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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With 'Queen Of Torts' Sheila Birnbaum

By **Emily Field**

Sheila Birnbaum

Law360 (April 19, 2019, 3:42 PM EDT) -- Dechert LLP's Sheila Birnbaum, known as the "Queen of Torts," recently discussed with Law360 the changes in product liability laws she has seen over her long career, her proudest achievement as a lawyer and the challenges of representing Purdue Pharma in the multidistrict litigation over the opioid crisis.

Birnbaum, co-chair of Dechert's product liability practice, graduated from New York University Law School in 1965 and began her career at Berman & Frost, where she was the firm's first female attorney.

She made her reputation with the 2003 U.S. Supreme Court decision in State Farm Mutual Automobile Insurance Co. v. Campbell, which won a reversal of a $145 million judgment against State Farm on the grounds that the punitive damages awarded were unconstitutionally excessive. Now, she represents Purdue Pharma in the multidistrict litigation over the opioid crisis in which the plaintiffs, mostly local governments, generally allege that drug companies downplayed the risks of opioids.

This interview has been edited for length and clarity.

What case are you proudest of and why?

There are a number of cases, but Campbell against State Farm, which I argued in the U.S. Supreme Court and is the seminal case now on punitive damages and due process. I think from the point of view of the whole area of jurisprudence, it set the rules that govern punitive damages both in state and federal courts and has probably had an enormous impact on the whole area of punitive damages and what is recoverable and what is not recoverable.

It was a tough case that came up from the Utah Supreme Court. I've argued three times in the U.S. Supreme Court and won each one of them, but this is the case I think that had the most important effect on the law and I was pretty proud to get that result.

What is your most challenging case?

I think the cases we are handling now in the opioid litigations are the most challenging cases we have ever had because they're brought by state attorneys general and cities and counties, rather than

individuals. In product liability, that has been how most cases were brought — individuals suing companies in products liability for the failure of the product or failure to warn about the risks of the product.

But now in these opioid cases, the arena has changed dramatically from individuals suing, to states and cities and counties suing to recover for the expenses they have incurred in protecting or remedying addiction in their states or cities and counties. Not only does the change in plaintiffs change the potential defenses that the defendants have, but it's also changed the causes of action that have been brought. So these cases are not the usual type of causes of action that one usually sees, such as negligence, strict liability or breach of warranty in products liability cases.

What we're now confronted with are causes of action in public nuisance and other esoteric types of causes of action that in many cases have not stood up in these types of products liability cases, such as the gun cases and the lead paint cases that have been brought by cities and municipalities against manufacturers.

So these cases are challenging from the point of view of the plaintiffs that are suing, the causes of action that are being brought, the number of defendants that are in the cases and the difficult issues that we're confronted with, even in trying to resolve them.

What other cases and litigation trends are you watching?

This trend that I just described of cities and counties suing, rather than individuals, is a trend we're going to see in other types of cases. I think it's something different.

For example, in cases where plaintiffs have brought actions against manufacturers and distributors of opioids and dealing with individuals, there are certain defenses that would be available, like the person was addicted and made certain choices and assumed certain risks.

When you're dealing with cities and counties and/or states, those defenses aren't available as such and the entire way you have to approach these novel causes of action and these new types of plaintiffs is very different in the products liability arena. So I think this is a trend that is going to continue because it does take away some of the defenses that were available to defendants. Another example is that in many states the statute of limitations doesn't apply to a state, while it certainly applies to individuals.

This is a trend I think we have to watch, and it could fundamentally change how defendants proceed in product liability cases and what their defenses are going to be.

What has changed in product liability since you started practicing?

I think the biggest changes that have occurred over the years are the advent of the multidistrict litigation and the coming together of hundreds, if not thousands, of cases with plaintiffs steering committees and more than one defendant usually.

This is now the trend in product liability cases. Almost all of the huge product liability cases are now in the multidistrict litigation, and there's a great deal now of management of cases, instead of one-off cases that are tried singularly and stand alone. So this is a big difference, certainly in the last 15 years in product liability —the rise of the mass tort and the multiplaintiff and multidefendant cases that are managed by a judge assigned by the multidistrict panel.

The other thing that I think that has changed, especially in pharmaceutical product liability cases and medical device cases and cases involving chemicals, is the use of Daubert in defining what experts can testify to. In almost all of these cases now, we have Daubert hearings, which affect what an expert can testify to and whether it is reliable.

What initially attracted you to product liability work?

It goes back a long time to my moot court, national moot court, when I was in law school. The problem was a product liability problem at that time, and so I spent my senior year getting steeped in product liability law.

Then in my first job, we were confronted with the oral contraceptive litigation, which was a mass tort, but we didn't know that at the time because we didn't even have the right words for it.

Since I was the only woman in the firm, and this had to do with oral contraceptives, I got to play a major role in the case. That's how I got started into the products liability field and have been doing it for over 50 years, watching it change but only getting more interesting and more challenging.

I also was fortunate enough to teach product liability at Fordham law school and New York University law school. That also was an incredible experience in learning it in a way that was very deep, because to teach something you really have to learn it and understand it. So I had an opportunity to watch the change in product liability law, not only from a practical litigation point of view, but also from an academic point of view.

So I think the combination of both the academic and practical have been very important over my career in approaching some of the thorniest issues in the product liability area.

What advice would you have for younger attorneys?

Stay in it. Stick in it. It's challenging and interesting. I never remember having a dull day. Learn both the practical skills, the litigating skills that you have to bring to it, the science, the substantive law. It will always be a field of law that is exciting, interesting and challenging, so stick with it and learn it, because you'll always enjoy it.

--Editing by Rebecca Flanagan and Jill Coffey.