I. **CAPITOL OBSERVATIONS**

**The Blue Cross Blue Shield Antitrust Case**

A federal judge in Alabama has given the green light for an antitrust case against Blue Cross Blue Shield to go forward. The lawsuit, filed in 2013 by providers (hospitals, doctors and other health care centers) and subscribers (policyholders), alleges that the national insurance heavyweight violated antitrust laws when it divided its service areas. U.S. District Judge David Proctor ruled that there is evidence to support the Plaintiffs’ claims, allowing the case to move forward so that the court can further evaluate the issue.

The case is divided into two tracts, one for providers and one for subscribers. Beasley Allen lawyers Dee Miles, who is head of the firm’s Consumer Fraud & Commercial Litigation Section, Archie Grubb, Leslie Pescia and Chris Baldwin were chosen to develop the provider side of the case for trial. This historic and favorable ruling by Judge Proctor relates to how the case will be tried as it moves forward.

The monumental antitrust ruling by Judge Proctor is one of the most positive steps forward we have witnessed in market misconduct cases in decades. This ruling will undoubtedly bring long-needed fairness to health insurance markets in this country.

The case involves 36 Blue Cross plans and at the heart of the case is whether an agreement among the different plans to provide service based on geography is legal. The Plans agree to provide health insurance coverage to subscribers within a certain geographic location and agree not to compete. Some of the plans have large overlapping coverage areas, including California, Idaho, New York, Pennsylvania, Washington and Oregon.

Providers claim that Blue Cross is using its size and market power to drive out the competition and keep doctor and other medical organizations reimbursements low. Subscribers claim the arrangement could drive up premiums.

More than 100 million people nationwide are covered by Blue Cross Blue Shield plans. One of the key plans involved in the suit is Blue Cross Blue Shield of Alabama, which holds the largest market share of any state in the country. An analysis by the American Medical Association shows the state is the least competitive when it comes to health insurance.

This is the largest antitrust case in U.S. history and it could go to trial next summer. Judge Proctor must first decide if the case can proceed as a class action. Not only is the case one of the largest, it may well be one of the most important and different cases ever. If you need more information, contact Dee Miles at 800-898-2034 or by email at Dee.Miles@beasley-allen.com.

Source: AL.com

II. **THE JOHNSON & JOHNSON DEBACLE**

**Johnson & Johnson Puts Profits Ahead of People**

Johnson & Johnson makes tens of billions of dollars each year based on the reputation of a trusted, family company. However, if actions speak louder than words, Johnson & Johnson’s actions show that the company cares more about the bottom line than its patients and consumers.

**Johnson’s Baby Powder & Shower to Show**

Since 1982, numerous case-control epidemiological studies, including six meta-analyses and one pooled study, consistently show a 30-60 percent increased risk of ovarian cancer with perineal talcum powder use.

In 1982, in a peer-reviewed study published in the journal *Cancer*, Dr. Daniel Cramer of Harvard University warned Johnson & Johnson that women using its talcum powder products for feminine hygiene were putting themselves at an increased risk of ovarian cancer. Despite the publication of multiple, credible scientific studies through the decades, J&J continued to promote its baby powder product for use by adult women. Dr. Cramer now estimates that 10-11 percent of new ovarian cancer diagnoses are attributable to genital talcum powder use. More than 7,500 lawsuits have been filed by women who have been diagnosed with or on behalf of women who have died from ovarian cancer after using talcum powder for feminine hygiene. Internal J&J documents introduced at trials indicate that the company has known about the link between talc and ovarian cancer since at least the 1960s.

**Xarelto**

More than 20,000 lawsuits are pending against Johnson & Johnson’s Janssen Pharmaceuticals by Plaintiffs who suffered catastrophic, and in some cases fatal, internal bleeding events while using Xarelto. J&J has failed to appropriately warn patients and doctors that Xarelto carries a higher risk of severe bleeding events, and that there is no antidote to reverse its effects. J&J has also concealed the facts about simple blood tests that could greatly improve the safety of treatment with Xarelto.
**Opioids**

Johnson & Johnson, along with other manufacturers and distributors, has been named as a Defendant in lawsuits filed by cities, counties and states across the nation alleging that the opioid crisis was caused by its deceptive marketing practices. These suits allege that J&J’s overzealous marketing campaign flooded the market with prescription painkillers, fueling an epidemic of addiction and causing governments to spend millions of dollars on substance abuse treatment programs, hospital services, emergency medical services, and law enforcement.

**Invokana**

Invokana was approved in 2013 as the first in a new class of Type 2 Diabetes drugs called SGLT2 inhibitors. Within two years, more than 100 patients reported suffering acute kidney injury while taking Invokana. Last year, results from an FDA-mandated clinical trial showed that Invokana doubled the risk of leg and foot amputations compared with placebo—even in patients with no risk factors for amputation. More than 1,000 cases are currently pending in the Invokana Multidistrict Litigation.

**SmartSet HV Bone Cement**

Johnson & Johnson’s DePuy SmartSet HV bone cement, used during knee replacement surgeries, boasts shorter mixing and waiting times and longer working and hardening phases, meaning surgeons can handle and apply the cement earlier than with low- or medium-viscosity cements. However, that convenience comes at a cost. There is mounting evidence that the bond that Smartset HV produces is not as strong. Researchers have observed more early failures with the use of high-viscosity cement, even when used with a previously well-performing implant.

**Power Morcellator**

J&J’s Ethicon unit produced the power morcellator for use in laparoscopy hysterectomy and myomectomy procedures. The device was designed to divide the tissue into small fragments inside the body, allowing them to be removed through a small incision. The problem is that if any of the tissue is cancerous, the morcellator essentially sprays those cells throughout the abdomen and pelvis. In 2014, the FDA warned that 1 in 350 women who undergo a hysterectomy may have undiagnosed uterine cancer. Before the FDA warning in 2014, more than 50,000 hysterectomies were performed each year using the power morcellator.

**Risperdal**

From the time it was approved, Johnson & Johnson subsidiary Janssen Pharmaceuticals knew that Risperdal had a greater risk for gynecomastia (enlarged breasts in males) than other drugs in its class. Despite this risk, J&J promoted its atypical antipsychotic for use in children for several years prior to being approved for pediatric use. As a result, thousands of men and boys have filed lawsuits against J&K, alleging that they developed gynecomastia after taking Risperdal.

**Metal-on-Metal Hips**

Johnson & Johnson’s DePuy Orthopaedics has had troubles with multiple metal-on-metal hip implants. J&J recalled the DePuy ASR XL Acetabular System and DePuy ASR Hip Resurfacing system in August 2010 because they were more than twice as likely to fail within five years as the average hip implant. One in eight patients who received one of the recalled hip replacements required revision surgery within five years. J&J paid more than $2.5 billion to resolve just over 10,000 DePuy ASR lawsuits beginning in 2013. Meanwhile, J&J is still litigating cases involving its Pinnacle hip implant, even after three juries have returned verdicts totaling nearly $1.75 billion in damages after hearing the evidence against J&J. There are approximately 9,000 more Pinnacle plaintiffs waiting for their day in court.

**DePuy ATTUNE Knee System**

Despite the overall high success rate in knee replacement surgeries, researchers have identified larger-than-usual failure rates with the DePuy Synthes ATTUNE Knee System. Problems with ATTUNE include loosening of the tibial component at the implant-cement interface within the first two years after implant. Once this implant fails, patients must undergo a second painful knee replacement surgery. Injured patients around the country are beginning to bring lawsuits against Johnson & Johnson and DePuy for the pain and disability caused by this device.

**Transvaginal Mesh**

J&J’s Ethicon transvaginal mesh products bypassed rigorous FDA approval and were put on the market without any product testing. Despite studies indicating complications such as pain, dyspareunia, tissue erosion, product shrinkage, degradation and contraction, and inflammatory and fibrotic reactions to the mesh, Ethicon did not warn physicians or patients of many of these risks, nor did they test or modify their products. Studies report the complication rate of slings implanted for stress urinary incontinence to range from 4.5 to 75.1 percent, depending on sling type and manufacturer. More than 100,000 transvaginal mesh lawsuits have been filed, with Johnson & Johnson/Ethicon facing more than any other manufacturer. Thus far, Plaintiffs have been favored in more than 10 jury trials, with the latest being an award of $35 million in March 2018.

**A long line of product failures**

Those listed above are just Johnson & Johnson’s most notable recent failures. This list could go on and on: insulin pumps vulnerable to hacking; heart catheterization devices recalled; Levaquin and tendon ruptures; Topamax and birth defects; Tylenol liver failure; Stelara and cancer; and defective artificial spine discs, to name a few.

How many more juries will have to return verdicts against J&J? How many more innocent victims will be killed or injured? When will the federal government say enough is enough and get involved? The American people demand answers!

**III. Opioids Litigation**

**An update on the opioid MDL**

In April, U.S. District Judge Dan Aaron Polster, the Ohio federal judge presiding over the opioid multidistrict litigation (MDL), overruled objections of the U.S. Drug Enforcement Administration (DEA) to providing detailed data of opioid sales. The DEA sought to limit the amount of detail regarding specific transactions of opioid sales and shipments in individual states. Judge Polster stated in overruling the DEA’s objection that “[d]iscovery of
precisely which manufacturers sent which drugs to which distributors, and which distributors sent which drugs to which pharmacies and doctors, is critical not only to all of plaintiffs' claims, but also to the Court’s understanding of the width and depth of this litigation.” The initial data release that occurred in April includes the cumulative amount of prescription opiate pills sold and the market shares of each manufacturer and distributor for the states of Ohio, West Virginia, Illinois, Alabama, Michigan and Florida. This data will further help the lawyers involved in the litigation to identify defendants and to allocate damages.

Judge Polster also entered the first case management order in the litigation in April. The order establishes briefing and litigation tracks for a limited number of state, county and city cases in order to address threshold legal issues through motion filings that may assist in ongoing settlement negotiations and to prepare test cases for trial in the event that settlement does not occur. The court selected cases that represent a variety of jurisdictions, plaintiffs, defendants and issues. The State of Alabama, the Counties of Summit Ohio, Cabell West Virginia, Monroe, Michigan and Broward, Florida and the City of Chicago were selected by the court to participate in briefing motions to dismiss, while the Counties of Summit and Cuyahoga, Ohio and the City of Cleveland were selected to conduct discovery and prepare their cases for trial tentatively scheduled to occur in March, 2019. The Court will also select representative test cases for States, Indian Tribes, Hospitals and Third-Party Payors in the future.

Although Judge Polster has ordered that some litigation will now take place, he has directed three special masters appointed to facilitate settlement talks to continue negotiations. Judge Polster has set an open status conference in May which will be followed by another settlement conference.

The lawsuits consolidated in the opioid have generally accused the drugmakers of deceptively marketing opioids and allege distributors ignored red flags indicating the painkillers were being diverted for improper uses. The case is In re: National Prescription Opiate Litigation in the U.S. District Court for the Northern District of Ohio.

Our firm has filed lawsuits on behalf of governmental entities against opioid manufacturers and distributors. Beasley Allen is investigating other opioid cases on behalf of governmental entities. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, Ryan Kral, Will Sutton, or Jeff Price lawyers in our firm’s Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, Ryan.Kral@beasleyallen.com, William.Sutton@beasleyallen.com; or Jeff.Price@beasleyallen.com.

**Major Insurer Changing Its Opioid Prescription Policies**

Blue Cross Blue Shield of Alabama has implemented a new plan to help decrease the potential misuse of opioid medications by its members. The following requirements took effect on April 1:

- Members will be limited to a seven-day supply in their first prescription of short-acting opioids. If the initial prescription is needed for more than seven days, members may request that their doctor complete a one-time Prior Authorization. These opioids include Lortab, Vicodin and Percocet.

- Members will be required to obtain a Prior Authorization for all first-time prescriptions for long-acting opioid medications, such as OxyContin and MS Contin.

Naloxone, the antidote for an opioid overdose, will be available to most members who pay the generic copay. The antidote, which will be available in pre-filled syringes and nasal spray, replaces Evzio, an auto-injector antidote, which is has increased drastically in prices over the past couple of years.

Blue Cross maintains control of 90 percent of Alabama’s health insurance market, so the requirements have the potential to positively impact the opioid epidemic plaguing the state. In 2015, Alabama had the highest per capita rate of opioid prescriptions and 282 people lost their lives.

Source: WSFA12

**How Prescription Opioids Led To A Heroin Crisis**

A new academic paper from economists at the University of Notre Dame and Boston University concludes that the opioid epidemic was caused, in large part, by the expiration of the patent for OxyContin in 2010. In 2010, OxyContin was the manufacturer’s major product, and it could not afford to compete with generic versions of OxyContin. So Purdue reformulated the drug, effectively extending the time it had the exclusive right to produce OxyContin. This new formulation was more expensive, but was claimed to be safer, because it was more difficult to crush into a powder. At the same time, the company asked the FDA to block approval of the predecessor version of OxyContin, claiming it was unsafe. Not surprisingly, the FDA obliged.

At around the same time, overdoses from heroin, fentanyl or a cocktail of the two began to skyrocket. The new formulation being more expensive and less effective for addicted individuals, those individuals substituted out OxyContin for the cheaper but more dangerous street drug.

OxyContin is highly addictive. The older formulation, ostensibly designed to offer pain relief over a 12-hour timeframe, often left addicted individuals craving more. Users would accelerate the time between doses, or crush the pill for faster absorption into the bloodstream. The new, higher price prevented the former, and the new formulation prevented the latter. When crushed, the pill would turn to goo rather than powder.

So users, unable to control their urges, turned to street drugs. In the past decade, heroin use among 18-25-year-olds has doubled. Heroin-related overdose deaths have increased by a factor of five from 2010 to 2016, and by 20 percent from 2015 to 2016.

The economists from Notre Dame and Boston University were able to pinpoint exactly where this trend began. The evidence is striking. The new formulation, introduced in 2010, led to a plateau in OxyContin-related overdose deaths; at the same time, heroin related deaths skyrocketed. Approximately 15,500 people died from heroin overdoses in the U.S. in 2016; 14,400 died from prescription opioid overdoses. Purdue changed its formulation to prevent generic versions from hurting Purdue’s bottom line, and thousands more have died as a consequence. If you need more information, contact Jeff Price at 800-898-2034 or by email at Jeff.Price@beasleyallen.com.

Sources: DailyBeast.com; Vox.com

**Beasley Allen Opioid Litigation Team**

Beasley Allen lawyers are investigating other opioid cases on behalf of governmental entities and individuals. If you have any questions about this subject, contact Rhon Jones, LaBarron Boone, Rick Stratton, Ryan Kral, Will Sutton, or Jeff Price, all lawyers on our firm’s Opioid Litigation Team, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, LaBarron. Boone@beasleyallen.com, Rick.Stratton@beasleyallen.com, Ryan.Kral@beasleyallen.com.
IV. AUTOMOBILE NEWS OF NOTE

FIAT CHRYSLER AND DOJ EMISSIONS SETTLEMENT TALKS MOVING AHEAD

Special master Kenneth Feinberg has told the California federal judge who is overseeing multidistrict litigation (MDL) over claims that Fiat Chrysler installed emissions-cheating devices in its vehicles that settlement talks with the federal government and the California Air Resources Board (CARB) are moving forward at a rapid pace. Feinberg told U.S. District Judge Edward M. Chen that FCA US LLC’s ongoing discussions with California and the U.S. Department of Justice (DOJ) are proceeding at “a rather swift pace.” He said the parties have been “extremely cooperative” in an effort to reach a comprehensive settlement. Feinberg told the judge:

Overall, I give all of the parties a high grade for trying to move this forward. Totally cooperative in that sense. And it’s a settlement negotiation in progress.

According to Fiat Chrysler there are regulatory issues related to the settlement agreements that still need to be worked out. There is a projected date for a “summer” settlement. Plaintiff steering committee chair Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein LLP said that while the Plaintiffs—Fiat Chrysler car owners—haven’t had access to draft settlement documents, they have sent a proposal regarding their needs and interests, mostly related to car performance and warranties, to the carmaker, the DOJ and the California attorney general. Elizabeth stated:

We also just want to make sure, as settlement discussions progress, that particularly with respect to warranties and other real world protections, those reflect how these vehicles are driven and used, and the consumer expectations of these vehicles in the real world. And it will matter as to the success or failure of any resolution.

The DOJ began investigating Fiat Chrysler two months after the U.S. Environmental Protection Agency (EPA) accused it in January 2017 of secretly installing engine software that allowed about 104,000 Jeep Grand Cherokee and Dodge Ram trucks to produce excessive amounts of nitrogen oxide.

The EPA announced at that time it had notified Fiat Chrysler that the automaker had failed to disclose that the “auxiliary emission control devices,” or AEDCs, were built into 3-liter EcoDiesel-powered Jeep Grand Cherokee and Dodge Ram 1500 vehicles. The AEDCs shut off portions of the emissions control system, allowing excess nitrogen oxide to escape the vehicles. In June, the U.S. Judicial Panel on Multidistrict Litigation sent the DOJ’s lawsuit from Michigan to the MDL in California federal court because the claims “mirrored” suits there.

Fiat Chrysler says it anticipates testing on a proposed emissions software fix by the end of June. The federal government and the state of California will then carry out analyses of the testing, according to Leigh P. Rende of the DOJ. Judge Chen set a hearing date for June 1 for a status update.

The Plaintiffs are represented by lead counsel Elizabeth Cabraser along with a number of very good lawyers. Dee Miles from our firm is one of the lawyers. The case is In re: Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices and Products Liability Litigation (case number 3:17-md-02777) in the U.S. District Court for the Northern District of California.

Source: Law360.com

UBER SETTLES QUICKLY WITH FAMILY OF AUTONOMOUS COLLISION VICTIM

Uber Technologies has settled with the family of the woman who was killed in the autonomous vehicle accident in Tempe, Arizona. The terms of the settlement were confidential and the family will have no comment about the matter. Without a doubt, Uber worked hard to settle the case quickly in an attempt to avoid more attention to the incident by the media and safety advocates.

As we reported last month, on the night of March 18, the Uber autonomous Volvo SUV struck and killed a 49-year-old woman who was walking a bicycle across a street in Tempe. Safety experts told The Associated Press that the SUV’s laser and radar sensors should have spotted the woman and that the vehicle should have stopped before hitting her.

Immediately after the crash, Uber suspended its autonomous vehicle testing in Arizona, as well as California, Pittsburgh and Toronto. The company said in a statement that it decided not to reapply for the California permit “with the understanding that our self-driving vehicles would not operate in the state in the immediate future.” The video image inside the car involved in the Tempe incident from a mounted camera shows an interior view moments before an Uber SUV hit the woman. This video was provided by the Tempe Police Department. The video showed that the SUV’s human backup driver was looking down before the crash and obviously had a stunned look when the crash happened. The Uber crash was investigated by Tempe police, as well as the National Transportation Safety Board and the National Highway Traffic Safety Administration.

The fatality in Tempe has caused a great deal of concern in the technology and automobile industries, with companies such as Toyota and NVIDIA suspending their autonomous vehicle tests on public roads. NVIDIA’s fleet is small in California. Uber made a quick decision to settle with the victim’s family, but I don’t believe that will stop further scrutiny of the autonomous car development.

UNCERTAINTY SURROUNDS AUTONOMOUS CAR DEBATES

As investigators piece together what caused the pair of fatal Uber and Tesla self-driving car accidents last month, including the one discussed above, many industry observers say it’s increasingly difficult to gauge whether federal or state regulators will restrict the autonomous car testing on city streets. Recent weeks have marked an inflection point for some autonomous car developers. It’s quite evident that the developers have definitely slowed the pace down in the race to be the first out with a fully self-driving car in the United States. These two incidents involving deaths had to be the primary reason for the slow down.

According to industry observers, regulators are trying to figure out how to adequately set parameters for safety without slowing down the technology. The National Highway Traffic Safety Administration (NHTSA) has federal guidelines for designing and building the cars. However, transportation and motor vehicle departments at the state level are setting the rules for testing and operating them. There doesn’t appear to be a real coordinated plan that requires cooperation between the states and the federal government.

I believe the states should move with extreme caution with their rollout of this new technology. In addition to the Tempe fatality, the driver of a Tesla Model X operating in Autopilot mode died after crashing into a northern California highway barrier on March 23. It is believed by a good
number of lawyers that any potential new regulatory implications from the Uber and Tesla self-driving car accidents will rest on what investigators find out from the crashes. Todd Benoff, a lawyer with Alston & Bird, observed:

"The root cause of each accident will drive how regulators respond. At the state level, it is possible that the rules governing how self-driving cars are tested could change. The federal level remains a black box. NHTSA is currently working on updated guidelines, but has kept those cards close to its vest."

In addition to Uber suspending its self-driving car tests in multiple U.S. cities and Canada after its accident, others have also halted their testing. For example, NVIDIA Corporation, the technology titan known for making computer graphics cards that has developed an autonomous vehicle platform, suspended self-driving car tests. Toyota Motor Corp. also halted testing autonomous cars on public roads in certain U.S. cities.

Other than Arizona ordering Uber to pull its tests in the state, which it had already done, there doesn’t appear to be an immediate regulatory crackdown. Self-driving car technology is a reality. However, the questions relating to safety are also with us as evidenced by the recent fatalities. Transparent safety standards must be developed based on testing, simulation and good engineering practices.

V. DRUG MANUFACTURERS FRAUD LITIGATION

IMPAX SETTLES A $20 MILLION PAY-FOR-DELAY LAWSUIT OVER ITS ACNE DRUG

Pharmaceutical giant Impax Laboratories, Inc. recently settled with a class of consumers and insurers for $20 million midtrial, bringing an end to its “pay-for-delay” litigation after more than three weeks of testimony before a Boston, Massachusetts jury. The litigation was pending in federal court where Impax was facing allegations that it delayed the launch of its generic acne medication in exchange for a $40 million payment. In these “pay-for-delay” agreements, a brand-name drug company and a generic rival locked in patent litigation reach a settlement. Historically, the brand-name drug company may offer cash or something else of value to the generic drug company and, in return, gains more time to sell its brand-name drug without encountering lower-cost generic competition. The generic drug maker, meanwhile, also comes away with a large payment and an agreement to sell its generic equivalent at a specified future date.

Here, the class of consumers and insurers claimed Impax entered into a “pay-for-delay” agreement in 2008 with brand-name drug company Medicis Pharmaceutical Corp, whereby Impax agreed to wait three years before launching its generic version of Solodyn in exchange for a $40 million payment from Medicis. The complaint also alleges that Medicis agreed to enter into a license agreement and joint development agreement with Impax in exchange for the delay. The class Plaintiffs allege that Impax could have gone to market with the generic acne medication in early 2009, but as a result of the “pay-for-delay” agreement with Medicis, the generic Solodyn was not introduced to the market until late 2011.

This case was consolidated in Massachusetts federal court in early 2014 after a host of suits were filed targeting Medicis’s settlements for its brand acne medication. Earlier this year, Impax entered into a $35 million settlement with direct purchaser class representatives Ahold USA Inc. and Rochester Drug Co-Operative Inc. over the same allegations.

These “pay-for-delay” agreements have raised antitrust concerns for years now. The Federal Trade Commission has estimated that these deals cost Americans $3.5 billion annually in higher health care costs. Challenging drug makers over these anticompetitive “pay-for-delay” agreements is just another way Plaintiffs can positively affect the price of prescription drugs in this country.

If you have any questions about this subject or other potential fraud claims, contact Ali Hawthorne, a lawyer in our firm’s Consumer Fraud Section, at 800-898-2034 or by email at Ali.Hawthorne@beasleyallen.com.

Source: Law360

CANADIAN DRUG COMPANIES TO PAY $34 MILLION FOR SELLING FAKE PRODUCTS

A Canadian online pharmacy and its owner have been ordered to pay $34 million after admitting to selling misrepresented and counterfeit drugs in the U.S. This ends a 17-year business that is said to have sold phony cancer drugs with no active ingredients. Kris Thorkelson and companies connected to him—Canada Drugs, Rockley Ventures and River East Supplies—admitted to widespread illegal sales of the drugs last month and were sentenced in Montana federal court.

According to the U.S. Department of Justice (DOJ) and the U.S. Food and Drug Administration (FDA), Canada Drugs was shipping prescription drugs to health care providers in the U.S. that weren’t approved statewide, were labeled in foreign languages or didn’t include adequate instructions for use.

In two instances, prosecutors said that Canada Drugs and River East Supplies sent counterfeit cancer drugs to U.S. medical clinics. Kurt Alme, U.S. attorney for the District of Montana, said in a statement on April 13 that the FDA’s approval process is important to protect public health and safety. He said:

"By circumventing the FDA approval process, Thorkelson and the Canada Drugs companies jeopardized the health and safety of Americans. As this case shows, American providers and consumers need to beware when purchasing drugs on the internet."

The Canadian companies must forfeit the $29 million they earned from the sales, pay a $5 million fine and submit to five years of probation. Thorkelson individually must pay a $250,000 fine and he was sentenced to five years of probation, the first six months of which are to be spent in home confinement.

The case is U.S. v. CanadaDrugs.com Ltd. Partnerships et al., (case number 2:14-cv-00027) in the U.S. District Court for the District of Montana.

Source: Law360.com

PFIZER GETS FINAL APPROVAL ON $94 MILLION CELEBREX ANTITRUST SETTLEMENT

A Virginia federal judge has given final approval to Pfizer’s $94 million settlement with drug buyers who said the pharmaceutical giant extended its monopoly over the anti-inflammatory Celebrex by illegally blocking generic competition. The certified class of 32 Plaintiffs claimed Pfizer’s legal maneuvering caused the courts to delay generic competition that would have driven prices down, saving the drug company millions. U.S. District Judge Arena L. Wright Allen said in her order: “The court hereby finally approves in all respects the settlement and finds that it benefits the class members.” The following will set out the history of the litigation.

According to the July 2014 suit, the issue dates to 2008, when the Federal Circuit invalidated a Pfizer patent for Celebrex, finding it not distinct enough from two other Celebrex...
patents. Though Pfizer won that infringement case based on the other patents, striking the “method of use” patent shifted expiration of Celebrex's patent protection against generic competition from December 2014 to May 30, 2014. But Pfizer successfully asked the U.S. Patent and Trademark Office to reissue the patent to correct errors in 2013. While a Virginia federal court invalidated that reissue in March 2014, legal moves by Pfizer and a resulting settlement with generic makers—who promised in the deal not to compete until that December—left Pfizer's exclusivity in place during the latter half of that year.

Direct purchasers said anyone who purchased Celebrex during that six-month window is entitled to the difference between the sticker price and the price driven down by generic competition. At the time, Celebrex was generating $2 billion in annual U.S. sales. The lawsuit said that total could reach hundreds of millions. In November, the drug buyers settled for roughly $94 million. This recent order noted that class representatives AmerisourceBergen Drug Corp, Cardinal Health and McKesson Corp., three of the largest class members who made a majority of the purchases in question, approved the settlement. No class members opted out or objected.

In 2016, shortly before the Plaintiffs in this case sought class certification, Pfizer agreed to pay $468 million to settle a 2004 lawsuit alleging it misled investors regarding the risks of Celebrex and another drug.

The direct purchasers are represented by Glasser & Glasser PLC, Hagens Berman Sobol Shapiro LLP, Radice Law Firm PC, Berger & Montague PC, Faruqi & Faruqi LLP, Taus Cebulash & Landau LLP, Nussbaum Law Group PC and Juan R. Rivera Font LLC. The case is In re: Celebrex (Celecoxib) Antitrust Litigation (case number 2:14-cv-00361) in the U.S. District Court for the Eastern District of Virginia.

**Kaiser Health News Launches Prescription For Power Database**

Over the years, we have learned to look out for money paid to lobbyists to influence laws and polices that benefit pharmaceutical companies. In addition, we have also become aware of payments being made directly to doctors to influence their prescribing habits. Now, a new database is showing that even charitable contributions can be problematic.

Kaiser Health News (KHN) compiled a database of donations made by pharmaceutical companies to patient advocacy groups and found at least $116 million in payments to patient groups from drug companies in one year alone. Six of the companies made payments of $1 million or more to patient advocacy groups that represent patients who rely on their drugs. Fifteen of the patient groups included in the database relied on pharmaceutical companies for at least 20 percent of their revenue, with some getting more than half of their annual revenue from the drugmakers. KHN calls its database “Pre$cription For Power” and it has some disturbing revelations.

To create the database, KHN used information gathered from charitable giving reports and federal 990 regulatory filings. KHN started with the 20 pharmaceutical companies included in the S&P 500 for the year 2015 (the most recent full year for which data is available). The first iteration of the database contains information from 14 of those 20 firms that were at least somewhat transparent with requests for information about funds they provided to patient groups. KHN hopes to expand this database to include more companies and more patient groups over time.

Patient advocacy groups focus attention on the needs of patients with a particular disease. A couple of well-known examples are the American Diabetes Association and Susan G. Komen, a patient group focused on breast cancer. These patient groups fill an important role in patient education, but funds from big pharma create a conflict between fully representing the needs of patients and acting to appease a major source of funding.

As a group, the 14 companies in the database spent nearly double the amount on patient groups versus federal lobbying. Bristol-Myers Squibb spent nearly 10 times the amount it spent on federal lobbying, providing more than $20.5 million to patient groups, compared with $2.9 million on federal lobbying and less than $1 million on major trade associations.

On the surface, these payments to patient groups appear to be altruistic. However, patient groups have proven to be very effective lobbyists—organizing letter writing and social media campaigns that have all of the trappings of a true grassroots movement. These groups even send patients to Washington and state capitals to support research funding and testify before Congress and state legislatures.

Donations to patient advocacy groups also serve a marketing function. Groups that receive significant funding from pharmaceutical companies are much more likely to provide information about more expensive branded products when the best therapy option might be a low-cost generic or over-the-counter medicine, or even diet and exercise, according to Dr. Adriane Fugh-Berman, the director of PharmEdOut, a Georgetown University Medical Center program that takes a critical look at pharmaceutical marketing practices. Patient groups that receive funding from pharmaceutical companies are also slow to complain about high drug prices or price increases.

AbbVie, for example, derives 65 percent of its revenue from Humira, which is used to treat autoimmune diseases such as Crohn's disease and certain kinds of arthritis. In 2010, AbbVie provided $4.3 million to the Crohn’s & Colitis Foundation and the Arthritis Foundation. According to Express Scripts, a pharmacy benefits manager, a month’s supply of Humira costs nearly $5,000. Humira will soon face competition from biosimilars (generic versions of biologic drugs), but the Arthritis and Crohn's foundations have voiced concerns about the safety of biosimilars. The Arthritis Foundation has even gone so far as to advocate for state laws that could make it more difficult for patients to have their prescription filled with a biosimilar, which would protect Humira’s market share.

“It is clear that more transparency in this space is vitally important,” said Senator Claire McCaskill of Missouri. The Physician Payments Sunshine Act was passed in 2010, requiring pharmaceutical companies to register payments to physicians on a public website (you can search these payments at projects.propublica.org/doddollars/). However, drug companies are not required to report donations to patient advocacy groups. Now Senator McCaskill is considering legislation to change that.

For their part, patient advocacy groups are in a tough spot. According to Lorren Sandt, executive director of the patient group Caring Ambassadors Program, “There aren’t a lot of large pockets of funding outside of the pharmaceutical money. We take it where we can find it.” Groups that refuse pharmaceutical funding have to get by with fewer staff members and outdated equipment, which can limit the reach of their programs.

To be fair, pharmaceutical funding of patient advocacy groups does provide the groups with more resources to bring attention to their cause. The power of these patient-lobbyists has led to government action that led to more effective treatments for AIDS, breast cancer, and other serious diseases. As a result, researchers have developed more effective treatments, and those groundbreaking treatments have become more widely available. However, with so much money flowing in so many directions, any voice advocating for any
VI. THE NATIONAL SCENE

WELLS FARGO FINED $1 BILLION FOR "RECKLESS" PRACTICES

Federal regulators have fined Wells Fargo $1 billion for misbehavior in its automobile and mortgage businesses. Wells Fargo has been under intense federal scrutiny since admitting in 2016 that it had opened millions of sham accounts that customers didn’t want. Wells Fargo charged thousands of customers for automobile insurance they didn’t need, driving some to default on their loans and lose their cars through repossession. The bank also charged some customers improper fees to lock in an interest rate for a mortgage.

Wells Fargo’s risk management system “constituted reckless unsafe or unsound practices,” according to the consent decree from the Office of the Comptroller of the Currency (OCC) and Consumer Financial Protection Bureau. The CFPB fined Wells Fargo $1 billion—by far the largest enforcement action in the agency’s six-year history. The OCC’s $500 million fine will be credited toward that amount, leaving Wells Fargo with a $1 billion bill overall. The enforcement action is the first announced by the CFPB since Mick Mulvaney took control of the agency as acting director late last year.

While the expected $1 billion fine is large, it is hardly crippling for Wells Fargo, which has more than $1 trillion in assets. Large, it is hardly crippling for Wells Fargo, which has more than $1 trillion in assets.

The Federal Reserve levied an unprecedented penalty in March against the bank, blocking its ability to expand. The bank has also faced criticism from some lawmakers after it awarded Tim Sloan, who took over as chief executive in the midst of the scandals, a $17.4 million pay package last year. That was an increase from about $13 million in 2016, when he took the job. While this large fine is certainly a step in the right direction, Wells Fargo’s conduct over a significant period of time was very bad. If the mega bank was an individual, it would receive a life sentence for such conduct.

Source: Washington Post

NFL ALLEGES THAT THE CONCUSION SETTLEMENT IS FRAUGHT WITH FRAUD

Nearly three years ago, a federal court in the Eastern District of Pennsylvania approved a settlement valued at an estimated $1 billion agreed to by the National Football League (NFL) and former NFL players. Thus far, only a small fraction of players has received a payout from the settlement. Recently, former players accused the NFL of using delay tactics to avoid its responsibility to pay. The NFL responded in a court filing on April 13, stating that the delay was due to “deep and widespread” fraud and it requested the Court to appoint a special investor to help root out fraudulent claims.

The motion filed by the NFL alleges that doctors, lawyers, and players are using fraudulent schemes to enlarge players’ portion of the settlement. According to the filing, “at least one player was advised to show up to a neuropsychological evaluation hungover and on Valium, to ensure that he failed cognitive tests required to qualify for a settlement.” However, many believe this is just another tactic by the NFL to rig the settlement system. Others believe that the $1 billion settlement was a huge win for the league considering that it takes in more than $10 billion in annual revenue. The NFL should be held to a high standard to prove its extremely serious charges and I am convinced the courts will require strict proof.

Source: New York Times

STUDENT AWARDED $7 MILLION IN LAWSUIT INVOLVING FOOTBALL BRAIN INJURY

Grossmont Union High School District has agreed to pay a former student athlete and his family $7.1 million to settle a brain damage lawsuit. It was alleged the football player has permanent brain damage resulting from the coaching staff at Monte Vista High School not recognizing the player had a concussion after a game. The suit was filed by the family of Rashaun Council, a 14-year-old freshman on the football team. The player was diagnosed with a concussion following a game in October 2013.

The suit alleged that coaches who had been trained to recognize those symptoms failed to call for medical help after the player displayed symptoms of a concussion. The complaint, filed in July 2014, described the player as a bright and athletic student with a promising future. Besides playing football, he was a track and field all-star and had a 3.9 grade point average. Brian Gonzalez, the family’s lawyer, said the youngster is now doing much better and, after taking a year off from school, he is planning to graduate in June at age 19 from Clairemont High. That school has a program for students with brain injuries. Gonzalez had this to say about Rashaun:

To go from being in a comatose state with concern about whether he would be able to walk or talk again to be in a position where he will be graduating from high school in June, it’s a miracle. The kid is the hardest working, inspirational individual I have known.

According to the lawsuit and depositions in the case, the youngster played in the October 2013 game, but a teammate told a coach that he was not playing well and should come out of the game. About 15 or 20 minutes after the game, a teammate noticed that Rashaun was sick and had vomited. After Rashaun told a coach he had a headache, the coach asked him a series of questions to determine his condition, and he answered them correctly and coherently.

While the school district contended that the player did not appear to be seriously injured, the judge determined that there was a question of whether the coach should have called for medical help after learning of his vomiting and headache.

Instead of calling 911, the lawsuit states that the coach called the player’s mother. The boy’s father, Terry Council, arrived to find the boy on the ground, slumped over with his head between his legs, and covered in his own vomit. His father took him to an emergency room. There the youngster was diagnosed with a concussioin and a subdural hematoma, which is a collection of blood between the brain and its outer covering. He had emergency surgery that day to relieve pressure on his brain and was put in a medically induced coma. It was the first of many surgeries the boy would have.

At the time the lawsuit was filed, about nine months after the incident, Rashaun was unable to walk and had just been taken off a ventilator. He still has trouble seeing because of the injury. The youngster plans to attend Mesa College after graduation. Rashun and his family were represented by Brian C. Gonzalez, a lawyer with offices in San Diego and Manhattan Beach, California.

THE DOJ IS CRACKING DOWN ON MEDICARE FRAUD AND IDENTITY THEFT

Attorney General Jeff Sessions in an interview with AARP about three weeks ago talked about health care fraud. He discussed Medicare fraud specifically and told what the Department of Justice (DOJ) is
doing to combat it. Jeff believes that more than 10 percent of Medicare is lost to fraud and waste. Much of this fraud involves physicians overprescribing opioid pain pills that are billed to Medicare. Jeff is now advocating for more aggressive measures to stop this fraud because the types of individuals that carry out these schemes seem to have become more emboldened over time. Medicare fraud claims are reviewed after they have been paid out, rather than on the front end, which makes many cases hard to prosecute. Following the lead of private sector law firms, the DOJ is now creating special units that analyze Medicare data for potential fraud leads.

Source: AARP

Wells Fargo’s financial relationship with gunmakers and the National Rifle Association (NRA) has cost the bank its mortgage business with the American Federation of Teachers. The Union notified the financial giant last month that it is dropping the bank as a recommended mortgage lender for the national education union’s 1.7 million members. The action came after Wells Fargo rejected the union’s call to either cut lending ties with or impose new restrictions on “firearms business partners.” This request came after the mass shooting on Feb. 14 that killed 17 people at Marjory Stoneman Douglas High School in Parkland, Florida.

Amid calls and marches for stricter gun control, Wells Fargo’s major banking rivals have announced they were taking action to limit their business exposure to the firearms industry. JPMorgan Chase’s chief financial officer said its business dealings with gunmakers “have come down significantly and are pretty limited.” A Bank of America vice president said the company would no longer finance or underwrite military-style weapons. Citigroup said it would require its business partners to bar firearm sales to customers younger than 21, as well as those who have not passed background checks.

I give the credit for these corporate decisions to the nationwide crusade by young people—mostly students—that has brought the need for reasonable gun control to the attention of Corporate America. Hopefully, “politicians” will soon see the need for more than talk and take action.

VII.
THE CORPORATE WORLD

Beasley Allen Files Lawsuit In Tennessee For Family Traumatized And Endangered At A Walgreens Store

Our firm, along with a Tennessee firm, has filed a lawsuit against Walgreens alleging the management and staff of a Walgreens store in Farragut, Tennessee, inflicted physical harm and emotional distress on Jamie Collins Doss and her family. The incident occurred May 18, 2017, when Jamie, while shopping with her son, Elijah, suffered a severe medical emergency. Jamie has Addison’s disease, and she recognized the symptoms of a crisis. She asked Elijah to go out to the car to get her husband, Jeremy, who was waiting for them. The complaint alleges that the store manager detained Elijah, preventing him from leaving the store and searching his backpack as if he had stolen something. Despite Jamie showing her Medic Alert and begging for help, she was ignored by store personnel. By the time her husband came into the store looking for his family, Mrs. Doss had worsened to the point she lost consciousness. What happened to Mrs. Doss and her son should absolutely never have happened. Pursuant to state law, Walgreen owed a duty of care to Mrs. Doss as a patron of its business establishment. That duty was breached by personnel ignoring Mrs. Doss’ medical condition or her urgent pleas for help. Making matters worse, they caused Elijah and Mr. Doss serious emotional injury by their actions.

As a result of their treatment at the hands of the Walgreens employees, including supervising personnel, the complaint alleges Mrs. Doss suffered a much more severe health crisis because of her Addison’s than she would have, to the point of threatening her life. Additionally, she and her family were traumatized. Elijah is very familiar with his mother’s condition and he feared for her life, as well as being humiliated by being suspected of thievery. Mr. Doss also was traumatized by finding his wife in critical medical condition and witnessing his son’s humiliation.

The complaint was filed in the Circuit Court for Knox County, Tennessee, Civil Action No. 1-112-18. The Doss family is represented by Beasley Allen lawyers Lisa Littell Courson, Warner Hornsby and this writer, along with Cynthia L. Wagner, Chadwick B. Tindell and Michael R. Franz of Lacy Price & Wagner law firm in Knoxville, Tennessee.

VIII.
WHISTLEBLOWER LITIGATION

Pennsylvania Supreme Court Ruling Expands Whistleblower Protections

The Pennsylvania Supreme Court has upheld a $3.2 million verdict for a whistleblower who was fired for speaking out against waste, fraud, and other costly misconduct within the Pennsylvania Turnpike Commission. The decision is a landmark one for Pennsylvania’s Whistleblower Law because it widens the scope of damages individuals may claim under the law.

Plaintiff Ralph Bailets worked for the PTC as Manager of Financial Systems and Reporting for 10 years when he was fired in November 2008 after speaking out about lucrative contracts the commission awarded to IT contractor Ciber Inc. Bailets alleged that Ciber acquired the contracts through improper bids and that the company’s subsequent performance was fraudulent and deficient. He also complained of other contracts, hiring practices, and E-ZPass discounts for large trucking companies.

Bailets’ whistleblower lawsuit and testimony blew open a culture of fraud within the PTC and paved a path for prosecutors to file corruption charges against several of the agency’s officials.

While the lower court ultimately affirmed Mr. Bailets’ whistleblower claims in 2016, the PTC disputed the court’s award of $1.6 million in non-economic damages to Bailets on top of another $1.6 million in actual damages for lost wages and attorney’s fees.

Lawyers for the commission argued that Pennsylvania’s whistleblower protection law did not provide for non-economic damages, such as humiliation, anxiety, mental anguish, and reputational damage. However, the high court’s ruling upheld non-economic damages for Mr. Bailets means that under Pennsylvania law, the “actual damages” whistleblowers fired in retaliation for reporting wrongdoing can seek may include non-economic damages.

Justice Kevin Dougherty, who wrote the court’s opinion in the Bailets case, said that state law provides that whistleblowers should be put “in no worse a position for having exposed the wrongdoing.” The judge wrote:
Any construction which limits the phrase 'actual damages' to economic losses leaves whistleblowers uncompensated for any non-economic harms they must suffer as a result of their decision to expose the wrongdoing of the employers, harms which lie completely outside such items as loss of pay and benefits.

Whistleblower laws that provide for actual economic damages do not offer adequate protections and may effectively discourage would-be whistleblowers from calling out fraud, waste, and corruption. This decision is sound and a win for whistleblowers who have the courage to report corporate and government fraud.

Sources: Legal Intelligencer, PennLive and RightingInjustice

**TAKATA WHISTLEBLOWERS AWARDED $1.7 MILLION**

The three former employees of Takata Corp. who alerted the federal government under the Motor Vehicle Safety Whistleblower Act to defective air bag inflators have been awarded a $1.7 million fee, which they will share. One of the whistleblowers was an upper-level engineer who provided documentation to the government that Takata knew its airbags were potentially deadly as early as 1999. Another of the whistleblowers provided evidence that Takata falsified data and testing procedures concerning the air bags.

The three whistleblowers also assisted the United States Department of Justice (DOJ) in its criminal case against the air bag manufacturer relating to the defective air bags that could potentially explode in automobiles. In the criminal case, Takata pleaded guilty to a felony count of wire fraud and agreed to a $1 billion settlement to end a Department of Justice Investigation. As previously reported, Takata filed for bankruptcy after the recall of 50 million defective air bags that have caused hundreds of known injuries and at least 22 fatalities. This was the most expansive recall in automotive history.

Congress passed the Motor Vehicle Safety Whistleblower Act in late 2015 to encourage employees and contractors of motor vehicle manufacturers, part suppliers, and dealerships to provide the government with information concerning motor vehicle safety defects or safety law violations. If the government recovers more than $1 million based on information provided by a whistleblower, the whistleblower who provided the information is entitled under the Act to receive a portion of the recovered funds. Congress directed the National Highway Traffic Safety Administration (NHTSA) to promulgate regulations for the whistleblower program by June 2017. However, thus far NHTSA has not completed writing rules for the program.

Because NHTSA has not finished promulgating rules for the whistleblower program, the government has not written a mechanism for paying awards to whistleblowers. Because of this, a NHTSA spokeswoman said the agency was not involved in the award to the Takata whistleblowers. However, Takata agreed in its bankruptcy proceedings to pay the three Takata whistleblowers $1.7 million through a fund created in its bankruptcy. Also, the Takata whistleblowers could still be awarded fees under the Motor Vehicle Safety Whistleblower Act for providing information related to the air bag defect.

Sources: 49 U.S.C. § 30172; Reuters

**THE BEASLEY ALLEN WHISTLEBLOWER LITIGATION TEAM**

Lawyers on the Whistleblower Litigation Team at Beasley Allen continue to vigorously investigate fraud against the government by motor vehicle manufacturers, part suppliers, and dealerships. We encourage anyone who knows of motor vehicle safety defects or motor vehicle safety law violations to step forward. Under the Motor Vehicle Safety Act, potential whistleblowers have the right to not be retaliated against for doing the right thing and reporting the fraud they have witnessed. Anyone considering blowing the whistle is strongly urged to seek legal advice before doing so.

Our lawyers are very familiar with the Motor Vehicle Safety Act and the False Claims Act, and can guide whistleblowers along the process. If you have any information relating to a safety defect in a motor vehicle and would like to speak with a lawyer contact Andrew Brashier or Paul Evans at 800-898-2034 or by email at Andrew.Brashier@beasleyallen.com or Paul.Evans@beasleyallen.com. Andrew and Paul are members of Beasley Allen’s Whistleblower Litigation team.

**IX. CONGRESSIONAL UPDATE**

**CONGRESS HOLDS OPIOID HEARINGS**

It might be good to review the magnitude of the opioid crisis. Many are asking, “why has it taken Congress so long to really get involved?” Let’s take a look at the effect of the opioid epidemic. In 2015, greater than 33,000 American died of overdose, and that number increased to over 42,000 in 2016, more than 115 persons per day. Experts agree the epidemic is getting much worse. Misuse includes prescription pain relievers, heroin, and synthetic opioids such as fentanyl. This crisis affects public health as well as social and economic welfare, and the estimated yearly economic burden of $78.5 billion a year includes costs associated with health care, lost productivity, addiction treatment, social services, and criminal justice involvement.

The U.S. Food and Drug Administration (FDA) is exploring new approaches to opioid packaging, labeling, prescription duration and ways they are prescribed. Thus far, it appears that the FDA has done little to help combat the massive Opioid crisis.

Congress is also moving to finally address the opioid crisis, with four committees in the House and the Senate holding hearings to review proposed bills to combat the epidemic. One of the issues discussed was packaging opioids in blister packs, which may limit the number of opioids dispensed to patients, as well as encourage prescription terms to be shorter. The lesser quantity distributed would also possibly limit unused or excess medication that could be misappropriated by others.

The information contained in opioid labels, such as the inclusion of guidelines for prescribing based on different medical conditions, is also under discussion. The FDA is considering development of a framework defining the proper treatment and duration for a given indication to ultimately require sponsors ensure that prescribers specifically document rationale for prescriptions outside those parameters.

One problem with opioid regulation is the influx of pills entering the country in unlabeled or partially labeled boxes that often contain loose pills. The FDA has authority to destroy or refuse entry to these drugs, but they must have evidence of a drug’s intended use in order to do so. Without such evidence, the package often is shipped back to the sender. If the FDA was given the authority to detain and destroy imported packages containing unlabeled drugs, it would decrease the amount on the market. Currently, the FDA must also initiate a lawsuit and establish probable cause to seize and destroy such packages. Change in seizure authority would eliminate this multi-week process. Prior to 2006, the FDA had authority to seize packages it deemed to be a public health hazard.

BeasleyAllen.com
BIO, the world’s largest biotechnology trade association, is encouraging and proposing ways to treat pain and addiction. BIO is backing three bills being considered by the Congressional committees. These bills include:

- One that would direct the FDA to explain the types of clinical data needed to show whether a new treatment reduces pain and opioid use. Many of the association’s companies are working on novel pain therapies that include non-opioid alternatives.
- A second bill would tell the FDA to issue guidance on how to accelerate approval of new pain-relief drugs.
- A third would grant the National Institutes of Health more authority to fund research and work with industry.

There is another proposed bill in Congress that should be considered. It is the Tribal Addiction Recovery Act, which provides for funding to tribal nations. Congress has a duty to act and must pass the legislation necessary to address one of the most serious drug-related crises in recent history. Hopefully, the committee work will result in the actual passage of legislation.

If you need more information, contact Jennifer Emmel, a lawyer in our firm’s Mass Torts Section at 800-898-2034 or by email at Jennifer.Emmel@beasley-allen.com.

Source: Law360.com

X.
PRODUCT LIABILITY UPDATE

Beasley Allen is among the Plaintiffs’ firms in the United States handling the most product liability cases in multidistrict litigation in recent years. This is according to a report released on April 2 by legal analytics firm Lex Machina. Other firms making the list are Lieff Cabraser Heimann & Bernstein LLP, Johnson Becker, Motley Rice, and Levin Papantonio Smith, according to the report. The report contains data on more than 400,000 product liability cases pending in federal courts from Jan. 1, 2009, to Dec. 31, 2017, which is limited to medical device, drug, asbestos, vehicle and aircraft cases. The following chart shows the listing for both Plaintiffs and Defendants firms.

The rankings are based on the numbers of cases filed after Jan. 1, 2000, that the firms were handling as of March 21, but the report does not go into how many cases each firm is individually handling. That detail will be included in later reports, Owen Byrd of Lex Machina told Law360.

Outside of MDLs, Farah & Farah PA was the top Plaintiffs law firm handling product liability cases that were filed between Jan. 1, 2000, and Dec. 31, 2017, and were terminated between Jan. 1, 2016, and Dec. 31, 2017, according to the report. There are more product liability cases filed each year in Lex Machina’s database than for any other type of cases, according to the report. Last year, just under 43,000 product liability cases were filed, compared to the combined 42,383 cases that were filed in the areas of patent, commercial, employment, trademark, copyright, antitrust and securities, as well as bankruptcy appeals, according to Lex Machina.

In both MDL and non-MDL cases, medical device and pharmaceutical litigation dominated the other three types of product liability cases included in Lex Machina’s report. In 2016, there were 667 non-MDL cases filed over pharmaceutical products and medical devices, compared to 381 vehicle cases. Medical device and drug cases also form the bulk of product liability MDLs, according to Lex Machina. By far, most medical device and pharmaceutical cases are associated with MDLs, the report states.

“In the years covered by this report, there were tens of thousands of medical device / pharmaceutical cases filed each year and only hundreds or dozens of aircraft cases filed each year,” Lex Machina said in the report. Asbestos filings in federal district court have also declined since 2012, according to the report.

Additionally, the report breaks down which district courts attract the most
product liability cases outside of MDLs, with the Central District of California, the Eastern District of Pennsylvania and the District of New Jersey in the top three. While not included in the report, the Eastern District of Pennsylvania and the Southern District of West Virginia have the most product liability MDLs, Byrd told Law360. The report also delves into how non-MDL medical device and pharmaceutical cases get resolved, finding that the vast majority are either settled or dismissed procedurally. “Of the 4 percent that reach a decision on the merits, about 90 percent are decided in the Defendant’s favor,” the report states.

The report also looks at how damages were awarded in non-MDL medical device and pharmaceutical cases between 2009 and 2017. In that period, $121,381,000 in damages was awarded, including economic damages, punitive damages and attorneys’ costs and fees. There were also two class action settlements in that category totaling $125.5 million, according to the report.

Source: Law360.com

**Polaris Agrees To Pay $27.25 Million Civil Penalty For Failure To Report Defective Recreational Off-Road Vehicles**

The U.S. Consumer Product Safety Commission (CPSC) announced last month that Polaris Industries Inc., of Medina, Minnesota, (Polaris) has agreed to pay a $27.25 million civil penalty. The penalty settles charges that Polaris failed to immediately report to CPSC that models of RZR and Ranger recreational off-road vehicles (ROVs) contained defects that could create a substantial product hazard or create an unreasonable risk of serious injury or death because the heat shield could fall off the vehicle, posing fire and burn hazards.

Polaris reported the fires on model year 2014 Rangers to CPSC in July 2016 and announced a recall of 42,500 model-year 2014 ROVs in September 2016. After the recall, Polaris received reports of heat shields coming loose or falling off the model-year 2015 Ranger, including reports of fires. Polaris failed to immediately notify CPSC of the defect or risk posed by the model year 2015 ROVs, as required by federal law. By the time Polaris did report, it had received 10 reports of heat shield incidents, including five reports of fires. Subsequently, CPSC and Polaris announced a recall of 51,000 ROVs in April 2017.

In addition to resolving the charged violations relating to the RZRs and Rangers, CPSC agreed not to seek civil penalties from Polaris for any failure to report a hazard or defect in a model year vehicle that Polaris had reported to staff by June 29, 2017. Polaris further agreed to maintain an enhanced compliance program to ensure compliance with the Consumer Product Safety Act and a related system of internal controls and procedures designed to ensure timely reporting in the future.

The U.S. Consumer Product Safety Commission is charged with protecting the public from unreasonable risks of injury or death associated with the use of thousands of types of consumer products under the agency’s jurisdiction. Deaths, injuries, and property damage from consumer product incidents cost the nation more than $1 trillion annually. CPSC is committed to protecting consumers and families from having this information that reasonably supported the conclusion that the RZRs contained a defect that could create a substantial product hazard or create an unreasonable risk of serious injury of death, Polaris failed to immediately notify CPSC of the defect or risk posed by the ROVs, as required by federal law. By the time Polaris did report the defect or risk, it had received reports of 150 fires, including one that resulted in the death of a 15-year old passenger, 11 reports of burn injuries, and a fire that consumed 10 acres of land.
products that pose a fire, electrical, chemical or mechanical hazard. CPSC’s work to help ensure the safety of consumer products—such as toys, cribs, power tools, cigarette lighters and household chemicals—contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 40 years.

Federal law bars any person from selling products subject to a publicly announced voluntary recall by a manufacturer or a mandatory recall ordered by the Commission. To report a dangerous product or a product-related injury go online to www.SaferProducts.gov or call CPSC’s Hotline at 800-638-2772 or teletypewriter at 301-595-7054 for the hearing impaired. Consumers can obtain news release and recall information at www.cpsc.gov, on Twitter @USCPSC or by subscribing to CPSC’s free e-mail newsletters.

Source: www.cpsc.gov

**Lack of Regulation Creates a Deadly Pastime for Hunters Using Tree Stands**

Hunters face many dangers in pursuing their favorite pastime—guns, animals, and the environment are just a few. Surprisingly, none of these factors is the most dangerous to a hunter. Instead, falling out of a tree stand injures and kills more hunters than guns. For example, the Indiana Department of Natural Resources reported in 2014 that 55 percent of its reported hunting accidents involved falls from tree stands. Just last year, four hunters died in New York, while three hunters died in North Carolina. In examining tree stand injuries from 1999 to 2013, The University of Wisconsin Department of Neurosurgery and University of Alabama at Birmingham found that 55 percent resulted in spinal injuries. Just this hunting season in Alabama, seven Alabama hunters had suffered tree stand accidents by Dec. 1.

Deer hunters really like elevated stands, which give them a superior view of hunting zone. The stands also put them up to the hazards of using tree stands for hunting. The staff cited 6,000 injuries attributed to tree stand use that were treated in U.S. hospital emergency rooms in 2001 based on a review of National Electronic Injury Surveillance System (NEISS) data. It also reviewed the Injury or Potential Injury Incident Database (IFII), the In-Depth Investigation Database (INDP), and Death Certificate Database, and found 137 incidents involving tree stands from 1980 through 2001, including 62 deaths and 55 injuries. Of the total incidents, 54 mention tree stand failures resulting in six deaths and 40 injuries; eight fatalities involved hanging or traumatic asphyxiation by a safety belt or harness. In April 2004, the staff recommended that the petition be denied, because it concluded that the standards adequately addressed the products’ structural integrity, stability and adherence to the tree, under a rated static load condition.

While the federal government refuses to regulate tree stands, hunters in many states, including Alabama, continue to die and suffer catastrophic injuries. The Tree Stand Manufacturers Association, a non-profit group that includes most of the top stand manufacturers in the nation, offers an on-line video on tree stand safety that might be a good reminder for all of us, no matter how experienced. The following are a few added safety reminders from the TMA website:

- Never climb while carrying weapons or gear; draw them up with a rope after you’re securely seated in the stand.
- Let other hunters know where you are, and take along a cellphone or two-way radio so you can contact them.
- Never use a stand that has worn, missing or loose parts.
- Always wear a full harness. Keep the tether as short as possible and clear of neck and shoulders.
- If you feel yourself becoming drowsy or sick, get out of the tree; many falls occur as a result of falling asleep, or from sudden illness.
- Practice using the harness, including suspending yourself by the tether, before you go hunting. Always have a helper standing by for practice runs.
- If you ever fall, first contact a hunting partner and let them know you are attempting self-recovery. Ask them to keep tabs on you with return calls every five minutes.
- If you can’t recover and are hung suspended by the tether, call for help. Keep your legs moving to pump blood out of them; otherwise, blood pooling in the legs could cause you to pass out.
- Manufacturers say the safest recovery via a harness is to climb back into the stand. Only as a last resort should you cut the tether or release the harness buckles.

With hunting season a few months away, we hope this information will be helpful both to hunters and also to the companies that design and manufacturer tree stands. Those in government who deal with safety issues should take the steps required to make tree stands safer.

Sources: Safety Research & Strategies, Inc., The Huntsville Times and The Alexander City Outlook
An Update on the E-Cigarette Litigation

A Gainesville man who had multiple teeth blown out when the battery on his electronic cigarette exploded in 2016 was awarded more than $2 million by an Alachua County jury last month. This was the first e-cigarette case to go to trial in the State of Florida.

The Plaintiff, J. Michael Hoce, had bought various parts for his electronic cigarette online including the battery, from Defendant R-L Sales. He was at the home of his parents on Feb. 29, 2016, when the incident occurred. The lawsuit stated:

Hoce started to inhale the subject vaporizer when suddenly and without warning, the subject battery and vaporizer exploded in Hoce's mouth.

The Plaintiff's medical expenses proved at trial totaled $27,800 with anticipated future medical expenses of $20,000.

The Plaintiff's lawyers argued that R-L Sales knew or should have known the lithium ion battery at issue in this case could overheat and explode when used in e-cigarettes. The batteries originated with a Chinese company named E-fest, which has been known to purchase and rewrap batteries from other companies. R-L Sales, which is based in Utah, imports them from China and sells them online throughout the country.

After a four-day trial, the jury found R-L Sales at fault and awarded damages of $2 million for pain and suffering plus the $47,800 for medical expenses.

The Plaintiff was represented by lawyers from Morgan and Morgan and Beasley Allen. Mike Morgan and Brian McClain of Morgan and Morgan were the lead lawyers in the trial. This verdict sends a strong message to the industry.

Defective Products Are Currently Being Looked At By Beasley Allen Lawyers

Lawyers at Beasley Allen have had years of experience investigating automotive, maritime and aviation accidents and our lawyers have learned a great deal that I feel should be passed on to our readers. Quite often product liability claims are the “hidden” causes for accidents and resulting injuries. Unless a lawyer is experienced in handling product liability claims, it is very easy to miss very good product liability claims. It is critical that lawyers consider the possibilities of a product defect so that no valid claim is overlooked and therefore missed. If there are injuries involved in an accident that are disproportionate to the severity of the accident, a product liability claim should be considered and investigated. I will mention several areas where our lawyers are involved in the handling of product liability claims.

Automotive

While the automotive umbrella technically covers any vehicle with a motor, it is usually used to describe cars, trucks and buses. These types of accidents can involve side, rear and front impact collisions, in addition to rollovers. They can be caused by various factors, including sudden unintended acceleration of the vehicle that causes it to speed out of control, and worsened due to issues such as defective guardrails. Defective product claims related to car accidents can involve:

• Airbags—An airbag defect could play a contributing factor to accident injuries if it fails to deploy although the vehicle has obvious damage; deploys with excessive force or deploys late or deploys in a collision that was slower than 10 miles an hour.

• Roof crush—Roof crush occurs when a roof is defectively designed, leaving it too weak to protect against severe injury in the case of an accident involving rollover. This can occur in passenger car, large truck and even ATV and golf cart accidents. In fact, structural weaknesses in most American-made truck cabs make the chance of being crushed in a rollover accident almost a certainty.

• Seat belts—Seat belts may not latch correctly or not be attached to the vehicle correctly, increasing risk of ejection during an accident.

• Seat backs—Seat back failure can interfere with the restraint system, allowing vehicle occupants to impact rear seat objects in a rear-impact collision because they are not properly restrained. In some circumstances the vehicle occupants can be completely ejected from the vehicle when they have slid out from under the safety restraints.

• Door latches—Door latch systems are a primary safety feature to ensure that occupants remain in the vehicle during an accident and malfunctions can increase the risk of ejection from the vehicle and related catastrophic injury.

• Tires—Aging tires or tires that were improperly designed or manufactured can cause a driver to lose control of a vehicle. Due to the stress concentrations and subsequent high internal temperatures at the edge of the belt, this area is particularly sensitive to manufacturing, design and material problems. Recreational vehicles are often involved in accidents caused by catastrophic tread separation due to the heavy loads of large RVs. Attorneys investigating these cases have found many instances where a tire manufacturer approved and sold a particular type of tire for use on an RV, when in fact the tire was not suitable for that type of vehicle.

• Fuel System—Design and manufacturing defects relating to the fuel system, including fuel filler cap design, fuel line design, fuel tank design and fuel pump design, can allow fuel to spill during an accident causing post-collision fuel fed fires that increase the risk of serious injuries.

• Awnings—The public should be aware of the dangers involving awnings attached to the side of recreational vehicles (RVs) and horse trailers. Awnings that have been rolled up and fastened to the side of the vehicle may become dislodged when the locks holding them to the vehicle fail, causing the awning to hang out toward oncoming traffic and posing a risk of serious injury or death to those drivers.

Truck accidents can also be caused or worsened by defective products. For example, cab guards are shiny, metal pieces positioned behind the cab of almost every log truck in the United States, and they were purchased with the belief they will protect from cargo shifting forward and crushing a driver’s cab during a crash. Litigation lawyers have been involved in has shown that these cab guards are defective and do not prevent injury.

Many heavy trucks and tractor-trailer rigs are defectively designed because the vehicles do not have proper underride protection devices installed. We have represented numerous clients who have lost relatives as a result of this underride defect. When a vehicle approaching from the rear goes under a heavy truck trailer, it usually results in severe injuries to vehicle occupants. That is because passenger cars are substantially lower than the bed of heavy truck trailers. The underride protection is designed
to protect the occupants of the striking vehicle.

In addition, many times when our lawyers deal with motorcycle accidents resulting in injury or death, there are defective parts to blame. For motorcycles, problems have been known to arise from these areas: rear brakes malfunction; brake lights malfunction; leak in fuel pump; engine stall; and tires.

Maritime

Defective maritime products can be found on watercraft ranging from yachts to jet skis, and may result in fire, explosion, loss of operator control, grounding, sinking or striking other watercraft, objects or individuals. Affected products may include engines, propellers or propulsion systems, electronic systems, warning or safety equipment, gauges and other parts.

Thousands of people suffer serious injuries or are killed by defective maritime products every year. Most of these injuries could be avoided if the distributor or manufacturer of these products took additional steps to ensure the safety of its consumers.

Aviation

By some estimates, mechanical failures cause up to 22 percent of aviation crashes. Historically, aircraft manufacturing defects, flawed aircraft design, inadequate warning systems, and inadequate instructions for safe use of the aircraft's equipment or systems have contributed to numerous aviation crashes. In such cases, the pilot may follow every procedure correctly but still be unable to avert disaster.

Since 1988, our firm has had its own in-house Accident Investigation Division. Having dedicated, experienced accident investigators in-house has been critical in evaluating potential transportation accident claims. Our investigators offer expert analysis and advice while assisting lawyers and support staff in the preparations for trial.

If you need more information on any of the above areas, contact Sloan Downes at 800-898-2034 or by email at Sloan.Downes@beasleyallen.com. She will put you in touch with a lawyer who can help you.

XI. MASS TORTS UPDATE

JURY AWARDS MORE THAN $100 MILLION IN J&J TALC CASE

A New Jersey state court jury has returned a $117 million verdict, which includes $37 million compensatory and $80 million punitive damages, against Johnson & Johnson and Imerys Talc America Inc., its talc supplier. The case involved claims that a man developed mesothelioma after using J&J's asbestos-containing talcum powder over several decades. The trial lasted for more than two months. At its conclusion, the jurors ruled for Plaintiff Stephen Lanzo III and his wife Kendra, finding that the company's products, including its baby powder, contained asbestos and that Lanzo's exposure to the toxic mineral in the products between 1972 and 2003 played a substantial role in his contracting the deadly disease.

The jury in the first phase of the trial awarded compensatory damages of $30 million to Lanzo and $7 million to his wife. Johnson & Johnson was ascribed 70 percent of the blame and Imerys 30 percent. The jurors returned the next day for the punitive damages phase of the trial.

In the first phase, jurors concluded that Lanzo was exposed to asbestos from using J&J's baby powder and/or Shower to Shower powder between 1972 and 2003, and that such exposure was a substantial factor in causing his illness. The jury found that the Defendants manufactured, sold or distributed a product that lacked an adequate warning from 1972 to 2003, and that J&J manufactured, sold or distributed a product that was defectively designed during that time period.

It was proved at trial that the company had known for years its talcum powder contained asbestos and that for years the Defendants withheld that knowledge from consumers and regulators by using tests it knew wouldn't detect the toxic mineral.

In the punitive damages phase, the jury found that Johnson & Johnson and the talc supplier acted with reckless indifference and in disregard of the rights of the Plaintiffs.

The Lanzos are represented by Moshe Maimon of Levy Konigsberg LLP, and Joseph Satterley and Denyse F. Clancy of Kazan McClain Satterley & Greenwood. The case is Lanzo et al. v. Cyprus Amax Minerals Co. et al. (case number L-7385-16) in the Superior Court of the State of New Jersey, County of Middlesex.

RECENT DEVELOPMENTS IN INNOVATOR LIABILITY

In the past several months, the doctrine of “innovator liability” has steadily gained more acceptance from state high courts. At its core, the innovator liability doctrine seeks to hold brand-name prescription drug manufacturers (the innovators) liable for inadequate, deficient or false labeling claims asserted by patients who were prescribed the generic version of the drug. The doctrine makes sense for several important reasons.

• First, when a brand-name drug manufacturer’s new drug application (NDA) is granted by the FDA, the manufacturer is given exclusive control over the market for a period of time before generic versions of the drug can be produced and sold.

• Second, generic manufacturers of a drug are required to use and provide the same labeled warnings and precautions as the brand-name version of the drug.

• Third, the FDA’s rules and regulations only allow the brand-name manufacturer to update or change the label—even after its NDA expires and generic manufacturers can produce and sell a generic (bioequivalent) version of the drug.

• Lastly, generic drug users’ only remedy is against name-brand manufacturers after the U.S. Supreme Court held that state law failure to warn and design defect claims against generic drug manufacturers are preempted by federal law. See PLIVA, Inc. v. Mensing, 564 U.S. 604, 131 S. Ct. 2567, 2570, 180 L. Ed. 2d 580 (2011); Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 135 S. Ct. 2466, 186 L. Ed. 2d 607 (2015).

Last December, the California Supreme Court affirmed its acceptance of innovator liability, and went on to expand the doctrine to include predecessor liability. See, T.H. v. Novartis Pharm. Corp., 4 Cal. 5th 145, 407 P.3d 18 (2017). The Court held that a name-brand manufacturer owes the ordinary duty of care to users of generic drugs regardless of who made the drug. The Court then went further and held that the name-brand manufacturer’s duty continues after the company has sold the rights to its drug and stopped selling it.

In March 2018, the Massachusetts Supreme Judicial Court recognized its own...
form of the innovator liability doctrine. *Rafferty v. Merck & Co., Inc.*, SJC-12347, 2018 WL 1354064 (Mass.). In *Rafferty*, the Court held that “a brand-name drug manufacturer that controls the contents of a label on a generic drug owes a duty to consumers of that generic drug *not to act in reckless disregard of an unreasonable risk* of death or grave bodily injury.” Although the Court rejected innovator liability based in negligence alone, it recognized that if it declined to impose liability on name-brand manufacturers, generic drug users would have few if any remedies. The Court concluded, “although we may be willing in certain circumstances to excuse ordinary negligence, we will not tolerate the reckless disregard of the safety of others.”

Though innovator liability has only been endorsed in a handful of states thus far, the trend appears to be growing. Right now, the doctrine is being considered by another state high court—West Virginia. *McNair v. Johnson & Johnson*, 694 F. App’x 115 (4th Cir. 2017), *certified question accepted* (Sept. 1, 2017). Additionally, Illinois’ adoption of innovator liability is on appeal to the Seventh Circuit. *Dolin v. GlaxoSmithKline LLC*, 269 F. Supp. 3d 851 (N.D. Ill. 2017).

In Alabama, our Supreme Court unequivocally recognized the doctrine of innovator liability in *Wyeth, Inc. v. Weeks*, 159 So.3d 649, 677 (Ala. 2014)—only to have the Alabama legislature nullify the Court’s ruling through an ill-advised and hastily passed law that gutted the doctrine. *Code of Alabama*, Sect. 6-5-530(a). Hopefully the growing wave of states endorsing the doctrine will cause our state lawmakers to rethink their position.

If you have any questions concerning this subject, contact David Byrne, a lawyer in our Mass Tort section, at 800-898-2034 or by email at David.Byrne@beasleyallen.com.

**$3.6 Million Verdict In Bard IVC Filter Bellwether Trial**

A Phoenix jury recently awarded $2 million in punitive damages on top of $2 million in compensatory damages to a woman who claimed the IVC filter implanted in her body fractured, causing bits of metal to lodge in her spine and heart. It only took the jury 16 minutes to reach their decision for punitive damages.

The jury found the device maker, C.R. Bard, responsible for 80 percent of the compensatory damages. A radiologist who failed to flag a visible metal shard on an X-ray before it punctured the woman’s heart, resulting in open-heart surgery, was found responsible for the remaining 20 percent of compensatory damages. In total, Bard was assessed $3.6 million in damages, and the radiologist with $400,000.

The punitive damages phase of the first bellwether involving Bard’s IVC filter devices immediately followed the verdict. During the punitive phase, Plaintiffs’ lawyers informed the jury that Bard had more than $1 billion cash on hand as of September 2017, and that its market value was $17.3 billion as of June 2016. They also revealed that one of Bard’s top executives made $35.2 million over a three-year period.

**Plaintiff Sherr-Una Booker** was implanted with Bard’s IVC filter, a blood clot-catching device, when she was 37 years of age. IVC filters are cage-like devices implanted in the inferior vena cava, a large vein in the body that delivers deoxygenated blood from the lower extremities to the heart and lungs. The device is intended to catch blood clots before they reach the heart or lungs and cause serious injuries.

In 2009, Ms. Booker had an X-ray during which a radiologist noticed the IVC filter had fractured. The bits eventually migrated within her body and lodged in her spine and heart, requiring the woman to undergo open-heart surgery. In 2014, Ms. Booker underwent surgery to remove the upward bits of metal from the fractured filter, with only partial success.

*The Booker case is one of more than 3,600 pending in a multidistrict litigation (MDL) alleging it misrepresents the safety of a hip implant device. Ms. Booker was implanted with Bard’s G2 device. The next case involves Bard’s fourth-generation filter, the Eclipse.*

*If you or a loved one has had complications related to a Bard IVC filter, contact Matt Munson, a lawyer in our Mass Tort section, at 800-898-2034 or by email at Matt.Munson@beasleyallen.com.*

**MEDICAL DEVICE CO. SMITH & NEPHEW MUST FACE CLAIMS IN HIP IMPLANT MDL**

A Maryland federal judge has ruled that medical device manufacturer Smith & Nephew PLC must face claims in multidistrict litigation (MDL) alleging it misrepresented the safety of a hip implant device, U.S. District Judge Catherine Blake found that patients’ negligence and other state law claims aren’t barred by federal law. The judge ruled that the majority of the patients’ state law claims—including negligence, failure to warn and negligent misrepresentation—are not preempted by the Food Drug and Cosmetic Act, because those claims parallel federal requirements for medical devices.

Judge Blake said that under U.S. Food and Drug Administration (FDA) regulations, Smith & Nephew is required to spread truthful information, report adverse events and adequately train surgeons working with its Birmingham Hip Resurfacing device. To the extent that the patients pin their negligence claims to alleged conduct that violated those federal requirements, the judge said their claims are not preempted.

There are about 200 suits in the MDL from more than 40 states and the District of Columbia over the metal-on-metal hip implant device. The Birmingham Hip Resurfacing device is designated Class III, or “high risk,” by the FDA. The judge said friction from the device’s metal parts can cause metallic debris to accumulate in the bloodstream and cause significant medical complications.

The company has issued two recalls over the device, once in 2007 for labeling issues in several versions of the device. Eight years later, after several competitors recalled similar devices, the company voluntarily recalled some of the devices because of “unreasonably high failure rates” in women, men older than 65 and men implanted with a certain size of the device.

The patients also claimed that the device was improperly manufactured. “But the heart of the Plaintiffs’ complaint focuses on Smith & Nephew’s unequivocal support for the BHR device’s safety despite growing evidence of its risks and Smith & Nephew’s failure to report adverse incidents to the FDA,” Judge Blake said.

The patients claimed that Smith & Nephew delayed reporting hundreds of adverse event reports and complaints about the device to the FDA and entirely failed to report that the BHR system was wearing down more quickly than expected. The judge dismissed the patients’ manufacturing defect claim, rejecting their argument that manufacturing defects in the BHR device can be inferred from significant wear rates. Judge Blake, on that claim, said:

Without pleading the FDA’s specified design of the BHR device or how any single device deviated from those specifications, it is impossible to tell whether the wear rates ... identified by the plaintiffs result from a manufacturing defect.

Judge Blake also dismissed the patients’ strict product liability claims, finding that those were preempted by federal law. The judge said:

The court will grant Smith & Nephew’s motion to dismiss these two claims because finding a device
unreasonably dangerous adds to or differs from federal requirements.


Source: Law360.com

**Family To Receive $1.5 Million In First-Ever Vaccine-Autism Court Award**

The first court award in a vaccine-autism claim occurred last month. The family of Hannah Poling will receive more than $1.5 million dollars for her life care, lost earnings, and pain and suffering during the first year. In addition to the first year, the family will receive more than $500,000 per year to pay for Hannah’s care. Those familiar with the case believe the compensation could amount to $20 million over the child’s lifetime. Hannah was described as normal, happy and precocious in her first 18 months.

Hannah was vaccinated in July 2000 against nine diseases in one doctor’s visit: measles, mumps, rubella, polio, varicella, diptheria, pertussis, tetanus, and Haemophilus influenzae. Afterward, her health declined rapidly. She developed high fevers, stopped eating, didn’t respond when spoken to, began showing signs of autism, and began having screaming fits. In 2002, Hannah’s parents filed an autism claim in federal vaccine court. Five years later, the government settled the case before trial and had the file sealed. It’s taken more than two years for both sides to agree on how much Hannah will be compensated for her injuries.

In acknowledging Hannah’s injuries, the government said vaccines aggravated an unknown mitochondrial disorder Hannah had, which didn’t "cause" her autism, but "resulted" in it. It’s unknown how many other children have similar undiagnosed mitochondrial disorder. All other autism "test cases" have been defeated at trial. Approximately 4,800 cases are awaiting disposition in federal vaccine court. The court’s order setting out the award in this case states:

A lump sum payment of $1,507,284.67, representing compensation for life care expenses expected to be incurred during the first year after judgement ($624,713.32), lost future earnings ($674,410.67) and pain and suffering ($208,160.68), in the form of a check payable to petitioners, as the court appointed guardian(s)/conservator(s) of the estate of Child Doe/77, for the benefit of Child Doe/77. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed a the guardian(s)/ conservator(s) of Child Doe/77’s estate;

Time Magazine summed up the relevance of the Poling case in 2008:

(T)here’s no denying that the court’s decision to award damages to the Poling family puts a chink—a question mark—in what had been an unqualified defense of vaccine safety with regard to autism. If Hannah Poling had an underlying condition that made her vulnerable to being harmed by vaccines, it stands to reason that other children might also have such vulnerabilities.

It appears that Julie Gerberding, the then-director of the Centers for Disease Control, is attempting to limit the importance of the decision. She stated:

The government has made absolutely no statement indicating that vaccines are a cause of autism. This does not represent anything other than a very specific situation and a very sad situation as far as the family of the affected child.

Interestingly, Ms. Gerberding is now President of Merck Vaccines. I wonder why her statement shouldn’t come as a big surprise?

Source: CBS News

**XII. BUSINESS LITIGATION**

**ConocoPhillips Wins $2 Billion In Claim Against Venezuela Oil Co.**

ConocoPhillips has received a $2 billion arbitration award against PDVSA, Venezuela’s state oil company, over the seizure a decade ago of investments in two projects in the OPEC nation. The award represents the equivalent of more than 20 percent of the cash-strapped Venezuelan government’s foreign currency reserves. The Houston-based company said in a statement that the ruling against PDVSA was made by an international tribunal constituted under the rules of the International Chamber of Commerce. It said the award is final and binding and that it intends to seek financial recovery of the award to the full extent of the law. ConocoPhillips is pursuing a separate legal claim against Venezuela’s government under the auspices of the World Bank’s investment dispute mechanism.

Source: Law360.com

**XIII. AN UPDATE ON SECURITIES INSURANCE AND FINANCE LITIGATION**

**Securities Settlements In 2018 Exceed Value For All Of 2017**

The total value of securities class action settlements for 2018 has already far surpassed the total for all of 2017, according to recently released data. Legal experts say the drop-off a year ago was mostly cyclical, but also likely due to a smaller number of high-profile fraud cases, along with a rising stock market. This year has started off much stronger. Thus far in 2018, there have already been more than $5 billion in settlements according to ISS Securities Class Action Services. The ISS numbers show that 162 settlements in 2017 totaled $2.1 billion, down from 199 settlements that generated $7.6 billion a year earlier. ISS Executive Director Jeffrey Lubitz stated:

The quantity of settlements was pretty consistent with recent years. It’s just that the dollar amounts were incredibly smaller. These numbers can be cyclical; there’s an ebb and flow. There just weren’t a lot of big cases settled last year.

Lubitz noted that no single settlement surpassed $250 million in all of 2017. But while 2017 was the lowest year in more than a decade for settlement amounts, Lubitz says a record number of new securities class actions were filed and that a “substantial amount” of disbursement occurred in cases settled prior to 2017. Moreover, because 2018 has jumped out to a strong start, Lubitz expects this year’s data to “show a significant jump for many of the top Plaintiff law firms.”

Source: Law360.com
A class action lawsuit has been filed on behalf of investors that purchased or otherwise acquired securities of MetLife, Inc. between Feb. 27, 2013, and Jan. 29, 2018, inclusive (the Class Period). MetLife investors had until April 6, 2018 to file a lead Plaintiff motion.

On Jan. 29, 2018, MetLife announced it postponed the Company’s 2017 earnings report and conference call, citing “material weakness” in its financial reporting. MetLife also disclosed that it expected to increase its annuity reserves in total between $525 million and $575 million. On this news, shares of MetLife fell $6.28 per share or more than 11.6 percent over the next two trading days to close at $47.67 per share on Jan. 31, 2018, thereby injuring investors.

The complaint filed in this class action alleges that throughout the Class Period, Defendants made materially false and misleading statements regarding the company’s business, operational and compliance policies. Specifically, it is alleged that Defendants made false and/or misleading statements and/or failed to disclose that MetLife’s practices and procedures used to estimate its reserves set aside for annuity and pension payments were inadequate; MetLife had inadequate internal controls over financial reporting; and as a result, Defendants’ statements about MetLife’s business, operations and prospects were materially false and misleading and/or lacked a reasonable basis at all relevant times.

Source: Businesswire.com

A Need To Explain The Term Subrogation

While lawyers use the term quite often, “subrogation” is not a word that most folks will hear very often. Most people will likely have no idea what it is or what the term means. Webster’s New Encyclopedic Dictionary defines the term subrogation as “the substitution of one party for another as creditor so that the new creditor succeeds to the first creditor’s rights in law and equity.” Did you get that? Do not feel left out—most people do not understand what it means.

Subrogation is the right to be reimbursed by one who paid or advanced funds on behalf of a person who may recover from another person or entity. The typical example is where a person is involved in a car wreck and his insurance carrier pays for his medical expenses. The insurance carrier now is “subrogated” to any benefits or recovery the injured person (the insured) may recover from a third party, i.e., the one who caused the injuries. In law, we refer to this third party as the tortfeasor or the wrongdoer.

Let’s look at an example of subrogation. John is driving his car to meet a friend for dinner. Robert fails to stop at a red light, goes through the red light, and strikes John’s vehicle. John is transported by ambulance to the local hospital where it is determined he suffered significant trauma, including broken bones and a back injury. John is hospitalized for three days, has to follow up with an orthopedic doctor, and has to undergo several weeks of physical therapy. John’s medical bills are covered by his health insurance company, Blue Cross. John seeks to recover the liability limits from Robert’s automobile insurance carrier ($25,000). John also seeks to recover the uninsured motorist coverage under his own automobile insurance ($25,000). John’s medical bills are $30,000, but Blue Cross paid $12,000 for those medical bills.

Under this scenario, Blue Cross will assert a subrogation claim of $12,000 in the potential $50,000 recovery that John may obtain from the two automobile insurance carriers. Blue Cross’s claim is known as subrogation. It is conceivable under some situations that Blue Cross will negotiate that number down. Without getting into the nuances and complexities of reduction of the subrogation claim, suffice it to say this is one significant reason why the average person cannot simply settle his own claim. In fact, most liability insurance carriers have gotten to the point where they want assurances that the subrogation claim has been or will be satisfied before it will pay over the insurance limits.

The issue is more complicated if your health insurance policy falls under a federal act known as ERISA, which gives greater rights to the health insurance company than traditional state law does. Further, if you are covered by Medicare or Medicaid, there are additional hurdles that must be dealt with in order to obtain a recovery for the injured person.

The message here for those who are seriously injured is that you must retain competent legal counsel. It is also very important for people to carry more uninsured or underinsured motorist coverage. This type of insurance is usually not very expensive and is a good investment in the event a person is injured in a car wreck. If the insurance coverage is low and the health insurance coverage is high, it is possible for the injured person to recover little or even nothing as a result of being injured.

If you need more information on this subject, contact Ben Locklar, a lawyer in our firm’s Personal Injury & Products Liability Section, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com. Ben is one of our lawyers who handles personal injury cases.

XIV. PREMISES LIABILITY UPDATE

Negligent Security Practice Addresses Issues Of Property Owner Responsibility

It seems that every day, you hear about another incident where someone is killed or severely injured because of violence. Recently, there were reports of yet another apartment shooting death in Atlanta, a beating that resulted in a death at an Atlanta hotel, and a rampage at a Nashville Waffle House that left four people dead. While these incidents often raise politically charged issues surrounding gun laws and mental health, there is another piece of the puzzle that is often completely overlooked—a legal issue known as “negligent security.”

Many lawyers are familiar with premises liability, an area of the law that designates responsibility for accidents, injuries or other incidents to the land or property owner where the incidents occurred. Basically, if you own land or property, it is your legal responsibility to make sure that it is reasonably safe. These cases often involve slip-and-fall or other physical injuries from falling, tripping, being crushed by falling debris, and other tragic accidents.

A subset of premises liability is a practice area called “negligent security.” In these cases, under the law, in most all states, owners and operators of establishments owe a duty to patrons and guests to ensure that the premises are reasonably safe and secure from anticipated dangers. This duty arises because property owners (as well as the people they hire to secure the premises) have far superior knowledge about the property, including past incidents at the property, than people that visit the property. Oftentimes, these cases involve tragic consequences to patrons or guests of an establishment, including stabbings, shootings, sexual assault, beatings, or other physical violence.

Many establishment owners do the right thing when they learn that their premises may be dangerous. For example, they may install security cameras, hire security guards who patrol the area, install adequate lighting, add security gates, maintain shrubs, use metal detectors (especially for events where crowds are in confined spaces), and monitor the premises to ensure the property is safe. However, security guards must be qualified and do their
job while fixtures must be maintained so they work. In our investigations, we sometimes find that while the establishment owner blames the criminal, it is the establishment owner that knew the premises was dangerous while creating the perception that it was safe—leaving the guest to the mercy of the danger.

Parker Miller, a lawyer who works in our Atlanta office, says negligent security law is a valuable tool that serves as a check so patrons and guests are not injured or killed in otherwise avoidable violent incidents. This can be accomplished by holding property owners and their contractors responsible when they do not take the necessary steps to ensure that people are safe in their establishment. Parker says:

In this day and age there is a lot of debate over gun laws and mental health, and those are important debates to have. But, we must not forget that many times the owner or operator of a property has far superior knowledge about past incidents and the safety of their premises than a visitor or guest. We have to make sure they do their part because mental illness, gun violence and sexual assault is not going away.

If you have any questions about negligent security cases, contact Parker Miller at Parker.Miller@beasleyallen.com or 800-898-2034.

$33 MILLION VERDICT IN TEXAS FACTORY FIRE CASE

A Texas jury has awarded $33 million to a man burned in an explosion at a wood processing plant located in Corrigan, Texas. The suit was filed against the makers of the facility's dust collection and suppression systems. Ralph Figgs, who was badly injured in the explosion at Georgia Pacific Wood Products South LLC and was later found to have brain damage and PTSD, according to his attorneys, was awarded $9 million for physical pain and $8 million for mental anguish, along with an additional amount for disfigurement, physical impairment, lost earnings and medical expenses.

The jury determined that the dust collection system's maker, Aircon, bore 51 percent of the responsibility for Figgs' injuries and assigned 26 percent of the blame to GreCon, which made the spark suppression system. The remaining blame was assigned to Georgia Pacific, which settled the claims against it before trial. Figgs sued GreCon, Aircon, and several other corporate entities after the explosion that occurred in April 2014. The explosion happened when sparks from a fire at the facility made their way to a “baghouse” where flammable dust generated at the plant was collected. The resulting blast killed two employees and injured others, including Figgs. GreCon and Aircon, the only Defendants who did not settle before trial, claimed that other parties, including Georgia Pacific, were primarily responsible for the explosion and resulting injuries.

Other workers caught in the explosion and their families sued in federal court, where a jury held safety reviewer Global Asset Protection Services LLC responsible, but pinned no blame on Grecon or Aircon. The Plaintiffs in that case, which was decided in November, each received less than $500,000.

The Plaintiff is represented by J. Kyle Findley, Kala F. Sellers and Adam Lewis of Arnold Itkin LLP. The case is Ralph Figgs v. Georgia Pacific Wood Product South LLC et al., (case number 2016-26100) in the 129th Judicial District Court, Harris County, Texas.

Source: Law360.com

XV. WORKPLACE HAZARDS

BENZENE—AT-RISK OCCUPATIONS

As we have previously stated, lawyers in our firm's Toxic Torts Section are handling a significant number of claims involving the chemical benzene, which is one of the 20 most widely used chemicals in the United States. Benzene is a naturally occurring part of crude oil and gasoline. Human exposure to benzene has been associated with a range of acute and long-term effects and diseases, including cancer and aplastic anemia.

Benzene is a known carcinogen, based on evidence from both human and animal studies, and has been linked to the development of acute myeloid leukemia (AML), acute lymphocytic leukemia (ALL), chronic lymphocytic leukemia (CLL), and other blood-related cancers such as aplastic anemia or multiple myeloma.

While exposure to benzene can occur domestically as a result of the ubiquitous use of benzene-containing petroleum products, there are many occupations that carry with them an abnormally high risk of benzene exposure.

• Chemical Plant Workers: This is the most common type of occupational benzene exposure simply because many industrial manufacturing chemicals have an aromatic element, and benzene is a precursor for common synthetics such as nylon and rubber.

• Painters: Benzene is often found in paint, and any painter or paint-factory worker in regular contact with such paint is at risk of benzene exposure.
• **Paper Factory Workers**: The production of paper and pulp often involves the use of benzene.

• **Oil Refinery Workers**: Benzene is derived from petroleum products, and has some applications in the refinement of oil.

• **Mechanics**: The solvents and degreasers commonly used by mechanics often contain benzene.

• **Rubber Industry Workers**: Many solvents which may contain benzene are used in the production of rubber products.

These are just a few of the many occupations in which workers may face a danger of benzene exposure. Individuals working at factories and other manufacturing plants face the highest potential risk, although any occupation involving regular contact with benzene-containing materials puts workers at risk of exposure. Employers can mitigate this exposure by promoting the use of alternative solvents in industrial processes, and by implementing policies that remove benzene from consumer products.

If you or someone you know is employed in one of these fields and has been diagnosed with AML or another blood-related cancer, they may have a claim. If you would like more information about these cases, you can contact John Tomlinson or Grant Cofer, lawyers in our firm’s Toxic Torts Section. They can be reached at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com or Grant.Cofer@beasleyallen.com.

**FORMER PAPER MILL EMPLOYEE FILES LAWSUIT OVER BENZENE EXPOSURE**

John Tomlinson, a lawyer in our firm, has filed a products liability lawsuit involving benzene in the Court of Common Pleas Hamilton County, Ohio. The suit was filed on behalf of a former employee of a Glafelter (formerly Mead) paper mill who developed Acute Myeloid Leukemia (AML), a type of cancer of the blood and bone marrow. The Plaintiff, who worked mainly as a tinting assistant and winder fourth-hand for 28 years and was constantly exposed to grease, solvents and cleaners containing the chemical benzene, has sued the manufacturers of these benzene containing products.

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, the chemical is often found in oil-based paints, various degreasers, solvents, cleaners, 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 AML, myelodysplastic syndrome (MDS) and other forms of leukemia and lymphoma.

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

John Tomlinson, who is handling the case for our firm, is also currently investigating other benzene exposure cases. If you need more information on this contact John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

**TRANSPORTATION**

**A TROOPER SHORTAGE IN ANY STATE CAN BE A MATTER OF LIFE AND DEATH**

Alabama, like many other states, has a severe shortage of state troopers. Unfortunately, Alabama’s problem is more severe than all states in the southeast. The shortage in my state has caused some very serious safety problems on Alabama highways. I have been aware of the severe underfunding of the Alabama Department of Public Safety for years and it has gotten much worse. The effect the shortage has caused from a highway safety perspective is very serious. There are times when there are no troopers on duty at night in Alabama and that is no fault of the troopers. Simply put—the Department of Public Safety has not been adequately funded. David Steward, president of the Alabama State Trooper Association, wrote the following assessment of the situation:

Between late 2010 and the end of 2014, the state of Alabama did not hire a single state trooper. Despite this freeze, we still had more than 400 state troopers. Now we have fewer than 300. That leaves us more than 700 men and women short of the number that we need—1,000, according to the Center for Advanced Public Safety at the University of Alabama. In fact, since that hiring freeze, trooper levels have dipped 22 percent further. The year before the freeze, there were 333 fatal accidents on Alabama roads. Last year there were 848. That’s a 155 percent increase in roadway fatalities.

After spending the last 21 years as a state trooper, I can assure you there’s a clear correlation between those numbers. There is no question that more troopers on the road deter accidents and saves lives. Response times can be measured in hours, not minutes, in rural counties. Many times troopers are handling multiple counties, covering hundreds of miles. Ideally, backup is a few minutes away, but at current levels, it could be 45 minutes or more. We’ve reached a point in staffing where it’s no longer just a safety concern for the people we serve, it’s a safety concern for our officers.

The force continues to grow older with a shrinking applicant pool to replace them. Many in our current force are eligible for retirement or will be soon. Without the ability to offer competitive salaries and benefits, those pools will continue to shrink. It’s not just a manpower shortage; resources are scarce as well. Troopers head out onto the highways in cruisers that are past their useful life, with equipment that needs to be replaced. Safety concerns are exponentially compounded when you’re understaffed and under-equipped.

Alabama doesn’t have unlimited funds, but the state is in a very different economic situation than in 2010. The unemployment rate has hit record lows, the economy is growing, and the state budgets are in better shape than they’ve ever been. One of the primary functions of government is protecting its citizenry, and that begins with a properly funded state police unit. This notion was borne out in a recent survey of Alabamians. Seventy-five percent of respondents believe a lack of troopers is leading to unsafe roadways. Seventy-five percent also think troopers should receive more funding, even if it means making other cuts in the budget.

The decision to serve the people of this state was an easy one, but the job can be anything but. Our current
funding level makes it nearly untenable. Alabama has a long history of unwavering support of our first responders. Please encourage your lawmakers to continue that tradition.

Lawyers in our firm who handle personal injury litigation involving highway accidents know from experience that Alabama needs more troopers on our highways. I guarantee you that trucking companies are well aware of the shortage and take full advantage of it when their trucks pass through Alabama. I strongly encourage Gov. Ivey and the Alabama Legislative leaders to make “adequate funding” for Alabama State Troopers a top priority and to remedy the situation as soon as possible.

**Recent Sightseeing Helicopter Crashes**

**Question Safety, Oversight**

Sightseeing helicopters help drive the tourism industry in many well-known destinations in the U.S., such as Hawaii, San Francisco, New York City and the Grand Canyon. Last year, Technavio predicted that the helicopter tourism industry would grow by more than three percent between 2017 and 2021. Yet, two high-profile, fatal crashes in 2017 and 2021. I strongly encourage Gov. Ivey and the Alabama Legislative leaders to make “adequate funding” for Alabama State Troopers a top priority and to remedy the situation as soon as possible.

A former NTSB managing director, Peter Goelz, said the tragedy “has the potential to be a watershed event for the industry,” CNN reported. Within days after the fatal crash the agency issued an urgent safety recommendation encouraging the Federal Aviation Administration (FAA) “to ensure that if a harness system is used for an open-door passenger flight, it allows for rapid egress from the aircraft in the event of an emergency.” The FAA issued the directive, but did not provide any details about how or when it would take action.

Experts believe the helicopter tourism industry is woefully underregulated, putting unsuspecting consumers at risk. Goelz explained that the open-door rule was adopted for commercial aerial photography, not tourists. But with the rise of social media, companies like FlyNYON market their tours by touting professional aerial photography services that are accessible to everyone and encourage passengers to “dangle [their] feet for the #shoeflyselfie.” It was that experience that proved to be one of the last for the front seat passenger and the four others who perished on the March 11 flight.

**New York City, East River Crash**

In March, five people drowned after their sightseeing helicopter operated by Liberty Helicopters crashed into the East River in New York City. The pilot, Richard Vance, told federal investigators with the National Transportation Safety Board (NTSB) that after implementing emergency landing protocols, he noticed that the emergency fuel shutoff lever was already in the “off” position when he went to shut it off. He explained that a portion of front seat passenger’s tether or harness was caught underneath the lever. He turned the lever back on and attempted to restart the engine, but unsuccessfully. He turned the lever back off when he realized a crash was imminent. Vance maneuvered the aircraft over the East River where it plunged into the cold water and eventually turned upside down, submerging the passengers.

Vance was strapped in using the aircraft’s manufacturer-installed restraint system that he could quickly release. The passengers were similarly secured by the helicopter’s restraint system and were additionally fastened to the aircraft by full body harnesses. The harnesses were supplied by FlyNYON, the company that chartered the deadly flight, since the passengers had purchased the “doors-off aerial photography flight.” The harnesses were “comprised of off-the-shelf components,” the NTSB report explains and intended to keep the passengers from falling out of the aircraft. However, the harness prevented the passengers from escaping after the helicopter capsized. The passengers perished in a crash that ordinarily was survivable, Wired.com reports.

**Grand Canyon, Papillon Airways Crash**

A month before the Liberty Helicopters deadly crash, a Grand Canyon sightseeing helicopter owned and operated by Papillon Airways (Papillon) crashed with six passengers and the pilot on board. Shortly after the Airbus Helicopter EC130B4 crashed in the Quartermaster Canyon in Arizona, witnesses described seeing explosions and a post-crash fire (PCF). Three passengers were dead at the site of the crash, two passengers who initially survived the crash, and newlyweds Jonathan and Eleanor Udall died within days after the accident, succumbing to extreme burn injuries. One passenger and the pilot remain hospitalized also with serious burn injuries.

The PCF is likely a result of the helicopter’s lack of a crash-worthy, or crash-resistant, fuel system, a persistent, but unnecessary problem within the aviation industry, and especially for helicopters. For decades, the aviation industry has known that flimsy fuel tanks rupture easily during a crash and can ignite a PCF, engulfing an aircraft in flames within seconds. While crash victims survive the impact, they often perish because of a PCF.

As this Report has discussed, since 1994, the FAA has required crash-resistant fuel systems on all helicopters newly certified after that year, but a loophole in the regulation allows helicopters with design certificates approved before the rule went into effect to keep using the older and more dangerous fuel tanks. So, even if a helicopter rolled off the production line in 2017, if it was based on a model that was certified before 1994, it is exempt for incorporating the safer fuel tanks. Approximately 84 percent of helicopters currently in use have the flimsier fuel systems that were developed decades ago.

Following the crash, Papillon announced it will retrofit its fleet of sightseeing helicopters with crash resistant fuel systems, Righting Injustice reported. While it is a step in the right direction, it is too late for those who perished as a result of the fiery crash. It is a change Papillon, which deems itself “the world’s largest aerial sightseeing company,” should have made long before now, especially since the technology has existed for decades.

Both Papillon Airways and Liberty Helicopters have questionable safety records. In fact, they both had similar accidents with the same fatal outcomes for passengers. In August 2009, another Liberty Helicopters sightseeing helicopter collided with a small private plane. The two air-
craft crashed into the Hudson River, killing nine passengers. Similarly, a Papillon Airways sightseeing helicopter crashed on its return flight from the Grand Canyon to Las Vegas in August 2001, according to ABC 15. Vertical Magazine reported that the company settled with the sole survivor of the crash, Chana Daskal, for $38 million. Daskal suffered severe burns over most of her body because of a PCF. The company has been investigated numerous times during the last two decades.

The FAA is currently “conducting a top-to-bottom review of its rules governing the industry,” CNN reported. If you have questions about the matters described above, contact Mike Andrews, a lawyer in our firm’s Personal Injury & Products Liability Section, at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com. Mike handles aviation litigation for the firm.

The Southwest Engine Failure

The tragic death of a Southwest Airlines passenger last month was the first U.S. commercial airline fatality in nine years. The midair engine explosion has raised liability questions for Southwest and also for aircraft and parts manufacturers. The incident has brought about increased scrutiny of aircraft inspection and maintenance protocols. At press time, National Transportation Safety Board (NTSB) investigators were seeking to find out what triggered the engine on Southwest Airlines Flight 1380 to explode and spray shrapnel that punctured a window.

The incident on board the New York to Dallas flight that made an emergency landing in Philadelphia ended the U.S. aviation industry’s longest streak of commercial airline flights without a fatality. The incident will prompt intense scrutiny of the aircraft inspection and maintenance procedures of Southwest, as well as the makers of the 737 aircraft, The Boeing Co., and the engine, CFM International.

The NTSB must ultimately determine what led to the engine failure. Early findings from the NTSB indicate that metal fatigue caused a hidden crack in a fan blade that broke off midair, causing the engine to explode with such force that it tore off the engine’s cowling, the external cover. This is what the industry calls an “uncontained engine failure.”

The day after the Southwest incident, the Federal Aviation Administration (FAA), the nation’s aviation safety regulator, said it will issue an airworthiness directive requiring inspections of certain CFM56-7B engines. The directive will require an ultrasonic inspection of fan blades when they reach a certain number of takeoffs and landings, the FAA said, and any blades that fail the inspection will have to be replaced.

Source: Law360.com

XVII. ENVIRONMENTAL CONCERNS

Appeals Court Increases Citgo’s Share in Fight Over $100 Million Spill Judgment

The Third Circuit Court of Appeals has handed down a precedential opinion that put the lion’s share of liability for a $100 million-plus oil spill judgment on three Citgo units. The appeals court said the refineries must fully repay the federal government for its role in the cleanup. This ruling reversed a lower court’s finding that Citgo only had to pay half of the government’s bill. Citgo Asphalt Refining Co., Citgo Petroleum Corp., and Citgo East Coast Oil Corp. had sought to overturn a Pennsylvania federal judge’s apportionment of the blame over a 2004 incident in which Frescati Shipping Co.’s Athos I tanker—which Citgo chartered—hit a submerged anchor and spilled 263,000 gallons of crude oil into the Delaware River.

Citgo argued that it violated no law or regulation in operating the terminal near where the tanker collided with the anchor, and that Frescati, in supporting the district court’s apportionment, didn’t dispute that it violated several safety provisions it was specifically responsible for under federal law. But the Third Circuit agreed with the lower court’s conclusion that none of the regulations Frescati violated were relevant to the incident and that Frescati adequately planned the ship’s passage, estimated the clearance between the ship’s hull and the channel bottom, and ensured proper communications between the ship’s master and pilot. The appeals court said:

Frescati operated the Athos I with neither bad navigation nor negligent seamanship. Nevertheless, the allision occurred. The district court did not err in concluding that the allision resulted from a breach of CARCO’s safe berth warranty.

That leaves intact the $66 million, including interest, the lower court ordered Citgo to pay Frescati after Frescati paid $143 million for the cleanup. But in a double blow for Citgo, the Third Circuit said the lower court shouldn’t have reduced from $88 million to $48 million the amount the company had to reimburse the federal government for what Frescati received from the Oil Spill Liability Trust Fund.

Agreeing with the government, the appeals court said that since Frescati had a right to a full recovery under its contract with Citgo, the government did as well. Citgo can’t adequately claim that federal agencies had a responsibility to search for potential underwater obstructions, or at least warn the company that it wasn’t performing such searches, the Third Circuit said. Not only do federal agencies not have those obligations, it’s essentially tort-based relief that Citgo is seeking, while the government is seeking contractual-based relief, the appeals court said in its opinion. The Third Circuit said in reversing the lower court’s reduction of Citgo’s payment and directing it to recalculate damages:

Equitable recoupment is intended to allow only truly similar claims arising from the same transaction to offset one another in the interest of equity between the parties. CARCO has failed to meet its burden of establishing an equitable recoupment defense. It is liable to the United States in full.

The $48 million to the government represented a little more than half of the $88 million originally reimbursed to Frescati under provisions of the Oil Pollution Act of 1990. A major issue was who was responsible for the abandoned anchor that lay hidden 900 feet from the boundary of Citgo’s terminal and gouged open the single-hulled oil tanker. No one knows who left it there. Citgo objected to the lower court’s conclusion that it bore some of the responsibility as it should have looked for hazards near its boundary.

Frescati is represented by Alfred J. Kuffer, John J. Levy and Timothy J. Bergere of Montgomery McCracken Walker & Rhoads LLP. The government is represented by acting Assistant U.S. Attorney General Chad A. Readler and Matthew M. Collette and Anne Murphy of the U.S. Department of Justice, as well as acting U.S. Attorney for the Eastern District of Pennsylvania Louis D. Lappen.

The case is Re: Petition of Frescati Shipping Co. Ltd., (case number 16-3470) in the U.S. Court of Appeals for the Third Circuit.

Source: Law360.com
A federal judge in California has ruled the U.S. Environmental Protection Agency (EPA) violated the law by allowing civil rights complaints in five states, including Alabama, to “languish for decades” before releasing any results. Lawyers for the Plaintiffs say the ruling will help ensure the EPA follows its own rules for civil rights complaints, which mandate that the agency release investigation results within 180 days of agreeing to investigate a discrimination claim. The case involved five separate complaints filed with EPA over heavy industrial operations, landfills, or hazardous waste facilities located in areas populated overwhelmingly by minorities. The Plaintiffs said permitting these facilities in minority areas amounted to discrimination, which is prohibited by entities receiving federal funding under Title VI of the Civil Rights Act of 1964.

One of those complaints was filed against the Alabama Department of Environmental Management (ADEM) relating to the permitting of the Stone’s Throw Landfill in Tallapoosa County, located near Tallassee. Despite the EPA rules requiring a response within 180 days, the agency went 15 years without publishing any investigation results related to the Tallassee complaint, and even longer in other cases. Environmental law group Earthjustice sued the EPA in 2015 over its long delays in responding to the five complaints.

Senior U.S. District Judge Saundra Brown Armstrong ruled that the EPA has a “mandatory duty” to issue findings within 180 days after accepting civil rights complaints for investigation, and cited previous instances when the EPA has been criticized for neglecting civil rights complaints. Judge Armstrong stated in the opinion:

> Despite the prior litigation involving its failures to resolve Title VI complaints in a timely manner and this Circuit’s criticism of those delays, the EPA has allowed Plaintiffs’ complaints to languish for decades.

The complaints in question were filed between 1992 and 2003, and when the lawsuit was filed in 2015, the Agency had not issued preliminary findings in any of them. After the lawsuit was filed, four of the complaints were closed with no actions taken after what the Plaintiffs called “cursory investigations” that found insufficient evidence of discrimination.

In the fifth and oldest case, a Flint, Michigan group called the St. Francis Prayer Center filed a complaint in 1992 alleging the state environmental agency discriminated against African Americans by treating them differently during the permitting process. In that case, the EPA Office of Civil Rights made its second-ever finding of discrimination in 2017, according to Earthjustice, but still closed the case without requiring any specific changes from the Michigan Department of Environmental Quality.

The complaint in Alabama against ADEM was filed by several members of the Ashurst Bar/Smith Community Organization in 2003. The complaint alleged that the siting of the landfill in a historically African American community—which claims to date back to land grants made to freed slaves during Reconstruction—amounted to discrimination in violation of Title VI.

Residents of the area, including the Rev. Ronald Smith and Phyllis Gosa, have alleged that since the landfill arrived, the town has been plagued by buzzards, foul odors, speeding garbage trucks and increased traffic on local roads. Ms. Gosa said last month in a news release:

> This is a case of both justice delayed and justice denied. We waited more than fifteen years for nothing: EPA didn’t come to our community, test the water, or test the air. Meanwhile, we feel that the landfill that ADEM allows to operate in the heart of our community threatens to destroy our way of life.

Earthjustice represented the Ashurst Bar/Smith Community Organization and the community organizations in other states in filing the civil rights complaints against EPA. Earthjustice staff attorney Suzanne Novak said the court’s ruling was an important one, even though the EPA was not forced to revisit the claims that had been dismissed. Earthjustice stated in a news release:

> Today’s decision affirms that EPA cannot continue going through the motions without meaningfully attending to serious problems of environmental discrimination. EPA must now secure real changes and ensure civil rights compliance by states and regional authorities that receive EPA funding. How long do communities overburdened with polluting facilities have to wait for justice?

Judge Armstrong ordered the parties to submit proposals for a resolution to the case based on her findings within 14 days.

Source: AL.com
missal of Upstate Forever and Savannah Riverkeeper’s citizen suit against Plantation Pipe Line Co. Inc. for lack of standing.

The majority opinion found that the CWA prohibits the discharge of pollutants from a point source through groundwater that has a direct hydrological connection to navigable waters of the United States. The majority opinion, authored by Judge Barbara Milano Keenan and joined by Chief Judge Roger L. Gregory, stated:

The plain language of the CWA requires only that a discharge come ‘from’ a ‘point source.’ Just as the CWA’s definition of a discharge of a pollutant does not require a discharge directly to navigable waters, neither does the act require a discharge directly from a point source.

While holding that a discharge need not be channeled by a point source until it reaches navigable waters, the majority opinion clarified that a discharge through groundwater does not always support liability under the CWA. The opinion said:

The connection between a point source and navigable waters must be clear. A plaintiff must allege a direct hydrological connection between groundwater and navigable waters in order to state a claim under the CWA for a discharge of a pollutant that passes through groundwater.

The judges applied that reasoning to this case, and noted the Plaintiffs have alleged that the contamination seeping into navigable waters was caused by a spill from the ruptured pipeline of Kinder Morgan Energy Partners LP et al. (case number 17-1640) in the U.S. Court of Appeals for the Fourth Circuit.

Source: Law360.com

XVIII.
UPDATE ON NURSING HOME LITIGATION

NURSING HOME RESIDENT CHOKES TO DEATH IN ALABAMA NURSING HOME

Nursing homes exist to provide skilled nursing care to elderly and disabled residents. In that capacity as a business, quality care should be their basic product and mission. However, the quality of care in the nursing home industry has markedly declined over the past decade. One of the main causes of this decline is that many nursing homes do not employ enough nurses and other qualified caregivers to allow them to provide quality care for all of the residents in their facilities. This understaffing creates a heavier workload for nurses and caregivers and often leads to patient neglect or poor-quality care for residents, which can result in avoidable illnesses or injury, many of which are serious and can lead to death. This fact is not only tragic and heartbreaking, but also completely unacceptable because many of these sicknesses or injuries are easily prevented with proper care.

Choking is one of these preventable nursing home injuries. Nursing home residents should never choke in nursing homes. Unfortunately, choking instances and deaths do happen. In fact, choking is the fourth leading cause of death among nursing home residents.

Lawyers in our firm are fighting to protect the safety and rights of nursing home residents by representing the injured in litigation to hold facilities accountable for their acts of abuse and neglect. Recently we filed a lawsuit on behalf of the family of a female resident in a Birmingham facility, who died as a result of a choking incident in Birmingham Nursing and Rehabilitation Center.

The complaint, filed in Jefferson County, Alabama Circuit Court, alleges that the nursing home failed to take the necessary precautions to prevent our client from choking, including providing adequate supervision and monitoring while she was eating. It is further alleged that once our client was discovered to be choking, the nursing home failed to immediately and properly respond to the choking crisis and provide medical care necessary to save her life. Carl Chamblee, Jr., of the Chamblee & Malone law firm in Birmingham is our co-counsel in this case.

Our lawyers are currently investigating other cases where residents have been injured or died as a result of suspected 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, a lawyer in our firm at Chris.Boutwell@beasleyallen.com or by phone at 800-898-2034. Chris handles Nursing Home Litigation for the firm.

MEMBERS OF CONGRESS INCREASE PRESSURE ON NURSING HOMES

Four Congressmen sent a nine-page letter to federal regulators in April requesting sweeping answers about the Centers for Medicare & Medicaid Services’ (CMS) oversight of nursing homes. The letter was part of an official inquiry into how well CMS oversees the nation’s skilled nursing care providers.

The inquiry is centered on the Rehabilitation Center at Hollywood Hills, Florida, which infamously did not have sufficient power supplies after Hurricane Irma hit Florida in the fall, allegedly leading to the deaths of 14 residents. The letter also asks CMS Administrator Seema Verma for information as to what CMS has been doing regarding “reports of sexual abuse and neglect” in skilled nursing and nursing facilities around the nation. The letter said:

The committee has been closely following recent media reports describing horrific instances of abuse, neglect, and patient harm allegedly occurring at skilled nursing facilities and nursing homes across the country.

The lawmakers noted that “the adequacy of the CMS’ oversight” also has been “called into question” recently by reports from the Office of Inspector General and the Government Accountability Office. “These reports raise serious questions about the degree to which the CMS is fulfilling its responsibility” to keep skilled nursing residents safe, wrote Congressmen Greg Walden (R-OR), Gregg Harper (R-MS), Michael C. Burgess (R-TX), and Gus M. Bilirakis (R-FL).
The letter went on to describe recent news accounts and federal agency reports detailing hundreds of incidents of neglect and abuse not being investigated in a timely manner, or not at all. The lawmakers also seek information on what CMS does to ensure nursing home staff are licensed appropriately. CMS was to have responded to the issues raised in the letter by late April. At press time we did not have access to the response. This level of Congressional interest in the safety of nursing home residents is a welcome development for those who have long advocated for the protection of residents’ rights and safety. Hopefully this will be the first step toward better CMS oversight of skilled nursing facilities and Congress passing laws better suited to protect the residents of skilled nursing and other nursing facilities.

Source: McKnight’s Long-Term Care News

**NURSING HOME LITIGATION**

If you have a potential claim involving a nursing home 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. Chris handles nursing home litigation for our firm.

**XIX. AN UPDATE ON CLASS ACTION LITIGATION**

**CLASS ACTION LAWSUIT SEeks TO HOLD POLARIS RESPONSIBLE FOR DANGEROUS DESIGN**

Lawyers in our firm’s Consumer Fraud & Commercial Litigation Section have filed a nationwide class action lawsuit on behalf of named Plaintiffs James Bruner, Michael Zeeck and Ed Beattie, individually and on behalf of the other members of the class, against off-road vehicle manufacturer and distributors Polaris Industries, Inc. and Polaris Sales Inc.

The lawsuit alleges Polaris has sold multiple models in its Ranger and RZR lines that suffer from a design defect that creates a significant and unreasonable risk of the vehicles overheating and catching fire. This defect has resulted in more than 250 fires, more than 30 severe injuries and at least three deaths.

Since at least 2011, Polaris has prioritized performance, style and cost savings over safety and in so doing produced more than 400,000 recreational off-road vehicles (ROVs) that can overheat and catch fire. Polaris has yet to offer owners an effective fix, so we filed to help bring about that change.

Polaris has continued selling Ranger and RZR off-road vehicles with ProStar engines, despite knowing that they suffer from an acute risk of catching fire. This lawsuit should force Polaris to seriously confront this issue and to start putting its customers’ safety above corporate profits.


It is alleged in the complaint the class vehicles contain a design defect in which the vehicles’ high-powered “ProStar” engine is located directly behind the occupant compartment, without proper ventilation and heat shielding. Because it is located within inches of combustible plastic body panels and close to vehicle occupants, it poses a high risk of fire and injury to passengers.

The Plaintiffs in this important case are represented by Dee Miles, who is head of the Consumer Fraud & Commercial Litigation Section at Beasley Allen, and Adam Levitt, a partner with the law firm of DiCello Levitt and Casey. The complaint is filed in the United States District Court for the District of Minnesota.

**HSBC AND DEUTSCHE GET $340 MILLION IN LIBOR SETTLEMENTS APPROVED**

U.S. District Judge Naomi Reice Buchwald, a New York federal judge, has granted preliminary approval for separate settlements by HSBC Bank and Deutsche Bank AG totaling $340 million in the multidistrict litigation (MDL) accusing several large financial institutions of manipulating the London Interbank Offered Rate (Libor). Judge Buchwald issued orders granting approval of the settlements, which were agreed to by a group of “over-the-counter investors” who purchased Libor-tied products directly from the banks.

HSBC had agreed last month to pay the investors $100 million to release their claims, while Deutsche Bank agreed to a $240 million settlement back in February. Both banks also agreed to cooperate in the ongoing litigation. The settlements are similar to agreements previously reached by the same investors with Citigroup Inc. and Barclays PLC totaling $250 million.

The allegations in the long-running suit stem from a multiyear investigation into banks’ alleged rigging of Libor, which tracks how much banks charge one another to borrow funds. Investigations by government enforcers around the globe sparked a series of lawsuits that were eventually gathered into multidistrict litigation in New York’s Southern District in August 2011.

The MDL is on remand from the Second Circuit, which reversed Judge Buchwald’s 2013 ruling that the Plaintiffs had not experienced an “antitrust injury,” since the Libor-setting process was not supposed to be about competition in the first place.

The OTC investors in the instant suit, which include Yale University and Baltimore city officials, were granted class certification by Judge Buchwald in March for a period between 2007 and 2010 after she found disagreements among experts about alleged Libor suppression and other factors showed that their claims were based on common issues.

The same order by the judge denied certification for a group of exchange-based investors, including investment manager Metzler Investment GmbH, which purchased instruments on the Chicago Mercantile Exchange between 2005 and 2010. Judge Buchwald found those investors had failed to meet the typicality and adequacy requirements of a class action.

Berkshire Bancorp Inc. also sought to lead a class of U.S.-based lenders that performed any loan transactions with interest rates tied to Libor before Aug. 1, 2007, and May 31, 2010. Judge Buchwald denied that request in the March order, after finding the lender would not be an adequate representative based on a previously undisclosed fee arrangement between a son of Berkshire Bank’s CEO Moses Krausz and Plaintiffs’ firm Pomerantz LLP.

Barclays was the first bank to settle with the OTC Plaintiffs, agreeing to a $120 million settlement in November 2015 that was granted preliminary approval in December of the following year. Judge Buchwald said when approving the agreement that it was the product of two years of negotiations and that it offered the investors “a significant recovery,” especially considering Barclays’ vow to cooperate.

Citi agreed to a $130 million settlement with the OTC investors in August 2017, which was approved later the same month. The HSBC and Deutsche settlements bring the total up to $590 million for the group of investors. The banks remaining in the case include Bank of America Corp., JPMorgan Chase & Co. and UBS AG.

The class is represented by Michael D. Hausfeld, Hilary Scherr, Nathaniel C.

Source: Law360.com

$16.8 Million Settlement Gets Preliminary Approval In Kellogg Employment Class Action

U.S. District Court Judge Ronald B. Leighton has granted preliminary approval for a $16.8 million settlement between food giant Kellogg Co. and a class of employees alleging that the company violated the Fair Labor Standards Act (FLSA). Named Plaintiff Patricia Thomas, a Kellogg employee, originally filed the suit in February 2013. In the complaint, Ms. Thomas claimed that Kellogg willfully violated the Fair Labor Standards Act by failing to pay territory managers and retail store representatives premium time-and-a-half wages when they worked over the standard 40 hours a week.

The named Plaintiff claimed that class members often worked in excess of 60 hours a week. The suit gained class certification in January 2014 and has survived numerous motions to dismiss filed by Kellogg. The case is: Thomas v. Kellogg Co. et al., (Case No.: 3:13-cv-05136) in the U.S. District Court for the Western District of Washington.

Source: Elizabeth DiNardo

Genworth And Investors Reach Settlement To End Suit Over $2.7 Billion Sale

Investors in insurer Genworth Financial Inc. have requested a Virginia federal judge to preliminarily approve a settlement resolving their proposed class action over alleged shortcomings in the company’s disclosures about its planned $2.7 billion sale to a Chinese conglomerate. The proposed settlement before U.S. District Judge Robert E. Payne would release Genworth and its board of directors from securities fraud claims brought by lead Plaintiffs Alexander Rice and Brian James. It was alleged that Genworth investors like the lead Plaintiffs hadn’t been given enough information to make their own judgments about the fairness of the merger with China Oceanwide Holdings Group Co. Ltd. that was announced in October 2016.

Rice and James told the judge in a motion that their pursuit of the case “resulted in Genworth making significant supplemental disclosures” in February 2017 that corrected the allegedly deficient disclosures and “allowed stockholders to make an informed decision regarding the merger.” The investors said:

In light of the benefits obtained from the supplemental disclosures, and the fact that Genworth would not have disclosed this material information absent lead plaintiffs’ efforts in this action, the settlement is clearly preferable to the risks, delay, and uncertainties of further litigation. Thus, the settlement clearly falls within the range of possible approval and should be preliminarily approved by the court.

The settlement papers filed with the court didn’t provide for additional mone tary compensation for Genworth investors other than an award of up to nearly $1.1 million in attorneys’ fees, costs and expenses that Rice and James said they intend to seek.

Rice and James also have asked Judge Payne to tentatively certify a settlement class consisting of investors who owned Genworth common stock at any point after the merger’s announcement and up until the merger’s completion or, if the merger doesn’t go through, the date of the shareholder vote on the merger: March 7, 2017.

China Oceanwide—through its investment platform, Asia Pacific Global Capital Co. Ltd.—agreed in October 2016 to acquire Genworth for $5.43 cash per share, a 4.2 percent premium to Genworth’s closing price leading up to the deal. China Oceanwide also pledged more than $1.1 billion in additional cash to help pay down debt and to help cover charges related to Genworth’s long-term care coverage claims.

Genworth was then sued by investors in a Virginia federal court for allegedly agreeing to a deal that undervalues the company and filing a misleading proxy statement with the U.S. Securities and Exchange Commission (SEC) that recommended shareholders vote for the deal while providing inadequate information on some key details, such as certain inputs and assumptions that went into the fairness opinions delivered by Genworth’s financial advisers Goldman Sachs & Co. and Lazard Freres & Co. LLC.

According to the settlement motion filed by Plaintiffs Rice and James, subsequent talks with Genworth led the company to agree to file some additional disclosures with the SEC in February 2017. Investor bids to block a planned shareholder vote on the deal were dropped, and the merger received shareholder approval the following month. In August 2017, Rice and James were appointed lead Plaintiffs in the suit, which was previously consolidated with several investor actions filed in Virginia and Delaware federal courts. The firms of Faruqi & Faruqi LLP and Kahn Swick & Foti LLC were selected to be co-lead counsel, with MeyerGoergen PC selected as liaison counsel.

A tentative agreement was reached in November 2017 to settle the suit and to conduct some additional discovery to further evaluate the proposed settlement. That discovery has been completed according to the motion. The lead Plaintiffs are represented by James M. Wilson Jr. of Faruqi & Faruqi LLP, Michael J. Palestina of Kahn Swick & Foti LLC, and Scott A. Simmons and Christopher J. Habenicht of MeyerGoergen PC.

The case is: Rice v. Genworth Financial Inc. et al., (case number 3:17-cv-00059) in the U.S. District Court for the Eastern District of Virginia.

Source: Law360.com

Good Technology’s $35 Million Settlement With JP Morgan Is Approved

A $35 million settlement between a class of shareholders of Good Technology Corp. and the company’s financial adviser J.P. Morgan Securities Inc. in the shareholders’ suit over the $425 million acquisition of the company by BlackBerry Ltd. received court approval last month in Delaware Chancery Court. The litigation involved Good Tech’s $425 million acquisition by BlackBerry in 2015. The shareholders alleged J.P. Morgan aided and abetted breaches of fiduciary duty by the directors by manipulating the board and failing to seriously pursue higher offers for the company or an initial public offering. BlackBerry Ltd. is funding the full amount of the settlement fund. The settlement amount represents a 100 percent premium over the deal price in the merger.

Most of the class members were former employees of Good Tech. The settlement with J.P. Morgan puts settlements with other Defendants in the case in question, especially a proposed $17 million settlement with the directors of Good Tech, which at press time was headed for arbitration.

Vice Chancellor J. Travis Laster found the settlement to be fair and reasonable and approved the attorneys’ fee and expense request. He had this to say to all parties: “I’m happy to enter the order approving the settlement and letting you

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all go on your way as it relates to this aspect of the case.”

Investors first sued for damages in October 2015, accusing Good Tech’s directors and the bank of squandering a chance to sell a “Silicon Valley unicorn” worth $1 billion and allowing it to spiral into a cash crisis that forced an undervalued sale. It was revealed in the suit that a Good Tech director had written in an internal email after the $425 million agreement that “BlackBerry got an absolutely fantastic fire sale deal because [Good Tech] couldn’t have made payroll next week.”

Holders of common stock eventually received only about 44 cents per share on the merger, down from a more than $4 per share market price earlier in the year. Venture capital and private equity holders of preferred stock, however, were paid at higher rates. Good Tech’s directors were accused of failing to police J.P. Morgan’s alleged conflicts of interest or to meet their duty to control the sale process.

The shareholders are represented by Joel Friedlander, Jeffrey M. Gorris and Christopher P. Quinn of Friedlander & Gorris PA and Randall J. Baron, A. Rick Atwood and Esther Lee of Robbins Geller Rudman & Dowd LLP. The case is In re: Good Technology Stockholder Corp. (case number 11580) in the Court of Chancery of the State of Delaware.

Source: Law360.com

**Syngenta To Pay $1.51 Billion To Settle GMO Corn Complaints**

We wrote last month about the $1.51 billion settlement reached by Agrochemical giant Syngenta AG with a large class of farmers who sued the company for economic damages. The Plaintiffs alleged Syngenta rushed its genetically modified pest-resistant Vipera corn seed to market before Chinese regulators approved the engineered strain. Seven additional state class actions in Arkansas, Illinois, Iowa, Missouri, Nebraska, Ohio and South Dakota were consolidated by the court.

U.S. District Judge John W. Lungstrum granted preliminary approval to the settlement last month. The judge also granted a joint motion to establish a settlement fund managed by Citibank NA. The settlement is believed to be “the largest agricultural litigation settlement in U.S. history.” If you need more information contact Scott Powell, a Birmingham lawyer, at 205-328-5330.

**Monsanto Stays On The Defense OnDicamba As Class Action Fight Moves Forward**

With the 2018 growing season gearing up, eyes on wide swaths of the nation’s farmland are sure to look out for continued damage from dicamba—a divisive weed killer blamed for damaging millions of acres of soybeans and other plants over the last couple years. But much attention will also be on a Missouri courtroom, where Monsanto is facing off in a proposed class action lawsuit with farmers who allege they were harmed by dicamba. The hard-to-control herbicide is notorious for its tendency to evaporate—or volatize—and move to other nearby areas. A schedule for the U.S. District Court’s proceedings in the cases has been set. There are more than a dozen complaints already in front of a federal judge.

The dicamba cases echo various complaints that have circulated since Monsanto’s 2015 release of its Xtend crop varieties genetically modified to tolerate the chemical. The trait enables farmers with Xtend cotton or soybeans to spray the crops with dicamba for weed control—leaving their plantings unharmed but threatening other, non-tolerant crops and vegetation through either volatility or physical drift.

Until last growing season, Xtend seeds had been on the market without the corresponding type of less-volatile dicamba spray, which had not secured regulatory approval. Its absence created a situation where many farmers with dicamba-tolerant seeds chose to illegally use older versions of the chemical that are more prone to off-target movement. But even with the new, lower-volatility sprays available for the 2017 growing season, incidents of reported dicamba damage continued—and actually increased—spanning 3.6 million acres of U.S. soybeans.

Senath, Missouri-based Cow-Mil Farms, Inc., in its lawsuit alleges that reported dicamba damage has been both a predictable and profitable result of Monsanto’s rollout of the Xtend product package. According to the complaint filed in the case:

To Monsanto, it was foreseeable that farmers would spray dicamba on a seed designed to resist it, that old dicamba is volatile and would drift, that the Xtend seeds would eventually dominate the market, and that the farming communities in the affected states (including Plaintiffs and the Class) would suffer massive destruction to their crops.

Citing both farmers and weed scientists, other contentions outlined in the complaint include allegations that Monsanto sales representatives privately cononed unauthorized use of the herbicide and suggestions that damage is expected to continue, even with the availability of new “allegedly lower-volatility” dicamba formulations made by Monsanto and other companies, such as BASF. The scope of the proposed Plaintiff class is still coming into focus, but it has been estimated “in the hundreds.”

Source: Herald & Review News Service

**Kimberly-Clark and Halyard Get Punitive Damages Award Reduced**

U.S. District Judge Dolly M. Gee has ruled that a California federal jury was right to hold Kimberly-Clark Corp. and its spinoff Halyard Health Inc. responsible for misleading buyers about the impermeability of the companies’ MicroCool surgical gowns, but awarded unconstitutionally high punitive damages. The judge reduced the original $450 million award to just over $20 million. The jury’s April 2017 award called for Kimberly-Clark to pay $350 million in punitive damages and for Halyard to pay $100 million, compared to their respective compensatory damages of about $3.9 million and $260,000.

Judge Gee said those ratios—90-to-1 for Kimberly-Clark and 382-to-1 for Halyard—are unconstitutional and said 5-to-1 ratios across the board are appropriate. Judge Gee wrote:

> Defendants’ conduct was egregious—but that assessment must be tempered by a consideration of the fact that this case presented evidence of only economic harm and not emotional or physical harm.

The new ratio would put Kimberly-Clark at about $19.4 million and Halyard at about $1.3 million. The Plaintiffs have to consent to the damages, or else Judge Gee said she would hold a trial over the damages issue. The judge also extended an existing stay on the judgment, granting an additional 30 days.

Bahamas Surgery Center and the class are represented by Michael Avenatti and Ahmed Ibrahim of Eagan Avenatti LLP. The case is Bahamas Surgery Center LLC v. Kimberly-Clark Corporation et al. (case number 2:14-cv-08390) in the U.S. District Court for the Central District of California.

Source: Law360.com

**Supreme Court Refuses To Hear Appeal Of Hot Fuel Settlements**

The U.S. Supreme Court has denied certiorari in the $24.5 million Hot Fuel class action settlement, which resolved claims...
that oil companies and fuel retailers mislead consumers and overcharged for fuel as temperatures increased. Objectors to the settlements argued unsuccessfully that the oil industry was essentially being forced to make political donations and that the settlements violated the sovereign legislative authority of the states. There are 28 total class action settlements, four of which involve the installation of temperature compensating equipment at fuel retail stations, with 24 more involving the payment of money into a fund for the future installation of such compensation equipment.

The Hot Fuel litigation had claimed that oil companies and fuel retailers were overcharging consumers because these companies did not compensate for temperature variations when selling fuel to retail consumers. Motor fuel expands and becomes less dense when heated, and therefore has less potential energy per gallon at higher temperatures. These variations are significant enough that temperatures are tracked and prices adjusted accordingly at all levels of the fuel distribution chain, except the final sale to retail consumers.

The oil industry argues that temperature compensation at the fuel pump is unnecessary and would not benefit consumers, despite the fact that these companies have installed temperature compensating equipment at their Canadian stations where fuel temperatures are low and the use of such equipment is to their direct benefit.

The agency also develops uniform safety standards, some being mandatory and others developed through a voluntary standards process. The CPSC also conducts research into product-related illness and injury.

In part due to its relatively small size, the CPSC attempts to coordinate with outside parties—including companies and consumer advocates—to leverage resources and expertise to achieve outcomes that advance consumer safety. The agency was created in 1972 through the Consumer Product Safety Act.

The CPSC reports to Congress and the President; it is not part of any other department or agency in the federal government. The CPSC has five commissioners, who are nominated by the president and confirmed by the Senate for staggered seven-year terms. Since 2009 the agency has generally been led by five commissioners, one of whom serves as chairperson. The commissioners set policy for the CPSC. The CPSC is headquartered in Bethesda, Maryland.

The commissioners of the CPSC are appointed by the U.S. president and with the consent of the U.S. Senate. Although the president is entitled by statute to select the chairperson (with the consent of the Senate), no more than three commissioners may belong to the same political party. The commissioners (including the chairperson) vote on selecting the vice chairperson, who becomes acting chairperson if the chairperson's term ends upon resignation or expiration.

The CPSC regulates the manufacture and sale of more than 15,000 different consumer products, from cribs to all-terrain vehicles. Products excluded from the CPSC's jurisdiction include those specifically named by law as under the jurisdiction of other federal agencies; for example, automobiles are regulated by the National Highway Traffic Safety Administration, guns are regulated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and drugs are regulated by the Food and Drug Administration.

The mission of the CPSC is to ban dangerous consumer products and to establish safety requirements for other consumer products. The CPSC issues recalls of products already on the market, and researches potential hazards associated with consumer products.

The CPSC makes rules about consumer products when it identifies a consumer product hazard that is not already addressed by an industry voluntary consensus standard, or when Congress directs it to do so. Its rules can specify basic design requirements, or they can amount to product bans. For certain infant products, the CPSC regulates even when voluntary standards exist. The CPSC is required to follow a rigorous, scientific process to develop mandatory rules. Failing to do so can justify the revocation of a rule.

The CPSC learns about unsafe products in several ways. The agency maintains a consumer hotline through which consumers may report concerns about unsafe products or injuries associated with products. Product safety concerns may also be submitted through SaferProducts.gov. The agency also operates the National Electronic Injury Surveillance System (NEISS), a probability sample of about 100 hospitals with 24-hour emergency rooms. NEISS collects data on consumer product-related injuries treated in emergency rooms and can be used to generate national estimates. The agency also works with and shares information with other governments, both in the U.S. (with states and public health agencies) and with international counterparts.

The CPSC alone obtained 473 voluntary recalls in 2007, which was a record. The Consumer Product Safety Improvement Act was passed in 2008. The bill increased funding and staffing for the CPSC, placed stricter limits on lead levels in children's products (redefined from products intended for children age 7 and younger to children age 12 and younger), restricted certain phthalates in children's toys and child care articles, and required mandatory testing and certification of applicable products.

The Danny Keysar Child Product Notification Act required the CPSC to create a public database of recalled products and to provide consumers with a postage-paid postcard for each durable infant or toddler product. This act was named after Danny Keysar, who died in a recalled crib. Danny's parents, Linda E. Ginzel and Boaz Keysar, founded Kids In Danger and were instrumental in working with the CPSC to strengthen product safety standards.

The public database (saferproducts.gov), constructed at a cost of around
$3 million and launched in March 2011, “publicizes complaints from virtually anyone who can provide details about a safety problem connected with any of the 15,000 kinds of consumer goods regulated by the” CPSC. It is very important that previously hidden information is made available by the CPSC.

The CPSC also works on a variety of publicity campaigns to raise awareness of safety.

We believe the work of the CPSC is critically important to the public. Hopefully the information relating to the CPSC will give our readers a better insight into this agency. There have been attempts both in Congress and the Trump White House to weaken the agency. Hopefully, the American people will respect that sort of thing and let President Trump and Congress know how they feel about the need for consumer protection.

**How To Know If Your Facebook Data Was Shared With Cambridge Analytica**

Facebook will begin alerting the 87 million users—of which an estimated 70 million are in the U.S.—that their personal data was affected in the Cambridge Analytica scandal. Last month, news broke that the London-based voter analytics group Cambridge Analytica was able to obtain information about tens of millions of Facebook users. The original data collection was done by a University of Cambridge psychology professor, Aleksandr Kogan. Kogan used an app, “This Is Your Digital Life,” to offer a personality test. Facebook users who downloaded the app gave it permission to collect certain data. That data included their location, their friends, and content they had liked on Facebook. Under the Facebook rules at the time of Kogan’s data collection, his actions were completely allowable.

Facebook has reported that Kogan did violate the terms of service when he passed the information on to Cambridge Analytica. Cambridge Analytica was later hired to work on President Donald Trump’s campaign in 2016. As of last month, both Kogan and Cambridge Analytica have been banned from Facebook’s platform.

Facebook users have two separate ways to check if their personal data was affected in the scandal:

- First, those affected by the breach should receive an alert through their News Feed. Anyone may check through Facebook’s online Help Center. While they will begin immediately, the News Feed alerts will be done over time, so rather than waiting for the alert to appear, users may check the Help Center and look for the “Was My Information Shared?” section, where Facebook will tell you whether you or any of your friends used the quiz app “This Is Your Digital Life,” which Kogan used to originally harvest personal information. Facebook will not notify individual users of the identity of their friend who used the app.
- Alternatively, Facebook users can check the online Help Center by clicking the question mark at the top right of face- book.com and then search “Cambridge Analytica” to find out if they were included in the improper sharing of their data. Even if a Facebook user never used the “This Is Your Digital Life” app, their data still may have been improperly shared if a Facebook friend used the app.

Affected users will be prompted to change app settings, but each of the 2.2 billion Facebook users will receive a notification titled, “Protecting Your Information,” with links to see what apps they use and what information they have shared with those apps. This notification gives the user the option to shut off apps individually or turn off third-party access to their apps completely.

Beasley Allen lawyers are investigating the violations of Facebook’s terms of service. If you were included in the improper sharing of your data then feel free to contact one of our lawyers investigating this matter, including Andrew Brashier (Andrew.Brashier@beasleyallen.com); Archie Grubb (Archie.Grubb@beasleyallen.com); or Leslie Pescia (Leslie.Pescia@beasleyallen.com) or you can call them at 800-898-2034.

*Sources: CBS News & MSN.com*

**Furniture Tip-overs Are A Major Threat in the Home**

Every 17 minutes, someone is injured in the United States by a furniture, television or appliance tip-over, according to the Consumer Product Safety Commission (CPSC). Estimated tip-over injuries for children younger than 6 involving dressers and other clothing storage units increased in 2016 to 2,800 from 2,100 the year before, or by 33 percent. It is therefore no surprise that the CPSC has labeled furniture tip-overs an “epidemic” capable of deadly consequences. Between 2000 and 2016, 82 percent of all reported tip-over deaths involving clothing storage units involved children younger than 6.

Janet McGee’s story is especially heart-breaking. One Sunday afternoon in 2016, she was waiting for her 22-month-old son, Ted, to wake from his afternoon nap. She had been checking on him every 15 minutes. When she checked on him for the last time, she noticed that he was not in bed. Instead, she saw that the dresser had toppled over. “He’s under there, he’s under there,” Janet remembers thinking. “I lifted the dresser up, and I started digging through the drawers because all of the drawers had fallen out. And there he was at the bottom. His face was purple. His eyes were half open. I screamed for my husband to come. I started CPR on him.” Paramedics rushed Ted to the hospital, but medical staff could not revive him.

Just like in many tip-over incidents, the weight of the dresser had suffocated the little boy. Although Janet and other family members were within earshot of him, no one heard the crash because Ted’s body absorbed the impact of the falling dresser. While they thought Ted’s death was a freak incident, they would later learn that these incidents happen all the time, and that the IKEA Malm, the dresser at issue, had been linked to previous tip-over deaths. IKEA did not decide to recall the product until four months after Ted died. What’s more, the McGees had tried to protect Ted. They installed safety gates, covered power outlets, and latched all cabinets—but they had never heard of a furniture tip-over.

Today, the industry operates under a voluntary tip-over testing standard, which means any dresser taller than 30 inches should stay upright with 50 pounds of weight hanging from an open drawer. Because these standards are voluntary, manufacturers are not required to do testing, let alone meet the standard. Some do meet the standard, but others, like IKEA, fall short.

The CPSC estimates that there are 30,700 annual emergency department-treated injuries related to furniture, televisions and appliances tipping over on a person. An investigation by Consumer Reports (CR) revealed a number of important findings concerning the stability of dressers in the marketplace. First, CR concluded that the industry standard is inadequate and that the standard should require a 60-pound test because it represents the weight range of U.S. children younger than 6. Dressers that passed CR’s tests tended to be heavier, back-weighted, deeper dressers with less drawer extension. Most significantly, CR found that there’s no easy way for consumers to simply eye a dresser and tell whether it is likely to tip over.

CR further found that 46 percent of tip-over deaths happen in bedrooms, sometimes after children have napped and subsequently climbed onto dressers. CR also found that consumers should avoid
placing TVs on top of dressers, as 53 percent of reported tip-over fatalities for children younger than 18 involved TVs and dressers tipping over together. CR concluded that while one of the most effective ways to prevent tip-overs is to secure dressers to walls, CR found that responsibility ultimately fell to industry to ensure that dressers were safer and more stable.

Clearly, furniture tip-overs are a major hazard to our most vulnerable populations, and responsibility falls squarely with manufacturers to ensure they are safe. Lawyers in our firm have investigated and litigated tragic cases involving tip-over incidents. The voluntary standards should be dropped for mandatory standards, and as the CR concluded, the present “voluntary” standard must be improved to accommodate the weight of children younger than 6.

If you have any questions about furniture tip-over incidents, contact Parker Miller, a lawyer in our firm’s Personal Injury & Products Liability Section, at Parker.Miller@beasleyallen.com or 800-898-2034.

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RECALLS UPDATE

We are again reporting a large number of safety-related recalls. We have included some of the more significant recalls that were issued in April. 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.

1.2 MILLION VEHICLES RECALLED OVER COOLANT PUMP FIRE RISK

Audi recalled the same vehicles last year and dealers did a software update. But the company says in documents posted by the U.S. National Highway Traffic Safety Administration that pump problems continued. Audi will send out recall letters on or before June 11.

FORD RECALLS 350,000 F-150s AND EXPEDITIONS THAT CAN ROLL EVEN WHEN PARKED

Ford is recalling about 350,000 trucks for a problem that could cause them to roll even after the driver shifts into park. The issue affects 2018 Ford F-150 and Ford Expedition vehicles with 10-speed automatic transmissions, as well as Ford F-650 and F-750 vehicles with 6-speed automatic transmissions. Ford says a piece of equipment on the affected vehicles can become dislodged over time, which means the car won’t be in the gear that it looks like it’s in, such as park. This means that if the driver shifts the car into park, the car might not actually be in park—and there would not be a warning message to indicate that. If he or she doesn’t use a parking brake, Ford says the vehicle could roll. Ford says it’s aware of one reported accident and injury.

The recall involves approximately 347,425 vehicles in North America, with 292,909 in the United States and federalized territories, 51,742 in Canada and 2,774 in Mexico. The Ford reference number for this recall is 18S10. Dealers will inspect and verify that the shift cable locking clip was properly installed. If the clip is not properly seated, technicians will adjust the shift lever and secure the locking clip at no cost to the customer.

FORD RECALLS SELECT VEHICLES FOR PARKING ISSUE DEFECT

Ford is issuing a safety recall in North America for approximately 161 2017-18 Ford F-150 and 2018 Ford Expedition, 2018 Lincoln Navigator and 2018 Ford Mustang vehicles with 10R80 transmissions for a potentially missing roll pin that attaches the park pawl rod guide cup to the transmission case.

If the pin is missing, with repeated use the transmission may eventually lose park function even when the shifter and instrument panel display indicate the vehicle is in park. This condition would allow the ignition key to be removed with no instrument panel warning message or warning chime when the driver’s door is opened that indicates the vehicle is not secured in park. If the parking brake is not applied, this could result in unintended vehicle movement, increasing the risk of injury or crash. Ford is not aware of any reports of accidents or injuries related to this condition. Affected vehicles include:

- 2017-18 Ford F-150 vehicles built at Dearborn Assembly Plant, Oct. 20, 2016 to March 5, 2018
- 2018 Ford Expedition vehicles built at Kentucky Truck Plant, Nov. 28, 2017 to Feb. 14, 2018
- 2018 Ford Mustang vehicles built at Flat Rock Assembly Plant, Nov. 6, 2017 to Feb. 12, 2018
- 2018 Lincoln Navigator vehicles built at Kentucky Truck Plant, Dec. 13, 2017 to March 8, 2018

The recall involves approximately 161 vehicles in North America with 142 in the United States and federalized territories, 18 in Canada and one in Mexico. The Ford reference number for this recall is 18S09. Dealers will inspect the transmission for a missing park pawl rod guide cup roll pin and will install the roll pin if required at no cost to the customer.

MIZCO INTERNATIONAL RECALLS POWER BANK CHARGING STATIONS DUE TO FIRE AND BURN HAZARDS

Mizco International Inc., of Avenel, New Jersey has recalled about 6,000 Re-fuel power bank charging stations. When the unit is being charged, it can overheat, posing fire and burn hazards. This recall involves the Re-fuel by Digipower Grab and Go Family Pack portable power bank charging stations. The power bank charger is a self-contained energy source used to charge cell phones and other devices when an electrical outlet is not available. The unit consists of three (black, gray and green) 2600 mAh re-chargeable lithium-ion battery chargers that sit on a recharging docking station. Each power bank is oval in shape and measures approximately 3.75 inches long by 1.25 inches high by 0.75 inches wide. “re-fuel by DIGIPOWER” is printed on each power bank. Item number RF-TRIP is printed on the bottom of the charging station. The company has received five reports of power bank charging stations overheating and melting. No injuries have been reported.

The banks were sold exclusively at The Container Store stores nationwide from October 2017 through February 2018 for about $40. Consumers should immediately stop using the recalled charging stations and contact The Container Store for
instructions on how to receive a full refund. Contact The Container Store toll-free at 888-266-8246 from 9 a.m. to 7 p.m. CT anytime, via email at contain@containerstore.com or online at www.containerstore.com and click on Product Recall for more information. Pictures available here: https://www.cpsc.gov/Recalls/2018/Mizco-International-Recalls-Power-Bank-Charging-Stations-Due-to-Fire-and-Burn-Hazards-Sold-at-The-Container-Store

SPRiTiT HAlLOWEn rECALLs NiCkELoDeON pAw pATRoL MArSHAll HaT wITH FlAshLIGHT DETo FIRE And BUrn HaZArDS

About 20,000 Nickelodeon PAW PATROL Deluxe Marshall Hat with flashlight have been recalled by Spencer Gifts, LLC of Egg Harbor Twp, New Jersey. In addition, about 1,500 were sold in Canada. The batteries in the flashlight can overheat, causing the flashlight to become hot, posing burn and fire hazards. This recall involves the Nickelodeon PAW PATROL Deluxe Marshall Hat sold with an accessory flashlight. The PAW PATROL Marshall hats are red with a yellow ribbon, black and white spotted dog ears and a black flash light attached to the side of the hat. The flashlight is included with the hat and they share the SKU number. Only flashlights with SKU 01029093 and date codes 1705RY01, 1603RY01, and 1505RY01 are involved in this recall. The SKU number and date codes are on the sewn in label under the ear on the hat. The company has received three reports of the flashlight overheating and one report of an overheating flashlight in Canada. No injuries or fires have been reported.

The hats were sold at Spirit Halloween stores nationwide from September 2015 through November 2017 for about $13. Consumers should immediately take the flashlight that was sold with the hat away from children, stop using it, remove the batteries and dispose of the flashlight and contact Spirit Halloween for a full refund. Customers will be asked to provide a photo of the tag located under the ear in the hat. Contact Spirit Halloween toll-free at 866-586-0155 from 9 a.m. to 5:30 p.m. ET Monday through Friday, email at GuestServices@spirithalloween.com or online at www.spirithalloween.com and click on Customer Service at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2018/Primark-Recalls-Decorative-Cushions-Due-to-Fire-Hazard

PReIMARK rECAlls dECORATIVE CUSHiONS DeTo FIRE hAzARD

Primark US Corp., of Boston, Massachusetts has recalled about 14,500 Decorative cushions. The cushions can catch fire if exposed to an ignition source, posing a fire hazard. This recall involves 21 different Primark decorative cushions. The cushions were sold in various colors and shapes, including square, rectangular, heart-shaped, unicorn-shaped, and pumpkin-shaped. The product code is printed on the label attached to the cushion.

The cushions were sold exclusively at Primark’s eight stores located in the northeastern U.S. from May 2017 through February 2018 for between $5 and $9. Consumers should immediately stop using the cushions and return the cushions to a Primark store for a full refund. Contact Primark toll-free at 855-215-5829 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.primark.com/en-us and click on “Customer Service” at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2018/Primark-Recalls-Decorative-Cushions-Due-to-Fire-Hazard

PoLaRiS rECAllS PhOENiX 200 All-terRaiN vEHiCLES DeTo CRASH hAZARD

Aeon Motor Co., of Taiwan has recalled about 5,600 Polaris Phoenix 200 all-terrain vehicles (ATVs). The throttle limiter can fail due to damage during shipping, posing a crash hazard. This recall involves all model year 2014 through 2017 Phoenix 200 all-terrain vehicles. “Polaris” is stamped on the front grill and on the sides of the ATV seats, and “Phoenix 200” is stamped on the side panels. The ATVs were sold in blue and gray. Model numbers A14PBJ20AF, A15YAZ20AF, A16YAZ20AF and A17YAZ20AF are included in this recall. The model number is located on the vehicle frame. To check for recalled vehicles by vehicle identification number (VIN) visit www.polaris.com. Polaris has received nine reports of a damaged throttle limiter failure that resulted in minor injuries.

The vehicles were sold at Polaris dealers nationwide from July 2013 through April 2018 for about $3,600. Consumers should immediately stop using the recalled ATVs and contact Polaris for instructions on how to inspect for a damaged throttle limiter, including one report of throttle limiter failure that resulted in minor injuries.

The vehicles were sold at Polaris dealers nationwide from July 2013 through April 2018 for about $3,600. Consumers should immediately stop using the recalled ATVs and contact Polaris for instructions on how to inspect for a damaged throttle limiter, including one report of throttle limiter failure that resulted in minor injuries.

Contact Polaris at 800-765-2747 from 7 a.m. to 5 p.m. ET 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. In addition, check your vehicle identification number (VIN) on the “Product Safety Recalls” page to see if your vehicle is included in any recalls. Pictures available here: https://www.cpsc.gov/Recalls/2018/Polaris-Recalls-Phoenix-200-AllTerrain-Vehicles-Due-to-Crash-Hazard

Briggs & stratton rECAlls SURFaCE cleanerS DeTo INJury hAZARD

Briggs & Stratton Corporation, of Wauwatosa, Wisconsin has recalled about 201,000 3000 PSI pressure washer surface cleaners. An additional 5,400 are recalled in Canada. The surface cleaner's spray bar can break and detach from the central hub, causing broken pieces to strike consumers, posing an injury hazard. This recall involves 3000 PSI Briggs & Stratton and Craftsman branded pressure washer surface cleaners. The recalled surface cleaners are black, red, or gray and have the Briggs & Stratton or Craftsman brand names printed on the top of the product. All recalled models have 3000 PSI molded into the top of the housing. Surface cleaners are designed to clean a variety of outdoor surfaces including concrete, asphalt and stone walkways. The cleaner connects to a pressure washer rated up to 3000 PSI. Briggs & Stratton has received five reports of the surface cleaners spray bar detaching from the central hub, including one report of the spray bar striking an operator, resulting in a cut on the knee which required sutures to close.

The pressure washers were sold at Briggs & Stratton dealers, Lowe’s and other department, home and hardware stores nationwide and online at www.Lowes.com from March 2010 through February 2018 for between $50 and $80. Consumers should immediately stop using the recalled surface cleaners and contact Briggs & Stratton for instructions to register online for a free replacement. Contact Briggs & Stratton toll-free at 877-370-7505 from 8 a.m. to 5 p.m. CT Monday through Friday, or online at www.briggsandstratton.com and click on “Support” at the top of the page and then “Recalls” or www.BriggsSurfaceCleanerInfo.com for more information. Pictures available here: https://www.cpsc.gov/Recalls/2018/Briggs--Stratton-Recalls-Surface-Cleaners-Due-to-Injury-Hazard

HE–b rECAllS hAlOGEN lIGHTbULbs DeTo lACeraTION AND FIre hAZARD

About 2.5 million GTC halogen light bulbs have been recalled by Parkway Trading and Manufacturing Company, of San Antonio, Texas (an HEB company).
The halogen light bulbs can shatter while in use in a lamp or light fixture, posing laceration and fire hazards to consumers. This recall involves GTC halogen light bulbs. They were sold in packages of 2 or 4 bulbs. The bulb packages were sold in 25 watt, 40 watt, 60 watt, 75 watt, or 100 watt bulb varieties in either clear or soft white colors. The bulbs measure approximately 4.5 inches in length and 2.375 inches in diameter. The tops of the bulbs read “GTC” and include the wattage and lumens values. The bulbs are packaged in blue and red cardboard boxes that read: “GTC NATURAL LIGHT” across the top, along with the wattage and color of the bulb. The UPC codes are printed on the product packaging. The company has received 14 reports of the light bulbs shattering while in a lamp or light fixture. One consumer had a cut on his hand, and another had a burn to his hand and cuts on his foot.

The bulbs were sold at H-E-B stores in Texas or online at www.heb.com from August 2015 to December 2017 for about $2.20 (for 2 pack) and $4 (for 4 pack). Consumers should immediately stop using the recalled halogen light bulbs and return them to H-E-B for a full refund. Consumer Contact: H-E-B at 800-432-3113 between 8 a.m. and 5 p.m. CT Monday through Friday or online at www.heb.com and click on Product Recalls under the Customer Service heading at the bottom of the homepage for more information. Pictures available here: https://www.cpsc.gov/Recalls/2018/H/E-B-Recalls-Halogen-Light-bulbs-Due-to-Laceration-and-Fire-Hazards

**PRIMO RECALLS BEVERAGE DISPENSERS DUE TO BURN HAZARD**

Primo Water Operations Inc. of Winston-Salem, North Carolina has recalled about 11,000 Primo iHtrio Multi-purpose beverage dispensers. Hot water can drip from the machine when it is used in high altitude areas over 6,000 feet in elevation, posing a burn hazard to users. This recall involves the Primo iHtrio Multi-Purpose beverage dispensers purchased on or before December 31, 2017 which provides both hot and cold water and brews 6, 8, and 10 ounce hot beverages. Model numbers 601225, 601229, and 601240 are printed on the bottom of the product and Primo is printed on the front. Primo has received three reports of hot water leaking from the product being used in high altitude areas, including one burn injury to a customer’s hand.

They were sold at Sam’s Club and online at Amazon.com, and Wayfair.com from January 2017 through December 2017 for between $200 and $250. Consumers in high altitude areas over 6,000 feet in elevation should immediately stop using the recalled dispensers and contact Primo for a free replacement. Contact Primo toll-free at 866-129-7566 from 10 a.m. to 6 p.m. ET Monday through Friday, or at www.primowater.com and click on Recall Information for more information. Pictures available here: https://www.cpsc.gov/Recalls/2018/Primo-Recalls-Beverage-Dispensers-Due-to-Burn-Hazard

**VORNAO AIR RECALLS ELECTRIC SPACE HEATERS DUE TO FIRE AND BURN HAZARDS**

Vornado Air LLC, of Andover, Kan., has recalled about 350,000 VH101 Personal Vortex electric space heaters. The electric space heater can overheat when in use, posing fire and burn hazards. This recall involves Vornado VH101 Personal Vortex electric space heaters sold in the following colors: black, coral orange, grayed jade, cinnamon, fig, ice white and red. The heaters measure about 7.2 inches long by 7.8 inches wide by 7.10 inches high and have two heat settings (low and high) and a fan only/no heat setting. “Vornado” with a “V” behind it is printed on the front of the unit. The model/type “VH101,” serial number and ETL mark are printed on a silver rating label on the bottom of the unit. Vornado has received 15 reports of the heaters catching on fire.

The heaters were sold at Bed Bath & Beyond, Home Depot, Menards, Orchard Supply, Target and other stores nationwide and online at Amazon.com, Target.com, Vornado.com and other websites from August 2009 through March 2018 for about $30. Consumers should immediately stop using the recalled heaters and contact Vornado for instructions on how to receive a full refund or a free replacement unit, including free shipping. Contact Vornado toll-free at 855-215-5131 from 8 a.m. to 5 p.m. CT Monday through Friday or online at www.vornado.com and click on “Recalls” in the lower right corner of the homepage or www.vornado.com/recalls and click on “recalled equipment” on the VH101 Personal Heater recall button for more information. Pictures available here: https://www.cpsc.gov/Recalls/2018/Vornado-Air-Recalls-Electric-Space-Heaters-Due-to-Fire-and-Burn-Hazards

**HONEYWELL RECALLS HARD HATS DUE TO RISK OF HEAD INJURY**

About 2,900 Petit Collage musical jumbo wooden xylophones have been recalled by Petit Collage, of San Francisco, California. The ball on the end of the toy xylophone beater stick can separate, posing a choking hazard to young children. This recall involves Petit Collage musical jumbo wooden xylophones. They are musical instrument toys for children. The recalled toy xylophone has a wooden base shaped like the profile of an elephant with five different colored metal keys and a wooden beater stick with a red wooden ball attached to one end. The beater stick measures about 5 5/8 inches long by 3/4 inches wide. “Petit Collage” and “TT.1902.0617” are printed on the bottom back of the xylophone. Only xylophones with this letter/number combination are included in the recall. The company has received one report of the ball separating from the beater rod and one report of the
ICE POPS SHIPPED TO ALABAMA RECALLED OVER LISTERIA CONCERNS

Ice pops shipped to Alabama and 14 other states have been recalled due to possible listeria contamination. West Virginia-based Ziegenfelder Company announced it was voluntarily recalling two types of frozen desserts—Budget $aver Cherry Pineapple Monster Pops and Sugar Free Twin pops, the Food and Drug Administration announced Monday. Almost 3,000 cases of the pops were shipped to Alabama, Arkansas, Florida, Maine, Missouri, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Texas, Utah, Washington and Wyoming between April 5-19. The Cherry Pineapple Monster Pops have the UPC code 0-74534-84200-9, and have lot codes D09418A through D10018B. The Sugar Free Pops have the UPC code 0-74534-75642-9, and have lot codes D09318A through D10018B. The recall comes after a routine state inspection discovered the presence of Listeria at the company’s Denver production facility. Listeria can cause serious and sometimes fatal infections in young children, frail or elderly people, and others with weakened immune systems.

Massive Egg Recall

Rose Acre Farms of Seymour, Indiana has recalled 206,749,248 eggs because they have the potential to be contaminated with Salmonella Braenderup, an organism which can cause serious and sometimes fatal infections in young children, frail or elderly people, and others with weakened immune systems.

Acre initiated the recall after at least 22 illnesses on the East Coast were traced back to its egg production farm in Hyde County, North Carolina, which produces 2.3 million eggs a day from 3 million laying hens. The U.S. Food and Drug Administration (FDA) is involved in an investigation that has included an inspection of the facility and interviews of the victims.

Healthy individuals infected with Salmonella Braenderup can experience fever, diarrhea, nausea, vomiting and abdominal pain. In rare circumstances, infection with Salmonella Braenderup can result in the organism getting into the bloodstream and producing more severe illnesses such as arterial infections (i.e., infected aneurysms), endocarditis and arthritis.

The potentially contaminated eggs from the Hyde County farm reached consumers in 10 states including Colorado, Florida, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Virginia, and West Virginia by direct delivery to retail stores and restaurants.

More than 550 million table eggs were recalled from two Iowa egg farms owned by Austin (Jack) DeCoster in 2010 involving a nationwide Salmonella outbreak that sickened thousands. Afterward, Jack and his son Peter DeCoster each plead guilty to one count of allowing misbranded and adulterated food to enter interstate commerce. They and their company, Quality Egg LLC, ended up paying $7 million in fines and both DeCosters served three months in federal prison.

The affected eggs this time are from plant number P-1065 with the Julian date range of 011 through the date of 102 printed on either the side portion or the principal side of the carton or package.

FDA ORDERS MANDATORY RECALL FOR KRATOM PRODUCTS DUE TO RISK OF SALMONELLA

Triangle Pharnanaturals refused to cooperate with the U.S. Food and Drug Administration (FDA) despite repeated attempts by the agency to encourage voluntary recall. As a result, the FDA was forced to issue a mandatory recall order for all food products containing powdered kratom manufactured, processed, packed, or held by Triangle Pharnanaturals LLC, after several were found to contain salmonella. The agency took this action after the company failed to cooperate with the FDA’s request to conduct a voluntary recall. This is the first time the agency has issued a mandatory recall order to protect Americans from contaminated food products.

The FDA is telling consumers to discard the products that are part of the mandatory recall, which include, but are not limited to: Raw Form Organics Maeng Da Kratom Emerald Green, Raw Form Organics Maeng Da Kratom Ivory White, and Raw Form Organics Maeng Da Kratom Ruby Red. The FDA understands that Triangle Pharnanaturals may manufacture, process, pack and/or hold additional brands of food products containing powdered kratom, including powder and encapsulated powder forms. FDA Commissioner Scott Gottlieb, M.D. stated:

This action is based on the imminent health risk posed by the contamination of this product with salmonella, and the refusal of this company to voluntarily act to protect its customers and issue a recall, despite our repeated requests and actions. We continue to have serious concerns about the safety of any kratom-containing product and we are pursuing these concerns separately. But the action today is based on the risks posed by the contamination of this particular product with a potentially dangerous pathogen. Our first approach is to encourage voluntary compliance, but when we have a company like this one, which refuses to cooperate, is violating the law and is endangering consumers, we will pursue all avenues of enforcement under our authority.

Mitragyna speciosa, commonly known as kratom, is a plant that grows naturally in Thailand, Malaysia, Indonesia and Papua New Guinea. Importantly, the FDA advises consumers to avoid kratom or its psychoactive compounds, mitragynine and 7-hydroxymitragynine, in any form and from any manufacturer. The agency also has received concerning reports about the safety of kratom, including deaths associated with its use. There is strong evidence that kratom affects the same opioid brain receptors as morphine and appears to have safety of kratom, including deaths associated with its use. There is strong evidence that kratom affects the same opioid brain receptors as morphine and appears to have properties that expose people who consume kratom to the risks of addiction, abuse and dependence. The agency also remains concerned about the use of kratom as an alternative to FDA-approved pain medications or to treat opioid withdrawal symptoms, as neither kratom nor its compounds have been proven safe and effective for any use and should not be used to treat any medical conditions.

Numerous brands of kratom-containing products have been linked to a multi-state outbreak of salmonellosis from multiple strains of salmonella. The FDA continues to advise consumers to avoid kratom and kratom-containing products and discard any in their possession. All salmonella...
bacteria can cause the foodborne illness salmonellosis, although the strains found in Triangle Pharmanaturals’ products are not currently linked to the outbreak. The FDA is working with the U.S. Centers for Disease Control and Prevention to continue to investigate the ongoing outbreak. Most people infected with salmonella develop diarrhea, fever and abdominal cramps 12 to 72 hours after infection. The illness usually lasts 4 to 7 days, and most people recover without treatment. However, in the current salmonellosis outbreak associated with kratom products, unusually high rates of individuals have been hospitalized for their illness.

If consumers have one or more of these products in their homes, they should discard them immediately. As a precaution, kratom no longer stored in its original packaging should be discarded and the containers used to store it should be thoroughly washed and sanitized. In order to prevent cross-contamination, consumers should wash their hands, work surfaces and utensils thoroughly after contact with these products, and not prepare any food in the area at the same time.

Once again there have been a large number of recalls since the last issue. While we weren’t able to include all of them in this issue, we included those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm’s web site at www.BeasleyAllen.com or our consumer blog at 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.

XXII.
FIRM ACTIVITIES

LAWYERS SPOTLIGHTS

GREG ALLEN

Greg Allen, our firm’s Lead Product Liability lawyer, has been universally recognized as one of the very best in the business. I will tell you a little more about Greg who has been with the firm for 38 years. I have tried a great number of cases with him and I can say without reservation that he is one of the very best trial lawyers handling product liability cases in the country. I have learned a great deal during my time working with Greg. The following is the “Greg Allen Story.”

Greg Allen drove his 1960 model Ford pickup truck loaded, half-full, with all his worldly possessions from Atlanta to Montgomery in the late 1970s. He had been transferred by his railroad employer to a city where he had never been or he didn’t know anybody in his new home. Greg soon learned about Jones School of Law, which offered night classes and would fit perfectly with his full-time work schedule. He had always been interested in the law, even though no one in his family were lawyers or had connections to the legal profession. Still, Greg applied and was accepted at Jones.

Halfway through law school, Greg was told that he would be transferred back to Atlanta. By then, Greg and Jane were married and Greg knew that he would soon be practicing law. So he turned down the transfer and contacted me after his neighbor told him I had just opened a law office. Greg came to my office and he made me an offer I couldn’t refuse. In 1979, Greg became the firm’s first law clerk and he agreed to work the rest of the year for free. That year turned into a lifelong career for the Georgia native at the firm. As I stated above Greg is now the firm’s lead products liability lawyer.

When he first came to the firm, Greg was especially pleased to learn that the goal of the newly formed law practice was to help folks. That was exactly why Greg wanted to be a trial lawyer. I can say without reservation that Greg remains committed to “helping those who need it most” and he really enjoys taking on giant corporations on behalf of folks who have been seriously injured, especially in the most difficult and technical cases.

Greg says his favorite part of practicing law is “helping people that really have no choice than to rely on our legal skills to obtain justice.” He adds: “I have had clients that were told they would never walk again, but because of our help, financially, they were able to hire the best medical care and physical therapy to recover enough function to walk again.”

Although our firm has had great success, we have also seen our share of difficulties, criticism and some very tough opponents outside the courtroom, Greg says he is encouraged that the firm has never wavered in its mission. Greg is proud to be part of the firm’s legacy in striving for justice on behalf of the “Davids” going up against the “Goliaths” of the world.

Greg and Jane have two children. Tracy Williford, married to T.J. Williford, resides in Montgomery, Alabama. The Allens’ son Evan is also a lawyer, having earned his J.D. from Faulkner University’s Thomas Goode Jones School of Law in 2012. Evan practices in our firm’s Personal Injury & Products Liability Section. He is married to Cameron. Greg and Jane also have two granddaughters, Avery and Collins, and two grandsons, John Mills and Rawlins. The Allens attend Frazer United Methodist Church in Montgomery. Greg is also involved in the revitalization of downtown Montgomery and has completed rebuilding the historic grist mill in Notasulga, Alabama. He also enjoys SCUBA diving and spends as much time as he can underwater in the Gulf of Mexico.

I am honored to say that Greg is my law partner, my friend and a person in whom I have tremendous respect. We are truly blessed to have Greg in the firm.

SHARON ZINNS

Sharon Zinns, who joined the firm’s Toxic Torts Section in April, is handling mesothelioma litigation from our Atlanta office. Sharon has dedicated her practice to helping clients affected by asbestos-related illnesses including mesothelioma, lung cancer, and asbestosis. Before joining Beasley Allen, Sharon represented clients who developed mesothelioma or other cancers after being exposed to the toxic substance, asbestos, in a wide range of occupations across the country. She has also represented individuals diagnosed with mesothelioma after household exposures to asbestos from the work clothes of their spouses or parents, or exposure to cosmetic talc products. Through her practice at a different Atlanta law firm, she also handled wrongful death litigation on behalf of the surviving family members of people who have died from such diseases. The following will tell you about this most talented and dedicated lawyer.

While earning a Bachelor of Arts with high honors in interdisciplinary studies from Emory University, Sharon interned for the American Civil Liberties Union and the Dekalb County Juvenile Court. In 2005, Sharon received her law degree from Emory University School of Law where she was a Robert W. Woodruff Scholar, which is “the highest accolade an incoming student can receive.” Robert W. Woodruff Scholars demonstrate
qualities of forceful and unselfish character, intellectual and personal vigor, outstanding academic achievement, impressive skills in communication, significant leadership and creativity in school or community, among others. Sharon was also a member of the Emory International Law Review, Student Bar Association President, and a law clerk for the American Cancer Society Office of Corporation Counsel.

The big constitutional issues of the day drew Sharon to the legal profession. She knew her calling was to be an advocate. She loved watching as real people found the help they needed through the justice system and wanted to be part of that process. As an experienced attorney, she is realizing her dream every time she sits with a family around a kitchen table listening to their stories and helps them fight for justice in court.

“My relationships with my clients almost always start with us sitting around their kitchen table hearing how their life has changed,” said Sharon. “All of my clients are either suffering from a fatal disease (mesothelioma) or family members of someone who has just died from this disease. I tell each of them that from that moment on, we are a team. And, we came to really care for one another.”

Whether it is a routine status conference or a four-week trial, spending time in court and in front of a judge is Sharon’s other favorite part of practicing law. It is where lawyers can do for clients what no one else can—speaking on their behalf.

As a member of the Georgia Trial Lawyers Association (GTLA), Sharon was selected for the organization’s LEAD (Leadership Education & Advanced Direction) program (2015-2016) and currently serves on the Board of Directors for the group’s magazine, Verdict. She previously served as Membership Committee Chair for the Georgia Association for Women Lawyers.

For the last three consecutive years, 2016-2018, Sharon was named to the Super Lawyers “Rising Stars” list. She is a member of Ahavath Achim Synagogue where she serves on the Board of Directors and chairs the Membership Committee. In her free time, she enjoys running, practicing Krav Maga (form of karate) and yoga, and volunteering in the community. Sharon’s family grew this year as she welcomed her first child in June 2017.

Sharon says she joined the firm because of our long history of representing injured individuals and the reputation we have for fighting “hard and smart.” She adds that she was looking for a firm that wanted to build on her expertise in asbestos litigation and would dedicate the firm’s resources to “fighting for mesothelioma victims.” We are blessed that Sharon chose Beasley Allen as her new home.

**STAFF SPOTLIGHTS**

**MELISA BRUNER**

Melisa Bruner is legal assistant to Andy Birchfield and Leigh O’Dell in the firm’s Mass Torts Section and she says she is blessed and inspired by their Godly examples. Last month, Melisa marked her 16th year at Beasley Allen. Currently, she helps the Talc, Xarelto and Transvaginal Mesh litigation teams get ready for their trials. Melisa prepares internal documents and pretrial documents, and files pretrial documents. She handles logistics, including reserving hotel rooms and offsite workspace, and assembles supplies and other needs for trial. Melisa also travels with the various litigation teams to assist, as needed, during trial. Before moving to Mass Torts 14 years ago, Melisa had previously worked for two years in the firm’s nursing home litigation.

Melissa holds a Bachelor of Science degree in Justice & Public Safety specializing in paralegal studies from Auburn University Montgomery. She also attended the University of Alabama School of Law. She is married to Darrell Bruner and they have two beautiful daughters, Grace (17) and Hope (16). The family attends Eastmont Baptist Church in Montgomery, Alabama. During her free time, Melissa enjoys photography, scrapbooking and spending time with her family. Melissa is a very hardworking and totally dedicated employee and she is an asset to the firm. We are blessed to have her with us.

**BENITA BUNCH**

Benita Bunch has been part of Beasley Allen’s Mass Torts Section for 17 years. As a clerical assistant, Benita opens the many different cases the Section handles. Being in the Mass Torts Section, Benita stays very busy and she does a good job in all areas of her work.

Benita has been married to Darrell Bunch for nearly 40 years. They have two sons, Brandon and Blake, and a beautiful granddaughter, Zadah. Zadah holds Benita’s “heart” in her little hands and enjoys a fair amount of Benita’s time and attention. Although Zadah was born deaf, she received the gift of hearing from Cochlear implants last year. Benita says their “lives are centered on getting Zadah where she needs to be, including school and speech therapy.”

The family makes many trips to and from Birmingham, Alabama, where Zadah receives special medical care and therapy for her hearing impairment. Benita also enjoys working with Zadah, in every way, to improve Zadah’s speech. Benita is another hard-working employee who is dedicated to the firm and our clients. We are fortunate to have her with us.

**KAY BULLARD**

Kay Bullard, who will celebrate her 15th anniversary at Beasley Allen in August, is legal assistant to Mike Andrews and Warner Hornsby in the firm’s Personal Injury and Product Liability Section. Kay corresponds with clients, helps keep their case files and records organized and maintains the attorneys’ calendars. She also helps coordinate different aspects of trial preparation, including drafting and filing pleadings, preparing documents for trial, working with experts, and keeping up with court deadlines and scheduling. Previously, Kay worked with J.P. Sawyer, a former lawyer in our firm who handled nursing home and product liability cases. J.P. is now back home in Enterprise.

A graduate of Prattville High School, Kay later received her Legal Assistant Education Certificate from Auburn University Montgomery and has worked in the legal field for 30 years. She and her husband Perry live in Prattville with her Shih Tzu fur baby, “Pebbles.” After serving 30 years in law enforcement, Perry retired from the Montgomery Police Department and now enjoys his side job as a taxidermist. Kay is also mother to 24-year-old twin daughters, and has two stepdaughters and two step-grandchildren with another one on the way.

From hunting, to fishing, to gardening and even hiking, Kay and Perry say they enjoy spending time together in the great outdoors. Kay especially loves hiking in the fall so that she can enjoy all the bright, beautiful colors during her favorite season. During football season, the two will most likely be cheering on their favorite SEC team—the Crimson Tide! Kay works hard at her job and is dedicated to the welfare of the clients she works with. We are fortunate to have Kay with us.
Willa Carpenter

Willa Carpenter is celebrating 25 years of service with Beasley Allen. Officially, “Miss Willa,” as she is known within the firm, is the Human Resources Liaison and has been described as “the heart” of the firm, serving as its spiritual leader. The collection of her Chaplain-like duties is a unique benefit available to firm employees and their families. Willa provides guidance and support to the firm’s employees as a certified counselor through the American Association of Christian Counselors and has years of experience both here at the firm and through her church.

Willa is available to confidentially meet with any of our employees about issues they may be facing. Willa’s peaceful nature and nurturing spirit, both spiritual gifts she inherited from her parents, help her bridge the gap between supervisors and their staff by offering advice and prayer.

Willa also oversees the firm’s weekly devotions, which she says are a wonderful testament to the spirit of Christian fellowship that exists, as well as an acknowledgement of our need for God’s blessings on our firm. It is a time when employees can voluntarily meet to be refreshed through God’s word and to fellowship over lunch.

In her own words, she is “here to listen to any problem, need or concern you may have, to pray with you and to help you find answers and peace.”

Willa and her husband, Sam, have three children and six grandchildren. They are faithful and active members at First Assembly Church of God. The Carpenters enjoy entertaining and have spent many years serving in events, ranging from the celebration of a couple’s anniversary, to larger group prayer meetings and dinner parties. They believe that family and friends are their greatest asset. We are truly blessed to have Willa with us.

Dee Miles Named To Legal Editorial Advisory Board

Dee Miles, head of the firm’s Consumer Fraud Section, is one of 12 lawyers in the United States selected to serve on the 2018 Product Liability editorial advisory board for the legal news publication Law360. Members of the editorial advisory board will get feedback on Law360’s coverage and gain insight from experts in the field about how to best shape future coverage.

Law360 covers legal news including litigation, policy developments, corporate deals, and more across dozens of practice areas, industries and jurisdictions. More than 1 million subscribers receive the Law360 newsletter every day, as well as real-time alerts about breaking news.

Dee joined Beasley Allen in 1991 and has not only been a pioneer of consumer fraud and commercial litigation nationwide, he has demonstrated great leadership resulting in the firm’s numerous record-setting verdicts for clients in many areas of law. In addition to representing clients in litigation, Dee manages the entire Consumer Fraud / Commercial Litigation Section of the firm and is involved in every case being litigated in it.

Dee is a proven leader in complex litigation on a national level. He has been appointed by federal district judges to serve in a leadership role for the Plaintiffs in numerous multidistrict litigations (MDLs) throughout the country, charged with the responsibility of coordinating the litigation for the entire country on certain cases such as the VW “Clean Diesel” Marketing, Sales Practices and Product Litigation MDL, Chrysler- Dodge-Fiat Ecodiesel Marketing Sales Practices, Toyota sudden unintended acceleration MDL, Target Data Breach MDL, the Home Depot Data Breach MDL, the Blue Cross Blue Shield Antitrust MDL and the Takata airbag MDL, to name a few. Dee also regularly represents state attorneys general in various states throughout the country on a variety of litigation.

A Martindale Hubbel AV rated attorney, Dee has been named in the “Who’s Who” of lawyers by the Heritage Registry; named to the 2013-2015 Lawdragon 500 Leading Lawyers; selected annually to the “Best Lawyers in America” list; selected by Alabama Best Lawyers; and selected to Alabama Super Lawyers for consecutive years. He was honored by the lawyers in this firm as “Litigator of the Year” in 2008. Dee also was selected as a “2013 Top Rated Lawyer in Commercial Litigation” by Martindale Hubbell and American Lawyer Media, featured in The American Lawyer, and Corporate Counsel magazine.

XXIV.
FAVORITE BIBLE VERSES

Dr. Terry Stallings, a longtime friend, sent in three bible verses this month to share with our readers. Terry, a dedicated Christian, loves the Lord and he “walks the walk” daily.

For this very reason, make every effort to add to your faith goodness; and to goodness, knowledge; and to knowledge, self-control; and to self-control, perseverance; and to perseverance, godliness; and to godliness,
brotherly kindness; and to brotherly kindness, love. For if you possess these qualities in increasing measure, they will keep you from being ineffective and unproductive in your knowledge of our Lord Jesus Christ. But if anyone does not have them, he is nearsighted and blind, and has forgotten that he has been cleansed from his past sins. 2 Peter 1:5-9 NIV

To keep me from becoming conceited because of these surpassingly great revelations, there was given me a thorn in my flesh, a messenger of Satan, to torment me. Three times I pleaded with the Lord to take it away from me. But be said to me, “My grace is sufficient for you, for my power is made perfect in weakness.” Therefore, I will boast all the more gladly about my weaknesses, so that Christ’s power may rest on me. That is why, for Christ’s sake, I delight in weaknesses, in insults, in hardships, in persecutions, in difficulties. For when I am weak, then I am strong. 2 Corinthians 12:7-10 NIV

Be self-controlled and alert. Your enemy the devil prowls around like a roaring lion looking for someone to devour. Resist him, standing firm in the faith, because you know that your brothers throughout the world are undergoing the same kind of sufferings. And the God of all grace, who called you to his eternal glory by means of his grace, will himself restore you and make you strong, firm and steadfast. 1 Peter 5:8-10 NIV

Joseph VanZandt, a lawyer in our firm, sent in two of his favorite verses for this issue.

Learn to do good; seek justice, correct oppression; bring justice to the fatherless, plead the widow’s cause. Isaiah 1:17 (ESV)

Trust in the Lord with all your heart, And lean not on your own understanding; In all your ways acknowledge Him, And He shall direct your paths. Proverbs 3:5-6

Debbie Cunningham, Legal Secretary to Gibson Vance, who also works as a Marketing Assistant in our firm, furnished the following Verses. She stated:

Recently, I decided to close my Facebook account, to get away from social media and reading the news on my phone. So much of what I was reading seemed to show only the ugliness this world offers; the hate, bullying, the meanness at least to me, just seemed to be overwhelming. We’ve become numb to others. Our empathy for others seems to be diminishing. That really makes me sad, it breaks my heart. Then I happened to read these verses in 1 Peter.

Finally, all of you, be like-minded, be sympathetic, love one another, be compassionate and humble. Do not repay evil with evil or insult with insult. On the contrary, repay evil with blessing, because to this you were called so that you may inherit a blessing. 1 Peter 3:8 & 9

Debbie says further:

As a Christian I know that this world is NEVER going to be perfect, perfection will only be in heaven. However, what a change we could make in this world if we (and I am speaking of myself too) showed more compassion and love to others and be humble our self.

Alison Hunnicutt, a lawyer in our Mass Torts Section, sent in two verses this month. She said:

In September of 2017, my father suffered a very serious stroke that rendered him bedridden due to paralysis on his left side. As his power of attorney, I was entrusted with the honor of serving my father here on earth by taking care of him and seeing to all his needs. There were many good days that gave my brothers and sisters and I hope for his recovery; unfortunately, there were more bad days than good. Early this year, My Dad ultimately succumbed to his condition and passed away. My family and I rejoice because he has now looked upon the face of God and been reunited with the dead in Christ, including my beloved mother.

During the six months that I was privileged to care for my father, there were some very difficult moments I encountered while trying to take care of my Dad, my husband, our family, and my work for Beasley Allen. In my walk with Christ, I looked to Him and my own small group of prayer warriors to help me through those difficult moments. While I worked remotely in Florida, it was not unusual for a work-related conference call with my colleagues to end with one of them asking us to bow our heads in prayer for my father and my family. Words simply cannot convey what these “conference call prayers” did for my heart and soul.

In addition to the prayers and frequent messages of encouragement from my Beasley Allen family, these are some of the verses I would like to share that sustained me during that difficult time:

For I am persuaded, that neither death, nor life, nor angels, nor principalities, nor powers, nor things present, nor things to come, nor height, nor depth, nor any other creature, shall be able to separate us from the love of God, which is in Christ Jesus our Lord. Romans 8:38-39

For this reason I kneel before the Father, from whom every family in heaven and on earth derives its name. I pray that out of His glorious riches He may strengthen you with power through His Spirit in your inner being, so that Christ may dwell in your hearts through faith. And I pray that you, being rooted and established in love, may have power, together with all the Lord’s holy people, to grasp how wide and long and high and deep is the love of Christ, and to know this love that surpasses knowledge—that you may be filled to the measure of all the fullness of God. Ephesians 3:14-19

Melinda Henderson, a legal secretary who works with Greg Allen, furnished two of her favorite Bible verses this month. She says:

I really love Proverbs 4:23 because it makes so much sense. The heart is one of the most important organs in the human body and if you don’t take care of it or let bitterness dwell in it, it can affect all of your relationships from here on out. It is so important to take care of your heart, both spiritually and physically.

Above all else, guard your heart, for everything you do flows from it. Proverbs 4:23

A verse from Romans resonates with me because it is one I say to my son often. When he or I feel let down or scared, I think of this verse and it puts things in perspective. If God has our backs, who can possibly hurt us?

What, then, shall we say in response to these things? If God is for us, who can be against us? Romans 8:31
Gov. Kay Ivey continues to receive high marks from her constituents, according to a recent online survey. Morning Consult released its latest quarterly edition of its Governor Approval Rankings on April 11 and Gov. Ivey maintained her standing as having the nation’s third-highest approval rating among governors. Gov. Ivey, who completed her first year in office last month, is seeking election to a full term.

Morning Consult’s latest rankings, compiled from online surveys submitted by almost 275,000 registered voters, took place Jan. 1 through March 31. The 10 governors with the highest approval levels are all Republicans. The top four governors, with Gov. Ivey in third place, remain the same from the fourth quarter of 2017: Massachusetts’ Charlie Baker, Maryland’s Larry Hogan, Gov. Ivey and Vermont’s Phil Scott. The top four all received at least 65 percent support from constituents.

Gov. Ivey also had the lowest percentage of any governor with a 15 percent disapproval ranking. The survey said 18 percent had no opinion on Gov. Ivey or did not know enough to state an opinion.

The Alabama survey had a margin of error of 1 percent, according to Morning Consult. At plus-52, the Alabama governor has the second-highest net approval rating for governors running for office in 2018. Gov. Baker had the highest net approval rating at plus-55 percent.

I am not at all surprised at Gov. Ivey’s high ranking. She has the ability and the experience required to be an outstanding chief executive. Everything Gov. Ivey has done thus far has been good for Alabama. It is quite obvious that she really cares about all of the people of Alabama and wants what’s the best for them.

Source: AL.com

Diversity, Hope And The Future

Two of the principles that guide the work and culture at Beasley Allen, “diversity” and “hope,” have been celebrated throughout the month of April. We believe that providing a positive and inclusive environment allows the firm to attract tremendously talented lawyers and support staff from diverse backgrounds. We understand that diversity is another way the firm can better serve our clients and identify with those in the civil justice system, such as judges and juries, who are charged with delivering justice.

Our firm has been recognized as a leader in gender and minority diversity after we became the first large firm in Montgomery, Alabama, to name an African-American female lawyer as a partner. Importantly, our firm was recognized for having the highest percentage of African-American partners among the top 10 best law firms for black lawyers in the U.S. This forward-looking perspective invokes a sense of hope, which is at the very core of the firm’s mission, “helping those who need it most.”

These two principles are also at the heart of a project in the firm’s own backyard in the Capital City. One that is encouraging at a time where hateful and divisive rhetoric is, once again, part of the national dialogue. The National Memorial for Peace and Justice and the Legacy Museum are part of an effort by the nonprofit legal advocacy group, the Equal Justice Initiative (EJI), to embrace hope and healing by confronting a darker side of the country’s history. The one-of-a-kind landmarks bring to life the stories of those who faced racial inequality and economic injustice throughout the history of the U.S.

The Memorial is the first national monument dedicated to “racial terror lynchings.” It was designed to encourage thoughtful reflection about a part of our nation’s history that is laden with deep wounds, shame and regret. The Museum stands just a block from “one of the most prominent slave auction spaces in America.” Together, they take visitors on a journey, stretching back to the darkness of slavery, revisiting the cruelty and humiliation of segregation during the Jim Crow era and the ensuing fight for equality during the Civil Rights movement.

The Memorial is a badly needed educational tool. When I learned that not a single member of a recent University of Alabama School of Law class recognized federal Judge Frank M. Johnson as an esteemed civil rights leader, nor his contributions to the Civil Rights Movement, I was shocked. I wondered how could this be? It made me realize that we must do a better job educating young Americans on the civil rights movement.

We have made progress in a lot of areas regarding racial inequality. However, if you don’t know the history of the fight for civil rights or the battles people had to be engaged in to achieve some level of success, we are missing the boat.

It’s critically important for us to spread the word about the Memorial in hopes it remains accessible to the public. As the project educates and provides the opportunity for healing, it will also improve our state’s credibility on the national stage.

This has the potential to move the national conversation in a positive manner.

Today we are more divided than I can recall in my lifetime. There is more hatred and evil intent and many of those who ought to be helping folks are in fact hurting them. We all have an obligation to change the course and we can be successful when we have the right motivation and a willingness to have an open and respectful conversation.

Our Monthly Reminders

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

2 Chron 7:14

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

Edmund Burke

Woe to those who decree unrighteous decrees, Who write misfortune, Which they have prescribed. To rob the needy of justice, And to take the name, will humble themselves and pray and seek my face and turn from their wicked ways, then will I hear from heaven and will forgive their sin and will heal their land.

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

BeasleyAllen.com
Recently, Pastor Jay Wolf, the Senior Pastor at First Baptist Church in Montgomery, told me about a miracle involving a member of his family. Jay has allowed me to pass on his message to our readers. There may be some who don’t believe in miracles. If so, Jay’s message is for them. It is also for others who may have doubts about God’s awesome powers. For those who believe in God’s miracles, and I am in that category, their belief will be made stronger. The following is Katherine Wolf’s story, as told by Jay, and that story is far from over.

**DAD, KATHERINE’S BRAIN IS BLEEDING... PLEASE PRAY!**

April 21, 2008 was a normal Monday at my slice of paradise, FBC of Montgomery. At 2:30 p.m., I was counseling with a friend when my cell flared: Jason Wolf. Family takes priority so my California son’s call was answered. With a desperate voice, Jason said Katherine was very sick and he was taking baby James and following the ambulance to the hospital. An hour later he delivered the devastating news that 26 year old Katherine was suffering a massive brain bleed and they were rushing to UCLA hospital for surgery. The news hit like a lightning strike out of a blue sky.

Within minutes, over 20 people assembled in our staff prayer place and we fervently interceded. Christ-serving brothers appeared at my home: Andy Birchfield, David Martin, Billy Irvin and Douglas McElvy. They got me to Atlanta and on to Los Angeles. I raced to UCLA and arrived at the lobby of the sprawling hospital. Jason saw me and ran my way. He sobbed, “Dad, Katherine survived the operation but she only has a tiny hope of living and if she does live there will be terrible brain and physical damage.”

My son was surrounded by members of his Sunday School Class. More than 50 of them spent all night in a prayer vigil for Katherine. Jason and I retreated to a chapel to weep and pray. At 10 a.m. we went to see Katherine in Neuro-ICU. She looked beyond horrible. Jason and Katherine’s mother both sank to their knees as if hit in the stomach by an invisible fist. We anchored to Romans 8 and prayed over our crushed treasure.

Around 3 p.m. Andy Birchfield walks into the hospital lobby. He looks like a cross between an angel and a super-hero! Andy said he was representing our church family and came to help bear this burden. He personified the grace and beauty of the Body of Christ.

At 9 p.m. Andy and I went to see Katherine before going to the hotel. A nurse named Beverly Darby told me, “Pastor Wolf, Katherine is responding to verbal commands.” I protested, “She’s in a medically induced coma. That’s impossible.” Ms. Darby instructed us to get Jason. We rapidly complied. In a few minutes we entered Katherine’s room and Beverly spoke, “Katherine, Jason is here. He needs some hope. Raise your hand again?” After a few seconds, Katherine raised her left hand and made a V sign with her fingers. She is NOT brain-dead or paralyzed! We were overwhelmed with inexpressible joy like seeing Lazarus arise! I knew in that moment God was suspending the natural laws and He was doing something miraculous.

Katherine began a “slow-motion miracle” that spanned two years of hospitalization. Jason walked every step of the way with her. You went on the journey with us and provided unending support. We are eternally grateful. Now Katherine and Jason are sharing their story to God’s glory all over the country. Sony Pictures has purchased the rights to their amazing book, “Hope Heals” so the impact of their witness for Christ keeps growing.

Their story reminds us that God’s power is bigger than our problems. And remember: WE NEED JESUS AND WE NEED EACH OTHER!

This is a powerful story and I am convinced that a miracle occurred. Otherwise, Katherine would have certainly died. Her miracle story has already affected thousands of people and I am convinced it will affect thousands and even millions more as her story is told. God is using Katherine and Jason in a mighty way. It is very important to understand how essential family and friends are when a person is hit with a severe crisis in their life. I strongly encourage our readers to get a copy of the book “Hope Heals.” All married couples and their children should read it—all will be blessed. The book can be purchased from a number of websites including Amazon.com—https://www.amazon.com/Hope-Heals-Story-Overwhelming-Overcoming/dp/0310344549.

My prayer today is for the continuing ministry of Katherine and Jay Wolf and for their miracle story to reach far and wide and to provide hope for all who need hope, joy and peace in their lives.
On January 15, 1979, Jere L. Beasley established a one-lawyer firm in Montgomery, Alabama, which has grown into the firm now known as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.

Jere has been an advocate for victims of wrongdoing since 1962, when he began his law practice in Tuscaloosa and then his hometown of Clayton, Alabama. He took a brief hiatus from the practice of law to enter the political arena, serving as Lieutenant Governor of the State of Alabama from 1970 through 1978. He was the youngest Lieutenant Governor in the United States at that time. During his tenure he also briefly served as Governor, while Gov. George Wallace recovered from an assassination attempt.

Since returning to his law career, Jere has tried hundreds of cases. His numerous courtroom victories include landmark cases that have made a positive impact on our society. His areas of practice include litigation in products liability, insurance fraud, business, nursing home and personal injury.

It has been nearly 40 years since he began the firm with the intent of “helping those who need it most.” Today, Beasley Allen has offices in Atlanta and Montgomery, and employs more than 250 people, including more than 75 attorneys. 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.

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