



The
JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

\$417 MILLION TALC VERDICT IN CALIFORNIA

The first California jury to hear the evidence linking Johnson & Johnson's talcum powder products and ovarian cancer returned a \$417 million verdict against the giant drug company. The jury found that the talc product played a role in causing a woman's terminal cancer. After more than two days of deliberations following the four-week trial, the Los Angeles jury returned a verdict for Plaintiff Eva Echeverria. The jury found that J&J had failed to warn consumers about the increased risk of ovarian cancer caused by its Johnson's Baby Powder and Shower to Shower products, and that Ms. Echeverria's terminal ovarian cancer was caused by her use of those products.

The jury awarded Ms. Echeverria \$70 million in compensatory damages, and hit J&J and its subsidiary and co-defendant Johnson & Johnson Consumer with \$347 million in punitive damages. This is by far the largest verdict against the company so far after similar trials in St. Louis and South Dakota.

Johnson & Johnson has known for decades that its talc products are dangerous. Thousands of women, including Ms. Echeverria, have been victims of some of the worst corporate conduct that I have experienced during my time as a lawyer. Ms. Echeverria filed suit with six other women in Los Angeles County Superior Court in July 2016. Ms. Echeverria used talcum powder mined by Imerys Talc America Inc. and sold by J&J for years. She developed ovarian cancer in 2007.

Ms. Echeverria began using Johnson & Johnson's Baby Powder when she was 11 years old and used it every day with the exception of about a year when she used Shower to Shower. She liked the J&J Baby Powder scent better than Shower to Shower so she switched back and used it until early 2016 when she saw a news report regarding the talc verdict our lawyers got in St. Louis on behalf of Jacqueline Fox.

Ms. Echeverria has one daughter, Elisha, who has been by her side helping take care of her during her disease. Ms. Echeverria feels as though she robbed Elisha of her childhood since Elisha was

only 16 when her mother was diagnosed with ovarian cancer.

Dr. Mabel Vasquez first diagnosed Ms. Echeverria in 2007 and then referred her to a Gynecologic Oncologist, Dr. Annie Yessaian, who testified in the trial that talc was a cause of her disease. In April 2007, Ms. Echeverria underwent total hysterectomy and chemotherapy. She was in remission for nine months. In 2008, Ms. Echeverria was diagnosed with recurrence and since then has been through countless chemotherapy treatments.

Ms. Echeverria is represented by Mark P. Robinson Jr., Kevin F. Calcagnie, Scot Wilson and Cynthia Garber of Robinson Calcagnie Inc.; Allen Smith of The Smith Law Firm; Ted Meadows, David Dearing and Ryan Beattie of Beasley Allen Law Firm; Helen Zukin from Kiesel Law Firm; and Michelle A. Parfitt of Ashcraft & Gerel LLP.

Our talc litigation team, headed by Ted Meadows, is dedicated to carrying this fight to a conclusion. Other lawyers on the team include Danielle Mason, David Dearing and Ryan Beattie. Leigh O'Dell is leading the MDL effort in New Jersey. Katie Tucker, a legal assistant, has been involved with the team from the beginning and has done a tremendous job.

II. MORE AUTOMOBILE NEWS OF NOTE

CARMAKERS WIN BRIEF REPRIEVE FROM LAWSUITS OVER FAULTY TAKATA AIR BAGS

Automakers have won a temporary reprieve from lawsuits filed by victims of defective air bags made by bankrupt Takata Corp. that led to the largest-ever auto safety recall and at least 18 deaths. It appears the decision will give the Japanese auto supplier enough breathing room to work through its bankruptcy reorganization.

U.S. Bankruptcy Judge Brendan Shannon granted a 90-day halt on lawsuits brought by Hawaii, New Mexico, and the U.S. Virgin Islands as well as those filed by individual victims. Judge Shannon did not extend the shield to 48 federal cases that extend across several

districts, saying the lawsuits had already advanced. Takata requested a six-month freeze on hundreds of lawsuits so management could complete a \$1.6 billion sale of its viable operations. Takata said that was crucial to its reorganization. It would allow Takata to replace air bag inflators that are subject to the biggest recall in automotive history. Judge Shannon said he was "extremely sensitive" to the Plaintiffs' cases, but believed a "breathing spell" for Takata was appropriate. The stay will expire on Nov. 15.

Major automakers, including BMW AG, Ford Motor Co, Honda Motor Co Ltd and Toyota Motor Corp, argued in favor of the stay. Takata and TK Holdings Inc, its U.S.

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unit, said they faced tens of billions of dollars in liabilities when they filed for bankruptcy protection in June, including claims from automakers that used its airbags and individuals who filed class-action lawsuits.

Bankruptcy automatically stayed hundreds of lawsuits against TK Holdings for wrongful death, injuries, economic loss and breach of consumer protection laws stemming from the faulty airbags. In July, the company asked the court to suspend lawsuits against automakers brought by airbag victims. Takata separately filed for U.S. bankruptcy protection (Chapter 15) in an effort to stay lawsuits in the U.S. against the parent. The official bankruptcy committee that represents injured drivers stated in court filings that the injunction would have “human consequences” and prevent people from pursuing compensation.

The committee cited a 23-year-old New Jersey woman who became quadriplegic from brain injuries that a government investigator said were caused by a faulty Takata air bag. The woman’s lawyers estimated her economic loss would be \$18 million, not including potential damages for pain and suffering. As we have reported, the defective air bags have been linked to at least 18 deaths and 180 injuries worldwide. The recall, the largest in automotive history, will eventually cover 125 million inflators, many of which still need to be replaced. In January, Takata entered a settlement with the U.S. Department of Justice, setting aside \$125 million to compensate consumers and \$850 million in restitution for automakers.

Source: Reuters

NISSAN TO PAY \$98 MILLION TO END TAKATA AIR BAG MDL

Nissan is the latest automaker to settle claims in multidistrict litigation (MDL) over defective Takata Corp. air bags. The automaker agreed to pay \$97.7 million in settlement. Under the agreement, consumers will receive \$87 million in a settlement fund; they will be allowed to apply for reimbursement for everything from child care payments and towing fees to lost wages; and Nissan will create a free rental vehicle program.

The settlement, if approved by U.S. District Judge Federico A. Moreno, would make Nissan the fifth automaker to be

dismissed from the litigation. As we reported, in May Toyota, Subaru, Mazda and BMW agreed to pay a combined \$553.6 million. Only two automakers—Honda and Ford—would remain in the suit. The Plaintiffs will continue to pursue their case against these companies.

Consumers first filed suit in 2014. Takata’s air bag inflators have been linked to at least 18 deaths and the company has faced massive global recalls. Takata has pled guilty to wire fraud, has agreed to pay \$1 billion in fines and restitution, and has acknowledged that it ran a scheme to use false reports and other misrepresentations to convince automakers to buy air bag systems that contained faulty, inferior or otherwise defective inflators. As has been widely reported, Takata filed for bankruptcy in June in Delaware and Japan.

Nissan filed a counterclaim against Takata in March, demanding the air bag manufacturer reimburse it for any future settlement. The settlement agreement covers some 4.4 million Nissan vehicles. As part of the agreement, Nissan will inform consumers about the dangers of the Takata air bags and provide class members with coverage for repairs, including parts and labor. The plan also opens the possibility of a residual distribution payment of up to \$500 per class member.

It should be noted that this settlement does not involve claims of personal injury or property damage. The Plaintiffs are represented by Podhurst Orseck PA, Baron & Budd PC, Colson Hicks Eidson, Power Rogers & Smith PC, Boies Schiller & Flexner LLP and Lief Cabraser Heimann & Bernstein LLP, among others. The case is *In re: Takata Airbag Products Liability Litigation*, (case number 1:15-md-02599) in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

GM IGNITION CLAIMS FROM DRIVERS IN SIX STATES DISMISSED

The New York federal judge overseeing ignition switch litigation against General Motors LLC has dismissed claims brought by drivers in six states and Washington, D.C., who bought cars from “Old GM” before the company’s 2009 bankruptcy sale. However, U.S. District Judge Jesse Furman held off on deciding claims from

nine other states. In his ruling, Judge Furman first determined that U.S. bankruptcy law didn’t bar the drivers’ claims, but then applied Delaware law to dismiss the claims of drivers from California, D.C., Florida, Louisiana, Massachusetts, New York and Wisconsin. At issue in the ruling were successor liability claims brought by drivers in 15 states and D.C. who bought or leased cars with the Delta-model ignition switch defect before the July 2009 bankruptcy sale.

Although the Second Circuit Court of Appeals ruled in September that bankruptcy law didn’t bar the claims, GM had argued that the appeals court’s more recent *Tronox* ruling supported treating the claims as belonging to the Old GM bankruptcy estate and that the court should dismiss them. But Judge Furman rejected that line of argument, reiterating the Second Circuit’s finding that the drivers didn’t know about their claims before Old GM’s bankruptcy and were therefore deprived of their constitutional right to due process.

However, Judge Furman then had to perform a state-by-state analysis to determine which states’ laws applied to drivers from each state, and then decide the merits accordingly. New GM had argued he should apply either the law of Delaware, where New GM is incorporated, or of New York, where the bankruptcy sale was negotiated. The drivers had argued he should apply the laws of their home states or of Michigan, where most of the alleged misconduct occurred.

Judge Furman ultimately found that Delaware law applied to the claims of drivers from California, D.C., Florida, Louisiana, Massachusetts, New York and Wisconsin. In Delaware, a company that buys the assets of another company isn’t responsible for the latter’s debts and liabilities, the judge said. There are exceptions to this rule against successor liability, including—as the drivers argued—that a purchaser is “merely a continuation of the seller,” the judge noted. But “in evaluating whether that is the case,” Judge Furman said:

Delaware courts consider, among other factors, whether the sale was an arm’s length, cash transaction; whether the transferor corporation existed after the sale; and whether there was any continuity of ownership or control. Applying those standards here, it is plain that New GM is entitled to summary judgment

on plaintiffs' successor liability claims under Delaware law.

Judge Furman held off on determining the fate of the claims of drivers from the nine other states, which include Alabama, Illinois, Maryland and Michigan, asking instead for more information from the parties.

The defective switch lawsuits, which have been consolidated into multidistrict litigation, allege that design defects in certain models of GM cars led the ignition to slip out of the run position, shutting off the car and preventing the air bags from deploying. More than 100 deaths have been attributed to the design flaw, and GM initiated an extensive recall of the affected cars in 2014. The MDL 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

TOYOTA ACCELERATION DEFECT MONITORING ENDS

Toyota Motor Corp. closed a chapter last month in the saga concerning its hiding of sudden acceleration defects from the National Highway Traffic Safety Administration (NHTSA) and the public. The government said in a New York federal court that the monitoring period laid out in a \$1.2 billion deferred prosecution agreement in 2014 had come to a close. In March 2014 Toyota had agreed to a deal with the U.S. Department of Justice (DOJ) in an investigation into whether the company knew about the defects, which caused vehicles to accelerate suddenly, pleading not guilty to a criminal charge of wire fraud but agreeing to submit to an independent monitor for three years. There was no doubt that Toyota had successfully withheld its knowledge of the defect for about 10 years.

The government said in a letter to U.S. District Judge William H. Pauley III that Toyota had held up its end of the bargain, so the monitor was no longer needed and the fraud charge would be dropped by prosecutors. The DOJ said in its letter to the court:

The agreement provides for the dismissal of the information after the period of deferral if Toyota complies with its obligations under the

agreement. The government has determined that Toyota has complied with these obligations and accordingly respectfully submits the attached nolle prosequi.

In March 2014, Judge Pauley had approved the agreement. It appears from the letter that Toyota has complied with the deferred prosecution agreement and that the government won't prosecute the company on the fraud charge.

Toyota admitted to making misleading statements about the safety issues. The agreement provided that prosecutors would drop the fraud charge after three years if Toyota complied with all of the terms of the settlement, including appointing an independent monitor. At the hearing, Judge Pauley had this to say:

The Toyota suit demonstrates that corporate fraud can kill. Corporations only act through their agents. From this court's perspective, I sincerely hope that this is not the end, but rather the beginning, to seek to hold those individuals who were responsible for making those decisions accountable.

The settlement stems from Toyota's recall in 2009 and 2010 of nearly 8 million vehicles in the U.S. because of sticking accelerator pedals and a design flaw that could cause floor mats to trap the pedals. The \$1.2 billion penalty was the largest of its kind ever leveled against an automaker, according to the DOJ. Under the deferred prosecution agreement, Toyota agreed to allow an independent monitor to review safety-related public statements and the sharing of accident information within the company.

Prosecutors accused Toyota of misleading NHTSA about both the accelerator pedal and floor mat defects. After NHTSA launched a defect investigation in 2007 following reports of unintended acceleration, Toyota did not immediately recall any vehicles, even though its own internal probe showed that floor mats were more likely to entrap gas pedals in some models, the DOJ said. Toyota also did not share its findings with NHTSA.

Our firm tried the first civil case in Oklahoma City in 2013 and we fully exposed Toyota's wrongdoing for the first time. We were able to prove Toyota's knowledge of the defect and its withholding of that knowledge. The real problem causing the sudden accelerations actually involved the computer system. The jury

found in our favor and found Toyota's conduct to be reckless. The case settled before we went to the punitive damages phase of the trial. This was the case that brought everything into focus and it was the real stimulus for all that occurred thereafter.

The government is represented by Joon H. Kim and Sarah K. Eddy. The case is *U.S. v. Toyota Motor Corp.* (case number 1:14-cr-00186) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

MERCEDES TO REPAIR SEAT HEATERS IN AROUND 270,000 CARS

Mercedes-Benz USA LLC will install new seat heater wiring in as many as 270,000 vehicles to settle claims the equipment could spark or catch fire as part of a proposed class action settlement. The settlement is said to be valued about \$54 million. That would be in addition to warranty and reimbursement relief. Elizabeth Callaway and her husband, William, filed the suit in December 2014, claiming seat warmers in a variety of Mercedes models were made with copper wires that could fail, spark, or catch fire. They accused the automaker of concealing the alleged defect and intentionally failing to disclose it to buyers.

A main part of the settlement will provide a free "bypass wire repair" for current owners of the affected vehicles, which involves installing a bypass wire in the seat cover intended to eliminate the risk of a malfunction. This was an important part of the settlement. Additionally, class members who don't get the bypass repair procedures will have extended warranty coverage if something happens to their vehicle seat, within certain mileage-based conditions, according to the terms of the settlement. Anyone who has already experienced an issue with their seat heaters can receive a reimbursement for costs of up to \$1,000.

The proposed class includes all current and former owners and lessees of certain Mercedes Benz vehicles with original equipment seat heaters, including 2000-2007 M-Class vehicles, 2006-2007 R-Class vehicles and 2007 GL-Class vehicles.

The Plaintiffs are represented by Jason M. Frank and Scott H. Sims of Frank Sims & Stolper LLP and Eric F. Yuhl and Colin A. Yuhl of Yuhl Carr LLP. The case is *Eliz-*

abeth Callaway et al. v. Mercedes-Benz USA LLC et al., (case number 8:14-cv-02011) in the U.S. District Court for the Central District of California.

Source: Law360.com

III. PURELY POLITICAL NEWS & VIEWS

ALABAMA SENATE RACE FEATURES DAVID VS. GOLIATH

Judge Roy Moore led the field in the Republican primary as expected and will face Luther Strange in the runoff on Sept. 26. As it turned out, the runoff features a classic replay of the battle between David and Goliath. Big Luther, who has been a Washington lobbyist for Big Oil before his official entry into politics, reportedly spent more than \$16 million in the first primary, with most of it coming from a Washington-based SuperPAC. Judge Moore only spent about \$700,000, much of it coming from small donations by individuals. You can figure out pretty quickly who David is in this race. The Washington crowd definitely does not want Judge Moore to win this race.

The run-off should be very interesting and I believe Judge Moore will win it. The runoff campaign has already started with robo-calls from a Washington-based group on Aug. 19-20, attempting to hurt Judge Moore. The information in the one I heard was totally false. Interestingly, the two things that have hurt Luther the most are the way he got his appointment from then Gov. Robert Bentley, who at the time was under criminal investigation by Luther's office, and the fact that Luther has been and still is a part of the Washington Crowd, first as a lobbyist for the powerful oil industry, and now as an official part of the establishment.

Doug Jones won the Democratic nomination without a runoff. He will face the winner of the Moore-Strange runoff in the general election. Doug will be a tough opponent for the Republican nominee in the Fall.

When you get down to it there is nothing like "Alabama Politics." There is one thing for certain and that is Alabamians don't like to be **told** who to vote for! We will see if that holds true on Sept. 26.

KAY IVEY WILL RUN FOR GOVERNOR

Kay Ivey filed paperwork with the Secretary of State's Office on Aug. 18 to form a principal campaign committee. This is her first step toward running for her own term in office as Governor of Alabama. Nim Frazer, manager of Montgomery-based Industrial Partners, is the committee treasurer with Cathy Randall of Tuscaloosa, Marilyn Tamplin of Ozark and Phil Hardee of Beatrice as members. Kay's entry into the race shouldn't have been a very big surprise to folks who have followed her career.

Kay is Alabama's second female governor. As we all know, she became governor on the resignation of Governor Robert Bentley after he pled guilty to campaign finance and ethics violations. It was clearly time for the change and fortunately Kay was serving as Lt. Governor and capable of stepping into the job.

Kay served as the state's Lieutenant Governor—the first Republican woman elected to the office—from 2011 to 2017. Prior to serving as Lieutenant Governor, she was Alabama State Treasurer from 2003 to 2011. It's most important that Kay's time in public office has been free of any hint of scandal. She was well prepared to take over as governor.

As governor, Kay has been focused on "righting the ship" after years of scandal involving Bentley. Ivey told reporters in June:

My job right now is focusing on governing. We have a few more months (before we have to) do anything else about campaigning. I'm trying not to mix the two right now and keep the ship of the state floating steadily.

I believe that Kay will be extremely difficult to beat next year. Her entry into the race will likely discourage some potential candidates from running. In fact, that has already happened. I believe that Alabama is now in good hands with Kay at the helm of government. I wish her the very best!

IV. THE NATIONAL SCENE

FAMILY OF TUCKER HIPPS SETTLES CLEMSON LAWSUITS

The family of Tucker Hipps has settled lawsuits that were filed against Clemson University, Sigma Phi Epsilon fraternity and several fraternity members involving the student's death in 2014. Documents from mediation in the case were released electronically by the Pickens County Courthouse. The Alternative Dispute Resolution report dated July 28, 2017, shows that the mediation resulted in the case being considered "fully settled." The confidential settlement amount has to be approved by a judge of the court.

Tucker Hipps, a 19-year-old Clemson University sophomore and fraternity pledge, was found dead near a bridge on Lake Hartwell hours after going on a run with about 30 members of the fraternity on Sept. 22, 2014. The student's parents, Cindy and Gary Hipps, filed a wrongful death lawsuit and also a survival action in March 2015. The two cases were consolidated earlier this year.

It was alleged in the lawsuits filed by his parents that the early morning run was organized by the three fraternity leaders who were named in the lawsuit. Hipps was forced to walk a narrow railing on the bridge over Lake Hartwell by members of the fraternity after he failed to bring breakfast for his fraternity brothers before the run. The student died of head injuries that the Oconee County Coroner said were consistent with having hit his head on rocks in shallow water below the bridge.

Fraternity members denied seeing Hipps fall, and the university and local and national chapters of the fraternity denied responsibility for his death. Druanne White, an Anderson lawyer, represented the family.

I believe that colleges and all fraternities and sororities on campuses have a legal and moral obligation to make as sure as possible that physical and emotion abuse of "pledges" is stopped. There is absolutely no excuse for allowing what happened to this Clemson student to be a recognized way of life on any college campus. Parents should

demand that those in charge of our colleges take a stand on this issue.

Source: Independentmailandthestate.com

V. THE CORPORATE WORLD

JURY AWARDS TRUCKING COMPANY \$31 MILLION OVER NAVISTAR ENGINES

A Tennessee jury awarded Milan Supply Chain Solutions, a trucking company, \$31 million, finding that Navistar Inc. committed fraud and violated the state's consumer protection laws when it sold the company 243 heavy-duty trucks without mentioning problems with its Maxxforce diesel engines.

The Jackson, Tennessee, jury awarded \$10.8 million in actual damages with an additional \$20 million in punitive damages, to the Plaintiff, which had accused Navistar of failing to disclose that the engines were launched with serious known defects. Milan also said that as Navistar praised the quality of its testing program, it knew the process had serious issues and that its customers would become the de facto test fleet for its 2010 model year engine.

Kevin Charlebois, Milan's CEO, said in a statement that he was pleased with the decision and that he hoped it would force some change within Navistar, which he said continues to blame past management for problems with the Maxxforce engine. Charlebois had this to say:

We made every attempt to collaborate with Navistar to resolve these very legitimate engine issues, but rather than trying to sit down and work out a settlement, Navistar's current executive team instructed its lawyers to carry out a contentious litigation strategy against our company. We need Navistar to stand behind their product and step forward to address the damages caused by these engines, and we hope the jury's verdict will lead to a change in Navistar's tactics.

Milan bought the trucks involved in the lawsuit in 2011 and 2012—trucks that ran on a Maxxforce engine that used exhaust gas recirculation to cut down on diesel emissions. Navistar eventually

switched to the selective catalytic reduction system that the rest of the heavy-duty engine industry used.

The decision to use exhaust gas recirculation led to numerous issues that resulted in hundreds of millions of dollars in warranty costs to Navistar and losses on the resale market for companies such as Milan.

Various executives testified during the trial, including Jim Hebe, Navistar's former senior vice president of North American sales, who said the company "did not test" engines before selling them to consumers. Other evidence included an email exchange between Navistar's current senior vice president of engineering, Dennis Mooney, to current CEO Troy Clarke, which said the company's management had told its board of directors in 2013 that the physics of the Maxxforce engine at issue were "not sound." None of this was revealed to the public prior to trial.

The jury also heard that Navistar knew when it launched the engine that its components had serious quality problems and a shortened lifespan. Jack Allen, Navistar's former chief operating officer and president of truck operations, was called by Navistar to testify and said that it was "normal business practice" for companies to not tell customers ahead of sale about known defects in products or that they were buying a product that hadn't been fully tested by the manufacturers. Clay Miller, one of the lawyers for Milan, of Miller Weisbrod, said in a statement:

The jury seemed shocked to hear this testimony about the corporate culture and philosophy of Navistar from one of the company's top executives. It appeared the jury's punitive damage verdict was a message to Navistar that it is not acceptable for the company to cover up important defects in the engines and the engine's testing program in order to make a sale.

Milan was represented by Clay Miller and Warren Armstrong of Miller Weisbrod and Adam Nelson of Rainey Kizer Reviere & Bell. It's most interesting that Corporate America appears to like the courts when they are injured and seek justice. It's too bad they don't feel the same way when they commit wrongs that hurt a person.

Source: Law360.com

VI. WHISTLEBLOWER LITIGATION

SENATE RESOLUTION RECOGNIZES WHISTLEBLOWERS' IMPORTANT CONTRIBUTIONS

Last month marked the 239th anniversary of our nation's first whistleblower protection law. Longtime whistleblower advocate, Senator Charles Grassley (R-Iowa), noted that Congress passed the law July 30, 1778. They did so after realizing the need to protect civilians who risked their safety and security to warn lawmakers of fraud and misconduct carried out by those working for or providing a service to the U.S. government during the Revolutionary War.

The Senate formally recognized the contributions of these brave relators in 2013, thanks to Sen. Grassley's leadership. The body unanimously passed a resolution designating July 30 as National Whistleblower Day as a tribute to that first law and in recognition of the sacrifices and important contributions whistleblowers have made for the country. Senators also established the bipartisan Senate Whistleblower Protection Caucus to raise awareness about and build on protections for whistleblowers including maintaining unanimous support for National Whistleblower Day, which was recently reaffirmed in the 2017 Senate resolution.

Whistleblowers, in effect, are revealing inside knowledge they have of some potential wrongdoing by their employer that affects the U.S. government. As ordinary citizens, whistleblowers risk their careers, livelihood, reputation and more by telling the truth and upholding their civic duty.

While whistleblowers save U.S. taxpayers billions of dollars each year, they may not always receive the appreciation they deserve. However, because of the False Claims Act, which was the successor to the 1778 law and was enacted during Abraham Lincoln's presidency, they are afforded certain protections, as discussed in my law partner Lance C. Gould's book, *Whistleblowers: A Brief History & A Guide to Getting Started*.

A recent whistleblower case demonstrates how whistleblowers' courage can have more serious implications including on matters of national security. My law

partner, Larry Golston, recalls how his client Blake Percival's actions made our country safer.

Mr. Percival worked for a government contractor, U.S. Investigation Services (USIS), when he discovered the company was fraudulently bilking the government out of payments for background checks it did not perform. The background checks were for federal job applicants seeking security clearances and it is estimated that the fraud affected more than 650,000 background checks. USIS was responsible for conducting background checks on Edward Snowden, who leaked classified information from the National Security Agency, as well as Aaron Alexis, the Navy Yard shooter.

Sources: Senator Charles Grassley, U.S. Senate

NINTH CIRCUIT DECISION COULD CAUSE PHARMA COMPANIES CONCERN OVER FCA SUITS

The Ninth Circuit Court of Appeals in *United States ex rel. Campie v. Gilead Sciences* recently revived a whistleblower's False Claims Act (FCA) case. The Court held that the whistleblowers plausibly alleged an FCA violation, finding that the alleged violations could be material to the government's decision to pay for HIV drugs manufactured by the Defendant drug maker, Gilead Sciences. Even though the lower court had twice dismissed the whistleblower's FCA complaint for failure to state a claim, the Ninth Circuit revived the whistleblower's case by heavily relying on the U.S. Supreme Court's landmark decision in *Universal Health Servs. Inc. v. United States*.

In *Universal Health Servs. Inc.*, the U.S. Supreme Court held that the relators did not state a claim because the alleged fraud was directed at the U.S. Food and Drug Administration (FDA) rather than a payor agency—i.e., Medicare or Medicaid. Thus, in *Campie*, the district court judge dismissed the case on several grounds including that the fraud was directed at the FDA, not the payor agency, and that payment was not conditioned on compliance with FDA regulations. However, the Ninth Circuit in *Campie* found that it is not the distinction between regulatory and payor agencies that matters, “but rather the connection between the regulatory omissions and the claim for payment.” In *Campie*, the whistleblowers alleged that Gilead falsified information

about its drug suppliers and concealed problems of adulteration in HIV drugs in order to gain FDA approval. The Ninth Circuit held that because the government only pays for drugs that are FDA approved, Gilead's alleged misrepresentations to the FDA are what allowed the company to seek reimbursement from the payors.

The Ninth Circuit's willingness to allow the FCA suit to advance and wade into the regulatory regime of the FDA could cause drug makers concern over potential FCA suits against them. The Ninth Circuit essentially allowed the case to go forward because in addition to submitting claims for payment, Gilead misrepresented its compliance with FDA regulations by omitting critical information regarding compliance with FDA standards. In doing so, the Ninth Circuit has opened the door for more Plaintiffs to attempt to transform FDA violations into FCA suits.

Gilead emphasized the decision's “enormous potential implications for the pharmaceutical industry,” predicting that it “may open the floodgates to a host of False Claims Act cases in the Ninth Circuit based on pharmaceutical regulatory violations, even when the government and the Food and Drug Administration have declined to take any action.”

It remains to be seen what impact the *Campie* decision will have on the pharmaceutical industry as a whole, but there is little doubt the panel's decision could have serious consequences for Gilead.

Lawyers at Beasley Allen handle a variety of *qui tam* cases and pharmaceutical drug cases very similar to *Campie*. If you have any questions about this article or about any potential fraud and whistleblower cases, feel free to contact Ali Hawthorne, a lawyer in our firm's Consumer Fraud Section, at Alison.Hawthorne@beasleyallen.com.

Source: Law360.com

RECENT SETTLEMENTS IN WHISTLEBLOWER CASES

There have been a number of significant settlements in the whistleblower litigation in the past several weeks. The following are some of them:

WHISTLEBLOWER SUIT ACCUSING MYLAN OF MEDICAID FRAUD SETTLES FOR \$465 MILLION

Drug company Mylan NV has agreed to pay \$465 million to settle a whistleblower lawsuit alleging the company overcharged the federal and state governments for its emergency allergy drug EpiPen. The settlement comes a year after French drug company Sanofi filed a whistleblower lawsuit under the False Claims Act in 2014. Mylan was accused of cheating federal and state Medicaid programs. Sanofi, the parent company of the largest biotech employer in Massachusetts, Sanofi Genzyme, produces a competing epinephrine auto-injector drug called AUVI-Q.

According to the U.S. Attorney's Office in Massachusetts, Mylan knowingly misclassified EpiPen, a branded drug, “as a generic drug to avoid paying rebates owed to Medicaid.” The law requires pharmaceutical companies to pay Medicaid rebates of 13 percent for generic drugs and at least 23.1 percent for branded drugs, which cost substantially more than generics.

Analysts estimate that Mylan's scheme cost the Medicare program more than \$700 million over much of the past decade. Accompanying the alleged rebate scam were several drastic price increases for the EpiPen, which cost less than \$100 for a pair nine years ago, but now cost more than \$600.

Mylan's outrageous EpiPen price hikes allowed it to collect substantially more from both the Medicaid and Medicare programs. The amount Medicare and Medicaid spent on EpiPens rose to \$486.8 million in 2015 from \$86.5 million in 2011, an increase of 463 percent.

Sanofi will get \$38.7 million of the total settlement as a whistleblower award. This was a victory for the U.S. Attorney's Office in Massachusetts which said that it “demonstrates the Department of Justice's unwavering commitment to hold pharmaceutical companies accountable for schemes to overbill Medicaid, a taxpayer-

funded program whose purpose is to help the poor and disabled.”

According to the U.S. Justice Department, Mylan entered into a corporate integrity agreement with the Department of Health and Human Services, requiring it to undergo an annual audit of its practices relating to the Medicaid rebate program.

Sources:MSN and RightingInjustice

PHH TO PAY \$74.5 MILLION TO SETTLE DEFECTIVE MORTGAGE CLAIMS

Mortgage lender PHH Corp. will pay nearly \$74.5 million to resolve claims that it failed to comply with certain origination, underwriting and quality control requirements from the Federal Housing Administration (FHA), the U.S. Veterans Affairs Department, Fannie Mae and Freddie Mac. A whistleblower lawsuit was filed under the False Claims Act (FCA) by a PHH employee. According to federal prosecutors, the employee will receive almost \$9.1 million from the settlement.

The Justice Department said that from 2006 to 2011, PHH certified ineligible home loans for FHA insurance. If a mortgage loan approved for FHA insurance later defaults, the holder of the loan may submit an insurance claim to the office of Housing and Urban Development (HUD), FHA's parent agency, for the losses resulting from the defaulted loan. The government suffered significant losses after it paid insurance claims on the loans certified by PHH.

Between 2005 and 2012, PHH submitted ineligible loans to be guaranteed for coverage through a Veterans Affairs Department program that helps members of the military and veterans become homeowners, according to the Justice Department. PHH also originated and sold ineligible loans from 2009 to 2013 to Fannie Mae and Freddie Mac.

Source: Reuters

DEFENSE CONTRACTOR ADS AGREES TO PAY \$16 MILLION TO SETTLE FCA LAWSUIT

Virginia Beach, Virginia-based contractor ADS Inc. and its subsidiaries have agreed to pay the United States \$16 million to settle allegations that

they violated the False Claims Act (FCA) by knowingly conspiring with and causing purported small businesses to submit false claims for payment in connection with fraudulently obtained small business contracts. The Department of Justice (DOJ) announced the settlement on Aug 10. The settlement resolves allegations that ADS engaged in improper bid rigging relating to certain of the fraudulently obtained contracts. The settlement with ADS ranks as one of the largest recoveries involving alleged fraud in connection with small business contracting eligibility. Chad A. Readler, Acting Assistant Attorney General of the Justice Department's Civil Division, stated:

Small or disadvantaged businesses serve as important engines of economic growth, and the United States utilizes small business set-aside contracts to aide those businesses in their development. When ineligible companies improperly obtain set-aside contracts, they prevent the small business community from receiving the assistance that Congress intended.

In order to qualify as a small business, companies must meet defined eligibility criteria, including requirements concerning size, ownership, and operational control. The settlement with ADS resolves allegations that ADS, together with several purported small businesses that it controlled, fraudulently induced the government to award certain small business set-aside contracts by misrepresenting eligibility requirements.

The purported small businesses affiliated with ADS include Mythics Inc., London Bridge Trading Co. Ltd., as well as MJL Enterprises LLC, which falsely claimed to be an eligible service-disabled veteran-owned company, and SEK Solutions LLC and Karda Systems LLC, both of which falsely claimed to qualify as socially or economically disadvantaged businesses under the Small Business Administration's 8(a) Business Development Program.

ADS and its affiliates allegedly concealed the companies' affiliations with ADS and knowingly made misrepresentations concerning the size of the businesses and their eligibility as service-disabled or 8(a) qualified businesses. Finally, the settlement resolves allegations that ADS engaged in illegal bid rigging schemes that inflated or distorted prices charged to the government under certain contracts.

Channing D. Phillips, the U.S. Attorney for the District of Columbia, issued the following statement related to the settlement:

This settlement reflects the government's commitment to ensure that its business partners are truthful in their dealings with the United States. Contractors who attempt to disguise or misrepresent themselves to obtain funds reserved to promote small and disadvantaged businesses will be held accountable for their fraud on the public fisc.

Acting Inspector General Mike Ware added these comments involving the wrongdoing:

The actions of ADS and its affiliated entities deprived legitimate small businesses of valuable federal contracting opportunities. OIG will aggressively pursue companies that, through false statements, wrongfully benefit from small business set-aside contracts. I want to thank the Department of Justice for its leadership and dedication to serving justice in this case.

SBA General Counsel Christopher M. Pilkerton had this to say about the government's efforts:

This case is yet another example of the tremendous results achieved through the joint efforts of the SBA, the Department of Justice, and other partner agencies, to uncover and forcefully respond to civil fraud committed by those participating in Federal Government contracting programs. This case involved fraud perpetrated in the Service-Disabled Veteran-Owned Small Busi-

ness Contracting Program and the 8(a) Program for disadvantaged individuals. Identifying and aggressively pursuing instances of civil fraud by participants in these procurement programs and other set aside contracting programs, is one of SBA's top priorities.

The settlement with ADS resolves a lawsuit filed under the whistleblower provision of the False Claims Act, which permits private parties to file suit on behalf of the United States for false claims and share in a portion of the government's recovery. The civil lawsuit was filed in federal district court in the District of Columbia by Ameliorate Partners LLP. As part of today's resolution, the whistleblower will receive approximately \$2.9 million.

The settlement is the result of a coordinated effort among the Civil Division's Commercial Litigation Branch, the U.S. Attorneys' Offices for the District of Columbia and the Eastern District of Virginia, the Small Business Administration's Office of Inspector General, and the General Services Administration's Office of Inspector General.

Source: pressreleasepoint.com

TEXAS-BASED IMPORTERS AGREE TO PAY \$15 MILLION TO SETTLE FALSE CLAIMS ACT LAWSUIT

The Department of Justice (DOJ) announced recently that University Furnishings LP and its general partner, Freedom Furniture Group Inc. (collectively University Furnishings) agreed to pay \$15 million to settle a lawsuit brought under the False Claims Act (FCA) alleging that the companies made or conspired with others to make false statements to avoid paying duties on wooden bedroom furniture imported from the People's Republic of China. Texas-based University Furnishings sells furniture for student housing.

Principal Deputy Assistant Attorney General Benjamin C. Mizer, head of the Justice Department's Civil Division, stated:

Those who introduce goods into the United States must comply with the law, including the payment of customs duties meant to protect domestic companies and American workers from unfair competition abroad. The Department of Justice will zealously pursue those who seek an unfair advantage in U.S. markets by evading the duties owed on goods imported into this country.

The government alleged that between 2009 and mid-2012, University Furnishings knowingly misclassified or conspired with others to misclassify wooden bedroom furniture on documents presented to U.S. Customs and Border Protection (CBP) to avoid paying antidumping duties on imports of wooden bedroom furniture manufactured in the People's Republic of China. Specifically, University Furnishings allegedly classified the furniture as office and other types of furniture not subject to duties while selling the furniture in the student housing market for use in dormitory bedrooms. The Department of Commerce assesses and CBP collects antidumping duties to protect U.S. businesses by offsetting unfair foreign pricing and foreign government subsidies. U.S. Attorney Richard L. Durbin Jr. of the Western District of Texas, stated:

Companies that cheat, by fraudulently mislabeling their imports, undermine U.S. manufacturers and others that obey the rules, and hurt consumers and taxpayers. We are hopeful that today's settlement will help deter others from this type of scheme.

The lawsuit was originally filed by University Loft Company under the qui tam or whistleblower provisions of the False Claims Act. The case was handled by the Civil Division's Commercial Litigation Branch, the U.S. Attorney's Office for the Western District of Texas, CBP's Office of Field Operations, Office of Regulatory Audit and Office of Chief Counsel; and U.S. Immigration and Customs Enforcement's Homeland Security Investigations.

The lawsuit is captioned *United States ex rel. University Loft Company v. University Furnishings, LP, et al.*, [No. A13-CV-678 (W.D. Tex.)].

US BIOSERVICES TO SETTLE KICKBACK CLAIMS FOR \$13.4 MILLION

US Bioservices will pay \$13.4 million to settle government claims that it violated the False Claims Act (FCA) by encouraging patients to unnecessarily refill prescriptions of the iron chelation drug Exjade in exchange for kickbacks in the form of referrals from the drug's maker Novartis, according to filings in New York federal court Tuesday. US Bioservices Corp. will pay about \$10.6 million to the federal government and \$2.8 million to several states. Additionally, US Bio will admit several key facts about its relationship with Novartis Pharmaceuticals Corp. Acting U.S. Attorney for the Southern District of New York Joon H. Kim stated:

The core allegation is that, from August 2010 to March 2012, US Bio violated the [Anti-Kickback Statute] and the FCA by participating in an arrangement with Novartis under which US Bio could receive more Exjade patient referrals and related benefits in return for achieving a higher Exjade refill percentage than Accredo and BioScrip.

The government said in the complaint that US Bio acquiesced to pressure from Novartis to compete with Accredo and BioScrip for referrals despite knowing that this violated anti-kickback laws. The complaint states:

US Bio trained its nurses to call and tell Exjade patients that not treating iron overload, for which Exjade is prescribed, could have severe consequences like organ failure, and that while Exjade had certain common side effects like diarrhea, such side effects typically went away with time. Second, US Bio also assigned a group of patient care coordinators to call Exjade patients and encourage them to order refills.

The scheme earned US Bio hundreds of dollars each year in the form of service fees and rebates, the complaint says.

In 2011, a Novartis marketing employee, David Kester, filed a qui tam action claiming that the company engaged in kickback arrangements with the three specialty pharmacies, including US Bio. The government reached settlements with BioScrip in January 2014, Accredo in April 2015, and Novartis in November 2015. After Kester litigation was resolved, the government began investigating US Bio's involvement with Exjade.

The case is *United States v. US Bioservices Corp.*, (case number 1:17-cv-06353) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

THE PSYCHOLOGY OF WHISTLEBLOWERS: WHY DO SOME SPEAK UP WHILE OTHERS KEEP QUIET?

Would-be whistleblowers almost always face giant risks when they choose to challenge authority, break loyalties, and call out wrongdoing. According to one recent psychological study, more than 90 percent of participants in a social experiment said they would disobey authority and blow the whistle on an experimenter they observed doing something immoral. Yet in another phase of the same study, less than 10 percent of the participants actually blew the whistle when they discovered an experimenter's cruel and immoral behavior during the realistic situational experiment. This finding echoed previous whistleblower studies that determined conformity and fear of defying authority can overwhelm a person's impulse to do the right thing. So what makes some whistleblowers choose to put their personal and professional lives in jeopardy while others who witness wrongdoing stay silent?

A report published by the *Washington Post* on July 13 delved into that question and found that there is no black-and-white answer in many cases but a variety of influencing factors. First, a whistleblower's belief in the rightness of his or her action must be strong enough to overcome the hazards of speaking out, the *Washington Post* found, citing recent

studies. The *Washington Post* cited a study conducted by Boston College recently that found "people who valued fairness above loyalty were more likely to say they would blow the whistle on someone who committed a crime."

"A lot of it comes down to their ability to hold on to a set of principles in the face of countervailing social information," Zeno Franco, a psychologist and expert in the study of heroism at the Medical College of Wisconsin, told the *Washington Post*. "That's a very tough call. Most of us don't want to be in the out-group."

According to the *Washington Post*, Dr. Franco classifies whistleblowers as "social heroes" because they are apt to make personal sacrifices on behalf of the greater good, much like military heroes who go beyond the call of duty or risk their lives to help others.

Whistleblowers also are comfortable with a degree of nonconformity, which is usually tied to security in their professional roles, the *Post* reports. Situational factors also make a difference in whistleblowing.

For instance, if a company or organization has a reputation for handling problems honestly and effectively, its employees will be more likely to voice concerns about wrongdoing. And, while many would-be whistleblowers can be discouraged by the potential costs, knowing the risks can help some whistleblowers better prepare. "The more aware would-be whistleblowers are of the powerful social pressure they'll face, the more they can steel themselves to withstand that pressure," the *Washington Post* reports.

Pressure to blow the whistle may also come from considering the price of staying silent, especially if something the whistleblower values and loves is threatened by misconduct, be it a company, a mission, a cause, a sport, a principle, and so on. "The term 'the sin of omission' is there for a reason: What will I have to live with if I don't take action?" Dr. Franco told the *Washington Post*. "Usually the truth does come to light, and that can be a really powerful guiding principle."

Sources: *Washington Post*, Boston College—ScienceDirect and Ohio State University

WHISTLEBLOWERS CAN GET HELP AT BEASLEY ALLEN

Are you aware of fraud being committed against the federal government, or a state government? If so, you may be protected and rewarded for doing the right thing by reporting the fraud. If you have any questions about whether you qualify as a whistleblower, you can contact a lawyer at Beasley Allen for a free and confidential evaluation of your claim. There is a contact form on our firm's website, or you may email one of the lawyers on our firm's Whistleblower Litigation Team: Archie Grubb, Larry Golston, Lance Gould or Andrew Brashier. You can call them at 800-898-2034 or email them at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

VII. PRODUCT LIABILITY UPDATE

A TRAGIC CASE INVOLVING SCHOOL BUSES AND CHILDREN MAY BRING ABOUT NEEDED SAFETY CHANGES

This month our firm settled a horrific case against a major school bus manufacturer for a large amount. Greg Allen, the lead lawyer for the firm in the case, represents the mother of 5-year-old Bissiah who was tragically killed when the rear wheels of his school bus, weighing more than 20,000 pounds, ran over and crushed his head. The bus arrived at the child's home just before dawn on Oct. 26, 2015. The little boy's older sister and brother entered the bus first.

Bissiah crossed in front of the bus behind his siblings and his backpack got caught on the crossing arm on the front of the bus. The backpack spilled its contents directly in front of the bus. Bissiah bent over to gather his books. Bissiah's mother watched in horror as the bus stop lights went off and the crossing arm moved in toward the bumper. The bus started forward and ran over her child. The mother ran out and picked up her dead child, cried, and sang to him while waiting on the authorities to arrive.

The bus driver testified that she saw only two children coming toward the bus

and did not see the third child in the cross-view mirrors. There is a blind spot in front of this and other buses that are the kind used by most school districts in the country.

The bus was manufactured in 2002. Bus manufacturers have known since the late 1980s that student detection systems (sensor systems) were available to eliminate the blind spot on the front of buses. Yet, no bus manufacturer had undertaken to install them in 2002. Even today, very few school buses are equipped with a sensor system. There is limited use of this safety device in a couple of states. New Jersey recently enacted Abigail's Law, which now mandates sensor systems on all new school buses sold in that state. Abigail was a toddler who followed her big sister to the bus. Abigail stopped right in front of the bus as her sister got on the bus. The bus driver never saw Abigail and drove over her. The general assembly of New Jersey realized that this tragedy needed to be addressed and enacted the law mandating sensor systems. The overwhelming majority of school buses on the road today do not have this safety device.

The Alabama School Bus Specifications Committee has never been asked by any school bus company to approve the use of student detection sensors in this state. The committee must approve any new technology. The head of the committee for more than 20 years testified under oath that he had heard of sensors, but that no manufacturer had ever presented the idea to the committee. He said that if it had been presented, the committee would have been very receptive to it.

The Defendant bus company in this case tried to hide behind the fact that the Alabama Bus Specifications Committee had never approved the technology. Judge Steve Perryman was our trial court judge. At the pretrial hearing, Judge Perryman demonstrated clearly that he had read everything filed and understood exactly how the manufacturer was attempting to escape its responsibility. Judge Perryman denied summary judgment, ruling that all the bus manufacturer had to do was ask for this new technology for it to be implemented.

During trial preparation, Greg and Bobby Monzingo, one of our in-house investigators, traveled to New Jersey to test a bus with the Rostra SDS System (Student Detection System). The system worked very well. We were also able to

prove that the cross-view mirrors are not reliable and are fraught with hazards. Anything from dust, dirt, ice, snow or even rain could obstruct the mirror or distort the view of students in peril. School bus drivers deal with many distractions. They have to deal with students loading and unloading the bus, traffic in the area and they also have to deal with the discipline of the students already on the bus.

This sensor technology is like an extra set of eyes and emits a visual and audible signal when a student is in a blind spot. It needs to be made mandatory on all school buses by the federal government. Unfortunately, there is little attention being paid to this danger. More than 800 injuries occur from students being run over by their own bus each year in this country. On the average, one to two students die each month in these incidents. Fifty-four percent of the accidents are with children between 5 and 6 years old. The families of the children are devastated by these accidents as well as the bus drivers who have to deal with the guilt of causing an injury or death of a child.

It's most unfortunate that neither the federal government nor the bus manufacturers have taken the initiative to implement this needed technology on all school buses. Hopefully, this case will shed some light on the safety issue and bring attention to this very significant problem. We have reason to believe that will happen.

The case was settled with the bus company for a large, but confidential, amount, with the understanding that we would not publish the name of the manufacturer. The case was handled by Greg Allen and Stephanie Monplaisir, along with this writer, from our firm; Darron Hendley of Montgomery; and Robert Thompson of Tuskegee, Alabama. Greg did a tremendous job of pre-trial discovery in this case and was able to locate some very important documents and papers written by engineers that helped us greatly. One of the engineers actually worked for the manufacturer. Hopefully, this case will help to bring about the badly needed safety changes in the industry. We have good reason to believe that it will happen.

GUARDRAIL ACCIDENTS ARE A GROWING CONCERN

As we reported previously, lawyers in our firm who handle product liability cases are currently investigating and litigating cases where passengers in vehicles were killed or catastrophically injured as a result of defective guardrails. Where dangerous areas exist along a stretch of highway, such as an embankment, cliff, or creek, a guardrail can serve to redirect the vehicle away from the hazard and to a safer place on the road.

Guardrail design materials and their installation must meet state and federal specifications to ensure they work as intended. Guardrail systems are supposed to be designed to lessen the severity of an accident, i.e., to mitigate the impact of an accident. Unfortunately, defective guardrail systems have been causing horrific injuries, either as a result of design defects, selection of materials, or from poor installation. Of course, it can be a combination of these factors.

Defective guardrails can result from poor design, the use of inferior materials, and poor construction or installation. For instance, in one such case handled by our firm, a certain guardrail end terminal system was banned for use (a breakaway cable terminal, or BCT) and could not be ordered because the system was known to impale (or spear) approaching vehicles that hit the guardrail. Instead of installing a system that was crashworthy, the contractor assembled parts together that formed the previously banned BCT, and installed it on highways. Predictably, when our client's car hit the approach end of the BCT configuration, the BCT did exactly what studies 17 years earlier said it would do—it impaled our client's vehicle, severely injuring her, including the loss of a leg.

There are several guardrail systems in use that do not work as expected to prevent injury and even death due to some type of defect.

Lawyers in our Personal Injury & Products Liability Section are investigating and have handled cases where vehicle occupants were severely injured or killed after striking a guardrail system. If you have any questions about these cases, contact Chris Glover or Parker Miller, lawyers in the Section, at 800.898.2034 or by email at Chris.Glover@beasleyallen.com or Parker.Miller@beasleyallen.com.

Source: Knoxville News Sentinel

VIII. MASS TORTS UPDATE

NEW JERSEY ACCUTANE RULING SHOULD CONTROL TALCUM POWDER LITIGATION APPEAL

A New Jersey state appeals court recently reversed the trial court's summary judgment ruling in the consolidated Accutane litigation, reviving more than 2,000 cases. The Accutane Plaintiffs allege that Hoffman-LaRoche Ltd. (Roche) did not warn them that taking the acne medication could cause them to develop Crohn's disease.

In February 2015, after several years of litigation, the trial court granted Roche's motion to bar Plaintiffs' experts from testifying that Accutane can cause Crohn's disease, finding that their methodologies were scientifically unreliable and inadmissible. In its 2015 order, the trial court described one of the Plaintiffs' experts as an "expert on a mission" and also stated the Plaintiffs were "cherry picking" evidence. The following May, the trial court dismissed all 2,076 claims.

This appellate decision affirms the vital role of the jury to weigh the credibility of expert witnesses. The appellate court found that the trial court went beyond its gatekeeping function and that the experts' testimony should not have been excluded simply because they emphasized different evidence and produced different conclusions than Defense experts. Plaintiffs' experts were not "cherry picking" evidence when they provided well-explained scientific reasons for analyzing the evidence differently from their Defense counterparts. The judge's role is not to determine which set of experts produce the most plausible opinion, but only to ensure that expert testimony presented in court is based on sound scientific principles.

In New Jersey, the standard by which a court is to assess the admissibility of scientific opinions is governed by a modification of the Frye standard, as decided by the New Jersey courts in *Landrigan v. Celotex Corp.* and *Kemp v. State of New Jersey*. Following a *Kemp* hearing, which in New Jersey refers to a hearing in which the court hears arguments related to the admissibility of expert testimony, Judge Nelson C. Johnson barred two of

the Plaintiffs' experts from offering certain crucial opinions.

Specifically, the trial court barred Plaintiffs' experts Dr. David Madigan, a statistician, and Dr. Arthur Asher Kornbluth, a gastroenterologist, from testifying that, 1) the epidemiology studies on which the Defendants relied were flawed and unreliable; and 2) that Accutane can cause Crohn's disease. The trial court also directed the parties to prepare an order listing the lawsuits affected by the ruling, and subsequently issued an order dismissing the 2,076 cases with prejudice.

In a published opinion, the three-judge appellate panel reversed the trial court's rulings and stated,

We agree with plaintiffs that the trial court went beyond its gatekeeping function.... The trial court took too narrow a view in determining whether the experts were using accepted scientific methodologies to analyze the evidence, and improperly determined the weight and credibility of the experts' testimony. Among other things, the judge inappropriately condemned the experts for relying on relevant scientific evidence other than epidemiological studies, despite their plausible explanations for doing so. Consequently, we conclude that the trial court mistakenly exercised discretion in barring the experts' testimony.

In September 2016, the same New Jersey trial judge, Nelson C. Johnson, similarly excluded expert testimony in a pre-trial ruling and dismissed two talcum powder lawsuits. Those cases are now on appeal. Attorneys for Diana Balderrama and Brandi Carl argue that the trial court erred in excluding testimony from Dr. Graham Colditz and Dr. Daniel Cramer, two of the world's leading cancer researchers, linking talcum powder and ovarian cancer. The appeal filed by Beasley Allen indicates that

[T]he trial court's decision to preclude the testimony turns New Jersey's law of expert admissibility on its head. . . . The court substituted its own judgment for that of the scientists and usurped the role of the jury by holding what was in effect a bench trial on the issue of causation.

Johnson & Johnson had previously lost two talcum powder trials in St. Louis, and a total of three jury verdicts there against Johnson & Johnson totaled \$197 million in 2016. In May, a St. Louis Circuit Court jury returned a \$110.5 million verdict for a woman claiming use of Shower-to-Shower and Baby Powder products over four decades caused her ovarian cancer. The most recent verdict—amounting to \$417 million, the largest ever—was returned by a California jury on Aug. 21. We wrote about the verdict in the Capital Comments Section of this issue.

The Accutane ruling provides some hope for the Ms. Balderrama and Ms. Carl, as the New Jersey appellate court considers their appeal. Hopefully, the decision of the appeals court to reinstate the Accutane cases is an indication of further rulings to come, particularly those related to the admissibility of expert opinions.

Sources: *In re: Accutane Litigation*, N.J. Super., (App. Div. 2017); FiercePharma; and Law360.com, PR Newswire and *In re: Accutane Litigation*, Docket No. A-4698-14T1, Superior Court of New Jersey Appellate Division (July 28, 2017)

MDL CREATED FOR PPI CASES

In July 2017, the Judicial Panel on Multi-district Litigation (JPML) met to decide whether to consolidate in one court all proton pump inhibitor (PPI) cases filed in federal courts across the country. On Aug. 2, 2017, the Panel decided that consolidation would promote the just and efficient administration of the cases and assigned the consolidated litigation to Judge Claire C. Cecchi in the District of New Jersey. The Order consolidates all cases currently filed in the federal courts involving claims of kidney injury resulting from ingestion of PPIs.

PPIs are indicated for the short-term treatment of gastrointestinal reflux disease and gastric ulcers, but have been heavily marketed as long-term, daily treatment of more common conditions such as acid reflux. PPIs have been widely available for more than 20 years and are now marketed as prescription, over-the-counter, and generic varieties. The PPI MDL will include claims against all PPI manufacturers, including Pfizer (Nexium OTC), Takeda (Prevacid), AstraZeneca (Prilosec), Proctor & Gamble (Prilosec OTC), and Novartis (Prevacid OTC).

Decades of studies and reports expose the serious risks of PPIs causing acute

kidney injuries, specifically acute interstitial nephritis (AIN). Finally, in October 2014, the U.S. Food and Drug Administration (FDA) required a warning regarding AIN on all prescription PPIs but, to date, no such warning is included in the over-the-counter product labeling. More recent medical studies support that PPIs can cause chronic kidney disease in the absence of an acute event. However, there is no information in the product warning label regarding the risk of chronic kidney disease developing following prolonged exposure to PPIs.

Plaintiffs in the litigation had originally petitioned the JPML for MDL consolidation in 2016, but the petition was rejected by the JPML in January 2017 after the various Defendant manufacturers opposed centralization citing the complexity of consolidating numerous manufacturing Defendants into one case (including citing concerns over disclosure of trade secrets). Given the Defendants' objections and the relatively few cases pending at that time, the JPML agreed with the Defendant manufacturers that formal consolidation was unnecessary. However, since then, a large number of PPI cases have been filed in federal district courts across the country. Facing the prospect of litigating multiple cases in multiple locations, all of the manufacturing Defendants except Takeda joined in the Plaintiffs' most recent JPML petition requesting the creation of the PPI MDL.

Lawyers in our firm's Mass Torts Section are currently investigating PPI-related acute kidney injuries. If you would like for us to review your potential claim, you can contact Roger Smith or Liz Eiland, lawyers in the Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com or Liz.Eiland@beasleyallen.com.

PHYSIOMESH MDL CENTRALIZED IN THE NORTHERN DISTRICT OF GEORGIA

The Judicial Panel on Multidistrict Litigation (JPML) recently issued a Transfer Order centralizing all Physiomes mesh lawsuits filed in the federal courts across the country in a multidistrict litigation (MDL) in the Northern District of Georgia for the purposes of coordinated discovery and other pretrial proceedings. United States District Court Judge Richard Story will preside over these cases.

MDLs benefit all parties involved by eliminating duplicative and costly discovery. Judges presiding over MDLs often set bellwether trials (or test cases) once discovery is completed in an effort to encourage settlement negotiations by setting high and low values, depending on how the juries find in those cases. This is accomplished by having both sides—the Plaintiff's Steering Committee, and the counsel for the Defendant—select their choices for what they believe to be a representative “pool” of cases after each filed case is carefully reviewed.

Intended for hernia repair, Physiomes mesh is a flexible polypropylene mesh designed to reinforce the abdominal wall, preventing future hernias from occurring. The mesh was designed to incorporate a multilayer biologic coating over the polypropylene, but it is contended that, over time, the coating wears off and is absorbed by the human body, leaving bare polypropylene in contact with tissues and organs.

On May 25, 2016, Ethicon, a subsidiary of Johnson & Johnson and manufacturer of Physiomes mesh, issued a voluntary recall of the product due to high rates of reoccurrence. In a safety notice, the company said unpublished data using two large independent hernia registries found the need for additional operations increased when Physiomes mesh was used in comparison to when other similar meshes were used in abdominal, or ventral, hernias.

Many reported complications in hernia surgeries, according to the U.S. Food and Drug Administration (FDA), are associated with now-recalled surgical mesh, which it credits as the main cause of bowel perforation and obstruction complications. Defects in Physiomes mesh was found only after it was put on the market.

Our lawyers are currently investigating cases involving serious injury or death as a result of Ethicon's Physiomes mesh. If you or a loved one has received hernia treatment that included Physiomes mesh and have experienced complications, reoccurring hernias or the need for additional surgeries, you may have a claim. You can contact Melissa Prickett or Megan Robinson, lawyers in our firm's Mass Torts Section, at 800-898-2034 or email at Melissa.Prickett@beasleyallen.com and Megan.Robinson@beasleyallen.com.

ENDO TO PAY \$775 MILLION TO SETTLE MESH CASES

Endo International PLC announced last month that it has reached agreements to end “virtually all known” mesh product liability claims in the U.S. and that it expects to pay out \$775 million to cover the costs of those as well as all known international claims. Dublin-based Endo, in a statement, said that under the agreements it is slated to end the known U.S. claims at “reasonable values” and will make installment payments starting in the fourth quarter of this year and continue making payments until the end of 2019. The company said it intends to set aside \$775 million to cover about 22,000 mesh implant claims in the U.S., in addition to all known international mesh product liability claims and other mesh-related matters.

Endo said that it wasn't aware of any claims that won't be covered by the \$775 million. However, the company says it can't predict the number of any future claims or the resolution of any unresolved claims. Endo CEO Paul Campanelli, in a statement, said:

We believe it is a very important milestone for Endo to have reached agreements to resolve virtually all known U.S. mesh product liability claims. While it remains possible that additional claims will be filed, we believe today's announcement will assist most mesh claimants to move forward with their lives and will permit Endo to move forward with an even greater focus on executing against our core strategic priorities.

In March 2016, Endo said it was winding down its Astora Women's Health unit, formerly AMS Women's Health, to reduce the potential for product liability claims related to future mesh implants. Endo's subsidiary had been hit by suits alleging health complications allegedly caused by a number of vaginal mesh devices. In April 2014, Endo said that it had reached settlements with several of the remaining Plaintiffs suing American Medical Systems Inc. over allegedly harmful vaginal mesh products, resolving “substantially all” of the claims in the case without admitting any liability or fault. The 2014 settlement announcement came just five months after the company announced it would pay \$830 million to

settle “a substantial majority” of the lawsuits related to AMS’ vaginal mesh devices.

The day before, the U.S. Food and Drug Administration (FDA) issued two proposed orders that would reclassify surgical mesh for transvaginal repair of pelvic organ prolapse as a high-risk device and require manufacturers to apply for pre-market approval with the agency. The two orders would address the health risks associated with the mesh, which is used to treat women whose internal structures become so weak or broken that their organs drop from their normal position and bulge into the vagina.

The surgical mesh is classified as a moderate-risk device, the agency said at the time of the orders. Other manufacturers, such as Ethicon Inc., have been sued over allegedly defective mesh implants, spanning seven multidistrict litigations (MDLs) encompassing thousands of suits.

Source: Law360.com

DAIICHI SANKYO SETTLES U.S. LAWSUITS OVER BLOOD PRESSURE DRUG BENICAR

Daiichi Sankyo Inc. and Forest Laboratories Inc. have agreed to pay \$300 million to settle claims in state and federal courts that the blood pressure drug Benicar caused gastrointestinal injuries. A master settlement agreement was signed prior to a conference before U.S. District Judge Robert B. Kugler in New Jersey federal court in Camden, New Jersey.

The first lawsuits over Benicar were filed in 2014 and the cases were eventually consolidated in a multidistrict litigation (MDL) in federal court in New Jersey. The Tokyo-based drugmaker said the agreement would not have a material impact on its financial position, as the settlement is expected to be funded by several of the group’s insurance companies. The settlement will become finalized if at least 95 percent of all claimants agree, or opt in. Sankyo said the settlement fund was capped at \$300 million.

Plaintiffs alleged that the company’s blood pressure medication Benicar, along with its sister drugs Benicar HCT, Azor and Tribenzor, did not carry labels that warned of gastrointestinal side effects, such as sprue-like enteropathy, which includes severe and chronic diarrhea, until a decade after it was introduced. The U.S. Food and Drug Administration

(FDA) approved olmesartan medoxomil, Benicar’s active ingredient, in 2002. But when studies showed the drug to be linked to intestinal problems, the agency required Daiichi Sankyo to change its label to include the warning in 2013. Plaintiffs accused the company of inadequately warning about the drug’s risks and misrepresenting its safety.

The settlement addresses about 2,300 filed collectively in state and federal court and concludes more than two years of litigation that played out before Judge Kugler and U.S. Magistrate Judge Joel Schneider in federal court and Judge Nelson C. Johnson in state court.

The suits involved Benicar and other blood pressure products containing olmesartan, including Benicar HCT, Azor and Tribenzor. The plaintiffs claimed Daiichi designed the drug in a defective manner and failed to warn users that it could cause chronic diarrhea, nausea, malnutrition, dehydration and weight loss. Forest is accused of promoting Benicar alongside Daiichi.

The Plaintiffs are represented by Mazie Slater Katz & Freeman LLC, Robins Kaplan LLP, Yale & Baumgarten LLP, Spangenberg Shibley & Liber LLP, Levin Papantonio Thomas Mitchell Rafferty & Proctor PA and Lieff Cabraser Heimann & Bernstein LLP, among others. The case is *In Re: Benicar (Olmesartan) Products Liability Litigation* (case number 2606) in the U.S. Judicial Panel on Multidistrict Litigation.

Source: Reuters and Law360.com

RULING IN TAXOTERE MDL ALLOWS CLAIMS AGAINST GENERICS

The Taxotere multidistrict litigation (MDL) has reached 1,000 claims against the French drugmaker, Sanofi Aventis. The number of claims is expected to continue climbing. This follows a recent ruling by the U.S. Judicial Panel on Multidistrict Litigation (JPML). The ruling allows claims against manufacturers of generic versions of the drug to be included in the MDL. As we previously reported, the U.S. Food and Drug Administration (FDA) approved Taxotere in 1996. Sanofi was aware of the risks after its own trials in the 1990s showed women with breast cancer who took Taxotere had persistent hair loss. Further, Sanofi studies published in 2007 and

again in 2010 showed risks of permanent hair loss.

Typically, manufacturers of generic versions of brand-name drugs have not been held accountable in lawsuits that claim that the manufacturer failed to warn of a drug’s defect, like those combined under the MDL. This is because, in most cases, the generic drug manufacturer must match its label to the branded drug’s.

However, there are some generic versions of Taxotere, sold as docetaxel, which entered the market through one of the FDA’s fast-track approval processes known as the 505(b)(2). That approval process is actually a form of new drug application (NDA), rather than the abbreviated new drug application (ANDA) used by most generic drug manufacturers. The process does not require similar versions of already approved drugs to complete the same health and safety testing. Instead, drug companies are allowed to rely on safety and efficacy studies not conducted by or for the drug company.

Because it is an NDA, drug companies with 505(b)(2)-approved medications face the same labeling obligations as the brand-name drug makers. The JPML’s ruling is not a determination that these quasi-generic manufacturers can be held liable for failure to warn, but it is a step in the right direction.

The FDA did not approve generic versions of Taxotere until between 2011 and 2016, meaning that all eight manufacturers of the generic and quasi-generic versions would likely have known about the risk of permanent hair loss prior to putting their products on the market. Sanofi began warning patients outside of the U.S. in 2005, but did not provide similar warnings to patients in the U.S. until a decade later when the FDA forced it to update the drug’s warning label.

Lawyers in our firm’s Mass Torts Section are currently investigating potential cases involving individuals who have suffered permanent hair loss following chemotherapy with Taxotere. For more information on this subject, contact Beau Darley or Melissa Prickett, lawyers in the Mass Torts Section, at 800-898-2034 or by email at Beau.Darley@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Sources: Lawyers and Settlements and National Center for Biotechnology Information

RETRIEVABLE IVC FILTER USE DOWN, BUT STILL HIGH CONSIDERING RISKS

The use of retrievable inferior vena cava, or IVC, filters has fallen since the U.S. Food and Drug Administration (FDA) issued a safety warning in 2010 about fracture and other adverse effects linked to the devices, but the rate for implanting the devices remains high, according to findings from a study announced earlier this summer by Temple University Hospital (TUH) researchers. The findings led some medical experts to fear that retrievable IVC filters are being overused – exposing more people to a higher risk of complications associated with the devices, without a known significant benefit, the Cardiovascular Research Foundation reports.

The TUH research team was led by Riyaz Bashir, MD, FACC, RVT, Director of Vascular and Endovascular Medicine at TUH. The team examined the rates of retrievable IVC filter placement in the U.S. from January 2005 to December 2014, which was compiled by the National Inpatient Sample database.

During the 10-year period, more than 1.13 million patients received an IVC filter implant. There was an initial surge in IVC filter placement between 2005 to 2010, but following the FDA safety warning in 2010 filter placements dropped by 29 percent. However, the rate for IVC filter use is still significantly higher in the U.S. (39.1 per 100,000 people) than in five large European countries (3 per 100,000 people). Despite the drop-off in IVC filter usage, the rate of hospitalization for venous thromboembolism remained steady.

The cage-like device is implanted in the inferior vena cava to catch blood clots that form in the legs and keep them from reaching the heart, lungs and other vital organs, as discussed previously by Beasley Allen. Retrievable IVC filters are used as an alternative to help prevent venous thromboembolism, such as deep vein thrombosis or pulmonary embolism, in trauma patients when they are unable to take blood thinners.

Retrievable filters are more prone to fracture, migrate or tilt within the body than their predecessor, the permanent IVC filter, because of their more fragile design. These adverse events can cause life-threatening injuries, which is the reason thousands of patients have filed lawsuits nationwide against various IVC filter manufactures.

Currently, cases involving Cordis IVC filters are consolidated in California state court while a multidistrict litigation (MDL) has combined approximately 2,213 claims against C.R. Bard, Inc. that is pending in U.S. District Court in Arizona, according to the Judicial Panel on Multidistrict Litigation. Another MDL has centralized 2,342 claims against Cook Medical in the in the U.S. District Court for the Southern District for Indiana. The first bellwether trial for the Cook Medical MDL is slated to begin Oct. 2.

If you would like more information about IVC filters, contact Melissa Prickett, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

Sources: Temple University Hospital; Cardiovascular Research Foundation and Judicial Panel on Multidistrict Litigation

XARELTO LITIGATION UPDATE

A federal jury in the Southern District of Mississippi returned a Defense verdict in the case of Dora Mingo, a Mississippi resident and the third Xarelto bellwether Plaintiff to proceed to trial this year. U.S. District Judge Eldon E. Fallon presided over the trial which commenced on Aug. 7 in Jackson, Mississippi. Prior to trial, Judge Fallon denied multiple summary judgment motions filed by Defendants Bayer and Johnson & Johnson's pharmaceutical unit, Janssen Pharmaceuticals. Janssen has exclusive rights to market Xarelto in the United States, while Bayer markets and sells Xarelto outside the United States.

In 2015, Plaintiff Dora Mingo developed a deep vein thrombosis (DVT) following hip replacement surgery. She was prescribed Xarelto to treat the DVT. After taking Xarelto for just 21 days, she suffered severe gastrointestinal bleeding, which required hospitalization in the ICU, multiple blood transfusions, and a life-saving surgical procedure to stop the bleeding. Although the jury found that Xarelto caused Ms. Mingo's gastrointestinal bleed, it did not hold the Defendants liable for failing to instruct Ms. Mingo's doctors about available laboratory tests to measure Xarelto's effects on patients.

Xarelto is a new-generation anticoagulant approved by the U.S. Food and Drug Administration (FDA) in 2011 to prevent clots and strokes for patients who suffer atrial fibrillation, and to treat or prevent

deep vein thrombosis and pulmonary embolism. Xarelto has high inter-patient variability, which means that Xarelto's blood-thinning effect varies greatly from one patient to the next. For years, Defendants have known that standard laboratory tests, including a test called Neoplastin PT, can be used to determine the effect Xarelto has on each patient and to identify patients at a significantly increased risk of bleeding on Xarelto.

Jurors considering this issue in the first three bellwether trials have had to navigate complicated medical testimony and scientific literature. Additionally, jurors have had to decipher conflicting statements and positions by Defendants, who continue to say one thing in court in this country and something entirely different in foreign countries and peer-reviewed medical literature.

Janssen has informed doctors in the United States through Xarelto's product label and sales representatives that it is not necessary or even possible to monitor Xarelto's effect on a patient's blood. Meanwhile, Bayer has told doctors in Canada and Europe that Xarelto can be monitored with standard laboratory tests and has provided instructions on how to conduct such tests.

What's more, medical literature published by Bayer scientists and released the same day as closing arguments in the *Mingo* trial supports Plaintiffs' position that a standard laboratory test, Neoplastin PT, can be used to measure Xarelto's effect on patients. This, along with other newly released and developing medical literature, provides further support for the use of Neoplastin PT to monitor Xarelto's effects and to identify patients at significantly increased risk of bleeding on Xarelto. However, despite what their own scientists say, Bayer and Janssen's lawyers and paid experts have been telling jurors that PT testing is meaningless and even dangerous for patients on Xarelto.

The lawyers in our firm's Mass Torts Section who are working on this litigation will continue to work to expose the Defendants' inconsistencies on this critical issue affecting the health and safety of thousands of patients who have been prescribed Xarelto. The Xarelto MDL (MDL Number 2592) in the United States District Court for the Eastern District of Louisiana includes more than 19,000 cases. A fourth Xarelto bellwether trial has been selected, but a trial date has not been set.

The next Xarelto trial is set for November 2017 in the Philadelphia Court of Common Pleas, where approximately 2,000 Xarelto cases are pending. A total of six Philadelphia cases have been set for trial in the coming months. If you need more information, contact Andy Birchfield, head of our Mass Torts Section, at 800-898-2034 or by email at Andy.Birchfield@beasleyallen.com.

IX. AN UPDATE ON SECURITIES LITIGATION

HD SUPPLY SUED BY INVESTORS OVER \$1.4 BILLION STOCK DROP

A number of securities lawsuits were filed against HD Supply Inc. last month by shareholders. The company and its directors were accused of triggering a nearly 20 percent stock drop that cut more than \$1.4 billion in market capitalization in a single day. On June 6, the stock price plunged as the onetime unit of The Home Depot Inc. not only reported first-quarter earnings that missed analyst estimates but also disclosed the divestiture of one of its main business segments.

Shares fell 17.5 percent, or \$7.24 apiece, to \$34.03 from \$41.27 that day. But before the company revealed its financial troubles, CEO Joseph J. DeAngelo allegedly sold 80 percent of his stake in HD Supply, dumping 1.3 million shares to take in \$53 million, the investors alleged. It was stated:

Despite the disappointing results, and despite their improper sales of large amounts of the company's stock for their own profit, HD Supply's senior officers continue to be rewarded with lavish compensation and have personally profited at the expense of the company and its shareholders.

HD Supply, originally a San Diego, California-based industrial supplier called Maintenance Warehouse, was acquired by The Home Depot in 1997. It changed its name to mirror its parent company in 2004, but was spun off in 2007. HD Supply went public in 2013.

Thus far, at least four suits have been filed in Georgia's Northern District over the company's or its officers' alleged concealment that it was having supply chain problems. Zhou and James Calderaro each filed shareholder derivative suits naming company executives as Defendants, while Obioma Ebisike filed a proposed class action on behalf of shareholders for their losses. Each of those suits mirrors claims outlined in a July 10 complaint filed by the City of Hollywood Police Officers' Retirement System. The Hollywood Police shareholders claimed that HD Supply's Facilities Maintenance business had suffered supply chain deficiencies in which the company incorrectly calculated the demand for its products, leaving it undersupplied in the 2016 spring and summer selling sessions.

It's alleged in the lawsuits that management responded by overcompensating, ultimately stretching HD Supply's distribution centers beyond capacity in the latter half of that year. But in November 2016, executives started saying that Facilities Management was recovering and on track for the following year. While the price was still soaring, DeAngelo allegedly sold off the bulk of his shares in HD Supply, taking in more than \$53 million between March 29 and April 4. Then, on June 6, the company reported earnings that missed analysts' estimates and broke the news that it would sell Waterworks, one of its main business units.

Waterworks is the nation's largest distributor of water, sewer, storm and fire protection products, the investors said. The company also revealed in its earnings announcement that it would have to invest more money in Facilities Management operations, a sign the unit's recovery wasn't as good as the shareholders had been led to believe. The executives had kept negative information about HD Supply's performance from investors, artificially inflating the price, only to have it plunge to a low it has stayed at since June.

Zhou and Calderaro are represented by Michael I. Fistel Jr., William W. Stone and David A. Weisz of Johnson & Weaver LLP. Calderaro is also represented by Brian J. Robbins, Felipe J. Arroyo and Steven R. Wedeking of Robbins Arroyo LLP. Ebisike is represented by David A. Bain of the Law Offices of David A. Bain LLC; Jeremy A. Lieberman, J. Alexander Hood II, Hui M. Chang and Patrick V. Dahlstrom of

Pomerantz LLP; and Peretz Bronstein of Bronstein Gewirtz & Grossman LLC. Hollywood Police is represented by W. Thomas Lacy of Lindsey & Lacy PC; Maya Saxena, Joseph E. White III, Lester R. Hooker and Steven B. Singer of Saxena White PA; and Stuart A. Kaufman of Klausner Kaufman Jensen & Levinson.

The cases are *Sean Zhou v. Joseph J. DeAngelo et al.*, (case number 1:17-cv-02977); *James Calderaro v. Joseph J. DeAngelo*, (case number 1:17-cv-02983); *Obioma Ebisike v. HD Supply Holdings Inc. et al.*, (case number 1:17-cv-02984); and *City of Hollywood Police Officers' Retirement System v. HD Supply Holdings Inc. et al.*, (case number 1:17-cv-02587), all in the U.S. District Court for the Northern District of Georgia.

Source: Law360.com

ESTATES OF BERNARD MADOFF'S SONS REACH \$23 MILLION SETTLEMENT

The estates of Bernard Madoff's dead sons reached an agreement with the U.S. government to pay a combined \$23 million to Bernard Madoff's victims, ending more than eight years of litigation. The agreement resolved a legal battle over the remnants of fortunes the sons amassed at their father's bogus securities firm. The sons ran the market-making and proprietary-trading business units for years.

Their estates were sued by the company's court-appointed bankruptcy trustee, who accused the two men of profiting from their father's fraud for years and squandering more than \$150 million of client money on their lavish lifestyles. Under the settlement, the estates will transfer all assets, cash and other proceeds to funds set up for victims.

The settlement ends an investigation by the U.S. Attorney's office in Manhattan, whose criminal probe resulted in a 150-year prison sentence for Bernard Madoff. His sons claimed that they didn't know about the Ponzi scheme and they went to the authorities immediately after their father confessed to them. It should be noted that Madoff's sons were never accused of a crime.

Source: Bloomberg

MASSACHUSETTS INVESTIGATING BROKERS AND KICKBACKS

Massachusetts' top securities regulator, Commonwealth Secretary William Galvin, launched an investigation recently into charges that brokers were receiving 'kickbacks' for routing sales orders to certain stock exchanges. The probe was inspired in part by a recent *New York Times* op-ed by Jonathan Macey, a Yale law professor, and David Swensen, Yale's chief investment officer, who claimed that brokers seeking payment for order flows—instead of choosing the exchange with the best prices for their clients—are taking money out of their clients' pockets. Mr. Macey and Mr. Swensen wrote in a July 18 piece:

Brokers routinely take kickbacks, euphemistically referred to as 'rebates,' for routing orders to a particular exchange. As a result, the brokers produce worse outcomes for their institutional investor clients—and therefore, for individual pension beneficiaries, mutual fund investors and insurance policy holders—and ill-gotten gains for the brokers.

Mr. Galvin said in a statement that his office is "looking into the veracity of these assertions." He stated in an interview that "it's up to the states to take the lead." As part of the investigation, he has sent inquiry letters to Charles Schwab & Co. Inc., Scottrade Inc., TD Ameritrade Inc., Fidelity Brokerage Services, E*Trade Securities, Edward D. Jones & Co. and Morgan Stanley & Co., but those letters were not released. Mr. Galvin said in the statement:

Institutional brokers are responsible for placing millions of dollars of average investors' life savings in their employers' pension plans, as well as in mutual funds and variable annuities. If financial rebates or kickbacks create a conflict that results in less than the best deal for the investors, this practice must stop. It is the obligation of regulators to have reasonable assurance that the customer is not being harmed, and that is the reason I instructed my Securities Division to begin this investigation.

The Securities and Exchange Commission (SEC) has wrestled with best execu-

tion for decades. It's a topic that doesn't lend itself to easy solutions, according to Todd Cipperman, principal at Cipperman Compliance Services, because other factors, such as timing and order size, go into calculating best execution. Mr. Cipperman said:

There's more to execution than price. Often, the lowest commission is not what determines the best execution. Just because they're paying [a broker] doesn't mean it's not the lowest price. It's a really complicated issue.

This issue, though complicated, has far-reaching implications. Kickbacks aside, brokers, who, according to Department of Labor's new fiduciary rule, have fiduciary duties to their clients, can be on the hook for not taking proper steps to verify their choice of exchange actually is the best execution. This new investigation is something that lawyers at Beasley Allen will be watching. If you have any questions contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud Section, at Rebecca.Gilliland@beasleyallen.com.

Source: InvestmentNews.com

PWC FINED \$1 MILLION BY OVERSIGHT BOARD

International Accounting firm PricewaterhouseCoopers (PwC) was recently fined \$1 million by the Public Company Accounting Oversight Board (PCAOB) for failing to obtain sufficient audit evidence that its client, Merrill Lynch, was complying with the Securities and Exchange Commission's (SEC) Customer Protection rule. The Customer Protection rule requires broker-dealers maintain customer securities in segregated accounts to ensure they are free of any potential claims of Merrill Lynch's creditors. Had Merrill Lynch failed as a business during the time customer accounts were exposed in this way, the customer accounts could have been wiped out as well.

Merrill Lynch ultimately admitted to wrongdoing, and paid penalties totaling \$415 million. While PwC admitted no wrongdoing in the consent agreement between it and PCAOB, it was censured. As part of its role in performing audit and attest services for Merrill Lynch, PwC was required to test the internal controls over Merrill Lynch's compliance reporting to the SEC—essentially make sure

they had adequate processes for complying with SEC regulations. In the modern world, Public Accounting Firms perform many functions beyond auditing financial statements, and perform a vital role in protecting investors; but if they fail to perform their duties adequately, things can go catastrophically wrong.

If you would like to discuss this case or need more information on the subject, contact Jeff Price, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section at 800-898-2034 or by email at Jeff.Price@beasleyallen.com.

Sources: *Accounting Today*, PCAOB Press Releases

X. INSURANCE AND FINANCE UPDATE

JUDGE APPROVES \$148 MILLION JPMORGAN AND DEUTSCHE LIBOR-RIGGING SETTLEMENT

A New York federal judge has preliminarily approved a settlement that will require JPMorgan Chase & Co. and Deutsche Bank AG to pay \$148 million to resolve two investor suits alleging they rigged the London Interbank Offered Rate (Libor). U.S. District Judge George B. Daniels gave preliminary approval to the settlement, which requires JPMorgan to pay \$71 million and Deutsche Bank to pay \$78 million. A hearing to consider the fairness of the settlements before final approval is scheduled for Nov. 9.

A multiyear investigation into banks' alleged rigging of Libor—which tracks how much banks charge one another to borrow funds—has focused on whether employees at the world's largest banks made fraudulent submissions to a London-based trade association that calculated and published the benchmark interest rate.

The two investor lawsuits—the *Sonterra* case filed in 2015 and another known as the *Laydon* case filed in 2012—alleged that JPMorgan, Deutsche Bank, Citigroup Inc. and about 20 other banks conspired to rig yen-denominated Libor, the Euroyen Tokyo Interbank Offered Rate and Euroyen Tibor contracts.

Judge Daniels had previously dismissed the *Sonterra* action in March. He found that those investors didn't have standing to bring their claims. Although that decision is being appealed, Judge Daniels

agreed in June to amend his judgment to put JPMorgan and Deutsche Bank back in the case for purposes of finalizing the settlements; the banks had reached the settlement with the investors before the case was dismissed.

In their motion to approve the settlements, the investors told Judge Daniels that allowing his subsequent ruling on standing to block previously agreed-to settlements would “vitiating the very bargain that the settling parties struck” and could have far-reaching consequences by blocking other non-settling Defendants from eliminating their litigation risks and “burying the hatchet with Plaintiffs.” The settlement motion stated:

Forcing the parties to continue litigating their appeal instead of settling—on the theory that standing does not exist—would be perverse and run roughshod over the judicial policy in favor of settlement.

The investors have already received final approval for other settlements, agreeing to a \$23 million settlement with Citibank and RP Martin Holdings Ltd. and a \$35 million settlement with HSBC. All of the settlements have included agreements from the banks to provide more information about the alleged rigging. Those banks are still involved in the Laydon case, but Judge Daniels dismissed claims in that case against three foreign institutions—ICAP Europe Ltd., Tullett Prebon PLC and Lloyds Banking Group PLC—in March.

The investors are represented by Vincent Briganti, Geoffrey M. Horn and Peter D. St. Phillip of Lowey Dannenberg Cohen & Hart PC, Joseph J. Tabacco Jr., Todd A. Seaver, Patrick T. Egan and Daryl DeValerio Andrews of Berman DeValerio, and Christopher Lovell and Gary S. Jacobson of Lovell Stewart Halebian Jacobson LLP. The cases are *Laydon v. Mizubo Bank Ltd. et al.*, (case number 1:12-cv-03419) and *Sonterra Capital Master Fund Ltd. et al. v. UBS AG et al.* (case number 1:15-cv-05844) both in the U.S. District Court for the Southern District of New York.

Source: Law360.com

MORGAN STANLEY AND FIVE BANKS SETTLE FOREX SUIT

Five more banks, including Morgan Stanley, have reached settlements total-

ing \$111.2 million with investors in the wide-ranging suit accusing the world's largest banks of rigging foreign exchange rates, bringing total relief in the case to more than \$2.1 billion. The latest settlements reached were with Bank of Tokyo-Mitsubishi UFJ Ltd., Morgan Stanley, RBC Capital Markets LLC, Societe Generale and Standard Chartered PLC, according to a motion for preliminary approval filed in New York federal court.

The lawsuit, which was first filed in 2013 amid regulatory probes, accused major financial institutions of engaging in a scheme to rig the \$6 trillion foreign exchange market from at least 2007 to 2013. Lianne Craig, a partner with Hausfeld in London, issued a statement suggesting there's additional recovery to be obtained on behalf of investors around the world. She stated:

The extent of collusive conduct in the FX market is now clear. U.S. investors and those trading in the United States will see compensation from these settlements. But the majority of the world's investors will need to pursue action outside the United States to recover their significant losses. London, the center of the global foreign exchange market, is the logical place to pursue such concerted action.

In December 2015, U.S. District Judge Lorna Schofield gave an early approval to the first nine settlements totaling \$2 billion reached with Bank of America Corp., Barclays PLC, BNP Paribas SA, Citigroup Inc., HSBC Holdings PLC, Goldman Sachs Group Inc., JPMorgan Chase & Co., Royal Bank of Scotland PLC and UBS AG. Under terms of the latest settlement, Morgan Stanley will pay \$50 million, Societe Generale will pay \$18 million, Standard Chartered will pay \$17.2 million, RBC will pay \$15.5 million and BTMY will pay \$10.5 million. The Plaintiffs also filed a motion for approval of a revised notice plan and plan of distribution to incorporate the new amounts. The remaining Defendants include Credit Suisse AG, along with its affiliates Credit Suisse Group AG and Credit Suisse Securities USA LLC, and Deutsche Bank AG, and Deutsche Bank Securities Inc.

The case is *In re: Foreign Exchange Benchmark Rates Antitrust Litigation* (case number 1:13-cv-07789) in the U.S.

District Court for the Southern District of New York.

Source: Law360.com

CITIGROUP IS THE SECOND BANK TO SETTLE IN OTC LIBOR LITIGATION

Citigroup Inc. has reached a \$130 million settlement in New York federal court with investors who bought the bank's financial products tied to the London Interbank Offered Rate (Libor). This makes Citigroup the second bank to settle with the investors over allegations the benchmark rate was manipulated. Citi and its Citibank NA subsidiary agreed to pay out \$130 million in cash and cooperate with the investors, who purchased the products directly from the bank, in their ongoing case against a number of financial institutions. The settlement proposal was filed on Aug. 7, and it is “substantially similar” to one preliminarily approved by the court in December between Barclays PLC and the investors, who are called “over-the-counter” (OTC) Plaintiffs.

The litigation will continue against the remaining banks, which include Bank of America Corp., JPMorgan Chase & Co. and UBS AG. The Citi settlement follows what is called an “ice-breaker” settlement with Barclays in December. In that settlement, the OTC Plaintiffs received preliminary approval for a proposed \$120 million settlement that also included a pledge that the bank would assist in the investigations into the other financial institutions in the suit. Investigations by government regulators around the world sparked a series of lawsuits that eventually were gathered into multidistrict litigation (MDL) in New York's Southern District.

The OTC Plaintiffs in the instant suit, which include Yale University and Baltimore city officials, in May sought to certify a class of U.S.-based people or entities that directly purchased, from the Defendants or their subsidiaries, financial instruments that paid interest indexed to Libor and were owned between August 2007 and May 2010. The same month, a different group of Plaintiffs, U.S. lenders and traders on the Chicago Mercantile Exchange, asked for class certification on their Libor conspiracy claims. And the court in December dismissed a group of bondholders from the MDL, finding that since they did not directly transact with

the banks, their injuries were too remote from the alleged conspiracy and they lacked standing as they were not efficient enforcers of the antitrust laws.

The case is *Mayor and City Council of Baltimore et al. v. Credit Suisse AG et al.* (case number 1:11-cv-05450) in the U.S. District Court for the Southern District of New York. The MDL is *In re: Libor-based Financial Instruments Antitrust Litigation*, (case number 2262) in the same court.

Source: Law360.com

XI. EMPLOYMENT AND FLSA LITIGATION

A SIGNIFICANT ERISA RULING IN THE SEVENTH CIRCUIT

In a mandamus petition involving an issue of first impression, the U.S. Court of Appeals for the Seventh Circuit held that the Employee Retirement Income Security Act (ERISA) of 1974's venue provision (29 U.S.C. § 1132(e)(2)) did not invalidate a forum selection clause in an ERISA-governed health plan (*In re Mathias*, (7th Cir. Aug. 10, 2017)). The Seventh Circuit characterized its decision as consistent with *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 931-34 (6th Cir. 2014), cert. den., No. 14-1168 (Jan. 11, 2016), in which the Sixth Circuit held that forum selection clauses in ERISA plans are enforceable and not inconsistent with ERISA's venue provision (or ERISA's purposes generally).

After experiencing serious health issues, the participant in this case received health insurance coverage through his employer as an employee on long-term disability. The employer billed the participant accordingly for his portion of the health premiums. The participant later retired, effective retroactively, but the employer neglected—for several years—to update his employment status and therefore undercharged him for premiums, eventually billing him for more than \$9,500 in past-due premiums.

The participant sued the employer and its health plans in federal court in the Eastern District of Pennsylvania. However, the controlling plan documents required that suit be brought in federal court in the Central District of Illinois, and the employer moved to transfer the

case under 28 U.S.C. Section 1404(a). The participant opposed the motion, arguing that the plan's forum selection clause was invalid in light of ERISA's venue provision. Relying largely on the Sixth Circuit's decision in *Smith* (at the time, the only appellate ruling on this issue), the district court rejected the participant's argument and granted the employer's motion and transferred the case to the Central District of Illinois.

When the case arrived in the Central District, the participant moved to transfer it back to Pennsylvania, but that motion was denied. The participant then petitioned for mandamus relief in the Seventh Circuit, asking that the case be transferred to either the Eastern District of Pennsylvania or the Middle District of Pennsylvania (where the participant lived, where the plant at which the participant had worked was located, and where the employer had dealerships).

Denying the participant's *mandamus* petition, the Seventh Circuit held that the plan's forum selection clause was enforceable. Noting that a party seeking mandamus in the transfer context has an "uphill fight," the Seventh Circuit first concluded that the plan's forum selection clause was controlling unless it was invalidated by ERISA. Under ERISA's venue provision, an action may be brought in the district court where either the plan is administered, the breach took place, or a Defendant resides or may be found. (29 U.S.C. § 1132(e)(2) (ERISA § 502(e)(2)). The Seventh Circuit observed that nothing in the venue provision's text expressly invalidated forum selection clauses in ERISA plans. The participant, however, argued that ERISA's overarching purpose of protecting participants required the court to read the venue provision as conferring on participants a statutory right to choose any of the listed venues without regard to the plan's forum selection clause. In the participant's view, plan forum selection clauses are categorically invalid because they deprive participants of the right to choose from the venue options available under 29 U.S.C. Section 1132(e)(2). The participant was joined in this argument by the Department of Labor (DOL), as *amicus curiae*.

This interpretation of ERISA's venue provision, the Seventh Circuit noted, had been carefully considered and rejected by the Sixth Circuit in *Smith*. In that case, the Sixth Circuit reasoned that the "may be brought" phrasing of ERISA's venue

provision is entirely permissive and no other statutory language prohibited the parties from contractually narrowing the options to one of the venues listed in ERISA.

The Seventh Circuit characterized this reasoning as convincing, and noted with approval the Sixth Circuit's conclusion that plan language limiting litigation to a single federal district promotes uniformity in decisions interpreting the plan (thereby reducing administrative costs for plan sponsors and participants alike). According to the Seventh Circuit, the plan's forum selection clause, by funneling litigation to a venue listed in Section 1132(e)(2), simply "settled on one of the various statutory options." Moreover, the Seventh Circuit concluded that this outcome reflected the significant leeway that ERISA affords plan sponsors in designing their benefit plans.

This decision gives employers in the Seventh Circuit (which covers Illinois, Indiana, and Wisconsin) some power over employees in an already tough field. As the Seventh Circuit noted, however, only one other appellate court (the Sixth Circuit, covering Kentucky, Michigan, Ohio, and Tennessee) has ruled on this question, and other appellate courts might reach a more participant-friendly conclusion. Moreover, neither the Sixth Circuit's *Smith* decision nor this one was unanimous, and the DOL continues to challenge the validity of forum selection clauses. In *Mathias*, for example, a dissenting judge took the view that ERISA gives plan participants certain procedural protections, which include the right to select from among the venues listed in the statute.

Let us hope that other Courts of Appeal do not so lightly toss aside a Plaintiff's choice of venue. If you have any questions, contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasley-allen.com.

Source: Westlaw

XII. PREMISES LIABILITY UPDATE

WISCONSIN FARMER COULD BE AWARDED \$13.5 MILLION IN STRAY VOLTAGE CASE AGAINST XCEL

A western Wisconsin farmer could be awarded as much as \$13.5 million in his suit against an electric services company over stray voltage. Paul Halderson's dairy farm herd of nearly 1,000 cows dealt with illness and decreased milk production for more than a decade because of Xcel Energy's improperly grounded power lines. Current that leaks from neutral wires in the ground are referred to as stray voltage. Animals can receive small shocks when they come into contact with a grounded object, such as a watering trough. Research from the U.S. Department of Agriculture (USDA) has found that it can cause cattle to avoid eating, become stressed and produce less milk.

The lawsuit said Northern States Power Company, a subsidiary of Xcel Energy, found excessive voltage in one of Halderson's barns in 1996, but failed to report it. Halderson hired a consultant in 2011 and found that the high levels of electricity were coming from the utility's distribution system. Xcel Energy installed equipment to reduce stray voltage in 2011. Halderson said in a statement:

It's like night and day. When we had stray voltage, we could never get the production we wanted and the cows were struggling with health problems. Now it seems effortless. Production is way up and the cows are doing great.

The utility said it didn't detect harmful currents where the cows were located and that the farm's dairy production issues were a result of difficulties in the dairy industry such as bad feed, disease and inadequate veterinary care. However, a Trempealeau County jury found the company was negligent and didn't follow state regulations, causing Halderson nearly \$4 million in losses. The jury awarded Halderson about \$4.5 million, but the court may triple that amount because the company was found in willful, wanton or reckless violation of statutes.

Source: *Insurance Journal* and *LaCrosse Tribune*

BEASLEY ALLEN LAWYERS ARE REVIEWING PREMISES' LIABILITY CASES IN GEORGIA

Property owners and business establishments have a duty in most every state to make their premises reasonably safe for people who use or visit them. For example, in Georgia all property owners or occupiers of land must exercise ordinary care to keep the premises and approaches reasonably safe for invitees and guests. While most property owners and businesses do a pretty good job of making and keeping their premises safe, lawyers in our firm are investigating a number of cases where a person was either seriously injured or killed due to dangerous conditions existing on the premises of a business establishment.

There are numerous ways the premises of a property or business establishment could be considered to be dangerous. A very common occurrence in urban areas is insufficient security. Whether as tenants at an apartment, complex, visitors at a business, or users of a parking garage, we all rely on the security of the properties we visit. If an owner for whatever reason knows their property is unsafe, they must take adequate steps to secure their property. There could be a history of serious crimes on the premises. While most do take adequate steps, unfortunately we find in some cases the owners do the exact opposite even though they are fully aware of violent crimes occurring on the premises. Even worse, in some of the cases our lawyers are handling, the property owner involved actually touted the safety of their premises as a marketing tool when they knew the premises were not safe.

Poor maintenance of a property, including walkways, stairways, elevators, various types of equipment, decks, electrical equipment, amusement facilities, or furniture, is another common cause for serious injuries or fatalities. Our lawyers have handled cases over the years where people were electrocuted, fell from balconies or decks, or had items fall on them from raised positions, all due to poor installation or maintenance. These situations, when they go bad, can result in catastrophic and sometimes fatal, injuries.

Poor installation of structures and fixtures on the premises can cause big problems. This can lead to incidents with catastrophic results, including injuries and even deaths. Something as simple as a heavy piece of furniture that is not properly balanced can tip over and

severely injure or kill a child. Our lawyers have frequently seen poor installation of decking or balconies on buildings, such as apartments, result in a collapse with serious injuries and even death to those involved.

Our lawyers are currently investigating numerous premises liability cases in Georgia involving serious injury or death. If you have any questions about premises liability, contact Chris Glover or Parker Miller, lawyers in our firm, at 800.898.2034 or by email at Parker.Miller@beasleyallen.com.

JURY AWARDS \$148 MILLION TO WOMAN PARALYZED AT CHICAGO AIRPORT

A Cook County, Illinois, jury awarded \$148 million to a woman paralyzed from the waist down by a falling pedestrian shelter at O'Hare International Airport. Twenty-four-year-old Tierney Darden was waiting to be picked up from O'Hare with her mother and sister on an August 2015 afternoon when a storm gust loosened a pedestrian shelter that weighed more than 750 pounds. The shelter came loose and fell on Darden, severing her spinal cord.

The city of Chicago had admitted liability in the case. The jury returned the verdict after a 10-day trial solely on damages. Ms. Darden was a dancer and student at Truman College when she was paralyzed. The City of Chicago and the City of Chicago Department of Aviation were named as Defendants.

After the incident, it was learned the shelter had missing bolts. A subsequent investigation at O'Hare found other shelters also had missing bolts as well as corroded parts or broken brackets.

Ms. Darden is represented by Patrick A. Salvi, Jeffrey J. Kroll, Tara R. Devine, Patrick A. Salvi II, and Eirene N. Salvi of the firm Salvi Schostok & Pritchard. The case is *Tierney Darden v. City of Chicago et al.*, (case number 2015 L 008311) in the Circuit Court of Cook County, Illinois.

Source: Law360.com

XIII. TRANSPORTATION

TRUCKER SLEEP APNEA TEST LATEST TO FALL UNDER REGULATION ROLLEBACKS

The Trump administration's recent decision to pull a proposal to screen all truck, train and bus operators for sleep apnea puts safety on the shelf and this will make our highways much less safe. The Federal Motor Carrier Safety Administration (FMCSA) and the Federal Railroad Administration (FRA) dropped an advanced notice of proposed rulemaking issued in March 2016, which would have created new national requirements for testing and treating obstructive sleep apnea for rail workers and commercial vehicle drivers. At the time, the agencies were following through on a recommendation from the National Transportation Safety Board (NTSB).

President Trump, who claims to be for working men and women, has been hard at work with regulatory rollbacks that are very pro-big-business and very much anti-people. Hopefully, the things his Administration is doing will be exposed. But so far the rollback of safety regulations has been under the radar.

Current federal regulation says a person is "physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his or her ability to control and drive a commercial motor vehicle safely." FMCSA regulations were amended in late 2015 to provide for a new medical examination report form in annual physicals to more deeply probe drivers' medical histories. The new form specifically includes questions on sleep apnea and sleep disorders; however, critics note that doctors are already supposed to screen drivers for any respiratory dysfunctions and make recommendations to see specialists if needed.

Federal safety officials, including the National Transportation Safety Board, have expressed disappointment in the administration's decision to pull the early rulemaking for obstructive sleep apnea testing. The NTSB explained that obstructive sleep apnea has been a probable cause of 10 highway and rail accidents investigated by the NTSB in the past 17 years, and that obstructive sleep apnea is

an issue being examined in several ongoing NTSB rail and highway investigations.

For example, federal investigators determined that an engineer for New York's Metro-North commuter rail line went to sleep while operating a train that went off the tracks in December 2013 while traveling 82 miles per hour around a curve with a speed limit of 30 miles per hour. Four people were killed and more than 60 others were injured in that accident. The NTSB said it was likely caused by factors that included Metro-North Railroad's failure to properly investigate accidents in order to prevent future incidents, as well as its organizational structure and lack of efficient safety identification protocols.

The NTSB said the engineer had fallen asleep due to undiagnosed severe obstructive sleep apnea exacerbated by a recent circadian rhythm shift required by his work schedule. Christopher O'Neil, an NTSB spokesman, said in a statement last week:

Medical fitness and fatigue, two of the NTSB's 10 Most Wanted List of Transportation Safety Improvements for 2017-2018, are tied to obstructive sleep apnea. The need for this rulemaking is well documented in the safety recommendations issued to both the FMCSA and FRA regarding obstructive sleep apnea.

The American people deserve to be protected from truck drivers who suffer from fatigue or medical unfitness. Instead of tearing down safety regulations, we should be making them stronger.

Source: Law360.com

UBER'S LIABILITY FOR ITS DRIVERS' WRONGFUL ACTIONS

Uber Technologies, Inc. is the creator of the transportation app Uber. This smart phone app provides users with a list of available drivers in their city that can pick them up and take them to their destination. Uber has drivers in most major cities. The drivers use their own vehicles to transport passengers. Uber calls these drivers independent contractors. Since the vehicles are not company-owned, and the drivers are not Uber employees, courts have struggled with imposing traditional respondeat superior

concepts of liability on Uber for the drivers' wrongful actions.

However, it is important that lawyers look beyond Uber's classification of its drivers as independent contractors. Instead, lawyers must conduct discovery on Uber's exertion of control over the driver through the implementation of policies and procedures and the selection and termination of the driver. According to Uber's website, Uber compares itself to a trucking company and its drivers to truck drivers. In soliciting drivers, Uber explains the requirements, licensing (or lack thereof), and average earnings between being an Uber driver and a truck driver.

Uber represents that its drivers make an average of \$19.04 per hour with no requirement for a CDL or set schedule. Yet, Uber drivers are entrusted to transport people safely. On the other hand, a truck driver makes \$18.37 per hour with a CDL requirement and regulations governing their schedules. Yet, truck drivers transport goods—not people.

In addition to comparing itself with a trucking company, Uber maintains a commercial automobile insurance policy that covers U.S. partner drivers that provide ridesharing. This policy provides the following:

- **\$1 million of liability coverage per incident.** Uber holds a commercial insurance policy with \$1 million of coverage per incident. Drivers' liability to third parties is covered from the moment a driver accepts a trip to its conclusion. This policy is expressly primary to any personal auto coverage (however, it will not take precedence over any commercial auto insurance for the vehicle). Uber has provided a \$1 million liability policy since commencing ridesharing in early 2013.
- **\$1 million of uninsured/underinsured motorist bodily injury coverage per incident.** In December 2013, Uber also added uninsured/underinsured motorist coverage. In the event that another motorist causes an accident with a rideshare vehicle and the motorist doesn't carry adequate insurance, this policy covers bodily injury to all occupants of the rideshare vehicle. This is important to ensure protection in a hit and run.
- **Contingent comprehensive and collision insurance.** If a ridesharing driver holds personal comprehensive

and collision insurance this policy covers physical damage to that vehicle that occurs during a trip up to the actual cash value of the vehicle, for any reason, with a \$1,000 deductible.

- **No fault coverage (e.g., Personal Injury Protection)** is provided in certain states at similar levels as limos or taxis in those cities.
- **\$50,000/\$100,000/\$25,000 of coverage between trips.** During the time that a ridesharing partner is available but between trips, most personal auto insurance will provide coverage. However, if the driver does not have applicable coverage, Uber maintains a policy that covers the driver's liability for bodily injury up to \$50,000/individual/accident with a total of \$100,000/accident and up to \$25,000 for property damage. This policy meets or exceeds the requirements for 3rd party liability insurance in every state in the U.S.

To become a driver with Uber, you must sign up on Uber's website. This process is quick and easy, allowing almost anyone to become an Uber driver. Uber must approve the driver based on the driver license, registration, proof of insurance, and other information. Uber promises to provide drivers with everything they need to be a success on the road. Lawyers should seek hiring and training materials to determine the extent of Uber's investigation of its drivers.

Uber's position in accident cases is that it is not responsible for the negligence of its drivers because it merely provides a phone app that allows drivers and passengers to communicate. However, it seems that Uber does much more than this. Uber selects the driver, provides the driver with "everything" the driver needs to drive successfully, and covers accidents with insurance. Lawyers should not give up on *respondeat superior*.

However, lawyers have an obligation to look for ways to hold Uber directly liable. For instance, Uber policies and contracts may show that Uber assumes the duty to hire, train, supervise, and retain. Uber may assume the duty to ensure the car is properly maintained and that the rider is safe. For instance, Uber's website contains a page on passenger safety and promises that it reviews all feedback because "our goal is to make every ride a great experience."

In fact, Uber provides a 24/7 Support Team that "is always ready to respond to any questions you may have about your trip and help you retrieve lost items." Uber's website promises safety for its riders. Even if a State does not recognize a common law duty in this situation, most States recognize the voluntary assumption of those duties. As Uber continues to expand its presence to more cities, the legal doctrine surrounding liability must be used creatively to hold Uber accountable for its drivers' negligence.

If you need more information on this subject, contact Stephanie Monsplaisir, a lawyer in our Personal Injury & Products Liability Section, at 800-898-2034 or by email at Stephanie.Monplaisir@beasleyallen.com

Source: www.uber.com

U.S. MILITARY STILL OBLIVIOUS TO V-22 OSPREY DANGERS

On Aug. 5, a Japan-based U.S. Marine Corps MV-22 Osprey carrying 26 Marines crashed off the eastern coast of Australia. Three Marines were killed during the crash, adding to the growing list of victims the aircraft, also known as "The Widowmaker," has claimed since testing began in 1991, according to *Righting Injustice*. By 2000, *Fortune* notes, four non-combat Osprey crashes claimed 30 lives and nearly a dozen more since then. The aircraft is a hybrid tilt-rotor aircraft that was designed to function as both an airplane and a helicopter.

In less than a year, three Osprey aircraft have crashed, including another Japan-based Osprey that crashed last December during a flight training exercise off the coast of Japan, as discussed in a previous *Report*. The following month, another Osprey crashed while on a mission in Yemen, killing one U.S. Navy Seal and injuring three others.

The latest Osprey to crash was assigned to the Marine Medium Tiltrotor Squadron 265 of the 31st Marine Expeditionary Unit based at Marine Corps Air Station Futenma in Okinawa—also home to the Osprey that crashed last December. The V-22 crashed while attempting to land on aircraft carrier USS Green Bay after launching from another aircraft carrier, USS Bonhomme Richard, while conducting regularly scheduled operations. The crash is still under investigation and no cause has been made public; however,

the military noted that the USS Green Bay was damaged during the crash and left inoperable.

Following the tragic crash, Japanese Defense Minister Itsunori Onodera asked the U.S. to cease all flight operations of the V-22 in Japan out of concern for the residents in the path of the deadly aircraft. Okinawa officials echoed the request, *AviationPros* reports, but the request was rejected by U.S. military officials unmoved by the Japanese officials' concerns. Instead, the military put in place "a 48-hour operational pause to review unity safety" and launched an investigation of the latest deadly crash, among other actions. In fact, the V-22 made its debut in the inaugural Northern Viper joint defense exercise between the U.S. and Japan on Aug. 18.

Residents in Japan, especially locals in Okinawa, have protested having the V-22 operational in their country since it first arrived in 2012 due to its controversial safety record.

The tilt-rotor aircraft takes off and lands like a helicopter, but flies like an airplane. The combination of completely different designs makes the Osprey dangerously defective and unreliable. Jack McCain, U.S. Navy pilot and son of famous Vietnam Veteran, Senator John McCain, has called the aircraft a "piece of junk" for its many flaws. The air filtration system does not function appropriately and keeps the aircraft from operating and landing safely in dusty environments, such as Middle Eastern theatres of war. The rotor blades' design increases its risk of a phenomenon called vortex ring state, which causes the aircraft to lose altitude too quickly often resulting in crash landings.

The deadliest Osprey crash to date occurred in 2000, killing 23 Marines while two test flights were attempting to land at Arizona's Marana Northwest Regional Airport. A 2015 crash of an Osprey stationed at Bellows Air Force Base in Hawaii killed two Marines, 21-year-old Lance Cpl. Matthew Determan and 24-year-old Cpl. Joshua Barron. Our law firm and Honolulu lawyer Melvin Y. Agena currently represent Determan's family. We will prove that this aircraft is defective and highly dangerous.

As we have written previously—and based on its history of crashes and deaths—it is just a matter of time before another V-22 tragedy. As long as this unsafe and poorly designed aircraft

remains in operation we can only expect these tragedies to continue. If you need additional information about this subject, contact Mike Andrews, a lawyer in our firm's Personal Injury & Products Liability Section at 800-898-2034 or Mike.Andrews@beasleyallen.com. Mike handles aviation litigation including several cases involving the Osprey.

Sources: Righting Injustice, *Fortune*, AviationPros, War is Boring (Blog), NBC News

GOVERNMENT DOES NOT NEED TO SLOW DOWN ON TRUCK PLATOONING

This year there have been significant technological advances in autonomous vehicles. Forbes says that the technology is estimated to drive a \$70 billion industry as early as 2030. The trucking industry is in lock step with passenger vehicles in terms of autonomous transportation technology. Trucking industry experts predict that in the next five to 10 years most truck companies will slowly incorporate automated driving technology, according to *The Atlantic*.

Other law- and policymakers, including the Atlanta Regional Commission (ARC), are also examining autonomous transportation technology, including truck platooning, and the potential impact the advances will have on local areas.

In its research, ARC found that the heavy truck industry (what it calls freight vehicles) is likely to be the first transportation sector to fully embrace autonomous and connected vehicle (vehicles equipped with internet access) technology. The group's research focuses on the anticipated benefits such as better efficiency, reduced use of fossil fuels and enhanced safety. However, the study also recognizes the need for additional research and continuous testing of evolving technologies to prepare for the impact of the inevitable rise in automated transportation technology.

A number of states have relaxed their laws requiring drivers of heavy trucks to keep a safe and sometimes specified distance between the front of their trucks and the vehicles in front of them. The National Law Review explains that relaxing these laws is part of an effort to allow experimental testing of automated truck platooning electronic systems on the states' roads and highways. The commercial trucking industry is the driving force behind this experiment because it stands to benefit from lower fuel costs. The

National Highway Traffic Safety Administration (NHTSA) supports autonomous vehicle technology, arguing that it can potentially improve safety on the nation's roads.

However, critics, including commercial trucking insiders, caution regulators and lawmakers to slow down efforts to mainstream the automated driving technology. Some of those critics voiced their concerns during a listening session convened by the Federal Motor Carrier Safety Administration (FMCSA) in Atlanta earlier this year. Participants included representatives from law enforcement agencies, various segments of the trucking industry, bus drivers and other representatives from the motor carrier industry, as well as automation technology developers.

Primarily, participants were concerned about the interface between the driver and technology. One driver questioned the capacity of automation to maintain control of a heavy truck during a tire blowout. Others expressed tentativeness about technology's ability to avoid a collision when passenger vehicles cut in between the trucks. In addition to cybersecurity, audience members questioned whether developers are creating equally proactive measures to address technology interference from the environment and other outside sources. The clear takeaway from the session was "slow and steady wins the race."

Truck platooning or driver assisted truck platooning (DATP) is semi-autonomous driving that takes place when two or three trucks are driven convoy-style by the driver in the lead truck using driver assisted technology. The trucks are equipped with radar and vehicle-to-vehicle (V2V) technology that allow them to connect virtually. The V2V operates as a WiFi-like network, ExtremeTech explains. It allows the trucks to send messages to each other about what they are doing and to react accordingly. For example, if the lead truck activates its braking system, the other trucks in the convoy will also engage their braking systems.

The technology allows the trucks to follow each other at shorter distances that have been deemed less safe in traditional driving environments. The scenario is commonly known as tailgating and typically prohibited by law. Yet, shorter distances reduce the gap between the trucks and the aerodynamic drag or air resistance, which improves fuel effi-

ciency, *Trucking Info* notes. It is a key focus of the heavy truck industry's concerted lobbying efforts at the local, state and federal levels—efforts that are propelling the technology closer to mainstream commerce.

And, while NHTSA has been quick to welcome the technology because of its potential to save lives, according to the National Law Review, others urge a slower, more cautious approach. Beasley Allen lawyer Chris Glover, who handles trucking litigation in our Atlanta office, made this observation:

Without a doubt, autonomous vehicles will revolutionize transportation, especially in the heavy truck and freight industries. While it's exciting this technology is within sight, it's important to anticipate and thoroughly test products before rushing them to market. We often see consumers suffer the negative effects of hastily placing a defective product in mainstream commerce.

The ARC research summarizes several policy implications that are in line with regulators' warnings to keep issues such as cybersecurity, data privacy, liability and related legal issues among the top considerations as the technology advances. Researchers and experts further emphasize the need for additional vehicle and technology testing and evaluation to assess the wide-ranging effects they will likely have on the other vehicles that share the road and traffic, generally.

As the present embraces the future that is no longer science fiction, heeding the advice to proceed with caution may be the best guidance to avoid as many unintended consequences of technology as possible. As with other emerging technology, it is too early to determine the trajectory of platooning. However, hastily rushing a new product to market frequently yields less than desired results and often sacrifices consumer safety.

Beasley Allen lawyer Chris Glover, who is in our Atlanta office, handles personal injury cases 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@beasleyallen.com or by phone at 800-898-2034. To get your free copy of *An Introduction to Truck Accident Claims: A Guide to Getting*

Started, visit Chris Glover's website at www.ChrisGlover-Law.com.

Sources: Federal Motor Carrier Safety Administration, *Forbes*, *The Atlantic*, Atlanta Regional Commission, ExtremeTech, *Trucking Info* and *National Law Review*

WAL-MART AND INSURERS SETTLE LAWSUITS OVER TRACY MORGAN VEHICLE CRASH

It appears that the litigation involving Tracy Morgan and Wal-Mart Stores has now come to an end. A lawsuit filed by two insurers sought to avoid covering the retailer's multi-million-dollar payout to Tracy Morgan for injuries he suffered in a 2014 crash involving one of the retailer's trucks. That lawsuit has now been settled.

U.S. District Judge Freda Wolfson in Trenton, New Jersey, has ordered the dismissal of all claims against Wal-Mart by Ohio Casualty Insurance and Liberty Insurance Underwriters, as well as all counterclaims by Wal-Mart against the insurers. Terms of the settlement are confidential. Both sides agreed this settlement was the end of the matter.

The settlement came two and a half months after the insurers, both affiliated with Liberty Mutual Group, had sought permission to question Morgan and another injured passenger, Ardley Fuqua, to help them determine whether Wal-Mart had paid too much in its settlement with the parties.

Morgan, a former star of "Saturday Night Live" and "30 Rock," was seriously injured on June 7, 2014, when a Wal-Mart truck crashed into his limousine van on the New Jersey Turnpike. His friend, comedian James McNair, was killed in the crash, and other passengers in the vehicle also suffered injuries. The truck driver had been awake for more than 24 hours when the crash occurred. He pleaded guilty last November to vehicular homicide under a plea agreement that let him avoid prison time.

The amounts paid by Wal-Mart to Morgan and Fuqua have not been disclosed, but court documents suggest that the Bentonville, Arkansas-based retailer might have paid more than \$90 million. That was based on a reported \$10 million settlement that Wal-Mart reached in early 2015 with McNair's children, and subsequent court filings saying that more than 90 percent of Wal-Mart's total settlement were for Morgan's and Fuqua's claims. Morgan, who suffered a broken leg and ribs and what his lawyer has called a

"traumatic brain injury" in the crash, has since returned to performing.

Source: *Reuters*

XIV. ENVIRONMENTAL CONCERNS

NEWLY RELEASED EMAILS INDICATE MONSANTO MAY HAVE INFLUENCED ROUNDUP SAFETY RESEARCH

The active ingredient in Roundup, a weed killer manufactured by Monsanto, is a chemical called glyphosate. The chemical is the most commonly used weed killer in the world. While Roundup's safety has been upheld by most regulators, it's claimed in a multidistrict litigation (MDL) pending in the U.S. District Court in San Francisco that the use of Roundup can lead to the development of non-Hodgkins lymphoma.

Documents released by the MDL Plaintiffs in early August have raised new questions about Monsanto's efforts to influence the media and scientific researchers with regard to Roundup's safety. Numerous emails appear to shed light on a practice of misleading authorship on academic research into glyphosate's potential risks. One academic, John Acquavella, a former Monsanto employee, expressed discomfort with Monsanto's demands during the research process. In an email to Monsanto, Acquavella stated:

I can't be part of deceptive authorship on a presentation or publication, and warned that we call that ghost writing and it is unethical.

Other internal emails establish that Monsanto employees had questions about Roundup's safety. One Monsanto scientist wrote in a 2001 email:

If somebody came to me and said they wanted to test Roundup I know how I would react—with serious concern.

However Monsanto has subsequently claimed that all questions concerning potential ghostwriting and claimed authorship over studies of Roundup's safety were resolved long before any final drafts were released. According to Scott Partridge, Vice President of Global Strat-

egy for Monsanto, "What you're seeing here are some cherry-picked things that can be made to look bad." Plaintiffs in the Roundup MDL call this nonsense, and argue that the newly released documents show that a debate outside Monsanto about the relative safety of glyphosate and Roundup (which contains other chemicals in addition to glyphosate) was also taking place inside the company.

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

Source: *The New York Times*

CHEMICAL MANUFACTURERS SUED FOR DEFECTIVE HERBICIDE

Monsanto Company and BASF Corp. were sued by Arkansas farmers who claim the companies knowingly misrepresented the safety of the defective herbicide Dicamba. The class action lawsuit alleges the herbicide damaged soybeans and other crops that are not genetically modified to withstand it, forcing the state to remove it from the market after many farmers already planted Dicamba-tolerant seeds for the upcoming year for an additional \$10 per acre.

Because of their inability to use Dicamba, the farmers claim they will see a reduced yield on their crops, which will be overrun with weeds. In addition, the farmers allegedly will be unable to redeem a rebate the companies offered to purchasers of Dicamba and Dicamba-tolerant seeds. Relying on the effectiveness of the herbicide, some farmers modified their equipment "at great cost" to apply Dicamba, but are now unable to utilize the upgraded equipment.

The proposed class includes those who bought Dicamba or Dicamba-tolerant seeds or who altered their equipment to spray the herbicide. The Plaintiffs allege product liability claims as well as violations of the state's deceptive trade practices laws, fraud, and unjust enrichment. They are seeking compensatory and punitive damages, disgorgement of profits, and injunctive relief. Lawyers handling these cases should be aware that Monsanto has refused to turn over all of its testing to the U.S. Environmental Protection Agency (EPA) or to state regulators.

If you want more information on these claims, contact Rhon Jones, who heads up our Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com.

Source: Law360.com

TVA MUST MOVE COAL ASH WASTE

A federal judge has ordered the Tennessee Valley Authority (TVA) to move coal ash waste currently located in pond disposal areas to a lined impoundment area, handing a win to environmental groups that brought the Clean Water Act (CWA) suit. U.S. District Judge Waverly D. Crenshaw Jr. directed the entry of judgment to the Tennessee Clean Water Network (TCWN) and the Tennessee Scenic Rivers Association (TSRA) on various claims in the suit alleging groundwater contamination from an ash pond complex where coal ash is disposed of. The judge said the TVA has to fully excavate the coal ash waste in the complex and move it to a lined site that offers reasonable assurances that it won't discharge waste into U.S. waters.

Judge Crenshaw said it was difficult to imagine why anybody would choose to build an unlined ash waste pond in "karst terrain"—or landscape that is porous—immediately next to a river. The judge wrote:

The futility of second-guessing such decades-old actions is one reason the CWA has a statute of limitations. Nevertheless, while the decision to build the ash pond complex is in the past, the consequences of that decision continue today, and it now falls on the court to address them. The way to do so is not to cover over those decades-old mistakes, but to pull them up by their roots.

The environmental groups sued TVA in April 2015 over alleged discharges of toxic metals and other pollutants into the Cumberland River from the Gallatin fossil plant, a 976-megawatt coal-fired power plant near Gallatin, Tennessee.

The groups claimed TVA has known for years that coal ash waste leaks into the river and groundwater through unpermitted seeps and sinkholes beneath the ponds, violating the agency's National Pollutant Discharge Elimination System permit and the CWA. "This is a huge

victory for the people of Tennessee and for all those fighting to ensure that we have clean water in our state and in our country," Beth Alexander, a lawyer for the TSRA, said in a statement.

In September Judge Crenshaw had dismissed some of the claims that he thought were duplicative of a Tennessee civil enforcement action, but found that other claims were sufficiently different and allowed them to go forward. Renee Hoyos, TCWN's executive director, said in a statement:

This is a great victory for the TCWN members and the general public that live in and around the Gallatin Plant. The court found that the coal ash ponds in the area are a significant health hazard and something has to be done to protect the ground and surface water near the plant.

The Tennessee Scenic Rivers Association is represented by Elizabeth A. Alexander and Jonathan M. Gendzier of the Southern Environmental Law Center. The Tennessee Clean Water Network is represented by its own Shelby R.B. Ward. The case is *Tennessee Clean Water Network et al. v. Tennessee Valley Authority*, (case number 3:15-cv-00424) in the U.S. District Court for the Middle District of Tennessee. If you want more information on Clean Water Act claims, contact Rhon Jones in our Toxic Torts Section at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com.

Source: Law360.com

RUST-OLEUM AND TURTLE WAX SUED OVER BENZENE EXPOSURE

An Illinois woman is suing two Illinois manufacturers, alleging they exposed the community to the harmful effects of benzene chemicals. Janice Hunter filed a suit recently in Madison County Circuit Court against Rust-Oleum Corporation and Turtle Wax Inc., alleging that the Defendants failed to exercise reasonable care and caution for the safety, health and welfare of others living in close proximity to their Wood River facilities.

According to the complaint, in January 2008, the Plaintiff was diagnosed with lymphoma due to direct exposure, inhalation, ingestion and/or absorption of the benzene being emitted, leaked, spilled, dumped and otherwise discharged into

the air and surface/ground water by the Defendants at the Wood River facilities. Ms. Hunter says she was a long-time resident of Wood River. As a result, she had to undergo chemotherapy treatment and suffered pain, suffering and incurred medical expenses.

The Plaintiff alleges the Defendants failed to sufficiently test, monitor and research the human health effects of benzene and benzene-containing products or processes on residents living in close proximity to where the chemical was being used, failed to warn people living near the Wood River facilities of the harmful effects of benzene chemicals and failed to recall and/or cease using benzene and benzene-containing products. Ms. Hunter is represented by Christopher Dysart of The Dysart Law Firm PC in Chesterfield, Missouri.

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.

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

Source: *Madison-St. Clair Record*

BILL BANNING PESTICIDE CHLORPYRIFOS INTRODUCED IN CONGRESS

As contamination issues and litigation concerning insecticides and herbicides continue to grow, Congress has taken notice. Senators Tom Udall and Richard Blumenthal introduced a bill to ban the

pesticide chlorpyrifos. Chlorpyrifos is a chlorinated organophosphate insecticide that is commonly used on food crops and non-residential turf. Hopefully, the Senators will be able to gain enough support from other Senators and House members to obtain passage of this bill.

The bill would outlaw the application of chlorpyrifos on food crops and prohibit any food containing the insecticide from being sold. It was introduced in response to U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt's refusal to ban the insecticide despite the EPA's own findings that it is unsafe for humans even with maximum protections in place. Chlorpyrifos was outlawed for home and garden use in 2000.

Humans can be exposed to chlorpyrifos from breathing in dusts drifting from nearby farms or from ingesting contaminated food or drinking water. Environmental groups claim that the insecticide can harm children's developing brains and nervous systems. The Occupational Safety and Health Administration (OSHA) has linked exposure to a range of symptoms including nausea, vomiting, headaches, dizziness, seizures and paralysis.

Chlorpyrifos is among the 30 chemical contaminants that will be tested in various public water systems nationwide between 2018 and 2020. Amendments to the Safe Water Drinking Act (SWDA) require the EPA to issue a list of contaminants to test that are not regulated under the SWDA. We expect water systems to keep a close eye on the test results to ensure they are delivering clean drinking water to their customers.

If you want more information about pesticide and herbicide claims, contact Rhon Jones in our Toxic Torts Section at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com.

Source: Law360.com and CNN

XV. HEALTHCARE UPDATE

PROMISING NEW MESOTHELIOMA DRUG DISCOVERED

Scientists at the University of Salento in Italy have found a platinum-based drug that successfully slows the growth of the

most aggressive type of mesothelioma cancer. Mesothelioma is a fast-growing cancer caused by asbestos that attacks the mesothelium, which is the tissue that lines the lungs and other organs. Sarcomatoid mesothelioma is the least common of the three types, but is considered the most aggressive form of mesothelioma and is the hardest to treat. In early trials, the experimental drug Ptac2S was much more effective at reducing the spread of sarcomatoid malignant pleural mesothelioma as compared to cisplatin—currently the most widely used chemotherapy drug for treating mesothelioma.

In this study, Ptac2S reduced the growth rate of sarcomatoid cells up to 50 percent and decreased tumor mass by 53 percent. Cisplatin, in the same study, showed just a 12 percent reduction in tumor mass. Ptac2S was also shown to be 12 times more effective in reducing the growth of epithelioid cells, which account for approximately 50 percent of all diagnosed cases of mesothelioma.

There is currently a great need for increased efficacy in mesothelioma treatments. The standard of care for treating malignant mesothelioma is a combination of surgery, chemotherapy, and radiation therapy. However, survival rates remain very low, with approximately 50 percent of patients surviving just one year post-diagnosis. Furthermore, chemotherapy drugs stop working over time as patients develop a tolerance to the drugs. Ptac2S, however, has been shown to be inherently less capable of evoking tolerance/resistance.

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

Source: Asbestos.com

XVI. UPDATE ON NURSING HOME LITIGATION

ALZHEIMER'S PATIENT DIES FROM NEGLECT IN NURSING HOME

Lois Moreland, an 88-year-old Missouri woman suffering from Alzheimer's

Disease, died in a Missouri nursing home after being left alone in a whirlpool bath for eight hours. Ms. Moreland, who had been married for 59 years and a stay-at-home mother for most of her life, lived at St. Sophia Health & Rehabilitation Center in Florissant, Missouri since March of 2013. Ms. Moreland suffered from Alzheimer's, dementia, depression, heart disease, hypertension, muscle weakness and difficulty walking.

At about 8:30 p.m. on the evening of March 22, 2016, a St. Sophia nursing assistant helped Ms. Moreland into a whirlpool tub for her nightly bath. Ms. Moreland's help never returned. It wasn't until 4:30 a.m. the next day that the nursing assistant remembered taking her to the shower room hours earlier. Ms. Moreland's dead body was found in a tub of cool water with the whirlpool jets still running. The pull cord she could have used to summon help was dangling against the wall and beyond her reach.

According to an investigative report by the U.S. Centers for Medicaid and Medicare Services (CMS), Moreland's doctor said it was unsafe to leave her alone in a bathtub for more than 30 minutes because of her declining mental and physical health. Her psychiatrist said she should not have been left unattended for longer than five to 10 minutes.

According to the same report, on the night of Ms. Moreland's death St. Sophia only had one nurse, two certified nursing assistants, and a medication technician to care for 35 residents. The investigation also found that the assistant who helped Ms. Moreland into the tub had a history of "negligent behavior towards residents" and reported to investigators that he felt "overwhelmed" by the workload at St. Sophia. After Ms. Moreland's death, government inspectors determined that residents at the facility were in immediate jeopardy, the most severe status given to nursing homes.

On July 5, Ms. Moreland's son, Steven Moreland, filed a lawsuit in St. Louis County, Missouri Circuit Court against St. Sophia alleging that the nursing home's negligence caused his mother's suffering and death and that St. Sophia put profits above health care by deliberately understaffing its 240-bed nursing home. Steven Moreland's lawyer, David Terry, stated:

When there are not enough staff members to care for residents, it creates an environment where employees are trying to do too

many things that they forget about putting a resident in a bathtub and end up leaving her there for over eight hours.

He said Lois Moreland was “unable to comprehend her circumstances or fend for herself because there were not enough employees to meet the needs of each resident. And as a result, Lois Moreland paid the price.”

This tragic story has become increasingly more common over the last few years. Lawyers in our firm are fighting to protect the safety and rights of elderly and infirmed Americans who reside in nursing homes across the country. Our nursing home lawyers represent the victims or families of those who have suffered death or serious injury because of nursing home abuse and neglect. If you have suffered serious injury, your loved one had been catastrophically injured or died, or you have any questions about nursing home abuse and neglect, contact Chris Boutwell, a lawyer in our firm, at Chris.Boutwell@beasleyallen.com or by phone at 800-898-2034.

Source: *St. Louis Post-Dispatch*

ATTORNEYS GENERAL SEEK TO PROTECT NURSING HOME RESIDENTS FROM FORCED ARBITRATION

The District of Columbia and 16 states are pushing the Trump administration to protect nursing home residents’ Constitutional right to take facilities to court over alleged abuse, neglect, and sexual assault.

D.C. Attorney General Karl Racine and state attorneys general for California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New York, North Carolina, Oregon, Pennsylvania, Vermont and Washington sent comments to the Centers for Medicare and Medicaid Services (CMS) opposing its proposal to reverse an Obama-era rule that banned nursing homes from putting language in resident admission contracts that require disputes to be settled by a third-party arbitrator rather than a court. The attorneys general said in their comments:

Pre-dispute binding arbitration agreements in general can be procedurally unfair to consumers, and can jeopardize one of the fundamental rights of Americans; the right to be heard and seek judicial

redress for our claims. This is especially true when consumers are making the difficult decisions regarding the long-term care of loved ones. These contractual provisions may be neither voluntary nor readily understandable for most consumers.

CMS announced its plan in June to revise the rule and allow nursing homes to use the provisions, known as pre-dispute arbitration agreements, so long as the agreements are written in plain language and are explained to the prospective resident. The resident must also acknowledge that they understand the agreement they are signing.

The attorneys general said they do not oppose mutually agreed upon arbitration agreements that are reached to resolve a dispute at the time the dispute arises; they oppose the imposition of such requirements on families who, under pressure, seek to admit a loved one into a long-term care facility and may not be in a position to object to the inclusion of such clauses in admission papers. Attorney General Racine said in a statement:

These kinds of clauses are unfair to seniors and their families and limit District residents’ basic right of access to justice. We are urging the Trump administration not to force vulnerable residents to sign away their own rights to gain the care they need.

Lawyers in our firm are currently representing—both in lawsuits and arbitration—nursing home residents or their families in cases where a resident was severely injured or died as a result of nursing home abuse or neglect. If you have suffered serious injury, your loved one had been catastrophically injured or died, or you have any questions about nursing home abuse and neglect, contact Chris Boutwell in our office at Chris.Boutwell@beasleyallen.com or by phone at 800-898-2034.

Source: *The Hill*

XVII. AN UPDATE ON CLASS ACTION LITIGATION

WELLS FARGO CARD-PROCESSING UNIT ACCUSED OF OVERBILLING

A pair of small businesses have filed a putative class action against Wells Fargo Merchant Services in New York federal court, alleging it misleads customers and charged excessive fees for its credit- and debit-card-processing services. The Plaintiffs, Patti’s Pitas LLC, a shuttered Pennsylvania restaurant, and Queen City Tours, a tour operator in Charlotte, North Carolina, claim Wells Fargo Merchant Services inflates “pass through” costs, increases agreed-upon fees, and imposes new charges without telling new customers about these costs when they sign up—and that it also charges a \$500 termination fee if they want to end their services.

The Plaintiffs say hundreds of thousands of merchants have been damaged by Wells Fargo Merchant Services’ alleged wrongful conduct. It’s alleged in the complaint:

As a consequence of defendant’s overbilling policies and practices, plaintiffs and the members of the proposed class have been wrongfully forced to pay unauthorized fees and charges. Defendant has improperly deprived plaintiffs and those similarly situated of significant funds, causing ascertainable monetary losses and damages.

The Defendant is co-owned by Wells Fargo Bank N.A. and First Data Merchant Services Corporation, the suit says.

The complaint claims Wells Fargo Merchant Services dupes customers from the start by making promises it doesn’t intend to keep about its fee structure and periodic charges. Its contractual terms are included in a “massive” 63-page program guide filled with fine print that would take an expert attorney weeks to read and understand, the suit says. Sales reps also tell the Plaintiffs they can cancel without a penalty, even though merchants often have to pay an early termination fee should they seek to cancel within a mandatory three-year period, the complaint says.

Queen City Tours says it negotiated a contract that had no monthly minimum charge, but wound up paying \$35 for a “monthly service fee” even if it didn’t have any transaction activity. This Plaintiff was also hit with a \$10 statement billing fee after cancelling paper statements, despite a contract footnote saying the fee would be waived if the customer signed up for electronic billing, the complaint says.

Patti’s Pitas says it stopped using Wells Fargo Merchant Services after its business shut down in May of this year—but it was continually charged fees until the owner complained. The complaint says:

Fortunately, by the time the business closed, Wells Fargo’s improper sales practices had already come to light so, when the owner of Patti’s Pitas informed defendant that he had not been told about a three-year term, defendant closed the account without a termination fee. Most of defendant’s customers are not so fortunate, rather they are put to a Hobson’s Choice—pay the early termination fee, usually \$500, or accept the overbilling for three years.

Claims in the complaint include breach of contract and breach of the covenant of good faith and fair dealing. The Plaintiffs seek restitution of any improper fees, disgorgement and other damages. The new lawsuit is the latest in a series of actions against Wells Fargo since September 2016, when it agreed to pay \$185 million in a settlement with the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency, and the Los Angeles City Attorney’s office over the creation of more than 2 million deposit and credit card accounts. It later agreed to a Wells Fargo Merchant Services settlement with customers who allege they suffered financial losses from unauthorized accounts that were opened in their names.

In late July, Wells Fargo said it would reimburse \$80 million to approximately 570,000 car loan borrowers who were wrongly charged by the bank for insurance. The latest lawsuit appears to be another chapter involving “dramatic revelations” about Wells Fargo’s business practices. E. Adam Webb of Webb Klase & Lemond LLC, the lawyer for the Plaintiffs, told Law360:

It has become obvious over the past year that Wells Fargo had a corporate culture which emphasized revenue and profit over honorable business practices. In April of 2017, internal reports surfaced that confirmed that this culture had infected the Merchant Services division, which provides the vital service of credit [and] debit card processing to many mom-and-pop businesses. We have now seen evidence of this through the experiences of our clients, who learned the hard way that profit trumps promises at Wells Fargo Merchant Services.

The Plaintiffs are represented by E. Adam Webb of Webb Klase & Lemond LLC. The case is *Patti’s Pitas LLC et al. v. Wells Fargo Merchant Services LLC*, (case number 1:17-cv-04583) in the U.S. District Court for the Eastern District of New York.

Source: Law360.com

LAWSUIT AGAINST CVS SAYS CHAIN CHARGES MORE FOR CUSTOMERS WITH INSURANCE

A lawsuit was filed against CVS, the country’s largest pharmacy chain, claiming CVS charges customers with insurance more than it does those without. The suit, filed Monday in Rhode Island, accuses CVS Health Corporation of overbilling customers who used insurance to pay for certain generic drugs. The chain also failed to disclose that medicines’ cash price was cheaper than amount billed for those using insurance, Bloomberg reported. The suit’s Plaintiff, Megan Schultz, cited an incident where she paid \$166 for a generic drug that would have cost \$92 if she had paid cash. In another case, Ms. Schultz paid \$101 for a drug that had a cash price of \$49.45. It’s alleged in the complaint:

CVS never told her that paying in cash would allow her to pay 45 percent less for the drug; instead, CVS remained silent and took her money—knowing full well that no reasonable consumer would make such a choice.

The suit claims the problem centers on money sent back to pharmacy benefit managers, or PBMs, which serve as the intermediaries between insurance com-

panies and pharmacy chains. PBMs negotiate the prices paid by insurance companies and, in return, receive a portion of the pharmacy’s sales, a process known as “clawbacks.” Customers are left paying the negotiated amount—detailed in confidential contracts—even if that “amount exceeds the price of the drug without insurance,” the suit claims. The lawsuit seeks class-action status.

The affected drugs, according to the suit’s lawyers, include such commonly prescribed ones as amoxicillin, Lexapro, penicillin, prednisone, Tamiflu and Viagra. CVS denies the allegations.

Source: NBC News

9TH CIRCUIT UPHOLDS \$42 MILLION RULING IN SAFEWAY OVERCHARGE CASE

A Ninth Circuit Court of Appeals panel has upheld a \$41.8 million judgment against Safeway Inc., agreeing with the lower court that the class of customers was overcharged for online orders and that the grocery giant did not have a right to change its contract without notifying customers. In the decision, the panel rejected Safeway’s argument that the contract consumers agreed to when they registered for the online service—which noted that terms could change—contained a requirement that they review its terms before each purchase. The panel wrote:

Safeway cites no authority from California law suggesting that a merchant may modify a consumer contract and bind the consumer without any form of notice. What authority does exist counsels that California would not enforce a modification without notice.

The suit, filed in June 2011, alleged that while a Safeway service agreement and the company’s website advertised that the price of groceries bought online would be the same as what the delivering store charged that day, Safeway snuck in a 10 percent price increase on most groceries. In the absence of Safeway’s breach, named Plaintiff Michael Rodman argued class members would have received the products they purchased for the cheaper in-store prices.

In March 2014, U.S. District Judge Jon S. Tigar certified a class of U.S. residents who registered to buy groceries through Safeway.com before Nov. 15, 2011, and

made at least one purchase subject to an alleged price markup implemented around April 12, 2010. In August 2015, Judge Tigar held that Rodman and his fellow class members were entitled to damages of about \$30 million, which is the sum of what Safeway made off of a concealed markup price for groceries delivered to class members from April 2010 to December 2012. Judge Tigar later approved prejudgment interest of \$10.9 million.

The appeals panel rejected Safeway's argument that the company could only be held to the terms of its agreement, and that the first paragraph referred to "prices quoted on the website" early on, which meant subsequent references to "prices quoted" had nothing to do with in-store prices. The panel said:

We agree with the district court that both [Rodman's and Safeway's] interpretations are reasonably susceptible readings of the Special Terms. We also agree with the district court that the extrinsic evidence supports Rodman's reading.

The class is represented by Steven Alan Schwartz of Chimicles & Tikellis LLP. The case is *Rodman v. Safeway Inc.*, (case number 15-17390) in the U.S. Court of Appeals for the Ninth Circuit.

Source: Law360.com

XVIII. THE CONSUMER CORNER

9TH CIRCUIT SAYS FCRA CLAIMS MEET STANDING BAR IN SPOKEO LITIGATION

The Ninth Circuit Court of Appeals ruled last month that a man who accused Spokeo of violating the Fair Credit Reporting Act (FCRA) by reporting inaccurate information about him had claimed a sufficient injury to meet the Article III standing bar established by the U.S. Supreme Court in the case last year. A unanimous three-judge panel again reversed the lower court's dismissal of Plaintiff Thomas Robins' putative class action accusing Spokeo of inaccurately reporting that he was wealthy and had a graduate degree when in fact he was struggling to find work.

The Ninth Circuit had previously ruled to revive the suit in 2014. The case is now back in the appeals court and it must reconsider its decision. This comes after the Supreme Court in a landmark May 2016 decision ruled that Plaintiffs must allege concrete injuries and not rely on mere statutory violations to establish Article III standing. The high court remanded the dispute to the Ninth Circuit to decide if Robins' claims met this standard.

On remand, the appellate panel rejected Spokeo's argument that Robins' allegations of harm were too speculative to establish a concrete injury. The Ninth Circuit instead concluded that Robins had met the standing bar by alleging an intangible statutory injury without any additional harm because Congress had crafted the FCRA provisions at issue in the dispute to protect consumers' concrete interests in accurate credit reporting about themselves. The panel, in a decision authored by Circuit Judge Diermuid F. O'Scannlain, said:

While Robins may not show an injury-in-fact merely by pointing to a statutory cause of action, the Supreme Court also recognized that some statutory violations, alone, do establish concrete harm. Even if their likelihood actually to harm Robins's job search could be debated, the inaccuracies alleged in this case do not strike us as the sort of 'mere technical violation[s]' which are too insignificant to present a sincere risk of harm to the real-world interests that Congress chose to protect with FCRA.

Robins is represented by Jay Edelson, Rafey S. Balabanian, Ryan Andrews, Roger Perlstadt and J. Aaron Lawson of Edelson PC and William Consovoy and Patrick Strawbridge of Consovoy McCarthy Park PLLC. The case is *Thomas Robins v. Spokeo Inc.*, (case number 11-56843) in the U.S. Court of Appeals for the Ninth Circuit.

Source: Law360.com

UBER TO PAY \$20 MILLION TO END TCPA SUIT OVER TEXT MESSAGES

Uber Technologies Inc. has agreed to pay \$20 million to settle a proposed class action in Illinois federal court alleging that the ride-hailing company violated

the Telephone Consumer Protection Act (TCPA) by sending unsolicited texts to potential drivers and riders. The settlement would end claims by Maria Vergara that Uber sent her unwanted text messages for weeks encouraging her to complete the app's sign-up process, as well as claims by Jonathan Grindell, Jennifer Reilly, James Lathrop, Sandeep Pal and Justin Bartolet that Uber sent them unwanted texts about becoming Uber drivers.

Ms. Vergara filed her suit in Illinois federal court in 2015 and agreed in March to enter mediation. The potential drivers, who filed a separate proposed class action in California federal court in 2014, asked to join the mediation. The parties reached a settlement in principle in May and "resolved most of the key elements" of the agreement in June, according to the filing.

Ms. Vergara and the potential drivers jointly filed an amended complaint in Illinois federal court. The proposed settlement would create three settlement classes:

- One proposed class would include everyone Uber texted about its referral program;
- a second proposed class would include potential drivers who had partly completed Uber's application process and received texts even after asking Uber to stop sending them; and
- a third proposed class would include everyone else who received unwanted texts from Uber.

As part of the settlement, Uber has agreed to discontinue its Refer-a-Friend program on cellphones issued to drivers, maintain an improved opt-out system and implement sign-up processes meant to reduce the chances of contacting wrong phone numbers.

The Plaintiffs are represented by Myles McGuire, Evan M. Meyers and Paul T. Geske of McGuire Law PC and Hassan A. Zavareei, Andrea R. Gold and Andrew J. Silver of Tycko & Zavareei LLP. The suit is *Maria Vergara, et al. v. Uber Technologies Inc.*, (case number 1:15-cv-06942) in the U.S. District Court for the Northern District of Illinois.

If you want more information about these cases, contact Jeff Price, a lawyer in our Toxic Torts Section, at 800-898-2034

or by email at Jeff.Price@beasleyallen.com.

Source: Law360.com

AN UPDATE ON THE OPIOID EPIDEMIC

In one of our previous issues, we wrote about investigations into opioid manufacturers' marketing and sales tactics by state attorneys general. These investigations were prompted by what has been described as an opioid epidemic due to the rapid increase in the use of prescription and non-prescription opioids since 2010. Opiates are a class of strong painkillers or analgesic drugs, including those naturally derived from opium, such as morphine and heroin.

On July 6, 2017, Endo International PLC (Endo) pulled its painkiller Opana ER from the market, following pressure from the U.S. Food and Drug Administration (FDA) to stop sales of the abuse-linked drug and as prescriptions of opioids remain high in many parts of the country. The FDA requested that the drugmaker withdraw the prescription opioid due to abuse risks. The FDA has said that it is examining abuse patterns involving other opioids and will take further action if appropriate.

Endo's decision to comply with the FDA's request may also have been pushed by the threat of litigation. As noted in our previous report, the number of suits alleging that drug makers have downplayed the addictive risks of their painkillers, filed largely by states and other municipalities, has grown significantly in recent months.

In March of 2016, the Centers for Disease Control and Prevention (CDC) released new guidelines for prescribing opioids, asking primary care providers to consider alternatives to prescription painkillers, limit the length of treatment and monitor patients to see if opioids are indeed the right choice for them. While voluntary, those guidelines were prompted to reduce opioid overdose deaths.

Per the CDC, the areas with highest prescribing rates of opioids also share qualities like higher unemployment and a greater prevalence of diabetes and arthritis, and they tend to be small cities and large towns.

If you would like more information about these cases, you can contact Rhon Jones in our Toxic Torts Section. Rhon

can be reached at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com.

Source: Law360.com

INSYS AGREES TO PAY \$4.45 MILLION TO RESOLVE ILLINOIS OPIOID LAWSUIT

Insys Therapeutics Inc. has agreed to pay \$4.45 million to settle a lawsuit filed by Illinois Attorney General Lisa Madigan claiming the company deceptively marketed an addictive fentanyl-based cancer pain drug for off-label uses. The settlement will resolve claims that Insys illegally marketed its product Subsys to high-volume prescribers of opioid drugs instead of to oncologists treating cancer patients. Attorney General Madigan said in a statement:

It's unethical, greedy behavior by companies like Insys that is responsible for creating the opioid epidemic and resulting overdose deaths in our state.

This lawsuit case came amid a series of investigations centered on Subsys, an under-the-tongue spray intended for cancer patients that contains fentanyl, a highly addictive and regulated synthetic opioid. Those investigations led to federal prosecutors in Boston in December charging six former Insys executives and managers, including former Chief Executive Michael Babich, with engaging in a scheme to bribe doctors to prescribe Subsys. Babich and his co-Defendants have pleaded not guilty. Federal charges have also been filed in several other states against other ex-Insys employees and medical practitioners who prescribed Subsys. The investigation came amid increased attention to the national opioid addiction epidemic.

According to the U.S. Centers for Disease Control and Prevention (CDC), opioids were involved in more than 33,000 deaths in 2015, the latest year for which data is available, and the death rate is estimated to have continued to rise. In her lawsuit, Attorney General Madigan alleged that Insys deceptively marketed and sold Subsys for uses other than its intended purpose of treating breakthrough cancer pain. She also claimed that Insys rewarded doctors nationally for prescribing Subsys to non-cancer patients through payments for sham speaking events and expensive dinners.

As part of the Illinois settlement, Insys also agreed to create a program aimed at identifying prescribers who abuse opioids and to restrict the promotion of Subsys to oncologists or prescribers who treat cancer patients. Insys has said it is in separate discussions with the U.S. Justice Department to settle the federal investigation. Insys has seen a major drop in prescriptions for Subsys, which until recently was the company's only U.S. Food and Drug Administration-approved drug. Insys took a \$4.5 million charge to cover the expected settlement with Illinois.

Source: Reuters

CINCINNATI LATEST GOVERNMENT ENTITY TO FILE OPIOID LAWSUIT

The City of Cincinnati has joined a growing list of municipalities and states around the country suing Cardinal Health and the nation's other "big three" pharmaceutical distributors in connection with their alleged role in the opioid epidemic. The lawsuits allege that the distributors failed to properly police suspicious orders and combat the diversion of drugs to third parties. The law firms representing Cincinnati, led by Dallas-based Baron & Budd, have filed similar suits on behalf of four Ohio counties: Vinton, Belmont, Clermont and Brown.

Dublin-based Cardinal, along with McKesson and AmerisourceBergen, are the major players in the U.S. drug-distribution market. These companies do not manufacture drugs, but fill orders for painkillers and all other types of prescription drugs for medical facilities and pharmacies.

The City of Cincinnati seeks damages to cover costs including "medical care and treatment for patients suffering from opioid-related addiction or disease; treatment of infants born with opioid-related medical conditions; costs associated with caring for children whose parents suffer from opioid addiction; and law-enforcement and public-safety services related to the opioid epidemic." It will be most interesting to see how these lawsuits fare as they proceed.

Source: The Columbus Dispatch

PUBLIC OPINION OF E-CIGARETTES

In the past few months there have been several published studies relating to user-based opinions on e-cigarette use. In general, these studies reported that users view e-cigarettes as safer than tobacco products as well as less addictive. The studies generated a debate as to whether e-cigarettes are a gateway to tobacco use or if instead they are effective in reducing tobacco usage among adolescents and teenagers. Interestingly, there are only a few detailed studies that have addressed this issue. The limited data shows that e-cigarettes are at least moderately effective as alternatives for people actively trying to quit tobacco.

In a related study, British investigators recently reported that e-cigarettes were helpful for people already attempting to quit tobacco, but their presence as an alternative did not increase the overall number of quit attempts or usage of other quitting aids. Alternatively, a recent German study reported that e-cigarettes were used primarily as alternatives to tobacco and nicotine substitutes.

There is at least one study that suggest that as “vaping” becomes more prominent, more and more people are starting to smoke e-cigarettes without ever having used tobacco products. Other studies have also assessed the role of e-cigarettes in the context of social interactions. The data suggests that these social interactions may be causing teens to start smoking and are an important driving factor toward e-cigarette usage, especially if e-cigarettes are viewed as safer alternatives to tobacco. Similarly, another study showed that 8th and 11th graders in Oregon reported that e-cigarettes were the most common form of smoking.

The efficacy of e-cigarettes as a smoking cessation tool and as a safer alternative to traditional tobacco products is still up for debate as additional studies are being conducted. If you would like more information, you can contact Will Sutton in our Toxic Torts Section. Will can be reached at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Source: Law360.com

MAKEUP AND MANY OTHER PRODUCTS STILL CONTAIN ASBESTOS

With increased awareness of the carcinogenic effects of using asbestos, it's easy

to believe we are well past discovering new products that contain the deadly group of silicate minerals. However, this past month proved that is unfortunately not the case. Makeup sold in tween clothing store Justice, formerly Limited Too, contained asbestos—a revelation discovered after a news station had samples tested.

Asbestos is a group of naturally occurring minerals that are linked to the development of lung cancer and mesothelioma, a deadly cancer that affects the lining of internal organs. The carcinogenic material was found in just one of seven of the chain's makeup products that North Carolina news outlet ABC11 had tested, but any exposure to asbestos could prove to be the cause of health issues years and even decades later, when most asbestos-related disease becomes apparent. The testing also found heavy metals barium, chromium, lead and selenium in the powder.

“What we have here is a talc that was contaminated with asbestos that was used to manufacture a product unfortunately aimed at young children,” said Sean Fitzgerald, the Director of Research and Analytical Services at the Analytical Institute in Greensboro, which tested the products.

The tainted powder, “Just Shine Shimmer Powder,” was sold in stores around the country, and Justice has pulled the cosmetic from the market while its own investigation into the asbestos find is underway. Fitzgerald said though the manufacturer likely didn't intend to use asbestos-laced talc in the product, it should have tested the talc reserve it was mined from and known it was contaminated with asbestos. He explained:

Children should not be allowed to breathe it. If a 10-year-old inhaled this fiber today, when he's 50 years old, it's still there.

While more than 60 countries worldwide have banned or are in the process of banning asbestos, including Canada and the European Union, many countries, including the United States, still allow it in some products. According to the Environmental Protection Agency website, asbestos is not banned in roof coatings, gaskets, brake blocks, automatic transmission components, cement pipe, pipe-lines and even some clothing.

Of course, makeup is not included in the list of permitted asbestos-containing products, but each day people interact with those that are, often unknowingly placing their health at risk. If you want more information about mesothelioma claims, contact Rhon Jones, who heads up our Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com.

Sources: ABC11, EPA, MyMeso

XIX. RECALLS UPDATE

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

GM RECALLS 691,000 TRUCKS OVER POWER STEERING DEFECT

General Motors LLC is recalling nearly 691,000 Chevrolet Silverado 1500 and GMC Sierra 1500 pickup trucks due to an electrical issue that can cause temporary loss of power steering during low-speed turns, increasing the risk of a crash. The affected trucks were built between January 2013 and September 2014 for the 2014 model year, GM said, estimating that about 2 percent of the 691,000 are actually affected by the defect. GM notified the National Highway Traffic Safety Administration (NHTSA) and its dealerships on June 29, saying that when a fix was available, the dealerships would update the trucks' software for free.

A GM spokesperson said that the company is working on a fix and that it will notify customers as soon as it is available to its dealers. Actions that demand high electrical current, such as low-speed turns, can cause temporary low voltage within the trucks' electrical systems, GM said. When the system voltage drops below 8.8 volts for more than one second, as it may during low-speed turns, the trucks' power steering assist is disabled until voltage returns to 9 volts for at least 40 milliseconds, the company explained.

That loss of power steering could result in the driver temporarily losing control of the steering wheel, even though the issue typically happens within a one-second period, GM said. Other electrical subsystems might also shut down at the same time or just before, temporarily disabling the radio, door locks, air conditioning and cruise control, among other devices.

GM opened a safety investigation into the issue in February after complaints related to the loss of power steering. It was able to link the various cases to an underlying electrical issue, the company said. It told dealers on June 29 to stop delivering the vehicles to customers until they could be fixed. Only 2014 model year trucks were affected because prior to 2015 model year production, a series of product and process changes were made that addressed the potential sources of the temporary low voltage conditions that disable the trucks' power steering assist, GM said.

POLARIS RECALLS SCRAMBLER ALL-TERRAIN VEHICLES DUE TO CRASH HAZARD

Polaris Industries Inc. is recalling 2,800 Scrambler XP 1000 all-terrain vehicles, model years 2014 through 2017, for a "crash hazard." The throttle release switch can fail, posing a crash hazard.

This recall involves all model year 2014 through 2017 Scrambler XP 1000 all-terrain vehicles. "Polaris" is stamped on the front grill and rear panel, and "Scrambler XP" on the center panel. The ATVs were sold in black, lime, red and white. Model numbers A14GH9EAW, A15SVE95AW, A16SVE95AM, A16SVE95AA and A17SVE95AM are included on this recall. The model number is located on the fuel tank cover. To check for recalled vehicles by vehicle identification number (VIN) visit www.polaris.com

The company said the recall notice comes after it received nine reports of the throttle release switch failing, including two "minor injuries." The ATVs in question were made in the U.S. by Polaris, and sold at Polaris dealers nationwide from April 2013 through June 2017 for about \$13,300. This recall comes just three weeks after the company recalled 25,600 Sportsman 570 ATVs after reports of fuel leaks and fires. Contact Polaris at 800-765-2747 from 7 a.m. to 7 p.m. CT Monday through Friday or online at www.polaris.com and click on "Off Road

Safety Recalls" at the bottom of the page for more information.

KAWASAKI RECALLS ALL-TERRAIN VEHICLES DUE TO FIRE HAZARD

About 15,000 all-terrain vehicles (ATVs) have been recalled by Kawasaki Motors Corp. U.S.A., of Foothill Ranch, California. The fuel tap can leak, posing a fire hazard. This recall involves 2013-2017 KFX50 and 2012-2017 KFX90 Kawasaki all-terrain vehicles (ATVs). The recalled ATVs have four wheels and seating for one person and were sold in a variety of colors. The company has received 18 reports of fuel leakage from the fuel tap. No injuries have been reported. The ATVs were sold at Kawasaki dealers nationwide from October 2011 through May 2017 for between \$2,000 and \$2,600. Consumers should immediately stop using the recalled ATVs and contact Kawasaki for a free repair. 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 and click on "Recalls" for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2017/Kawasaki-Recalls-All-Terrain-Vehicles>.

FRED'S STORES RECALLS CHARCOAL GRILLS DUE TO FIRE HAZARD

Fred's Stores of Tennessee Inc., of Memphis, Tennessee, has recalled about 2,000 ini barrel charcoal grills. The exterior paint on the grill can ignite, posing a fire hazard. This recall involves Living Traditions mini barrel charcoal grills. The black steel grills measure about 18 inches by 15 inches by 18.5 inches. They have a black handle on the lid and one on each side, and at the front a heat gauge and a silver latch. Model number SXB1501 and UPC code 00000 19877 are printed on the product's packaging. There are two reports of paint on the exterior of the grill igniting. No injuries or property damage have been reported.

The grills were sold at Fred's stores in Alabama, Arkansas, Georgia, Illinois, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee and Texas from January 2017 through June 2017 for about \$22. Consumers should immediately stop using the recalled product and return the

grill to any Fred's Store for a full refund of the purchase price. Contact Fred's at 800-374-7417 from 8 a.m. to 4:30 p.m. Monday through Friday or online at www.fredsinc.com and click on the "Recall Information" banner for more information.

ACADEMY SPORTS + OUTDOORS RECALLS CRAWFISH KITS WITH STRAINER DUE TO FIRE HAZARD

About 21,000 Outdoor Gourmet 100-Qt. Crawfish kits with strainer have been recalled by Academy Ltd., d/b/a Academy Sports + Outdoors®, of Katy, Texas. The crawfish kit hose can melt and/or burn, posing a fire hazard. This recall involves the Academy Sports + Outdoors Outdoor Gourmet® 100-Qt. Crawfish kit with strainer which is an outdoor appliance used to cook crawfish and other seafood in a 100-quart pot. The Crawfish kit includes a hose assembly that connects the burner component to an external LP fuel tank supplied by the consumer. Model number FSOGBG4201 is printed on the silver label located on the burner component. The company has received 14 reports of hoses melting or catching fire. No injuries or property damage have been reported.

The hose was sold at Academy Sports + Outdoors stores and online at Academy.com from March 2014 through May 2017 for about \$130. Consumers should immediately stop using the recalled 100-quart crawfish kits and contact Academy Sports + Outdoors for instructions on obtaining a free replacement hose assembly. Contact Academy Sports + Outdoors Customer Care toll-free at 888-922-2336 from 7 a.m. to midnight CT daily, email at customerservice@academy.com, or online at www.academy.com and click on the Product Recalls link for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2017/Academy-Sports-Outdoors-Recalls-Crawfish-Kits-with-Strainer>

NUTRILIFE RECALLS BOTTLES OF HYDROGEN PEROXIDE DUE TO FIRE AND BURN HAZARDS

Nutrilife Plant Products, of Canada, has recalled about 11,800 Nutrilife 29% hydrogen peroxide (H2O2) one-gallon bottles. The bottle caps on the 29% hydrogen peroxide one-gallon bottles do

not vent properly and can allow pressure to build up in the bottle and cause it to expand and rupture, posing fire and burn hazards. This recall involves Nutrilife Plant Products one gallon/four liter bottles of hydrogen peroxide (H2O2) liquid 29% oxidizer which is used as a source of oxygen for water, a preservative for fresh cut flowers, and to keep unwanted nutrient residuals clear in reservoirs, drippers and dripper lines. The plastic bottles are white with a blue/green label with a handle at the top. The Nutrilife logo, H2O2, Liquid 29% Oxidizer and "An Oxygen Source for Water" are printed on the front label. Open and closing instructions are printed on the bottle caps with indented lettering. At press time, Nutrilife had received one report of a fire resulting in minor property damage.

The bottles were sold at Plant food and hydroponic stores nationwide from November 2016 through July 2017 for about \$33. Consumers should immediately stop using the recalled bottles of hydrogen peroxide, contact Nutrilife for safe handling instructions and to receive a free replacement bottle cap or for instructions on how to destroy the bottles and receive a full refund. Contact Nutrilife toll-free at 877-533-9572 anytime, direct at 604-996-6609 or 250-300-9455, by email at nutrilifeproductrecall@gmail.com or online at www.nutrilifeproducts.com and click on "H2O2 Urgent Recall Notice" for more information. Pictures available here:

<https://www.cpsc.gov/Recalls/2017/Nutrilife-Recalls-Bottles-of-Hydrogen-Peroxide>

NVIDIA Recalls European Plug Heads Sold With Power Adaptors Due To Electric Shock Hazard

About 6,900 European plug heads for NVIDIA SHIELD™ power adaptors have been recalled by NVIDIA Corp., of Santa Clara, California. The plug heads can break exposing metal prongs, posing an electric shock hazard. This recall involves European plug heads for power adaptors included with NVIDIA SHIELD™ World Charger Kits, as well as with NVIDIA SHIELD tablet computers and TVs intended for use in Europe. The European plughead has two thin round metal prongs within a black plastic hexagonal extender on a black plastic base plate that can be attached to the power adaptor. The power adaptor has the

model number SPA011AU5W2 and the NVIDIA name and logo etched on the side of the power adaptor where the European plug head can be attached. There are six different plug heads that come with the World Charger Kit. Only the European plug head is being recalled. There have been no reports of injuries or incidents in the U.S. NVIDIA has received nine reports of the European plug heads breaking overseas, including six reports of consumers receiving electrical shocks.

The adaptors were sold online at NVIDIA.com, Amazon.com, BestBuy.com, and NewEgg.com from October 2015 through June 2017 for about \$30. Consumers should immediately stop using the recalled European plug heads and contact NVIDIA for a free replacement. Contact NVIDIA toll-free at 800-797-6530 anytime or online at www.nvidia.com and click on USA/Canada Link, then click on the support tab located at the top of the page. Pictures available here: <https://www.cpsc.gov/Recalls/2017/NVIDIA-Recalls-European-Plug-Heads-Sold-with-Power-Adaptors>

SAFETY BOOTS RECALLED BY CLARKSVILLE-BASED BOOT COMPANY

A Clarksville boot company is recalling 7,200 safety boots due to injury hazard. The boots and shoes can fail to protect feet when heavy or sharp objects fall on them, posing an injury hazard to consumers. The U.S. Consumer Product Safety Commission (CPSC) announced the recall by Clarksville-based Dan Post Boot Company following a complaint by a consumer who had the safety boots on but broke his foot after a tire fell on his foot. This recall involves McRae Industrial brand steel toe boots, static dissipative shoes and composite boots. There are seven styles of the McRae Industrial brand shoes included in the recall. The model numbers are MR85300, MR85394, MR47321, MR47616, MR87321, MR43002, and MR83310 printed on a tag on the lining of the boot or the tongue of the shoe. The products were sold from October 2013 through June 2017 at Grainger Inc., Gerler and Sons Inc, Safety Solutions Inc, Standup Rancher, and online at Kohls.com, Steel-Toe-Shoes.com, Thewesterncompany.com, and Workboots.com. Contact the Dan Post Boot Company Return Department toll-free at 866-301-4488 from 8 a.m. to 4 p.m. ET Monday through Friday, email at

dpreturns1@danpostboots.com or online at www.danpostboots.com and click on the recall tab located at the middle of the page for more information.

RICHIE HOUSE CHILDREN'S ROBES RECALLED BY BELLE INVESTMENT DUE TO VIOLATION OF FEDERAL FLAMMABILITY STANDARD

Belle Investment Corporation, of Irvine, California, has recalled about 1,500 Richie House children's robes. The children's robes fail to meet federal flammability standards for children's sleepwear, posing a risk of burn injuries to children. This recall involves Richie House-branded children's 100 percent polyester robes. They were sold in youth sizes 4/5 through 12/14 and in four different color/print combinations; red with dog print, blue with butterfly print, pink and white with white polka dots and solid pink. The robes have long-sleeves, a belt and two front pockets. The red robe comes with a hood. "Richie House Los Angeles" and the size are printed on a label sewn into the neck of the robe.

The robes were sold at Amazon.com from December 2015 through March 2017 for between \$20 and \$22. Consumers should immediately take the recalled robes away from children and contact Richie House for a full refund. Contact Richie House toll-free at 844-742-1303 from 9 a.m. to 4:30 p.m. PT Monday through Friday, email at info@richie-house.com or online at www.richie-house.com and click on "Recall Information" for more information.

MEIJER RECALLS CHILDREN'S SWIMSUITS DUE TO CHOKING HAZARD

Meijer, of Grand Rapids, Michigan, has recalled about 22,200 Wave Zone children's swimsuits. The snaps on the swimsuit can detach, posing a choking hazard to the child. This recall involves the Wave Zone one-piece, zip-back swimsuit for newborns, infants and toddlers. The swimsuits have a zipper on the back and four snaps on the bottom and were sold in four colors: blue and gray with a shark on the front; white and navy stripes with an anchor pattern; pink and teal with a strawberry on the front; pink arms with a multi-colored fish pattern. The swimsuits were sold in sizes: 0-3m, 3-6m, 6-9m, 12m, 18m, and 24m. "Wave Zone" and "Made in China" are printed on the inner

collar. The tracking number located on the sewn-in label on the inner side seam is "NOV 2016 021-14328." Meijer has received 11 reports of the snaps detaching. No injuries have been reported.

The suits were sold exclusively at Meijer stores in Illinois, Indiana, Kentucky, Michigan, Ohio, and Wisconsin from January 2017 through July 2017 for about \$14. Consumers should immediately stop using the recalled swimsuits and return them to the customer service desk at any Meijer store for a full refund. Contact Meijer at 800-927-8699 anytime or online at www.meijer.com and click on "Product Recalls" at the bottom of the page for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2017/Meijer-Recalls-Childrens-Swimsuits>

PANELCRAFT CHILDREN'S BUILDING SET RECALL

Panelcraft recalled an estimated 2,000 Children's Magnetic Building Sets due to suspected component detachment, subsequent Magnet component release and consequential risk of choking, ingestion and GI tract laceration damage, all serious health and safety hazards. The Rainbow Dream Builder Set consists of 19 windows in red, yellow, green, blue and purple colors that each measure approximately nine (9) inches square. The Rainbow Solid Builder Set includes 19 pieces: 11 solid panels in red, yellow, green, blue and purple and eight white windows that also measure approximately nine (9) inches square.

According to the CPSC, the corner welds on the recalled Magnetic Building Sets can fracture, allowing the panels and frames to separate and release Magnets during play. When released, these exposed Magnets can create choking and ingestion hazards. If a child swallows more than one magnet, the magnets can stick together across the walls of the child's intestine or other digestive tissue, which can lead to internal injuries and even death. These magnets may need emergency surgical intervention to remove. If you believe you have purchased or have in your possession any of the recalled Children's Magnetic Building Sets, please do not use them. Instead, kindly return the product to the store where you purchased it for a full refund.

If you have any questions about this recall notification, please contact Panelcraft toll-free at 888-288-7615 from 9 a.m.

to 5 p.m., Eastern Standard Time, Monday to Friday. Alternatively, you can visit the company's website at <http://www.panelcraft.com> and click on the Contact Us link for more information.

If you need more information on any of the recalls listed above, visit our firm's web site at www.BeasleyAllen.com or our blog, www.RightingInjustice.com. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

XX. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

DIANNE BROWN

Dianne Brown, who has worked at Beasley Allen for 14 years, is our firm's Medical Advisor. As a Legal Nurse Consultant and Medical Advisor, Dianne's responsibilities include researching drug side effects; collecting, organizing, and reviewing medical records and other relevant health care or legal documents; summarizing and analyzing the information in medical records; and preparing reports of reviewed material. She also helps all of us at Beasley Allen stay safe by maintaining and monitoring our firm's automatic external defibrillators (AEDs) in all four buildings, as well as providing AED education in the event they are needed.

Dianne graduated from Troy State University and became a registered nurse, a field of work she enjoys. Before coming to Beasley Allen, Dianne worked as a perioperative nurse in her role as Registered Nurse First Assistant (RFNA) where she assisted physicians with surgical procedures and followed up with patients in their postoperative care. Dianne then decided to take her education to the next level by going to Kaplan College. There she received a diploma in Legal Nursing Consulting. She considers it a privilege to provide medical review assistance to our lawyers and staff so that they can better "help those who need it most."

Dianne has been married to her husband Randall Brown, a Lieutenant with the Montgomery County Sheriff's Department, for 36 years. The couple have raised three grown children: Jeffrey Brown, an Alabama State Trooper in Baldwin County; Amanda Brown Chapman, a mother of three who works hard as a stay-at-home mother; and Nathan Brown, a police officer for the city of Prattville. Because of her family's career choices, Dianne has the state, county and city covered in law enforcement! She also enjoys being the grandmother of four children: Raleigh-Ann Faith Chapman, Rawlins Chapman, Remi-Jean Chapman and Ellington Elizabeth Brown.

In her spare time, Dianne enjoys listening to the "oldies but goodies" radio channel, being with her family and watching her grandchildren grow up. As members of Taylor Road Baptist Church, she enjoys being an active part of the church's music ministry, serving as the church pianist, playing along and singing to both traditional and contemporary praise and worship music. Dianne says she especially enjoys her quiet time when she can meditate on God's word and read uplifting books that give her encouragement. Dianne is very important to the firm and we are blessed to have her with us.

MATT MUNSON

Matt Munson is a lawyer in Beasley Allen's Mass Torts Section, handling defective medical device litigation. He is lead lawyer in cases involving Zimmer Biomet's Comprehensive Reverse Shoulder System. Matt has been with the firm since 2006. He decided to pursue law after finding irregularities in a non-fiction novel while writing a literature paper at Auburn University Montgomery. By making what he says was a long-shot phone call to the author, Matt questioned him until he admitted it was not an entirely first-person account, as he had led everyone to believe. The author told Matt he should think about becoming a lawyer, and, after taking a few pre-law classes, Matt changed his major and then attended Western Michigan University's Thomas M. Cooley Law School.

Matt said he enjoys the continuous learning curve involved in the practice of law. "I like seeing problems and looking for different ways to solve problems and uncover truths," he said. "No two cases are exactly alike," especially in the field

of Mass Torts. “We may have 1,000 cases that all have the same Defendant, but it is important to remember that those are 1,000 separate individuals, each with their own stories, each with their own families, and they each were damaged in different ways, because the damage happened to them and was personal to them.” It’s the trust his clients put in Matt to right a wrong that he says makes the job worthwhile. “Ultimately, it is my duty to respect and honor the trust they have placed in me as their lawyer. Solving mysteries to help individuals, so at the end of their case they hug me or send me a note saying we made their life better, makes it all worth it.”

Matt says he believes Beasley Allen is unique because “the firm has maintained itself as a small-town firm, but with a global presence.” He believes “the ability to have all of these specialties and knowledge in house provides the firm with a unique opportunity to help clients in ways most firms cannot.”

Matt is married to the former Katherine Tanner Rees of Montgomery, Alabama. They have two daughters, Anna and Isabella. He is a hardworking lawyer who is dedicated to the cause of his clients. We are most fortunate to have Matt with us.

SUSAN SCARBOROUGH

Sue Scarborough is a Clerical Assistant in our Consumer Fraud & Commercial Litigation Section who has been with the firm since July of 2009. Many of her daily tasks used to revolve around maintaining the *Jere Beasley Report* but now Susan is responsible for several new duties, including opening new case files, speaking to potential clients, sending letters to clients, as well as adding and updating contact cards and retention files in our case file management database ProLaw.

A native of Huntsville, Sue moved to Montgomery more than 30 years ago. She and her husband Jerry have three adult sons and one very lovable Golden Retriever. Since the couple lives out in the country, lots of folks have driven by their home and dropped off unwanted pets, thus leaving the Scarborough family to raise numerous stray dogs and cats over the years. However, they don’t have any at this time.

Many of Sue’s passions revolve around helping children at her church. She previously worked as director of the children’s ministry at the church, but now she focuses on teaching the children’s Sunday School classes, helping with Vacation

Bible School, assisting with the children and youth at Common Ground and even working with the children on Wednesday nights.

Sue is currently involved with the start-up of a new ministry in Montgomery called “Communities of Transformation.” As the Coordinator of the Children’s Program, she says she is very excited about what this ministry offers families on a limited income in the Montgomery community. Every Tuesday night, the group meets mentors to accomplish various goals the families set for themselves. It is a 12-week learning process, but the first group has just successfully concluded and now a new group of families will begin this month.

When Sue isn’t helping with her church community, she enjoys taking time to travel to out-of-the-way places, grow flowers in her garden, shop at flea markets, read and just sit on the beach. Sue is a very good employee who is dedicated to her work. We are blessed to have her with us.

RICK STRATTON

Rick Stratton, a lawyer in Beasley Allen’s Toxic Torts Section, has been with the firm since 2010. He has spent more than 30 years of his life dedicated to a civil litigation practice in state and federal courts in Alabama and throughout the South. Rick’s legal experience encompasses a broad range of litigation, including products liability, bad-faith insurance, workplace safety, environmental, toxic torts, civil rights, commercial and vaccine claims.

As a graduate of Samford University’s Cumberland School of Law, Rick has always believed in helping “ordinary folks” who have become victims of wrongdoing and abuse. Rick thanks the many great mentors he has had throughout his life, including his father who was a rural doctor, for his becoming an advocate for the average citizen. This advocacy has become Rick’s favorite part of practicing law.

Rick strongly believes that Beasley Allen shares his conviction of helping average folks, sometimes against long odds. He says that Beasley Allen truly follows our firm’s slogan of “helping those who need it most” both in our practice of law and our community involvement. Rick is active with Habitat for Humanity of Greater Birmingham and is a frequent Continuing Legal Education lecturer. He is married to Sharon Wall Strat-

ton and they have two grown children and three grandchildren.

Rick is a very good lawyer who truly believes in what he does. He is a tremendous asset to Beasley Allen. We are most fortunate to have Rick with us.

BEASLEY ALLEN ACTIVE AT AAJ ANNUAL MEETING IN BOSTON

The American Association for Justice (AAJ) Annual Convention was held in Boston, Massachusetts, July 22-25, and our lawyers were actively involved. Our activities at the convention included volunteer work in the community and speaking at CLE classes. Three Beasley Allen lawyers also were recognized for outstanding achievement. Highlights of the meeting included:

Andrew Brashier, who practices in the firm’s Consumer Fraud & Commercial Litigation Section, was awarded the AAJ Wiedemann & Wysocki Award. The award is presented annually to lawyers who demonstrate a deep commitment to the highest standards and who are passionately committed to the principles of the civil justice system and the mission of AAJ. Andrew says, “This is a tremendous honor. Everyone who is a part of AAJ is a part of the fight to defend the 7th Amendment right to a trial by jury, regardless of political party or political affiliation. Without the right to a trial by jury, it is impossible to protect and enforce each of the liberties enshrined in our Constitution and the Bill of Rights.”

Navan Ward, who practices in our Mass Torts section, was elected Treasurer of AAJ. He has previously served the organization as Parliamentarian, as past chairman of the Minority Caucus, past chairman of the Diversity Committee, a member of the Board of Governors and a member of the Executive Committee.

Navan also received the American Association for Justice’s Minority Caucus Stalwart Award for his dedicated years of service to the organization. He says, “I’m honored to receive this award from the Minority Caucus, which is a group that I have learned so much from during my

time at AAJ. I look forward to seeing this Caucus continue to do great things for this organization and all of our clients.”

Parker Miller, a Principal in the firm’s Personal Injury and Products Liability Section, was elected Secretary of AAJ’s Products Liability Section.

Leslie Pescia, an Associate in the firm’s Consumer Fraud & Commercial Litigation Section, was named an AAJ New Lawyer’s Division Star and was featured in The Sidebar magazine. She also participated in Cradles to Crayons service project, held the day before the convention starts. Cradles to Crayons is a non-profit organization that provides supplies for homeless and low-income children. Leslie and other volunteers sorted through clothing donations and made “kids packs,” which are packs that contain multiple outfits, pajamas, socks, and underwear for each child.

Danielle Ward Mason and Leigh O’Dell, were featured speakers for CLE programs and presented on very important topics:

Danielle Mason spoke on the topic “When Bad Products Target Minority Communities” at the Minority Caucus’ CLE/ Talcum Powder/Ovarian Cancer Litigation Group update CLE. Danielle is one of the lawyers leading our firm’s efforts against Johnson & Johnson as part of the Talcum Powder Ovarian Cancer Litigation Team.

Leigh O’Dell made a presentation at the Talcum Powder/Ovarian Cancer Litigation Group CLE. Leigh was recently selected to serve as co-lead counsel for consolidated multidistrict litigation (MDL) in New Jersey federal court concerning talcum powder’s link to ovarian cancer. It is estimated that 14,000 women die from talc-related ovarian cancer each year. One medical expert calculates that this use of talcum powder leads to nearly 10 percent of the new ovarian cancer cases reported annually. More than 70 cases are pending in the MDL.

THE COOPER FIRM AND BEASLEY ALLEN SPONSOR COBB COUNTY BAR ASSOCIATION CLE

Beasley Allen, expanding its outreach from its Atlanta office, joined with The Cooper Firm to host the Cobb County Trial Lawyers and Business Law & Litigation CLE on Sept. 22. The event, presented by the Cobb County Bar Association, was held at the Cobb Superior Courthouse.

Presentations during the day-long event included a Welcome and Introduction by Lance Cooper of The Cooper Firm, and a presentation titled Reading the Signs: Spotting a Potential Product Liability Case presented by Beasley Allen lawyer Chris Glover. Closing remarks were delivered by Drew Ashby of The Cooper Firm.

Following the Cobb County CLE event, The Cooper Firm and Beasley Allen sponsored a cocktail reception for attendees at The Strand. This provided Georgia lawyers with an opportunity to network with colleagues and enjoy making connections.

For more information about Beasley Allen’s Atlanta office, contact Chris Glover at 800-898-2034 or by email at Chris.Glover@beasleyallen.com.

XXI. SPECIAL RECOGNITIONS

THE THIRD ANNUAL NATIONAL NIGHT OUT

For the third year, Beasley Allen will host a tire safety event during the Prattville Police Department National Night Out event. This year the event will be held on Tuesday, Oct. 3 in the Target shopping center. Apreill Hartsfield with our firm will be on hand to explain the importance of tire safety, specifically the DOT (Department of Transportation) numbers found on tires. This number is important because it tells you when your tire was manufactured so that you can track when it should be taken off the road.

Several law enforcement agencies from around the River Region will participate, along with Crime Stoppers and other area businesses. Well over 2,000 people attended last year’s event. There were activities for the children and food for the whole family.

More information about tire safety is available on our website at <http://www.beasleyallen.com/practice/personal-injury-and-product-liability/defective-automotive-products/tires/>. If you need more information, contact Helen Taylor at 800-898-2034 or by email at Helen.Taylor@beasleyallen.com.

XXII. THE MYTHBUSTER SERIES

A CAREFULLY ORCHESTRATED MYTH: LAWSUITS ARE BAD FOR BUSINESS

Tort reform has become the motto for many businesses and the U.S. Chamber of Commerce. If you are only measuring bottom lines, in some cases lawsuits are bad for business. However, there are prime examples of how lawsuits made businesses or even industries better—and their customers safer because of them. The automobile industry is one such industry. In 1970, 54,633 Americans were killed in motor vehicle accidents. The population of the United States at the time was 203 million. Twenty five years later the population had grown by 28 percent and the number of vehicles on the road had increased by 86 percent. Yet, by 1995 the number of Americans killed in auto accidents had decreased to 43,363.

This significant improvement is likely the result of many factors, but one must be significant safety improvements made in cars. The safety improvements result from more effective regulation by the federal government by way of the National Highway Traffic Safety Administration (NHTSA) and because of the influence of civil juries. One case stands out and it involves how Ford was forced to make safer products after the Bronco II litigation.

The Bronco II was introduced in 1983 and 700,000 were produced before it was replaced by the Explorer in 1989. By 1989 NHTSA had instituted an investigation about a large number of rollovers. *Consumer Reports* testing made it say consumers should not buy the vehicle. However, NHTSA closed its investigation after receiving Ford’s submission and without questioning Ford’s employees or officials. In lawsuits years later, it was dis-

covered Ford had not submitted all relevant documents to NHTSA. It was learned Ford rushed the Bronco II to market to compete with the Chevy S-10 SUV.

It's quite probable that Ford knew before it ever built a Bronco II that it would have a rollover problem since it was based on the CJ-7. The CJ-7 had been under investigation for rollovers. Ford even learned in its own testing that the Bronco II was susceptible to rollovers during lane changes and routine avoidance maneuvers. Ford even suspended testing because it feared for the safety of its test drivers. In one deposition, a Ford official admitted to deliberately hiding some of the rollover test results from NHTSA.

NHTSA did nothing to Ford even after it learned Ford had withheld information. This does not work in private litigation. Later, some former NHTSA employees were hired by Ford to be experts in the litigation. NHTSA decided against ordering a recall of the Bronco II. That same year the Bronco II was replaced with the Explorer. While the Bronco II story was special, there were several other SUVs that had the same rollover problem during that time.

This story mirrors others about the Corvair, Pinto and GM pickup trucks with side mounted gas tanks. As a result of lawsuits these vehicles have become safer. Litigation is only one prong in our system that makes products safer. Citizen organizations such as the Center for Auto Safety and Mothers Against Drunk Driving (MADD), and the media can help bring change and safer products. Lawsuits brought by individuals or families involving deaths in accidents all have helped automobile manufacturers become better at what they are intended to do—provide customers with a safe vehicle to travel in.

While companies are making safer automobiles, the battles continue. GM ignition switch lawsuits, the Toyota unintended acceleration cases and the Volkswagen/Porsche “cheat device” litigations are all more recent examples of why the judicial system and civil juries must continue to be a force in bringing about corporate change and thus safer product change to make these companies better corporate citizens.

If you need more information on this subject, contact Frank Woodson, Presi-

dent of ALAJ, at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com.

Source: *Why Lawsuits are Good for America*. Carl Bogus

XXIII. FAVORITE BIBLE VERSES

Chris Glover, a lawyer in our firm's Atlanta office, furnished verses for this issue. He says these two verses came to him one morning when a dear friend and member of our firm was facing a very difficult situation. Chris says we should always look at difficulty in life “through the lens of faith knowing that it works its good in us and in those with whom God had destined us to share life with.” In the end, Chris says that God is glorified through it all.

Consider it pure joy, my brothers and sisters, whenever you face trials of many kinds because you know that the testing of your faith produces perseverance. James 1:2-3

Blessed is the one who perseveres under trial because, having stood the test, that person will receive the crown of life that the Lord has promised to those who love him. James 1:12

LaSheryl Dotch, a law clerk in our Mass Torts Section, sent in a verse this month. She says it is her daily reminder that no weapons formed against her shall prosper.

Because he hath set his love upon me, therefore will I deliver him: I will set him on high, because he hath known my name. He shall call upon me, and I will answer: I will be with him in trouble; I will deliver him, and honour him. With long life will I satisfy him, and shew him my salvation. Psalms 91:14-16 KJV

LaBarron Boone, a lawyer in our Personal Injury & Products Liability Section, also sent in four verses this month. He says “in the midst of change, chaos and a world full of evil we all have choices. The one and only constant in this fallen World is our Lord and Savior Jesus Christ. Christ will meet all our needs if we trust in him.

My hope and prayer is that everyone will experience the peace and serenity available through Christ Jesus! All we have to do is choose to be a “child of God.” He added: “If you have not accepted Jesus Christ as your savior, then today, I pray you choose to be a part of the Family of Jesus Christ.” LaBarron says these verses have helped him and he believes they will help you.

*And my God will meet all your needs according to the riches of his glory in Christ Jesus. Philip-
pians 4:19 -*

*“But seek first his kingdom and his righteousness, and all these things will be given to you as well.”
Matthew 6:33*

“For I know the plans I have for you,” declares the Lord, “plans to prosper you and not to harm you, plans to give you hope and a future.” Jeremiah 29:11

“Many are the plans in a person's heart, but it is the Lord's purpose that prevails.” Proverbs 19:21

Navan Ward Jr., a lawyer in our firm who is also in our Atlanta office, sent in two verses for this issue.

Navan and his family moved to Atlanta. He says Hebrews 8:5 is a great reminder of how much God loves us, no matter how terrible we are, no matter how undeserving we are. He says God's promise to always have our back and never leave us is truly comforting.

Let your character or moral disposition be free from love of money [including greed, avarice, lust, and craving for earthly possessions] and be satisfied with your present [circumstances and with what you have]; for He [God] Himself has said, I will not in any way fail you nor give up nor leave you without support. [I will] not, [I will] not, [I will] not in any degree leave you helpless nor forsake nor let [you] down (relax My hold on you)! Hebrews 8:5

What shall we say to all of this? If God is for us, who [can be] against us [Who can be our foe, if God is on our side]. Romans 8:31

Navan says Romans 8:31 is his anthem of encouragement whenever he is facing a difficult situation personally or professionally. Truly believing this allows him to have the confidence and courage to not only withstand challenges, but also to thoroughly defeat them because he has God on his side.

XXIV. CLOSING OBSERVATIONS

THE LEGACY OF JUSTICE JANIE L. SHORES

“Trail-blazer,” “Role Model,” “Icon,” “Mentor,” “Legend” and “Heroine.” These are just a few words that have been used to describe the legacy of Justice Janie L. Shores’. But no words can truly describe this woman’s lasting impact on the legal profession and on women, not just in the State of Alabama, but nationally.

Justice Shores attended Judson College, a women’s college, from 1954-1956, earning pre-law credits before entering the Law School at the University of Alabama. Her class at the law school contained only four other female students. Yet, she excelled while there and served as Editor of the *Alabama Law Review*, graduating with honors in 1959.

Justice Shores worked as a legal secretary before law school and learned short hand dictation. This remarkable trail-blazer told *Litigation and Commentary Review*:

I had a real advantage when I finally got to law school. I did know how to take dictation and I took down every word the professors uttered, typed them up and studied them for the exams. I think I made good grades because I often answered the questions using the professor’s own words.

Justice Shores’ notes and outlines at the School of Law were legendary. For years after she graduated, countless students insisted that they succeeded in law school primarily because they relied on “the Jamie Shores notes.” I followed her in law school and heard many stories about how very, very smart this woman was. I actually used her summaries and fall into the category mentioned above.

Justice Shores became the first female law school professor in the state of Alabama, and one of the first in the South, when she became a professor at Cumberland School of Law at Samford University in 1965. In 1972, Justice Shores first ran for the Alabama Supreme Court, but lost in large part due to racial prejudices. In an interview, Justice Shores stated:

Race played a role in my race for other reasons as well. The Faulkner who was my opponent was a member of the so-called Sovereignty Commission, which like the White Citizens Council, had been formed to resist integration of the schools. His supporters spread the rumor that I was the wife of Arthur Shores, a prominent Black Birmingham lawyer whose home had been bombed more than once by anti-integration forces.

However, in 1974, Justice Shores ran again and won a seat on the Supreme Court of Alabama as a Democrat, becoming the first woman ever to be elected to that court. “I hope it has now been demonstrated that women can hold these positions and can be elected in Alabama, and I hope I have had some small part in letting women know to do that is possible,” she told the *Birmingham News* in an article that was published on March 29, 1975. She was the first woman ever elected to any appellate judicial post in the United States. Since braving those new frontiers, a full 30 percent of the United States’ appellate jurists are now women.

Justice Shores served with distinction on the Supreme Court of Alabama for 25 years. She participated in decisions of the Court that now shape the way people live and work in Alabama. Her influence has been, and will be, felt for generations.

My friend Howell Heflin, who served as Chief Justice of the Alabama Supreme Court and later as a U.S. Senator, called Justice Shores a “trail-blazer, a role model, a legend, and yes, a heroine,” in a 2002 speech to the Women’s Division of the Alabama State Bar.

In 1993, Howell recommended Justice Shores to President Bill Clinton for U.S. Supreme Court nomination, and she joined the shortlist of candidates for nomination. Even though Clinton ultimately nominated Ruth Bader Ginsberg for the seat, he appointed Justice Shores to the

State Justice Institute, a private nonprofit entity focused on improving the administration and quality of state courts.

“During the time she served on the Court,” Howell said, “Janie never lost sight of the fact that she should eliminate barriers to equal opportunity for women.” Justice Shores accomplished much toward eliminating those barriers in her career, but she also took time to encourage and inspire young women in other ways. Howell credited Justice Shores with the success of “thousands of women who have profited by the doors she has opened, and helped keep open, in a male-dominated profession.”

There have been many tributes posted online to Justice Shores. One accomplished female lawyer stated: “Justice Shores inspired women to go to law school and to become appellate judges. She certainly paved the way for me. The State lost an icon today.” Another stated: “She was and remains my ideal of a female lawyer and jurist. . . . I admired her remarkable combination of wit, dedication to justice and ability to nail an issue head on without reservation.”

Judson College wrote a thoughtful remembrance to Justice Shores:

Today Judson finds great inspiration in the legacy of Justice Janie L. Shores, who “came before” many young women in legal professions in the state of Alabama... We are reminded that “mak[ing] the world a better place” is something that we all can and must do, and that our labor is for “all who come behind us.”

This is the legacy of Justice Shores, one that will never be forgotten, and it has influenced many people over the years in a positive manner. She was a great lawyer, a great judge, and an even greater person. Alabama is better because this woman—Justice Jamie L. Shores—came our way.

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 bear 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

XXV. PARTING WORDS

The Rule of Law is more important in Alabama today than perhaps ever before. For that reason, I thought it necessary to write on the subject in this issue. It's

essential to understand the importance of the Rule of Law for all Americans. The jury is an important part of the American judicial system; it guarantees the Rule of Law will prevail. I have written previously about the importance of the jury system in this country.

The jury box is the one place where political influence from powerful interests cannot control an outcome. We constantly see how powerful special interest groups virtually control our government. That is especially true with agencies that have the mandated responsibility to protect consumers - to make sure to the extent possible that products are safe for their intended use—to see that the advertising of products is truthful, and to assure that business relations are fair and just between all parties.

We are a nation that depends on the Rule of Law for its very existence. Further, as Professor Ronald Cass, author of "The Rule of Law in America," points out:

The nature of the judicial system is critical to the Rule of Law. Impartial judges, governed by clear legal rules, committed to enforcing the rules as written, independent of political influence are essential if law is to be a reliable guide to individuals and a constraint on those in power.

The jury system is tremendously important in making sure that the laws are fairly and justly enforced.

The long-established concept behind the Rule of Law can again be found in our own Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed....

Without any doubt the right to trial by jury is one of our most important constitutional rights. I learned long ago that lots of folks believed the U.S. Constitution guaranteed a trial by jury only in criminal cases. However, that is not the case. The right to trial by jury in civil cases is also guaranteed by the very same constitution. The Seventh Amendment to the Constitution gives citizens the right to a jury trial in "suits at common law, where the value in controversy shall exceed twenty dollars."

There should be little debate over the fact that the right to a jury trial is a very important one. In fact, Thomas Jefferson, who believed strongly on the subject, said, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Clearly, the right to trial by jury is an essential safeguard for a free society. With that being said, why has the civil jury system in the U.S. been under constant attack?

I know from experience that juries have made a real difference for ordinary citizens. The public welfare has been well served by the civil jury system. Our judicial system is the one part in our system of government that, when it works as intended, helps to keep our nation strong and free and guarantees liberty and justice for all of our people.

Lawyers and judges are an essential and critically important part of the system. It is absolutely necessary for each of us who are in the system to do our jobs well and in the right way. I am very proud and also humbled to be a part of the judicial system. It is a system for which I have great respect. The Rule of Law is the bedrock of our Democracy and it must be upheld at all cost.

My prayer today is simply for the preservation of the civil justice system in this country. It's the place where people should be able to go to settle disputes that can't be otherwise resolved. We must all work to make the system free, independent and accessible to all.

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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.



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