# Product Liability

With trade becoming increasingly global and supply chains more complex, it is crucial for businesses to pay greater attention to managing product safety and liability issues. With this in mind, we speak to Colin K. Kelly, a partner in Alston & Bird's Products Liability and Litigation & Trial Practice Groups in Atlanta, Georgia, where he focuses his practice in the areas of product liability, toxic/mass torts and crisis management.

**Please give me an overview of yourself, your firm and your involvement with product liability.**

With more than 800 attorneys (more than twenty of whom specialize in Product Liability matters nationally), Alston & Bird is a leading national AmLaw 50 firm. The firm has built a reputation as one of the country's best employers, appearing on FORTUNE magazine's "100 Best Companies to Work For" list for 15 consecutive years, an unprecedented accomplishment among law firms in the United States. The firm has offices in Atlanta, Brussels, Charlotte, Dallas, Los Angeles, New York, Research Triangle, Silicon Valley and Washington, D.C.

I routinely serve as national, regional counsel and trial counsel to multiple Fortune 500 clients in product liability maters. I have litigated product liability and complex litigation matters in more than 15 different states and have tried many high-profile product liability matters to verdict in some of the most dangerous jurisdictions in the United States.

**What have been the key areas of litigation in the product liability sector in your jurisdiction?**

There are a number of areas of product liability litigation that have received a fair amount of attention lately, including food/beverage consumer fraud cases in particular. Over the past several years, the FDA's refusal to issue clear guidance on the definition of what ingredients qualify as "all natural" for food/beverage products has spawned a large number of putative class actions involving false or deceptive advertising. Until the FDA issues new guidance, the volume of state-law false labeling cases will continue to rise and provide inconsistent outcomes for this industry.

**What do businesses need to be particularly mindful of, in terms of product liability, in order to avoid litigation?**

Traditionally, good quality assurance/control programs and sound manufacturing processes and procedures were considered adequate to protect a manufacturing company against most product liability litigation risks. However, with the advent of the "consumer expectations test" being adopted in states like California, even the most expertly designed, manufactured and marketed products are subject to liability if the product did not perform in the manner "expected" by the consumer. Product manufacturing companies should continue to focus on their product labelling, use and instructions (warnings) in order to be in the best position to defend itself against claims.

**What recent cases has your product liability group been involved in recently of interest?**

National Coordinating Counsel, Verizon Wireless Cell Phone Brain Cancer Litigation: Members of our Products Liability Group (along with the firm's Class Action Team) recently defended Verizon Wireless and other companies in litigation alleging that cell phones cause brain cancer.

National Counsel, Toyota Class Actions: Our firm recently served as lead counsel in the economic loss class actions in the Toyota Unintended Acceleration (UA) Marketing, Sales Practices and Products Liability Multidistrict Litigation (MDL) in the Central District of California. The UA MDL consisted of more than 200 class actions and individual economic loss cases and more than 100 individual product liability cases transferred from every state and Puerto Rico, as well as claims by foreign plaintiffs seeking to represent Toyota customers from every country in the world outside the United States.

**Do you see any changes ahead for product liability law in your jurisdiction?**

The doctrine of federal pre-emption, which prevents a plaintiff from bringing a claim under a state's law when that law conflicts with federal law, has the potential to be dramatically altered across a number of industries. Companies should be aware that long-established federal pre-emption principles could be changing in the near future, which could subject the companies to numerous new legal challenges.

For example, the United States Food and Drug Administration (FDA) is considering changes to the generic pharmaceutical industry's ability to control the labelling on its products. Such a change likely would subject that industry to state law failure-to-warn claims for the first time, which could open the door to a flood of lawsuits against companies in the generic pharmaceutical industry. Similarly, the role of FDA in defining what is permissible in "all natural" marketing claims has been at issue in a number of state lawsuits alleging deceptive advertising over such claims. What guidance FDA ultimately gives on this issue will go a long way in shaping when plaintiffs may succeed in claiming that an "all natural" marketing claim actually is just deceptive marketing. Additionally, the cell phone industry is asserting that federal preemption should prevent plaintiffs from being able to sue the industry over allegations that cell phone use causes brain cancer.

These are just three examples of the potential for enormous shifts in the ability of plaintiffs to bring state law claims against companies in a wide variety of industries. Federal preemption is a complicated area of law, but it's an area that companies should monitor carefully as the ability of plaintiffs to bring claims heavily depends on when courts decide that claims are preempted by federal law. **LM**

**Contact:**
**Colin K. Kelly**
**Alston & Bird LLP**
**1201 W. Peachtree St.**
**Atlanta, GA 30309**
**Tel: 404-881-7670**
**Cell: 404-931-1334**

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