Port Authority of New York and New Jersey, and former Christie aide Kelly were respectively sentenced in 2016 to two years and 18 months in federal prison for conspiracy and related charges. Prosecutors say they plotted to shutter lanes on a key link between New York and New Jersey to punish Fort Lee Mayor Mark Sokolich for not endorsing the governor's 2013 re-election bid.

Baroni and Kelly both testified during the trial that they did not take part in the revenge plot, claiming that their co-defendant, former Port Authority executive David Wildstein, duped them into believing the September 2013 lane closures were for a legitimate traffic study.

In their Third Circuit appeal, they said U.S. District Judge Susan G. Wigenton incorrectly instructed jurors that they could convict the defendants of conspiracy without finding that they intended to exact revenge against Sokolich.

The defense has argued that it was reversible error to allow the jurors to convict without unanimously agreeing that the purpose of the traffic jam was retaliation, given that was what the government argued

at trial, noted McCarter & English LLP partner Robert A. Mintz. The government, however, says that retaliation is simply the motive for the crime, which isn't an element of the offense, Mintz said.

Mintz, a former federal prosecutor and head of the firm's white collar and internal investigations practice, boiled the situation down to an analogy.

"The government doesn't have to prove why you robbed a bank [but] the government does have to show intent," Mintz said.

The government is represented by Lee M. Cortes Jr., Vikas Khanna, Bruce Keller and Mark E. Coyne of the U.S. Department of Justice.

Kelly is represented by Jacob M. Roth, Henry W. Asbill and Charlotte H. Taylor of Jones Day, and Michael Critchley and Michael Critchley Jr. of Critchley Kinum & DeNoia LLC.

Baroni is represented by Stephen M. Orlofsky, Mayling Blanco and Carlos F. Ortiz of Blank Rome LLP, Michael A. Baldassare, Jennifer Mara and Dillon H. Malar of Baldassare & Mara LLC, and Matthew J. Letten, Nicholas M. McLean, Michael D. Mann and Michael A. Levy of Sidley Austin LLP.

The cases are U.S. v. Kelly, case number 17-1818, and U.S. v. Baroni, case number 17-1817, in the U.S. Court of Appeals for the Third Circuit. The underlying case is U.S. v. William E. Baroni Jr. et al., case number 2:15-cr-00193, in the U.S. District Court for the District of New Jersey.

AG Targets the Opioid Crisis

Christie's war against the state's opioid addiction crisis has created legal battlefields for pharmaceutical companies facing civil suits for allegedly unethical marketing practices and doctors who stand to lose their licenses for purportedly overprescribing painkillers.

OxyContin producer Purdue Pharma LP and Insys Therapeutics Inc., maker of the fentanyl opioid drug Subsys, along with Insys founder John M. Kapoor, are among those the Office of Attorney General has slapped with civil suits in recent months. Meanwhile, doctors — including one who allegedly prescribed 62,000 oxycodone pills to patients in four years' time — are getting blacklisted as part of Christie's takedown.

While the state's actions have certainly given pharmaceutical companies and physicians a reason to examine their practices, a side effect could be highlighting substance abuse or addiction within the workplace — a touchy topic employers may be hesitant to address, says attorney Matthew M. Collins, chair of Brach Eichler LLC's labor and employment practice group.

As the spotlight on the epidemic gets brighter, companies are likely to seek guidance on how to navigate the various legal minefields when it comes to dealing with the problem, according to Collins. He cited a National Safety Council study this year that revealed seven in 10 employers have felt some impact of prescription drug usage in the workplace.

"Most employers have either ignored the issue or have taken on a paternalistic approach. You need an approach that's in the middle, that kind of blends those two," he said.

In the Purdue case, the state is represented by Assistant Attorney General John M. Falzone, Deputy

Attorneys General Janine Matton, Brian DeVito, Patricia Schiripo and Jesse Sierant, and attorneys from Cohen Milstein Sellers & Toll PLLC and the Keefe Law Firm.

Purdue is represented by Quinn Emanuel Urquhart & Sullivan LLP.

The case is New Jersey v. Purdue Pharma LP, case number C-00245-17, in the Superior Court of New Jersey, Essex County.

In the Insys case, the state is represented by Assistant Attorney General John M. Falzone and Deputy Attorneys General Janine N. Matton, Lara J. Fogel and Evan A. Showell.

Counsel information for Insys was unavailable by press time.

The case is New Jersey v. Insys Therapeutics Inc., case number C-00162-17, in the Superior Court of New Jersey, Middlesex County.

Hoffmann-La Roche Fights to Revive Accutane Victories

Pharmaceutical company Hoffmann-La Roche Ltd. got another chance to fight lawsuits over the adverse effects of acne medication Accutane when the New Jersey Supreme Court agreed in December to review two state appellate decisions issued in July that revived thousands of cases in the multidistrict litigation.

The first appellate opinion determined that the label didn't adequately warn users of possible gastrointestinal side effects, handing a win to consumers who alleged they developed inflammatory bowel disease after using the drug. The other decision reinstated 2,076 cases from individuals alleging they developed Crohn's disease as a result of taking Accutane, saying a trial court improperly barred testimony from plaintiffs' experts.

In the label case, the plaintiffs must overcome the deference the state Legislature has afforded to labels that have been approved by the U.S. Food and Drug Administration. That's according to attorney Edward J. Fanning Jr. of McCarter & English, which represents the Health Care Institute of New Jersey, the New Jersey Business and Industry Association and the New Jersey State Chamber of Commerce as amicus participants in the litigation.

The "presumption of adequacy" of FDA-approved labels was enacted not only to protect one of the state's top industries, but also with the assurance that the federal government strictly oversees those products, said Fanning, the immediate past chair of the firm's the product liability, mass torts and consumer class actions group.

"[Lawmakers] know the FDA process is rigorous," Fanning said.

Roche may have a harder time with its second high court bid. That one stems from an Appellate Division panel's finding that courts must determine whether qualified experts relied on methodologies and data of the type used by comparable experts, and that the plaintiffs' experts in these cases should be allowed to testify because they met those requirements.

Roche said the Supreme Court needed to clarify the appropriate degree of judicial scrutiny in evaluating expert testimony, suggesting that the court adopt the more stringent admissibility test that evolved

from the U.S. Supreme Court's 1993 case *Daubert v. Merrell Dow Pharmaceuticals*.

Those *Daubert* standards — which are used in federal court but haven't been adopted in New Jersey — give judges greater discretion to exclude expert testimony. The Garden State's hesitance to adopt them means Roche and defendants fighting similar litigation here have a disadvantage, according to Fanning, who said New Jersey isn't as stringent about weeding out "junk science."

The plaintiffs are represented by Bruce D. Greenberg of Lite DePalma Greenberg LLC, David R. Buchanan of Seeger Weiss LLP and Peter Samberg of Weitz & Luxenberg PC.

Roche is represented by Paul W. Schmidt and Michael X. Imbroscio of Covington & Burling LLP, Natalie H. Mantell of Gibbons PC and Russell L. Hewit of Dughi Hewit & Domalewski PC.

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

Sports Betting Bid Reaches The U.S. Supreme Court

The fate of sports betting in New Jersey is now in the hands of the U.S. Supreme Court, which is tasked with determining if a federal law prohibiting states from authorizing the activity is unconstitutional or if it legitimately preempts state law.

During oral arguments in December, the justices seemed to favor overturning the 1992 Professional and Amateur Sports Protection Act, the law at the heart of the Garden State's yearslong fight against the NCAA and the four major professional sports leagues to allow the activity.

The justices are reviewing the Third Circuit's en banc ruling striking down the state's attempt to allow sports betting, in what was the third opinion by the circuit court that the state's efforts clashed with PASPA. The state considers the law a "perverse" move to maintain prohibitions that violate the 10th Amendment's anti-commandeering doctrine, because it dictates the contents of state laws by prohibiting states from authorizing sports betting. The sports leagues, however, contend that PASPA is a valid application of the federal government's ability to preempt state law.

The questioning by the justices in December seemed to suggest they side with the notion that PASPA unconstitutionally usurps the state's authority. Genova Burns LLC attorney Nicholas R. Amato said that if he had to bet on it, the odds would be in New Jersey's favor.

"It was obvious — to me, anyway — that the majority of the justices were not impressed with PASPA and viewed it as the federal government overreaching on states' rights," said Amato, who had a ringside seat to the argument and noted the skeptical input by Chief Justice John Roberts and Associate Justices Anthony Kennedy, Stephen Breyer and Samuel Alito.

New Jersey is represented by Theodore B. Olson, Matthew D. McGill, Nicole A. Saharsky, Ashley E. Johnson and Lauren Blas of Gibson Dunn & Crutcher LLP, Michael R. Griffinger, Thomas R. Valen and Jennifer A. Hradil of Gibbons PC, and by Attorney General Christopher S. Porrino, First Assistant Attorney General Peter Slocum and Assistant Attorney General Stuart Feinblatt.

The New Jersey Thoroughbred Horsemen's Association is represented by Ronald J. Riccio and Elliott Berman of McElroy Deutsch Mulvaney & Carpenter LLP and Edward A. Hartnett of Seton Hall University

School of Law.

The leagues are represented by Paul D. Clement, Erin E. Murphy, Michael D. Lieberman and Edmund G. LaCour Jr. of Kirkland & Ellis LLP, and Jeffrey A. Mishkin and Anthony J. Dreyer of Skadden Arps Slate Meagher & Flom LLP.

The cases are Christie et al. v. National Collegiate Athletic Association et al., case number 16-476, and New Jersey Thoroughbred Horsemen's Association Inc. v. National Collegiate Athletic Association et al., case number 16-477, in the Supreme Court of the United States.

--Additional reporting by Adam Rhodes, Bill Wichert and Zachary Zagger. Editing by Mark Lebetkin.

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