



THE
JERE BEASLEY REPORT OCTOBER 2016

Beasley Allen

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I. CAPITOL OBSERVATIONS

**BEASLEY ALLEN LAWYER LANCE GOULD
PUBLISHES WHISTLEBLOWER BOOK**

Lance Gould, a lawyer in Beasley Allen's Consumer Fraud & Commercial Litigation section, has just published a book about the False Claims Act and whistleblower laws. The False Claims Act (FCA) was established in 1863 to allow individuals to sue on behalf of the government when they witness fraud against the government. Provisions of the FCA make these whistleblowers eligible to receive up to 30 percent of money recovered as a result of their report.

In this book, titled *Whistleblowers: A Brief History & A Guide To Getting Started*, Lance provides a brief history of whistleblower law, and how it has grown through the years to expose health care fraud, pharmaceutical and medical device fraud, government contractor fraud, as well as financial fraud. He also provides basic instruction on how to identify a whistleblower claim, and advice about how to navigate these often complex claims.

Lance began his legal career with Beasley Allen in 1997. Since that time Lance has handled numerous cases in several different areas. In the last several years, he has focused more and more on whistleblower litigation. Whistleblower law, in particular, offers a great opportunity to help citizens who are trying to do the right thing, and who have often been penalized by their employer as a result of exposing fraud, waste and abuse. Whistleblower laws enable everyday folks to help our country.

Whistleblowing is not a new phenomenon. The False Claims Act was established by President Abraham Lincoln during the Civil War as a way to allow individuals to come forward and put an end to frauds on the government. Blowing the whistle takes courage, and facing what comes after can be daunting to most people. Lance says he is happy to be able to help guide them through this process in his practice. Retaliation by employers against whistleblowers is wrong and won't be tolerated.

In addition to the history of whistleblower laws, this book shares some basic instruction on how you can identify a whistleblower claim. Advice is given on

how to navigate these often complex claims. We are making Lance's book available free to lawyers. You can order a hard copy of the book by calling the firm at 800-898-2034, or you can order a copy or download the e-book at www.lance-gould-law.com/book.

II. TALC LITIGATION UPDATE

THIRD TALC TRIAL UNDERWAY IN ST. LOUIS

Beasley Allen lawyers are now in St. Louis for the third talcum powder trial. The Plaintiff in the case, Deborah Giannecchini, was diagnosed with ovarian cancer at age 57. She is the third Plaintiff to have her case tried in this venue. The previous two trials in February and April of this year resulted in verdicts of \$72 million and \$55 million, respectively. The bulk of the verdicts awarded in these cases were punitive damages levied against Johnson & Johnson for its wrongful conduct in concealing the dangers of talcum powder from its customers.

The Defendants, in a most unusual and totally frivolous manner, removed this case to federal court on the Friday night before the case was scheduled to start on the following Monday. This was their second attempt to remove the case to federal court, with the first being unsuccessful. A federal judge again remanded the case to St. Louis on Sept. 21 immediately after a hearing conducted by telephone.

Johnson & Johnson continues to deny any wrongdoing and asserts that talcum powder is safe and does not cause cancer. However, decades of epidemiological studies have shown a statistically significant association between the perineal use of talcum powder and ovarian cancer.

Furthermore, the company's own internal documents demonstrate without any doubt that the company has been aware of these risks since at least 1975. Johnson & Johnson worked in concert with its talc supplier, Imerys Talc America, Inc., and the cosmetic trade organization, the Personal Care Products Council, to influence the classification of talc as a human carcinogen by the FDA.

More trials are set in St. Louis in January, February, April and June of 2017.

Currently, there is a petition pending to form a multidistrict litigation (MDL) in the Southern District of Illinois, and at press time the U.S. Judicial Panel on Multidistrict Litigation (JPML) was set to hear arguments both for and against the creation of the MDL on Sept. 29th. Thus far approximately 1,800 cases have been filed in St. Louis. Other cases are filed in state courts in New Jersey and California. There are others filed in various federal courts.

CLASS ACTION LAWSUIT IN FEDERAL COURT

On Sept. 20th U.S. District Judge David R. Herndon of the Southern District of

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Illinois denied certain arguments made by Johnson & Johnson and related entities asserted in their motion to dismiss a class action complaint filed by class Plaintiff Barbara Mihalich. The Court denied Johnson & Johnson's argument to throw out Plaintiff's Consumer Fraud and Deceptive Business Practices Act claims, as well as Plaintiff's claims of unjust enrichment. However, the court dismissed the claims against Johnson & Johnson for injunctive relief.

This positive ruling for class Plaintiff Mihalich came after the class action complaint was amended in January to plead reliance in more detail. Judge Herndon said in his order that Ms. Mihalich's claim under the Illinois Consumer Fraud and Deceptive Business Practices Act was pleaded well enough to survive dismissal.

The class action complaint, which was filed in May 2014, alleges that Johnson & Johnson concealed from consumers the serious risks of ovarian cancer caused by the use of the company's talcum baby powder. The complaint alleges that Johnson & Johnson made false representations to consumers that their talcum baby powder was safe, gentle and mild, and encouraged women to use the product in their genital areas daily, despite the company's knowledge of cancer risks associated with the use of the product.

In his order upholding Plaintiff's Consumer Fraud and Deceptive Business Practices Act and the unjust enrichment claims, Judge Herndon wrote, "At this stage, Plaintiff's assertions are sufficient to withstand dismissal." Overall, this is a very positive ruling for Plaintiffs engaged in litigation against Johnson & Johnson concerning the company's harmful and dangerous talc powder. Another class action has been filed against Johnson & Johnson in California where the parties are currently waiting on a ruling on a motion to dismiss. If you need more information on the class action litigation, contact Ali Hawthorne, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Ali.Hawthorne@beasley-allen.com.

JOHNSON & JOHNSON GETS TEMPORARY WIN IN NEW JERSEY STATE COURT

Our lawyers were shocked when a state court judge struck two of their expert witnesses last month in the New Jersey talc litigation. These witnesses,

Dr. Daniel Cramer, who is from Harvard and is with the Brigham & Women's Hospital in Boston, and Dr. Graham Colditz from Washington University in St. Louis, are two of the most qualified medical scientific researchers in the country.

Dr. Colditz was recently recognized as the leading medical scientific researcher in the entire world. It's most significant that both Dr. Cramer and Dr. Colditz were listed by the company that mined and sold talc to Johnson & Johnson as qualified medical researchers they would use to determine if there was a link between talc use and ovarian cancer. As has been widely reported, each of these medical researchers found there to be a significant cancer risk. In addition, each is well-respected by their peers.

The New Jersey decision ignores the fact that Johnson & Johnson has admitted in internal documents that its talc powder product carries a cancer risk and that the scientific studies on the link between talc use and ovarian cancer have been against them. The supplier of talc to Johnson & Johnson actually puts a cancer warning on the containers of talc delivered to Johnson & Johnson.

Our lawyers are confident that the New Jersey state court decision will be reversed on appeal. We will also continue with the litigation in other courts around the country. Both federal and state court judges have favorably reviewed our expert testimony on the link between talc use and ovarian cancer. The New Jersey decision goes against these previous rulings.

The internal documents show without any doubt that Johnson & Johnson knew of the cancer risk to women for decades and failed to warn them of the risk. We asked Johnson & Johnson to agree for us to furnish copies of the trial transcripts where both Dr. Cramer and Dr. Colditz testified and where the Johnson & Johnson internal documents were introduced into evidence and seen by judges and juries in other trials.

III. MORE AUTOMOBILE NEWS OF NOTE

SECOND CIRCUIT COURT OF APPEALS RULES AGAINST GM ON BANKRUPTCY SHIELD RULING

On Sept. 14, the Second Circuit Court of Appeals rejected General Motor's request that the court rethink its decision that struck down bankruptcy court orders that shielded the post-bankruptcy iteration (New GM) of the company from liability for ignition-switch defects due to a 2009 asset sale. The panel declined GM's petition for an en banc rehearing of its ruling earlier this summer. In that ruling the Second Circuit reversed a lower court's decision that the sale order of GM could be used to evade claims from the alleged defects.

In its July decision, the appeals court panel revived claims over GM's ignition-switch defects, finding that that the liability protection from the sale order violated potential victims' rights to due process. GM did not reveal the ignition switch problem during the bankruptcy.

As we have previously reported, GM began recalling cars because of the defect in February 2014. The timing of the disclosure by GM effectively denied consumers the right to weigh in on the sale—therefore they cannot be bound by the provisions of the sale order that shielded the company from litigation, the Second Circuit said. Those seeking to hold New GM liable include individuals injured in accidents, and representatives of people killed, prior to the bankruptcy sale as well as those seeking to hold New GM liable for economic losses tied to the defects. This ruling is a major blow to GM and is legally—as well as morally—sound.

Source: Law360.com

TRACTOR-TRAILER CARRYING DEFECTIVE TAKATA AIRBAG PROPELLANT INVOLVED IN FATAL EXPLOSION

A tractor-trailer carrying Takata airbag inflators and propellant exploded in August. The driver of the truck failed to negotiate a curve and crashed his vehicle. The resulting explosion was powerful enough to shatter windows and knock doors off the hinges of about 10 nearby homes. Media reports stated

that truck parts and rubble were recovered nearly a mile away from the site of the blast in Quemado, Texas. The explosion engulfed the trailer in flames, and set fire to a nearby home and a passing car. Four persons were injured and a 67-year-old woman was killed. The woman was inside her home, which was set on fire by the explosion.

The truck driver and a passenger were able to escape from the truck before the explosion. The tractor-trailer was operated by a subcontractor. The propellant that the tractor-trailer was carrying is a compound called ammonium nitrate, which Takata uses in its airbags. The propellant was being transported from a Takata plant in Washington state to a warehouse in Eagle Pass, Texas, which is about 25 miles away from the site of the explosion.

Takata says that it has been working closely with the subcontractor and the appropriate authorities to investigate the incident. The company also claimed that it “has strict safety procedures relating to the transportation of its products that meet or exceed all regulatory requirements.” As of the time of this writing, the specifics of the truck explosion in Texas are still being investigated.

This explosion comes in the wake of a \$200 million civil penalty imposed on Takata by the National Highway Traffic Safety Administration (NHTSA), and a recall of more than 100 million vehicles worldwide due to a dangerous and deadly defect in Takata airbags. This defect centered on the propellant used in Takata airbags—ammonium nitrate—which is the same propellant that was being transported by the tractor-trailer that exploded in Texas.

NHTSA’s analysis of the Takata airbags being recalled, which are used in millions of America’s cars, determined that a combination of time, environmental moisture, and high temperatures led to the ammonium nitrate degrading in the airbag inflators, causing the airbags to explode with excessive force, spraying the passenger compartments of cars with shrapnel. As a result of these explosions, 14 people have died and more than 150 more injured.

Takata has admitted that it failed to alert NHTSA of the defect in its airbag inflators even though the company clearly knew about it. Takata has also admitted that the data submitted to the agency, since at least 2009, concerning the defect was selective, incomplete, or inaccurate. The \$200 million civil penalty is the largest that NHTSA has ever imposed.

TAKATA FAILED TO REPORT 2003 AIR BAG RUPTURE TO U.S. ROAD AUTHORITY

Takata Corp has now admitted it failed to inform the National Highway Traffic Safety Administration of a 2003 rupture of one of its air bag inflators in Switzerland. An internal Takata report was released by NHTSA that revealed this problem. Takata also said in the report that its U.S. arm, not the parent company, was largely responsible for designing, testing and producing tens of millions of defective air bag inflators. NHTSA released a series of reports last month into Takata’s defective air bag inflators.

In the United States, nearly 70 million inflators have been declared defective. The internal Takata internal report released examined the Japanese company’s handling of the problems since the inflators were first produced in 2000 as well as outside experts’ analysis of the defect. In one event detailed in the report, Takata said it did not inform the NHTSA when it learned in 2003 of the rupture of an inflator in Switzerland. A U.S. engineer at Takata asked if that incident should have been disclosed to the NHTSA in 2010, but it was not. Reuters reported on the 2003 incident in December 2014.

A Takata spokesman said the report was required by NHTSA as part of the company’s settlement announced in November. Reports released included one from Germany’s Fraunhofer Group commissioned by Takata, which said prolonged exposure to moisture and hot conditions could cause the propellant used in inflators to become more volatile. This finding was consistent with Fraunhofer’s previous assessments and other independent analyses.

GM WANTS TO DELAY RECALL OF 980,000 CARS WITH TAKATA AIR BAGS

General Motors (GM) has asked the National Highway Traffic Safety Administration (NHTSA) to push back by one year the recall of about 980,000 cars with the Takata air bags. GM claims that the air bags don’t pose an unreasonable risk. A petition filed by GM requested that NHTSA slow down the recall, which is currently set to begin on Dec. 31, and delay it until the end of 2017. The agency’s recall of the Takata air bag inflators—which are linked to at least 10 deaths in the U.S and four others worldwide—more than doubled this past spring when NHTSA added up to 40

million more vehicles, making it the largest recall in U.S. history.

For GM, the recall affects about 6.8 million vehicles; the automaker is asking NHTSA to delay the recall for certain 2007-2012 GM full-size trucks and SUVs. GM claims these vehicles “are safe to drive and that the propellant in these inflators is not currently at risk.” The automaker says these inflators will likely perform as designed until at least Dec. 31, 2019. NHTSA had expanded the recall in May after it determined the root cause of the air bag inflators’ propensity to rupture—a combination of time, environmental moisture and varying high temperatures that leads to the propellant degrading in the inflators. It will be interesting to see what NHTSA does with GM’s request.

Source: Law360.com

SUBARU AGREES TO SETTLEMENT IN HOOD DEFECT SUIT

Subaru of America Inc. has agreed to settle a class action lawsuit alleging certain vehicles have a defect that causes the hood to fly open at high speeds and crack the windshield. U.S. District Judge Robert Kugler was notified of the settlement last month. The lawsuit, filed by lead Plaintiff Marion Hadley, alleged that Subaru hadn’t done anything to fix the defect affecting its 2006 Subaru B9 Tribeca, despite the National Highway Traffic Safety Administration (NHTSA) having received 17 complaints about it. The complaint alleged that the defect endangers drivers and also diminishes the value of the cars.

The hood of Ms. Hadley’s vehicle flew open in May 2015 while she was driving at approximately 65 miles per hour, cracking her windshield and dislodging the rearview mirror. The driver was unable to see the road because of the broken hood, but managed to safely make it to the side of the road.

Ms. Hadley says when she contacted Subaru about the accident, the automaker refused to take responsibility for the defect, wouldn’t compensate her for the cost of repairs and refused to even look at the vehicle. It appears her experience was far from being an isolated incident. Numerous consumers have complained online about the very same defect, and NHTSA has received complaints from drivers citing a similar experience to Ms. Hadley’s.

Subaru was accused of actively concealing the alleged defect and of failing

to disclose that the alleged defect would diminish the value of the vehicle. The Plaintiff had asked for certification of a national and Pennsylvania class of drivers who bought or leased the 2006 Subaru B9 Tribeca. At least 18,000 of the class vehicles were sold by Subaru.

Claims were made in the complaint under the New Jersey Consumer Fraud Act and Magnuson-Moss Warranty Act. Claims for breach of express warranty and common law fraud, among others were also made. The Plaintiff is represented by Benjamin Elga, Taylor Asen, William H. Anderson and Charles J. LaDuca of Cuneo Gilbert & Laduca LLP. The case is *Hadley v. Subaru of America Inc.* in the U.S. District Court for the District of New Jersey.

Source: Law360.com

TOYOTA CLASS ACTION LAWSUIT INVOLVES MELTING DASHBOARD REPAIRS

A class action lawsuit has been filed against Toyota Motor Corp., alleging that the automaker has failed to repair cracking and melting dashboards in its vehicles. It's also contended that the automaker forced drivers to wait a long time for fixes. It appears that Toyota had promised to address the issue in exchange for a 2014 proposed class action lawsuit over the defect having been dismissed.

The lawsuit was filed last month in a South Carolina federal court by a proposed class of owners who said Toyota failed to honor its promises despite a warranty program launched to fix Lexus and Toyota vehicles affected by the defect. The owners said that the replacement effort faces a backlog because dealers authorized to make the repairs do not have sufficient inventory to address the large number of people facing the issue.

The suit filed by Lexus owner Wendy George arises from the other suit mentioned above filed in a South Carolina federal court in November 2014 by Melissa Graham. It was claimed in the Graham suit that dashboards on Toyota and Lexus vehicles melt in excess heat, creating a glossy film that reduced visibility. Ms. Graham said in her complaint that Toyota issued a service bulletin regarding the problem for 2006 to 2008 Lexus IS 250 and IS 350 vehicles in 2011, after many of the owners' warranties expired. The owners said Toyota knew of a similar issue in the 2006 to 2008 Lexus ES and the 2007 to 2009 Toyota

Camry, but failed to release a service bulletin. They said while Toyota knew how to fix the issue, the automaker concealed it from vehicle owners.

Toyota faced at least three other class actions regarding this defect, including one filed in a Florida state court in July 2014, which Toyota had removed to federal court. A U.S. federal judge remanded the case back to state court after those owners argued the removal was an attempt by Toyota to forum shop. Ms. Graham agreed to dismiss her lawsuit in March 2015, after Toyota promised to fix the vehicles free of charge. However, it's alleged in the George complaint that more than 18 months has passed since the initial notice of the warranty program and that most of affected vehicles remain unfixed.

The Plaintiffs seek injunctive relief, as well as damages and attorneys' fees. The owners are represented by T. Christopher Tuck, A. Hoyt Rowell III, James L. Ward Jr., Robert S. Wood and Catherine H. McElveen of Richardson Patrick Westbrook & Brickman LLC. The case is *George v. Toyota Motor Corp. et al.* in the U.S. District Court for the District of South Carolina.

Source: Law360.com

FIAT LOSES ITS ATTEMPT TO GET JEEP FUEL TANK RECALL SUIT DISMISSED

The class action lawsuit filed against Fiat Chrysler Automobiles (FCA) by a proposed class of Jeep owners has survived the automaker's motion to dismiss. It's alleged that FCA attempted to downplay the severity of a fuel tank defect and that the owners suffered damages. U.S. District Judge Greg Kays ruled that owners of 1993-2004 Grand Cherokee and 2002-2007 Liberty vehicles showed that allegedly misleading statements made by FCA mitigating the possible dangers posed by the placement of vehicles' fuel tanks could have factored into the decisions by some consumers to buy the vehicles. The judge also said the owners sufficiently pled that the defect is not a "potential" one and that FCA turned a blind eye to the actual problem. Judge Kays said:

Plaintiff must now bear the cost to bring his vehicle into conformance with FCA's representations regarding the fuel tank. Because plaintiff sufficiently alleges he did not receive the benefit of the bargain in purchasing his vehicle, FCA's

motion to dismiss on this ground is denied.

FCA did not take proper steps to address the issue of Jeep vehicles having plastic fuel tanks positioned behind the rear axle without proper means to withstand rear impact collisions. The National Highway Traffic Safety Administration Office of Defects Investigation launched a preliminary evaluation of the alleged problem in August 2010 and concluded in 2013 that the fuel tank issue was a defect that had the ability to lead to fires, injuries and even fatalities in the aftermath of a crash.

Jeep had failed to recall the vehicles to fix this problem. Finally, in June 2013, Jeep launched a recall to improve the strength of the rear structure of the vehicles and install a trailer hitch. The consumers contended that FCA dragged its feet on the recall and only fixed three percent of the approximately 1.5 million vehicles under the program. One claim was made against FCA alleging a violation of the Missouri Merchandising Practices Act. It's alleged that the automaker made a number of misrepresentations in communications with NHTSA, in press releases and in general statements that hid the actual dangers concerning the placement of the fuel tank in the Jeep vehicles.

The consumers are seeking repayment for the loss in value for their vehicles based on the defect or the cost of repair to bring the vehicles in line with representations by FCA that the vehicles are safe and nondefective. The consumers are represented by Christopher S. Shank, David L. Heinemann and Stephen J. Moore of Shank & Moore LLP. The case is *Faltermeier v. FCA US LLC* in the U.S. District Court for the Western District of Missouri.

Source: Law360.com

CLASS ACTION LAWSUIT SAYS FORD PANORAMIC SUNROOFS EXPLODE

A federal class action lawsuit was filed last month against Ford Motor Co., contending the automaker ignored for years that many models' luxury panoramic sunroofs can explode from compression pressures. Panoramic sunroofs are bigger than normal sunroofs. Their size gives them a larger role to play in the structural integrity of a roof. Ford's sunroofs are made of tempered glass. It's alleged in the complaint that they are too thin and prone to suddenly fail. It's alleged further:

The shattering events are so powerful that startled drivers compare it to the sound of a gunshot, after which glass fragments rain down upon the occupants of the vehicle, sometimes while driving at highway speeds. Flexing and vibration caused by ordinary driving imposes stress on the sunroof. In the Ford models at issue, the compromised tempered glass cannot withstand the pressures and flexing that the sunroof frame and vehicle demand, even when the vehicle is brand new or is parked and sitting still.

The Plaintiffs said that the problem is caused by at least these reasons: Ford uses tempered glass that's only 4 mm thick, which is allegedly too thin for tempered glass; and the integrity of the glass is compromised further by painting it with ceramic materials that allegedly are known to weaken glass.

The Plaintiffs said that "Ford has known about this problem since at least 2008 as a result of a number of National Highway Traffic Safety Administration (NHTSA) complaints." They cited customer communications with Ford that describe inverted craters left in the centers of sunroofs where pressure emanating from the edges exploded the glass upward, also destroying the four corners of a sunroof pane.

The problem allegedly exists in panoramic sunroofs from the following Ford models: Edge from 2007-present, Flex from 2009-2016, Focus from 2009-2016, Fusion from 2010-present, Explorer from 2011-2016, F-150 from 2011-2016, Mustang from 2009-2014, Escape from 2013-2016, Transit Connect from 2014-2106, and C-Max from 2013-2016.

Cars from Ford's Mercury and Lincoln brand are also allegedly affected. The cars include Lincoln MKX from 2007-2016, Lincoln MKS from 2009-2015, Lincoln MKZ from 2013-2016, Lincoln MKT from 2010-2016, Mercury Milan from 2010-2011, and Mercury Montego from 2010-2011.

For those who are not familiar with the term, tempering is a process in which annealed glass is cut to size, heated, and then rapidly cooled, which leaves the core of the glass still trying to expand and so creates additional tensile strength because of that pressure. But if the outer layer is "compromised" in any way, the complaint says, the violent failure of the entire pane immediately follows.

The Plaintiffs are represented by Crystal Foley, Paul Hanly, and Mitchell Breit of Simmons Hanly Conroy LLC and Gregory Coleman, Mark Silvey, Adam Edwards, and Lisa White of Greg Coleman Law PC. The case is *Krebsbach et al. v. Ford Motor Co.* in the U.S. District Court for the Eastern District of California.

Source: Law360.com

IV. PURELY POLITICAL NEWS & VIEWS

THE PRESIDENTIAL RACE IS IN FULL SWING

I—like 100 million others—watched the first debate between Hillary Clinton and Donald Trump on September 26th. I came away convinced that Trump would be a disaster in the event he became president. But based on previous debates, I believe it's too early for Hillary to take a victory lap. However, it's very clear Trump failed to take advantage of an opportunity to keep his momentum going. At times during the lengthy debate, he appeared almost irrational.

The most obvious and perhaps most significant factor was that Trump appeared to be emotionally drained and extremely unsettled during the last 50 minutes of the debate. My guess is that his advisors were none too happy with their candidate's performance. It's a scary thought that a man with Trump's temperament could have the power of the presidency in his grasp. He appears to go off the deep end when confronted with a tough issue. When you combine all of this with his out right lies and contradictions, which are a daily occurrence, this man should not be president.

While Hillary is far from perfect, she is clearly the best candidate. She has specific plans in all areas that the next president will have to deal with. I plan on voting for her on November 8th.

V. COURT WATCH

LAWSUIT TARGETS STATEWIDE JUDICIAL ELECTIONS

A lawsuit was filed last month challenging Alabama's method of electing appellate judges statewide. It's contended that the current method makes it nearly impossible to elect an African-American. Currently, all 19 judges on the Alabama Supreme Court, the Court of Criminal Appeals and the Court of Civil Appeals are white. History confirms that it is more difficult for blacks to be elected at large in Alabama. The lawsuit, filed on behalf of the Alabama NAACP and four black citizens, wants the state to change over to district elections. It's contended that the at-large method "unlawfully dilutes the voting strength of African Americans and prevents them from electing candidates of their choice."

The case was filed in federal court in Montgomery and alleges the state is in violation of the Voting Rights Act. At present about one-quarter of Alabama's voting-age population is African-American. No black jurists have been elected to any of the three appellate courts over the past 21 years and that's a pretty strong argument for change.

It's said that Alabama's record of racially polarized voting, where blacks and whites have strongly different preferences, makes it harder for minority voters to have enough power to elect a minority candidate. Kristen Clarke, President and Executive Director of the Lawyers' Committee for Civil Rights Under Law, had this to say:

We are struck by the fact that, in such an extended period of time, African Americans have been unable to elect a judge of their choice to one of three highest courts in state. The racial dynamics we see when it comes to voting sparked a desire to look at what was happening in the state and ultimately led us to file this case.

Only two black justices, Oscar Adams and Ralph Cook, have been elected to the Alabama Supreme Court, and each was first appointed to the job by the governor. A third, John England Jr., was appointed in 1999, but he was defeated a year later. There have been nine black candidates for seats on the three courts

since 2000, and all were defeated by white candidates. It should be noted that this isn't the first time civil rights groups have tried to change how Alabama elects its appellate judges. A similar lawsuit, filed 22 years ago, was settled with an agreement that the state would add seats to the appellate courts and give minority groups a voice in selecting the new appointees. The proposed settlement was ultimately thrown out by the 11th Circuit Court of Appeals in 1996.

In this new case, the civil rights groups are asking the court to elect judges by district instead of at large, with at least one district having a majority black population. The new lawsuit makes no mention of political parties, which is also a factor in Alabama judicial elections. All appellate judges in Alabama are Republican, along with every other statewide elected official, and that doesn't appear to be a factor in the suit. Ms. Clarke said her organization did not look at the "partisan dynamics" involved. She added:

The only reason we focused on this is that African Americans make up 26 percent of the population. And what we see in Alabama is an environment that has intensely racially polarized voting.

This lawsuit will be watched closely. It will be most interesting to see how the case is defended. The historical truth concerning diversity on the appellate courts will be undisputed. The question will be if the U.S. Constitution and the Voting Rights Act requires the election of appellate court judges to reflect the demographic make-up of its citizens. Stay tuned!

Source: *Montgomery Advertiser*

VI. THE CORPORATE WORLD

REGIONS BANK PAYING \$52 MILLION FOR IMPROPERLY HANDLED MORTGAGE LOANS

Alabama-based Regions Bank has agreed to pay more than \$52 million to the government to resolve allegations that it improperly handled mortgage loans insured by the Federal Housing Administration (FHA). Regions, a unit of Birmingham, Ala.-based Regions Financial (RF), admitted that between Jan. 1,

2006, and Dec. 31, 2011, it certified for FHA insurance mortgage loans that did not meet the U.S. Department of Housing and Urban Development's (HUD) standards for borrower creditworthiness, the Justice Department says. That's a problem since the FHA relies on the credit measure recommendations from so-called direct endorsement lenders like Regions.

Regions also did not follow the appropriate "self-reporting requirements" when finding fraud, serious violations or other deficiencies with loans, according to the Justice Department. If a loan is approved by a direct endorsement lender, but later defaults, the loan's holder can make an insurance claim to HUD to cover losses. Principal Deputy Assistant Attorney General Benjamin C. Mizer, head of the Justice Department's Civil Division, had this to say:

Mortgage lenders that participate in the FHA insurance program must follow the requirements intended to safeguard its integrity and to protect homeowners. We will continue to hold responsible lenders that knowingly violate these important requirements.

As part of the settlement, Regions acknowledged it failed to follow several federal guidelines from Jan. 1, 2006, to Dec. 31, 2011. Federal authorities said that as a result, the U.S. government insured hundreds of loans approved by Regions that were not eligible for FHA mortgage insurance. HUD subsequently incurred substantial losses when it paid insurance claims on those loans, authorities said.

Sources: U.S. Department of Justice and Associated Press

CVS TO PAY \$795,000 TO MASSACHUSETTS AND WILL OVERHAUL OPIOID DISPENSING POLICIES

CVS Health Corp. agreed to pay Massachusetts \$795,000 and overhaul its opioid dispensing practices to settle allegations that prior to 2013 certain CVS locations failed to use "sound professional judgment" and filled prescriptions of the powerful painkillers for customers even after being warned not to do so. U.S. Attorney General Maura Healey called this latest action a "big deal," citing more than 1,500 opioid overdose-related deaths in 2015 alone.

Attorney General Healey's office discovered during an investigation that certain CVS locations in the state failed

to provide pharmacists with adequate internet service to access the state's Prescription Monitoring Program. The online database monitors patients' prescription histories and was set up to curb abuse of prescription medications, such as opioids, which are the most abused prescription drugs in the country.

Opioids are a class of powerful painkillers such as morphine, Oxycontin and heroin. The drugs give patients a feeling of euphoria, and are easily misused and abused. Massachusetts is one of several states, counties and cities who have started pushing back at drug companies for misleading doctors and patients about the highly addictive nature of the drugs, which in turn fuels the prescription drug abuse epidemic.

Massachusetts isn't the only state to file charges against opioid manufacturers. Suffolk County in New York filed a lawsuit against 11 pharmaceutical companies. Two counties in California, the city of Chicago, and the state of Kentucky have filed similar lawsuits.

CVS now requires pharmacists at its Massachusetts locations not to dispense certain prescription drugs without first reviewing the customer's prescription history. The company has also revised its prescription drug policies and improved training of pharmacists. All of this is the result of Massachusetts lawsuit.

Sources: Righting Injustice and PharmPro

WELLS FARGO IS GUILTY OF A MASSIVE FRAUD

Last month, the Consumer Financial Protection Bureau (CFPB) announced that Wells Fargo Bank, N.A. agreed to pay a fine of \$100 million for its "widespread illegal practice of secretly opening unauthorized deposit and credit card accounts." Wells Fargo further agreed to pay \$35 million to the Office of the Comptroller of the Currency and \$50 million to the City and County of Los Angeles. Specifically, the CFPB found that Wells Fargo:

- "opened unauthorized deposit accounts for existing customers and transferred funds to those accounts from their owners' other accounts, all without their customers' knowledge or consent;
- submitted applications for credit cards in consumers' names using consumers' information without their knowledge or consent;

- enrolled consumers in online-banking services that they did not request; and
- ordered and activated debit cards using consumers' information without their knowledge or consent."

Wells Fargo employees "requested and issued debit cards without consumers' knowledge or consent, going so far as to create PINs without telling consumers." These employees also, "created phony email addresses not belonging to consumers to enroll them in online-banking services without their knowledge or consent."

In the wake of that initial announcement, Wells Fargo has faced public criticism, congressional pressure, investigations from U.S. Attorneys, and civil lawsuits concerning its widespread scheme. Class action lawsuits have been filed on behalf of Wells Fargo customers who were victim to this widespread scheme.

A previous class action lawsuit was filed in 2015 on behalf of customers, and Wells Fargo purportedly agreed to settle that action around the same time it agreed to the CFPB penalties. At press time, the settlement of the 2015 action had not yet been submitted to the court for approval. Class action lawsuits have also been filed on behalf of Wells Fargo employees who tried to meet aggressive sales quotas without engaging in fraud and were later demoted, forced to resign or fired.

Wells Fargo and its leadership are also facing another type of lawsuit arising as of this illegal scheme, and it was brought on behalf of its shareholders. The shareholder class actions allege that Wells Fargo's senior ranks created an incentive system that allowed the fraud to occur, enabling the institution to meet sales targets and boost its bottom line. The allegations accuse Chief Executive Officer John Stumpf, Carrie Tolsted (the now-retired executive at the center of the scandal) and other leaders of breaching their fiduciary duty, unjust enrichment and corporate waste. These shareholder lawsuits seek damages on behalf of the company. I will be shocked if persons other than the employees who were filed didn't have knowledge of what was going on. If you need more information, contact Leslie Pescia, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Leslie.Pescia@beasleyallen.com.

Sources: Consumer Financial Protection Bureau and Bloomberg

VII. WHISTLEBLOWER LITIGATION

WHISTLEBLOWER CLAIMS RESEARCH FRAUD ALLOWED DUKE UNIVERSITY TO COLLECT MILLIONS IN FEDERAL GRANTS

A whistleblower lawsuit filed against Duke University by a former research biologist claims that a former colleague's extensive research fraud helped generate more than \$200 million in federal grants. Whistleblower Joseph Thomas, a cell biologist at Duke from 2008 to 2012, alleges that the head of Duke's pulmonary research lab and other university officials turned a blind eye to the fraud and withheld it when reporting on existing federal grants or applying for new ones.

Mr. Thomas alleges that as a result the bad research helped Duke secure at least 49 research grants worth \$82.8 million from the National Institutes of Health (NIH), the Environmental Protection Agency, and other agencies. Additionally, Mr. Thomas says the fraudulent research helped other institutions using Duke's research labs to secure an additional 15 grants totaling nearly \$121 million.

The alleged fraud involves former Duke researcher Erin Potts-Kant, who worked in the Airway Physiology Laboratory studying the effects of pollutants on the body's airways under the direction of William Michael Foster, a leading expert in the study of inflammation of the respiratory system.

Ms. Potts-Kant was arrested for embezzlement in 2013 after stealing more than \$25,000 from the Duke University Health System to buy merchandise from Amazon, Walmart, Target and other vendors. Her arrest triggered an investigation of the work she did for Duke over the course of several years, which uncovered extensive fraud that led to the full and partial retraction of scores of published studies.

Mr. Thomas' complaint alleges that when Ms. Potts-Kant was studying the effects of pollutants on the body's airways, she manipulated data to produce the outcome she desired. According to the complaint, sometimes Ms. Potts-Kant didn't expose mice to the proper experimental conditions and on other occasions she failed to run the experiments at all. At other times, she ran the experiments but altered the data, manipulating the numbers and outcomes

to fit her hypothesis or embellish their relevance, according to allegations in the complaint.

This case is one of the largest False Claims Act cases to go after a university over alleged research fraud where federal funds are involved. The case could spur other potential whistleblowers in academic institutions to call out research fraud, especially when phony data and experiments are helping colleges rake in federal research grants.

Sources: The News & Observer and the complaint

GOVERNMENT CHARGES 16 PERSONS IN \$175 MILLION PHARMACY FRAUD SCHEME

The U.S. Department of Justice (DOJ) has charged 16 individuals in a Florida federal court as part of an elaborate fraud scheme that allegedly used call centers and kickbacks to generate bogus prescriptions and cheat government and private insurers to the tune of \$175 million. The charges include conspiracy to commit racketeering, launder money and commit wire fraud.

A Criminal Information described an enterprise that appears to have operated from 2013 to 2015 and which controlled numerous stops on the supply chain, including selection of ingredients for compounded drugs, solicitation of patients for unnecessary prescriptions and funneling of kickbacks to "corrupt physicians."

Clifford Carroll, a Boca Raton resident, who faces up to 23 years in prison, is said to be the ringleader of the operation. Potential sentences for the other individuals range from five to 15 years.

According to the information, participants secretly purchased failing pharmacies and they functioned as fronts for the illicit conduct. The fact that the pharmacies held licenses made the operation possible. Drugs produced by the pharmacies were selected based on the amount of money reimbursed by military program TriCare and private insurers. It should be noted that none of the private insurance plans were named in the information. The medications were usually for skin conditions, and the information provided several examples of expensive products, including "a \$31,000 tube of compounded cream." The government claims that more than \$175 million was eventually paid out in the scheme.

A key component of the scheme was the use of call centers where staffers obtained information on potential patients, including military veterans,

who had previously been prescribed medications. The staffers contacted patients and read from deceptive prepared remarks in an effort to convince the patients to authorize the faxing of prescriptions to doctors' offices. The information states:

Corrupt co-conspirator physicians issued prescriptions for compounded medications to patients regardless of medical necessity and in exchange for illegal compensation, such as cash, gift cards and free consulting, which also described small payments to patients.

The government says payments were often disguised as reimbursement for "data collection" and were distributed through a sham software company called ClinicalCorp LLC. Other companies that participated were NuMedCare LLC, which purportedly supplied management services to pharmacies, and two failing compounders: Rx of Boca LLC and Dallas-based Texas Compounding Pharmacy. NuMed eventually was advised by in-house counsel that its conduct was illegal, and the lawyer "continued to assist...in the operation of NuMed by providing legal advice and the preparation of legal documents in order to conceal and disguise the criminal activity."

Source: Law360.com

OTHER WHISTLEBLOWER NEWS OF NOTE

There have been numerous developments in cases involving whistleblower litigation. I will mention several of them below. Currently, Beasley Allen has a team of lawyers working on whistleblower litigation.

TENNESSEE NURSING HOME COMPANY FACING FCA SUIT FOR "WORTHLESS" CARE

A False Claims Act (FCA) suit against bankrupt nursing home provider Vanguard Healthcare LLC was filed in Tennessee federal court, alleging the company didn't provide "the most basic and essential skilled nursing services" and misbilled Medicare and Medicaid. Prosecutors said that between Jan. 1, 2010, and Dec. 31, 2015, patients were harmed because of Vanguard's nonexistent, "grossly substandard," or "worthless" care, which included staffing and supply shortages, a lack of infec-

tion control, improper medication administration and inadequate pain management.

The provider is also accused of forging signatures on preadmission forms submitted to Tennessee Medicaid. Principal Deputy Assistant Attorney General Benjamin C. Mizer said in a statement:

Our seniors rely on the Medicare and Medicaid programs to help care for them with dignity and respect. It is critically important that we confront nursing home operators who put their own economic gain over the needs of their residents. Operators who bill Medicare and Medicaid while failing to provide essential services will be held accountable.

The suit names the corporate entity; its units Vanguard Healthcare Services LLC, Boulevard Terrace LLC, Vanguard of Crestview LLC, Glen Oaks LLC, Imperial Gardens Health and Rehabilitation LLC, Vanguard of Memphis LLC and Vanguard of Manchester LLC; and the company's director of operations, Mark Miller, who allegedly knew the care was substandard, but did nothing to change it. Vanguard, which filed for Chapter 11 protection in May, is accused of "chronic" shortages of staff and running low on critical medical supplies. The skilled nurses allegedly didn't provide standard infection control, follow physician orders for medication administration and wound care, or properly manage residents' pain. They would also use unnecessary and excessive psychotropic medications and unnecessary physical restraints, prosecutors said.

From this conduct, residents had ulcers, fell, and became dehydrated and malnourished, among other harms, the Department of Justice (DOJ) said. Vanguard Healthcare denied any wrongdoing.

Source: Law360.com

FORMER MONSANTO EXECUTIVE WILL RECEIVE \$22.5 MILLION AS WHISTLEBLOWER

A former Monsanto Co. financial executive who told regulators about the agribusiness giant's accounting

practices involving rebates for its Roundup weed-killer will receive almost \$22.5 million as a whistleblower. The Securities and Exchange Commission (SEC) says the fee comes out of the \$80 million penalty the St. Louis-based company agreed to pay under a February settlement with the agency. This fee award is the second-biggest the SEC has given a whistleblower since a \$30 million fee paid in 2014.

The February agreement by Monsanto settled claims that the company misstated its earnings by not properly accounting for millions of dollars paid to distributors as Roundup rebates, which had the effect of distorting the company's earnings reports for 2009, 2010 and 2011. Monsanto agreed to hire a consultant to review the company's financial reporting procedures for rebates.

The latest award brings the total issued to whistleblowers under the SEC's program to more than \$100 million, the agency said. Thirty-three whistleblowers have received awards; the largest, issued in 2014, was \$30 million. The SEC said the whistleblower office has received more than 14,000 tips from all 50 U.S. states and 95 foreign countries since its launch, and the tips have led to more than \$500 million in penalties.

Calling the program a "game changer" for the agency, SEC Chair Mary Jo White said tips to the whistleblower office are "providing a source of valuable information" to help the SEC with its mission. The program, developed under the Dodd-Frank Act, gives 10 to 30 percent of a penalty for a securities violation if that penalty exceeds \$1 million.

Source: Jim Suhr, AP Business Writer

FORMER HOME HEALTH OWNER SENTENCED TO 20 YEARS IN PRISON OVER \$57 MILLION MEDICARE FRAUD

A Florida man who formerly owned and managed three Miami-area home health agencies has been sentenced to serve 20 years in federal prison and ordered to pay millions in restitution for his role in a \$57 million Medicare fraud scheme. Khaled Elbeblawy was sentenced by

U.S. District Judge Beth Bloom. In addition to prison time, he was also ordered to pay \$36.4 million in restitution.

Elbeblawy was convicted in January on one count of conspiracy to commit health care fraud and wire fraud, as well as one count of conspiracy to defraud the U.S. and pay health care-related kickbacks. He had been charged in the scheme seven months earlier, being among the 243 people nationwide arrested by the Medicare Fraud Strike Force.

Elbeblawy managed Willsand Home Health Agency Inc. and owned JEM Home Health Care LLC and Healthy Choice Home Services Inc. Prosecutors presented evidence at the trial that between January 2006 and May 2013 Elbeblawy and his co-conspirators used the entities to submit about \$57 million in false claims to Medicare, about \$40 million of which were actually paid.

The government had alleged that the claims were based on services that patients didn't medically need and/or were never provided. The patients themselves, according to the government, were procured by paying kickbacks to doctors, patient recruiters and staffing groups.

Cynthia Vilches, the former co-owner of Healthy Choice, is set to be sentenced on Oct. 13, and has pled guilty to one count of conspiracy to commit health care fraud. Elbeblawy's case was one of the 36 initiated in June 2015 in the Southern District of Florida, part of a far-reaching coordinated sweep that covered 17 federal districts from Florida to Alaska. A wide variety of medical professionals were charged with falsely billing \$172 million for Medicare services.

The crackdown involved more than 900 law enforcement personnel and seven states attorneys general and was the largest action ever by the Medicare Fraud Strike Force, which was founded in 2007. Seventy-three of those charged were in the Southern District of Florida, accounting for more than \$262.5 million in false billings—30 percent of the total defendants and 37 percent of the alleged false claims. Since its inception in March 2007, the Medicare Fraud Strike Force has charged

almost 2,900 Defendants who have collectively billed the Medicare program for more than \$10 billion.

Source: Law360.com

MOTHER AND SON ADMIT TO \$16 MILLION PHARMACY MEDICARE FRAUD

A Miami pharmacy owner and her son have pleaded guilty to a scheme to bilk Medicare out of \$16 million by submitting claims for medically unnecessary prescriptions. Niurka Fernandez, 54, and Roberto Alvarez, 29, both of Miami, pled guilty to one count of conspiracy to commit health care fraud. Prosecutors say Fernandez, an owner of Calan Pharmacy & Discount Service LLC and Bertyann Corp., also known as Best Pharmacy—two pharmacies located in Miami-Dade County, Fla.—admitted to organizing and playing a lead role in the scam. The fraudsters paid Medicare beneficiaries and patient recruiters for prescriptions that weren't medically necessary. They also billed Medicare for many other prescription medications that were not dispensed to the designated beneficiaries.

Alvarez also admitted to being involved in the Medicare fraud at Best Pharmacy, where he purportedly worked as a pharmacy technician, but actually facilitated kickback payments to Medicare patients. He also wrote checks to money launderers in order to get cash for the kickbacks. As a result of the scheme, Medicare made more than \$16 million in overpayments to Calan Pharmacy and Best Pharmacy.

The case was brought as part of a push by the U.S. Department of Justice's Medicare Fraud Strike Force, implemented in March 2007 and now operating in nine cities around the country. As part of the dragnet, the government has charged almost 2,900 defendants who have collectively billed the Medicare program for more than \$10 billion.

Source: Law360.com

NORTHEAST FLORIDA PAIN-MANAGEMENT CLINIC AGREES TO A \$7.4 MILLION SETTLEMENT OVER UNNECESSARY TESTING OF ELDERLY

A Northeast Florida surgery and pain management clinic will pay \$7.4 million in fines to the federal

government in a case of excessive billing over a pattern of drug testing that included expensive screens of elderly patients for drugs such as ecstasy, cocaine and heroin.

Coastal Spine and Pain Center operates clinics in Jacksonville and across the region and sees an estimated 200,000 clients a year. The clinics performed unnecessary drug screenings of patients then charged Medicare and Tricare, the medical insurance provider for military veterans. The settlement covered only government billings. The fine represents a doubling of the amount the company billed for tests conducted from August 2015 to Feb. 1, 2016.

Source: Jacksonville.com

GOVERNMENT SEEKS UP TO 16 YEARS IN JAIL AND \$60 MILLION FOR CLINIC OWNER

The U.S. Department of Justice (DOJ) wants Valentina Kovalienco, the owner of two Brooklyn, N.Y., medical clinics, to spend about 13 to 16 years in prison and pay nearly \$60 million in restitution and forfeited for her role in a \$55 million health care fraud. Ms. Kovalienco pled guilty in late October 2015 to conspiracy to commit health care fraud and conspiracy to commit money laundering.

The scheme involved billing Medicare and Medicaid for services not necessary or actually given and then fabricating records to hide the fraud. The sentencing is set for the 13th of this month.

From February 2008 to February 2011, Ms. Kovalienco and others were engaged in a scheme in which patients were paid cash kickbacks to subject themselves to medically unnecessary physical and occupational therapy, diagnostic tests and office visits that weren't performed by licensed professionals. The clinics billed Medicare and Medicaid for these services.

Source: Law360.com

CALIFORNIA NURSING FACILITIES TO PAY \$30 MILLION IN FCA SETTLEMENT

A California company that runs 35 skilled nursing facilities and two of its executives have agreed to pay \$30 million to settle claims that they violated the False Claims Act (FCA) by billing Medicare and Tricare for

medically unnecessary services. North American Health Care Inc. (NAHC) has agreed to pay \$28.5 million and enter into a five-year corporate integrity agreement with the U.S. Department of Health and Human Services' Office of Inspector General for the alleged misbilling to Medicare and Tricare, a Defense Department health program. The company's chairman, John Sorenson, will pay \$1 million, and Margaret Gelvezon, the senior vice president of reimbursement analysis, will pay \$500,000.

NAHC runs 35 skilled nursing facilities, largely in California, where it provides inpatient services including physical, occupational and speech therapies. From Jan. 21, 2005, through Oct. 31, 2009, the facilities provided unnecessary services and then asked the federal health care programs to cover the costs, the government alleges. The practice then continued in three facilities, which lie in the Northern District of California, through Dec. 3, 2011, the government said. Gelvezon was the one who created the scheme, and Sorensen reinforced it, the government alleged. Principal Deputy Assistant Attorney General Benjamin C. Mizer said in a statement:

Medicare patients and those insured by Tricare are entitled to receive care necessary for their clinical needs and not the financial needs of their health providers. Health care providers will be held accountable if they bill for unnecessary services or treatment.

Under the corporate integrity agreement, all NAHC facilities must have their billing for therapy services reviewed annually by an independent organization.

Source: Law360.com

If you need more information concerning whistleblower litigation you can contact any of the lawyers on our firm's Whistleblower Litigation Team. Lawyers currently on the team are Lance Gould, Archie Grubb, Andrew Brashier and Larry Golston. They can be contacted by phone at 800-898-2034 or by email at Lance.Gould@beasleyallen.com, Archie.Grubb@beasleyallen.com, Andrew.Brashier@beasleyallen.com or Larry.Golston@beasleyallen.com.

VIII. PRODUCT LIABILITY UPDATE

BEASLEY ALLEN SETTLES ROOF RAIL AIRBAG CASE WITH GM

One rainy Sunday afternoon, Arthur and Patricia Rigsby left church and were on their way to eat lunch. They were traveling in their 2008 Buick LaCrosse CXL vehicle which was manufactured by General Motors, LLC. Mr. Rigsby lost control of the vehicle and left the roadway, ultimately hitting a tree on the driver's side rear door. Mr. Rigsby was properly wearing his seatbelt when the crash occurred.

The vehicle was equipped with side impact roof rail airbags designed specifically to protect the head in a side impact; however, the side impact airbag on the driver's side failed to deploy in this accident. Interestingly, the side impact airbag did deploy on the passenger side of the vehicle despite no impact occurring on that side of the vehicle. That is most significant.

Mrs. Rigsby survived the accident and was largely uninjured. As a result of the accident, Mr. Rigsby's head came into contact with the B-pillar, causing him to suffer a severe head injury. He ultimately died from his injuries.

Our investigation of this case revealed that the side impact roof rail airbag system should have deployed in this accident. In fact, the owner's manual for the vehicle states, "A roof-rail airbag is intended to deploy on the side of the vehicle that is struck." According to GM's own internal documents, the Rigsby crash met every criteria needed in order to deploy that airbag. GM runs testing to make sure the vehicle meets their internal criteria and actually deploys an airbag in the crash. However, the only "pole impact test" that GM ran on the 2008 Buick LaCrosse was to the front door, wholly ignoring the fact that rear door impacts were foreseeable.

Thousands of General Motors documents were produced to our lawyers in this case, and several key depositions were taken, including those of GM corporate representatives and expert witnesses. Without question, this was a very strong case of liability. Settlement was reached for a confidential amount during the course of litigation. Chris Glover, a lawyer in our firm's Product Liability Section, handled the case for our firm

and he says he was "honored to represent the Rigsby family." Mr. Rigsby left behind a wife and three children. Hopefully, General Motors learned a lesson from this case and will make the necessary design changes.

ARE YOUR TIRES TOO OLD TO BE IN USE ON YOUR VEHICLE?

Lawyers in our firm who handle defective tire litigation are well-familiar with the term "tire aging." They learned early on that the public was unaware of the dangers created by old tires. The issue of "tire aging" is discussed quite often behind closed doors by tire and automobile manufacturers. Rarely is information ever distributed to the public to make consumers aware of potential tire aging problems that could lead to a catastrophic failure of the tire while being used. Even the National Highway Traffic Safety Administration (NHTSA) has examined this issue, but its findings and discussions of the issue are rarely publicized or revealed to the public. To date, the federal government has taken no action to regulate or limit the age of tires that can be used by consumers.

How do you know how old your tire is? Each tire sold to the public contains a serial number known as the DOT number. This number is stamped on the side wall of all tires. Unfortunately, the DOT number is often stamped on the side of the tire that is turned inward to the vehicle so it is not readily accessible. The DOT number contains information related to the identity of the manufacturer of the tire and the manufacturer's plant of origin for the tire. The last four digits of the DOT number will indicate the week and year the tire was manufactured. For example, a tire with a DOT number with the last four digits of 3613 indicates that the tire was manufactured during the 36th week of 2013.

The manufacturing date is important because a number of automobile manufacturers have determined that tires with a certain age should be removed from a vehicle for safety reasons. For example, Ford Motor Company and others now warn that tires more than six years old should be removed from a vehicle even if there is significant tread on the tire. This is especially true of a spare tire that may have been placed on the vehicle when it was new but never used. The tire may have all its tread but due to its age, it may be unsafe to use on the vehicle. Some tire manufacturers provide information

through their websites that state that their tires should not be used if more than 10 years old, but in the event an automobile manufacturer has a lower age, the auto manufacturer's tire age should be followed to determine if a tire should be removed a vehicle.

Federal databases show that in recent years that there have been more than 17,000 crashes per year caused by "blow-outs or flat tires." These same statistics show that these wrecks resulted in nearly 400 fatalities per year and over 11,000 non-fatal injuries per year. Therefore, tire aging that may be linked to catastrophic tire failure, such as tread belt separations, which can cause loss of control or a blow-out, are a significant risk to consumers.

Even though consumer information related to tire aging is not readily available, tire manufacturers do provide the information to their retailers and it is also available to tire service centers. Unfortunately, tire service centers often fail to review the DOT numbers of tires that they are servicing. Retailers also sometimes sell tires as new that are past the age requirements set forth by automobile manufacturers. Retailers sometimes sell used tires that are too old to be put into service. For this reason, it is not unusual for consumers to have tires that are too old to be in service on a vehicle due to the failure of a tire service center or tire retailer to recognize that tires are too old. If you need more information on this subject, contact Ben Baker at 800-898-2034 or by email at Ben.Baker@beasleyallen.com.

ARKANSAS JURY RETURNS \$1.2 MILLION VERDICT IN HANKOOK TIRE CO. CASE

A state court jury in Arkansas last month returned a \$1.2 million product liability verdict against Hankook Tire Co. Ltd. The jurors determined that the company was fully liable for a crash that severely injured a truck driver. Elmer Philpot, now 76, was driving a gravel truck in 2010 when the tread of his right front tire separated, causing a crash. Philpot suffered leg fractures and needed a hip replacement. It was contended that Hankook was negligent in its design, testing, construction and manufacture of the 22.5-inch tire, and that the company failed to inspect the tire or warn of its defects. The defect originated at the Hankook plant in South Korea.

This was in the largest verdict in the history of rural Conway County, Ark.

The case involved a heated discovery dispute resulting in Hankook being sanctioned and having to pay \$43,000. The trial judge found that Hankook obstructed discovery. The company's own internal policies mandated that it keep documents related to product liability on file permanently, but many documents were destroyed.

During discovery, Hankook originally only turned over documents related to the same model that was on Philpot's dump truck, and only at the plant where they were manufactured. This resulted in the \$43,000 sanction. Hankook attempted to explain the delay claiming it was responding reasonably. It said the task was made more difficult because of translating documents from Korean into English. The trial judge didn't buy that excuse, saying that Hankook's "conduct in obstructing discovery has been egregious."

In November 2013, the court granted Philpot's motion to compel and ordered Hankook to produce documents related to all the tires that used the same inner liner compound or the same belt skim. There will likely be more litigation involving these 22.5-inch tires, which have been coming off around the country.

The Plaintiff is represented by Bruce Kaster and Skip Lynch at Kaster Lynch Farrar & Ball LLP; Jerry Kelly of The Kelly Law Firm PA; and Ben Caruth of Gordon, Caruth & Virden PLC. These lawyers did a very good job in developing and trying this case. The case is *Elmer Philpot v. Hankook Tire Co. Ltd, et al.* in the Circuit Court of Conway County.

Source: Law360.com

JURY AWARDS \$4.65 MILLION IN WRONGFUL DEATH CASE INVOLVING DEFECTIVE FORD MOTOR CO. AIRBAG

A jury has awarded \$4.65 million to the widow of a former Charleston area pharmacist who killed himself nearly one and a half years after he was in an automobile accident caused by a defective airbag. John Wickersham suffered serious injuries in the crash. His wife sued Ford Motor Co. over the defective airbag, contending that pain from the injuries her husband suffered led him to take his life. Ford claimed Wickersham had a long history of depression and suicidal thoughts and that his death was unrelated to the accident. During the trial, Ford typically tried to blame the driver. For example, the automaker said

the airbag injuries occurred because Wickersham was not seated properly in the vehicle, with his head too close to the steering wheel at impact.

Ronnie Crosby, a lawyer for the widow, Crystal Wickersham, said a data download from the vehicle's "black box" proved the airbag deployed late, allowing John Wickersham to move dangerously close to the steering wheel at the time it deployed. Crosby said further:

Ford's claim of scientific evidence to the contrary was refuted at trial and obviously rejected by the jury. The airbag shouldn't have deployed at all in the low-speed crash. We had two very different versions of what happened and the jury simply did not believe what Ford tried to sell.

The federal court jury determined that while Wickersham's mental history contributed to his suicide, Ford's wrongful conduct was overwhelmingly to blame for his death. The jury's award includes actual damages to compensate his wife and the couple's four grown children for his wrongful death, but the jury did not award punitive damages. The jurors didn't find clear and convincing evidence that Ford acted recklessly or maliciously. The lawsuit against Ford was filed in 2013 in state court and was removed to federal court.

Wickersham was returning to Charleston after working a night shift at a hospital on Feb. 3, 2011, when he lost control of the 2010 Ford Escape he was driving. The vehicle went through an intersection, hit a curb and then struck a tree on the front passenger side. The vehicle's airbag deployed late, causing serious and permanent facial injuries to Wickersham, who was wearing a seat belt at the time.

Testimony at trial revealed that Wickersham, who underwent numerous surgeries, "felt like he looked like a monster and was very self-conscious about his disfigurement as a result of the accident." A neuropsychologist testified that "the accident certainly caused a significant degree of pain, far more than (Wickersham) was able to cope with." Unable to work because of the pain, Wickersham, who was 55 years old, committed suicide on July 21, 2012, by swallowing a lethal dose of pills. Ford says it will appeal the verdict.

Source: Post & Courier

Pfizer Failed To Disclose Viagra's Melanoma Risks

Consumers in California multidistrict litigation (MDL) against Pfizer Inc. have accused the pharmaceutical giant of aggressively promoting Viagra without admitting that research has linked use of the blockbuster erectile dysfunction (ED) drug to an increased risk of developing melanoma. The consumers made out their claims in a master complaint that alleges Pfizer knew or should have known about the health risks associated with Viagra and Revatio, which is the same substance sold under a different name for treating a lung condition, but didn't disclose this information on its labels or in its advertisements.

The master complaint alleges Pfizer should have been aware of the connection between Viagra and melanoma by the late 1990s. Pfizer knew as early as 1998 that people had dropped out of clinical studies because they developed cancers that start in the skin or in the tissue lining organs after taking Viagra. Since then, several studies have found links between the way Viagra works and the development of melanoma cells. Viagra inhibits the secretion of a specific enzyme that can prevent erection. However, studies over the last few years have found that blocking this enzyme can also trigger the creation of melanoma cells.

A 2014 study reported that of the nearly 25,850 participants, those who had recently used the medication showed an 84 percent increase in the risk of developing or worsening melanoma, a risk that was even higher for those who had used Viagra at any time in the past. However, Pfizer has engaged in a "continuous, expensive and aggressive" advertising campaign to promote the drug to men worldwide since the medication got FDA approval in 1998, the master complaint says. The marketing has paid off, with Pfizer bring in more than \$1.8 billion in revenue from worldwide sales of Viagra in 2013, according to its annual report.

The master complaint includes numerous allegations, including negligence, unfair and deceptive trade practices, strict liability, breach of express and implied warranty, unjust enrichment, fraud and deceit, and negligent misrepresentation and concealment.

In April, the U.S. Judicial Panel on Multidistrict Litigation consolidated a number of suits bringing similar claims over the medication in California federal court and asked for a master complaint

in August. Pfizer says it stands behind the medicine and will vigorously defend the lawsuits. The Plaintiffs are represented by lawyers from Cory Watson PC, Levin Simes LLP, Motley Rice LLC, Davis & Crump PC and Robins Kaplan LLP, among others. The case is *In re: Viagra (Sildenafil Citrate) Products Liability Litigation* in the U.S. District Court for the California Northern District.

Source: Law360.com

IX. MASS TORTS UPDATE

ZOFRAN LITIGATION UPDATE

We have previously reported that the Zofran multidistrict litigation (MDL) was formed last fall. Since then, Plaintiffs have continued to file lawsuits on behalf of children born with birth defects as a result of in utero exposure to Zofran. Thus far more than 250 lawsuits have been filed in the Zofran MDL, which is pending in the U.S. District Court for the District of Massachusetts.

As you may recall, Zofran is a powerful anti-nausea medication approved by the U.S. Food and Drug Administration (FDA) for patients suffering from nausea as a side effect of chemotherapy and following surgery. However, for years, GlaxoSmithKline (GSK) promoted it to doctors for the treatment of nausea and vomiting during pregnancy, despite the fact that it has never been approved as safe and effective for that use. Doctors relied on GSK's representations about its product. Even after GSK paid \$3 billion to settle criminal and civil liabilities relating to that improper promotion, Zofran continues to be prescribed routinely for pregnant women suffering from morning sickness.

Earlier this year, the Court denied GSK's Motion to Dismiss all of the pending Zofran cases. GSK argued that because the FDA already rejected a Citizen Petition seeking to reclassify Zofran from pregnancy category B to category C, D, or X and notify health care providers that Zofran use during pregnancy may lead to birth defects, the plaintiffs' claims were preempted. In other words, Plaintiffs could not argue that GSK should have included a warning about the potential for birth defects

because the FDA rejected a citizen petition with a similar request.

Judge Saylor correctly denied GSK's motion, ruling that just because the FDA rejected the citizen petition did not mean that the FDA would reject a proposed label change by GSK, since GSK obviously has access to more information about its drug than an ordinary citizen. While Judge Saylor did not rule on the merits of GSK's motion, he did rule that Plaintiffs are entitled to an opportunity to investigate how the FDA would have responded to GSK's proposal had GSK submitted all of the information at its disposal.

The Zofran MDL is moving forward with discovery. The lawyers on the Plaintiffs Steering Committee (PSC) have already negotiated with GSK to develop a Product Identification Fact Sheet and Plaintiff Fact Sheet (PFS) that each individual Plaintiff will complete. Once a Plaintiff completes the Product ID Fact Sheet and PFS, GSK will produce a Defendant Fact Sheet (DFS). Additionally, the PSC is working on a document production protocol, whereby GSK will provide the PSC with documents relating to the development, approval, and promotion of Zofran.

Lawyers in our firm's Mass Torts Section continue to investigate cases involving children born with a heart defect or cleft palate after *in utero* exposure to Zofran. If you would like more information about this litigation, or if you or someone you know has had a family member who suffered from a congenital heart defect or cleft palate as a result of prenatal Zofran exposure, contact Liz Eiland or Roger Smith, lawyers in our firm's Mass Torts Section, at 800-898-2034 or by email at Liz.Eiland@beasleyallen.com or Roger.Smith@beasleyallen.com.

RISPERDAL LITIGATION UPDATE

We have written previously in several issues about the drug Risperdal. For our new readers, this drug is an atypical anti-psychotic medication approved to treat symptoms of schizophrenia, bipolar disorder, and autism. Manufactured and sold by Janssen Pharmaceuticals, Inc. (Janssen), a subsidiary of Johnson & Johnson, Risperdal was first marketed and sold in the United States in January 1994. At that time, Risperdal was only approved by the U.S. Food and Drug Administration (FDA) for the management of psychotic disorders in adults.

Despite having no clinical evidence to support safety and efficacy, Janssen sought FDA approval for a pediatric indication for Risperdal in 1997. Janssen knew that obtaining a pediatric indication for Risperdal would greatly expand its consumer base, and thus drastically increase sales.

Even after the FDA denied its request for a pediatric indication, Janssen developed a marketing plan specifically to promote the use of Risperdal in children and adolescents. Janssen continued promoting Risperdal for use in children and adolescents even after discovering it was more likely to cause adverse effects in comparison to other atypical anti-psychotic medications. One of the main adverse effects of which Janssen was aware was gynecomastia, or the development of breasts in males.

Johnson & Johnson settled charges brought by the U.S. Department of Justice (DOJ) for \$2.2 billion in 2013 related to the off-label promotion of Risperdal for use in children during the 1990s and early 2000s. Additionally, more than 1,750 cases have been filed against Janssen in the Philadelphia County Court of Common Pleas and its Complex Litigation Center on behalf of young men who developed female-like breasts after taking Risperdal. Consolidated litigation is also ongoing in California.

In July, a jury in the case of *Andrew Yount v. Janssen Pharmaceuticals*, the fifth Risperdal case heard in the Philadelphia Court of Common Pleas to date, awarded the plaintiff \$70 million in damages for physical disfigurement and emotional distress related to his development of breasts connected with taking Risperdal. In August, Judge Paula A. Patrick agreed to add approximately \$6.7 million in delay damages to Plaintiff Andrew Yount and his family.

After the verdict was issued, lawyers for the Yount family asked the court to increase the award amount on the basis that the family was entitled to delay damages from April 16, 2014, one year after service of the complaint, through July 1, 2016, the date of the verdict. Plaintiffs' lawyers calculated the amount at 4.25 percent annually for years 2014 and 2015, and at 4.5 percent for 2016.

To date, \$70 million is the highest award to a Plaintiff in the Philadelphia Risperdal litigation, following earlier Plaintiff's verdicts of \$2.2 million and \$500,000. So far, only one case, featuring Pennsylvania Plaintiff William Cirba, has ended with a ruling in Janssen's favor.

Firms across the country, including Beasley Allen, continue to press forward in an effort to resolve Risperdal cases against Janssen. For more information, contact James Lampkin or Beau Darley, lawyers in our firm's Mass Torts Section, at 800-898-2034 or by email at James.Lampkin@beasleyallen.com or Beau.Darley@beasleyallen.com.

Sources: *Penn Record*, *The Legal Examiner* and Law360.com

X. BUSINESS LITIGATION

PUNITIVE DAMAGES IN \$6.9 MILLION NONSOLICITATION VERDICT UPHELD

A Pennsylvania appeals court has upheld nearly \$7 million in compensatory and punitive damages awarded to an insurance brokerage, B.G. Balmer & Co. Inc. The brokerage firm had sued a group of former employees for trying to lure clients to a competing agency in violation of their nonsolicitation agreements (NSAs). A three-judge Superior Court panel agreed that punitive damages were warranted based on extensive evidence about brazen efforts to lure both employees and clients of Balmer to Frank Crystal & Co. Inc. (FCC) as FCC opened its first office in the Philadelphia area. The court ruled:

When a company hires essentially all of the sales [and] marketing staff of one agency, the purpose in doing so is to induce the clients of that agency to move their business with that sales force. FCC Philadelphia's first year business revenue of approximately \$300,000.00 was received all from Balmer Agency clients. Based on the foregoing facts, we cannot conclude that the trial court abused its discretion in awarding punitive damages.

Among those approached was Wellington Investments, which the Superior Court said had a 26-year relationship with Balmer and was the agency's most lucrative client. Balmer sued FCC and its former employees in the Chester County Court of Common Pleas in December 2003 seeking damages for tort claims including breaches of fiduciary duty, tortious interference, unfair competition,

and conspiracy. NSA violations were also alleged.

Balmer is represented by Thomas Riley Jr. of Riley Riper Hollin & Colagreco PC and Jeanette Warren of Hinman Howard & Kattell LLP. The case is *B.G. Balmer & Co Inc. v. Frank Crystal & Co. Inc. et al.* in the Superior Court of the State of Pennsylvania.

Source: Law360.com

XI. AN UPDATE ON SECURITIES LITIGATION

FIDUCIARY DUTY TO MONITOR PLAN INVESTMENTS UNDER ERISA

In May, 2015, a unanimous U.S. Supreme Court in *Tibble v. Edison International* explained the fiduciary duty rule as it applies to 401(k) Plan investments. Although the case involved considerable procedural detail, the issue before the Court was a simple one:

- is it enough for the ERISA duty of prudence that the fiduciary make prudent decisions to invest in the first instance, or
- must the fiduciary also make prudent decisions about whether it should sell assets (or otherwise change the composition of the plan's portfolio)?

The Court determined that fiduciaries who select investment options for 401(k) plans have a continuing duty under the Employee Retirement Income Security Act of 1974 (ERISA) to monitor their selections and remove imprudent investment options.

The Court of Appeals for the Ninth Circuit, from whence the case originated, had affirmed a trial court dismissal of certain claims brought against fiduciaries of the Edison 401(k) Savings Plan (Plan) as untimely because they related to investment options that were selected for the Plan in 1999, more than six years before the complaint was filed in 2007.

This ruling opens the door to claims challenging the prudence of plan fiduciaries' retention of investment options within 401(k) plans, including options that were selected outside the limitations period established under ERISA.

ERISA imposes employee benefit plan fiduciaries with a duty of prudence that requires the fiduciary to “discharge his duties with respect to a plan ... with the care, skill, prudence, and diligence” that a prudent person would use under similar circumstances. Plan beneficiaries, and a few other groups, can bring a civil action alleging breach of fiduciary duty to recover any Plan losses related to that breach. Those claims, generally, must be brought within six years after “the date of the last action [by the fiduciary] which constituted a part of the breach” or, if earlier, within three years after the earliest date on which the Plaintiff had actual knowledge of the breach.

In *Tibble*, the firm’s 401(k) plan invested in a series of mutual funds in 1999 and another series in 2002. Participants in the Plan filed suit in August 2007 against Edison International and other plan officials, alleging that the Defendants had breached their duty of prudence by offering retail classes of mutual fund shares as investment options when institutional share classes that have lower management fees could have been made available to Plan participants.

The U.S. District Court for the Central District of California dismissed the Plaintiff’s claims with respect to three mutual funds that had been added as investment options under the Plan in 1999 because they were added more than six years before the complaint was filed. According to the District Court, the Plaintiffs had failed to establish that the circumstances relating to those investments had changed to such an extent that a prudent fiduciary would undertake a full-scale due diligence review of the investments within the six-year limitations period.

On appeal, the Plaintiffs argued that the Defendants committed a continuing breach of fiduciary duty for so long as the challenged investments remained as options within the Plan. In spite of this argument, the Ninth Circuit affirmed the ruling of the District Court.

In vacating the Ninth Circuit and remanding the case, Justice Stephen Breyer, writing for the Court, noted that the Court of Appeals had erred by failing to recognize the law of trusts, from which ERISA’s duty of prudence is derived. Like the opinion Justice Breyer wrote for the Court last year in *Fifth Third Bancorp v. Dudenhoeffer*, the opinion suggests that the basic concept of prudence compels the result so clearly that the Court can’t even find contrary arguments to consider.

The result is an opinion that strings together broad statements about the ERISA duties. Moreover, in contrast to *Fifth Third*, in which the Court balanced its ERISA message with a cautionary discussion of the perils of stock-drop class actions, the opinion contains nothing to water it down. A few quotes convey the tone:

- “Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee’s duty to exercise prudence in selecting investments at the outset.”
- “The trustee must systematically consider all the investments of the trust at regular intervals to ensure that they are appropriate.”
- “When the trust estate includes assets that are inappropriate as trust investments, the trustee is ordinarily under a duty to dispose of them within a reasonable time.”

Accordingly, a claim alleging that the Defendants failed to prudently monitor and remove the investments is still timely as long as the alleged failure to monitor occurred within the limitations period. This case, though Defendants would like to argue is just a statute of limitations case, has broadened the rights of beneficiaries seeking to recover for bad investments by the Plan.

In fact, as we have previously written, several major universities have since been sued over their plan investments. Specifically, New York University, the Massachusetts Institute of Technology, Yale University, Duke University, the University of Pennsylvania, Johns Hopkins University, and Vanderbilt University all face proposed class actions accusing the schools of causing retirement plan participants to pay millions of dollars in excessive fees.

Sources: scotusblog.com and skadden.com

DISTRIBUTION PLAN PROPOSED IN \$2 BILLION FOREX SETTLEMENT

On Aug. 31, 2016, Plaintiffs filed their proposal to distribute the \$2 billion foreign exchange manipulation settlement among aggrieved investors. This settlement was reached with nine banks—JPMorgan Chase, Citigroup, Barclays PLC, HSBC Holdings PLC, The Royal Bank of Scotland PLC, Goldman Sachs Group Inc., BNP Paribas SA, UBS

AG, and Bank of America Corp.—and arises from litigation alleging that these entities (and others) engaged in a broad scheme to rig the \$6 trillion foreign exchange market.

According to the complaint, filed in 2013, traders at the banks colluded to manipulate the global standard WM/Reuters Rates used to determine exchange rates for 158 different currencies. The WM/Reuters Rates are employed extensively in the operation of financial markets for uses such as valuing portfolios and funds that track global indexes and as a benchmark for currencies in contracts.

Traders at the banks allegedly traded ahead of large client orders that were believed to move the market, thus permitting the banks to profit or avoid losses. The traders allegedly would manipulate the rates by pushing through a high number of low-volume trades in the one-minute period before the WM/Reuters Rates were calculated—a process known as “banging the close.” These trades could artificially increase or decrease an exchange rate by hundredths of a percent, and could result in approximately 100 basis point deviation from the day’s exchange rate. This resulted in profit for the banks at the expense of their customers.

Lawyers representing the Plaintiffs have filed a plan for settlement distribution in federal court in Manhattan. The proposal is subject to approval by U.S. District Judge Lorna G. Schofield, who is presiding over the case. The settlements included in the broad agreement were given preliminary approval by Judge Schofield in December of 2015.

These settlements account for some of the largest settlements ever in any anti-trust case. Funds included in the settlement consist of JPMorgan’s agreement to pay \$99.5 million; UBS AG’s, UBS Group AG’s, and UBS Securities LLC’s \$135 million settlement; Bank of America Corp. and Bank of America NA’s \$180 million settlement; Citigroup and Citibank NA’s required \$394 million payment; Barclays \$384 million settlement; HSBC Holdings’ agreement to pay \$285 million; and BNP Paribas’ agreement to contribute \$115 million to the settlement funds.

If the settlement gets final approval, which is expected, RBS will pay \$255 million and Goldman Sachs will pay \$134 million. Each of the class settlements also included a cooperation agreement, whereby the settling banks will cooperate in the prosecution of the

action against the seven non-settling banks.

Barclays, Citigroup, JPMorgan, RBS, and UBS were also part of a broader, \$5.6 billion settlement with U.S. and U.K. authorities in May 2015. Of those five banks, only UBS was able to avoid a guilty plea to criminal charges of alleged foreign exchange manipulation.

The distribution plan includes notice by mail to investors and publicity in national and international publications, all of which will direct investors to a website where they can submit claims. Lawyers will then evaluate claims made by individual investors and determine the amount that will be disbursed to them. Judge Schofield has given careful scrutiny to the proposed settlements, and has previously asked for details regarding damages to determine whether the \$2 billion combined payout was enough to remedy the alleged violations.

But even if Judge Schofield provides final approval of the settlement, there is still lots more left to be done in this litigation. The Plaintiffs still have outstanding claims against Morgan Stanley, Credit Suisse AG, and Deutsche Bank AG, which were in the original group of banks that were sued. It appears these banks will continue to fight the class claims. Additionally, Japan's Bank of Tokyo-Mitsubishi, Canada's RBC Capital Markets LLC, France's Societe Generale SA, and Britain's Standard Chartered PLC were named as Defendants in July and have yet to settle the claims against them. We will report on all future developments of significance.

Sources: Law360.com and Dailyreportingsuite.com

INTERCEPT'S \$55 MILLION IN STOCK-DROP MDL GETS FINAL APPROVAL

A New York federal judge has given final approval to a \$55 million settlement by Intercept Pharmaceuticals Inc. in multidistrict litigation (MDL) brought by investors accusing the company of securities fraud by concealing a liver drug's side effects. The recovery for individuals will depend on variables, including the number of Intercept shares purchased, but the estimated average distribution per share of Intercept stock will be about \$48.27. This is before deductions for fees and expenses, according to the declaration filed with the court.

U.S. District Judge Naomi Reice Buchwald granted the motion for final approval, noting that more than 20,000

notices about the settlement were sent out and "no objections or opt-outs were received." The investors' two proposed class actions, which were consolidated in May 2014, accused Intercept, along with CEO Mark Pruzanski and Chief Medical Officer David Shapiro, of sitting on news that the drug, obeticholic acid, caused "substantial" increases in cholesterol lipids, in order to drive up the value of Intercept's stock.

In March 2015, Judge Buchwald denied Intercept's bid to dismiss the multidistrict litigation, finding that the investors provided evidence that the company and its executives knowingly concealed the liver drug's side effects. She noted in her memorandum and order that Intercept learned from a National Institutes of Health doctor running a clinical trial that the drug had proven effective but also had the side effect of increasing cholesterol. Yet the company only told investors about the good news, and correspondence between the doctor and Intercept's chief medical officer revealed that the company had misgivings about keeping the information under wraps, according to the judge's order.

The price of the company's stock shot up more than 500 percent after Intercept announced the drug's positive effects in January 2014, but dropped steeply days later when the NIH revealed the patients' increased cholesterol levels. The class includes those who purchased Intercept stock during two days that month. Plaintiffs' attorney Tor Gronborg said in his declaration that "the recovery of \$27.5 million for each day in the class period is, lead counsel believes, the largest per-class-day recovery in the history of securities litigation."

The Plaintiffs are represented by Tor Gronborg, Kevin A. Lavelle, David Avi Rosenfeld, Samuel Howard Rudman and Trig Randall Smith of Robbins Geller Rudman & Dowd LLP, and Jeremy Alan Lieberman of Pomerantz LLP. The case is *In re: Intercept Pharmaceuticals Inc. Securities Litigation* in the U.S. District Court for the Southern District of New York.

Source: Law360.com

COURT APPROVES \$486 MILLION CELEBEX AND BEXTRA SECURITIES MDL SETTLEMENT

A New York federal judge has preliminarily approved Pfizer Inc.'s \$486 million settlement resolving long-running multidistrict litigation (MDL) accusing the company of misleading investors about

the alleged risks of its pain treatments Celebrex and Bextra. A final approval hearing was set for Dec. 21. U.S. District Judge Laura Taylor Swain also said that in light of the extensive effort to notify potential class members as part of the class certification process, it's unnecessary to give people further opportunity to exclude themselves from the class. Furthermore, any person opting out would appear to be time-barred from suing Pfizer for the claims released by the settlement, the judge said.

The underlying suit alleged that the company and its executives, including former CEO Henry McKinnell, knew that drug safety studies conducted between 1998 and 2004 showed Celebrex and Bextra posed serious cardiovascular risks, but hid the information from the public. A consolidated class action complaint was filed in February 2006, and, in July 2012, Judge Swain certified a class led by the Teachers' Retirement System of Louisiana.

It's believed this settlement is likely among the last major payments Pfizer will make over the two drugs. It previously paid \$894 million to settle product liability and consumer fraud suits brought by drug users and state attorneys general; \$1 billion to settle civil allegations it fraudulently promoted and marketed Bextra; and a \$1.3 billion criminal fine - at the time the largest criminal fine ever imposed in the U.S.—for the same fraudulent misbranding.

The investors are represented by Gregory P. Joseph, Douglas J. Pepe and Sandra M. Lipsman of Joseph Hage Aaronson LLC; Jay W. Eisenhofer, Richard S. Schiffrin, James J. Sabella, Charles T. Caliendo, Brenda F. Szydlo, Geoffrey C. Jarvis and Mary S. Thomas of Grant & Eisenhofer PA; Jonathan S. Massey of Massey & Gail LLP; and David Kessler, Andrew L. Zivitz, Matthew L. Mustokoff and Michelle M. Newcomer of Kessler Topaz Meltzer & Check LLP. The case is *In re: Pfizer Securities Litigation* in the U.S. District Court for the Southern District of New York.

Source: Law360.com

XII. INSURANCE AND FINANCE UPDATE

PLAINTIFFS IN THE BLUE CROSS BLUE SHIELD ANTITRUST MDL FACE SUMMARY JUDGMENT

The Blue Cross Blue Shield Antitrust MDL, currently pending in the Northern District of Alabama, is a broad-sweeping group of claims against the insurance giant that is divided into two tracks, one for subscribers and one for providers. Because of the different remedies sought and available to the two groups, they each face different challenges to their claims and are proceeding at slightly different paces.

The subscribers are facing a challenge to their claim for damages under decades-old U.S. Supreme Court precedent that bars all damages claims related to a rate that has been filed with the government. Seeking summary judgment, BCBS said that CB Roofing Inc. and American Electric Motor Service Inc. cannot collect money damages under the Sherman Act because the rates they paid to BCBS Alabama were validly filed with the state's Department of Insurance, the agency with authority to regulate the reasonableness of those rates.

The two companies had told the Alabama federal court overseeing the MDL that they were forced to pay premiums that were too high because of BCBS' anti-competitive conduct, and that the companies would have paid less had the other defendants sold health care coverage in Alabama.

The filed-rate doctrine itself does not depend on the level of agency review because any finding regarding appropriate levels of review would tell the agency how to do its job, and even if the rate actually charged was different from the filed rate, the doctrine still applies, the insurer argued.

Providers are currently facing summary judgment motions from a few of the wholly blue-owned companies involved in the anticompetitive agreements alleged in the complaint. National Accounts Service Company (NASCO) and Consortium Health Plans (CHP) both sought summary judgment by arguing that they are not involved in the conspiracy but are fully separate from the Blues. Lawyers for providers believe that the summary judgment will be denied. Both companies only offer their services to the Blue Cross Blue Shield entities and

have goals of furthering the Blue Cross Blue Shield market dominance.

Providers and subscribers are both facing motions to dismiss for lack of personal jurisdiction and venue from several, but not all, of the Blue Cross Blue Shield entities. Those arguments, however, ignore the nature of an anti-competitive conspiracy. Antitrust and personal jurisdiction have a strange relationship in that by the nature of the agreement, some entities have agreed to not enter into the market of another entity. Under the conspiracy theory of personal jurisdiction, utilized under Alabama law, so long as one party to the conspiracy takes an action in furtherance of the conspiracy within the jurisdiction, then jurisdiction lies as to all parties to the conspiracy. On top of that, the Blue Cross Blue Shield system includes several programs that allow the Blues to operate across state lines to cater to national accounts—companies with employees living and working in more than one state. These programs mean that while the Blues do not compete with each other in other jurisdictions, they do operate in other jurisdictions.

Under the BCBS business model at the time of the consolidation, 38 separate plans operated in local areas nationwide under the company's brand, providing health insurance to about 100 million subscribers. The lawsuits generally contend that the companies would compete against each other under normal market conditions, but that the companies instead allocated themselves regional health insurance markets in violation of the Sherman Act. Even though the case began in 2012, it is still in relatively early stages of the litigation.

Judge Proctor has indicated he will rule on the NASCO and CHP summary judgment motion on the briefs and will have oral argument on the filed-rate doctrine in November. If you need more information, contact Leslie Pescia or Rebecca Gilliland, lawyers in our Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com or Leslie.Pescia@beasleyallen.com.

PENN STATE SETTLES WITH INSURER OVER SANDUSKY CLAIMS

Pennsylvania State University has settled its long-running legal fight with an insurer over claims stemming from the Jerry Sandusky sex abuse scandal.

The battle dates to 2012, when insurer Pennsylvania Manufacturers' Association Insurance Co. (PMA) filed a declaratory action suit seeking to limit exposure to potential claims. In 2013, Penn State responded with two lawsuits accusing the insurer of acting in bad faith by trying to evade the claims. All three of these suits were settled.

Penn State has faced a string of claims from victims of Sandusky, who is serving a 30- to 60-year prison sentence after being convicted on 45 counts of child molestation in June 2012, leading to a string of settlements. In October 2013 the school agreed to pay \$60 million to 26 alleged victims. There was also a second round of settlements approved in April 2015. The settlement comes after several significant developments in the cases over the last seven months.

Source: Law360.com

ABUNDANT INSURANCE COVERAGE ISSUES EXIST FOR UBER AND OTHER RIDE SHARING COMPANIES

Ride-sharing companies, now being referred to as Transportation Network Companies (TNCs), including companies such as Uber, Lyft and Sidecar, have exploded in popularity in the past three to four years. If you have not heard of these companies, the concept is simple. The companies are essentially taxi services that you hail through a smartphone app. After downloading the companies' app to your smart phone, you can request a driver to pick you up at your current location. Once a request is sent, you will be matched with a driver in your vicinity. The driver's smartphone navigation will then direct the driver to your location.

The passenger can then enter their destination into the app, which syncs with the driver's phone and directs the driver to the final location. Payment is made through the smartphone app, so no money is physically exchanged. Drivers and passengers never have to speak or interact unless they choose to do so. The ease and convenience has caused TNCs to explode in large metropolitan areas and they continue to spread into smaller markets.

TNCs differ from traditional taxi operations, not only in the amount of technology utilized, but in the very structure of the business as well. TNCs, from the outset of the business concept, have distanced themselves from the traditional

norms of taxi services. These differences are:

- TNC drivers are independent contractors, driving their own personal vehicles.
- TNC drivers go through minimal background checks and do not have any specialty driver's license.
- Most TNCs do not consider their business to be taxi or shuttle service, but instead, they are technology companies.
- TNCs have taken every step and means possible to deviate from the traditional taxi business model.

One issue that TNCs and their drivers have been forced to navigate is how to insure thousands and thousands of personal vehicles operating under the TNC business's name.

Uber is the largest and most popular TNC and will be the focus in this writing, although all of the current TNCs now in operation face similar insurance issues. Uber, which has more than 450,000 drivers on the road daily, was recently valued at over \$60 billion. It should be noted that with innovation comes new challenges. Uber is a privately held business. One issue with Uber and other TNCs is how to properly insure a private vehicle that is also used as a commercial vehicle.

Nearly all personal vehicle insurance policies exclude coverage when the vehicle is used commercially. This includes receiving payment for ride sharing. Accordingly, Uber drivers and their passengers are not covered by the driver's personal insurance policy if the driver is engaged in commercial activity, or ride sharing. The obvious next question is when does a vehicle go from a personal vehicle to a commercial vehicle, and is there any insurance coverage available to the driver, passenger or others on the road while ride sharing?

In an effort to standardize how this was handled, Uber has set a policy for insuring their drivers while ridesharing. However, the amount of coverage depends on exactly when during the ridesharing process an incident occurs. Uber breaks the ride sharing process down into three periods for insurance purposes.

- Period one is when the Uber driver is in their personal vehicle, using it for their own purposes and "offline." During period one, Uber provides no insurance coverage and the driver

must maintain personal insurance at this time.

- Period two starts once the driver activates the app and begins to search for potential passengers. During period two, Uber provides insurance with a \$50,000 liability limit per person with \$100,000 total per occurrence.
- Period three begins once the Uber driver accepts a passenger, picks the passenger up, and drops the passenger off. During period three, Uber provides insurance to the driver with a \$1,000,000 liability limit and a \$1,000,000 uninsured or underinsured provision. Once the passenger is dropped off, the coverage goes back to period two, with \$50,000/\$100,000 limits until a new passenger is accepted.

There is obviously a large gap between the \$1,000,000 coverage available in period three when a passenger is in the vehicle and the \$50,000 coverage available in period two when the driver is in search of a passenger. Interestingly, a large portion of an Uber driver's time will be searching for a passenger, or driving with the app on to areas where passengers are likely to be.

All the while, the driver will undoubtedly be looking at his smartphone in an attempt to match with a passenger. In essence, during the time period that a driver is likely to be distracted, insurance drops to a minimal \$50,000. Additionally, during period two, personal insurance will likely be voided as the driver is using the vehicle for commercial purposes, leaving only \$50,000 available to an injured person.

Although Uber has standardized how their drivers are insured, there are obvious gaps in the coverage. A company that is valued at more than \$60 billion should certainly maintain insurance in excess of the \$50,000 minimum required by most states. Unfortunately, the independent contractor relationship between the drivers and Uber shield the company from liability. Action will likely have to come in the form of legislation and government regulation to force TNCs to adequately insure drivers operating under their name.

With nearly a half million Uber drivers on the road daily, folks will be injured and will find they won't have adequate recourse until this coverage gap is corrected. If you need more information on this subject, contact Evan Allen, a lawyer in our Personal Injury & Products Liabil-

ity Section, at 800-898-2034 or by email at Evan.Allen@beasleyallen.com.

Sources: CNBC and UBER Newsroom

\$15 MILLION VERDICT IN CASE AGAINST METLIFE

A California woman who lost her life savings in a real estate investment scam offered by an insurance agent has been awarded more than \$15 million in her lawsuit against MetLife and two subsidiaries. Christine Ramirez filed the lawsuit in Los Angeles Superior Court. The jury found the companies and a former MetLife partner were guilty of both deceit and securities violations. The Defendant was also found to be negligent and guilty of financial elder abuse. Ms. Ramirez, who was 75 years old, was the first of 98 people who have filed suits after being cheated in a \$200 million real estate fund scheme run by convicted felon Bruce Friedman, who died in a French jail while waiting to be returned to the U.S. to face federal criminal charges.

Jurors found that MetLife allowed Tony Russon, a former managing partner, to promote Friedman's fund during insurance sales meetings. The Plaintiff, a retired mortgage processor, had put \$280,000 into Friedman's Diversified Lending Group (DLG) that guaranteed 12 percent returns. According to federal authorities, DLG was a classic Ponzi scheme, with some early investors being repaid, but most ending up with nothing. Friedman was enjoying a lavish lifestyle and then left for Europe when the Securities and Exchange Commission (SEC) sued him. It appears that MetLife was aware that the branch office run by Tony Russon was not following MetLife's own policies and procedures, and failed to act to correct this dangerous behavior. As a result, others were victimized by this investment fraud.

The jury awarded nearly \$240,000 in compensatory damages. In addition, punitive damages were awarded as follows: \$10 million against MetLife Inc., \$2.5 million against New England Securities; \$2.5 million against New England Life Insurance Co.; and \$330,000 against Russon. Thomas Foley, a very good lawyer, represented the plaintiff in this case.

Source: Brian Melley at Associated Press

XIII.

EMPLOYMENT AND FLSA LITIGATION

FOX NEWS SETTLES GRETCHEN CARLSON SEXUAL HARASSMENT CASE FOR \$20 MILLION AND OFFERS UNPRECEDENTED PUBLIC APOLOGY

Two months after Gretchen Carlson filed a lawsuit accusing former Fox News' Chairman Roger Ailes of sexual harassment and alleging she was retaliated against and her contract with the network not renewed for rejecting his advances, the network's parent company has agreed to a \$20 million settlement. In addition, 21st Century Fox made a public apology to the former Fox & Friends anchor, a move that is unprecedented in cases involving on-the-job harassment claims. In a statement, the media giant said, in part:

We sincerely regret and apologize for the fact that Gretchen was not treated with the respect and dignity that she and all of our colleagues deserve.

Ms. Carlson filed her lawsuit against Ailes two months ago, alleging she suffered retaliation for refusing his advances including a cut in pay, being moved from the high-profile morning show to a lower-rated afternoon program, and not being given the opportunity to do important interviews. Her contract with Fox expired in June and was not renewed.

In the wake of the lawsuit, Ailes was removed as head of Fox News, although he continues to deny all allegations of sexual harassment from all accounts.

Some of Carlson's former co-workers at Fox News, including Geraldo Rivera and Greta Van Susteren, initially disputed her harassment charges and publicly defended Ailes. However, shortly after the settlement was announced, both said they regretted doubting her and retracted their defense of Ailes. Rivera, in particular, noted that his reaction is what prevents many victims of sexual harassment, abuse and assault from coming forward, saying:

I apologize for my skepticism. Like victims of sexual assault, those alleging harassment deserve the presumption of credibility. To all the victims of sexual harassment, direct and indirect, I am sorry for what happened to you. If you see

harassment, say harassment, even if the alleged offender is an old friend.

It is believed that most people who experience sexual harassment on the job do not report it, fearing they will not be believed and that they will be retaliated against. That Ms. Carlson obtained a settlement, and certainly one of this size, is against the odds in cases like these, but it is even more rare and, frankly, extraordinary, that Fox News publicly apologized for what she went through.

After Ms. Carlson filed her lawsuit, several other women who worked at Fox News came forward with similar claims of harassment by Ailes and filed lawsuits of their own. Sources told Vanity Fair that the network has reached settlements with two other claimants, although the sums were not disclosed.

In a statement, Ms. Carlson said she is "gratified that 21st Century Fox took decisive action after I filed my Complaint." She says she will now move on with the next chapter of her life. She has vowed to work to empower women in the workplace. In her statement, she had this to say:

I want to thank all the brave women who came forward to tell their own stories and the many people across the country who embraced and supported me in their #StandWithGretchen. All women deserve a dignified and respectful workplace in which talent, hard work and loyalty are recognized, revered and rewarded.

Based on his conduct, Ailes should be punished to the fullest extent of the law. This man used his position of power to his advantage. Fortunately, this perverted individual was finally caught and his actions reported. It's most interesting that Ailes, who is as lowdown and sorry as "gully dirt," has wound up advising Donald Trump in his political campaign. Why should anybody be surprised at this being his landing place?

Sources: Vanity Fair, ThinkProgress.org, NPR

XIV.

PREMISES LIABILITY UPDATE

ALABAMA JURY RETURNS \$1.725 MILLION VERDICT AGAINST DOLLAR GENERAL IN PERSONAL INJURY CASE

A jury in Mobile returned a \$1,725,000 verdict against Dollar General last month. They jury found that inadequate inspection policies led to a customer's injuries. The incident occurred at a Dollar General Store in Mobile on July 9, 2012. A customer, Deborah Revette, who was 60 years old at the time, slipped and fell in clear liquid laundry detergent that was on the floor in the chemical aisle. She suffered severe leg and shoulder fractures that resulted in eight surgeries, 395 doctor visits, and more than \$470,000 in medical bills. Ms. Revette remains permanently disabled.

This is the second large injury settlement Dollar General had ruled against them in Alabama in 2016. In April, a Dollar General store in Lauderdale County was forced to pay \$925,000 to a delivery driver from Kentucky. The evidence at trial showed that while Dollar General stores are open 14 hours a day, their corporate policy only requires employees to devote 10 minutes each day to safety inspections. Those safety inspections are informal, undocumented, and are not verified by a supervisor.

Testimony in the case compared the method by which and how often other retailers in and around Mobile County conduct safety inspections made clear that Dollar General's informal policy of "visual safety checks" for 10 minutes each day was both unsafe and unacceptable. Ms. Revette was represented by the firm of Cunningham Bounds. They did a very good job in this case.

Source: AL.com

WOMAN AWARDED \$4.6 MILLION AFTER BEING STUCK BY NEEDLE IN TARGET PARKING LOT

A South Carolina jury has awarded a woman \$4.6 million in a lawsuit against Target Corp. The Plaintiff, Carla Denise Garrison, was stuck with a needle her child picked up in a Target parking lot. She was injured in May 2014 after her 8-year-old daughter picked up a needle in the Target parking lot in Anderson, S.C. Ms. Garrison swatted the needle out

of her child's hand, and in so doing was stuck in her right palm.

Ms. Garrison reported the injury to store employees and later sought treatment at a health clinic. She was tested for HIV and hepatitis after the needle stick and the results of both tests were negative. However, drugs prescribed to treat a possible HIV infection made her sick and bedridden. Prior to the trial, Ms. Garrison's lawyer offered to settle with Target for \$12,000, but the offer was rejected. Target countered with a \$750 offer. It will be interesting to see what happens as this case goes forward.

Source: AL.com

XV. WORKPLACE HAZARDS

BEASLEY ALLEN LAWYERS OBTAIN \$500,000 VERDICT FOR WORKER INJURED ON THE JOB

A circuit court jury in Calhoun County, Ala., awarded Gregory Bell and his wife, Althea, \$500,000 in compensation for a serious injury he sustained on the job as a furnace operator at Union Foundry Co. Mr. Bell was operating the furnace on Sept. 28, 2010, when he stepped into an unguarded opening and into hot melted iron. As a result, he lost a portion of his right foot. The jury found the furnace was defectively designed, lacking any type of guard that would prevent such a devastating injury.

Employees have a reasonable expectation that when they go to work, they will be able to do their jobs safely. In this case, Mr. Bell was exposed to a very serious hazard that could very easily have been prevented by simply changing the design of the furnace so that the molten metal was guarded, preventing a worker from accidentally being exposed to the burn hazard. Hopefully, this verdict will help lead to safety changes that will prevent any other workers from having to suffer a similar injury.

DISA Industries, Inc. was the only Defendant to go to trial in the case. The jury's verdict confirmed the Plaintiff's allegations that DISA was guilty of negligence and that its design violated Alabama's product liability laws. The case was tried in the Circuit Court of Calhoun County, Ala. Beasley Allen lawyers Kendall Dunson and Evan Allen repre-

sented the Bells and tried the case. This was a very good result for our client.

Source: Vital Record, Texas A&M University Health Science Center

SHORT TERM EXPOSURE TO TOXIC WORKPLACE CONTAMINANTS CAN RESULT IN ACUTE RESPIRATORY DISTRESS SYNDROME

As many of us learned in school, our lungs and respiratory tract are our body's primary interface with the outside world. The quality of the air we breathe therefore has major implications for our health. Although approximately 25 percent of our time is spent in the workplace, studies have shown that the workplace environment is more likely to be the cause of exposure-related respiratory problems because, generally, air quality will be poorer at work than in a domestic environment.

Despite the Occupational Safety and Health Act's requirement that employers comply with hazard-specific safety and health standards and to provide employees with a workplace free from recognized hazards likely to cause death or serious physical harm, more than 1 million workers in the U.S. are estimated to be under the risk of exposure to respiratory irritants annually. In fact, occupational lung diseases are the primary cause of occupation-associated illness in the U.S. Handling chemicals, working in inadequately ventilated areas, or entering areas of exposure with improper or no protective equipment are generally the reasons for these lung-related occupational injuries.

Most occupational lung diseases are caused by repeated, long-term exposure, but sometimes a severe, single exposure to a hazardous agent can cause serious damage to the lungs. Exposures to a high concentration of even mildly toxic substances can prove dangerous. In some cases, a high dose exposure for as little as a few minutes can lead to dangerous health conditions, like acute respiratory distress syndrome, also known as ARDS.

ARDS is a rapidly developing, life-threatening condition where the lungs are severely injured. In a person suffering from ARDS, swelling occurs throughout the lungs, tiny blood vessels in the lung tissue leak, and the air sacs collapse or fill with fluid. This leads to dangerously low blood oxygen levels or dangerously high carbon dioxide levels in the blood.

Although with medical care many people survive, about 40 percent of

people with ARDS die from the syndrome—even with intensive medical treatment. Of the survivors, many experience temporary or permanent health problems. These problems may include shortness of breath, persistent cough, hoarseness, lack of energy, muscle weakness, loss of stamina, anxiety, depression, and problems with memory and thinking clearly.

ARDS can be caused by any major direct or indirect injury to the lung, including inhaling toxic chemicals in the workplace. Onset of the syndrome can occur suddenly or can develop over a period of 24 to 48 hours following exposure. The first signs and symptoms of ARDS are feeling like you can't get enough air into your lungs, rapid breathing, and low oxygen levels in the blood.

In previous issues we have discussed the types of occupations in which severe lung injuries like ARDS are more commonly seen and many of the types of chemicals and agents that cause these lung diseases. However, certain chemicals are known to cause immediate lung injury, like ARDS. These include: chlorine, ammonia, sulfur dioxide, hydrogen chloride, nitrogen dioxide, phosgene, and ozone.

Lawyers in our firm are investigating cases where persons were exposed to harmful agents or chemicals in the workplace and, as a result, they developed a serious lung injury or disease, including ARDS. If you have any questions about this subject, contact Chris Boutwell or Ryan Kral, lawyers in our firm's Toxic Torts Section, at 800-898-2034 or by email at Chris.Boutwell@beasleyallen.com or Ryan.Kral@beasleyallen.com.

AN UPDATE ON BENZENE EXPOSURE FOR RAILROAD WORKERS

Railroad workers are at risk of exposure to benzene, a dangerous chemical that is widely recognized as causing health problems including cancer. These workers go to work faithfully every day to support their families and to help keep commerce moving in this country. However, over the course of years and sometimes decades, these workers have been exposed to toxic killers that cause cancer in many forms, including Acute Myeloid Leukemia (AML), myelodysplastic syndromes (MDS), and Lymphoma. Most of the time, these individuals have no idea that their cancer was caused due to on-the-job exposure.

Several decades ago, the federal government named benzene a hazardous air pollutant based on evidence suggesting that exposure to the chemical was linked to certain cancers, particularly leukemia. Since then, studies have consistently proven that benzene is carcinogenic. In fact, the Environmental Protection Agency (EPA) and the Department of Health and Human Services (HHS) have determined that Benzene is a known carcinogen. Despite this knowledge, benzene is one of the most commonly used industrial chemicals.

Railroad workers are especially susceptible to suffer the harmful effects of benzene as a result of diesel fumes and solvent exposure. Diesel fuel fumes are inhaled in dangerous amounts by railroad workers across the nation. Benzene has also been widely used as a solvent, especially for the purposes of degreasing locomotives. Benzene has high toxicity whether it is absorbed through the skin or inhaled. It has also been revealed that that exposure to these fumes and chemicals may cause bladder, colon, kidney, esophageal, lung, and naso-pharyngeal cancers.

The Federal Employers Liability Act (FELA) is a federal law that was passed by Congress in 1908 to protect railroad workers in the event of work-related injury or illness. This law was born after countless railroad workers suffered serious or fatal injuries during the course of their labor. At that time, no clear-cut laws protected the rights of injured railroad workers and assisted them in seeking compensation for their medical expenses, lost wages, disability, pain and suffering, and other losses.

In the 44 years following the enactment of FELA, 26 bills were introduced in Congress to replace FELA with workers' compensation. Unlike worker's compensation, the FELA entitles a worker to a jury trial and damages for pain, suffering, and emotional distress. Congress has refused in each instance to make this change. These attacks on the FELA continue. Thus far, in each instance, the efforts have been rebuffed by Congress.

It is very important for railroad (and all workers) to know the risks involved to their health and safety in the workplace due to exposure to toxic chemicals such as benzene. It is also important that these workers be provided with the proper legal options to receive fair and just compensation for the negligence of others. We certainly applaud the government's efforts in keeping FELA intact and available to the many dedicated and

hard-working railroad employees throughout this country. If you need additional information on this subject contact John Tomlinson, a lawyer in our Toxic Torts Section, at 800-898-2034 or by email at John.Tomlinson@beasley-allen.com.

XVI. TRANSPORTATION

BEASLEY ALLEN SETTLES TRACTOR TRAILER INJURY CASE AGAINST SAYER DELIVERY SERVICE, INC.

In the early morning hours of June 19, 2014, 21-year old Evan McCollum was on his way to work in his 2007 Nissan Titan truck. It was still dark at that time. Evan was driving east on Alabama Highway 14 in Autauga County, Ala. At the same time, Bruce Haven was operating a 2007 Volvo Tractor Trailer owned by Sayer Delivery Service, Inc. Haven was traveling south on Avant Street when he approached the intersection with Alabama Highway 14. Despite Evan's approaching vehicle in plain sight, Haven, the truck driver, turned left onto Alabama Highway 14, directly in the path of Evan's vehicle. Unable to avoid the collision, Evan's vehicle struck the Sayer trailer on the right hand side. Evan was severely injured in the crash and will be permanently disabled for the remainder of his life.

Evan was completely free from fault. There was no evidence that he was speeding, inattentive, fatigued, intoxicated or using his cell phone at the time of the collision. Evan did absolutely nothing wrong. There was no evidence that he swerved or left the roadway during his approach to the intersection where the impact occurred. The officer who investigated the accident testified that there was no visual obstruction to the truck driver's line of sight. His investigation revealed that the driver failed to yield the proper right-of-way to Evan. The truck driver admitted that he failed to see Evan's truck before he pulled his tractor-trailer into the intersection.

Negligence and wantonness claims were made against Sayer Delivery Service, Inc. and the truck driver. Negligent hiring, training and supervision claims were also brought against Sayer. The suit was filed in the Circuit Court of Autauga County, Ala.

There was eyewitness testimony that the truck driver "lingered at the intersection for as long as 30 seconds" prior to pulling out. His trailer was partially still on Avant Street when the crash occurred. We learned in our investigation that all Sayer drivers knew that this intersection had signage around it that created a known "blind spot." They knew that as a result, a driver turning onto Highway 14 would not be able to see oncoming vehicles. There had been previous accidents and near-accidents at this intersection.

A number of depositions were taken in the case by both sides, including those of experts in the areas of accident reconstruction, trucking industry standards, fatigue management, cellular telephone forensics, human factors, vocational, rehabilitation and economic factors. In addition, several hundred pages of internal documents, produced by Sayer, were reviewed by our lawyers. One week prior to trial, the parties reached a settlement for a confidential amount. Chris Glover, who handled the case for our firm, says he was pleased that he could successfully represent Evan McCollum in his case.

\$2.75 MILLION VERDICT RETURNED AGAINST TRUCKING COMPANY

A federal court jury in Illinois awarded \$2.75 million last month to the estate of a deceased truck driver who was killed after he crashed into the back of another tractor trailer. The jury found that the driver of the struck vehicle, along with his employer JBS Carriers Inc., were 55 percent responsible for the incident. The estate of Hasib Karahodzcic was awarded 55 percent of the \$5 million the estate sought in the lawsuit against JBS carriers and individual Defendant Orrentio Thompson. The jury also awarded an additional \$625,000 to Edin Karahodzcic, who suffered injuries while attempting to rescue his father after the crash, and was also a Plaintiff in the suit.

The lawsuit was filed in 2012, just months after Hasib Karahodzcic was killed. He died on impact after crashing his truck into the back of Thompson's truck. The Plaintiffs alleged that at around 2 a.m. on March 17, 2012, Thompson had pulled his truck over to the shoulder of Interstate 70 just past an exit to inspect a blinking light on the side of his trailer. After unplugging the trailer lights from the tractor and then plugging them back in, it appears that

Thompson got back in his truck. He left his flashing lights on and attempted to merge back onto the interstate highway from the shoulder.

Karahodzic's truck collided into Thompson's truck shortly after Thompson attempted to merge back onto the highway. There is a pronounced curve in the road where the Thompson truck pulled over. It was alleged that because of Thompson's negligent attempt to get back on the highway, Karahodzic was endangered.

It was claimed by the estate that Thompson drove his truck onto the roadway with his flashing lights on, did not look back to check for oncoming traffic, or simply ignored the oncoming traffic, and did not use the blinking signal to indicate he was moving the truck back into a traffic lane. In addition, Thompson attempted to merge onto the highway at a speed of about 15 to 18 miles per hour even though the minimum speed limit is 45 mph. The Plaintiffs contended further that Thompson failed to follow the driver training he had received.

Karahodzic's vehicle caught fire as a result of the crash. The burning vehicle caught the attention of his son Edin, who was driving his own truck in the vicinity of the accident. The Plaintiffs claim that after pulling his truck over, Edin attempted to pull his father from the burning vehicle, but was unable to do so because of the heat from the flames. The younger Karahodzic sustained physical and psychological injuries as a result. Other family members testified that they too were emotionally scarred by the incident. The Defendants claimed that Hasib Karahodzic was fatigued at the time of the accident and that he was in violation of federal regulations for driving time and time on duty.

The Plaintiffs are represented by Frank J. Niesen III, and by D. Keith Henson of Paule Camazine & Blumenthal PC. The case is *Edin Karahodzic et al. v. JBS Carriers Inc. et al.* in the U.S. District Court for the Southern District of Illinois.

Source: Law360.com

\$120 MILLION JUDGEMENT AGAINST CITGO IN 2004 DELAWARE RIVER SPILL

A federal judge in Philadelphia has ruled in favor of the Greek owners and operators of the oil tanker Athos I, which struck an anchor in the Delaware River in November 2004 as it approached the

Citgo refinery dock in Paulsboro. Judge Joel H. Slomsky had ruled in late July, with a final order on Aug. 17, that Citgo, the refinery operator, had failed its duty to provide "safe berth warranty" to the Athos I tanker sailing from Puerto Miranda, Venezuela. Judge Slomsky ordered Citgo Asphalt Refining Co. to pay Frescati Shipping Co. (the ship owner) and Tsakos Shipping & Trading (the ship operator) \$55.5 million plus \$16 million in interest for a total of \$71.5 million. Judge Slomsky also ordered Citgo to pay about half of the federal government's costs for the spill cleanup, which amounted to \$48.6 million.

A submerged rusty ship anchor punctured the hull of the Athos I, causing 264,000 gallons of oil to spill, and affecting hundreds of miles of shoreline. The Salem nuclear power plant was temporarily shut down and shipping was delayed. It was reported that more than 180 birds died. Frescati paid \$143 million to clean up the spill, and was seeking about \$55 million, plus more for damage to the ship, according to John J. Levy, a lawyer from Montgomery McCracken Walker & Rhoads, who represented the ship owners.

The U.S. government reimbursed Frescati \$88 million, and then the government filed its own suit to recover that amount from Citgo. Judge Slomsky's ruling came in the third trial of the case. Frescati filed an original contract claim against Citgo for breaching the "safe berth warranty," and a negligence claim against Citgo for failing to locate, warn of, or remove the anchor. After a nonjury trial in 2010, U.S. District Judge John Fullam ruled that Citgo was not liable. Frescati appealed and in May 2013, the Third Circuit appeals court affirmed in part, and vacated in part, Judge Fullam's decision.

The Third Circuit sent the case back to the District Court. Because Judge Fullam, the first judge, had retired, the case was assigned to Judge Slomsky. After another trial, Judge Slomsky ruled in favor of the ship owner and the vessel operator. It was claimed that when the Athos I struck the anchor on the river bed, Citgo Asphalt Refining Co. had failed its responsibility to provide a safe berth for the ship. Citgo had chartered the ship, the Athos I, to bring in the crude oil. Judge Slomsky wrote:

The story of the final voyage of the Athos I and the reasons why it came to rest prematurely may be in the minds of the maritime community for years to come. But in

this court, for now, its legal journey will conclude here.

Judge Slomsky found that the Athos I pilots, captain, and crew maintained proper safety management, which made the vessel seaworthy. The U.S. Coast Guard determined, not long after the spill, that the crew and pilots did nothing wrong in their approach and had not violated any regulations. It took 12 years, three trials, and 70 days of court testimony to finally reach this point in litigation. Citgo has filed a notice to appeal the ruling to the U.S. Third Circuit Court of Appeals in Philadelphia. Stay tuned!

Source: Associated Press

WRONGFUL DEATH LAWSUIT FILED IN GLAZER PLANE CRASH

A wrongful death lawsuit has been filed involving the deaths of Larry and Jane Glazer in a plane crash that happened in 2014. Ken Glazer, as the administrator of his parents' estate, filed the lawsuit against several aircraft companies. Claims were made in the complaint that the companies were negligent in the design, manufacture, testing and sale of the Socata TBM 900 aircraft that Larry Glazer was piloting on Sept. 5, 2014, and which crashed off the coast of Jamaica.

The complaint alleges that the plane's cabin pressurization system was faulty and that some of the companies knew it could malfunction, but had neglected to warn the Glazers of the risk or provide protection for occupants of the plane. The complaint doesn't precisely identify what flaw or series of flaws were responsible for the crash.

The complaint was filed in state Supreme Court and names as Defendants 17 foreign and domestic companies, many of them related. Among the Defendants are the plane's manufacturer, Socata S.A.S., a French company; Liebherr-Aerospace Toulouse S.A.S., another French company that designed the cabin pressurization system; and the subsidiaries of those two companies. The lawsuits seek damages on behalf of all beneficiaries of the Glazers' estate. The Glazers, prominent local real estate developers and philanthropists, had taken off from the Greater Rochester International Airport at 8:26 a.m. the day of their fatal flight, and were bound for Naples, Fla., where they had a vacation home.

Two Air National Guard fighter jets that were dispatched from South Carolina to intercept the plane reported

seeing Larry Glazer slumped over the controls but breathing and the cockpit windows frosting over. The jets shadowed the Glazers past Florida and over the Bahamas, but disengaged prior to the plane entering Cuban airspace, where it gradually descended as the engine ran out of fuel and crashed into the Caribbean Sea.

The National Transportation Safety Board (NTSB) is investigating the crash. Many experts at the time of the crash speculated that the aircraft experienced a gradual loss of air pressure, causing the Glazers to suffer a lack of oxygen that caused them to become disoriented and eventually fall unconscious. The complaint claims that “upon information and belief, at some time after takeoff, unbeknownst to Larry Glazer, the cabin of the subject aircraft began to insidiously depressurize.” The Socata TBM 900 the Glazers were flying was the first one off the assembly line.

It’s alleged that Socata had contacted Larry Glazer about purchasing the plane because Glazer, who had extensive experience flying Socata TBM aircraft, was president of the TBM Owners and Pilots Association. He agreed to buy the \$3.7 million plane in February 2014. A newer Socata TBM model, the 930, which was released this year and is an extension of the TBM 900, is reportedly equipped with an emergency descent mode. The function is designed to automatically bring the plane down to 15,000 feet in case of a loss of cabin pressure, unless the pilot responds.

Daniel Rose, a lawyer at Kreindler & Kreindler, a New York City law firm, represents the estate in this case.

Source: Associated Press

DEADLY TUSCALOOSA PLANE CRASH CAUSED BY FUEL PUMP FAILURE

The National Transportation Safety Board (NTSB) released its preliminary report last month for the plane crash in Tuscaloosa County, Ala., that claimed the lives of six people on August 14. According to the report, the cause of the crash was due to both fuel pumps failing. The preliminary air traffic control data indicated that the pilot, Dr. Jason Farese, reported a failure of a fuel pump and requested a diversion to the nearest airport. When the airplane was approximately 10 miles from Tuscaloosa Regional Airport, the pilot reported that the airplane had lost “the other fuel pump.”

According to the NTSB report, Dr. Farese’s Piper PA-31-325 was “topped off” with 134 gallons of fuel before departing from Kissimmee Gateway Airport in Florida around 8:55 a.m. eastern time. According to preliminary air traffic control data, Dr. Farese reported a failure of a fuel pump and requested a diversion to the nearest airport around 11:11 a.m. The controller provided radar vectors toward runway 30 at the Tuscaloosa airport.

When the airplane was about 10 miles away, Dr. Farese reported the plane had lost “the other fuel pump.” The airplane continued to descend until it impacted trees, only 1,650 feet from the end of runway 30. It was so close, but all too far, resulting in the tragic loss of lives.

According to Federal Aviation Administration (FAA) records, Dr. Farese held a private pilot certificate with ratings for airplane single-engine land, multiengine land, and instrument airplane. His most recent third-class medical certificate was issued in August 2014. According to a flight log found in the airplane, the pilot had accumulated 48.7 hours of flight time since March 2016.

According to FAA records, the airplane was manufactured in 1984, and issued an airworthiness certificate in 1998. It was equipped with two Lycoming TIO-540-series, 350-horsepower engines. It was also equipped with two four-bladed Hartzell controllable pitch propellers. The most recent annual inspection was performed on Nov. 13, 2015, and at that time the airplane had accumulated 3,260.8 total hours of time in service. The debris from the wreck covered 250 feet.

Source: Tuscaloosa News

XVII. HEALTHCARE ISSUES

FDA SAYS THERE IS NO PROOF OVARIAN CANCER SCREENING TESTS WORK

The U.S. Food and Drug Administration (FDA) last month warned that any devices claiming to screen for ovarian cancer aren’t backed by scientific proof. The FDA urged women and physicians not to use the devices. Women should turn to their physicians if they fear ovarian cancer, not to tests like Abcodia Inc.’s new Risk of Ovarian Cancer Algo-

rithm (ROCA) test, the FDA said. There’s no scientific evidence supporting ROCA, or other similar devices, that can properly detect the cancer, according to the agency. The agency said:

FDA is concerned that women and their physicians may be misled by such claims and rely on inaccurate results to make treatment decisions. Based on the FDA’s review of available clinical data from ovarian cancer screening trials and recommendations from health care professional societies and the U.S. Preventive Services Task Force, available data do not demonstrate that currently available ovarian cancer screening tests are accurate and reliable in screening asymptomatic women for early ovarian cancer.

The tests could either provide a false positive, in which a woman would go through unnecessary tests and surgeries, or a false negative, in which a woman wouldn’t seek necessary treatment. Additionally, negative tests could discourage women who either because of a gene mutation or family history are at a high risk of developing ovarian cancer from taking steps to decrease their risk, the FDA said. Ovarian tumors don’t have a detectable pre-cancer like with other cancers. This means ovarian cancer can’t be detected without invasive surgery at this time. The cancer, which is the fifth deadliest cancer for women in the U.S., is usually discovered after it has spread.

The American College of Obstetricians and Gynecologists and the Ovarian Cancer Research Fund Alliance (OCRFA) quickly voiced their support for the FDA’s announcement. These groups, in separate statements, said that while they would like to have a test, the medical community isn’t there yet. OCRFA President and CEO Audra Moran stated:

We all wish there were an effective screening test for ovarian cancer. Unfortunately, we haven’t yet found a test proven to save women’s lives. We share the FDA’s concern that the ROCA test, which is being marketed directly to women in 47 states, may do more harm than good. The money spent marketing tests of questionable benefit would be much better spent on research to find an effective test, better treatments and a cure.

I suspect these will be more developments in this matter. We have been

dealing with ovarian cancer issues in the J&J litigation and know how deadly and devastating this cancer is for women.

Source: Law360.com

DOCTORS WON'T BE GIVING NASAL FLU VACCINE THIS YEAR

The Centers for Disease Control and Prevention (CDC) is advising everyone to get an influenza vaccine by way of injection this year instead of using the nasal spray. This is not good news for the children who don't like the flu shots. The American Academy of Pediatrics is joining with the CDC in recommending against the nasal spray vaccine this flu season, saying it does not effectively protect against the spread of the virus. The organization said in an updated policy statement:

The American Academy of Pediatrics recommends that all children ages 6 months and older receive a seasonal flu shot during the 2016-17 season, as vaccination remains the best available preventive measure against influenza.

According to the CDC's Advisory Committee on Immunization Practices, the nasal spray vaccine—marketed under the name FluMist—did not protect against certain strains of the flu that were most prominent the past three seasons. The nasal vaccine's effectiveness among children 2-17 was 3 percent last year; the injected vaccine had an effectiveness rate of 63 percent. FluMist, which makes use of a weakened form of a live virus, is the only influenza vaccine delivered nasally. In the past, it was recommended for any healthy people ages 2-49. FluMist, produced by Astra Zeneca subsidiary MedImmune, accounted for more than a third of all influenza vaccines given to children last year.

As a result of the recent findings, reportedly companies that distributed the nasal spray vaccine no longer offer it to pharmacies. It also appears that doctors' offices aren't ordering it. Flu vaccines are reformulated each year in anticipation of the strains that will be prevalent each year. Health care providers should begin offering the flu vaccine to patients 6 months and older no later than October, the CDC said.

The concern now is children will balk at the idea of an injection and parents may opt out of the vaccination. That would be a mistake, according to Dr. Henry Bernstein of Cohen Children's

Medical Center in New York and one of the authors of the AAP statement. Dr. Bernstein told NBC News:

Families want their children and themselves to be protected against influenza. Not having the option of receiving a flu vaccine intranasally or (via) a nasal spray is disappointing to some but I think that people recognize that flu vaccine is the best preventative measure that we have to protect everyone against influenza.

It should be noted that flu—which strikes the very young and the elderly the hardest—is blamed for as many as 5,000 deaths each year in the U.S.

Source: AL.com

FDA BANS OTC CONSUMER ANTIBACTERIAL HAND AND BODY WASH

Antibacterial soaps sold over the counter that contain at least one of 19 active ingredients can no longer be sold in the U.S. because there is “no scientific evidence they work better than plain soap and water,” and “in fact, ... may do more harm than good over the long-term,” the Food and Drug Administration (FDA) announced.

The final rule comes following an FDA review of chemicals in OTC consumer antiseptic wash products such as antibacterial hand soap, during which the agency said it did not find concrete evidence that the chemicals promoted to protect against illness and infection actually prevented the spread of germs.

The FDA issued a proposed rule in 2013 after some data suggested that long-term exposure to certain active ingredients in antibacterial products could pose health risks, such as bacterial resistance or hormonal effects. Under that rule, manufacturers who used at least one of the 19 active ingredients listed who wanted to continue to sell their products in the U.S. needed to provide the FDA with additional data on the safety and effectiveness of their products. This included data from clinical studies demonstrating that the products were better than non-antibacterial washes in preventing human illness or reducing infection.

Manufacturers of antibacterial hand and body washes did not provide the information requested to establish the safety and effectiveness for the 19 active ingredients addressed in the final rule. Thus, the final rule will go into effect.

Some manufacturers have already started removing the ingredients from their products.

The final rule includes antiseptic hand and body washes that contain one or more of the 19 active ingredients specified by the FDA. It does not affect consumer hand “sanitizers” or wipes, or antibacterial products used in health care settings.

Sources: Righting Injustice and the FDA

POTENTIAL NEW MESOTHELIOMA TREATMENT OPENS CLINICAL STUDY TO PATIENTS

The Baylor College of Medicine Mesothelioma Treatment Center has begun enrolling patients in a clinical research study evaluating an investigational drug (anetumab ravtansine) that shows promise for the treatment of malignant pleural mesothelioma. As you probably know, mesothelioma is a rare and aggressive form of cancer that develops in the mesothelial tissue lining the lungs, abdomen, or heart. Pleural mesothelioma specifically develops in the pleura, a thin layer of tissue surrounding the lungs.

Mesothelioma is caused by exposure to asbestos, and though long-term exposure leads to a greater risk of developing the disease, short-term and one-time exposures to asbestos are also known to cause this cancer.

The investigational drug being studied has shown promise amongst those patients who have already started on chemotherapy, or whose cancer has progressed after attempting chemotherapy. Mesothelioma is particularly challenging to treat because of the length of time that can pass between exposure to asbestos and detection of the disease.

It is not uncommon for 30-40 years to elapse between asbestos exposure and a resulting mesothelioma diagnosis, and by the time the disease is detected it is often in the most advanced stages. This inability to detect mesothelioma in the earliest stages is a major reason why a diagnosis generally carries with it a life expectancy of only 6-18 months. Currently, treatment options are extremely limited for patients whose mesothelioma has progressed or does not respond to initial chemotherapy treatment.

The study is currently in Phase II clinical trials, and is now testing the safety and effectiveness of the investigational drug against more commonly used medications. Over the course of the study, 210 eligible patients will randomly

receive the investigational medication or a control drug every three weeks. Though this treatment is not expected to result in a cure, researchers hope that the new drug will extend the life expectancy of those who have the most advanced and aggressive forms of pleural mesothelioma.

If you would like more information about this subject, you can contact Grant Cofer, a lawyer in our firm's Toxic Torts Section. He can be reached at 800-898-2034 or by email at Grant.Cofer@beasleyallen.com.

Source: <http://medicalxpress.com/news/2016-09-potential-treatment-mesothelioma-patients.html>

XVIII. ENVIRONMENTAL CONCERNS

WATER WORKS AND SEWER BOARD OF GADSDEN FILES PFC CONTAMINATION LAWSUIT

The Water Works and Sewer Board of Gadsden, Ala., has filed a lawsuit against carpet and textile companies, and their chemical suppliers. It's alleged that the Defendants are responsible for polluting the city's water supply. The lawsuit contends that the Defendants are responsible for putting perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) into the raw water supply, causing Gadsden water to have higher readings for the man-made chemicals. In May of this year, the U.S. Environmental Protection Agency (EPA) issued new lifetime health exposure guidelines for PFOS and PFOA.

After the EPA issued the new exposure limits, an advisory warning was provided to eight systems in Alabama. The EPA advisory focused on PFOA and PFOS, man-made chemical compounds that are used in the manufacture of non-stick, stain-resistant, and water-proofing coatings on fabric, cookware, firefighting foam, and a variety of other consumer products. Exposure to the chemicals over time, even in trace amounts, could promote serious health problems, the EPA warns.

The Alabama Department of Environmental Management (ADEM) and the Alabama Department of Public Health (ADPH) are working with the Water Works and Sewer Board of Gadsden (WWSBG) to monitor for PFOS and PFOA in the community's water system. The

suit was filed in the Circuit Court of Etowah County, Ala.

Rhon Jones, who heads up our firm's Toxic Torts Section, and this writer will handle the litigation for Gadsden. The Gadsden Water Works and Sewer Board and its customers did not put these chemicals in the water. Neither should they be responsible for removing them either.

DAIKEN SETTLES WATER CONTAMINATION CLAIMS IN NORTH ALABAMA FOR \$5 MILLION

The West Morgan-East Lawrence Water Authority has agreed to settle its water contamination claims against Daikin America for \$5 million. The Authority filed a class-action federal lawsuit last year alleging that 3M, Daikin, and Dyneon had contributed to PFC contamination in the Tennessee River, thereby polluting the Authority's drinking water supply and putting its thousands customers at risk for health problems. This partial settlement does not resolve the Authority's claims against 3M or Dyneon, nor does it affect the claims of any individuals who allege that they have suffered personal injury as a result of PFC exposure. For its part, 3M has vowed to fight all allegations made in the Authority's suit, and litigation against the remaining two Defendants will continue unabated.

The Water Authority plans to use the settlement to pay for the installation of a new granular activated carbon filtration system that will remove up to 99 percent of the PFC contaminants, and has issued a news release detailing how the funds will be spent. Approximately \$3.9 million of the settlement will be directly applied to the installation of the new filter system, while another \$450,000 has been earmarked for rebates to customers who paid higher bills over the summer when temporary measures were put in place to reduce PFC levels. The remainder of the settlement will be used to cover court costs and other associated fees. Fortunately for the Water Authority's customers, this settlement should prevent the cost of the new filtration system from being passed down in the form of higher water bills.

PFC contamination has been a hot button topic since May 19, when the EPA issued a new drinking water health advisory for PFOS and PFOA (two types of PFCS), warning that the chemicals can cause health problems at much lower exposure levels than previously

believed. Tests of eight water systems in Alabama, including the West Morgan-East Lawrence Water Authority, revealed PFC levels in excess of the new health advisory. It was not until June 23 that Governor Robert Bentley announced that all Alabama water systems were testing within the new EPA threshold, though efforts to address PFC contamination are ongoing. If you need more information on this subject contact Rhon Jones, who heads up our firm's Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com.

TOXIC SOIL DRIVES INDIANA RESIDENTS FROM THEIR HOMES

Residents of the West Calumet Housing Complex in East Chicago, Ind., recently learned that much of the soil outside their homes contains staggering levels of lead, one of the worst threats to children's health. The levels are so high that community involvement coordinators from the U.S. Environmental Protection Agency (EPA) have gone door-to-door warning residents not to allow children to play in the dirt and providing information about ways to prevent exposure to lead in soil.

Mayor Anthony Copeland of East Chicago announced in August that the residents would have to move out, and that the complex would be demolished. He also announced plans to close the nearby elementary school. The news affects about 1,100 poor, largely black residents of West Calumet, including 670 children, who are scrambling to find a new home.

The housing complex, built in 1972 and run by the East Chicago Housing Authority, is located just north of a huge former U.S.S. Lead smelting plant and on top of a smaller former smelting operation. The area was designated a Superfund site in 2009.

Residents are now asking why neither the state nor the EPA told them just how toxic their soil was much sooner, and a timeline is emerging that suggests a painfully slow government process of confronting the problem. Records indicate the EPA has planned since 2012 to remove the contaminated soil without displacing residents.

Despite this, residents were not informed until last month that even the top six inches of soil in their yards had up to 30 times more lead than the level considered safe for children to play in, and that it also had hazardous levels of

arsenic. Farther down, the contamination is much worse.

Robert A. Kaplan, the EPA's acting regional administrator for the Great Lakes region, said the EPA had in fact warned West Calumet residents for at least a decade to avoid the soil, with public notices and community meetings. Mr. Kaplan said the hot spots discovered during preliminary testing had not created a sense of urgency partly because a 2011 federal assessment of the Superfund site concluded that "breathing the air, drinking tap water or playing in soil" in the area "is not expected to harm people's health."

Extensive testing to figure out which soil needed to be removed did not begin until November 2014, according to Administrator Kaplan. The EPA did not receive the final results showing "exactly where" the contamination was, he said, until this May. The delay, Kaplan said, was due to problems with the contractor the agency hired to tabulate the data and concerns about the data's quality.

The federal Department of Housing and Urban Development has provided the East Chicago Housing Authority with \$1.9 million to help residents pay for new rentals in the city or anywhere in the country, starting next month. But many questions remain, including whether the city, state or federal government will cover residents' moving expenses and security deposits and whether they will be able to find safe, affordable housing with the amounts they receive.

A housing discrimination complaint has been filed by the Sargent Shriver National Center on Poverty Law in Chicago that says the East Chicago Housing Authority's plan for relocating residents violates federal civil rights laws.

Jennifer O'Malley, a spokeswoman for the Indiana State Department of Health, said that since early July, 474 residents of the housing complex and surrounding neighborhoods had been screened for lead and that 29, including 19 children younger than 8, had elevated levels in their blood. But a July 14 letter to the EPA indicated preliminary tests had found that "hundreds of children suffer from excessive levels of lead in their blood."

Sources: EPA and *The Northwest (Indiana) Times*

JUDGE UPHOLDS \$1.2 MILLION VERDICT AGAINST FERTILIZER MANUFACTURER

A federal judge in Utah upheld a \$1.2 million verdict to a fruit orchard that claimed fertilizers manufactured by Bio Tech Nutrients ruined its crops. Although the jury found there was no design or manufacturing defect, it still concluded the company failed to adequately warn Fowers Fruit Ranch, a family-owned orchard, about the dangers of using its BTN+ fertilizer.

Bio Tech moved the Court to vacate the verdict, arguing that the jury could not simultaneously absolve it of liability for the defect claim while finding the fertilizer was acidic enough to damage plants. U.S. District Court Judge Tena Campbell denied the motion, finding it was reasonable to conclude the plants were nevertheless damaged by Bio Tech's fertilizers.

The Fowers filed suit in January 2011, alleging their crops sustained \$5 million in damages after applying Bio Tech's recommended fertilizers. Court documents reveal that the Fowers purchased Bio Tech's BTN products after being told it would replace conventional fertilizers and lead to more bountiful produce. In 2008, the Fowers sprayed BTN+ directly on some new plantings and via fertigation, which is a method of injecting the fertilizer into water to be sprayed over a patch. Although the fertilizer's label and instructions state the product should only be applied via fertigation, owner Jerry Fowers testified he did not recall receiving any instructions.

In the following spring, Bio Tech allegedly recommended that Fowers use a new product called Enviromoist, which was a mixture of BTN+ with polymers that would aid in root growth. Apparently heeding Bio Tech's advice, Fowers dipped the roots of his new apple tree into Enviromoist before planting. The trees began to die within a few weeks of planting and failed to rebound despite additional applications of BTN+.

XIX. UPDATE ON NURSING HOME LITIGATION

COURT AWARDS \$30 MILLION JUDGMENT AGAINST ALLENBROOKE NURSING AND REHABILITATION CENTER

A Shelby County jury has awarded a \$30 million judgment against a Memphis nursing home where poor care led to a resident's death. The verdict includes \$28 million in punitive damages against Allenbrooke Nursing and Rehabilitation Center LLC, as well as its two owners in New York and related companies. The case was filed in 2010 by the family of Martha Jane Pierce, a woman in her early 80s who was a resident of the Allenbrooke nursing home in 2008 and 2009.

The resident was living in a shared room with her husband, William Pierce, when she developed pressure sores on her right foot that went to the bone. The sores became infected with fecal bugs and required her leg to be amputated in October of 2009. She died two months later. The jury found Allenbrooke to have been negligent and also to have violated the Tennessee Adult Protection Act, including fraudulent records of her care. All of the damages were compensatory with the exception of the \$28 million in punitive damages.

Source: *The Commercial Appeal*

STARTLING STATISTICS FOR AN AGING POPULATION

It is no secret that Americans are growing older and living longer. The demographics for our country have made substantial shifts in the last 100 years, and the age of people is a primary reason. For a starter, let's just consider Social Security benefits. In 2015, nine out of 10 people older than 65 received Social Security retirement benefits. Social Security benefits represent about 39 percent of the income of the elderly, and in many instances is the only source of income for elderly Americans. Since 1940, the life expectancy of people has increased by seven years. By 2035, it is estimated that the number of people older than 65 will increase from 48 million to 79 million. Currently, there are approximately 2.8 workers for each recipient of benefits; that number is

expected to decrease significantly in the coming years.

As American citizens grow older and live longer, more people find themselves in need of long-term care. A nursing home stay can cost as much as \$4,500 per month. Today, the average life expectancy is 76 years old, with women, on average, living longer than men. That fastest growing segment of our population are those individuals older than 75. Today, 10 percent of all Americans are older than 85 years of age! Approximately one-half of all people who live past the age of 65 are expected to be admitted to a nursing home for either short-term or long-term care. At present, more than 22 percent of Americans older than 85 live in long-term care facilities. Twenty percent of nursing home residents stay at the facility a year, while 10 percent stay as long as three years.

The primary reason for admission to nursing homes (as much as 40 percent of all admissions) is not illness; rather, according to the American Association of Retired People (AARP), most admissions are the results of falls resulting in injuries. Currently, more and more doctors are discharging patients from the hospital to nursing homes. A large percent of these admissions are for short-term rehabilitative services, such as physical therapy and occupational therapy.

About one-half of all people who are admitted to a nursing home do not immediately qualify for government assistance. Instead, those persons are expected, and often have to, pay for the stay out of their personal resources or family members have to make the payments. With the costs of nursing homes, personal resources are often diminished quickly. After all savings and other resources have been spent, then Medicaid and/or Medicare (which will pay for the skilled nursing and rehabilitation services in some instances) will begin to pay some or all of the costs of the nursing home stay. In some instances, patients are fortunate enough to have long-term care insurance that will assist with the costs of nursing home care.

The take-away message here is that we are all living longer and that is generally very good. But with a longer lifespan comes some real problems. Based upon limited governmental resources and stricter requirements to qualify for those benefits, it may be a wise decision for people to begin to make financial plans in the event that long-term care becomes necessary. If you need additional information on this subject, or nursing home liability generally, contact Ben Locklar, a

lawyer in our firm who handles nursing home litigation, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

Sources: SSA, ElderWeb

XX. AN UPDATE ON CLASS ACTION LITIGATION

CRUISE COMPANIES SETTLE ROBOCALL CLASS ACTION LAWSUIT FOR \$76 MILLION

A massive class action accusing several cruise marketing companies of violating the Telephone Consumer Protection Act (TCPA) by robocalling millions of Americans with offers for free trips has been settled. Under the terms of the settlement the companies could pay up to \$76 million. The settlement will cost Caribbean Cruise Line Inc., The Berkley Group Inc. and Vacation Ownership Marketing Tours Inc. between \$56 million and \$76 million to settle claims that they used robocalling machines to call millions of people. The settlement was agreed to just two days before the trial was set to begin. The parties told U.S. District Judge Matthew Kennelly the case had been resolved shortly before a scheduled pretrial hearing.

The Plaintiffs, which include 1 million people who received calls from Caribbean Cruise Line and its subsidiary marketing companies between August 2011 and August 2012, will receive about \$500 for each call they received. They are divided into two classes—one for cellphones and one for landlines.

The money will be paid out in four increasing installments, with the first coming after preliminary approval and the last a year later. The amount class members will receive will shift depending on how many people make claims. The minimum amount the companies will pay will be \$56 million, while the maximum will be \$76 million. People who make a claim and appear on a class list of nearly 1 million people will be cleared to receive their award, while people who aren't on the list will have to prove they received the calls. Judge Kennelly made it clear that he was eager to hold the settlement approval hearings. That is because of the age of the suit and the millions of class members involved, some of whom may have objections.

Lead Plaintiff Grant Birchmeier brought the suit in 2012, claiming members of the class had received calls on their cellphones offering them a free cruise in exchange for taking a survey. The cruise companies said the calls' purpose was to conduct public opinion surveys, but the class argued they were a scam actually meant to sell vacation products. The settlement comes after several rulings in favor of the classes, which were certified in 2014.

In April, Judge Kennelly granted the cellphone class partial summary judgment against Economic Strategy Group, a nonprofit who administered the survey, finding that the calls broke the law, regardless of whether they offered something for sale or were taking a public opinion poll. However, the judge declined to find the cruise companies liable for using the nonprofit to drum up business, saying that was matter a jury needed to resolve. Economic Strategy Group has since been held in default for failing to respond to the class' most recent complaint. At the end of August, the judge blocked the cruise companies' efforts to get the classes decertified in light of the Supreme Court's decision in *Spokeo Inc. v. Robins*, which requires Plaintiffs to show actual injury to sue. He said the TCPA provides the substantive, not procedural, right to be free from unwanted calls. Judge Kennelly wrote in his 16-page opinion denying the cruise companies' motion:

Both history and the judgment of Congress suggest that violation of this substantive right is sufficient to constitute a concrete, de facto injury. As other courts have observed, American and English courts have long heard cases in which plaintiffs alleged that defendants affirmatively directed their conduct at plaintiffs to invade their privacy and disturb their solitude.

The class is represented by Jay Edelson, Rafey S. Balabanian and Evelyn J. Rapp of Edelson PC and Jonathan I. Loevy, Scott R. Rauscher and Michael I. Kanovitz of Loevy & Loevy. The case is *Birchmeier et al. v. Caribbean Cruise Line Inc. et al.* in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

BANK OF AMERICA PAYS \$12.8 MILLION TO SETTLE MERRILL BROKERS' COMPENSATION LAWSUIT

A North Carolina federal judge has approved a \$12.8 million settlement to resolve a proposed class action accusing Merrill Lynch of shortchanging financial advisers on deferred compensation following Bank of America Corp.'s 2008 acquisition of the brokerage. U.S. District Judge Robert J. Conrad Jr. granted final approval of the settlement, which resolves claims brought by former Merrill Lynch financial advisers Benjamin E. Davis and Roberto F. Garcia, who asserted they were involuntarily terminated and denied bonuses earned through various compensation plans, including a plan designed to retain Merrill Lynch employees following the merger. The judge wrote in an 11-page order:

This court hereby approves the settlement set forth in the stipulation and finds that the settlement is, in all respects, fair, reasonable and adequate to the settling parties.

For purposes of the settlement, Judge Conrad certified a class of more than 270 Merrill Lynch financial advisers who were employed by the company in September 2008 and involuntarily terminated from employment from January 2009 and March 2016, and have unvested awards in one of four compensation plans. Also included in the class are current Merrill Lynch advisers who were employed as of March 23 with unvested awards in the plans. The judge approved attorneys' fees of approximately \$3.2 million, or 25 percent of the settlement amount, costs of about \$124,000 and service awards of \$20,000 each to Davis and Garcia for their roles as class representatives.

The suit was filed in April 2015 and alleges Merrill Lynch failed to follow the contractual requirements of the plans following involuntary termination, which made the terminations not for "cause," and therefore the advisers were entitled to their bonuses. Judge Conrad granted preliminary approval of the settlement in March. The class is represented by Michael S. Taaffe, Michael D. Bressan, Jarrod J. Malone, Steven A. Meckler and David L. Wyant Jr. of Shumaker Loop & Kendrick LLP. The case is *Benjamin E. Davis et al. v. Merrill Lynch & Co. Inc. et al.* in the U.S. District

Court for the Western District of North Carolina.

Source: Law360.com

\$30.4 MILLION TIBCO-VISTA MERGER CLASS AWARD GETS COURT APPROVAL

Delaware Chancellor Andre G. Bouchard has approved a \$30.4 million settlement involving Tibco Software Inc.'s flawed \$4.2 billion sale to Vista Equity Partners in 2014. The settlement resolves a claim that Tibco financial advisor Goldman Sachs Inc. damaged the class by informally conveying bid guidance to Vista after a share-counting error. Vista allegedly reduced its initial offer by \$100 million based on the error.

The case had two key aspects: a reformation claim and an aiding and abetting claim. Chancellor Bouchard called the settlement an excellent outcome for the shareholders. The settlement included an agreement to limit the amounts available to Tibco's former directors and officers, who were dropped along the way as Defendants and therefore eligible to share in any settlement. That change reduced the potential claim pool from \$100 million to \$91.7 million, with a roughly 33 percent settlement yielding a \$30.4 million recovery. Most stockholders will receive about 19 cents per share extra as a result of the agreement.

The settlement terms limit distributions to those who submit claims, so that distributions will potentially be greater than 33 percent of the damage amount if some stockholders fail to submit forms. Tibco directors and officers will be limited to \$439,251, or about 5 percent of the damage amount. Chancellor Bouchard said he was concerned that some stockholders would miss out on the compensation since the full amount will be distributed to those submitting claim forms after submission and verification deadlines. He added "I'm just worried that smaller shareholders may get shut out and the big boys will get more than they otherwise would have."

The lawsuit was based on findings that Goldman "double counted" 4,147,144 shares of one category of Tibco common stock when preparing diligence materials for the bidders and its own fairness analysis. Vista initially offered \$4.24 billion, expressed as a total cash amount at \$24 per share based on the inflated count. When the count was corrected and reduced, the total offer fell, however, despite what class attorneys said was Vista's clear purchase price

intent. The following was stated in a settlement document filed in the case:

Plaintiff had no doubt that Goldman had mishandled the share count in the bidding process and had not come clean about these problems with the board, and that Vista had enjoyed an approximately \$100 million windfall at Tibco stockholders' expense.

The shareholders are represented by Stuart M. Grant and Cynthia A. Calder of Grant & Eisenhofer PA, Mark Lebovitch, David Wales, Edward G. Timlin and John Vielandi of Bernstein Litowitz Berger & Grossmann LLP, Francis Bottini Jr. of Bottini & Bottini Inc., and Juan E. Monteverde and James Wilson Jr. of Faruqi & Faruqi LLP.

Source: Law360.com

PNC FINANCIAL SERVICES GROUP WILL PAY AT LEAST \$24 MILLION IN MORTGAGE CLASS ACTION

PNC Financial Services Group has agreed to pay at least \$24 million to settle a class action lawsuit in a Pennsylvania federal court. The suit, brought by homeowners, alleged that a bank acquired by PNC overcharged fees and interest for its secondary mortgages and failed to accurately disclose business arrangements or the terms of its loans. It was claimed this violated truth in lending and racketeering laws. The settlement, preliminarily approved in early September, and announced in a notice to potential class members on Sept. 5, will now go before a three-member arbitration panel, which will decide whether to ratify the \$24 million figure PNC suggested or the \$70 million proposed by the class.

The class consists of the 26,698 homeowners who took out a second mortgage with Community Bank of Northern Virginia (CBNV) on their primary residence between May 1998 and December 2002. The per-Plaintiff payout is estimated to be on average \$560 or \$1,680, depending on which settlement amount the arbiters choose. All eligible class members will receive compensation, and any money left over in the settlement fund will not be returned to PNC. Class counsel, in an unopposed motion, asked U.S. District Judge Arthur J. Schwab to approve the settlement. It was stated in the motion:

The proposed settlement falls well within the 'range of possible

approval,' particularly in light of the substantial risks and costs associated with further litigation. The proposed settlement merits preliminary approval and warrants the dissemination of notice apprising class members of their opportunity to participate in the settlement, or to opt-out from or object to the settlement.

CBNV was bought in 2005 by Mercantile Bankshares Inc., which in turn was bought in 2006 by PNC, which inherited liability for the case, which was filed in 2003. CBNV conspired to generate as many high-interest second mortgage loans as possible, according to a joint consolidated amended complaint filed in 2011 that said the bank's conduct "demonstrates the types of sharp practices that fueled the collapse of the American mortgage market." The bank was accused of participating in a scheme that ensnared homeowners with a direct mail marketing campaign, charged them high rates and fees, and paid kickbacks to mortgage brokers.

The homeowners are represented by lead counsel R. Frederick Walters, J. Michael Vaughan, David M. Skeens and Garrett M. Hodes of Walters Bender Strohehn & Vaughan PC. The case is *Brian W. and Carla et al. v. Residential Funding Co. LLC et al.* in the U.S. District Court for the Western District of Pennsylvania.

Source: Law360.com

XXI. THE CONSUMER CORNER

PROBLEMS ARISE FOR SAMSUNG AFTER RECALLS AND LAWSUIT INVOLVING GALAXY CELLPHONE FIRES

Samsung launched its much-anticipated Samsung Galaxy Note 7 on August 19—just ahead of Apple's iPhone 7. The Galaxy Note 7 was heralded as one of the most exciting gadgets of the year. It has a sleeker design and can scan the owner's eyes to unlock the phone. The phone's hefty pricetag was \$850. The company claims to have "rethought the Galaxy Note from every angle." But, one angle Samsung missed was the safety of the lithium ion battery inside the Galaxy Note 7. Just two weeks after putting the phone on the market, at least 35 units

caught fire due to the lithium-ion battery. So far, Samsung has recalled 2.5 million units in 10 countries and has stopped all sales of the Galaxy Note 7. This is the largest cellphone recall in history.

Just days after Samsung issued the recall, a man filed a lawsuit in New Jersey claiming that his Samsung Galaxy S7 Edge smartphone exploded in his pocket while he was working on a construction site, causing second-degree burns to his hands and third-degree burns to his leg and groin. The Plaintiff has undergone a skin graft and extensive physical therapy. The complaint alleges that "Samsung's misrepresentations and omissions regarding the purported safety and reliability of the defective Samsung Galaxy S7 Edge cell phone were likely to deceive a reasonable purchaser . . . had Plaintiff known that the Samsung Galaxy S7 Edge cell phone posed a significant safety and life-threatening defect, he would not have purchased it."

One month after Samsung's voluntary recall, the Consumer Product Safety Commission (CPSC) issued a recall notice urging consumers to stop using and to power down the recalled Galaxy Note7 devices purchased before Sept. 15, 2016. Despite all the warnings, most Galaxy note owners have continued to use their devices. Data collected by Aptelligent, a mobile analytics company, shows only a 13 percent decline in usage of Note 7 devices. This indicates that Samsung's warnings have not effectively conveyed the seriousness of the defect.

Consumers are often unaware that there are many products on the market with life-threatening defects. Lawyers in our firm's Personal Injury & Products Liability Section will look at any case involving a significant injury or death caused by products. Our lawyers have handled product liability cases involving automobiles, airplanes, heavy and industrial equipment, workplace equipment, and smoke alarms. For more information, you can contact Cole Portis, who heads up the Personal Injury & Product Liability Section, or Stephanie Monplaisir at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Stephanie.Monplaisir@beasleyallen.com.

Source: Law360

LITHIUM-ION BATTERIES ARE STILL EXPLODING

Lithium-ion batteries were introduced to the market in the early 1990s when they first appeared in hand-held video cameras. Since then, the batteries have been used to power just about everything. The batteries are extremely popular because they can store large amounts of energy in a small space. In other words, lithium-ion batteries are energy dense.

In the past few months there have been a number of high-profile incidents with lithium-ion batteries exploding or catching fire in smartphones, self-balancing hover boards and electronic cigarettes that have caused consumers to suffer severe burns and other injuries. The common factor is usually a faulty manufacturing process, where the batteries are manufactured defectively or without a high degree of quality control.

Like any other battery, a lithium-ion battery is made of one or more power-generating compartments called cells. Each cell has essentially three components: a positive electrode, a negative electrode, and a chemical called an electrolyte in between them. The batteries work by moving lithium particles between a negative and positive electrode to charge and discharge. The movement of the particles causes heat as the battery is charged and discharged.

A faulty manufacturing process can lead to at least two situations that cause a lithium-ion battery to catch fire or explode. Those are:

- First, if a lithium-ion battery is defective in some respect, the heat generated by the charging and discharging can ignite the electrolytes, causing a fire or explosion. This is commonly known as thermal runaway. Essentially, a thermal runaway situation entails the insides of the batteries undergoing a chemical reaction that generates uncontrolled extra heat in addition to the heat that is produced in a normal charge or discharge.
- Second, if a lithium-ion battery's outside shell or the barrier separating the electrodes is defective, the battery will be susceptible to puncture or tear, which can cause a short circuit to happen when positive and negative electrodes touch. The instant electrical discharge from the short circuit can be explosive.

The speed and severity of a fire or explosion in either situation is determined by a number of factors, including

the power density of the lithium-ion battery and its composition. As such, high power cells can be particularly dangerous when they release large amounts of energy in an uncontrolled way.

Businesses and researchers continue to look into new battery technologies, but these lithium-ion batteries remain the standard. Lithium-ion batteries simply charge faster, last longer, and have a higher power density for more battery life than traditional battery technology.

If you would like more information about lithium-ion batteries, you can contact Will Sutton, a lawyer in our firm's Toxic Torts Section, at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Source: CNN

AGRICULTURAL POLLUTANTS IN DRINKING WATER LINKED TO BIRTH DEFECTS

Americans most likely don't worry very much about the safety of their drinking water that comes from private wells. However, a recent study from the Texas A&M Health Science Center School of Public Health warns that those who get their drinking water from private wells should be mindful of the potential presence of dangerous contaminants in their water. Women thinking about becoming pregnant should especially be concerned.

Most often, private water wells are used in rural areas, which are also frequently home to some type of agricultural operations. Large-scale agricultural operations, including crop production and beef, pork and chicken producers, have for decades been contaminating waterways and ground water supplies with toxins found in synthetic fertilizers and excess manure. The Texas A&M study found that nitrates and other contaminants associated with large agricultural operations have been linked to certain birth defects.

The study found that women who had babies with birth defects—such as limb deficiencies, cleft palate, and cleft lip—were almost two times more likely to have ingested water with large amounts of nitrate during their pregnancies as compared to mothers of babies without major birth defects. Nitrates are a component in many common synthetic fertilizers. Dr. Jean Brender, co-author author of the Texas A&M study, referring to periodic testing required for municipal and other public water suppliers, said:

We know what's in our public water supply, but many people are on private wells for their drinking water, and those wells aren't routinely tested. People who live in rural areas and who use private wells need to have their well water tested, particularly if they are thinking about becoming pregnant. If testing shows the water does exceed acceptable limits for [nitrates or other] chemicals, they would want to use an alternative source of water.

It is important to keep in mind that water does not necessarily have to look or smell bad to be dangerous, especially to the most vulnerable: embryos in their first few weeks of development. Studies, like the Texas A&M study, and recently publicized drinking water troubles, like in Flint, Michigan, should impress upon all Americans how vital it is that we protect the safety of our nation's drinking water—whether the water comes from public water systems or private wells.

If you use a private well as the source of your drinking water you can contact your local health department or county extension service to get more information on companies offering water testing services or call the federal Safe Drinking Water Hotline at 800-426-4791. If you need more information on this subject, contact Chris Boutwell at 800-898-2034 or by email at Chris.Boutwell@beasleyallen.com.

MANUFACTURER MYLAN IS FACING LEGAL ACTIONS OVER THEIR EPIPEN PRICE JUMP

Pharmaceutical giant Mylan faced a storm of controversy and criticism in August, when it announced the price for its emergency epinephrine injector, EpiPen, would jump from around \$100 to near \$600 for a pack of two pens, an increase of 461 percent, which is very hard to understand. Consumers were outraged and dismayed, as there are no comparable alternatives in the marketplace, leaving them feeling left over a barrel. Congress is looking into this matter and hearings took place last month.

The move has also placed Mylan in the crosshairs for a number of legal actions. Legal experts believe the drug manufacturer may potentially be liable for claims on three fronts.

Anticompetitive Conduct

The most obvious problem with Mylan's decision to increase the EpiPen price is its lack of competition, which leaves consumers with no choice but to pay whatever the company charges. Drug maker Sanofi-Aventis had a competing product, Auvi-Q, but it was recalled in October 2015. Amedra Pharmaceuticals does have a similar product, Adrenaclick, but it is not covered by many insurers.

Mylan also appears to have squashed efforts by Teva Pharmaceutical Industries Ltd. to bring a generic competitor to the marketplace. Mylan made a deal with Teva to hold off on its product launch, and then filed a citizen petition to delay Teva again. Teva's product ended up being rejected by the U.S. Food and Drug Administration (FDA), but lawyers say the wheeling and dealing looks a lot like an illegal pay-for-delay scheme. Law360 reports Sen. Amy Klobuchar and Sen. Richard Blumenthal have asked the Federal Trade Commission (FTC) to investigate.

Additionally, in New York, Attorney General Eric T. Schneiderman is investigating similar antitrust claims surrounding Mylan's "EpiPen-4Schools" program. The deal allegedly would provide EpiPens to schools at a discounted rate, but only if they sign an agreement not to purchase a competitor's product for a year.

Unjust Enrichment

Legal experts say states have a strong case against Mylan for violating consumer protection laws with price-gouging. They expect class action lawsuits to be filed in state courts.

This area of litigation also may play partner with politics, as legislators examine the issue of unjust enrichment and public harm versus capitalism—charging what the market will bear. Law360 notes that lawmakers will likely try to increase requirements for Big Pharma to demonstrate why it is charging a particular price. Mylan has faced criticism because it has not been able to list any market forces that

would require such a price hike, such as increased manufacturing or research and development costs.

Medicaid Fraud

As has proven to be the case many times over, the False Claims Act (FCA) may provide the strongest weapon in this battle. We write about the FCA a lot in the Report, so regular readers will know that the FCA is used to prosecute those who attempt to defraud the government. This applies to government health care programs such as Medicaid.

Law360 reports that U.S. Senator Ron Wyden and Rep. Frank Pallone have asked the U.S. Department of Health and Human Services to investigate Mylan's procedure for reimbursing the government under the Medicaid Drug Rebate program.

Companies are required to reimburse Medicaid 23.1 percent of the average manufacturer price minus the best price, which is the lowest price available to retailers. For generic or "non-innovator" drugs, the drugmaker would pay only 13 percent of the average manufacturer price.

The legislators note that Mylan is classifying the EpiPen as a generic drug when it determines how much the company must reimburse Medicaid and the Children's Health Insurance Program. However, they tell Law360, while the drug epinephrine is an off-patent drug, the injector provided by Mylan to administer the drug is not. If the device applicator argument succeeds, the classification could affect other medications that are delivered through inhalers or injectors.

Mylan purchased the EpiPen from Merck KGaA in 2007, after it was already on the market. Mylan argued its classification of the EpiPen as a generic in a statement reported by Law360:

EpiPen has been classified as a non-innovator since long before Mylan acquired the product. Mylan's classification of EpiPen as a non-innovator drug is consistent with long-standing written guidance from the federal government.

In an effort to address what has become a public relations as well as a legal minefield, Mylan has announced plans to expand its patient assistance program. The drug maker said it will provide a savings card to cover up to \$300 of the copay, and will allow those who are up to 400 percent of the federal poverty level to get the EpiPen at no charge.

The company hasn't garnered any sympathy, particularly in light of news that its top leaders—including CEO Heather Bresch—have enjoyed huge salary bumps during the same period that EpiPen's price skyrocketed. From 2007 to 2015, Bresch's total compensation increased by a whopping 671 percent, from \$2,453,456 to \$18,931,068.

While not on such an astounding scale, Mylan's president Rajiv Malik saw his base pay increase by 11 percent, to \$1 million annually as of 2015; and Mylan Chief Commercial Officer Anthony Mauro got a 13.6 percent bump to \$625,000 per year. EpiPen accounts for approximately 40 percent of Mylan's profits.

Sources: Law360, NBC News, USUncut.com and Bloomberg

XXII. RECALLS UPDATE

We are again reporting a large number of safety-related recalls. We have included some of the more significant recalls that were issued in September. If more information is needed on any of the recalls, readers are encouraged to contact Shanna Malone, the Executive Editor of the Report. We would also like to know if we have missed any safety recalls that should have been included in this issue.

GM RECALLING 4.3 MILLION VEHICLES GLOBALLY FOR AIRBAG SOFTWARE DEFECT

General Motors (GM) has recalled 4.3 million vehicles for a software problem that can prevent airbags from deploying in a crash. The defect, which affects all of GM's current full-size pickups and SUVs, is linked to one death and three injuries. The repair involves updating software in the sensing and diagnostic

module that controls airbag deployment and does not require replacement of any physical parts for most vehicles. The recall covers the following vehicles: 2014-16 Buick LaCrosse, Chevrolet SS and Chevrolet Spark EV; 2014-17 Chevrolet Corvette, Trax, Caprice and Silverado 1500, Buick Encore and GMC Sierra 1500; and the 2015-17 Chevrolet Tahoe, Suburban and Silverado HD, GMC Yukon, Yukon XL and Sierra HD, and Cadillac Escalade and Escalade ESV.

More than 3.6 million of the vehicles are in the U.S., and there is no link to the industry's ongoing global recalls for explosive airbags made by Japan's Takata Corp. It is GM's largest recall this year. GM, in a statement, said the software can prevent airbag deployment "in certain rare circumstances when a crash is preceded by a specific event impacting vehicle dynamics." The airbag control modules were supplied by Delphi Automotive, which said it produced them "in compliance with GM's product specifications and validation criteria." Delphi, in a statement, said it was cooperating with GM's recall.

GM said it was alerted to the problem in May by way of Speak Up for Safety, a program encouraging employees to report potential dangers that was established in response to GM's 2014 ignition-switch recalls. The report said the airbags and seat-belt pretensioners in a 2014 Silverado did not deploy in a crash. GM said it began investigating the issue on June 7. It provided data from the crashed Silverado to Delphi on June 28 and spent several weeks in July gathering reports of similar incidents and allegations. The company conducted three days of road tests at its Milford, Mich., proving ground before deciding on Aug. 31 to conduct a recall. The ignition-switch recalls also involved airbags failing to deploy, resulting in at least 124 deaths and 275 injuries, but in those vehicles the problem was caused by power to the vehicle being cut off inadvertently rather than a software problem. Due to GM's mishandling of the ignition-switch defect, GM's handling of safety issues is being monitored by former federal prosecutor Bart Schwartz.

FORD EXPANDS DOOR LATCH RECALL BY 1.5 MILLION VEHICLES

Ford Motor Co. has added approximately 1.5 million vehicles to a safety recall over malfunctioning side door

latches, more than doubling the size of the recall and bringing the total number of affected vehicles to more than 2.3 million. Ford's latest recall covers model year 2013 to 2015 Ford C-MAX and Ford Escape vehicles, as well as 2012 to 2015 Ford Focus, 2015 Ford Mustang and Lincoln MKC and 2014 to 2016 Ford Transit Connect models. Ford recalled the vehicles to repair pawl spring tabs in door latches that could break and open while driving, or may not close at all.

The recall builds off of another recall in August surrounding approximately 830,000 vehicles with the same models and model years. The original recall only affected owners in 16 states that generally have higher ambient temperatures and solar loading, including Arizona, California, Florida and Texas. The recall now covers 2,046,297 vehicles in the United States and federalized territories, 233,034 in Canada and 61,363 in Mexico. Ford is investigating one reported accident and three reported injuries that may be related to the door latch issue. The automaker said it is working with its suppliers to obtain replacement parts and will notify customers when they become available. Ford says it will notify customers affected by the recall the week of Oct. 3, 2016. Dealers will replace door latches free of charge to customers.

Ford's latest recall continues the automaker's door latch woes, having recalled nearly 3.3 million vehicles over issues with faulty pawl spring tabs since 2015. The first recalls came in January 2015 with 205,000 Ford Taurus sedans. Ford announced a second, separate recall of 213,000 Ford Explorer and Police Interceptor SUVs in March 2015. The automaker launched another recall in April 2015, covering 390,000 model year 2011 to 2014 Ford Fiestas and 2013 to 2014 Ford Fusion and Lincoln MKZ vehicles. Ford added 156,000 of the same vehicles to the recall a week later.

Ford is also the subject of an investigation launched in January 2016 by the National Highway Traffic Safety Administration (NHTSA) after the agency received nearly 75 complaints over faulty door latches on model year 2012 and 2013 Ford Fiestas. The investigation is ongoing.

MAZDA RECALLS 575,000 VEHICLES OVER POSSIBLE HATCH FAILURE

Mazda Motor Corp. has initiated recalls of 575,000 vehicles in the U.S.

because of liftgates that can fall down. The company confirmed that it filed papers with the National Highway Transportation Safety Administration (NHTSA) to start a recall of 2010-2013 Mazda3s, 2012-2015 Mazda5s, 2013-2016 CX-5s, and 2016 CX-3s. The liftgate has two supports that were coated with too little corrosion protection substance, the car company said, which meant that if salt and water got in, they could fail. "The rear hatch or lift gate may drop suddenly, and/or the broken parts may hit the customer," the carmaker said in a statement, but noted that it hasn't received any injury reports.

Meanwhile, in August, Mazda announced a recall of about 190,000 CX-7 SUVs over a suspension ball joint that could cause a total loss of steering control. Although there are no reported injuries from the defect, Mazda told NHTSA that it would recall the CX-7s from model years 2007 to 2012 beginning in early October. A ball joint in the car's lower control arm is particularly susceptible to water entry, the company said. If that water contains salt, including from winter roads, "the ball joint may corrode and separate from the lower control arm, resulting in a loss of steering control," NHTSA said. All of the vehicles were made in Mazda's Hiroshima, Japan, factory, according to agency records.

Mazda CX-7s from model years 2007 to 2012 were also the subject of a late May recall over Takata air bag inflators. Those inflators' capacity for catastrophic failure has roiled the auto industry for months; they were used in many brands and models. Mazda's Takata-related recalls included the 2004 model RX-8, 2003 to 2008 model Mazda 6 and 2006 to 2007 Mazdaspeed6. Nearly 20 million vehicles overall have been recalled by a dozen additional automakers in connection with Takata's faulty inflators, which have been linked to several deaths and about 100 injuries. An ammonium nitrate propellant helps cause the inflator explosions, which can send fragments of metal flying toward drivers and passengers.

NISSAN RECALLS 120,000 VEHICLES OVER FIRE-CAUSING FLUID LEAKS

Nissan North America Inc. has recalled 120,000 vehicles because their anti-lock braking systems (ABS) may malfunction and leak brake fluid onto an internal electrical circuit board, increas-

ing the risk of a fire. Nissan's recall covers 2016 to 2017 model year Maxima cars, 2015-2017 Murano crossover vehicles, and 2015 to 2016 Murano hybrid vehicles equipped with an intelligent cruise control system. According to documents submitted to the National Highway Traffic Safety Administration (NHTSA) by Nissan, the ABS actuator pump seal may leak, causing the electric circuit board to malfunction and the ABS warning lamp to light up. "If the vehicle continues to operate in this condition, the leak could cause a short, which in rare instances could result in thermal damage," a Nissan spokesperson told Law360 in a statement.

Nissan owners should park vehicles outside if the ABS warning lamp is illuminated, the spokesperson said. The automaker also recommends contacting its roadside assistance service to have the vehicle towed to an authorized Nissan service center. Nissan said it began to investigate the issue in June after hearing of an incident of thermal damage in a 2016 Nissan Maxima. The automaker determined in July that the fire likely began around the ABS actuator housing. Nissan contacted the supplier for the actuators, ADVICS North America Inc., and the pair determined that a certain range of faulty actuators supplied to the automaker were the cause of the issue. During the investigations Nissan also received reports of other incidents of thermal damage. There were no traffic accidents, injuries or fatalities related to the issue.

To fix the issue, dealers will inspect the serial number of the vehicle's ABS actuator. If the actuator is within the affected range, the dealer will replace it with a new one, free of charge to the owner. Nissan notified dealers on Sept. 2 and will alert owners of the recall within 60 days. Some of the vehicles recalled by Nissan may have already been subject to another launch by Nissan in April. The recall sought to fix an air bag system defect that could result in the car misclassifying an adult passenger as a child, causing it not to deploy in the event of a crash. The recall, which covered more than 3 million vehicles, included 2016 to 2017 Maxima and 2015 to 2016 Murano models. The recall also covered 11 other models. Customers who have questions about the recall can contact Nissan Consumer Affairs at 1-800-NISSAN1 (1-800-647-7261).

FIAT CHRYSLER RECALLING 1.9 MILLION VEHICLES FOR AIRBAG DEFECT LINKED TO THREE DEATHS

Fiat Chrysler Automobiles (FCA) announced it is recalling 1.9 million vehicles worldwide for an airbag defect that is linked to three deaths and five injuries. The recall is to resolve a defect that may prevent deployment of airbags and seat-belt pretensioners in some crashes. The recall includes models sold between 2010 and 2014, including the Chrysler Sebring, 200, Dodge Caliber, Avenger, Jeep Patriot and Compass SUVs. It said the recall also includes the 2012-2013 Lancia Flavia midsize car. About 1.4 million of the vehicles covered by the recall are in the U.S. Another 142,959 units are in Canada. The recall is the latest in a series affecting tens of millions of the devices for a series of problems.

Fiat Chrysler said the issue occurred when vehicles equipped with a particular occupant restraint control module and front impact sensor wiring of a specific design are involved in certain collisions. Fiat Chrysler said it no longer uses the occupant restraint controllers or wire routing design. The notice did not say when it will begin recall repairs, which spokesman Eric Mayne said the automaker is "finalizing."

PAGANI RECALLS \$1.3 MILLION SUPERCARS OVER AIR BAG DEFECT

Italian supercar manufacturer Pagani recalled 32 of its \$1.3 million Huayra vehicles, citing an air bag defect that could cause it to deploy improperly in the event of a crash. Pagani said the issue, which covers certain model year 2014 to 2016 Huayra vehicles, affects the driver's side front air bag, which may be improperly fastened to the steering wheel during deployment, increasing the risk of an injury. "Pagani does not know of any cases of personal injury or death arising from the defect," the company said in its safety recall report. "Nevertheless, to minimize the risk of a serious incident Pagani is taking the recall action." The supercar maker discovered the defect during routine testing in late July, according to a safety recall report filed by Pagani with the National Highway Traffic Safety Administration (NHTSA) on Aug. 8. Pagani said while the test showed a correct deployment of the driver air bag, the steering wheel structure demonstrated markings indicating excessive damage to the structure

around the air bag assembly's fastening points.

To fix the issue, dealers will replace the fasteners used to hold the steering wheel's air bag assembly in place, at no cost to customers. The new fasteners are a different part entirely, with a separate part number, and a different shape and color than the original pieces. The automaker said it successfully tested and confirmed the effectiveness of the remedy in addressing the issue. Pagani launched its recall on Aug. 16 and has already notified owners. The supercar manufacturer also said the recall will include a plan to reimburse any Huayra owner or purchaser who paid to fix the defect before the announcement of the fix.

Pagani manufactured the affected Huayra vehicles between April 21, 2014, and July 29, 2016. The NHTSA estimates the 32 recalled vehicles represent all Huayra vehicles sold in the U.S. between 2014 and 2016. Consumers in the U.S. are some of the biggest purchasers of Huayra vehicles, which Pagani manufactures in extremely limited quantities. For example, in the first six months of 2014, U.S. consumers purchased 40 percent of all Huayra vehicles sold, representing the largest geographic market for the Pagani brand.

Pagani is not the only supercar brand to have air bag troubles. Ferrari recalled about 2,000 of its vehicles in July 2015 that were equipped with defective Takata air bags. Among the vehicles recalled were the Italian automaker's LaFerrari, which retails for about \$1.4 million.

POLARIS RECALLS RZR XP TURBO RECREATIONAL OFF-HIGHWAY VEHICLES

Polaris Industries Inc., of Medina, Minn., has recalled about 13,000 Recreational Off-Highway Vehicles (ROVs). The vehicles' engine can overheat and turbo system's drain tube can loosen, posing a fire hazard. This recall involves all model year 2016 Polaris RZR XP Turbo and RZR XP 4 Turbo recreational off-highway vehicles. The ROVs were sold in blue, gray, orange and red and have two or four seats and a rear box. "RZR" is printed on the rear box or on the right and left rear fenders and "Turbo" on the hood or on the right and left front fenders. "Polaris" is stamped onto the front grill. All model and Vehicle Identification Numbers (VINs) are included in this recall. To check for recalled vehicles visit www.polaris.com. Polaris has received 19 reports of the

ROVs catching on fire, resulting in six reports of burn injuries. One of the reported fires occurred in Utah's American Fork Canyon, which led to a young child suffering severe burns and 15 acres of forest land being destroyed.

The ROVs were sold at Polaris dealers nationwide from August 2015 through July 2016 for between \$25,000 and \$27,500. Consumers should immediately stop using the recalled ROVs and contact Polaris to schedule a free repair. Consumers will receive an extended warranty on each repaired RZR Turbo and a discount toward the purchase of a new vehicle. Contact Polaris at 800-765-2747 from 7 a.m. to 7 p.m. CT Monday through Friday, or online at www.polaris.com and click on "Off-Road Safety Recalls" on the main page for more information.

POLARIS RECALLS RANGER RECREATIONAL OFF-HIGHWAY VEHICLES

Polaris Industries Inc., of Medina, Minn., has recalled about 42,500 Polaris Ranger 900 recreational off-highway vehicles (ROVs). The heat shield can fall off the vehicle, posing fire and burn hazards to riders. This recall involves all model year 2014 Polaris Ranger XP 900, XP 900 EPS, and CREW 900 recreational off-highway vehicles (ROVs). The recalled ROVs were sold in a variety of colors and have either three or six seats and a rear box. "Ranger" is printed on the rear box, and "900" is printed on the hood of the ROVs. All 2014 Ranger 900 models and Vehicle Identification Numbers (VINs) are included in this recall. To check for recalled vehicles by VIN, visit www.polaris.com. Polaris has received 36 reports of the recalled ROVs overheating and catching on fire, including reports of three minor burns and one sprained wrist.

The Rangers were sold at Polaris dealers nationwide from April 2013 through June 2014 for between \$13,200 and \$16,200. Consumers should immediately stop using the recalled ROVs and contact Polaris to schedule a free repair. Polaris is contacting all known purchasers directly. Consumer Contact: Polaris at 800-765-2747 from 7 a.m. to 7 p.m. CT Monday and Friday, or online at www.polaris.com and click on "Off Road Safety Recalls" at the bottom of the page for more information. Photos available at: <http://www.cpsc.gov/en/Recalls/2016/Polaris-Recalls-Ranger-Recreational-Off-Highway-Vehicles/>

**KTM NORTH AMERICA RECALLS MOTOCROSS
COMPETITION OFF-ROAD MOTORCYCLES**

About 920 Motocross competition off-road motorcycles have been recalled by KTM North America, Inc., of Amherst, Ohio. The connecting rod in the crankshaft assembly can fracture, causing the operator to lose control of the motorcycle and crash. This recall involves model year 2016 KTM brand and Husqvarna Motorcycles brand motocross off-road motorcycles with 250cc, 4-cycle engines. Recalled KTM 250 SX-F motorcycles are orange and black with the KTM logo on both sides of the shrouds covering the fuel tank. The engine size is printed on both sides of the rear fender below the rear of the seat. Recalled KTM 250 SX-F Factory Edition motorcycles are orange and blue with the KTM and the Red Bull logos on both sides of the shrouds covering the fuel tank. The number "13" is printed on both sides of the rear fender below the rear of the seat. Recalled Husqvarna FC 250 motorcycles are white with blue and yellow markings. The Husqvarna logo and engine size are on both sides of the shrouds covering the fuel tank. Model year 2016 motorcycles have a letter "G" in the 10th position of the vehicle identification number (VIN), located on the right side of the steering head. The firm has received five reports of the rod cracking. No injuries have been reported.

The motorcycles were sold at 2016 KTM Motorcycles were sold at KTM authorized dealers nationwide from October 2015 through March 2016 for between \$8,400 and \$9,100. 2016 Husqvarna Motorcycles were sold at Husqvarna Motorcycles authorized dealers nationwide from October 2015 through March 2016 for about \$8,400. Consumers should immediately stop using the recalled motorcycles and contact an authorized KTM or Husqvarna Motorcycles dealer to schedule a free repair. Contact KTM North America/Husqvarna Motorcycles North America toll-free at 888-985-6090 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.ktmusa.com or www.husqvarna-motorcycles.com and click on "Service" and then "Safety" for more information. Photos available at: <http://www.cpsc.gov/en/Recalls/2016/KTM-North-America-Recalls-Motocross-Competition-Off-Road-Motorcycles/>

**SAHN DESIGNS RECALLS BICYCLE HELMETS DUE
TO RISK OF HEAD INJURY**

SAHN Designs Inc., of Vancouver, Canada, has recalled about 2,000 SAHN Classic bicycle helmets. The helmets do not comply with the impact requirements of the federal safety standard for bicycle helmets, posing a risk of head injury. This recall involves SAHN Classic SH523 adult bicycle helmets. "SAHN" is printed on the outer shell of the helmet on the right side. The production date and "SH-523 Classic" are printed on the white sticker label on the inside of the helmet. The helmets come in matte and gloss colors. Matte colors include black, white, blue, tan, grey, green, cream and brown. Gloss colors include black, white, blue, tan, cream and green.

The bicycle helmets were sold at authorized boutique bicycle dealers from May 2013 through December 2015 for about \$130. Consumers should immediately stop using the recalled bicycle helmets and contact SAHN Designs for a free replacement helmet. Contact SAHN Designs at 800-642-7086 from 9 a.m. to 6 p.m. PT Monday through Friday or online at www.sahn.cc and click on "Recall Notice" at the top of the page for more information. Photos available at: <http://www.cpsc.gov/en/Recalls/2016/SAHN-Designs-Recalls-Bicycle-Helmets/>

**GE APPLIANCES RECALLS TOP-LOADING CLOTHES
WASHERS**

GE Appliances, of Louisville, Ky., has recalled about 222,000 GE Profile™ top-loading clothes washers. An electrical component in the washers can overheat, posing a fire hazard. The recall involves three models of GE Profile high-efficiency top-loading clothes washers. The washers come in gold, gray and white and measure about four cubic feet. "GE Profile" is printed on the front of the washers. The model number is located on the rear cover of the washer's back-splash, above the water valve connections. GE Appliances has received 71 reports of internal washer components burning or catching fire, including three reports of fires resulting in about \$129,000 in property damage. No injuries have been reported.

The washers were sold at Best Buy, Lowe's, Sears, The Home Depot and other stores nationwide from June 2003 through October 2011 for between \$900 and \$1,400. Consumers should immediately unplug and stop using the recalled washers and contact GE Appliances for a

free repair. Contact GE Appliances toll-free at 877-830-9732 between 8 a.m. and 5 p.m. ET Monday through Friday or online at www.geappliances.com and click "Recall Information" at the bottom of the page for more information.

**SAMSUNG RECALLS 2.5 MILLION GALAXY NOTE
PHONES OVER BATTERY FIRES**

Samsung Electronics is halting all sales of its Galaxy Note 7 smartphone and will replace about 2.5 million units after reports that at least 35 units caught fire due to a battery defect shortly after the phone's release. South Korea-based Samsung said the recall is being undertaken in all 10 countries where the phone is sold, marking a major blow to the company in its bid to take market share from Apple's iPhone. Samsung has shipped about 2.5 million units of the Galaxy Note 7 since its launch on Aug 19. More was written on this recall and related problems in the Consumer Section.

**DENON RECALLS RECHARGEABLE BATTERY
PACKS DUE TO FIRE AND BURN HAZARDS**

About 3,400 HEOS 1 Go Pack rechargeable battery packs have been recalled by Denon Electronics (USA) LLC, of Mahwah, N.J. The battery can overheat, posing a fire and burn hazards. This recall involves Denon's HEOS 1 Go Pack lithium-ion rechargeable battery packs for wireless speakers. Only HEOS 1 Go Packs with a 10-character alphanumeric serial number beginning with 5 or 601G91 and ending with 3517 through 4004 are included in the recall; the battery packs are black or white, hexagon-shaped and have four blue LED lights and a power button. HEOS, the model and serial numbers are printed on the bottom. Only the speaker battery is being recalled.

The packs were sold at Best Buy (Magnolia), Brookstone and online at BestBuy.com and Amazon.com from May 2015 through June 2016 for about \$100. Consumers should immediately stop using the recalled battery packs and contact Denon for a free replacement battery pack, including shipping. Contact Denon toll-free at 844-759-1987 from 10 a.m. to 10 p.m. ET Monday through Friday and 12 p.m. to 8 p.m. ET on Saturday or online at <https://usa.denon.com> and click on "Product Recall Information" at the

bottom of the page. Photos available at: <http://www.cpsc.gov/en/Recalls/2016/Denon-Recalls-Rechargeable-Battery-Packs/>

WHIRLPOOL RECALLS MICROWAVES DUE TO FIRE HAZARD

Whirlpool Corporation, of Benton Harbor, Mich., has recalled about 15,200 Whirlpool brand microwave hood combinations. Internal arcing during use can ignite an internal plastic component, posing a fire hazard. This recall involves Whirlpool brand microwave hood combinations. The microwave ovens were sold in stainless steel, black and white. Model numbers and serial numbers are located on the inside of the unit, above the oven cavity on the left hand side. A complete list of model and serial numbers included in this recall is posted on the company's website at <http://repair.whirlpoolcorp.com>. Whirlpool has received five reports of incidents, including one home fire, two fires involving the surrounding cabinets, one report of smoke, and one report of a burning odor.

The hood combinations were sold at Best Buy, HH Gregg, Lowes, Sears and other home improvement, home appliance and retail stores and by homebuilders nationwide from January 2014 through April 2016 for between \$370 and \$470. Consumers should immediately stop using the recalled microwaves, unplug the units and contact Whirlpool for a free replacement product at 800-990-6254 from 8 a.m. to 8 p.m. ET Monday through Friday, or online at <http://repair.whirlpoolcorp.com>. Consumers can also visit www.whirlpool.com and click on "Product Recall" for more information.

HAUS MOSQUITO ZAPPER LED LIGHT BULBS RECALLED BY CREATIVE SOURCING

About 11,500 ZapBulb mosquito zapper LED light bulbs have been recalled by Creative Sourcing International, Inc., of Miami, Fla. The light bulb's base can separate from the connector, posing an electrical shock hazard. This recall involves the HAUS ZapBulb 2-in-1 mosquito zapper LED light bulbs. The 10-watt bulb has a white grid housing that measures about 3.1 inches high, 3.1 inches wide and 6.1 inches deep. The grid housing has a blue light used to attract insects and an LED light below, for lighting. Only units

without any markings or labels are included in this recall. SKU number IK 3000 is on the product's packaging. The company has received two reports of the bulb separating from the connector. No injuries or property damage have been reported.

The bulbs were sold online at Amazon, Groupon, Hammacher Schlemmer, Pulse TV, Sharper Image, Sportsman and Universal Direct from April 2016 through July 2016 for about \$30. Consumers should immediately stop using the recalled light bulbs, turn off the power supply and contact Creative Sourcing for a free replacement mosquito zapper LED light bulb, including shipping, and instructions for removing and replacing the light bulb. Creative Sourcing will reimburse consumers if a professional electrician is needed to remove the recalled light bulb's base. Contact Creative Sourcing International/Haus toll-free at 888-521-8326 from 8:30 a.m. to 5 p.m. ET Monday through Friday, email at hauswares@kolorik.com, or online at www.hauswares.com and click on Recall Information for more information. Photos available at: <http://www.cpsc.gov/en/Recalls/2016/HAUS-Mosquito-Zapper-LED-Light-Bulbs-Recalled-by-Creative-Sourcing/>

BLACK+DECKER™ RECALLS ELECTRIC BLOWER/VACUUM/MULCHERS

BLACK+DECKER (U.S.) Inc., of Towson, Md., has recalled about 560,000 BLACK+DECKER electric blower/vacuum/mulchers. The fan cover can unlatch unexpectedly, posing a laceration hazard. This recall involves BLACK+DECKER 3-in-1 electric blower/vacuum/mulchers with model numbers BV5600, BV6000 and BV6600. The model number and "Type 1" are printed on the name plate on the right side of the motor housing. Only "Type 1" blower/vacuum/mulchers are included in this recall. They are orange with black accents, a black fan cover and a two-speed switch. They were sold with a blower tube, a vacuum tube and a reusable collection bag. Model BV6600 also has a rake attachment. BLACK+DECKER has received four reports of the fan covers unexpectedly coming off and consumers receiving finger lacerations from contact with the fan.

The fans were sold at Lowes and other stores nationwide and online at Amazon.com and other websites from May 2013

through September 2016 for between \$70 and \$90. Consumers should immediately stop using the recalled product and contact BLACK+DECKER for a free repair kit, which includes a replacement fan cover. Contact BLACK+DECKER toll-free at 866-937-9805 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.blackanddecker.com and click on Safety Recalls for more information. Consumers can also email the company at recall@sbdinc.com. Photos available at: <http://www.cpsc.gov/en/Recalls/2016/BLACK-DECKER-Recalls-Electric-Blower-Vacuum-Mulchers/>

HUISH OUTDOORS RECALLS BUOYANCY CONTROL DEVICES DUE TO DROWNING HAZARD

Huish Outdoors LLC, Salt Lake City, Utah, has recalled about 1,400 Zeagle brand buoyancy control devices (BCDs). The buoyancy control devices can suddenly leak air causing a loss of flotation, posing a drowning hazard to scuba divers. This recall involves all Zeagle brand Grace and Element BCDs. BCDs are used to help a diver maintain buoyancy under water during scuba diving. The Grace model is black with light green accents and has the logo "Z/Grace" on the right side pocket and left shoulder. The words "Zeagle Sport" are on the left side pocket. The Element model is black with red accents and has the logo "Z/Element" on the right side pocket and left shoulder. The words "Zeagle Sport" are on the left side pocket. The company has received one report of a seam failure in the BCD resulting in air leakage. No injuries have been reported.

The devices were sold at authorized Zeagle dealers and online at www.zeagle.com for about \$412 for the Grace model and about \$490 for the Element model BCD, from September 2015 through August 2016. Consumers should immediately stop using the recalled BCDs and return them to Huish Outdoors or an authorized Zeagle dealer for a free replacement. Contact Huish Outdoors toll-free at 888-270-8595 between 8 a.m. and 5 p.m. PT Monday through Friday or online at www.zeagle.com and click on recall notice for more information. Consumers can also e-mail the company at recall@huishoutdoors.com. Photos available at: <http://www.cpsc.gov/en/Recalls/2016/Huish-Outdoors-Recalls-Buoyancy-Control-Devices-BCDs/>

BUNGEE CHAIRS SOLD EXCLUSIVELY AT BIG 5 SPORTING GOODS STORES RECALLED

About 4,100 Bungee chairs have been recalled by Big 5 Sporting Goods, of El Segundo, Calif. The chair rivets can break while in use, posing a fall hazard to the consumer. This recall involves Captiva Designs bungee chairs with model number AC098 printed on the header cards of the product packages. The collapsible chair has a navy blue and teal nylon and bungee seat and black metal legs. The chair's bungee cords are laced through the seat frame. The company has received three reports of chair rivets breaking, including two reports of injuries from falls.

The chairs were sold exclusively at Big 5 Sporting Goods stores nationwide from May 2016 through July 2016 for about \$30. Consumers should immediately stop using the recalled bungee chairs and return them to any Big 5 Sporting Goods store for a full refund. Contact Nanjing Kekang Outdoor Products toll-free at 866-283-4412 from 8 a.m. to 4 p.m. ET Monday through Friday, or online at www.big5sportinggoods.com and click on "Product Recall" at the bottom of the homepage for more information. Photos available at: <http://www.cpsc.gov/en/Recalls/2016/Bungee-Chairs-Sold-Exclusively-at-Big-5-Sporting-Goods-Stores-Recalled/>

NATIONWIDE RECALL OF HYOSCYAMINE SULFATE DUE TO SUPERPOTENT AND SUBPOTENT RESULTS

Virtus Pharmaceuticals Opco II, LLC (Virtus) is recalling seven batches of Hyoscyamine sulfate (0.125mg) to the consumer level, which include the tablet, sublingual, and orally disintegrating tablet form. This recall is being initiated due to both superpotent and subpotent test results. All of these batches were manufactured by Pharmat-ech LLC for distribution by Virtus throughout the United States and Puerto Rico.

Taking a product that is superpotent could result in hot/dry skin, fever, blurred vision, sensitivity to light, dry mouth, unusual excitement, fast or irregular heartbeat, dizziness, an inability to completely empty the bladder, and seizures. The severity of the adverse event would depend on how superpotent the tablet was. Adverse events such as clotted blood within the tissues and fractures could occur, as a result of falls from dizziness or seizures if the strength is particularly high. To date, Virtus has

received three adverse event reports involving hallucinations, stroke-like symptoms, confusion, dizziness, blurred vision, dry mouth, slurred speech, imbalance, and disorientation. These symptoms were reported to be resolved are all believed to be temporary. None of the adverse events were life threatening, and the patients who reported the incidents were treated and released.

Hyoscyamine sulfate is an anticholinergic agent which blocks the action of acetylcholine and is used to treat diseases like asthma, incontinence, stomach cramps, peptic ulcers, control gastric secretion, intestinal spasm and other bowel disturbances. These products were distributed nationwide in the U.S. and Puerto Rico starting on March 11, 2016, to distributors, hospitals, and retail pharmacies.

Virtus is notifying its distributors and retailers by letter and email and is arranging for return of all recalled drug product. Consumers, distributors, and retailers that have the hyoscyamine sulfate product lots in the recall should stop using/distributing and return to place of purchase.

Consumers with questions regarding this recall can contact Virtus at 1-855-255-6076 on Monday through Friday from 8 am to 5 pm EST or rxrecalls@inmar.com. Consumers should contact their physician or health care provider if they have experienced any problems that may be related to taking or using these drug products.

Adverse reactions or quality problems experienced with the use of this product may be reported to the FDA's MedWatch Adverse Event Reporting program either online, by regular mail or by fax. Complete and submit the report online: www.fda.gov/medwatch/report.htm. Regular mail or Fax: Download form www.fda.gov/MedWatch/getforms.htm or call 1-800-332-1088 to request a reporting form, then complete and return to the address on the pre-addressed form, or submit by fax to 1-800-FDA-0178. This recall is being conducted with the knowledge of the U.S. Food and Drug Administration.

TOYS 'R' US RECALLS PACIFIER CLIPS DUE TO CHOKING HAZARD

Toys 'R' Us Inc., of Wayne, N.J., has recalled 53,000 Babies 'R' Us pacifier clips. The pacifier clip's spring mechanism can break and release small parts, posing a choking hazard. This recall

involves Babies 'R' Us pacifier clips sold in an assortment of six colors and character designs, including a red monster, blue monster, monkey, giraffe, owl with one eye closed, and an owl with both eyes open. The pacifier clips have a circular plastic cover affixed to a metal spring clip and a fabric strip with snaps at the other end. The recalled pacifier clip assortment has model number 5F6237F and "©2014 Geoffrey, LLC" engraved on the back to the plastic cover. The company has received two reports of pacifier clips breaking. No injuries have been reported.

The clips were sold exclusively at Babies 'R' Us and Toys 'R' Us stores nationwide from February 2015 through April 2016 for about \$4. Consumers should immediately take the recalled pacifier clips from babies and return the product to Babies 'R' Us or Toys 'R' Us for a refund. Contact Toys 'R' Us at 800-869-7787 from 9 a.m. to 5 p.m. ET Monday through Friday, or online at www.toysrus.com and click on Product Recalls for more information. Photos available at: <http://www.cpsc.gov/en/Recalls/2016/Toys-R-Us-Recalls-Pacifier-Clips/>

Once again there have been a large number of recalls since the last issue. While we weren't able to include all of them in this issue, we included those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm's web site at www.BeasleyAllen.com or www.RightingInjustice.com. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

XXIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

AMY BROWN

Amy Brown, who has been an employee of our firm for nearly 15 years, works with Ted Meadows, a lawyer in our firm's Mass Torts Section. Amy has worked a total of 24 years in the legal field, including her time with us. Amy

has been involved in numerous litigations, including Medtronic/Guidant heart devices, knee replacements, hormone replacement therapy and Lotronex. She is currently working on the talcum powder litigation, with responsibilities ranging from the firm's incoming cases and non-filed cases to interacting with clients and referring law firms.

Amy says she has been happily married to JJ Brown for 20 years. They have three children—Cadey, a senior in high school, and twin boys, Zach and Tyler, who are in the sixth grade. All of their children attend Macon East Academy. In her spare time, Amy enjoys spending time with her family and watching her children compete in various sports, such as softball, baseball, football, volleyball and taekwondo. The family enjoys traveling to different states, hunting, fishing, swimming and taking care of their many different pets. Amy is a very good, hard-working employee who puts the interest of the firm's clients at the top of her priority list in her work.

CHRIS GLOVER

Chris Glover, a lawyer in our Personal Injury & Products Liability Section, has focused his legal career on protecting the rights of survivors of catastrophic personal injury and victims of wrongful death. He has litigated numerous cases that have resulted in verdicts or settlements in excess of \$1 million. Chris was also lead counsel in a case resulting in a \$4.7 million verdict against seatbelt manufacturer Key Safety Systems. This result was very significant because it is one of the only verdicts of its type against an automobile component manufacturer.

A graduate of Cumberland School of Law, Chris practiced law for several years in Birmingham, Ala., before joining Beasley Allen in 2008. While Chris notes helping others and a love for the law as two main reasons for becoming a lawyer, he says the real reason was because it was exactly what God called him to do. Chris says he finds being a lawyer allows him the unique opportunity to help people who have been through tremendous tragedy.

In 2015, Chris authored a book, *An Introduction to Truck Accident Claims: A Guide to Getting Started*. The book is a primer for lawyers interested in trucking litigation, covering topics including the basics of trucking regulations and requirements, and how to prepare for a case involving commercial vehicles, including issues such as "Hours of

Service" regulations, fatigue, maintenance and products liability. The book is available free to lawyers.

Chris says he thanks Beasley Allen for its strong, God-driven priorities in the firm. He says lawyers in the firm are always trusted to do what they say they will do. Chris points out that the firm places clients' needs first. By prioritizing his personal life in order with God, family and work, Chris has been able to ensure a happy life, have what he calls a great place to work and to establish a successful law practice.

Chris is married to the former Erin Henley and they have two children, Kaitlyn and Andrew. Chris is an Adult Sunday School teacher and a Deacon at Montgomery First Baptist Church. He is also active in a number of church, civic, and charitable organizations.

Chris is a very good person who is recognized as an outstanding trial lawyer by his peers. He is totally committed to representing his clients to the best of his ability. We are blessed to have Chris with us.

WARNER HORNSBY

Warner Hornsby joined our firm last month as an associate in the Personal Injury & Products Liability Section. At the outset, Warner will be working on personal injury and wrongful death litigation. Warner is now a member of the Alabama State Bar (ASB) and the ASB Young Lawyers Section.

Warner graduated from the University of the South: Sewanee in 2013 with a Bachelor of Arts in Economics, minoring in Business and French. He was a Carey Fellow at Sewanee, which is a pre-business honors course. He then attended The University of Alabama School of Law, earning his J.D. in 2016. Warner was a member of the Order of the Barristers, Bench and Bar, and was a member of the Trial Advocacy Competition Team. He is a huge supporter of the Alabama Crimson Tide football team, as well as all other sports at the University. Warner also enjoys deer hunting, and spending time at lake Martin, where his family has a cabin.

Warner says in some ways he always knew he was going to be a lawyer. Both his father, Clay Hornsby, and his grandfather, Sonny Hornsby, are lawyers. Sonny was Chief Justice of the Alabama Supreme Court in the 1990s, and is a past president of the State Bar and of the Trial Lawyers Association, which is now the Alabama Association for Justice. Clay was also a President of the Alabama

Association for Justice. Both were tremendously talented lawyers.

Warner attends First United Methodist of Montgomery, in Cloverdale. We are pleased that Warner is now with the firm. I predict that he will carry on the family tradition and be an outstanding trial lawyer. We are blessed to have Warner with us.

SHANNON RATTAN

Shannon Rattan, a Legal Assistant in the firm's Personal Injury & Product Liability Section, has worked at Beasley Allen for 10 years collectively. In her position, Shannon is responsible for all of the case files for her attorney, Julie Beasley, as well as filing legal documents, drafting letters, maintaining files in the office and keeping organized. Prior to becoming a Legal Assistant for Julie Beasley, Shannon first worked in the firm's Accounting Department and then became a relief receptionist, a clerical assistant and a legal secretary.

Shannon lives in Millbrook and is married with three boys—a 14-year-old, a 12-year-old and a 5-year-old. The family also has a male cat and a newly added male German Shepherd puppy. This leaves Shannon as the only female in the homestead!

Shannon grew up in a military family and moved around frequently, so she says experiencing new places has always been a pleasure for her. The family visited Arizona last summer, camping along the way and visiting several national parks and historical sites. In her free time, Shannon enjoys painting wall murals, gardening, and any outdoor activity that allows her to spend time with her boys.

Shannon is an exceptionally good employee who works very hard and is totally dedicated to the clients she works for. She is totally committed to her work. We are blessed to have Shannon with us.

JOHN TOMLINSON

John Tomlinson, a lawyer in our firm's Toxic Torts Section, graduated from The University of Alabama in 1995, with a B.S. Degree in Commerce and Business Administration. It wasn't until after he graduated that John says he realized the importance of lawyers in people's lives and society in general. This realization would eventually lead to his graduation from Jones School of Law in 2001.

John joined the firm as an associate in May 2002. He first worked in the Consumer Fraud Section; however, he now works in our Toxic Torts Section focusing on occupational and environmental

cases. John is specifically interested in litigation involving cancer victims with occupational and environmental exposure to benzene. Exposure to toxic chemicals, such as benzene, is a risk factor for the development of Myelodysplastic Syndrome (MDS) and Acute Myeloid Leukemia (AML).

John finds communication with other lawyers to be one of the most rewarding parts of his profession. He has been fortunate enough to work with some extremely talented lawyers throughout his legal career, as well as assist some clients. John says to be able to assist his clients during some of their most difficult circumstances in life gives him a great sense of humility and purpose.

John says he finds Beasley Allen to be particularly unique considering the firm has remained steadfast in its core mission of helping others. He has a son, Jet, who attends Montgomery Academy. John is a member of First Baptist Church in Montgomery. He is a very good lawyer, who enjoys helping his clients in their cases, and he is totally dedicated to that work. We are most fortunate to have John with us.

XXIV. SPECIAL RECOGNITIONS

"END DISTRACTED DRIVING" CAMPAIGN LAUNCHED BY ALAJ

As a tribute for the 15th anniversary of "9/11," the American Association for Justice (AAJ) and the Alabama Association for Justice (ALAJ) announced a partnership with "End Distracted Driving" to inspire trial lawyers to give free presentations in schools to encourage students to make safe choices while driving and to be empowered, educated passengers. It should be noted that teenagers have the highest crash rate of any group in the United States.

A large number of Alabama trial lawyers located all across the state have already signed up to participate in the AAJ "Remember and Volunteer campaign," which commemorates the Plaintiff trial bar's volunteer response to 9/11.

Spain Park High School students in Birmingham were the first to hear the presentation and make the commitment to end distracted driving. It was reported that 380 seniors attended ALAJ President

Ken Riley's talk. Ken had this to say about the program:

Working together on this service project, trial lawyers have a chance to save young lives. Our organization is committed to increasing safety awareness, which will help prevent injuries and fatalities.

The Alabama Association for Justice is comprised of lawyers who are committed to the proposition of doing well by doing good. Those lawyers are fostering positive relationships with the public by serving and giving to others who are in need.

Distracted driving kills more than 5,000 people and injures nearly 450,000 more nationally each year. ALAJ is part of a national effort that will reach more than 100,000 drivers this year with the message to "End Distracted Driving." This will address a most serious safety issue that is causing deaths and injuries in our nation's highways. This is certainly a worthy project designed to make our highways safer and save lives.

Ginger Avery-Buckar is the Executive Director of ALAJ and she does an outstanding job. If you need more information on the project discussed above, or anything about the work of ALAJ, contact Ginger by phone at 334-262-4974 or email at ALAJ@alabamajustice.org.

XXV. FAVORITE BIBLE VERSES

Roman Shaul, a lawyer in our firm, says that Philippians 4:6-7 is his favorite. He says that the scripture makes it clear that God is always right there with us and never distant. Roman says he has relied on this passage through many difficult times.

Let your gentleness be obvious to everyone. The Lord is near. Be anxious for nothing, but in everything, by prayer and petition, with thanksgiving, present your requests to God. And the peace of God, which surpasses all understanding, will guard your hearts and your minds in Christ Jesus. Philippians 4: 6-7

Ashley Locklar, who works in our Accounting Section, sent in two verses

for this issue. She says regardless of what she faces God always gives her the guidance and strength that she needs. Ashley says trusting in God's will, whatever that may be, gives her great comfort and peace.

I can do all things though Christ, who strengthens me. Phil 4:11

For we live by faith, not by sight. 1 Cor. 5:7

Tara Oliver, a legal assistant in our Personal Injury & Products Liability Section, says that because our life on earth is temporary, we should do "good" while we are here. She furnished these two verses.

For our light and momentary troubles are achieving for us an eternal glory that far outweighs them all. So we fix our eyes not on what is seen, but on what is unseen. For what is seen is temporary, but what is unseen is eternal. 2 Corinthians 4:17-18

Let all bitterness and wrath and anger and clamor and slander be put away from you, along with all malice. Be kind to one another, tenderhearted, forgiving one another, as God in Christ forgave you. Ephesians 4:31-32

XXVI. CLOSING OBSERVATIONS

LAW 360 NAMES BEASLEY ALLEN AMONG TOP 10 BEST LAW FIRMS FOR AFRICAN-AMERICAN LAWYERS IN THE U.S.

Our law firm has been selected by Law360 as one of the 10 Best Law Firms for African-American lawyers in the entire country. I consider that to be a very high honor. The firm was recognized as having the highest percentage of African-American partners of any of the firms included on the list. We have always felt that it was very important to provide opportunities for African-American lawyers. We have actively supported programs of the Alabama Lawyers Association, and each year the firm takes two or more law clerks from that network. Our firm believes that diversity is both necessary and the American way.

We have African-American lawyers in each section of the firm. LaBarron Boone

was the first African-American lawyer to join the firm, having been recommended to the firm by the Dean of the University of Alabama law School. LaBarron was a tremendous addition to the firm and he is an outstanding trial lawyer. Kendall Dunson, another outstanding lawyer in our Personal Injury & Products Liability Section, was named Beasley Allen's Litigator of the Year for 2015. He has served as president of both the Alabama Lawyers Association and the Capital City Bar Association, and served as the first African-American President of the Montgomery County Bar Association. Kendall says Beasley Allen is proud of its stance on diversity, but we're more proud of the success of our African American attorneys. Each of us have distinguished ourselves as an excellent attorney, and an asset to the legal field.

To compile its Top 10 list, Law360 surveyed more than 300 U.S. firms with a U.S. component, about their overall and minority headcount numbers as of Dec. 31, 2015. Only U.S.-based lawyers were included in the survey. Firms are ranked based on three factors: the percentage of partners, both equity and non-equity, who self-identify as black; the percentage of non-partners who self-identify as black; and the number of attorneys at the firm who self-identify as black.

To obtain more information about Beasley Allen's African American lawyers and their tremendous record of successes, visit the attorneys page on the firm's website at www.beasleyallen.com/attorneys. For additional information about verdicts and settlements, contact Helen Taylor, Public Relations Coordinator, at Helen.Taylor@beasleyallen.com.

OUR MONTHLY REMINDERS

If my people, who are called by my name, will humble themselves and pray and seek my face and turn from their wicked ways, then will I hear from heaven and will forgive their sin and will heal their land.

2 Chron 7:14

All that is necessary for the triumph of evil is that good men do nothing.

Edmund Burke

Woe to those who decree unrighteous decrees, Who write misfortune, Which they have prescribed. To rob the needy of justice, And to take what is right from the poor of My people, That widows may be their prey, And that they may rob the fatherless.

Isaiah 10:1-2

I am still determined to be cheerful and happy, in whatever situation I may be; for I have also learned from experience that the greater part of our happiness or misery depends upon our dispositions, and not upon our circumstances.

Martha Washington (1732—1802)

The only title in our Democracy superior to that of President is the title of Citizen.

Louis Brandeis, 1937
U.S. Supreme Court Justice

The dictionary is the only place that success comes before work. Hard work is the price we must pay for success. I think you can accomplish anything if you're willing to pay the price.

Vincent Lombardi

XXVII. PARTING WORDS

I have mentioned on several occasions that at an early age all Americans are pushed very hard in all areas of life to compete and to win. We are continuously graded on our performances, and our accomplishments receive scores based on how we do. That scoring takes place in most every area of our lives. It's

not only in sports, but in school, on our appearance and in many other areas.

Once we move into the workplace, we continue to be graded on performance. As we all know, our work product is constantly being graded. I am in a line of work where juries keep score during my trials and give me a grade at the end. The hard work that takes place prior to starting a case and my performance during the trial play a huge part in the final result. That result—without a doubt—based on scoring by the jurors.

There is another area that I am familiar with where competition and scoring are involved. My daughter Julie participates in Cutting Horse Competition. She and her horses compete in shows and have to score extremely well in order to win. I have never fully understood the scoring system, but apparently it works very well. That is definitely another area where hard work and preparation dictate how the horse and rider will perform on "game day."

The Summer Olympics—recently completed—is a prime example of how highly skilled athletes are graded based on their performance. It's very obvious that the scorekeepers during the games are very tough on the athletes.

We live our lives every day competing in some manner. Our wins and victories in life should be ones that help others in some significant way. Instead of our successes being all about "I" and "me," they should also be very much about "others" who can benefit from what we accomplish. There have been a tremendous number of results in trials involving my law firm—especially in cases involving defective products—that have helped folks other than our clients. Significant safety improvements came about after these trials and as a result many lives were saved.

I am sure each of you can give examples of how accomplishments in your life have helped others. We learn in the Holy Bible that we are in fact our brother's keeper and that is very true and also needed in today's world. My prayer is for each of us to strive to be "difference makers for good" in the lives of others. Contrary to what some may say, we are in fact our brother's keeper.

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No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

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Jere L. Beasley, Principal & Founder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley's law firm, established in 1979 with the mission of "helping those who need it most," now employs over 75 lawyers and more than 175 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 35 years.



No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.

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Attorneys at law

helping those who need it most since 1979