



*The*  
**JERE BEASLEY REPORT**

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# I. CAPITOL OBSERVATIONS

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## BEASLEY ALLEN LAWYERS LEADING STATE ASSOCIATIONS

I am pleased to report that two Beasley Allen lawyers are now leading state legal associations. Frank Woodson, who practices in the firm's Mass Torts Section, was inducted as President of the Alabama Association for Justice (ALAJ) at the organization's annual meeting on June 16. Cole Portis, who heads the firm's Personal Injury and Products Liability Section, is completing his term as President of the Alabama State Bar (ASB). Cole will pass the gavel to Augusta S. Dowd of White Arnold & Dowd, PC, in Birmingham, at the ASB annual meeting, set for July 12-15.

It is the mission of ALAJ to make sure any person injured through another's misconduct or negligence can get justice in the courtroom. ALAJ works to eliminate civil justice restrictions and to strengthen the civil justice system so that everyone can have their day in court and equal access to justice.

Frank says, "As a 33-year member and now in my sixth year as an officer of the Alabama Association for Justice, I know firsthand the importance of the work we as trial lawyers do, not only for members, but for the citizens of the State of Alabama. As President, I will work closely with our staff, lobby team, officers and board of directors to keep the doors of the Courthouse open for our clients, educate and assist our members and fight to uphold the 7<sup>th</sup> amendment rights of the Citizens of our State."

Among Cole's major platforms as President of the ASB was a commitment to enhancing the Bar's engagement with lawyers to ensure that they have resources available to help them in their practice. Cole developed Lawyer University, which provided educational information, seminars and hands-on training to help lawyers better understand how to use technology to enhance their practice, to develop foundational business principles for running their practice as a successful business, and to be on the forefront to identify emerging areas of law.

Cole also worked to bring the Bar into closer collaboration with the courts to ensure that the rule of law is enforced,

and that the Bar is dedicated to serving the public through pro bono work, charitable stewardship and involvement in everyday affairs that impact the communities where we practice law.

Cole says, "I have been honored to represent all Alabama lawyers this year. We have emphasized the importance of lawyers to love their neighbors well by serving others. Lawyers in Alabama are gifted to serve. They serve their families, their clients and the public through the legal work they perform, and through their involvement in local communities."

Cole did an outstanding job as bar president and I am confident that Frank will also do an outstanding job as he takes over the reins at ALAJ. We are blessed to have these two lawyers in our firm.

Many of Beasley Allen's lawyers are in leadership roles in legal and community organizations locally, statewide, and at the national level. We are proud to be able to have lawyers willing to serve in this capacity. Their efforts will continue to ensure a strong network of resources for our colleagues in the legal profession, as well as for our community and state and actually for our nation.

## II. MORE AUTOMOBILE NEWS OF NOTE

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### NEW GM CAN FACE NONSWITCH CLAIMS FOR POST-SALE CONDUCT

The 2009 bankruptcy sale of General Motors (GM) does not shield the car-maker from non-ignition switch-related product liability claims that are based solely on GM's alleged conduct occurring after the sale. This was made clear in an order by U.S. Bankruptcy Judge Martin Glenn last month. This clears the way for millions of claims to proceed against the successor.

Judge Glenn determined that the post-bankruptcy version of GM, commonly referred to as "New GM," cannot use the "free and clear" sale provisions in its agreement to purchase the assets of its predecessor to avoid claims over a failure to issue a recall or warn about alleged vehicle defects other than its well-known ignition switch problems.

Judge Glenn ruled that "non-ignition switch Plaintiffs" may bring claims against New GM based solely on the company's wrongful conduct after the close of the bankruptcy sale. This ruling permits claims related to GM recalls other than its February and March 2014 ignition switch recalls to be heard in trial court proceedings.

The ruling expands on a 2015 bankruptcy court decision, affirmed by the Second Circuit Court of Appeals last year, that since the ignition switch defect did not fully come to light until after the bankruptcy sale, New GM could still face liability, even if the cars in question were put out by "Old GM." As a result, potentially millions of non-

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ignition switch Plaintiffs can now seek recovery for damages “associated with its sale of knowingly defective cars and its failure to timely recall the vehicles.”

GM has recalled more than 27 million vehicles that had the defective ignition switch. It appears this decision means that millions of claims involving other ignition switch defects, power steering defects, and defects in side impact air bag systems can be heard in the district court, unencumbered by the 2009 sale order.”

Judge Glenn’s ruling helps resolve a liability issue left unanswered last year. The Second Circuit, in its successor liability decision, left open questions such as “who is an ignition switch Plaintiff” and “what types of Plaintiffs” can bring independent claims against the company.

To address those so-called threshold issues, Judge Glenn has been sorting out how the Second Circuit ruling should be interpreted by asking for input from New GM and the buyers. The purchasers include Plaintiffs bringing claims over the ignition switch defect, some whose cars had other defects, and drivers or passengers who sustained accidents after GM’s 2009 bankruptcy sale. GM had contended that the only successor liability claims it should face beyond those made by car owners whose vehicles were subject to the February and March 2014 faulty ignition switch recall are those arising from a select group of Plaintiffs who appealed a set of 2015 bankruptcy court orders issued by retired judge Robert Gerber, addressing the permissibility of certain types of claims.

GM had claimed that any “non-ignition switch Plaintiffs” who failed to appeal from the bankruptcy court’s 2015 rulings lost the opportunity to bring their due process claims. But Judge Glenn said that his readings of the court’s earlier decisions reveal that the door was not closed for Plaintiffs with “truly independent claims,” or “those claims that could not have possibly been asserted before the bankruptcy sale.” Applying the Second Circuit’s formulation, Judge Glenn said the actions brought by Plaintiffs who were involved in accidents after the 2009 sale that were allegedly caused by “a non-ignition switch-related defect” are outside the scope of the sale order.

The threshold issue addressed by the court is tied to a specific case brought by the estate of an 8-year-old girl who died after a shifter in her family’s 2004 Chevrolet Suburban allegedly failed.

Judge Glenn’s ruling now allows that case to head to trial this month in a Connecticut federal court.

The bankruptcy is *In re: Motors Liquidation Co.*, (case number 1:09-bk-50026) in the U.S. Bankruptcy Court for the Southern District of New York.

Source: Law360.com

#### **GM ENDS NHTSA OVERSIGHT AFTER IGNITION SWITCH RECALL**

General Motors said on June 23<sup>rd</sup> it had ended a three-year-long consent order with the National Highway Traffic Safety Administration over the automaker’s delayed recall of vehicles affected by the ignition switch defect. Since the May 2014 consent order — following a record \$35 million civil penalty levied over the delayed recall—the automaker has met monthly with NHTSA. GM said it has proposed continuing monthly meetings with senior agency officials on field investigations, safety recalls and other issues.

GM started its first recall involving 619,122 vehicles in February 2014. Ultimately, millions of vehicles worldwide were recalled. Hundreds of deaths and injuries have been attributed to the design flaws, which vary from model to model. The automaker also paid \$900 million in September 2015 in a deferred prosecution agreement with the U.S. Department of Justice.

As of December 2015, before shutting down, GM’s ignition switch compensation fund had paid nearly \$600 million on 399 eligible death and injury claims. Reportedly, GM has settled more than 1,000 lawsuits over the issue. Our firm settled a large number of ignition switch defect claims, with a number of them outside the fund. All that happened in this litigation started with the excellent work by Lance Cooper who represented the Melton family in Georgia and discovered the ignition switch problem. As I have said before Ken and Beth Melton are the real heroes in this sad chapter in GM’s history. Their daughter Brooke was killed in a collision caused by the defect that GM was well aware of and had hidden from NHTSA and the public.

Source: Law360.com

#### **GM HAS SETTLED MORE IGNITION SWITCH CLAIMS**

General Motors LLC has agreed to a private, confidential settlement that will

resolve hundreds of claims against the automaker involving the defective ignition switch. GM reported the settlement in a letter to U.S. District Judge Jesse Furman, the federal judge overseeing the multidistrict litigation. The letter said 203 plaintiffs with claims pending in the MDL—including a bellwether trial candidate—are among those who would be able to participate in the settlement. It could also resolve hundreds of state court claims.

The plaintiffs affected by the settlement are represented by The Potts Law Firm, Junell & Associates PLLC and the Burnett Law Firm. The case is *In re: General Motors LLC Ignition Switch Litigation*, (case number 1:14-md-02543) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

#### **DUTCH AND ENGLISH DRIVERS TEAM UP TO SUE VW OVER ‘DIESELGATE’**

Around 220,000 car drivers in the Netherlands, England and Wales have joined forces in what could become a pan-European lawsuit against German carmaker Volkswagen (VW) seeking compensation over its “dieselgate” emissions scandal. Marcus Sinclair, a United Kingdom law firm, along with Dutch Foundation “Stichting Volkswagen Car Claim,” a U.S.-style class action on behalf of an estimated 180,000 Dutch VW car owners, have teamed up in this litigation. It’s believed this could spark a wave of coordinated litigation across Europe.

About 11 million VW cars worldwide were fitted with software to cheat diesel emissions tests that are designed to limit car fumes blamed for respiratory diseases and global pollution. As we have reported, the automaker has agreed to spend up to \$25 billion in the United States to address claims from owners, environmental regulators, states and dealers and has offered to buy back about 500,000 polluting U.S. vehicles. However, VW has not reached a similar deal in Europe and faces billions of euros in claims from customers and investors.

The automaker has offered European drivers a software update for all affected vehicles, but lawyers say this does not resolve the problem and they are demanding adequate compensation. The Dutch Foundation, which says it has been trying to reach a “reasonable settlement” with VW, Europe’s largest car manufacturer, since 2015, said it was

also “cooperating” with partners representing drivers in Austria, Germany and Switzerland, and was in talks with others in Spain, France, Italy, Poland, the Czech Republic and Scandinavia. Guido van Woerkom, director of the foundation, stated:

*We are delighted to be teaming up with Harcus Sinclair UK Limited, who have done an excellent job in paving the way for car owners to seek redress from VW through the courts.*

The expanding lawsuit is seeking compensation for damage suffered by VW, Audi, SEAT, Skoda and/or Porsche car owners, alleging VW and supplier Bosch were responsible for the sale of cars that breached toxic nitrogen oxides emissions rules.

Harcus Sinclair filed its lawsuit in January 2016. Thus far they have signed up about 41,000 English and Welsh VW drivers. A London trial is expected in early 2019. VW said it took the trust of its customers very seriously, but it claims no legal basis for consumer lawsuits. The carmaker says that’s because its plans to fix cars in Europe, coordinated with regulators and price fluctuations for diesel cars, were within a “normal range.” The company said:

*To date, the owners of the 8.5 million affected European cars remain in the cold. All vehicles affected are and have been technically safe and roadworthy. They can be driven on roads without any limitations and can be sold without loss in residual value. Even if we were to hold talks with law firms we would maintain this position.*

It will be most interesting to see how this expanded litigation will proceed. I would have to believe VW would make a sincere effort to settle at any early stage.

Source: Reuters

#### **ANOTHER POTENTIAL VW EMISSIONS SCANDAL— DIESELGATE 2.0**

According to German press reports, Volkswagen has been exposed for operating a separate and more sophisticated emissions cheat program in its diesel powered Porsches. Software in Porsche’s Cayenne diesel SUV detects whether the vehicle is in a testing lab or on the road, Germany’s Spiegel Maga-

zine reported after consulting German software experts and product safety inspectors. The magazine cites Martin Führ, Professor for administrative and environmental law, who declared that Porsche is using “a defeat device that is illegal according to EU law.”

Der Spiegel was alerted to the new and improved “Dieselgate 2.0” software by a whistleblower who characterized the new code as “working inconspicuously and much smarter than the crude software that started the scandal in the U.S.A. back in 2015.”

According to the whistleblower[s] the Porsche Cayenne has two driving modes, one for ordinary road conditions and one for closed environment lab testing. In test mode, the car selects higher gears and optimizes engine output for reduced fuel consumption and reduced exhaust output. However, says Der Spiegel, “in 99% of all situations” the Cayenne picks a more aggressive, higher polluting program. In that mode, the Cayenne emitted 68% more NOx than allowed by EU law, according to independent product safety testing agents.

Where VW’s 2.0/3.0L cheat software studied steering angle to detect road vs dynamometer test conditions, the Dieselgate 2.0 software reportedly registers g-forces and angle of attitude. The vehicle’s default startup setting is clean mode. And the engine computer holds that setting until the vehicle is moved. For example, subjecting the vehicle to lateral turning forces or attitude change triggers the computer to exit clean mode. According to reports, lifting the nose of the vehicle to simulate an incline triggers the Cayenne computer to switch into dirty mode and maintain that setting until powered off.

The new scandal, which is only beginning to unfold, comes on the heels of the German government accusing Audi of cheating on emissions tests with its top-end models. The involved models (Audi A7 and A8) share diesel engines with the Porsche Cayenne. Audi claims it committed an unintentional technical error.

Furthermore, the scandal at Porsche also could affect Volkswagen’s new CEO Matthias Muller as he was CEO of Porsche from 2010 through late 2015. Porsche introduced the current model Cayenne in 2010.

Source: Forbes

#### **8<sup>TH</sup> CIRCUIT UPHOLDS TOYOTA SUDDEN ACCELERATION VERDICT**

The Eighth Circuit Court of Appeals has upheld a \$11.4 million verdict awarded in a suit involving an unintended acceleration defect that caused a fatal Toyota car crash. The appellate panel found that the jury was presented with sufficient evidence to determine that the 1996 Camry involved in a 2006 crash, which killed three people and left two injured, contained a design defect.

The panel rejected Toyota’s argument that the lower court abused its discretion in allowing three witnesses to testify about similar incidents of sudden acceleration in other 1996 Camrys, saying the judge was in the best position to decide if that evidence would be “unduly distracting” to the jurors in the case.

The ruling stems from a 2006 accident, when driver Koua Fong Lee rear-ended an Oldsmobile after exiting a highway. The Oldsmobile’s driver, Javis Trice-Adams Sr., and his son were instantly killed. Devyn Bolton, a relative and a passenger in the Oldsmobile became a quadriplegic as a result of the crash and died 18 months later. Trice-Adams’ father and daughter were also injured in the accident.

Lee was imprisoned for more than two years after being found guilty of negligent homicide in 2008, but was released when his conviction was overturned because of the fact that Toyota had recalled millions of vehicles due to a defect that could cause unintended acceleration.

The Trice-Adams family sued Toyota in 2010, alleging a defect in the Camry caused it to suddenly accelerate. Lee and his family intervened as Plaintiffs later that year. It was contended in the lawsuit that the accelerator got stuck in a “near wide-open position.”

Regarding the evidence of other similar incidents, the Eighth Circuit declined to hold a series of “mini-trials” regarding their admissibility, saying instead that the record showed that circumstances of those incidents were substantially similar to the 2006 accident. The appeals court did find that the lower court erred in awarding the Trice-Adams family prejudgment interest.

Trice is represented by Eric J. Magnuson of Robins Kaplan LLP, W.B. Markovits, Paul M. DeMarco, Louise M. Roselle and Eric J. Kmetz of Markovits Stock & DeMarco LLC, and Kenneth R. White of the Law Office of Kenneth R. White PC.

Lee is represented by Larry Espel and Xiaochuan Kevin Zhao of Greene & Espel, Rudy Gonzales Jr., Robert C. Hilliard, John M. Martinez, Thomas Pinedo, Marion M. Reilly, Catherine D. Tobin and Austin Webber of Hilliard Munoz Gonzales LLP, and Brent Schafer of Schafer Law Firm.

The case is *Adams et al. v. Toyota Motor Corp. et al.*, (case numbers 15-2507, 15-2511, 15-2516, 15-2635, 15-2636, 15-2637 and 15-2638) in the U.S. Court of Appeals for the Eighth Circuit.

Source: Law360.com

#### **NHTSA INVESTIGATING AIR BAG LIGHT ISSUE IN JEEP LIBERTYS**

The National Highway Traffic Safety Administration (NHTSA) is looking into complaints from drivers that the air bag computer control in about 105,000 model year 2012 Jeep Liberty vehicles can fail. This failure could stop the air bag system from deploying correctly in a crash. Drivers have reported that the air bag warning light stays on, allegedly because the occupant restraint controller module failed. NHTSA said that its Office of Defects Investigation has identified 44 owner questionnaire reports for 2012 Jeep Liberty SUVs stating that the warning light was on while the vehicle was running. NHTSA stated: "A preliminary evaluation has been opened to assess the scope, frequency, and safety-related consequence of the alleged defect."

So far there are no injuries reported to the NHTSA associated with the alleged defect. This is not the first time that agency has investigated air bag issues in Jeep vehicles. In 2015 NHTSA launched a probe into about 630,000 Jeep Wranglers over the possibility that an electrical problem could prevent driver's-side air bags from deploying on impact. NHTSA widened the probe after an initial investigation found a total of more than 2,000 complaints over an air bag light that possibly indicated a faulty clockspring in the driver's-side air bag. An open clockspring circuit would prevent deployment of the driver air bag, the document said. However, the agency said it had not receive reports of accidents or injuries.

Source: Law360.com

#### **CONGRESS MAY OVERRIDE STATE RULES ON SELF-DRIVING VEHICLE TESTING**

Congress is working on national self-driving vehicle legislation that could replace state-by-state rules and make it easier for automakers to test and deploy the technology. Senior U.S. House and Senate lawmakers discussed this development last month with Reuters.

Rep. Greg Walden, the chairman of the House Energy and Commerce Committee, said he planned to unveil a package of legislation to overhaul federal rules governing self-driving vehicles. "We are getting very close. I think it's a good package. We have put a lot of work into it," Rep. Walden said in an interview, adding that there was "good bipartisan agreement" and he hoped to unveil and take up the package relatively soon.

Senator John Thune, a Republican who chairs the Senate Commerce Committee, is also working on a legislative self-driving proposal with Senator Gary Peters, a Michigan Democrat. "We are not there yet but we are getting closer," Senator Thune said. The two Senators spoke jointly to Reuters on June 7 after getting a ride in a self-driving Audi, a unit of Volkswagen AG.

A number of companies, including Alphabet Inc. and Ford Motor Co., are pursuing automated technologies and want unified federal regulations to replace outdated rules. They want to make it simpler to develop and eventually sell the technology across the country. This spring, Republican staff drafted a summary of 16 potential legislative proposals on federal reforms and regulations that they circulated to automakers. This draft was seen by Reuters and the summary includes:

*One proposal under consideration would to allow the U.S. Transportation Department to exempt up to 100,000 autonomous vehicles from current safety standards, which were written on the assumption responsibility for a car's operation rested with the human driver. The existing motor vehicle safety standards bar the sale of vehicles without steering wheels and gas pedals, for example. Alphabet Inc's Waymo unit has called for those rules to be changed.*

*Another proposal would prohibit a state from restricting testing by a manufacturer of up to 250 vehicles and comes as automakers*

*have sparred with California over revisions to its self-driving car testing rules.*

Senator Thune has said he wanted to avoid a "patchwork" of regulations from 50 different states on self-driving cars and look at cybersecurity and other issues. Senator Walden said:

*The key thing is to make sure we stay in the lead on the innovation that there aren't unnecessary roadblocks in the way, balancing that with safety.*

The U.S. Transportation Department has said it would unveil revised self-driving guidelines within the next few months, responding to automakers' calls for regulations to sanction costly efforts to put autonomous vehicles on the road. The voluntary guidelines would provide direction to states on self-driving cars as Congress works to set more permanent rules to oversee autonomous vehicles. But legislation might not be approved this year. States and automakers are seeking guidance from regulators in the interim.

Vehicle crashes annually kill more than 35,000 people on U.S. roads and injure 2.4 million. Sen. Walden said the goal was to get self-driving cars on the roads in big numbers so in a generation people would say: "What a bunch of barbarians—they drove themselves? Are you kidding me? And look at how many died every year and they thought that was acceptable?"

It will be interesting to see how the proposed legislation fares. Obviously, lots of folks will be following the bills closely. I am not quite ready to accept this technology as being ready for the U.S. market. Hopefully, the automakers are not "outkicking their coverage," to borrow some terminology from my football days.

Sources: *Insurance Journal* and Reuters

#### **DRIVER IN TESLA CRASH IGNORED NUMEROUS WARNINGS**

The driver behind the wheel of a Tesla Model S in self-driving mode when he died in a May 2016 accident was warned seven times to put his hands on the wheel, according to documents released last month by the National Highway Traffic Safety Administration.

NHTSA uploaded more than 500 pages of documents related to the accident, which is believed to be the first

involving a death with the car on self-driving mode. The documents range from studies on traffic patterns to interviews with the family of driver Joshua Brown and a report on what happened during the accident. One part of the report states that six times Brown was warned to put his hands on the wheel through “visual cues,” and then once with a “chime sound.”

In an accompanying press release, NHTSA said more documents will be added to the National Transportation Safety Board’s (NTSB) docket. The agency warned that conclusions were to be made based on the raw data. The release states:

*The docket contains only factual information collected by NTSB investigators; it does not provide analysis, findings, recommendations, or probable cause determinations. No conclusions about how or why the crash occurred should be drawn from the docket. Analysis, findings, recommendations, and probable cause determinations related to the crash will be issued by the board at a later date.*

The crash took place May 7, 2016, in Florida. It appears that Brown’s car struck a tractor-trailer, and his car was traveling at 74 mph. The truck was meeting the Brown car on the highway. The tractor-trailer was turning left across the eastbound highway and onto a local road when it was hit by the Tesla, which went under the semitrailer. The Tesla then traveled alongside the roadway, hitting a drainage culvert and two wire fences before breaking a utility pole, rotating and stopping in the yard of a private home some 910 feet away from the semitrailer, the report states.

The roof of the Tesla was “sheared off” by the semitrailer. Brown died in the crash. There were no passengers in the Tesla. The driver of the semi-truck wasn’t injured, but for some reason it appears he refused to cooperate in the investigation. It should be noted that as part of this investigation, NHTSA in January said there was no safety defect involved in the Tesla that would require a recall.

Source: Law360.com

#### **TAKATA FILES FOR BANKRUPTCY**

After weeks of speculation, Japanese airbag maker Takata Corp. has filed for

bankruptcy protection in Japan and the U.S. Frankly, the odds were definite favoring bankruptcy because of the weight of the world’s biggest automotive recall. Takata said it would sell key assets to U.S. supplier Key Safety Systems. Key Safety, based in Sterling Heights, Mich., confirmed that it would buy “substantially all” of Takata’s global assets and operations for \$1.59 billion. The sale will not include some operations related to Takata’s scandal-plagued business in ammonium nitrate airbag inflators subject to the global recall that brought the company to the brink of collapse. The inflators were prone to exploding with too much force and spraying vehicle cabin’s with metal shards. At least 16 deaths and 180 injuries worldwide were linked to the airbags.

In February, Takata pleaded guilty to wire fraud charges in the U.S. for systematically withholding information about the defects and manipulating inflator test data. In January, a federal grand jury indicted three former Takata executives for criminal wrongdoing in connection with the safety defect. A month later, Takata agreed to a \$1 billion criminal penalty. Key Safety said the ammonium nitrate airbag inflator operations would be run by a reorganized Takata following the closing of the transaction—and they would eventually wind down. Takata said it would keep producing the components through March 2020 to ensure a steady supply of replacement inflators for the millions being recalled.

Because the bankruptcy news came just as this issue was being sent to the printer, we will hold further discussion of this development and its overall effect for the August issue. I will say that no informed persons were really surprised that Takata filed for bankruptcy. However, it’s critically important that Takata’s victims be protected as this matter evolves.

### **III. DRUG MANUFACTURERS FRAUD LITIGATION**

#### **OPIOID MANUFACTURERS UNDER INVESTIGATION BY STATE ATTORNEYS GENERAL**

Attorneys General throughout the United States have launched a combined probe into opioid manufacturers’ marketing and sales tactics in order to determine whether, and to what extent, drugmakers have contributed to the country’s worsening opioid epidemic. A key issue in the investigation is the allegation that these drug manufacturers have recklessly and unlawfully pushed addictive opioids on the unsuspecting public by downplaying opioids’ risks of addiction and dependence.

The Centers for Disease Control (CDC) estimates that the opioid epidemic killed more than 33,000 people in 2015. The bipartisan group of Attorneys General are seeking to uncover whether drug manufacturers’ pursuit of higher profits prolonged this epidemic, resulting in the loss of thousands of lives that could otherwise have been prevented through honest and truthful communications regarding the possible dangers of these powerful medications.

Multiple lawsuits have already been filed against the various opioid manufacturers. Mississippi, Ohio, and Missouri have filed a suit and I suspect other states will soon do the same.

Opioid manufacturers oppose these claims, arguing that all opioids carry FDA-mandated warnings about the known risks of the medication on every product label. However, drugmaker Teva agreed last month to pay \$1.6 million to settle a lawsuit brought by California’s Santa Clara and Orange counties in 2014.

The bipartisan group, comprised of attorneys general from the majority of states, will use resources including subpoenas for documents and testimony during its investigation. Illinois Attorney General Lisa Madigan, in a statement, said:

*I want to know whether drug companies, seeking higher profits, have recklessly and unlawfully pushed addictive opioids. We must hold drug companies accountable for their role in the epidemic levels*

*of opioid overdoses and deaths in Illinois and around the country.*

Attorneys general from Alabama, Illinois, Pennsylvania, Colorado, Texas, Tennessee and Massachusetts are among those involved in the investigation.

The Ohio suit, filed in an Ohio state court, alleges drugmakers Allergan, Endo, Johnson & Johnson unit Janssen, Purdue and Teva unit Cephalon exacerbated the epidemic by downplaying opioids' risks of addiction.

The complaint blames the companies for fueling an epidemic that has killed thousands of Ohio residents in recent years. The lawsuit filed by state Attorney General Mike DeWine accuses the defendants of violating state law by making false and misleading statements about the risks and benefits of opioids. Their marketing allegedly included medical journal advertising, sales-representative statements and the use of "front groups" to provide information that downplayed the risks and inflated the benefits of certain opioid formulations. Attorney General DeWine said in a statement:

*These drug manufacturers led prescribers to believe that opioids were not addictive, that addiction was an easy thing to overcome, or that addiction could actually be treated by taking even more opioids. They knew they were wrong, but they did it anyway—and they continue to do it. Despite all evidence to the contrary about the addictive nature of these pain medications, they are doing precious little to take responsibility for their actions and to tell the public the truth.*

New York's Suffolk County, two California counties and Chicago have made similar allegations against the drugmakers in recent years.

Allergan PLC sells Kadian, Norco and several generics owned by Teva Pharmaceutical Industries Ltd.; Cephalon Inc. sells Actiq and Fentora; Purdue Pharma sells OxyContin, MS Contin, Dilaudid, Butrans, Hysingla and Targiniq; Endo Health Solutions sells Percocet, Percodan, Opana and Zydone; and Janssen sells Duragesic and Nucynta.

If you would like more information about these cases, you can contact Rhon Jones, who heads up our Toxic Torts Section. Rhon can be reached at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com.

Sources: Law360, StamfordAdvocate.com

## IV. PURELY POLITICAL NEWS & VIEWS

### **AN EARLY LOOK AT THE ALABAMA SENATE RACE**

A full field of candidates hope to represent Alabama in the U.S. Senate. The field in the special election includes 11 Republican candidates and 8 Democrats. One of the candidates is Luther Strange, who was selected by former Gov. Robert Bentley to fill the seat when President Trump made Jeff Sessions the U.S. Attorney General. Here is how the race shakes out now:

#### **Republicans**

- Roy Moore—The former Alabama Chief Justice has been elected by the people twice. According to most "political experts," he appears to be fairly certain to be in a run-off.
- Luther Strange—The former Alabama Attorney General was appointed by former Gov. Robert Bentley—is spending lots of money and appears to be DOING well financially.
- Alabama State Senator Trip Pittman—Although already active in politics, Sen. Pittman says he is proud of the fact that he is a successful businessman. He is the owner of a company that sells tractors. He feels this experience sets him apart from other candidates. Sen. Pittman hails from South Alabama, the town of Montrose, between Daphne and Fairhope, and he will be a factor for that reason.
- U.S. Representative Mo Brooks—Currently he represents the Huntsville area in Congress, being elected to the House in 2011. It appears Rep. Brooks will also be well funded. He will also be a factor in the race being from North Alabama and being well financed.
- Dr. Randy Brinson—Former head of the Christian Coalition of Alabama. Founder and chairman, "Redeem the Vote." Dr. Brinson runs on a platform positioning himself as a "voter advocate and

faith leader" in opposition to what he terms "career politicians."

- Dominic Gentile—A newcomer to politics, this candidate has never run for office before. He founded and runs his own company, managing commercial cleaning businesses throughout the state. He supports term limits, a flat tax, and says he will refuse campaign donations from "special interests."
- Bryan Peebles—Another political newcomer, he is a Birmingham businessman, territory manager for Heartland Payment Systems and President and CEO of his own business, Peebles Consulting. Peebles says he is a fiscal conservative and believes in small, limited government.

#### **Democrats**

- Doug Jones—He is a former U.S. Attorney and now is in a private practice, Doug is best known for successfully prosecuting those responsible for the 1963 Sixteenth Street Baptist Church bombing, which killed four young girls. Doug says recent political leadership has "embarrassed" the state, and feels politicians are not focused on the real concerns of the people, including jobs, health care and education. If any Democrat can win statewide, Doug would be that candidate.
- Michael Hansen—Billed as an "unexpected" candidate by AL.com, Hansen is the executive director of environmental advocacy group Gasp. He also is openly gay. He says he decided to enter the race because he believes Alabama politics needs "new blood." He says he supports universal health care, policies to streamline immigration, advance renewable energy, and protect LGBTQ people from discrimination.
- Robert Kennedy, Jr.—He is referred to as a "mystery" candidate with a famous name by AL.com. As of press time, no additional information was available, other than Mr. Kennedy is from Mobile.

- Jason Fisher—He hails from Orange Beach, where he is vice president and senior consultant at Ruffalo Noel Levitz, a direct marketing company. He told AL.com his reason for running is that he feels the people have lost confidence in their elected officials. He feels Alabama will benefit from having a representative not tied to lobbying groups in D.C.

I have previously predicted a very low turnout for this special election with the primary being held on August 15. If necessary, the run-off will be on September 26. Thus far, nothing has happened to make me change my mind in that regard. It may well be the lowest turnout ever for a U.S. Senate race in Alabama.

Sources: AL.com and WAAY-TV

## V. COURT WATCH

### **GOVERNOR IVEY APPOINTS WILL SELLERS TO THE ALABAMA SUPREME COURT**

Governor Kay Ivey has appointed Will Sellers to the Alabama Supreme Court as an Associate Justice. Will previously served as a Partner in the Montgomery office of the Balch & Bingham law firm. Gov. Ivey had this to say in making this appointment:

*I am extremely pleased to appoint Will Sellers to the Alabama Supreme Court. I cannot think of an individual who is more qualified, capable and who exemplifies the qualities of a true public servant. His conservative principles and commitment to the rule of law along with his commitment to his family, church and community are foundations that make him uniquely qualified for the position of Associate Justice.*

Will is well known for his involvement in numerous civic organizations and professional associations. He is the past President of the Rotary Club of Montgomery, past Chairman of the Montgomery Area Business Committee for the Arts, past Chairman of the United Way Campaign in the Montgomery Area and past Chairman of the YMCA of Greater Montgomery. Will is an active member of Trinity Presbyte-

rian Church. He currently serves on the Alabama State Council on the Arts, as Chairman of the Fair Ballot Commission and as the community liaison with the International Officers School at Maxwell Air Force Base.

Will is a native of Montgomery, Alabama. He received a Bachelor of Arts Degree from Hillsdale College with high honors in 1985 and his Juris Doctorate from the University of Alabama School of Law in 1988. In addition, Will received his LL.M in Taxation from New York University in 1989. A major part of his law practice has involved litigation against the Internal Revenue Service and the Alabama Department of Revenue.

Will is married to the former Lee Grant and they have three children: Arthur, age 23, George, age 22, and Caroline, age 18. Will will fill the seat previously held by Chief Justice Lyn Stuart. His appointment was effective immediately.

### **MALPRACTICE DAMAGE CAPS STRUCK DOWN BY FLORIDA SUPREME COURT**

The Florida Supreme Court ruled last month that a law limiting pain-and-suffering damages in medical malpractice cases is unconstitutional, rejecting a controversial change that the Legislature and then-Gov. Jeb Bush approved in 2003. The Justices were sharply divided, with the four-member majority finding that the caps on “non-economic” damages violated equal-protection rights.

The majority also disputed that a malpractice insurance “crisis” exists—a justification that lawmakers used in approving the limits. The majority opinion stated:

*We conclude that the caps on non-economic damages ... arbitrarily reduce damage awards for plaintiffs who suffer the most drastic injuries. The majority opinion was shared by Chief Justice Jorge Labarga and justices Barbara Pariente, R. Fred Lewis and Peggy Quince. We further conclude that because there is no evidence of a continuing medical malpractice insurance crisis justifying the arbitrary and invidious discrimination between medical malpractice victims, there is no rational relationship between the personal injury noneconomic damage caps*

*... and alleviating this purported crisis.*

Justice Ricky Polston, in a dissent, joined by justices Charles Canady and Alan Lawson, said the majority was overstepping its role.

The ruling, which came in a case from Broward County, dealt with malpractice lawsuits that allege personal injuries. It was effectively an extension of a 2014 Supreme Court ruling that found caps unconstitutional in wrongful-death malpractice cases. Lawmakers and Gov. Bush spent months debating caps and other changes in the malpractice system in 2003. Doctors were claiming there was a crisis of high insurance premiums.

The damage limits would definitely hurt injured patients. Gov. Bush ultimately signed the law that capped damages at different amounts, depending on factors such as the numbers of claimants in lawsuits and the types of Defendants.

The Broward County case decided by the Supreme Court began after dental assistant Susan Kalitan went into surgery in 2007 for carpal-tunnel syndrome and ended up with a perforated esophagus because of tubes inserted into her mouth and esophagus during the anesthesia process.

Ms. Kalitan filed a lawsuit in 2008 against the North Broward Hospital District and other Defendants. A jury awarded \$4 million in non-economic damages, but the amount was reduced by about \$2 million because of the caps in the 2003 law. The 4<sup>th</sup> District Court of Appeal ruled that the damage caps were unconstitutional, pointing to the Supreme Court’s 2014 decision in the wrongful-death case.

Source: [Orlandosentinel.com](http://Orlandosentinel.com)

## VI. THE NATIONAL SCENE

### **JEFF SESSIONS ENDS SETTLEMENTS THAT REQUIRE THIRD-PARTY DONATIONS**

Attorney General Jeff Sessions issued a memo last month ending the practice of the U.S. Department of Justice (DOJ) requiring big businesses to include a donation to an unrelated third party in settlement agreements. The DOJ considered the donations a way to offset

damages caused by the alleged offenders. An example of how the practice worked involved the multi-billion-dollar settlement agreement related to the 2008 housing market meltdown tied to subprime mortgage lending. The DOJ required financial institutions, including Citigroup and Bank of America, to include millions of dollars in donations to nonprofits. Jeff stated in the memo:

*Effective immediately, department attorneys may not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any nongovernmental person or entity that is not a party to the dispute.*

The memo said further that any settlement funds in these types of cases should go to the U.S. Treasury Department or directly to affected victims. The new policy states restitution would only be allowed to go to directly remedy “the harm that is sought to be addressed,” and that certainly sounds good.

Advocates backing the existing policy say the third-party donations do affect victims of the alleged wrongdoing. For example, the donations in the mortgage fraud litigation benefited the communities that were harmed by the housing market collapse by supporting organizations that work to provide affordable housing. Similar third-party donations required Volkswagen, after admitting it was cheating on emissions tests, to donate part of its \$4.3 billion criminal and civil penalties to pay for environmental remediation and to invest in electric vehicle research and development.

Under President Barack Obama, the Department of Justice required millions of dollars in donations to legal aid funds and nonprofits like Habitat for Humanity and NeighborWorks America as part of a series of multibillion-dollar settlements with Bank of America, Citigroup and others related to the 2008 housing market meltdown. The donations, and others like them, were considered by the DOJ as a way to offset damages caused by the alleged offenders.

A prime example would be the donations from Bank of America as part of its \$16.65 billion settlement were described at the time as helping communities recover from the financial crisis

by supporting affordable housing. Unfortunately, some Republicans and a number of right wing groups don't like the practice, calling the payments to third parties “slush funds,” and accusing the DOJ of steering the money toward liberal activist groups. I suppose they believe Habitat for Humanity is a liberal group. For the record—I don't!

A bill in the U.S. House sponsored by Virginia Republican Bob Goodlatte, the “Stop Settlements Slush Funds Act,” would legally prohibit all federal agencies from including payments to third parties in settlement agreements. Rep. Goodlatte introduced a similar bill last year that passed the House, but failed to get a vote in the Senate.

Proponents of the existing policy were totally against Jeff's move. Amy Spitalnick, press secretary for New York Attorney General Eric Schneiderman, told Law360 that “Attorney General Sessions' new policy is ill-advised and ignores the tens of thousands of families who were helped by housing service providers across the country in the wake of the financial crisis.” I really believed that the old policy was a good one. Hopefully, Jeff will have a change of heart.

Sources: Law360.com and CNBC

## VII. THE CORPORATE WORLD

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### **NEGLIGENT AUDITS COULD LEAD TO BIG LIABILITY**

The 2008 financial crisis has been in the news a lot recently, albeit the news is usually buried in the Business section of the newspapers. International accounting firm PwC was facing a potential liability of \$5.5 billion when it settled a case last year for allegedly defective audits it conducted for Colonial BankGroup, Inc., the parent company of Colonial Bank, which collapsed in 2009.

PwC was facing potential liability of \$5.5 billion in a suit brought by the bankruptcy trustee for Taylor, Bean & Whitaker Mortgage Corp., for failing to detect a fraudulent scheme perpetrated by the company. In PwC's role as auditor for Colonial, it failed to detect this scheme, which involved Colonial's purchase of mortgage loans from Taylor

Bean that were worthless, either because they did not exist or were otherwise impaired. In an interesting twist, PwC did not conduct an audit of Taylor Bean. However, it could have ended the fraud had it discovered that the loans purchased by Colonial from Taylor Bean were worthless.

These fraudulent sales ultimately led to the demise of both Taylor Bean and Colonial. The trustee for Taylor Bean and PwC recently settled the Trustee's claim for an undisclosed amount. PwC is currently facing a similar lawsuit in Alabama brought by the Federal Deposit Insurance Corporation (FDIC) for the same scheme. At the center of the lawsuit is the depth of auditor's role in conducting an audit.

The Public Company Accounting Oversight Board, which regulates the performance of audits of public companies, requires that the auditor “obtain evidence about whether the financial statements are free of material misstatement, whether caused by error or fraud” before issuing an unqualified audit opinion. Yet the audit staff members conducting the audit of Colonial reportedly were undertrained. For example, PwC was said to have assigned an intern to review collateral for billions of dollars of loan. The Plaintiffs allege that PwC was in no position to express an opinion, based on that sort of conduct.

If you need more information on this subject, contact Jeff Price, a lawyer in our firm, at 800-898-2034 or by email at [Jeff.Price@beasleyallen.com](mailto:Jeff.Price@beasleyallen.com).

Sources: *Miami Herald*, Bloomberg.com, ft.com

## VIII. WHISTLEBLOWER LITIGATION

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### **TRUMP'S EXECUTIVE ORDER CONTRADICTS NEW LAW AND THREATENS AMERICAN SAFETY**

In recent years, Americans have been plagued with a series of auto defect scandals that have resulted in massive recalls, such as the Takata exploding air bags, Volkswagen emission cheat devices, Toyota's sudden acceleration cases, and General Motors faulty ignition switches, just to name a few recent scandals. In 2015 alone, nearly 900 recall campaigns were initiated, which

affected more than 51 million vehicles.<sup>1</sup> As a result, Congress enacted the Motor Vehicle Safety Whistleblower Act (MVSWA) with bipartisan support on Dec. 4, 2015. The Act was desperately needed to encourage whistleblowers to report serious violations of federal vehicle-safety laws and reward courageous whistleblowers with a monetary award and retaliatory protection from employers.

Upon the statute's enactment, the Department of Transportation (DOT) Secretary was provided 18 months to promulgate regulations detailing the new whistleblower program, akin to the similar Securities and Exchange Commission (SEC) and Internal Revenue Service (IRS) Whistleblower Programs. Therefore, these regulations informing automotive-safety whistleblowers on how to submit tips were due June 4, 2017. However, the DOT Secretary failed to issue the required regulations. This is likely a consequence to the Trump Administration's executive orders on new regulations.

On Jan. 30, 2017, President Trump signed Executive Order 13771, requiring two prior regulations be identified for elimination for every one new regulation issued.<sup>2</sup> The White House claims the executive order will cause the executive branch to be more fiscally responsible and prudent. However, public interest groups have raised serious concerns regarding the constitutionality of such an order and the negative effects it will have on public health and safety.<sup>3</sup>

In a lawsuit filed in the United States District Court for the District of Columbia on Feb. 8, 2017, three public interest groups filed suit against President Trump and his Executive administrators for exceeding constitutional authority, violating executive duty under the Take Care Clause, and for directing federal agencies to engage in unlawful actions that will cause harm to countless Americans.

The lawsuit accurately claims that the President has effectively blocked the

issuance of and forced the repeal of regulations necessary to protect the health and safety of Americans by mandating two regulations be eliminated for every one regulation issued. Additionally, when considering which regulations to repeal, agencies are instructed to choose two regulations that will offset the costs of the one new regulation. The executive order makes no mention in considering the benefits or harm to public welfare when considering the elimination of a regulation.

Automobile recalls due to safety defects have continuously climbed to record highs since 2014.<sup>4</sup> As a result, Congress worked diligently to pass a bipartisan act that would aid in lowering incidents of safety defects and protect the American people. However, unless the DOT Secretary promulgates the regulations required under the statute to encourage whistleblowers to come forward, little if any progress will likely be made and American safety will continue be in jeopardy. In order to combat the rising trend of automobile defects, it is imperative that the Trump Administration and DOT Secretary act in the best interest of American citizens, and in accord with the Motor Vehicle Safety Whistleblower Act by issuing the regulations required by the Act.

The Motor Vehicle Safety Whistleblower Act is in effect and potential whistleblowers should act quickly in order to timely file a tip with the Department of Transportation. Therefore, it is highly recommended that potential whistleblowers contact a lawyer familiar with the current status of the law. Beasley Allen has a team of lawyers dedicated to whistleblower laws such as the SEC, Commodity Futures Trading Commission (CFTC), and IRS whistleblower programs, and the False Claims Act. Feel free to contact one of the lawyers on our Whistleblower Litigation Team: Andrew Brashier, Archie Grubb, Lance Gould, or Larry Golston. They can be reached at 800-898-2034 or by email at Andrew.Brashier@BeasleyAllen.com, Archie.Grubb@BeasleyAllen.com, Lance.Gould@BeasleyAllen.com, or Larry.Golston@BeasleyAllen.com.

<sup>4</sup> Nathan Bomey, *U.S. Auto Recalls Hit All-Time Record in 2015* (Jan. 21, 2015) <https://www.usatoday.com/story/money/cars/2016/01/21/nhtsa-recall-completion-washington-auto-show-mark-rosekind/79111364>

## **GENESIS HEALTHCARE TO PAY \$53.6 MILLION TO SETTLE FCA CLAIMS**

Genesis HealthCare Inc., one of the largest providers of skilled nursing and rehabilitation services in the U.S., will pay the federal government \$53.6 million to settle False Claims Act (FCA) claims that its subsidiaries provided medically unnecessary and "grossly substandard" care. The U.S. Department of Justice (DOJ) announced the settlement on June 16.

The settlement ends six federal lawsuits and investigations into the submission of false claims by companies and facilities acquired by Genesis. The qui tam lawsuits were brought by seven whistleblowers who once worked for those companies. According to the DOJ, the named Plaintiffs will receive a combined \$9.67 million as part of the settlement. Special Agent in Charge Steven J. Ryan, of the U.S. Department of Health and Human Services' Office of Inspector General, said in a statement:

*It's disturbing when health care companies bill Medicare and Medicaid to care for vulnerable patients, but provide grossly substandard care and medically unnecessary services just to boost company profits. We will continue to crack down on medical providers who betray the public's trust and the needs of vulnerable patients through fraudulent billing and irresponsible practices.*

Genesis, which is based in Kennett Square, Pennsylvania, owns and operates skilled nursing facilities, assisted-living and senior homes, and rehabilitation therapy businesses. The settlement resolves four sets of claims:

- The first set of allegations involves claims that Skilled Healthcare Group (SHG), which Genesis acquired after the conduct at issue, along with its subsidiaries Skilled Healthcare LLC and Creekside Hospice II LLC, knowingly submitted false claims to Medicare for services performed at Creekside's facility in Las Vegas. SHG allegedly billed for hospice services for patients who were ineligible because they weren't terminally ill, and inappropriately billed for certain physician evaluation management services.
- The second set involves SHG and its subsidiaries Skilled LLC and Hallmark Rehabilitation GP LLC being accused

<sup>1</sup> Nathan Bomey, *U.S. Auto Recalls Hit All-Time Record in 2015* (Jan. 21, 2015) <https://www.usatoday.com/story/money/cars/2016/01/21/nhtsa-recall-completion-washington-auto-show-mark-rosekind/79111364/>

<sup>2</sup> Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

<sup>3</sup> Compl. *Public Citizen, Inc. v. Trump*, No. 1:17-cv-00253, 2017 WL 515396 (D.D.C. Feb. 8, 2017) (<https://www.citizen.org/sites/default/files/complaint-public-citizen-nrdc-cwa-v-donald-trump.pdf>)

of submitting false claims to Medicare, Tricare and Medicaid by providing therapy to patients longer than was medically necessary or billing for more time than the patients were actually treated. These claims were allegedly submitted between the start of 2005 and the end of 2013.

Medicare reimburses skilled nursing facilities based on a patient's Resource Utilization Group (RUG) level—which is determined by the amount of skilled therapy a patient requires—and it was also claimed that SHG, Skilled LLC and Hallmark fraudulently upped patients' RUG levels to get more money.

- The third set of claims by the whistleblowers was that Sun Healthcare Group Inc., SunDance Rehabilitation Agency Inc. and SunDance Rehabilitation Corp., which Genesis acquired in December 2012, sent false claims to Medicare Part B between Jan. 1, 2008, and Sept. 27, 2013. These claims involved billing for outpatient therapy services in Georgia that weren't necessary or were unskilled.
- The fourth and final set of claims involves claims that between Sept. 1, 2003, and Jan. 3, 2010, Skilled LLC sent false claims to Medicare and Medi-Cal programs from certain nursing homes in an effort to collect on services that were ineligible for payment because they were grossly substandard or otherwise worthless.

Specifically, the services violated requirements that facilities must meet in order to receive reimbursement from government health care programs. Skilled LLC also failed to provide enough nurses to meet its residents' needs.

It's good to see the FCA being used effectively in the area of health care fraud. John Horn, U.S. Attorney for the Northern District of Georgia, said in a statement:

*Health care providers that falsify claims for unauthorized or unnecessary services steal precious taxpayer dollars, and we will aggressively seek to recover those funds for the program that needs them.*

The cases are *Cretney-Tsosie et al. v. Creekside Hospice II LLC* (case number 2:13-cv-00167,) in the U.S. District Court for the District of Nevada; *McAree v.*

*SunDance Rehabilitation Corp.* (case number 1:12-cv-04244) in the U.S. District Court for the Northern District of Georgia; *West v. Skilled Healthcare Group Inc. et al.* (case number 3:11-cv-02658) in the U.S. District Court for the Northern District of California; *Deaton v. Skilled Healthcare Group Inc. et al.* (case number 4:14-cv-00219) in the U.S. District Court for the Western District of Missouri; and *Wilson v. Skilled Healthcare Group Inc. et al.* (case number 4:14-cv-00860) also in the U.S. District Court for the Western District of Missouri.

Source: Law360.com

#### **JUSTICE DEPARTMENT SIDES WITH WHISTLEBLOWERS FIRED BY WELLS FARGO**

The U.S. Department of Justice (DOJ) has filed a friend-of-the-court brief in a lawsuit brought against Wells Fargo & Co. by two former employees who were fired after they reported misdemeanors they had noticed to their supervisors. The DOJ's filing concluded that the appellate court, which had earlier dismissed the case, should revisit and modify its analysis. Two whistleblowers who filed a False Claims Act (FCA) lawsuit against Wells Fargo accusing the bank of engaging in improper mortgage practices may get another chance. The DOJ is encouraging the U.S. Second Circuit Court of Appeals to revise the legal analysis it made last year when it dismissed the case.

The Plaintiffs, Paul Bishop and Robert Kraus, in a complaint filed in 2011, said the Wall Street bank had requested Federal Reserve loans on various occasions when it was in violation of certain banking regulations. The False Claims Act is designed to encourage people to bring to light evidence of fraud against the government. *The San Francisco Business Times* elaborates, reporting that Wachovia Bank, which Wells Fargo acquired amid the financial crisis of 2008, misled federal regulators by hiding billions of dollars in losses when applying for Federal Reserve loans, according to the whistleblower complaint.

The lawsuit alleges that Wachovia's Federal Reserve loans were obtained while moving records to an off-balance-sheet entity designed to make Wachovia's books look better by hiding billions in losses, *The San Francisco Business Times* reported. This offshore entity was called the "Black Box" by Wachovia executives.

The False Claims Act lawsuit does not relate to complaints accusing Wells Fargo of opening millions of fake accounts for its customers without their authorization. The Plaintiffs claim they were fired in retaliation for speaking out against Wells Fargo's unlawful activity to their superiors.

Source: *Insurance Journal*, *New York Times* and Reuters and *The San Francisco Business Times*

#### **BNSF RAILROAD WHISTLEBLOWER AWARDED \$147,000 IN RETALIATION CASE**

A whistleblower who was fired in retaliation for reporting railroad track defects to management at BNSF Railway Company will receive more than \$147,000 in back pay and damages. The U.S. Occupational Safety and Health Administration (OSHA) said BNSF's actions in firing the track inspector for reporting track defects violated the Federal Railroad Safety Act's whistleblower protections.

OSHA ordered the Fort Worth, Texas-based railroad company to take a number of corrective measures in addition to compensating the whistleblower. Gregory Baxter, regional OSHA administrator in Denver, stated:

*BNSF employees have the right to protect their safety and that of other employees and the public without fear of retaliation by their employer. Our investigation and our actions on this worker's behalf underscore the agency's commitment to take vigorous action to protect workers' rights.*

It was reported by CBS4 News that the whistleblower, identified as Brandon Fresque, had to ride the rails every day looking for track defects. Last year, after finding safety defects on the tracks and reporting them to his supervisor, Mr. Fresque was told to falsify his report. In an interview, he told CBS4 that a confrontation ensued shortly after he was told to falsify the report, and that he was "removed from service and later fired."

It was reported by CBS4 that "Freight trains filled with flammable cargo can also turn into rolling bombs in a derailment." Track defects are the second leading cause of rail accidents after human error.

It was reported that BNSF pushes to keep trains moving despite rail problems and that they do so in order to make more money. The longer they can

delay fixing problems, the more trains they can run and the more money they can make. From October 2007 through June 2015, OSHA regulators received more than 2,000 complaints of retaliation filed by railroad industry employees. In fact, about 70 percent of whistleblower complaints during the period of time were made against U.S. railroads, with BNSF and Union Pacific receiving the lion's share of those complaints.

Sources: OSHA and CBS Denver 4

#### **AMEDISYS PAYS \$44 MILLION TO SETTLE INVESTORS' MEDICARE FRAUD SUIT**

Amedisys Inc. has agreed to pay \$43.75 million to settle a shareholder suit alleging the health care provider and its top executives hid a Medicare fraud scheme that caused its stock prices to drop by half, ending the case after seven years of litigation and an appeal to the Fifth Circuit Court of Appeals.

The settlement ends long-running claims that Amedisys and senior management defrauded investors by concealing a Medicare fraud scheme that provided patients medically unnecessary therapy visits in order to maximize profits.

Amedisys agreed in April 2015 to pay the federal government \$150 million to resolve allegations that the company violated the False Claims Act (FCA) by submitting false home health care billings to the Medicare program, according to a U.S. Department of Justice (DOJ) statement.

Investors first filed the proposed class action against Amedisys in 2010, and the court rejected it two years later. U.S. District Judge Brian A. Jackson said the investors had relied on three pieces of inadequate evidence:

- news stories featuring interviews with a nurse who alleged overtreating patients,
- the announcement of a Securities and Exchange Commission investigation, and
- a DOJ announcement of an investigation.

The Fifth Circuit revived the case in October 2014, criticizing the lower court for applying "an overly rigid rule that government investigations can never constitute a corrective disclosure in the absence of a discovery of actual

fraud." The appeals court panel said it agreed with the district court that the start of government investigations do not amount to corrective disclosure when standing alone, but that they must be viewed "together with the totality" of the other alleged partial disclosures.

The U.S. Supreme Court left that ruling intact when it decided in June 2015 not to take up a case concerning the stringency of pleading standards in securities fraud cases. The investors then filed an amended complaint in September 2015, accusing Amedisys and its executives of improperly inflating Medicare reimbursements by pressuring nurses and therapists to provide patients unnecessary treatment visits in order to trigger higher fees and avoid price adjustments that could have lowered reimbursements.

Amedisys' shares lost more than half their value as a result of the scheme, dropping from \$66 per share before 2011 to \$27 in 2015, according to the suit. Proposed class members included investors in a pension fund for retired Mississippi employees and teachers who receive benefits from the Commonwealth of Puerto Rico.

The court reduced the scope of the amended complaint in August, said there was enough evidence to justify allegations that Amedisys, CEO William Borne and Chief Compliance Officer Jeffrey Jeter knowingly and intentionally misrepresented Amedisys' fraudulent activities to investors under SEC Rule 10b-5 and Section 10(b) of the Securities Exchange Act.

The investors are represented by Robert C. Finkel, Joshua W. Ruthizer and Sean M. Zaroogian of Wolf Popper LLP and John C. Browne, Adam H. Wierzbowski, Adam Hollander and Julia Tebor of Bernstein Litowitz Berger & Grossman LLP. The case is *Bach et al. v. Amedisys Inc. et al.* (case number 3:10-cv-00395) in the U.S. District Court for the Middle District of Louisiana.

Source: Law360.com

#### **WHAT TO DO IF YOU KNOW ABOUT FRAUD BEING COMMITTED AGAINST THE GOVERNMENT**

Are you aware of fraud being committed against the federal government? If so, the False Claims Act (FCA) can protect and reward you if you are willing to report the fraud. There are also states that have whistleblower acts. If you have any questions about whether you qualify as a whistleblower, contact a lawyer at Beasley Allen for a free and

confidential evaluation of your claim. Because of the heavy volume of activity in this area of our firm's practice, we established a special unit in our Consumer Fraud & Commercial Litigation Section to handle whistleblower claims. That has turned out to be a very good move.

There is a contact form on our firm's website, [www.beasleyallen.com](http://www.beasleyallen.com). You may also contact one of the lawyers on our Whistleblower Litigation Team: Archie Grubb, Larry Golston, Lance Gould or Andrew Brashier by phone at 800-898-2034 or by email at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

## **IX. PRODUCT LIABILITY UPDATE**

### **A LOOK AT SIDE UNDERRIDE CRASHES**

It can be one of the most devastating traffic accidents when a car crashes into the side of a tractor trailer and slams underneath. In such an incident, many of the safety features on a vehicle are rendered worthless. The top of the car is probably sheered off in a crash of this sort. In many cases the occupants are decapitated. Government statistics show that more than 200 people are killed this way every year and experts say that these type of crashes and fatalities could be prevented if trucks were required to have side guards to deflect cars.

The Federal Agency in charge of highway safety requires guards on the back of trucks, but not along the sides. Key lawmakers in Congress have not pushed the issue despite a recommendation from the National Traffic Safety Board (NTSB).

The dangers of side underride crashes and the accompanying fatalities have been well known and documented for decades. The death of Hollywood star Jayne Mansfield 50 years ago on a Louisiana highway sparked the first call for rear and side protection. But it wasn't until 1998 that the National Highway Traffic Safety Administration (NHTSA) mandated rear guards. However, side guards are still not required even though the NTSB, which investigates highway accidents, concluded that they would reduce injuries and deaths on the

American highways. The NTSB issued a non-binding recommendation to NHTSA in April of 2014 that all new trailers have side protection systems.

Joan Claybrook, a consumer advocate who ran the National Highway Safety Administration in the '70s, said technology isn't the stumbling block. Joan says NHTSA has the power to issue regulations, or Congress can order the department to act—a process that starts with the Senate Commerce, Science, and Transportation Committee.

Safety advocates have pointed out the money flowing from truck manufacturers. Members on the Committee have received more than \$9 million from the transportation industry in 2016. Rep. John Thune, R-South Dakota, has been the chairman of this committee since 2015. He received more than \$750,000 in contributions in the past five years.

Underride guards on the rear of tractor trailers have proven effective in preventing underride in crash tests conducted by the Insurance Institute for Highway Safety (IIHS). Now new IIHS tests show how well-built guards can prevent a passenger vehicle from sliding beneath the side of a semi-trailer.

The tests conducted in the Spring of 2017 marked the first time the IIHS has evaluated side underride guards. IIHS ran two 35 mph crash tests: one with an Angel wing side underride protection device and the second test with a fiberglass skirt intended to provide improved aerodynamics, but not underrides. In both tests, mid-size cars struck the center of the 53-foot-long dry van trailer. In the Angel wing test, the underride guard bent but did not allow the car to go underneath the trailer, so that cars airbag and safety belt could properly restrain the test dummy in the driver's seat. In the second test with no underride guard protection, the car ran into the trailer and kept going. The impact sheered off part of the roof and the sedan became wedged beneath the trailer. In a real world crash like this, any occupant in the car would likely sustain fatal injuries.

In 2012 an IIHS study found that strong side underride guards have the potential to reduce injury risks in about three quarters of large truck side crashes producing fatalities or serious injuries to passengers vehicle occupants. This proportion increased to almost 90 percent when restricted to crashes with semi-trailers.

Federal law requires large trucks to have rear underride guards but not side underride guards. At least three U.S.

cities—Boston, New York and Seattle—mandate side guards on city owned and/or contracted trucks as part of Vision 0 Initiatives to eliminate crash deaths and injuries, particularly among pedestrians and bicyclists.

Even though the wheels of the tractor trailer offer some underride protection, if a passenger vehicle were to strike it with no side underride guard, only 28 percent of the 53-foot trailer length would be protected from the underride. With the Angel wings side underride guard in place, 62 percent of the trailer's length is protected. The side underride guard can be retrofitted to existing semi-trailers.

Marianne Carth knows first hand the devastation caused by an underride crash involving a tractor-trailer. Her two teenage daughters, AnnaLeah and Mary, died in an underride crash in May of 2013. Since her daughters' death, Mrs. Carth has been advocating for legislative and regulatory reforms that will mandate side underride guards and strengthen existing rear under guard standards, which are mandatory on semi-trailers. Mrs. Carth and another mother, Lois Durso, are pushing legislation aimed at preventing underride crashes called "The Roya, AnnaLeah and Mary Comprehensive Underride Protection Act of 2017." Mrs. Durso lost her 26-year-old daughter Roya to a side underride crash 12 years ago.

In Europe, side and rear underride guards had been required on trailers since 1989. The Truck-Trailer Manufacturer's Association opposes mandating side underride guards on trailers, stating they are not cost effective and may add weight, which could weaken them. Until side underride guards are mandatory and stricter rules are adopted to strengthen rear underride guards, Mrs. Carth and Mrs. Durso will continue their fight to have legislation passed to protect others on the highway.

If you need more information on the need for side underride guards—and the subject generally—contact Greg Allen, our Senior Product Liability lawyer, at 800-898-2034 or by email at Greg.Allen@beasleyallen.com.

Sources: Insurance Institute, Highway Safety and Highway Loss Data Institute; NBC News.com; and www.trucks.com

#### **A LOOK AT CAB GUARDS ON BIG TRUCKS**

A hundred thousand pounds of timber travels down the Interstate alongside workers on their way to work, families

on their way to vacations and other commercial freight carriers delivering their loads. Log truck drivers charged with ensuring their timber's safe delivery also have a huge responsibility to protect those with whom they share the road. However, few people realize drivers of a log truck themselves are often not properly protected from their cargo.

Cab guards are supposed to be protecting these drivers. The shiny, metal pieces positioned behind the cab of almost every log truck in the United States are purchased with the belief they will protect cab occupants from cargo shifting forward and crushing the cab during a crash. The earliest concept of a cab guard for heavy trucks, called a "truck driver protection shield," dates back to at least 1960. The patent for the 1960 guard cites earlier designs for streetcar fenders and rail car guards as inspiration.

However, it wasn't until the federal government and other interested parties began sponsoring and conducting research to evaluate the causes of heavy truck crashes in the '70s and '80s that cab guards truly made their way onto the manufacturing scene.

The studies found the primary contributing factors for truck fatalities were ejection and rollover, and determined the best way to help prevent deaths was to strengthen the structural integrity of the cabs. Manufacturing companies saw a niche they could fill, and cab guards' popularity increased. Merritt Equipment Co. created the term cab guard and began manufacturing the product in 1972.

Ultimately, the tests from the '70s and '80s culminated in the Federal Motor Carrier Safety Administration (FMCSA) and the Society of Automotive Engineers (SAE) developing a regulation requiring cab guards on the back of large trucks and guiding minimum manufacturing standards, though implementation and compliance was largely left to the discretion of trucking companies. Unfortunately, those minimum standards did not work as intended. Beasley Allen lawyer LaBarron Boone, who handles cab guard litigation for the firm, says:

*Instead of prompting manufacturers to exceed the minimum—as the auto industry did—cab guard manufacturers continued to only meet the bare minimum. Once it was clear the minimum standards and cab guard requirements were*

*not being used as intended, they were scrapped in 2004.*

The 2004 rewrite of FMCSA standards was prompted by hearings in the U.S. House of Representatives, which were called after nine cargo securement accidents occurred in New York between 1990 and 1993 with three fatalities. The North American Load Security Research Project was launched “to revise the regulations concerning protection against shifting and falling cargo for commercial motor vehicles (CMVs) engaged in interstate commerce,” according to the Federal Register on Dec. 18, 2000.

From the research project, new regulations were developed and took effect on Jan. 1, 2004. These new regulations switched the focus from vehicle crash-worthiness to load securement, and do not include design or performance standards for cab guards—only for front-end structures, which are attached to trailers, not cabs, and have direct contact with the cargo.

Cab guards’ woefully inadequate design—using weak aluminum instead of a stronger metal like steel—remains as it was prior to 2004, further illustrating the minimum design standards of the past were not used as intended and cab guard manufacturers continue to risk lives with their products. In the coming weeks, we will highlight the devastating effects of defective cab guards and what can be done to protect people on America’s roadways.

For more information about cab guards and trucking injuries, contact LaBarron Boone or Ben Baker in our Montgomery office at Labarron.Boone@beasleyallen.com, Ben.Baker@beasleyallen.com or Chris Glover in our Atlanta office at Chris.Glover@beasleyallen.com. You can call them at 800-898-2034.

Sources: U.S. Patent, Federal Register, FMCSA—Cargo Securement Rules, and Congressional Hearing—1993

#### **FAMILIES FILE WRONGFUL DEATH SUITS AGAINST GUARDRAIL COMPANIES**

The families of three people killed in 2016 after their cars hit highway guardrails have filed wrongful death lawsuits against the guardrail manufacturer and the company that installed them. The suit was filed in a Tennessee state court, alleging that the guardrails were defective and improperly installed. The two suits, brought by the families of Jacob Davison and Lauren Beuttel and Wilbert Byrd, respectively, claim that the manu-

facturers of the X-Lite guardrail system—Valmont Industries, Lindsay Corp. and their subsidiaries—were defectively designed and manufactured.

Instead of the guardrail terminals “telescoping” to absorb the impact of the collision, the families contended that the guardrails pierced the cars and struck Davison, Beuttel and Byrd. The families also claim that Cumberland Guardrail Inc., which contracted with the state of Tennessee to install the guardrails, failed to correctly install the guardrails. They contend that was because Lindsay Corp. didn’t provide adequate instructions. The two lawsuits allege that Cumberland didn’t exercise reasonable care to ensure the guardrails were properly installed and secured.

Almost exactly a year ago, Jacob Davison, 18, was driving on an interstate highway in Cumberland County, Tennessee, with Lauren Beuttel, 22, sitting in the rear seat of his 2004 Toyota Solara when his vehicle left the roadway and collided “straight on” with an X-Lite guardrail end terminal. On impact, the guardrail terminal failed to stop the beams, which pierced through the car’s fender and floorboard into the compartment and struck Davison and Beuttel. In July 2014, Wilbert Byrd was a passenger in his nephew’s car when their car crashed into an X-Lite guardrail end in Chattanooga. Instead of buckling on impact, the guardrail pierced the car’s passenger compartment, going through the dashboard and exiting the windshield. It’s alleged in the complaint that more than 60 feet of guardrail passed through the car in seconds.

A statement accompanying the lawsuits stated that there have been repeated incidents of X-Lite guardrails piercing cars in Tennessee, and that since 2016, the X-Lite has been linked to at least seven deaths nationwide in which the device impaled vehicles. Currently, it’s said that there are about 14,000 X-Lite units installed across the country. While the Tennessee Department of Transportation is removing the guardrail ends, at least 20 states and Puerto Rico still have them on the highways. The families said in a statement that the Federal Highway Association has failed to take action on the allegedly unsafe guardrail terminals, even though U.S. Tennessee Senators Bob Corker and Lamar Alexander urged the agency to revoke the letters of eligibility that signify that the guardrails passed required crash tests.

The families are represented by Ted Leopold, Leslie Kroeger and Poorad

Razavi of Cohen Milstein Sellers & Toll. The cases are Beuttel and Gambill v. Valmont et al. in the Circuit Court of Cumberland County at Crossville, Tennessee, and Byrd v. Valmont et al. in the Circuit Court of Hamilton County at Chattanooga, Tennessee.

Source: Law360.com

## **X. MASS TORTS UPDATE**

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### **ST. LOUIS TALC TRIAL ENDS IN MISTRIAL AFTER SCOTUS RULING**

After a U.S. Supreme Court ruling on June 19, Circuit Judge Rex Burlison declared a mistrial in the latest talcum powder case in St. Louis Circuit Court. This was the sixth case in St. Louis against Defendants Johnson & Johnson and Imerys Talc America. The Plaintiffs in the case represent the estates of three women who died from ovarian cancer following long-term genital applications of talcum powder.

The Supreme Court ruling involved cases filed against pharmaceutical company Bristol-Myers Squibb Co. over injuries allegedly caused by its blood thinner Plavix. The cases were filed in California. The Supreme Court ruled that state courts are limited in their authority to hear claims against companies that are not based in the state when the alleged injuries did not occur there.

We fully intend to continue our efforts on behalf of our clients. Plaintiffs in the St. Louis talc trial included two from out of state and one man from Webster Groves, Missouri. Beasley Allen lawyer Ted Meadows had this to say:

*It’s not the venue that makes it difficult for Johnson & Johnson and Imerys to win these trials, it’s the facts. After reviewing the Supreme Court ruling, and based on evidence and statements now in the record, we believe this litigation can go forward in Missouri courts. We plan to conduct additional discovery and depositions to confirm this position, and look forward to that opportunity. Our trial team remains confident that the evidence and the science remains on the side of our clients. We’re prepared to file these cases in courts across the nation should that be*

*necessary, and believe that jurors will continue to carefully consider the clear link between talcum powder use and ovarian cancer.*

The Supreme Court ruling overturns an earlier ruling by the California Supreme Court. Justice Sonia Sotomayor offered the lone dissent, saying the decision will make it more difficult for individual Plaintiffs to access the courts. Justice Sotomayor wrote of the decision:

*It will make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different states. And it will result in piecemeal litigation and the bifurcation of claims.*

Our talc litigation team believes the Missouri cases will proceed and that the verdicts will stand. We will keep you fully advised on all developments.

#### **MISTRIAL IN THE FIRST BELLWETHER TRIAL IN THE TESTOSTERONE LITIGATION**

The first Testosterone Replacement Therapy (TRT) bellwether trial, Konrad v. Abbvie, et al., ended in a mistrial on June 12 due to an illness suffered by one of the co-lead lawyers, Chris Seeger. The trial began as scheduled on June 5 in the U.S. District Court for the Northern District of Illinois before Judge Matthew Kennelly. Prior to the order declaring mistrial, we had presented two witnesses in our case-in-chief.

The first was Dr. David Kessler, a former Food and Drug Administration (FDA) Commissioner under Presidents George H.W. Bush and Bill Clinton, who testified that the manufacturers of Androgel improperly marketed the drug outside of its approved indication and failed to test the drug in that population.

Dr. Ardehali, a physician/scientist at Northwestern University, was the second witness. He testified Androgel has adverse cardiovascular risks for which there was no warning.

There are more than 7,000 claims pending against the manufacturers of testosterone treatments alleging they did not adequately warn users of potential cardiovascular side effects. In 2015, the FDA required manufacturers of TRT to provide new warnings regarding adverse cardiovascular events and that TRT is not approved for use in men suffering age-related testosterone decline. The Court will proceed with the next bellwether trial on July 10, 2017, as scheduled and has reset the Konrad trial

for Sept. 18, 2017. The remaining bellwether trials against the manufacturers of Androgel are scheduled through April 2018.

The cases are consolidated under U.S. District Judge Matthew Kennelly. Beasley Allen lawyer Matt Teague is a member of the Plaintiff's Steering Committee (PSC) and is handling testosterone replacement therapy litigation for the firm. Matt is one of the lawyers trying the Chicago case with Chris Seeger and other members of the PSC. For more information, you can call Matt at 800-898-2034 or email Matt.Teague@beasleyallen.com.

#### **BAYER AND JANSSEN WIN SECOND XARELTO BELLWETHER TRIAL**

A New Orleans federal jury on June 12 returned a Defense verdict in favor of Janssen and Bayer in the second bellwether trial in multidistrict litigation (MDL) over unstoppable bleeding allegedly caused by their blood thinner Xarelto. It was the second win for the drug companies in the 15,000-case litigation.

In the case, widower Joseph Orr said that the companies failed to warn doctors of Xarelto's dangers, and therefore were responsible for the stroke that killed his wife Sharyn Orr in May 2015.

Representatives for the Orr family stressed that, notwithstanding the label language, U.S. doctors were victims of an informational imbalance. "Physicians outside the U.S. knew as early as 2013 that patient monitoring and a simple blood test would be useful in predicting and identifying patients that are most likely to suffer serious bleeding. But American doctors were told otherwise," attorneys for the family said in a statement after the verdict. Sharyn Orr was an academic adviser at Tulane University and was 67 at the time of her death, according to the Plaintiffs.

The Orr family is represented by Andy Birchfield of Beasley Allen Crow Methvin Portis & Miles PC and Brian Barr of Levin Papantonio Thomas Mitchell Rafferty Proctor PA. The drugmakers are represented by Beth Wilkinson of Wilkinson Walsh & Eskovitz and Susan Sharko of Drinker Biddle & Reath LLP. The case is In re: Xarelto (Rivaroxaban) Products Liability Litigation, case number 2:14-md-02592, in the U.S. District Court for the Eastern District of Louisiana.

Lawyers for the Plaintiffs state that they will continue to press forward with

the legal claims of thousands of innocent victims of Xarelto, and they urge the makers of Xarelto to inform U.S. doctors of the simple, widely-available blood test that can be used to identify patients most likely to suffer serious bleeding while on Xarelto. A third bellwether trial is scheduled to start on August 7, 2017, in Jackson, Mississippi.

The Plaintiff in the third bellwether trial is Mississippi woman Dora Mingo, who was prescribed Xarelto after developing a blood clot in her leg after hip replacement surgery. Ms. Mingo took Xarelto for just 21 days before suffering severe anemia and a life-threatening gastrointestinal bleeding. She had to be admitted to the ICU and undergo a surgical procedure and multiple blood transfusions.

In addition to the federal bellwether trials in the U.S. District Court for the Eastern District of Louisiana, there are several state court cases in Philadelphia, Pennsylvania set for trial later this year.

#### **STUDY SHOWS POST-APPROVAL SAFETY EVENTS IN NEARLY ONE THIRD OF FDA APPROVED DRUGS**

A study published by Yale University researchers in a recent edition of the *Journal of the American Medical Association* found that nearly one third of drugs approved by the U.S. Food and Drug Administration (FDA) over a 10-year period were affected by one or more post-market safety events. That is downright scary. Researchers tracked 222 novel therapeutics approved by the FDA between 2001 and 2010. Between the date of approval and 2017, a total of 123 safety events were reported, associated with 71 individual drugs.

The events reported were largely boxed warnings and safety communications from the FDA to the drug manufacturers, but also included three withdrawals of the products from the market. The study authors found that safety events were statistically significantly more likely among drugs categorized as biologics or psychiatric therapeutics, as well as drugs receiving accelerated approval from the FDA. The fast track program has been heavily abused by Big Pharma.

While the results of the study demonstrate that the FDA actively monitors the safety of drugs after their approval, they also demonstrate the importance of this monitoring. Further, because drugs receiving accelerated FDA approval are statistically more likely to be associated

with a safety event, the study demonstrates the risks of pushing for faster evaluation of drug safety and approval. Currently, the FDA drug approval process generally involves about six months' worth of trials, involving about 1,000 patients. Shortening the time period or decreasing number of individuals exposed prior to approval has the potential to lead to even more post-market safety events. The FDA must balance the importance of developing new drugs with the risks of accelerated approval highlighted by this study.

#### **A REPORT ON THE INVOKANA LITIGATION**

The results of the 10,142-patient Invokana study were unveiled on June 12, 2017, at the annual meeting of the American Diabetes Association, and the results support the FDA requirement of a black box warning concerning amputations, which was implemented in May of 2017. Approved in March 2013, Invokana® (canagliflozin) is an SGLT2 Inhibitor used to treat adults with Type 2 diabetes, manufactured by Janssen Pharmaceuticals, a subsidiary of Johnson & Johnson.

SGLT2 inhibitors prevent high blood sugar by helping the kidneys remove excess sugar through urine elimination. In the study unveiled before the American Diabetes Association, Invokana was shown to decrease the risk of cardiovascular events such as heart attack or stroke, by 14 percent.

This is the same benchmark exhibited by Jardiance in its 2015 7,000-patient study. However, the similarities between the two drugs end there. The recent Invokana study also revealed a two-fold increase in the rate of leg, foot and toe amputations.

Inexplicably, Jim List of Janssen overlooked the amputation data and focused exclusively on the cardiovascular risk data by stating that “[w]e think, looking at the data—the size, the breadth, the duration of trials—we think these are very strong, very clinically important, and we look forward to filing this with the FDA and other regulatory agencies around the world.” Really? Why would any responsible pharmaceutical company “look forward” to filing a study with the FDA and “other regulatory agencies around the world” that reveals its drug causes a twofold increase in the rate of amputations of the lower extremity?

Clearly, List is only trying to protect the substantial revenue stream provided

to Janssen by Invokana, which has been a blockbuster drug for several years. According to FiercePharma, Invokana is one of the top 10 highest selling diabetes drugs in 2016, with more than \$1 billion in sales. Furthermore, it is the only SGLT2 diabetes medication in the top 10.

As noted by Matthew Herper of *Forbes Magazine*, “[t]he result of the 2017 Invokana study is a blow to J&J, and a boost to rivals Eli Lilly and Boehringer Ingelheim, [the makers of Jardiance], which has been shown to reduce the risk of cardiovascular death but does not appear to carry the amputation risk.” Indeed, the risk of amputation seems to be unique to Invokana among the entire class of SGLT2 inhibitors, which includes AstraZeneca PLC’s Farxiga and Xigduo XR and Boehringer Ingelheim GmbH and Eli Lilly and Co.’s Jardiance and Glyxambi. As noted by Evercore ISI analyst Umer Raffat, “[t]he amputation imbalance is a headwind for JNJ in particular.”

Dr. John Buse, the chief of endocrinology at UNC-Chapel Hill has stated “[p]ersonally, I would much rather have a small heart attack than lose a toe, and I think I would much rather have a heart attack than lose a leg.” (Herper, Matthew, “J&J Drug Prevents Heart Attacks at Cost of Amputated Toes,” *Forbes Magazine*, June 12, 2017). It is sad commentary that an individual with diabetes may be forced to choose between the loss of a limb or a slightly reduced risk of heart attack in order to treat diabetes.

The Invokana study of 2017 and the Jardiance study of 2015 have revealed that these SGLT2 inhibitors carry a cardiovascular benefit, but the Invokana study has now revealed that Invokana has an increased risk of amputation. Thus far, no one can explain why these two drugs carry a cardiovascular benefit, or why Invokana carries an amputation risk. As noted by Matthew Herper of *Forbes Magazine* both “drugs decrease blood pressure and blood sugar, both good for the heart, but that can’t explain the whole benefit. Perhaps the SGLT2 thickens the blood leading it to pool in the foot.” Some of these questions may be answered by the next big clinical trial of Farxiga, which involves 17,150 patients and is funded by AstraZeneca.

The 2017 Invokana study will be published in the *New England Journal of Medicine*. It should be noted that the study was funded by Johnson & Johnson. If you need more information

on the Invokana Litigation contact Allison Hunnicutt, a lawyer in our firm’s Mass Torts Section at 800-898-2034 or email [Allison.Hunnicutt@beasleyallen.com](mailto:Allison.Hunnicutt@beasleyallen.com).

Sources: *Forbes Magazine*, *FiercePharma*, and Law360

#### **\$15 MILLION VERDICT AGAINST ABBOTT LABS IN DEPAKOTE TRIAL**

In a June trial, an Illinois federal jury found that Abbott Laboratories failed to properly warn doctors about the risk of a severe birth defect in the babies of women taking its blockbuster drug Depakote. The jury awarded Stevie Gonzalez, a 10-year-old boy born with the defect, \$15 million. The jury found that doctors who prescribed the drug to the child’s mother, Christina Raquel, were not aware that her risk of having a baby born with spina bifida or other major malformations was greater than 10 percent. However, the jury declined to award punitive damages against Abbott in a separate proceeding that immediately followed their initial verdict.

During the trial, Stevie’s lawyers contended that Abbott made a conscious decision not to update its label to include the 10 percent figure in an effort to keep Depakote—the first of Abbott’s drugs to hit \$1 billion in sales—profitable for the drugmaker. Doctors treating Raquel for her severe bipolar disorder only saw a label that described the risk of spina bifida as 1 or 2 percent.

Raquel sued Abbott in 2015, claiming her doctors didn’t have all the necessary information when they put her on Depakote to treat her severe bipolar depression in the months before she became pregnant with Stevie. Abbott separated some of its pharmaceutical business—including the rights to Depakote—into a separate pharmaceutical company, AbbVie, in 2013.

This case is the sixth suit over Depakote, an antiepilepsy drug used to treat a number of different conditions, to go to trial. Earlier suits tried in federal courts in Illinois and Ohio resulted in verdicts for the pharmaceutical company. In state court in Missouri, a jury awarded a group of 25 Plaintiffs \$38 million.

There are hundreds of suits filed against Abbott by mothers and children who say they were not told of the true dangers to developing fetuses when they were given the medication. The bulk of them are consolidated in the Southern District of Illinois, where

Judge Rosenstengel has explored both a bellwether and a batching method to deal with the claims. Attempts to reach a global settlement have failed, and Abbott has fought the wave of suits.

Testimony from an Abbott representative was that the company didn't consider data from the studies that put the risk at more than 10 percent was important enough to be included on the label. Abbott was said during the trial to put their profits over their patients.

Raquel is represented by John E. Williams Jr. and John T. Boundas of Williams Kherkher Hart Boundas LLP. The case is *E.G. et al. v. Abbott Laboratories Inc.*, (case number 3:15-cv-00702) in the Southern District of Illinois.

Source: Law360.com

#### **AN UPDATE ON THE COOK IVC FILTER LITIGATION**

There are currently approximately 1,900 individual lawsuits involving products manufactured by Cook Medical, Inc. consolidated before Judge Richard L. Young in the United States District Court for the Southern District of Indiana. The cases, filed on behalf of individuals who suffered serious complications due to Cook Medical's Celec and Gunther Tulip IVC (inferior vena cava) filters, are part of multidistrict litigation (MDL) as ordered by the Judicial Panel on Multidistrict Litigation. MDL is a consolidation of civil cases transferred from different jurisdictions around the country to a single United States District Court to achieve certain pre-trial efficiencies. The aim of this consolidation is to preserve judicial resources, eliminate duplicities in the fact-finding process, and prevent inconsistencies in pre-trial rulings.

IVC filters are wire devices implanted in the vena cava, the body's largest vein, to stop blood clots from reaching the heart and lungs. These devices are used when blood thinners are not an option. Both the Celec and Gunther Tulip filters are retrievable and are designed to be removed once a patient is no longer at risk for blood clots. While permanent IVC filters have been used since the 1960s with almost no reports of failure, retrievable IVC filters were introduced in 2003. Potential complications from retrievable IVC filters include device fracture, migration, and perforation of the inferior vena cava, which can lead to embolism, organ damage, and death.

The MDL's first bellwether trial, involving Plaintiff Elizabeth Jane Hill, is

scheduled to begin on Oct. 2, 2017. As of now, the trial will move forward on Plaintiff's strict liability failure to warn, strict liability design defect, and negligence claims.

On May 31, 2017, the MDL Court dismissed the claims of several Plaintiffs following a Motion for Judgment on the Pleadings filed by Cook Medical. In its motion, Cook Medical argued that the claims of six individual Plaintiffs were time-barred pursuant to the statutes of repose recognized by Georgia, Tennessee and Texas. Georgia and Tennessee recognize a 10-year statute of repose and measure the period of repose from the date of the first sale or use (i.e., implant surgery). Texas applies a 15-year statute of repose, with the period of repose measured from the date the Defendant sold the product at issue.

With respect to two Plaintiffs, for which Georgia law applied, the Court dismissed the Plaintiffs' strict liability and breach of warranty claims, but allowed claims for negligence and consumer fraud to remain. With respect to the four Plaintiffs, in which Tennessee and Texas law applied, the Court dismissed all claims based on the expiration of the statute of repose. The implant dates of these four Plaintiffs ranged from September 2001 through May 2006 and their complaints were filed in 2016 and 2017.

Beasley Allen lawyers continue to investigate, review and file cases involving men and women that have suffered injuries following implantation with Cook Medical IVC filters. For more information, contact Melissa Prickett, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at [Melissa.Prickett@beasleyallen.com](mailto:Melissa.Prickett@beasleyallen.com).

Sources: *Hill v. Cook Medical, Inc. et al.*, 1:14-cv-06016, Entry on the Cook Defendants' Motion for Partial Judgment on the Pleadings (S.D. Ind. May 17, 2017); *Sales-Orr, et al. v. Cook Medical, Inc. et al.*, 1:16-cv-2636, Entry on Motion for Judgment on the Pleadings Based on the Statute of Repose (S.D. Ind. May 31, 2017); and Amended Case Management Order #19 (Amended Bellwether Trial Plan), *In re: Cook Medical, Inc., IVC Filters Marketing, Sales Practices and Prods. Liab. Litig.*, MDL No. 2570 (S.D. Ind. Jan. 4, 2017).

#### **J&J APPEALS \$48 MILLION JURY AWARD OVER MAN'S SEVERE MOTRIN REACTION**

Johnson & Johnson has appealed the \$48 million jury award for a man who developed a severe skin condition from taking the pain reliever Motrin. Johnson & Johnson claimed the jury's "confused" verdict form responses were irreconcil-

ably inconsistent. J&J and its subsidiary co-Defendant McNeil Consumer Healthcare argued to an appellate panel that while the jury had found Motrin did not "present a substantial danger," they nonetheless found McNeil should have known that "Motrin was dangerous or was likely to be dangerous," and negligently failed to warn the man.

In his suit, Christopher Trejo alleged he suffered Stevens-Johnson Syndrome and its more severe variation, Toxic Epidermal Necrolysis, after taking Motrin at the age of 16 to treat aches and pains. It was contended in the suit that McNeil and J&J should have placed warning labels on the medication about the risk of the extreme reaction.

In October 2011, jurors awarded Trejo about \$32 million in compensatory damages, including \$11 million to cover the cost of future medical expenses and future lost earnings, and \$22 million in noneconomic damages, including mental suffering and pain. The jury also awarded \$16 million in punitive damages: \$7 million against McNeil and \$9 million against J&J.

Earlier that year, a California appellate court denied J&J's petition to dismiss the lawsuit, ruling the company bore responsibility for the content of its labels at all times. Labels for prescription Motrin had long contained an explicit warning about the potential skin reactions associated with the medication, indicating the company should have known about the potential for a more extreme reaction associated with ingesting the medication, the appeals court said.

The over-the-counter version Trejo used didn't include a warning at the time he developed his severe reaction. The label has now been changed. Months after Trejo was hospitalized, the FDA required the company to post more explicit information about the potential skin reaction.

It was reported that Trejo had aspirations of becoming a professional soccer player before he was hospitalized. He is represented by Brian D. Witzer and Michael P. Manapol of the Law Offices of Brian D. Witzer Inc. and Jeffrey Isaac Ehrlich of The Ehrlich Law Firm. The case is *Christopher Trejo v. Johnson & Johnson et al.*, (case number B238339) in the Court of Appeal of the State of California, Second Appellate District.

Source: Law360.com

The first IVC filter multidistrict litigation (MDL) bellwether trial is slated to begin Oct. 2 in the U.S. District Court for the Southern District for Indiana. Judge Richard L. Young is presiding over the nearly 2,000 combined claims against IVC filter maker Cook Medical, according to the U.S. Judicial Panel on Multidistrict Litigation.

The blood-clot filter is implanted in the inferior vena cava—the body’s largest vein. The filter is intended to catch blood clots that form in the legs before they reach vital organs such as the heart and lungs. It is used as an alternative to the anticoagulant Heparin in trauma patients to prevent venous thromboembolism prophylaxis. Unlike permanent IVC filters, those of the retrievable variety have a high rate of failure. They are more fragile in design, often leading them to fracture, migrate or tilt within the body and potentially cause life-threatening injuries.

The first case, involving a Florida woman, demonstrates the device’s potential danger. She was implanted with a Cook Medical Celect Cava in 2010 and returned to her doctor to have it removed four months later. When the doctor’s attempts to remove the filter failed, an endoscopy procedure revealed that it had pierced a large blood vessel and the woman’s small intestine. She was transferred to another hospital where it was finally removed.

There are 10 other IVC filter manufacturers including C.R. Bard, Inc. and Cordis—both are also facing mounting lawsuits in their own MDLs. The Bard MDL is pending in U.S. District Court in Arizona, and cases involving Cordis IVC filters are consolidated in California state court.

Recent scientific research also challenges the necessity and reliability of the filters. A study published in May by the scientific journal *JAMA Surgery* reveals that using fewer vena cava filters did not result in an increase of pulmonary embolism among trauma patients. As we have previously reported, a 2016 study revealed IVC filter use did not indicate any significant difference in the patient’s survival, but low removal rates could be even riskier to the patient’s health.

If you would like more information about the IVC filters litigation, contact Melissa Prickett, a lawyer in our Mass Torts Section, at 800-898-2034 or by

email at [Melissa.Prickett@beasleyallen.com](mailto:Melissa.Prickett@beasleyallen.com).

Sources: *Indianapolis Business Journal*, U.S. Judicial Panel on Multidistrict Litigation, Righting Injustice and The JAMA Network Surgery

## XI. AN UPDATE ON SECURITIES LITIGATION

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### **SUPREME COURT UPHOLDS ERISA EXEMPTION FOR CHURCH HOSPITAL PENSION PLANS MAINTAINED BY AFFILIATED ORGANIZATIONS**

The Employee Retirement Income Security Act (ERISA) is a federal law that applies to many, but not all, private employers that offer employer-sponsored health insurance coverage and certain other benefit plans. One exemption includes plans established by a church and plans established by a church but maintained by an affiliated organization; however, Congress left it unclear whether a hospital established by a church with pension plans established and maintained by an affiliated organization is exempt from ERISA.

On June 5, 2017, the Supreme Court issued a unanimous decision upholding the ERISA exemption for church-affiliated pension plans that are not established or maintained by a church. Relying on legislative history and statutory language, Justice Elena Kagan authored the majority opinion stating that it was Congress’s intention to include these plans in the exemption. Why is this question so important? Because of the protections in place through ERISA, exempting those plans from ERISA requirements exposes the hospitals’ employees to the possibility of making career-long contributions to a pension plan that is insolvent by the time they retire. On the other hand, because compliance is expensive, and liability for damages when an ERISA-governed plan does something wrong are so severely limited, extending those rules to church-affiliated hospitals would raise the costs of health care at a time when the need for cost containment in the health-care industry could hardly be more pressing.

Without addressing these public policy implications, the Court published a unanimous decision, authored by Justice Sonia Sotomayor, and rested the

result on the plain language of ERISA. Specifically, the opinion focused on the provision of ERISA that exempts any plan “established and maintained for its employees by a church.” Shortly after the adoption of ERISA, the IRS held that the exemption did not reach hospitals established by an order of Catholic nuns, reasoning that the hospitals did not involve “religious functions.” Congress responded with a 1980 amendment to ERISA that broadened the church-plan exemption, stating that “[a] plan established and maintained for its employees ... by a church ... includes a plan maintained by an organization ... controlled by or associated with a church.”

Another interesting point about the opinion: It shows how far the court has moved in the still-nascent post-Scalia epoch that an opinion can justify its sense of what Congress could and could not have meant by reference to legislative history, without a single word of objection or qualification. In a passage that would have been remarkable in a unanimous opinion a few short years ago, Kagan reports that “everything we can tell from extra-statutory sources about Congress’s purpose ... supports our reading of its text.” To be sure, the opinion’s tack is to suggest that the legislative history is unhelpful rather than to say that the legislative history is affirmatively persuasive. Justice Kagan went on to comment that there was little to no legislative history on this point at all, much less anything particularly helpful.

In any case, the case can be viewed as both a positive and a negative. Positive in the sense that ERISA’s limitations on recovery have a massive chilling effect on litigation related to ERISA-governed plans. Negative in that ERISA provides a certain amount of protection to consumers whose entire retirement savings may fall into one of these accounts. Consumers should always be aware of the investments their employer is making, though, regardless of whether or not the plan is governed by ERISA.

If you need additional information on this subject, contact Rebecca Gilliland, a lawyer in our firm’s Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or email [Rebecca.Gilliland@beasleyallen.com](mailto:Rebecca.Gilliland@beasleyallen.com).

Sources: Lahle Wolfe, *What is Erisa and What Does it Cover?* (Mar. 7, 2017) <https://www.thebalance.com/what-is-erisa-law-3515060> and Ronald Mann, *Opinion Analysis: Justices Unanimously Uphold ERISA Exemption for Church-Affiliated Pension Plans* (June 5, 2017) <http://www.scotusblog.com/2017/06/opinion-analysis-justices-unanimously-uphold-erisa-exemption-church-affiliated-pension-plans/>

## XII. INSURANCE AND FINANCE UPDATE

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### **9<sup>TH</sup> CIRCUIT COURT OF APPEALS AFFIRMS \$14 MILLION ALLSTATE BAD FAITH VERDICT**

The Ninth Circuit Court of Appeals has affirmed the \$14 million bad faith judgment returned against Allstate, finding there was sufficient evidence to conclude the insurer could and should have settled an underlying motorcycle collision case. A three-judge panel rejected Allstate's appeal of a 2012 jury verdict that the insurer acted in bad faith when it rejected Carlos Madrigal's offer to settle his claims against policyholders Anna and Richard Tang for policy limits.

In the underlying case, Madrigal had sued the Tangs after a July 2009 collision between his motorcycle and a car driven by Richard Tang left Madrigal a paraplegic. Madrigal made a settlement demand for the Tangs' \$100,000 policy limit. Allstate initially rejected the offer and made a counteroffer of approximately \$34,000. Madrigal rejected this offer and a later \$100,000 offer. The case went to trial in state court, and in October 2012, the jury awarded Madrigal \$10 million.

Following the trial, the Tangs assigned their rights against Allstate to Madrigal, who sued the insurer in California federal court in April 2014 for bad faith failure to settle. In November 2015 the jury found bad faith and awarded Madrigal approximately \$14 million. Allstate appealed, seeking a reversal of the trial court's denial of a new trial or a judgment notwithstanding the verdict.

Madrigal and the Tangs are represented by Arash Homampour and Wendi O. Wagner of the Homampour Law Firm, Warren J. Binder of Binder & Associates, and Jeffrey I. Ehrlich of The Ehrlich Law Firm. The case is *Madrigal et al. v. Allstate Indemnity Co.*, (case numbers 16-55839 and 16-55863) in the U.S. Court of Appeals for the Ninth Circuit.

Source: Law360.com

### **INVESTIGATIONS FINDS MINORITY NEIGHBORHOODS CHARGED HIGHER INSURANCE RATES**

It is no secret insurers have been known to charge higher premiums to drivers living in predominantly minority

urban neighborhoods than drivers with similar records who live in majority-white neighborhoods. Insurance companies have defended this practice by arguing the risk of accidents is greater in those neighborhoods. That argument, however, may not hold water. A joint investigation by Consumer Reports and ProPublica found that consumers in some minority neighborhoods are charged as much as 30% more for car insurance than those in other neighborhoods with similar accident-related costs. The analysis examined information from four states and found that discrepancies in premium prices between these neighborhoods cannot be explained by differences in risk.

Most states have passed laws making discriminatory rate setting illegal, and companies maintain they use nondiscriminatory rating factors. Still, it is unclear why minority neighborhoods are treated differently than similarly risky white neighborhoods. For example, in looking at two similarly-situated drivers, both of whom receive a good-driver discount and have similar policies from Geico, the investigation found that the man living in a minority neighborhood paid a \$190.69 premium for his 2012 Honda Civic, while a man in the more affluent neighborhood paid a \$54.67 premium for his 2015 Audi Q5. Worse, in assessing risk from an auto insurance perspective, the minority neighborhood was actually safer. This disparity can be devastating for many consumers.

Some companies consider other factors, such as credit score and occupation, which can affect premium pricing. Still, many companies refuse to collect or publish the data needed to assess redlining and discriminatory practices arguing such data is a trade secret. The lack of data makes it difficult to analyze and discover these potential discriminatory disparities. The investigation sought data from all 50 states and the District of Columbia, but only four states said they collected such data and provided it (California, Illinois, Missouri, and Texas).

The insurance industry has a long and troubled past with discriminatory tactics. Thurgood Marshall, who went on to become a Supreme Court Justice, was denied auto insurance based on his living in a certain area and noted, "it is practically impossible to work out a court case because the insurance is usually refused on some technical ground." While we have thankfully made strides in making discriminatory

tactics illegal, this analysis indicates there may still be more ground to cover.

Source: *A World Apart*, Consumer Reports, July 2017

## XIII. WORKPLACE HAZARDS

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### **\$28 MILLION WRONGFUL DEATH VERDICT IN WRONGFUL DEATH LAWSUIT**

A jury returned a verdict last month of nearly \$28 million in the wrongful death lawsuit filed on behalf of the family of a Duke Energy Ohio lineman who died while climbing a utility pole that collapsed and fell due to hidden underground decay. The case was tried in Hamilton County, Ohio (Cincinnati).

Keith Jester was a senior lineman / trainer who climbed a utility pole with another utility worker when the pole broke below ground and fell on top of Jester, who was strapped to the pole. He survived for one hour and died of internal injuries. The Jester family filed a wrongful death lawsuit against Utilimap Corporation, a division of Quanta Services.

Utilimap was hired by Duke Energy to inspect 30,000 poles in Southwestern Ohio. As a utility wood pole inspection company, Utilimap was obligated by contract to perform inspections of the poles for the safety of the public and utility workers and for the reliability of the electricity system. The inspection program occurred approximately 28 months before this fatality.

Evidence in the case revealed that Utilimap inspectors skipped the pole that failed without notifying Duke Energy. In addition, Utilimap billed and was paid for the skipped pole. Utilimap denied all fault and blamed Keith for his own death. At the end of trial, the jury found Utilimap 100 percent negligent in failing to inspect the pole and failing to notify Duke Energy. The jury found no negligence on the part of Keith, who is survived by his wife and three children. Spangenberg Shibley & Liber LLP, an Ohio firm, represented the family in this case.

Source: Spangenberg Shibley & Liber LLP

**JUDGE RULES ALABAMA WORKERS'  
COMPENSATION ACT UNCONSTITUTIONAL**

Those persons injured on the job are often entitled to workers' compensation benefits. Workers' compensation is referred to as an exclusive remedy, meaning that it is often an injured employee's only option for recovering damages as a result of their accident. Simply put, an employee cannot sue their employer for negligence if they are subject to worker's compensation. Workers' compensation is a no-fault system, in that, the injured employee will receive benefits for lost wages, medical care and rehabilitation, even if the worker plays some role in causing the injuries.

The purpose of the no fault system is to provide a quick and easy remedy for on the job injuries. In order to do so, The Alabama Workers' Compensation Act outlines specific damage awards for various injuries as well as sets weekly pay caps for those injured on the job. However, Alabama's Workers' Compensation laws and monetary payment schedules have not been upgraded in decades.

In May, Jefferson County Circuit Court Judge Pat Ballard found the Alabama Workers' Compensation Act to be unconstitutional. Judge Ballard was presiding over a 2013 case, *Nora Clower vs. CVS Caremark*. In that case, the worker injured her back while on the job at CVS Caremark. According to an affidavit filed with the Court, Clower earned an average weekly wage of \$355 at the time of her injury. However, under the current Alabama Workers' Compensation laws, workers hurt on the job are eligible for a maximum of \$220 per week in compensation once their injury has stabilized. This cap dates to 1987, when \$220 per week was above minimum wage and poverty levels.

However, in today's terms, \$220 per week is significantly below the two levels. As Judge Ballard pointed out:

*There is little credibility in telling two injured workers, both of whom are 99 percent disabled due to work injuries, that they both get \$220 per week, when one earns \$8.50 per hour for a 40-hour work week, and the other earns an annual salary of \$125,000. In fact, \$220 a week for a family of four is more than half below the poverty line.*

Accordingly, Judge Ballard found the Act unconstitutional, but stayed his order for 120 days to give the Alabama Legislature time to pass new laws. Additionally, Judge Ballard found the current 15 percent contingency fee cap set forth in the Act unconstitutional as well. The 15 percent cap often prevents injured workers from obtaining legal counsel as the cases simply aren't economically feasible to pursue. As Judge Ballard noted, this cap fails to afford due process of the law.

Although Judge Ballard's order does not affect other cases or nullify the Act because it came from the trial court level, it certainly puts a spotlight on a glaring flaw with Alabama Workers' Compensation Act. Our lawyers having litigated workers' compensation cases in Alabama, as well as several surrounding states, workers injured on the job in Alabama are compensated at an alarmingly lower rate than their counterparts in other states. In Alabama, many serious injuries are codified into what is known as "scheduled injuries."

The legislature took it upon themselves to pre-determine what an injured worker will receive for a given injury. For instance, if your hand is amputated, the Alabama legislature determined that you are entitled to \$37,400. If you lose your arm, that loss was determined to be worth \$48,840. An amputated thumb is worth \$13,640 and all other digits are under \$10,000. Any reasonable person would say these caps are far too low to adequately compensate someone forced to live the remainder of their life without an appendage.

Hopefully Judge Ballard's Order will be the catalyst needed to re-write the Alabama Workers' Compensation Act. We should have laws that both protect workers on the job and also adequately compensate them when they are injured. No longer should an Alabama worker have to be subject to an outdated and grossly unfair set of Workers' Compensation laws.

If you need more information on this subject, contact Evan Allen, a lawyer in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at [Evan.Allen@beasleyallen.com](mailto:Evan.Allen@beasleyallen.com).

## XIV. TRANSPORTATION

### **DANGERS ON OUR HIGHWAYS INVOLVING LARGE TRUCKS**

Millions of vehicles travel at least as many miles a day on the roads and highways across the United States. Transporting people and cargo is vital to maintaining the social and economic health of countless communities. These needs continue to grow steadily, which means there is also a growing demand for trucking services. Business Insider reports that 80 percent of all cargo in America is transported by the trucking industry.

Consequently, passenger vehicles are increasingly forced to share the roads with large trucks such as 18 wheelers or tractor trailers. The result is all too often tragic. According to the Insurance Institute for Highway Safety (IIHS), one in 10 highway deaths occurs in a crash involving a large truck and, most often, passenger vehicle occupants pay the ultimate price. In 2015, 3,852 people died in large truck crashes and 69 percent of the deaths were passenger vehicle occupants.

However, truck drivers are also at risk. It should be noted that truck driving consistently ranks among the deadliest occupations in the country. Trucks.com reports that there has been an 11.2 percent increase in truck driver deaths since 2011.

As explained in his book, *An Introduction to Truck Accident Claims: A Guide to Getting Started*, Beasley Allen lawyer Chris Glover notes that maintenance and liability are among the top safety concerns in the trucking industry. Truck drivers and all who share the roads with them depend on the safety and reliability of the truck. Despite earnest efforts to improve safety within the industry, not all methods and devices that promise protection or improved safety live up to those claims.

One particular truck accessory not only fails to protect drivers as promised, it intensifies the risks to drivers during truck crashes. Cab guards have been deceptively marketed as safety devices, particularly for log trucks. Manufacturers promised the devices would prevent drivers' cargo from crushing them in the event of a crash where the load shifts. However, even the manufacturers' own experts have admitted cab guards are little more than shiny decora-

tions for large trucks. Visit [BeasleyAllen.com](http://BeasleyAllen.com) for more information.

Chris Glover, who is in our Atlanta office, handles cases of personal injury and deaths involving heavy trucks, log trucks, 18-wheelers and other commercial vehicles. For more information about these types of claims, contact Chris by email at [Chris.Glover@beasley-allen.com](mailto:Chris.Glover@beasley-allen.com). To get your free copy of *An Introduction to Truck Accident Claims: A Guide to Getting Started*, visit Chris Glover's website at [www.Chris-Glover-Law.com](http://www.Chris-Glover-Law.com).

Sources: *Business Insider*, Insurance Institute for Highway Safety and Trucks.com

### OPIOID USE AND TRUCKING ACCIDENTS

The trucking industry is facing what is referred to as "a silent epidemic." Half of the nations' truck drivers are older than 50. Many of these drivers have sat behind the wheel of a truck for years, which has led to a dependence on opioids to treat back pain, arthritis, and several other medical conditions. Without any regulation requiring disclosure of opioid use, these drivers continue to operate commercial motor vehicles. The mixture of opioids with the use of a 20,000-pound vehicle is a recipe for disaster.

Deficiencies in drug policy regulations are contributing to our nation's large highway death toll from motor vehicle collisions. While commercial drivers are drug tested before employment and are re-tested randomly and after accidents during employment, these drugs tests do not look for all opioids. This is because the regulations allow drivers to take prescription drugs as long as they are prescribed by a practitioner who knows the driver's medical history and advises that the drugs will not affect driving ability. The regulations also require drivers to undergo a medical examination and obtain a health certificate that depends on the driver to disclose all medicines the driver may be using.

Both of these regulations depend on the driver to self-report all medications. Drivers may not report all drugs they are taking for one of two reasons. One is that they want to pass their medical examination. Another is that they simply do not think it is important to report their prescription drug use.

Because opioid use is likely to go undetected, an injured party's lawyer must be diligent in determining whether a driver's opioid use contrib-

uted to a motor vehicle collision. There are several steps the lawyer can take in making this determination:

- First, the lawyer must request the driver's qualification file and personnel records, which will contain the Department of Transportation (DOT) physical examination. This file may contain the driver's medical conditions, drug and alcohol test reports, and employee absences associated with treatment for chronic pain.
- Second, the lawyer can send interrogatories to the employer confirming the driver's past injuries, surgeries and ongoing physical conditions. Tailoring discovery to opioid use may be helpful in defeating relevance objections from the defense lawyer.
- Third, the following records should be subpoenaed:

All records from the DOT medical examiner;

All records from the providers who treated the truck driver for injuries arising out of the crash;

All workers' compensation and insurance carrier records pertaining to the truck driver;

Records from the truck driver's family doctor or primary care provider; and

Urgent care, emergency room, and hospital records.

While it is important to look for use of opioids, it is just as important to determine whether the driver recently stopped using them. Studies show that withdrawal symptoms from opioids may increase risks of collisions. Opioid withdrawal symptoms can include low energy, irritability, dizziness, muscle aches, yawning, or insomnia.

If you need more information, contact Stephanie Monplaisir, a lawyer in our firm's Personal Injury & Product Liability Section at 800-898-2034 or email [Stephanie.Monplaisir@beasleyallen.com](mailto:Stephanie.Monplaisir@beasleyallen.com).

Source: Ammons, Robert E. *A Silent Epidemic*. *Trial Magazine*, The American Association For Justice. February 2017.

### HACKERS PRESENT A DANGEROUS THREAT TO DRIVERS

It is hard to read the newspaper headlines and not see a new story about another major hacking incident. To put

the impact of this most serious problem into perspective, Hackers are costing consumers and companies an estimated \$375 to \$575 billion per year. Other estimates have placed the total cost closer to \$1 trillion. Few hackers are ever caught—particularly if they very good hackers. James Lewis, Center for Strategic and International Studies (CSIS) senior fellow, stated:

*We don't catch most cybercriminals and we don't catch the most successful ones. That's the heart of the problem. So far there is impunity for cybercriminals.*

A report prepared by Mr. Lewis found that due to the billions of dollars lost at the hands of hackers, 200,000 jobs were lost in the United States alone. Aside from the financial cost, government entities have been hacked with regularity, causing a release of sensitive data and personal information.

Unfortunately, hacking risks extend beyond financial, government and privacy concerns, to health and safety issues as well. Over the past few years, testing has confirmed that hackers have the ability to hack into car computer systems, obtain access to the car, and manipulate the car to do what they want it to do. The Jeep "Hackers," Charlie Miller and Chris Valasek, proved such a feat was possible when they hacked into a 2014 Jeep Cherokee in 2015, and paralyzed the car on Highway I-64 while it was being driven in traffic.

These "hackers" could even disable the car's breaks at low speeds. Their testing caused Jeep to institute a recall of 1.4 million vehicles to patch vulnerabilities in Jeep software. In 2016, the Jeep Hackers returned to prove they could do even more—they hacked into a car and caused it to accelerate to high speeds, they could slam on the car's brakes, or turn the car's steering wheel at any speed. Miller had this to say, which is very scary:

*You have one computer in the car telling it to do one thing and we're telling it to do something else. Essentially, our solution is to knock the other computer offline.*

Their second test, which involved a direct link to the vehicle as opposed to a remote hack, overrode contradicting signals that tell the parking brake not to activate, and, disabled steering so the steering wheel resisted the driver's attempts to turn it. When they digitally turned the wheel at 30 miles per hour

on an empty road, they crashed the Jeep into a ditch.

Vulnerabilities in vehicle software systems are not just limited to the ones mentioned above. In 2011, researchers at the University of California at San Diego and University of Washington found ways into the Chevy Impala's computer system, which included everything from the car's Onstar connection, a hacked smartphone connected to the infotainment system via Bluetooth, and a hack accomplished by inserting a CD containing malicious files into the vehicle's CD player.

Car manufacturers are aware of these vulnerabilities. They have tried to respond as researchers have exposed those vulnerabilities. However, with cars relying more and more on computer systems and their access to satellite, Bluetooth and internet connectivity, the danger of vehicle hacking will persist. Miller had this to say:

*We're doing as much as we can to get manufacturers to build layers and layers of security into their cars. There's no reason to think the bug we found and got patched [in 2015] is the only bug of its kind. There are definitely more vulnerabilities in other cars, and probably more in the Jeep, too.*

Yoni Heilbronn, vice president of marketing at Argus Cyber Security, an automotive security company, observed:

*The equation is very simple. If it's a computer and it connects to the outside world, then it is hackable.*

Hopefully, automakers and NHTSA will keep track of this potential threat and take all steps necessary to protect the public. This is a most serious problem.

Source: U.S. News & World Report, Wired, The Washington Post

#### **NAVY REPORT CONNECTS FAULTY OXYGEN SYSTEMS TO JET CREW DEATHS**

Faulty oxygen systems on Navy FA-18 fighter jets have been linked to four fatal accidents, according to a redacted U.S. Navy review released on Thursday, June 16. The review was of onboard oxygen system problems spurred by a number of hypoxia incidents that have grounded training flights for more than a month.

The report attributes a surge in reports of "physiological incidents" from FA-18 and T-45 trainer jet crews begin-

ning in 2010 to faulty onboard oxygen generation systems on the aircraft and improvements in awareness and reporting mechanisms for the increase in reports of hypoxia, a sometimes fatal condition resulting from lack of oxygen in the body, and related illnesses. The report said:

*The integration of the on-board oxygen generation system (OBOGS) in the T-45 and FA-18 is inadequate to consistently provide high quality breathing air. To varying degrees, neither aircraft is equipped to continuously provide clean, dry air to OBOGS—a design specification for the device. The net result is contaminants can enter aircrew breathing air provided by OBOGS and potentially induce hypoxia.*

The specific causes and dates of the four fatal incidents, and a fifth where a FA-18 pilot survived after ditching the aircraft, are redacted. But the report notes that "correct application of emergency oxygen" probably would have saved the aircraft and their crews.

The report comes after the surge in reported incidents culminated in a refusal by flight instructors at three separate bases to accompany students on T-45 flights over safety concerns. The Navy has since grounded all training flights and limited conditions under which trainers can fly the T-45 jets.

Reports of incidents on FA-18s before 2010 peaked at 17. In 2010 the number rose to 28 and has risen every year since except 2014, reaching 125 last year. Reports of physiological episodes on T-45s rose from just five in 2011 to 38 last year, with 21 already reported in 2017.

According to the report, an aircrew had to eject from a T-45 in 2016, and the Navy's response helped shake confidence in both the jets and the Navy leadership's response to the problem. Although the cause of the incident is redacted, the report states that the aircrew disputed the initial conclusions of the Navy's investigation.

The top admiral for naval aviation, Vice Adm. Paul A. Grosklags, told the Senate Armed Services Subcommittee on Seapower on June 13 that the Navy has been "tearing apart" jets in an effort to pinpoint the cause of the oxygen system failures. While specific causes of the physiological episodes have yet to be identified, the report lists a number of potentially concerning issues with the oxygen systems, including use of

components that are not designed to withstand extreme temperature fluctuations and components beyond their intended lifespans.

Among the review's recommendations are a redesign of the systems on the aircraft to overcome design shortcomings and establishment of a dedicated organization to oversee efforts to reduce the number of physiological incidents on Navy and Marine flights.

Source: Law360.com

#### **WILL THE FAA CLOSE THE HELICOPTER CRASHWORTHY FUEL TANK LOOPHOLE AND PREVENT POST CRASH FIRE DEATHS?**

The deadline is quickly approaching for the Federal Aviation Administration (FAA) to take action on a loophole that has existed for more than two decades despite strong evidence it has resulted in a number of preventable post-crash fire (PCF) deaths and serious injuries. Last July, the FAA Extension, Safety, and Security Act of 2016 (FAA Extension Act) became law. Section 2105 of the Act requires the FAA "to evaluate and update the standards for crash-resistant fuel systems for civilian rotorcraft" within one year after the law was enacted.

According to AviationPros.com, the FAA Extension Act is a 14-month extension of the FAA's Reauthorization Act, which outlines reforms across the aviation industry. The agency's Aviation Rulemaking Advisory Committee took an initial step toward closing the loophole just months after the law was enacted. It unanimously approved a report specifically stating that "nearly all thermal injuries in survivable accidents would be expected to be eliminated" if all helicopter manufacturers adhered to the 1994 federal standards requiring crash-resistant fuel systems (CRFS) in all helicopters, NBC affiliate KUSA 9News reported. However, the report is still awaiting complete approval by the FAA.

The 1994 standards were the result of a recommendation proposed by the National Transportation Safety Board (NTSB) nine years earlier. In 1985, the NTSB issued Safety Recommendations A-85-69 through 71 asking the FAA to "[a]mend the helicopter certification standards...for seats, restraint systems, fuel systems, and structures to incorporate the crash design guidelines developed by the U.S. Army..." It specified that the new, safer standards should

apply to “newly type-certificated helicopters.”

During the nine-year period between the NTSB’s recommendation and FAA action, the FAA conducted a public comment period and sought input from the helicopter industry. The 1994 FAA standards mandated that all newly certified helicopters have crash-resistant fuel systems—carving out an exception as described in a prior issue of this Report to appease helicopter manufacturers that put their bottom lines ahead of protecting human life. The exception allows even newly manufactured helicopters to abide by decades-old fuel tank designs if the particular aircraft was certified prior to 1994. It has allowed nearly 84 percent of helicopters manufactured since the standards were published to avoid meeting the higher safety standards.

The outcome of this exception has been tragic. Heliweb reports that since the 1994 rule change there have been 202 helicopter crashes and nearly 40 percent of them (78) resulted in PCF deaths.

A study commissioned by the FAA in 2002 confirmed that absent PCFs the number of serious injuries and deaths would be significantly lower. It noted that “advances in other areas of crash survivability... have allowed occupants to survive in accidents that are severe enough to totally destroy the aircraft... [i]t is, therefore, not unreasonable to expect the CRFS to safely contain its contents throughout the entire severe crash sequence.”

The study’s findings were supported by past military research, as discussed in a prior issue of this Report, which identified weak fuel tanks as the most frequent cause of PCFs that claimed the lives of many pilots who survived the initial impact. That research prompted the U.S. Army to equip its entire fleet of helicopters with stronger, more durable fuel tanks by the mid-1970s. Yet, more than 40 years later, civil aviation continues lagging in implementing technology known to save lives.

In July 2015, just weeks following the tragic, fiery crash of Air Methods Flight for Life in Frisco, Colorado, in which one PCF death and one serious PCF injury occurred, the NTSB issued Safety Recommendation A-15-012 renewing its call for the FAA to require CRFSs in “all newly manufactured rotorcraft regardless of the design’s original certification date.” Further, when the NTSB released official findings from its investigation regarding the Frisco, Colorado, crash, it

noted that the crash was survivable, but the lack of a CRFS led to the deadly outcome.

As the two-year anniversary of the tragedy approaches, Congressman Ed Perlmutter (D-Colorado), who took up the cause in response to the tragedy that occurred in his district, will be vigilant in ensuring the FAA meets the deadline set by the FAA Extension Act. He says, “The benefits of making helicopter fuel systems safer far outweighs the cost to make the changes”—a sentiment he shares with many experts, lawmakers and families of those killed and seriously injured because of PCFs.

Sources: Government Publishing Office, AviationPros.com, KUSA, National Transportation Safety Board, Office of Aviation Research, Heliweb and Congressman Ed Perlmutter (D-Colorado)

## XV. ENVIRONMENTAL CONCERNS

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### **PUBLIC HEALTH ADVISORY VALIDATES TOWN OF CENTRE LAWSUIT**

We wrote last month about the lawsuit our firm filed on behalf of the town of Centre. The Alabama Department of Public Health (ADPH) has issued a public health advisory for the Town of Centre Water Works and Sewer Board that validates the lawsuit. The advisory states in part:

*The health department, in coordination with ADEM [Alabama Department of Environmental Management], continues monitoring the situation and providing information regarding the EPA health advisory and recent reported levels.*

The State Toxicologist has reminded affected consumers that the Environmental Protection Agency (EPA) advisory suggests that sensitive populations such as pregnant women, breastfeeding mothers, and formula-fed infants served by the identified water system consider using alternate sources of drinking water.

The public health advisory validates the lawsuit our firm filed by the Water Works and Sewer Board of the Town of Centre against carpet and textile companies, manufacturers and chemical suppliers of PFCs, holding them responsible for polluting the city’s water supply. The

lawsuit alleges the Defendants are responsible for putting PFOS and PFOA into the raw water supply upstream of Centre Water’s intake site, in or near the City of Dalton, Georgia.

Safe drinking water is of vital importance to every community. The Town of Centre has already undertaken expenses that it shouldn’t have to bear in order to try and clean up these PFCs. The Town will also continue to face the challenge or monitoring, blending and ultimately filtering the water as a result of the pollution resulting from these chemicals being dumped in its water supply. The Water Works and Sewer Board of the Town of Centre is taking the appropriate actions to insure the safety of the water in its system.

Beasley Allen lawyers Rhon Jones, Rick Stratton, and this writer, along with Roger H. Bedford of Roger Bedford & Associates in Russellville, Alabama, are representing the Town of Centre. The complaint was filed in the Circuit Court of Cherokee County, Alabama. The case has been removed by the Defendants to federal court and we have filed a remand motion.

### **DRINKING WATER OF 15 MILLION AMERICANS CONTAMINATED WITH TOXIC NONSTICK CHEMICALS**

A new study published by the Environmental Working Group (EWG) and Northeastern University found highly fluorinated toxic chemicals, known as PFCs, in the drinking water of 15 million Americans across 27 states. The study measured the levels of two PFCs in particular, PFOS and PFOA, which are used in the manufacture of non-stick, stain-resistant, and water-proofing coatings on fabric, cookware, firefighting foam, and other consumer products.

PFCs are not regulated. Instead, they were tested by the U.S. Environmental Protection Agency (EPA) between 2013 and 2015 as part of the Unregulated Contaminant Monitoring Rule. In May 2016, the EPA issued a new drinking water lifetime health advisory for PFOS and PFOA of 70 parts per trillion. It warned that exposure to elevated levels of these compounds, which accumulate over one’s lifetime, can lead to a number of health problems including testicular cancer, kidney cancer, ulcerative colitis, thyroid disease, high cholesterol and pregnancy-induced hypertension.

According to the study, sources of the contamination include military bases, airports, industrial facilities, and civilian firefighting stations. Industrial sites

operated by corporations like 3M and DuPont have been sued for discharging these chemicals into bodies of water that serve as the water supply for communities. Contamination from military bases, airports, and firefighting stations has been attributed to the use of aqueous film forming foam, which was used as an effective fire suppressant to combat fuel fires.

Although the report sheds much needed light on this problem, it is limited by the EPA testing, which only included water systems serving more than 10,000 people. Thus, the extent of the contamination of smaller water systems and private wells is unknown unless those parties conducted their own testing. Fortunately, more communities have become aware and are testing their supplies to ensure the safety of their drinking water.

Source: Environmental Working Group, ewg.org

#### **ALABAMA HAS SECOND MOST SITES IN U.S. WITH CONTAMINATED DRINKING WATER**

The study conducted by the Environmental Working Group (EWG) and Northeastern University, referred to above, revealed startling results for Alabamians. It was reported that Alabama is tied with New Hampshire for having the second-highest number of sites where drinking water is contaminated with PFCs, behind only New Jersey.

PFC levels exceeding the EPA's health advisory were measured at five sites in northern Alabama: Decatur, Centre, and three in Etowah County near Gadsden. Lawsuits have already been filed by the impacted water systems against the alleged sources of the contamination. The West Morgan-East Lawrence Water and Sewer Authority claims facilities operated by 3M Company, Daikan America, Inc., and Dyneon, LLC in Decatur polluted the Tennessee River, which serves as its drinking water source. That case has settled, in part, with Daikan for \$5 million.

Our firm, along with Roger H. Bedford of Roger Bedford & Associates, represents the water systems in Gadsden and Centre. These complaints allege that carpet and textile companies, manufacturers, and chemical suppliers located upstream in Dalton, Georgia, are responsible for contaminating the Coosa River and Weiss Lake.

Our firm is investigating other PFC contamination cases. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, or Ryan Kral,

lawyers in our firm's Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, or Ryan.Kral@beasleyallen.com.

Source: Al.com

#### **MESOTHELIOMA CONTINUES TO AFFECT YOUNGER AMERICANS**

The landscape of asbestos exposure has shifted over the decades, changing with the places people have been historically exposed. The first wave of asbestos exposure occurred in asbestos mines and the second, the effects of which we are still experiencing, occurred in industry, where workers were exposed to products and manufacturing processes that contained asbestos. The third wave of asbestos exposure, the one lawyers in our firm are looking into today, is a different beast: It can happen right in your home.

The most recent Centers for Disease Control and Prevention (CDC) report concerning asbestos exposure in the United States noted the mesothelioma mortality rate decreased from 1999 to 2015 for 45- through 74- year-olds. However, it also noted that the continued exposure by people 55 and younger to asbestos suggests "ongoing occupational and environmental exposures to asbestos fibers...despite regulatory actions by the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) aimed at limiting asbestos exposure."

How is exposure still occurring? The report cites the renovation or demolition of aging buildings as a likely culprit. Younger people can be exposed to asbestos while working on a demolition or renovation site or just being in its proximity because just trace amounts of asbestos can cause health issues, including mesothelioma, a deadly cancer that affects the protective lining of internal organs.

The theory has ample evidence to support—at the very least—that it is plausible. Many of our nation's buildings were built with asbestos insulation, flooring tiles, pipes, etc. For example, it was estimated in the 1980s—the last year a federal asbestos risk assessment was completed for schools—35,000 contained asbestos, according to Asbestos Nation. The EPA estimated 15 million students and 1.4 million teachers were at risk of asbestos exposure then. Those buildings have undoubtedly since undergone numerous repairs or have

been demolished, potentially releasing asbestos into the air, where it becomes a health threat to both demolition workers or those in the schools. This helps explain why teachers are twice as likely to die from mesothelioma than average Americans, and construction workers face some of the highest odds of contracting the preventable disease.

According to the Agency for Toxic Substances & Disease Registry, "Today in the United States, most occupational exposures occur during repair, renovation, removal or maintenance of asbestos-containing products installed years ago." For homeowners, that reality is particularly frightening due to a rise in do-it-yourself (DIY) renovation and construction.

Federal laws requiring a licensed professional to abate asbestos do not apply to detached, single-family homes, according to the EPA, though state regulations may contain that requirement. Regardless of legality, it is of the utmost importance that projects that could potentially expose asbestos are not considered a DIY opportunity. Though rare, mesothelioma is still occurring at higher rates than expected, likely due to improper abatement procedures that can even affect us in our own homes.

Sources: EPA, CDC, Asbestos Nation, Agency for Toxic Substances & Disease Registry

#### **FRACKING SUIT REVIVED AFTER EXPERT REPORT ALLOWED**

The Eighth Circuit Court of Appeals has revived a fracking lawsuit filed by property owners alleging that waste from Southwestern Energy Co. (SWE) contaminated their land. The court overturned the district court's decision that dismissed the lawsuit after rejecting an expert report analyzing the underground spread of fracking waste. The Eighth Circuit said the report and other evidence raised factual issues that should be decided by a jury.

The lawsuit alleges fracking waste migrated to the Plaintiffs' property from a neighbor's property. The neighbor had leased his land for a fracking liquid waste disposal well. The expert report addressed the likely distance the fracking waste migrated. SWE challenged the mathematical equations and techniques used by the expert and claimed they yielded unrealizable results.

After the report was excluded, the district court concluded there was insufficient proof of the contamination and granted SWE's motion for summary

judgment. The Circuit Court disagreed, stating that the expert's analysis was well within his expertise and could assist a jury in describing where the waste spread. The court ultimately determined that it was the jury's duty, not the court's, to determine which expert to believe when both opinions are within the range where two experts might reasonably disagree.

Prosecuting a fracking case is highly technical as it necessarily relies on expert evidence and significant discovery. It's no surprise that energy companies attack the reliability of expert reports and attempt to have them excluded before reaching the jury. Permitting diverging opinions on difficult cases like this is important. It allows Plaintiffs to get a fair shake in our legal system. This ruling is most significant and is a good one.

Source: Law360.com

#### **CONTRACTOR ON \$42 MILLION PENNSYLVANIA BRIDGE PROJECT CANNOT AVOID CWA CHARGES**

A Pennsylvania federal judge has ruled that the owner of a painting company that has been cited multiple times for workplace safety violations cannot avoid charges that he knowingly discharged pollutants into the Susquehanna River during a \$42 million bridge rehabilitation project.

U.S. District Judge Sylvia H. Rambo refused to dismiss the Clean Water Act (CWA) charges against Andrew Manganas of Canonsburg, Pennsylvania, and his company, Panthera Painting Inc. Judge Rambo said the 2016 indictment sufficiently laid out the charges that they knowingly allowed pollutants to enter the Susquehanna River, including abrasive paint blasting materials, waste paint and metal, rather than collecting them for recycling or hazardous waste disposal, during and related to their work on the George Wade Bridge.

Manganas and Panthera were indicted in July 2016 on three CWA charges, one count of embezzlement, 21 counts of providing false statements to the U.S. government and 21 counts of wire fraud for the money paid by the government as a result of those claims, according to the indictment. The illegal acts allegedly occurred between 2011 and 2013 while Panthera was working to rehabilitate the bridge over the Susquehanna River in Harrisburg, Pennsylvania. Judge Rambo said:

*The indictment clearly identifies the statute defendants are charged with violating, provides the elements of the offense by tracking the statutory language, alleges that defendants acted 'knowingly,' and specifies a time period for each CWA count. Nonetheless, defendants urge the court to require that the government allege mens rea for each statutory element of the CWA in the indictment.*

Judge Rambo explained that whether "knowingly" applies to each element or only specific elements of Section 1319(c)(2) of the CWA is a question to be determined at a later juncture, not in a pretrial motion to dismiss.

The Pennsylvania Department of Transportation, in September 2009, awarded a contract for rehabilitation work on the George Wade Bridge to J.D. Eckman Inc. Federal aid programs were to reimburse 90 percent of the \$42 million cost. A month later, Panthera was awarded a \$9.9 million subcontract by Eckman that covered cleaning, resurfacing and painting the bridge's structural steel, according to the U.S. Department of Justice (DOJ). The federal oversight and funding of the contract required each contractor and subcontractor to submit certified payroll reports for every worker and every pay period to prove that the appropriate federally established wage was being paid to each worker.

However, Manganas and his company allegedly embezzled money from benefit and pension plans using a scheme in which workers got two checks—one for regular hours worked and a separate "per diem" check that was allegedly for overtime hours, but didn't include required contributions to the workers' union welfare benefit and individual employee pension plans. The government said about \$400,000 was embezzled from these plans between 2011 and 2013.

The company then sent false certified payroll reports for workers to the Federal Highway Administration, which caused the agency to wire payments from the Federal Highway Trust Fund to Pennsylvania, including payments for work performed by Manganas and his company, the government said. Workers allegedly lost a total of about \$209,000 as a result of the Defendants' failure to pay appropriate wages, according to the DOJ. In 2013, the U.S. Department of Labor's Occupational Safety and Health

Administration (OSHA) proposed nearly \$460,000 in fines against Panthera for exposing workers to lead and other safety and health hazards while working on bridges. In 2000, OSHA fined the company after a mechanical lift fell and killed a worker.

The U.S. is represented by Assistant U.S. Attorney James T. Clancy and Special Assistant U.S. Attorney Martin Harrell. The case is *U.S. v. Andrew Manganas and Panthera Painting Inc.*, (case number 1:16-cr-00209) in the U.S. District Court for the Middle District of Pennsylvania.

Source: Law360.com

#### **JUDGE IN ROUNDUP MDL GRANTS MOTION TO COMPEL TISSUE SLIDES**

The multidistrict litigation (MDL) Court overseeing the national coordinated docket for Roundup personal injury claims recently compelled Monsanto to produce or permit the inspection of kidney tissue slides from mice. The Plaintiffs had said these tissue slides were important to the issue of general causation. The slides were part of study BDN-77-420, which played a critical role in the U.S. Environmental Protection Agency's (EPA) decision to re-categorize glyphosate to Category E—"evidence of non-carcinogenicity to humans."

BDN-77-420 is one of three long-term animal toxicity and carcinogenicity studies owned by Monsanto and has been relied upon by Monsanto since the outset of the litigation. Plaintiffs' motion to compel stated that "Monsanto's repeated reliance upon the original and re-cut kidney tissue slides necessitates granting Plaintiffs access to the same slides."

Originally, the study conducted by Monsanto in 1983 regarding the effect of glyphosate (a chemical used in Roundup) on mice, demonstrated a dose-related response to glyphosate, and the EPA classified glyphosate as a Category C oncogene "possibly carcinogenic to humans." Subsequent to this classification, and despite the fact that it was its own study, Monsanto attacked the results and sent it to the EPA along with justifications as to why the tumors in the mice were not significant to the association of glyphosate and cancer. Monsanto also claimed that there was a newly found tumor in the control group of mice that called into question the results.

In response to Monsanto's questionable tactics and conclusions, the EPA

reclassified glyphosate into Category D—"not classifiable as to human carcinogenicity" and requested that Monsanto repeat the study, which Monsanto failed to do. In 1989, the EPA dropped its request for a new study and in 1991 performed a complete inversion from its original findings, dubbing glyphosate Category E—"evidence of non-carcinogenicity to humans." In their motion, Plaintiffs stated:

*No scientist or laboratory free of financial ties to Monsanto has ever affirmed the presence of a tumor in the control group slide of BDN-77-420. Moreover, the only independent scientists to review the pathology disputed the presence of a tumor within the control group. These disparate findings, coupled with changes in tumor classification and technological advances, provide ample reason to believe another review may yield different results.*

You can contact John Tomlinson, who is currently investigating other Roundup exposure cases. If you need more information on this subject, contact John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

Source: HarrisMartin

#### **MECHANIC FILES LAWSUIT OVER BENZENE EXPOSURE**

Lawyers in our firm recently filed a products liability lawsuit in Mobile County, Alabama on behalf of a mechanic who was diagnosed with Multiple Myeloma, a disease that causes cancer cells to accumulate in the bone marrow, where they crowd out healthy blood cells. The Plaintiff had been a diesel mechanic for over 20 years and was constantly exposed to solvents, cleaners, lubricants, oils and other petroleum derived products containing the chemical benzene.

Benzene is a clear, highly flammable liquid with a sweet, gassy smell. It occurs naturally in petroleum, and it is used as an organic solvent to make a variety of other chemicals and various plastics. It is also used in the manufacturing of some types of rubbers, lubricants, dyes, detergents, drugs and pesticides. Because benzene comes from petroleum, benzene is often found in oil-based paints, various degreasers, solvents, and fuels—including diesel, gasoline and kerosene. Persons working

in close proximity to benzene or benzene-containing products can be put at serious risk because their exposure can occur at much higher levels and for longer periods of time. The medical literature indicates that benzene causes multiple myeloma, acute myeloid leukemia (AML), myelodysplastic syndrome (MDS) and other forms of leukemia and lymphoma.

The Mobile lawsuit alleges that the Defendants know that the products the Plaintiff was exposed to contained benzene and that they have known for years that benzene poses a health hazard and can kill humans working in close proximity to their products. However, the defendants continued to manufacture and sell these products, while at the same time marketing the products as safe. We are very proud to be able to represent our client in his efforts to recover for his injury.

John Tomlinson, a lawyer in our firm's Toxic Torts Section, is currently investigating other Benzene exposure cases. If you need more information on this contact John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

## **XVI. AN UPDATE ON CLASS ACTION LITIGATION**

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#### **DEUTSCHE BANK TO PAY \$170 MILLION TO SETTLE EURIBOR INVESTOR SUIT**

Deutsche Bank AG has agreed to a \$170 million settlement with investors accusing big banks of conspiring to rig Euribor in a deal that would bring proposed relief to more than \$300 million. Settlement documents were filed in a New York federal court on June 12. The court has already granted preliminary approval to settlement details with Barclays and HSBC for a total of \$139 million, which would be paid out to investors who traded on Euribor products during a nearly seven-year period.

The Deutsche Bank settlement proposal is more than one-third of the sum that the bank paid in a European Commission fine over the bank's alleged role in the "Euro interest rate derivatives' cartel." Deutsche Bank will also "provide cooperation to Plaintiffs and the class to aid them in pursuing their

case against the nonsettling Defendants."

The motion also asks the court to conditionally certify a settlement class on the Deutsche Bank claims, approve Lowey Dannenberg and Lovell Stewart as class counsel, appoint Amalgamated Bank as escrow agent for the settlement fund and approve a proposed class notice and notice plan. The investors first sued the banks in Illinois federal court in February 2013, before the case was transferred to New York that April. Named Plaintiffs include entities like the California State Teachers' Retirement System, FrontPoint Partners Trading Fund LP, and Sonterra Capital Master Fund Ltd.

The suit claims that from June 2005 to March 2011, the banks conspired to fix Euribor, which is used to reflect the interest rate charged on short-term loans of unsecured funds in euros between prime banks and the wholesale money market. U.S.

The investors are represented by interim co-lead class counsel Vincent Briganti, Geoffrey M. Horn, Peter D. St. Phillip and Michelle E. Conston of Lowey Dannenberg Cohen & Hart PC and Christopher Lovell, Gary S. Jacobson and Ian T. Stoll of Lovell Stewart Halebian Jacobson LLP. Other counsel includes Joseph J. Tabacco, Patrick T. Egan and Todd A. Seaver of Berman DeValerio, Brian P. Murray and Lee Albert of Glancy Prongay & Murray LLP, and David E. Kovel of Kirby McInerney LLP. The case is *Sullivan v. Barclays PLC, et al.*, (case number 1:13-cv-02811) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

#### **BARCLAYS, UBS, AND HSBC AGREE TO \$36 MILLION SETTLEMENT IN LIBOR SUIT**

Barclays Bank PLC, UBS AG and HSBC Bank PLC have agreed to pay into a \$36.1 million fund to settle a putative class of bondholders' claims that the banks conspired to manipulate the London Interbank Offered Rate (LIBOR). The proposed settlements were filed in a New York federal court on June 7. Bondholders Ellen Gelboim and Linda Zacher asked U.S. District Judge Naomi Reice Buchwald to grant preliminary approval of the settlements, which were negotiated separately with each of the banks.

To create the settlement fund, Barclays has agreed to contribute \$7.1 million, UBS has agreed to contribute

\$17.9 million and HSBC has agreed to contribute \$11.1 million. The bondholders said negotiations began on the proposed settlements in January 2016, months before Judge Buchwald's December ruling that dismissed the bondholders' case.

Judge Buchwald found in that ruling that the court lacked personal jurisdiction over the foreign banks named in the suit and that the bondholders were not "efficient enforcers" of antitrust laws. But as part of their settlement bid, the bondholders have asked the judge to modify her dismissal so that it does not apply to Barclays, UBS and HSBC pending her consideration of the proposed settlement. According to the bondholders, the three banks have not opposed this request.

For the purposes of the settlement, the bondholders are also seeking certification of their putative class, which would cover the owners of more than 5,200 Libor-based debt securities with an outstanding face value of more than \$500 billion. The bondholders additionally requested that the court appoint their counsel, Morris and Morris LLC and Weinstein Kitchenoff & Asher LLC, as lead counsel. Judge Buchwald previously granted preliminary approval to a \$120 million settlement between Barclays and a group of so-called over-the-counter Plaintiff investors who bought Libor-based products directly from the British banking giant.

The bondholders are represented by Karen L. Morris, Patrick F. Morris and R. Michael Lindsey of Morris and Morris LLC, and David H. Weinstein and Robert S. Kitchenoff of Weinstein Kitchenoff & Asher LLC.

Source: Law360.com

#### **JP MORGAN AND GOOD TECHNOLOGY CORP. SETTLE FIRE SALE SUIT FOR \$52 MILLION**

Good Technology Corp. has settled a stockholder lawsuit that accused directors and financial adviser J.P. Morgan Securities LLC of arranging a wrongful "fire sale" in Good Technology's \$425 million merger with BlackBerry Ltd. in 2015. The settlement of \$52 million—still subject to court approval—followed a J.P. Morgan threat to exercise a claimed veto over a \$17 million deal to sever the software tech company's directors and associated venture capital funds from the suit. Instead, the bank reached its own \$35 million settlement agreement on the eve of a two-week trial.

Investors first sued for damages in October 2015, accusing Good Technology's directors and the bank of squandering a chance to sell a "Silicon Valley unicorn" worth \$1 billion and allowing it to spiral into a cash crisis that forced an undervalued sale.

It's alleged in the suit that a Good Technology director wrote in an internal email after the \$425 million agreement that "BlackBerry got an absolutely fantastic fire sale deal because the company couldn't have made payroll next week." It was alleged further that J.P. Morgan "illicitly manipulated the deliberative processes of Good's board of directors for self-interested ends." The suit also accused the bank of committing "frauds on the board" that included use of Good Technology to cultivate BlackBerry as a client and failing to pursue higher offers or an initial public stock offering. Good Technology's directors, meanwhile "never took the steps necessary to police J.P. Morgan's conflicts of interest and take control of the sale process," according to the lawsuit.

Although directors and venture capital funds reached their \$17 million settlement in May, Friedlander objected in a May 26 letter to Vice Chancellor Laster that J.P. Morgan was attempting to invoke a provision of its financial adviser retention agreement to block a court-approved severing of that group from the case. Friedlander wrote:

*JPM is seeking to impose on stockholder plaintiffs and director defendants the massive cost of continued litigation through final judgment, and deny the stockholder class the benefit of the \$17 million settlement consideration, absent an unconditional release of JPM.*

In a separate letter, JPMorgan told a Delaware Vice Chancellor that its retention agreement with Good Technology barred the bank from being left as "the last Defendant standing" and prohibited BlackBerry from tapping a \$65 million indemnification fund for a settlement payout without J.P. Morgan's consent. Payment pursuant to the settlement is being funded pursuant to J.P. Morgan's indemnification agreement. In an earlier order denying a director and bank motion for summary judgment, the Vice Chancellor found that the class had pled a sufficiently plausible theory that bank and director self-interest and disloyalty played a part in delaying Good Technology's move toward a quick IPO or sale,

despite its dwindling cash reserves and looming liquidity crisis.

The suit noted that one \$825 million offer for Good Technology from an unnamed prospect in early 2015 was not pursued. The Vice Chancellor said in his order denying summary judgment that a \$650 million to \$700 million offer from Thoma Bravo in June 2015 was likewise allowed to pass. Vice Chancellor Laster wrote in his summary judgment order:

*There is evidence that this decision was motivated by the company fiduciaries' economic interests, which caused them to be more risk-seeking than a loyal fiduciary.*

The Vice Chancellor noted that the company's CEO and other fiduciaries had interests that would be triggered only by a high-value IPO or acquisition. The court's summary judgment ruling also cited an assortment of evidence plausibly showing J.P. Morgan's liability. Among the details were assertions that the financial adviser lied to Good Tech about giving BlackBerry price guidance and favored BlackBerry as a buyer because of interest in the company as a client.

The class is represented by Joel Friedlander, Jeffrey M. Gorris and Christopher P. Quinn of Friedlander & Gorris P.A. and Randall J. Baron of Robbins Geller Rudman & Dowd LLP. The case is *In re: Good Technology Stockholder Corporation* (case number 11580) in the Court of Chancery of the State of Delaware.

Source: Law360.com

#### **INTERNATIONAL PAPER CO. SETTLES SUPPLY-FIXING LAWSUIT FOR \$354 MILLION**

International Paper Co. has agreed to pay \$354 million to settle a class action lawsuit accusing it and other container-board manufacturers of colluding to suppress supply and increase prices. A proposed settlement agreement was filed in an Illinois federal court last month. The settlement came after "extensive" motions to dismiss, a discovery process that included 1.8 million documents and 85 depositions, a Seventh Circuit appeal, and a failed bid by International Paper to have the U.S. Supreme Court overturn the class certification.

Filed in 2010 by floor care products company Kleen Products LLC, Ferraro Foods Inc. and others, the lawsuit

alleged that, beginning in 2004, the containerboard manufacturers colluded to suppress supply and increase prices. In its complaint, Kleen alleged that as demand for containerboard rose, the small number of manufacturers in the industry all began suppressing supply at the same time, leading to skyrocketing prices.

In 2014, Packaging Corp. of America agreed to pay \$17.6 million to settle and get out of the suit. It also agreed to provide evidence against other containerboard manufacturers.

U.S. District Judge Harry Leinenweber granted class certification in March 2015, ruling that any difference among class members was overcome by the fact that they would likely rely on the same evidence in an attempt to prove they paid more than they would have absent a conspiracy.

In April, the U.S. Supreme Court denied a December 2016 petition by International Paper Co., Weyerhaeuser Co. and Temple-Inland Inc.—later joined by briefs from co-respondents RockTenn CP LLC and Georgia-Pacific LLC—in which the three said the Seventh Circuit wronged them by granting class certification. International Paper's actual payout under the settlement could still change, according to the proposal, depending on what Georgia-Pacific ends up paying. International Paper's class share is three times the size of Georgia-Pacific's, the proposal says. International Paper will only pay three times the amount Georgia-Pacific pays out. So if Georgia-Pacific settles for anything less than \$118 million, International Paper's payout will go down.

On August 1, International Paper will put \$165 million into escrow for the class under the settlement proposal. "In addition to a monetary payment, the settlement will provide additional benefits to the members of the class, including cooperation from the settling defendants as provided in the settlement agreement. The class is represented by Michael Freed and Robert J. Wozniak of Freed Kanner London & Millen LLC, and Daniel Mogin and Jodie Williams of MoginRubin LLP. The case is *Kleen Products LLC et al. v. International Paper Co. et al.*, (case number 1:10-cv-05711) in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

## XVII. THE CONSUMER CORNER

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### **DOJ REVERSES POSITION IN CLASS WAIVER SUIT**

The Trump Administration is proving to be very much anti-worker and I fear there is more bad news on the horizon in that arena. A prime example is a recent action by the Department of Justice (DOJ). In a shocking move, the DOJ made a rare reversal of its position in a U.S. Supreme Court case by siding with employers in an amicus brief defending the legality of class waivers in arbitration agreements. The DOJ argued the exact opposite last year while representing the National Labor Relations Board (NLRB). As you may recall from prior issues, the NLRB has invalidated such provisions on several occasions.

The high court in January agreed to hear three consolidated cases involving Ernst & Young LLP, Murphy Oil USA Inc. and Epic Systems Corporation over whether arbitration agreements that prohibit employees from pursuing work-related claims as a class violate the National Labor Relations Act, as the NLRB has ruled in many cases.

One of those cases, *NLRB v. Murphy Oil USA Inc.*, got to the high court on a certiorari petition from the labor board filed by the DOJ in the late months of the Obama Administration. But since President Trump took office, the DOJ has "reconsidered the issue and has reached the opposite conclusion," according to a copy of an amicus brief uploaded by The Huffington Post. The brief said:

*We do not believe that the board in its prior unfair-labor-practice proceedings, or the government's certiorari petition in Murphy Oil, gave adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the [Federal Arbitration Act].*

The NLRB's previous position didn't take into account that the FAA requires the enforcement of arbitration agreements unless they "run afoul of arbitration-neutral rules of contract validity," the brief said. The high court was urged in the brief to reverse court of appeals decisions in the Ernst & Young and Epic Systems case, and affirm the decision in the Murphy Oil case.

The NLRB over the past few years has issued a large number of decisions invalidating arbitration agreements because they contained class waivers. Since a 2012 decision involving construction company D.R. Horton, the labor board has routinely stated that such waivers violate employees' rights under the NLRA and are unenforceable. Those decisions were legally sound and it's difficult to comprehend how the DOJ could reverse its position on such an important issue.

Murphy Oil has asked the Supreme Court to affirm a Fifth Circuit decision rejecting an NLRB ruling nixing its class waiver agreements with workers, and Epic Systems has asked the court to reject a Seventh Circuit decision affirming a similar adverse ruling. Ernst & Young is challenging a Ninth Circuit ruling agreeing with the NLRB's stance.

The DOJ said in its amicus brief that enforcing arbitration agreements with class waivers doesn't deprive employees of their rights under the NLRA, and that enforcement is required under the FAA save for certain exceptions. That is nonsense because arbitration is extremely unfair to ordinary citizens and that includes working men and women.

The cases are *Ernst & Young LLP et al. v. Stephen Morris et al.* (case number 16-300); *NLRB v. Murphy Oil USA Inc.* (case number 16-307); and *Epic Systems Corp. v. Lewis* (case number 16-285), before the Supreme Court of the United States.

Source: Law360.com

### **ANTHEM REACHES RECORD \$115 MILLION SETTLEMENT OVER MASSIVE DATA BREACH**

Anthem Inc. has agreed to a settlement valued at \$115 million to end litigation over a massive 2015 data breach. A pool of funds will be created to provide credit protection and reimbursement for customers in the largest-ever data breach settlement.

Pursuant to the settlement, the nation's second-largest health insurer will provide the nearly 80 million victims of the data breach with two years of credit monitoring, cover customers' out-of-pocket expenses stemming from the breach, and pay cash compensation to customers who already got their own credit monitoring. The settlement also calls for Anthem to guarantee a certain amount of funding for information security and to make certain changes to its data security systems.

The Plaintiffs are represented by Cohen Milstein Sellers & Toll PLLC, Altshuler Berzon LLP, Girard Gibbs LLP and Lieff Cabraser Heimann & Bernstein LLP, among others. The case is *In re Anthem Inc. Data Breach Litigation*, (case number 5:15-md-02617) in the U.S. District Court for the Northern District of California.

Source: Law360.com

#### **MERCK HALTS KEYTRUDA MYELOMA TRIAL ENROLLMENT**

Merck is testing Keytruda in combinations with Celgene's Revlimid and Pomalyst as a treatment for multiple myeloma. After an onslaught of what was said to be good trial results and regulatory news, drug maker Merck announced on June 12 that it was halting enrollment on a pair of phase 3 multiple myeloma studies of the drug to investigate trial deaths.

The move, which comes at the recommendation of an independent data monitoring committee, came after "more reports of death" in the Keytruda groups of studies Keynote-183, which is examining a combo of Keytruda with Celgene's Pomalyst and dexamethasone in previously treated patients, and Keynote-185, which is combining Keytruda with Celgene's Revlimid in certain not-yet-treated patients.

Patients already enrolled in those trials will continue to receive treatment, according to Merck. The company told Credit Suisse analyst Vamil Divan that "this is not a clinical hold." Nevertheless, it deals with deaths that occurred during the trials.

At press time, there were a number of unanswered questions. For example, Merck had not revealed how many patients have died. Neither is it known whether investigators observed the imbalance in just one study or both, Divan wrote in a note to clients on June 12.

It was said by the Credit Suisse analyst that the "dearth of information" makes it "difficult to draw meaningful conclusions." Nevertheless, Divan said she is not worried about the situation, stating: "We don't believe there is anything of major concern here at this time."

In the weeks leading up to the conference, Keytruda picked up three U.S. Food and Drug Administration (FDA) approvals—as part of a front-line lung cancer chemo combo, in bladder cancer, and in microsatellite instability-high cancer—as well as a priority review in

stomach cancer. This is a situation where the drug maker and the FDA must be absolutely certain that Keytruda is a safe drug.

#### **JURY IN CALIFORNIA RETURNS A RECORD \$60 MILLION FCRA VERDICT AGAINST TRANSUNION**

A federal court jury in California found in a trial last month that TransUnion violated the Fair Credit Reporting Act (FCRA) when it conflated a class of consumers with similarly named terrorists and criminals from a government watch list. The jury awarded statutory and punitive damages in excess of \$60 million. The Plaintiffs' lawyers say this is the largest FCRA verdict to date.

TransUnion LLC's credit reports checked consumers against the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) database, which lists terrorists, drug traffickers and other criminals. But the suit alleged that reports about law-abiding consumers were sometimes linked to similarly named criminals on the OFAC watch list.

After a weeklong trial, the jury found that TransUnion willfully failed to assure the maximum accuracy for its results, to notify class members of their OFAC results in written disclosures, and to provide them with notice of their FCRA rights. The 8,185 class members profiled by TransUnion will each get \$984 in statutory damages and \$6,353 in punitive damages, bringing the total award to \$8 million in statutory damages and \$52 million in punitive damages.

John Soumilas of Francis & Mailman PC told Law360 the award was "the highest verdict in the history of the FCRA." "The jury understood that the technology was available to deliver accurate results in credit reporting and that the failures of TransUnion to ensure accuracy showed willful noncompliance with the FCRA," he added.

Class counsel Carol M. Brewer, a lawyer with Anderson Ogilvie & Brewer LLP, agreed. She pointed out that the compensatory damages are limited under the FCRA to \$1,000, and that "we think they were trying to send a message" with the punitive damages.

The suit, filed in February 2012, alleges lead Plaintiff Sergio L. Ramirez was prevented from buying a car in 2011 because TransUnion told lenders he potentially matched two entries on the OFAC list. Ramirez said that when he tried to get off of TransUnion's list, the

company's customer service agents gave him "the runaround" and didn't explain how the error could be corrected.

At trial, TransUnion argued Ramirez's experience occurred because a credit report produced by TransUnion was "garbled" after it was transferred between multiple financial entities before ending up at the auto dealer. The company also noted consumers weren't financially harmed by the mix up.

The class argued that TransUnion didn't ensure accuracy, as required by the FCRA, by cross-checking OFAC name hits with other results, such as date of birth. It also alleged TransUnion kept the OFAC results from the consumers themselves and only disclosed potential matches to the companies requesting the credit checks.

Ramirez was represented by Carol M. Brewer and Andrew Ogilvie of Anderson Ogilvie & Brewer LLP and John Soumilas and James Francis of Francis & Mailman PC. The case is *Sergio L. Ramirez v. TransUnion LLC* (case number 3:12-cv-00632,) in the U.S. District Court for the Northern District of California.

Source: Law360.com

#### **WELLS FARGO TO PAY \$14.8 MILLION TO SETTLE TCPA LAWSUIT**

Wells Fargo has agreed to pay about \$14.8 million to settle Telephone Consumer Protection Act (TCPA) claims over autodialed calls. An almost \$1 million reduction to the preliminarily anticipated settlement fund occurred after discovery revealed that the class was smaller than originally estimated.

In late February, U.S. District Judge Thomas W. Thrash Jr. granted preliminary approval to a proposed settlement that called for Wells Fargo Dealer Services Inc. and parent company Wells Fargo Bank NA to pay about \$15.7 million to end class action litigation brought by consumer Frederick Luster in a Georgia federal court.

But the settlement amount was based on Wells Fargo's estimate that the settlement class included nearly 3.4 million members, a number that was subject to confirmatory discovery, according to a late May joint motion to approve a revised class notice and to amend the preliminary approval order.

The deposition offered by a Wells Fargo employee during that process revealed that the actual number of affected cellphone numbers was about 3.2 million, a difference that is "attributed

able to additional de-duplication of the preliminary estimate to avoid double-counting unique cellular telephone numbers,” the motion said.

However, the motion noted that even though the total amount Wells Fargo is required to provide is less than originally expected, “because the settlement has always been based on a per class member amount, the value of the settlement per class member remains the same.”

The settlement provides for a payout of \$4.65 per class member, but based on the expected claims rate, members of the settlement class are likely to receive between \$20 and \$50, depending on the total number of approved claims. Luster is slated to get up to \$20,000 as an incentive award and class counsel can request up to nearly \$4.5 million in fees and costs. The consumer filed suit in April 2015, alleging that Wells Fargo had made autodialed calls to his cellphone number in the previous four years, trying to collect debts apparently owed by two people he didn’t even know.

After mediation, the parties reached a settlement that they asked Judge Thrash to approve in late February. The motion asking for approval said the settlement provided for a \$15.7 million settlement fund to compensate the estimated 3.39 million members of the proposed class.

The class would include anyone with a cellphone number to which Wells Fargo Dealer Services made a collection call about an auto retail installment sale contract with an autodialer from April 2011 to March 2016. Judge Thrash granted preliminary approval and conditionally certified the settlement class soon thereafter.

However, after confirmatory discovery revealed that the class was smaller than originally estimated, on May 24 the parties asked the judge to approve a revised class notice that reflects the final settlement amount and to extend some case deadlines. Judge Thrash granted the request on June 9. A final settlement approval hearing is slated for Nov. 2.

Luster is represented by lawyers from Burke Law Offices LLC, Lief Cabraser Heimann & Bernstein LLP, Skaar & Feagle LLP, Meyer Wilson Co. LPA, Law Offices of Douglas J. Campion APC, Keogh Law Ltd., Greenwald Davidson Radbil PLLC, Kazerouni Law Group APC and Hyde & Swigart. The case is *Luster v. Wells Fargo Dealer Services Inc.*, (case number 1:15-cv-01058), in the U.S.

District Court for the Northern District of Georgia.

Source: Law360.com

#### **TRISTAR LOSES BID TO DECERTIFY CLASS IN EXPLODING PRESSURE COOKER SUIT**

An Ohio federal judge has denied the request by Tristar Products Inc. to decertify a class of consumers that claims its pressure cookers are explosively defective and worthless. U.S. District Judge James S. Gwin found that the cookers’ fluctuating price and the currently unknown number of cookers sold wasn’t enough to scrap the class.

In addition to refusing Tristar’s decertification bid Judge Gwin decided to bifurcate the upcoming trial due to potentially different damages for class members and an uncertain class size. As a result, the jury will first decide whether the cookers have a defect that allows them to be opened while still pressurized and whether that defect makes them worthless. If the jury finds that to be true, the parties will then move on to the proof of appropriate damages.

The three named Plaintiffs, who are from Ohio, Pennsylvania and Colorado, say the cookers appeared to be safe to open, and could be opened, but still contained a dangerous amount of pressure. They said opening the cookers caused scalding food to explode out onto their bodies. They claim that the defect makes the cookers worthless and are seeking a full refund.

In late April, the court certified a class comprised of Ohio, Pennsylvania and Colorado residents who bought Tristar pressure cookers. The company moved to decertify the classes, saying the fluctuating price of the cookers and the unknown number of cookers sold by third-party retailers in the three states were fatal to the class.

But Judge Gwin disagreed. He found that neither issue was enough to get rid of the class, adding:

*The fact that class members bought cookers at different prices than other members does not “necessitate decertification.”*

The judge noted that the cookers are currently sold by Kohl’s at prices ranging from \$110 to \$160. Judge Gwin, citing the Seventh Circuit’s 2013 decision in *Butler v. Sears, Roebuck & Co.*, said:

*After all, ‘it would drive a stake through the heart of the class action device, in cases in which damages were sought ... to require that every member of the class have identical damages.*

Tristar’s argument that the consumers can’t measure their damages without a more solid idea of how many cookers are involved in the lawsuit was rejected by Judge Gwin. He said that the Plaintiffs can collect Tristar’s online sales data and information from retailers to get the numbers they need to sufficiently figure out damages.

The Plaintiffs are represented by Gregory F. Coleman, Adam E. Edwards and Mark E. Silvey of Greg Coleman Law PC; Shanon J. Carson and Arthur Stock of Berger & Montague PC; Drew Legando of Landskroner Grieco Merri-man LLC, and Edward A. Wallace; and Tyler J. Story of Wexler Wallace LLP. The case is *Chapman, et al., v. Tristar Products Inc.* (case number 1:16-cv-01114) in the U.S. District Court for the Northern District of Ohio.

Source: Law360.com

#### **FDA E-CIG RULES UNDER FIRE**

In previous issues we wrote about the U.S. Food and Drug Administration’s (FDA) regulation of electronic cigarettes promulgated in 2016 that finalized a “deeming rule” that extended the FDA’s authority to all tobacco products, including e-cigarettes. The regulations involved several restrictions aimed at preventing youth access. The rule also required manufacturers of all newly regulated products to show that the products met the applicable public health standard set forth in the law and received marketing authorization from the FDA. Certain aspects of the rule were set to become effective on Aug. 8, 2016. However, in May 2017, the U.S. Department of Justice (DOJ) delayed enforcement of the new rule.

As a result of the delay, e-cigarette manufacturers do not have to submit their plans for placing addictiveness warnings on their products. Moreover, e-cigarette manufacturers currently do not need to submit ingredient information contained in their e-cigarettes by August 2017, which otherwise would have been required pursuant to the new rule. In addition, the Department of Justice’s move to delay FDA enforcement of e-cigarettes also stops the ban on e-cigarette interstate commerce, including the

labeling to identify the types of e-cigarettes for consumer.

Opponents of the new rule cite to the rule's negative impact on e-cigarette companies. For example, two major e-cigarette companies, NJOY and Electronic Cigarettes International Group Ltd., have gone bankrupt since the rule became effective. Opponents also argue that the new rule requires the companies to perform additional costly user research. On the other hand, supporters of the new rule cite the rapid rise in e-cigarette consumption by youths. Particularly, from 2011 to 2014, the use of e-cigarettes among teens rose from 1.5 to 13.4 percent.

The FDA and the U.S. Department of Health and Human Services have considerable discretion when implementing tobacco policy reform. The future of the FDA's regulation of e-cigarettes is uncertain, but it seems that e-cigarettes may no longer be classified as tobacco products.

If you need more information on this subject, contact Will Sutton, a lawyer in our firm's Toxic Tort Section, at 800-898-2034 or email [Will.Sutton@beasley-allen.com](mailto:Will.Sutton@beasley-allen.com).

Source: Law360.com

## XVIII. 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 June. 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.

### **FORD RECALLS 402,000 TRANSIT VANS**

Ford Motor Co. has recalled more than 402,000 Ford Transit vans in North America because of a driveshaft coupling defect that the company expects to spend \$142 million to repair. The affected model year 2015, 2016 and 2017 Transits have a flexible driveshaft coupling that cracks after about 30,000 miles, possibly causing the driveshaft to separate from the transmission, resulting in a loss of power while driving or unintended movement of parked vehi-

cles not anchored by a parking brake. Such separation can also damage surrounding components, including brakes and fuel lines, Ford said in a statement.

A driveshaft separation may increase the risk of injury or crash, but Ford said it's not aware of any crashes or injuries associated with the issue. Based on field data, Ford doesn't expect the couplings to deteriorate enough to cause separation in vehicles that haven't yet been driven 30,000 miles. For those, no repair is necessary until they reach that milestone, the company said. Once a van has been driven more than 30,000 miles, it should undergo temporary repairs to replace the coupling every 30,000 miles until a final repair is available and can be completed. Owners will be informed of the issue by mail and instructed to take their Transits to a dealership, where the coupling will be replaced at no cost.

According to Ford, owners will also be notified when a permanent repair is available. At that point, they will be able to have a redesigned coupling or revised driveshaft installed at no cost, the company explained. Its not known why a permanent fix is not currently available, or when one might be. The Transits in question were built at Ford's Kansas City Assembly Plant in Missouri between Jan. 17, 2014, and June 15, 2017. About 371,000 of the vans are in the U.S., 26,000 are in Canada, 3,200 are in Mexico and 2,400 are in U.S. territories. The reference number for the Transit recall is 17S15.

### **OTHER FORD RECALLS**

Ford also announced two smaller safety compliance recalls— for four 2017 Ford Police Interceptor utility vehicles and three 2016 Ford Escapes. The police vehicles were built at Ford's Chicago Assembly Plant on Jan. 20 and may be missing seat attachment studs in the second row of seats. The company says it isn't aware of any crash or injury associated with the problem, but said the vehicles' seats might not adequately restrain passengers in a crash. The Escapes were built at Ford's Louisville Assembly Plant on Dec. 18, 2015, and feature driver knee airbags that might not inflate as intended due to a lack of material necessary to produce inflator gas. Incompletely filled airbags could increase risk of injury to a driver in a crash, but Ford said it isn't aware of any related injury.

### **HYUNDAI ISSUES RECALL FOR 600,000 U.S. VEHICLES**

Hyundai has issued a recall that includes more than 600,000 vehicles in the U.S. The Car Connection reports the recall affects 437,000 Santa Fe and Santa Fe Sport SUVs, made between 2013 and 2017. The recall deals with the vehicle's hood latch. A cable for the secondary latch could corrode, which would leave the hood unsecured if the primary latch fails.

The other recall involves about 161,000 Genesis and Sonata models made between 2015 and 2016. A parking brake switch may corrode, causing the indicator light to not light up when the parking brake is engaged. Hyundai will mail out notices to vehicle owners at the end of the month, and dealers will replace the parts at no charge. For more information, visit Hyundai's vehicle website at <https://autoservice.hyundai-usa.com/campaignhome>.

### **KAWASAKI RECALLS UTILITY VEHICLES, ROVS, ATVs DUE TO FIRE HAZARD**

Kawasaki, in cooperation with the U.S. Consumer Products Safety Administration (CPSA), has issued a recall for certain utility vehicles, recreational off-highway vehicles and all-terrain vehicles. The manufacturer reports the fuel gauge retainer can collapse and leak fuel, posing a fire hazard. This recall involves 2017 Mule™ utility vehicles, Teryx® and Teryx4™ recreational off-highway vehicles, and Brute Force® 750 all-t The 2017 Mule utility vehicle is a four-wheel off-highway vehicle with side by side seating for two to six people and automotive style controls. The model name is printed on the right and left front fender. For the Mule SX series and the Mule 4000 series, the vehicle identification number (VIN) is located under the seat. For the Pro models, the VIN is located on the steel frame between the right front lower A-arm mounts. The 2017 Teryx recreational off-highway vehicle is a four-wheel off-highway vehicle with seating for two or four people and automotive style controls. The model name is printed on the right and left front fender. The VIN is located on the steel frame between the right front lower A-arm mounts. The 2017 Brute Force 750 4x4i all-terrain vehicle is a four-wheel off-highway vehicle with seating for one person. The model name is printed on the right and left front fender. The VIN is located on

the steel frame between the left front lower A-arm mounts. The vehicles were sold in various colors. The vehicles, manufactured in the U.S., were sold at Kawasaki dealers nationwide from March 2017 through April 2017 for between \$8,000 and \$15,000. No injuries have been associated with this recall. Consumers should immediately stop using the recalled vehicles and contact Kawasaki for a free repair. Kawasaki is contacting all known purchasers directly. Contact Kawasaki toll-free at 866-802-9381 from 8 a.m. to 5 p.m. PT Monday through Friday or online at [www.Kawasaki.com](http://www.Kawasaki.com) and click on "Recalls" for more information.

**CYCLING SPORTS GROUP RECALLS GT MOUNTAIN BICYCLES DUE TO FALL HAZARD**

About 1,000 GT mountain bicycles have been recalled. The handlebars can crack, posing a fall hazard to the consumer. Consumers should immediately stop using the recalled bicycles and contact an authorized GT dealer or Cycling Sports Group to schedule a free repair of the handlebar and stem. This recall involves 2017 GT mountain bicycle models: Karakoram Sport, Karakoram Comp, Aggressor Sport, Aggressor Comp and Aggressor Expert. The bikes were sold in a variety of colors including, black, blue, gunmetal grey and neon yellow. Only models with 1) a solid black GT logo on the downtube and 2) a stem marked "Ø31.8 9-10N.m" are included in the recall. For a complete list of GT Mountain bicycles included in this recall, visit the company's website at [http://www.gtbicycles.com/usa\\_en/recalls/](http://www.gtbicycles.com/usa_en/recalls/).

The bicycles were sold at bicycle stores nationwide from June 2016 to August 2017 for between \$440 and \$800. Contact Cycling Sports Group at 800-726-2453 from 9 a.m. to 6 p.m. ET Monday through Friday, email at [cust-serve@cyclingsportsgroup.com](mailto:cust-serve@cyclingsportsgroup.com) or online at [www.gtbicycles.com](http://www.gtbicycles.com) and click on Recalls under the Recalls& Safety tab at the bottom of the page for more information. Pictures are available at <https://www.cpsc.gov/Recalls/2017/Cycling-Sports-Group-Recalls-GT-Mountain-Bicycles>

**BRITAX ANNOUNCES A SAFETY RECALL OF CHEST CLIP ON CERTAIN INFANT CAR SEATS**

Britax Child Safety, Inc., has recalled chest clip on certain B-Safe 35, B-Safe 35 Elite and BOB B-Safe 35 infant car seat models manufactured between Nov. 1, 2015 and May 31, 2017 as identified on [www.bsafe35clip.com](http://www.bsafe35clip.com). Britax determined the center tab on the chest clip—on certain infant car seat models—can break and present a choking hazard to an infant in the car seat. There have been no choking injuries. Britax said it is announcing this recall out of an abundance of caution.

Consumers can continue to safely use the affected car seats if they remove the chest clip or monitor the center tab of the chest clip for signs of breakage. The chest clip is not a required safety device: it is added to the harness system to help position the shoulder straps. Consumers should always ensure harness straps are tight and properly positioned at or slightly below the child's shoulders. To verify the tightness of the harness straps consumers should make sure they cannot vertically pinch any webbing at the child's collar bone.

To determine if your infant car seat is included in the recall, visit: [www.bsafe-35clip.com](http://www.bsafe-35clip.com) and follow these steps: Look for the Date of Manufacture (DOM) label on the back of the infant car seat shell. Compare the DOM details to the model numbers and date range listed on the site. If your seat is affected and you registered your seat, you will automatically be sent a free replacement chest clip. If your seat is affected and you didn't register your seat, you can order your free kit here: [www.bsafe35clip.com](http://www.bsafe35clip.com). Until you receive your replacement chest clip, you can continue to safely use the car seat as long as you remove your current chest clip or monitor the center tab of the chest clip for signs of breakage. Before installing the new replacement chest clip, review the printed step-by-step instructions and/or watch the how-to video on the site. Do not return product to the retailer.

Consumers with any questions can speak with a Britax Customer Service representative by calling 833-474-7016. Extended Customer Service business hours are Monday-Friday 8:30 a.m. to 7 p.m. ET and on Saturday 9 a.m. to 3 p.m. ET.

**NIDEC MOTOR RECALLS SWIMMING POOL MOTORS DUE TO ELECTRICAL SHOCK HAZARD**

Nidec Motor Corp., of St. Louis, Missouri, has recalled about 16,000 swimming pool motors. The pump control cover can be improperly grounded, posing an electrical shock hazard. This recall involves variable speed swimming pool motors with a programmable user interface on the top. "Emerson" or "EcoTech EZ" is printed on top of the control box and the model number is printed on the rating plate located on the side of the pump. The model numbers included in this recall are listed below.

M63PWBLE-0121	M63PWBLV-0135
M63PWBLM-0128	M63PWBLW-0136
M63PWBLR-0131	M63XZBMA-0139
M63PWBLS-0132	M63PWBMB-0140
M63PWBMC-0141	M63PWBME-0143
M63PWBMD-0142	M63PWBMF-0144
M63PWBMG-0145	M63PWBSC-0229

The motors were sold at Leslie's Pool Supply and other retail stores, wholesale pool suppliers including Pool Builders Supply, Pool Corp., Pool & Electrical Products, and United Aqua Group from September 2010 through October 2016 for between \$400 and \$500. Consumers should immediately stop using the recalled swimming pool motors and contact Nidec Motor Corp. (NMC) to schedule a free repair by a qualified technician to install an external ground lead. Contact NMC toll-free at 877-282-0223 from 8 a.m. to 5 p.m. EST Monday through Friday or online at [www.nidec-motor.com](http://www.nidec-motor.com) and click on "RECALL" for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2017/Nidec-Motor-Recalls-Swimming-Pool-Motors>

**FIREWORKS RECALLED BY AMERICAN PROMOTIONAL EVENTS DUE TO BURN AND INJURY HAZARDS**

About 36,100 TNT Red, White, & Blue Smoke fireworks have been recalled by American Promotional Events. The fireworks can explode unexpectedly after being lit, posing burn and injury hazards to consumers. This recall involves TNT Red, White, & Blue Smoke fireworks. The recalled fireworks are pyrotechnic devices that make smoke when lit. They were sold in a bag containing three canisters: one red, one blue and one white. Each colored smoke firework is a card-

board cylinder tube that measures about 1 inch in diameter and 5 inches long. The TNT logo, "Red, White & Blue Smoke" and UPC number 027736036561 appear on the packaging. American Promotional Events has received three incident reports, resulting in three people suffering burn injuries. No property damage has been reported.

The fireworks were sold at: Albertsons, Kroger, Meijer, Target, Wal-Mart and other retailers in Illinois, Ohio, Vermont and Wisconsin from May 2017 through June 2017 about \$5. Consumers should immediately stop using the recalled fireworks and contact America Promotional Events for a full refund. Consumer Contact: American Promotional Events at 800-243-1189 from 8 a.m. to 5 p.m. CT Monday through Friday; email at [info@tntfireworks.com](mailto:info@tntfireworks.com) or online at [www.tntfireworks.com](http://www.tntfireworks.com) and click on Product Recall at the bottom right-hand corner of the page. Pictures are available here: <https://www.cpsc.gov/Recalls/2017/Fireworks-Recalled-By-American-Promotional-Events>

#### **EXTECH RECALLS DIGITAL CLAMP METERS DUE TO ELECTROCUTION HAZARD**

About 1,700 digital clamp meters have been recalled by FLIR Commercial Systems Inc., of Goleta, California, owner of Extech. The meters can fail to give an accurate voltage reading, resulting in the operator falsely believing the electrical power is low or off, posing an electrocution hazard. This recall involves Extech digital clamp meters with model numbers EX650, EX655, MA160, MA61, and MA63. These models are all AC/DC clamp meters, which are electrical testing devices that measure AC/DC voltage, resistance, capacitance, frequency, temperature, continuity, and diode. Serial numbers in the following format are included in the recall: R15XXXXXXXX to R17XXXXXXXX. Only serial numbers in this range are included in the recall. The "EXTECH" logo and the model number are printed on the front of the unit and the serial number on the back. The digital clamp meters are green and orange. Extech received two reports of clamp meters displaying an incorrect voltage reading. No injuries have been reported.

The meters were sold at Grainger, Platt Electric Supply stores and industrial and electrical distributors and wholesalers nationwide and online at Amazon.com and other websites from

January 2016 through April 2017 for between \$110 and \$230. Consumers should immediately stop using the recalled digital clamp meters and contact Extech for a free replacement meter toll-free at 855-239-8324 from 9 a.m. to 5 p.m. ET Monday through Friday, by email at [meter.recall@extech.com](mailto:meter.recall@extech.com), or online at [www.extech.com](http://www.extech.com) and click on Safety Notices at the bottom of the page for more information.

#### **NOTICE OF EMERGENCY RECALL ON REFILLABLE 1-LB PROPANE CYLINDER**

U-Haul has received notice from propane tank manufacturer Flame King that its refillable one-pound cylinder is subject to an immediate recall. Flame King manufactures the refillable one-pound cylinder that has been available for purchase at propane-certified U-Haul locations in California since June 2016. A very limited quantity of promotional cylinders were sold in Arizona. Some Nevada residents may have bought cylinders at the U-Haul South Lake Tahoe store just across the California border.

Cease using your refillable one-pound cylinder immediately and return it to the closest propane-certified U-Haul location. Find your nearest U-Haul location at [uhaulpropane.com](http://uhaulpropane.com). U-Haul regrets any inconvenience this may cause. If you have questions or concerns regarding the product or recall, please contact Flame King at [info@ysnimports.com](mailto:info@ysnimports.com). In addition, you may contact U-Haul at [flamekingrecall@uhaul.com](mailto:flamekingrecall@uhaul.com). If you no longer own a Flame King-manufactured refillable one-pound propane cylinder that you purchased, please provide this notice to the individual you believe has possession of the tank.

#### **LITHONIA LIGHTING RECALLS TO REPAIR CEILING LIGHT FIXTURES DUE TO IMPACT HAZARD**

About 5,600 LED light fixtures have been recalled by Lithonia Lighting, a division of Acuity Brands Lighting Inc., of Conyers, Georgia. The plastic diffuser lens can detach and fall unexpectedly, posing a risk of injury from impact. This recall involves Lithonia Lighting LBL4W model ceiling light fixtures which are used indoors in commercial applications such as offices, schools, closets, hallways and stairwells. The fixtures are painted white metal and measure about four feet long with a low profile, curved plastic diffuser lens (cover). The plastic diffuser lens measures 4 feet long by 15

inches wide. Only fixtures manufactured between February 2016 and March 2017 are included in this recall. Lithonia Lighting, the model number and the date of manufacture are printed on a label attached to the fixture's housing. The date code is in the MM/DD/YY format on the fixture's housing. The company has received six reports of loose or falling diffuser lenses. No injuries have been reported.

The fixtures were sold at electrical distributors nationwide and online through the commercial desk at 1000Bulbs.com, Amazon.com, ATG-Stores.com, Build.com, HD.com, ShineRetrofits.com, and Wayfair.com from February 2016 through March 2017 for between \$150 and \$200. Consumers should remove the lens and contact Lithonia Lighting to receive a free lens to repair the unit. Consumers should prevent people from going into the immediate area under the fixtures until the lenses are repaired. A video showing proper lens removal and repair is available at [www.lithonia.com/LBL4Wvideo](http://www.lithonia.com/LBL4Wvideo). Contact Lithonia Lighting toll-free at 888-876-4181 from 8 a.m. to 5 p.m. ET Monday through Friday or online at [www.lithonia.com](http://www.lithonia.com) and click on "LBL4W LED Recall" on the left side of the page for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2017/Lithonia-Lighting-Recalls-to-Repair-Ceiling-Light-Fixtures>

#### **MADISON MILL RECALLS SAFETY GATES DUE TO ENTRAPMENT AND STRANGULATION HAZARDS**

Madison Mill Inc., of Ashland City, Tennessee, has recalled about 25,180 Foldaway expandable safety gates. A young child's neck can fit into the "V" shaped opening along the top edge of the gate, posing entrapment and strangulation hazards to young children. Also, young children can pass under the gate allowing access to restricted areas, such as stairs. This recall involves Madison Mill 23 and 25 foldaway expandable safety gates. Item number 23 extends to three feet and item number 25 extends to five feet. The expandable gates are made of hardwood and are used to secure children or small pets in certain areas of the home. The model and item number can be found on the original packaging.

The gates were sold at Do It Best stores and other independent hardware stores nationwide from January 2013 through May 2017 for between \$20 and \$35. Consumers should immediately

stop using the recalled gates and contact Madison Mill for instructions on receiving a full refund. Contact Madison Mill at 877-220-4705 from 7:30 a.m. to 5 p.m. CT Monday through Friday, email at tom.mckelvey@madisonmill.com or online at [www.madisonmill.com](http://www.madisonmill.com) and click on “Product Recalls” for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2017/Madison-Mill-Recalls-Safety-Gates>

**HOMESTAR NORTH AMERICA RECALLS THREE-DRAWER TV CHESTS DUE TO SERIOUS TIP-OVER AND ENTRAPMENT HAZARDS**

Homestar North America LLC, of Statesville, N.C., has recalled about 1,470 Stockholm three-drawer TV chests. The recalled chests are unstable if they are not anchored to the wall, posing serious tip-over and entrapment hazards that can result in death or injuries to children. The chests do not comply with the performance requirements of the U.S. voluntary industry standard (ASTM F2057-14). This recall involves Stockholm three-drawer TV chests sold in Java Brown, Sonoma, Sonoma/Java Brown and Java Brown/Sonoma. The chests have a top shelf and three drawers, and measure 40 1/8 inches high by 30 1/2 inches wide by 15 3/8 inches deep. Model number 249-09-2740, 249-09-0041, 249-09-2739, or 249-09-3429 is located on the back panel of the units.

The stands were sold at Target.com from May 2015 through August 2016 for about \$160. Consumers should immediately stop using any recalled chest that is not properly anchored to the wall and place it into an area that children cannot access. Contact Homestar for a choice between two remedy options: a full refund including return shipping charges or a free tip-over restraint kit with virtual how-to instructions. Consumers who purchased the recalled chests are being contacted directly. Homestar toll-free at 855-837-2569 from 8 a.m. to 7 p.m. ET Monday through Friday. Consumers can also visit the firm’s website at [www.homestarna.com](http://www.homestarna.com) and click on the Recall Alert link for more information.

**NOBLE HOUSE RECALLS CHAIRS DUE TO FALL HAZARD**

Noble House has recalled Kaius, Henrietta, and Fauna dining chairs. The

recalled chairs have a label underneath the seat that reads “MADE FOR: NOBLE HOUSE HOME FURNISHINGS LLC: 21325 Superior St., Chatsworth CA 91311.” Consumers should immediately stop using the recalled chairs and contact Noble House for a free repair kit including shipping. The firm has received six reports of the chairs breaking, with four incidents resulting in consumers receiving bruises from falls. The chairs were imported and sold by Noble House Home Furnishings LLC, of Chatsworth, California, online at Amazon, Overstock and Wayfair, and from September 2016 through March 2017 for about \$130. The chairs were manufactured in Malaysia.

You can contact Noble House toll-free at 888-600-6376 from 8 a.m. to 5 p.m. PT Monday through Friday or online at [www.noblehousefurniture.com](http://www.noblehousefurniture.com) and click on the Safety Recall Link located under the Contact Us tab at the bottom of the page.

**STAPLES RECALLS HAZEN MESH OFFICE CHAIRS DUE TO FALL HAZARD**

Staples has recalled Quill Hazen Mesh Task chairs. The chairs have SKU number 1058246 and item number 26680 printed on a white label on the underside of the seat cushion. Consumers should immediately stop using the recalled chairs and contact Staples to receive a free replacement base and instructions for replacing the original base. Staples has received 20 reports of the legs breaking on the chairs, including three reports of injuries resulting in minor cuts and bruises.

The chairs, manufactured in China, were sold at Staples’ stores nationwide and online at [staples.com](http://staples.com), [staplesadvantage.com](http://staplesadvantage.com), and [quill.com](http://quill.com) from October 2014 through April 2017 for between \$100 and \$180. Staples the Office Superstore LLC, of Framingham, Massachusetts was the importer, and the chairs were sold by Staples the Office Superstore LLC and Quill Lincolnshire, Inc. LLC, of Framingham, Massachusetts. Consumers can call Staples toll-free at 866-755-1321 from 8 a.m. to 8 p.m. ET Monday through Friday, or register online at [www.seatingrecall123.com](http://www.seatingrecall123.com), or go to [www.staples.com](http://www.staples.com) and click on the Warranty & Recall link under the Customer Service tab at the bottom of the page for more information.

GTHI Recalls Climbing Belay Devices Due To Fall And Injury Hazards

Great Tano Holdings Inc. (GTHI) has recalled Trango Vergo belay devices with batch numbers 16159 and 16195 printed on the side of the unit. The devices were sold in blue, gold, or purple and feature the word “VERGO” on the front plate of the unit. Belay devices are used with climbing ropes to protect the climber while climbing, to arrest a fall or while being lowered on the rope. Consumers should immediately stop using the recalled devices and contact Trango for instructions on receiving a free replacement. The firm has received three reports of the belay device’s handle over-rotating and braking malfunction. No injuries have been reported.

Great Trango Holdings Inc. (GTHI), of Lafayette, Colorado, sold the products through authorized GTHI dealers and outdoor specialty stores nationwide and online at [www.trango.com](http://www.trango.com) from October 2016 through April 2017 for about \$90. The products were manufactured in the United States. Consumers can contact Trango email at [vergorecall@trango.com](mailto:vergorecall@trango.com), or call 800-860-3653 from 8 a.m. to 4 p.m. MT, Monday through Friday, or online at [www.trango.com](http://www.trango.com) and click on “Product Alerts” for more information.

**FDA ANNOUNCES RECALL OF MAQUET INTRA-AORTIC BALLOON PUMPS**

The U.S. Food and Drug Administration (FDA) said Maquet/Datascope is voluntarily performing a worldwide “field correction” of certain intra-aortic balloon pumps (IABPs) for a potential electrical test failure code. This field correction also applies to any System 98 or System 98XT IABP that was converted to a CS100i or CS300 IABP. Datascope received a complaint that has been associated with a patient death due to the failure of the device to initiate therapy. This complaint involved a CS300 IABP that did not pump due to an electrical test failure code #58 (power up vent tests fail), maintenance code #3, and an autofill failure. An electrical test failure code #58 is caused by a solenoid valve requiring more power than the solenoid driver board can deliver to open the valve.

It should be noted that patients receiving IABP therapy are in critical condition and sudden interruption of therapy could result in unsafe, hemodynamic instability.

The affected IABP units were distributed in the U.S. and worldwide (in more

than 100 countries). Affected units were distributed between March 23, 2003, and Dec. 11, 2013. Units distributed after Dec. 11, 2013, are not affected by the field correction. There are approximately 12,000 affected units sold globally. Maquet has told end-users that the risk-benefit of using an affected CS100i, CS100 or CS300 IABP should be assessed by the medical team for each patient when no alternative IABP or alternative therapy is available. The company said clinicians should not leave the patient unattended during IABP therapy. An additional hazard associated with a sudden shutdown is related to the static condition (no inflating or deflating) of the balloon during the interruption of therapy, the vendor said. The patient balloon should not remain inactive in the patient (i.e., not inflating or deflating) for more than 30 minutes due to the potential for thrombus formation.

Until the service is performed, Datascope recommends powering on the IABP prior to inserting the IAB catheter to allow the IABP to successfully complete its self-test. This action will take less than 60 seconds to perform. In the event the IABP fails to successfully complete the self-test and exhibits electrical test failure code 58, the IABP should be removed from service and contact the local Maquet/Getinge sales and service office in your area. A service representative from Datascope will be replacing the defective solenoid driver boards. Customers having affected IABP unit(s) will be contacted by a representative of the Maquet/Getinge service team to schedule on-site service. For additional information regarding this field correction, contact the customer service department at 888-627-8383 and press 2 (Monday through Friday from 8 a.m. to 6 p.m. EDT).

**KREATIVE KIDS RECALLS CHILDREN'S ROBES DUE TO VIOLATION OF FEDERAL FLAMMABILITY STANDARD**

Kreative Kids Inc., of Pomona, California, has recalled about 7,600 children's robes. The children's robes fail to meet flammability standards for children's sleepwear, posing a risk of burn injuries to children. This recall includes eight styles of children's 100-percent polyester, hooded robes. The robes were sold in sizes 4-6 and 7-9 in the following styles: purple elephant, lion, pink bear, lady bug, blue puppy, duck, monkey, and princess cat. A label sewn in the robes has item number 2013NW081 and

"Kreative Kids" printed on it. The robes also have a hood, long-sleeves, a belt, cinched back and two front pockets.

The robes were sold at online at Amazon.com and at gift and specialty stores in California, Iowa, New York, Ohio and Texas from September 2013 through April 2017 for between \$15 and \$17. Consumers should immediately take the recalled robes away from children and contact Kreative Kids for a full refund. Contact Kreative Kids at 800-786-2919 from 9 a.m. to 5 p.m. PT Monday through Friday, email at sales@kreativekids.net or online at www.kreativekids.net and click on "Recall Information" at the bottom of the page for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2017/Kreative-Kids-Recalls-Childrens-Robes>

**LITTLE GIRAFFE RECALLS CHILDREN'S ROBES DUE TO VIOLATION OF FEDERAL FLAMMABILITY STANDARD**

Little Giraffe, of Van Nuys, California, has recalled about 2,000 Luxe Satin children's robes. The children's robes fail to meet the federal flammability standards for children's sleepwear, posing a risk of burn injuries to children. This recall involves Luxe Satin children's long-sleeve robes. The robes are 43 percent acetate with 57 percent rayon, satin outer shell and a 100 percent polyester microfiber inside. The robes were sold in pink, blue and cream in sizes 1 (XS-S/4-6 years), 2 (MD-LG/6-8 years) and 3 (XL-XXL/8-10 years). The robes have two belt loops on each side and an unattached belt. Lot number "21706-DFR001" and "Not Intended for Sleepwear" are printed on the robes' inside seam label.

The robes were sold at Children's specialty stores nationwide and online at [www.littlegiraffe.com](http://www.littlegiraffe.com) from November 2012 through March 2017 for about \$100. Consumers should immediately take the recalled robes away from children and contact Little Giraffe for a full refund. Contact Little Giraffe toll-free at (866) 201-6613 from 10 a.m. to 4 p.m. PT Monday through Friday or online at [www.littlegiraffe.com](http://www.littlegiraffe.com) and click on "Recall Information" at the bottom of the page for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2017/Little-Giraffe-Recalls-Childrens-Robes>

**LILA + HAYES RECALLS CHILDREN'S PLAYWEAR DUE TO CHOKING HAZARD**

About 600 Eloise and Benton bubble children's playwear have been recalled by Lila + Hayes LLC, of Fort Worth, Texas. The buttons can detach from the garment, posing a choking hazard to young children. The recall includes Benton and Eloise pima cotton, sleeveless, bubble playwear. The Benton style was sold in navy, white, light blue and blue and green ticking stripes. The Eloise style was sold in navy, white, pink and blue and green floral. The garment has a snap closure at the bottom and crisscross straps that button over the shoulders on the front of the garment. The Benton style was sold in boys sizes NB, 0-24 months, 2T and 3T. The Eloise was sold in girls sizes NB, 0-24 months, 2T and 3T. The manufacture dates codes for December 2016 (DEC16) and February 2016 (FEB16) are printed on the inside garment tag located inside the seam. "Lila + Hayes" and the garment size are printed on the inside of the back of the garment. The company has received eight reports of the button detaching from the straps while in use. No injuries have been reported.

The playwear was sold at Layette (Dallas, Texas), Hip Hip Hip Hooray (Dallas, Texas) and Born Children's (Montgomery, Alabama) stores and on-line at [www.lilaandhayes.com](http://www.lilaandhayes.com) from February 2017 through April 2017 for between \$45 and \$65. Consumers should immediately stop using the playwear and contact Lila + Hayes to receive a pre-paid mailer envelope to return the garment for a full refund. Contact Lila + Hayes at 855-850-1308 from 10 a.m. to 6 p.m. CT Monday through Friday or online at [www.lilaandhayes.com](http://www.lilaandhayes.com) and click on "Recall" located at the bottom of the page. Pictures available here: <https://www.cpsc.gov/Recalls/2017/Lila-Hayes-Recalls-Childrens-Playwear>

**TYSON RECALLS MORE THAN 2 MILLION POUNDS OF CHICKEN SHIPPED NATIONALLY**

More than 2 million pounds of breaded chicken are under recall because they contain undeclared milk, a known allergen. Tyson Foods is recalling certain ready-to-eat chicken items produced and packaged on various dates from Aug. 16, 2016 to Jan. 14, 2017. These products, which have the establishment number P-1325 inside the USDA mark of inspection, were shipped

for institutional use nationwide. “The problem was discovered on June 6, 2017, when the company received notification from an ingredient supplier that the bread crumbs the company received and used in the recalled products potentially contained undeclared milk,” a statement reads on the USDA website. “There have been no confirmed reports of adverse reactions due to consumption of these products.”

Tyson is urging customers to throw away the chicken or return it to the place of purchase. Anyone concerned about an injury or illness should contact a healthcare provider. The recall is a Class 1 health hazard situation, meaning “there is a reasonable probability that the use of the product will cause serious, adverse health consequences or death.”

#### **PUBLIX RECALLS FRUIT MIX SOLD IN ALABAMA FOR LISTERIA RISK**

Publix has recalled its tropical fruit medley because of possible listeria contamination. The 5.7-ounce mixes were sold in retail produce departments in Florida, Georgia, South Carolina, Alabama, Tennessee and North Carolina. Products of all use by dates sold with a UPC of 41415088586 are being recalled. Listeria can cause serious illness in young children, frail or elderly people. It can also cause miscarriages and stillbirths in pregnant women. Customers who have purchased the mix may return it to any Publix store for a full refund. Customers can also contact the U.S. Food and Drug Administration at 888-SAFEFOOD (888-723-3366). To date, there haven’t been any reported cases of illness related to the products.

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](http://www.BeasleyAllen.com) or [www.RightingInjustice.com](http://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](mailto:Shanna.Malone@beasleyallen.com) for more recall information or to supply us with information on recalls.

## **XIX. FIRM ACTIVITIES**

#### **COLE PORTIS ENDS HIS SUCCESSFUL TERM AS 141<sup>ST</sup> ALABAMA STATE BAR PRESIDENT**

At its annual meeting July 12-15, Beasley Allen lawyer Cole Portis will conclude his service as the 141<sup>st</sup> President of the Alabama State Bar. Prior to becoming president last year, Cole served on multiple committees and task forces within the 17,900-member organization, including the Finance and Audit Committee, Client Security Fund Committee and various others. He has also served on the Alabama State Bar Board of Bar Commissioners for the 15<sup>th</sup> judicial circuit since 2007. Cole states:

*I have been honored to represent all Alabama lawyers this year. We have emphasized the importance of lawyers to love their neighbors well by serving others. Lawyers in Alabama are gifted to serve. They serve their families, their clients and the public through the legal work they perform, and through their involvement in local communities.*

Among Cole’s major platforms was a commitment to enhancing the Bar’s engagement with lawyers to ensure that they have resources available to help them in their practice. Cole developed Lawyer University, which provided educational information, seminars and hands-on training to help lawyers better understand how to use technology to enhance their practice, to develop foundational business principles for running their practice as a successful business, and to be on the forefront to identify emerging areas of law.

Cole also worked to bring the Bar into closer collaboration with the courts to ensure that the rule of law is enforced, and that the Bar is dedicated to serving the public through pro bono work, charitable stewardship and involvement in everyday affairs that impact the communities where we practice law.

Public outreach efforts included a continued focus on access to justice, particularly providing legal services for the poor and indigent who would not otherwise be able to afford a lawyer through the state and local Volunteer Lawyers Program; a foster care awareness program; and a drive to encourage lawyers to participate in public service

in the political realm through running for public office.

Cole received his J.D. from The University of Alabama School of Law in 1990 and joined the Beasley Allen Law Firm in 1991. He is now the head of the firm’s Personal Injury & Products Liability Section. Cole represents people and families who are severely injured or killed by defective products.

Cole is a board member of the Alabama Law Foundation, where he is also a fellow, and a member of the Atticus Finch Society. He supports the Alabama Civil Justice Foundation through its Pioneers of Justice Society and is a Montgomery County Bar Association volunteer lawyer. He is past president of the Alabama State Bar Young Lawyers’ Section, the Montgomery County Bar Association and the Montgomery County Trial Lawyers Association.

It’s important to know that above all, Cole is a husband and a father to nine children. He and his wife Joy have four daughters and five sons (soon to be six). Cole and Joy are strong advocates for adoption, having adopted six of their nine children. The couple also serve as foster parents. They have fostered more than 30 children in the last seven years. Cole and Joy are the founders of Love 100 Ministry, which assists Alabama families with adoption costs.

Cole has been an active member of Morningview Baptist Church in Montgomery for more than 40 years and previously served as lay elder and as chair of the deacons. In addition, he teaches a Sunday school class as a way to invest in the lives of young adults.

#### **TED MEADOWS NAMED TO 2017 LAWDRAGON 500 LEADING LAWYERS IN AMERICA**

Beasley Allen lawyer Ted G. Meadows has been selected for inclusion in the 2017 Lawdragon 500 Leading Lawyers in America. This annual list represents “the most elite distinction in the profession, covering the best of the best in all practice areas.” Speaking about this year’s honorees, Lawdragon notes that Plaintiffs lawyers represent the “plight of individuals who feel powerless and abandoned. Plaintiff lawyers are a powerful army for the injured, and we are proud of their representation on this year’s 500, as every year.”

The Lawdragon 500 guides are selected from a combination of editorial research by Lawdragon staff; submissions from law firms; and an online

nomination form that allows visitors to our site to recommend and comment on their favorite lawyers.

Ted practices in the firm's Mass Torts Section and he has been co-lead attorney in the talc litigation. He has also been actively involved in a number of important lawsuits involving Mass Torts. Ted is an outstanding lawyer who truly cares about his clients and we are blessed to have him in the firm.

#### **BEASLEY ALLEN PARTICIPATED IN THE ALABAMA LEGAL FOOD FRENZY**

Beasley Allen joined law firms from across the state in raising money and collecting food items for Alabama Legal Food Frenzy, sponsored by the Alabama State Bar, the Alabama Attorney General's office and the Alabama Food Bank Association. Beasley Allen donations will go directly to the Montgomery Area Food Bank. Helen Taylor spearheaded this project for our firm and she did an outstanding job. All of our staff and lawyers worked very hard on this project and donated more food than any other large law firm—4,990 total pounds. Tom Methvin, who manages our firm, had this to say:

*I'm excited that we were able to participate in this great effort again this year, and proud of our employees for their participation and spirit of giving. We were pleased to join the efforts of other lawyers and law firms throughout the state to help provide food for those who would otherwise go hungry.*

The Montgomery Area Food Bank is the largest food bank in Alabama. Its service area includes 35 of Alabama's 67 counties, including 11 of 12 rural counties in the Black Belt, chronically among the most poverty stricken in the nation. The Montgomery Area Food Bank connects people, food and resources to combat hunger and food insecurity. For information about how you can support this critical organization, visit [montgomeryareafoodbank.org](http://montgomeryareafoodbank.org) or call 334-263-3784.

## **XX. SPECIAL RECOGNITIONS**

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### **ALABAMA JOINS NATIONWIDE INVESTIGATION OF OPIOID SALES**

Alabama Attorney General Steve Marshall has announced he is joining the bipartisan coalition of attorneys general nationwide investigating whether drug manufacturers have engaged in unlawful practices in the marketing and sale of opioids. We wrote about this investigation in another section of this issue. General Marshall said:

*Alabama has disproportionately suffered from prescription painkiller abuse and I have joined with a majority of my fellow Attorneys General to investigate what role opioid manufacturers may have had in creating or prolonging the opioid abuse epidemic.*

Opioids were involved in 33,091 deaths nationwide in 2015, and opioid overdoses have quadrupled since 1999. Alabama was among the top five states reporting opioid overdose death increases from 2014 to 2015. The attorneys general are currently issuing subpoenas for documents and testimony to determine the appropriate course of action in addressing opioid abuse.

The *Washington Post* has reported that state and local leaders nationwide are studying tactics used in the tobacco lawsuits of the 1990s, as they try to claw back billions of dollars from the companies that make and sell the powerful painkillers. That report stated:

*More than 20 U.S. states, counties and cities have sued firms including Johnson & Johnson, Purdue Pharma Inc., and McKesson Corp. in the past year, claiming they fueled a public-health crisis with misleading marketing and aggressive distribution of opioids. Attorneys general in Alaska and Tennessee are also considering lawsuits as their health and legal budgets are stretched to a breaking point by the surge in addictions, overdoses and crime.*

*It's a strategy cigarette manufacturers will recognize: Two decades ago, they faced similar allegations as states and local governments sued, saying they'd shouldered*

*huge costs for treating diseases blamed on tobacco.*

*Last month, Ohio sued five drug-makers, alleging they made false and deceptive statements about the risks and benefits of prescription opioids. And Nassau County, New York, this week sued drug-makers, distributors and doctors, saying it has had to increase spending on health care and law enforcement as a result of the epidemic.*

*It's difficult to say how successful such legal action will be. The companies who make and distribute opioids defend the drugs' safety and say they work actively to keep them from being abused.*

Attorney General Marshall is to be commended for his office's involvement in this nationwide effort. Alabama has a vested interest in this matter because of the massive problems being caused in our state. We wish the Attorney General and his staff the very best in this important undertaking.

Source: Jeremy Gray—Jgray@al.com

## **XXI. FAVORITE BIBLE VERSES**

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Bryan Kelly, Executive Director of Common Ground Montgomery furnished a verse for this issue. Bryan and his folks do a tremendous job helping youngsters get their lives on track.

*"Come magnify the Lord with me, let us exalt His name together."*

Psalm 34:3

Valerie Scroggins, a legal secretary in the firm's Consumer Fraud & Commercial Litigation Section, furnished two verses for this month.

*"The LORD will fight for you, and ye shall hold your peace."*

Exodus 14:14

*He shall cover you with His feathers, and under His wings you shall take refuge. His truth shall be your shield and buckler.*

Psalm 91:4

Candice Wyatt, a legal secretary in the firm's Personal Injury & Product Liability Section, furnished her favorite verse for this issue.

*"Your beauty should not come from outward adornment, such as elaborate hairstyles and the wearing of gold jewelry or fine cloths. Rather, it should be that of your inner self, the unfading beauty of a gentle and quiet spirit, which is of great worth in God's sight."*

Peter 3:3-4

My friend Jeremy Smith, who is now at Crosspoint UMC in Niceville, Florida, sent a verse for this issue. Jeremy was a youth minister at St. James UMC for four years before moving to Florida. He says the message is not just a future hope, but a present reality.

*"For you died, and your life is now hidden with Christ in God. When Christ, who is your life, appears, then you also will appear with him in glory."*

Colossians 3:3-4 NIV

## XXII. CLOSING OBSERVATIONS

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### **BEASLEY ALLEN'S ATLANTA OFFICE BUILDS MOMENTUM**

We are now halfway through 2017, and our Atlanta office is rapidly building momentum as a resource for clients and referring lawyers in Georgia. Chris Glover and Navan Ward, two veteran litigators, have now moved into a larger office in Atlanta to handle the growing practice there. They have recently filed a number of new cases in Georgia.

We mentioned in a previous issue of the Report that Chris was selected to serve on the Executive Committee for the Georgia Trial Lawyers Association (GTLA), where he has a vote in issues affecting the GTLA membership and he also oversees the organization's ListServ. Later this month, July 13-15, Chris will attend the GTLA 2017 Auto Torts Workshop, which will include continuing legal education in handling automobile crash cases, as well as opportunities for networking and building relationships.

Chris recently joined Beasley Allen Principal Lance Cooper of The Cooper Firm, at a fundraising event for U.S. Congressional candidate Karen Handel in her 6<sup>th</sup> Congressional District race. The event featured a keynote address from Vice President Mike Pence. Chris also attended a fundraising event for Justice Michael P. Boggs, who is running for reelection to the Georgia Supreme Court.

Chris and Navan are attending meetings for area Bar Associations. In addition to the State Bar of Georgia, there are a number of county bar associations as well as other legal interest groups in the state. Chris says:

*We continue to be excited about the reception we've had in Georgia. One of the most enjoyable things about this move is being able to meet the lawyers in this state. This is a tremendous Bar Association and we're making great connections with our colleagues. We're excited about the work we're doing here and the potential to help clients together with the lawyers that we've met here.*

Beasley Allen's Atlanta office is located at 4200 Northside Parkway, Building One, Suite 100, Atlanta, Georgia, 30327. You can reach the lawyers in the Atlanta office by phone at 800-898-2034 or by email (Chris.Glover@beasleyallen.com and Navan.Ward@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

## XXIII. PARTING WORDS

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I am passing on to our readers this month a message I received from Rev. Walter Albritton. My friend Walter sent me a piece he had written about a place he and I love and that's the United States of America. With all of the turmoil and hate-driven activities that today threaten our Republic, it's high time that we take stock of where we as a nation have been, where we are presently and where we appear to be headed. Let's see what this highly respected and loved "old preacher" had to say.

### **Come Home America**

Recently our choir director Diane Scott introduced me to some powerful new music titled "America Come Home." The song says God Almighty is calling America to repent of our sins and come home to God. And the song makes a strong plea for Christians to stand up and speak out against the evils that are destroying our nation.

Sunday at Saint James United Methodist Church our chancel choir will sing this stirring music and join me in urging our people to resolve to live holy lives and not lose hope that Almighty God can revive and save our nation.

The choir will sing also the “Battle Hymn of the Republic,” “If My People Will Pray,” and “Let there be Peace on Earth.” We are praying that this “God and Country” service will inspire our people to stand more boldly for Christ in the decadent culture of our day.

American citizens enjoy a freedom that is unprecedented in the history of nations. It is right that our hearts should swell with pride when we sing together, “Sweet Land of Liberty.” Our country is indeed a land of sweet liberty where, within the boundaries of our laws, all of us enjoy many precious freedoms.

Despite the decay and corruption that are weakening the moral fiber of our land, we are blessed with a godly heritage. Though secularists continue their efforts to rewrite the history of our nation, trying to eradicate all references to God, we still have a godly heritage. The spiritual roots of America are very deep.

Our Founding Fathers sought to build a nation that recognized its dependence upon almighty God. Our ancestors built upon these foundational stones: 1) Faith in God; 2) The dignity and sacred worth of man; 3) Respect for the rights and property of others; and 4) The need to worship God.

Quietly reflect on some of the treasures for which we Americans can thank God:

Our motto is still “In God We Trust.” It is printed on our money and engraved on the walls of Congress. As we handle money daily we are reminded that we do not trust in the power of the state, but in the power of God.

Religious holidays are legally established in our nation. Two of these, Good Friday and Christmas, are Christian holidays—or holy days. Thanksgiving is a holiday that completely rejects the claim that ours is a secular state. We owe this day of national Thanksgiving to President Abraham Lincoln. Every president since him has called our nation to a reverent recognition of the blessings of almighty God. Thanksgiving belongs to everyone. By being on a Thursday, it is wonderfully trans-denominational.

Our Pledge of Allegiance still contains the phrase, “one nation under God.” The salute to the flag rejects secularism. The words, “under God,” were used by President Lincoln in his Gettysburg Address in November 1863. Where did Lincoln get it? No doubt he got it from his Bible; it appears in the address to King James in the version of the Bible Lincoln read as a boy. So, when we salute the flag, we are declaring the sovereignty of God.

Our Congress still opens its sessions with prayers asking for the divine guidance of almighty God. This is a tradition that distinguishes our country from countries that have completely secular governments.

The Holy Bible is still used in the inaugurations of our Presidents. This important tradition has not been changed by those who would “remove God” from the realm of government.

We still appoint Chaplains to serve in the Armed Forces and in Congress. Thus do we as a nation acknowledge the need of all people for spiritual guidance.

Our nation continues to provide freedom from taxation to church bodies, including seminaries. This relieves religious societies of an enormous tax burden, giving churches greater freedom to propagate scriptural truth.

We will begin worship Sunday by singing “God Bless America.” This popular song unites us as Americans. Whenever we sing it, we should remember to thank God that he has indeed blessed our nation. Let us give him thanks for all he has done and resolve to stand boldly for Christ and by so doing help to preserve the precious freedoms we enjoy as American citizens.

I will just say a strong “Amen” to all that Walter had to say about America and our need to acknowledge God—to trust Him—and to count our many blessings. It’s no time to be timid and to live in fear. Instead, it’s a time to pray with increased intensity for God to heal our land. However, we must do our part. We must join with folks across this nation to truly honor and praise God for what He is and who He is. Because God is for us nothing on this earth can defeat us. My prayer is that God will heal our land and bless America.

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Jere Beasley, the founding member of Beasley Allen Law Firm, has practiced law as an advocate for victims of wrongdoing since 1962. During his career, he has tried hundreds of cases. Jere's numerous courtroom victories include landmark cases that have made a positive impact upon our society. His areas of practice include litigation in products liability, insurance fraud, business, nursing home and personal injury.

Jere established a one-lawyer firm that officially opened on Jan. 15, 1979, and he filed his first case on behalf of the practice on Jan. 17, 1979. Now, it has been 30 years since he began with the intent of "helping those who need it most." Today, the firm is known as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., still located in Montgomery, Alabama. Beasley Allen is one of the country's leading firms involved in civil litigation on behalf of claimants, having represented hundreds of thousands of people. The firm employs more than 250 people in Montgomery, including more than 70 attorneys.



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