I
CAPITOL
OBSERVATIONS

NBC NIGHTLY NEWS ANCHOR LESTER HOLT
BROADCASTS FROM MONTGOMERY

Montgomery was once again featured on the national stage when NBC Nightly News anchor Lester Holt visited the capital city last month. The veteran broadcaster visited several sites in Montgomery, and anchored the Nightly News from Dexter Avenue, in front of the Dexter Avenue King Memorial Baptist Church and the State Capitol.

The broadcast featured an interview with Bryan Stevenson, founder and Executive Director of the Equal Justice Initiative. It is the EJI’s mission to challenge wrongful convictions and strive for racial justice. This has brought worldwide attention to the capital city.

Earlier this year, EJI opened the Legacy Museum and the National Memorial for Peace and Justice. These two attractions share the shameful history of lynching in America, bringing visibility to its victims. Holt was particularly moved during his visit to the memorial when he found a family name listed among the victims.

In addition, the news segment highlighted Althea Thomas, who has been the organist at the Dexter Avenue church for more than 60 years, after she was hired by the then-unknown young pastor, Dr. Martin Luther King, Jr.

Holt’s visit to Montgomery was part of a weeklong series dubbed the “Across America” tour. He also visited Houston, Texas; Kansas City, Missouri; San Diego, California; and Tampa, Florida.

About his visit to Montgomery, Holt told al.com, “We want to tap into stories that resonate with these communities that may resonate in other areas of the country and shine a light on the unique things about these cities. (Montgomery has) a rich and incredible story to tell.”

Convincing NBC to include Montgomery on the five-city tour was due in large part to the dedication of our local Raycom affiliate, WSFA, which pitched the city to the network scouting locations, together with the City, County, and the Montgomery Area Chamber of Commerce. Our law firm was one of the local entities that was featured in the presentation to NBC News. The following was part of a Raycom PowerPoint used in the efforts to get Lester Holt to Montgomery.

It was quite an honor to be listed with the two other “legal entities” shown above. We were very glad to have played a small role in getting some well-deserved attention to the Capitol City.

Sources: WSFA and AL.com

II.
LITIGATION ON BEHALF OF STATE GOVERNMENTS

BEASLEY ALLEN WORKS WITH STATE GOVERNMENTS ON BEHALF OF PEOPLE

Our Consumer Fraud & Commercial Litigation Section, headed by Dee Miles, is currently representing numerous states, through the offices of the state attorneys general, in various types of litigation involving fraudulent, unfair, and deceptive practices against the states’ Medicaid programs that cost the states hundreds of millions in taxpayer dollars. Lawyers in our firm are particularly passionate about this work with attorneys general in several states. As a chief legal officer of the state the attorney general is in a unique and powerful position to pursue litigation and recover money for their states that was essentially stolen as a result of fraudulent corporate conduct.

While fraudulent activity can occur under any circumstance, state Medicaid programs are characteristically preyed upon due to their sheer volume paired with limited resources by overwhelmed government employees. By law the states are supposed to pay the most discounted prices for products and services including prescription drugs, medical care and contractor services, but through clever pricing schemes by pharmaceutical companies, medical supply wholesalers and large

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chain pharmacies the states often end up grossly overpaying for drugs, medical supplies and services.

While in the past we have reported on the Average Wholesale Pricing cases our firm handled for eight state attorneys general, our Fraud Section lawyers are now working with several states’ attorneys general on the following litigation concerning companies defrauding the state Medicaid Programs:

**Usual & Customary Pricing Litigation**

States marginally differ in how they reimburse pharmacies for prescription drugs, particularly generic drugs dispensed to their Medicaid beneficiaries, but, by and large, a state calculates the amount for which it will reimburse a pharmacy based upon a statutory and federally approved reimbursement formula being the lesser of the Federal Upper Limit (FUL), Average Wholesale Price (AWP), Wholesale Acquisition Cost (WAC), if applicable, or the pharmacy’s “usual and customary” price. The “usual and customary” price is collectively understood to be the equivalent to the price a cash-paying customer would pay for a drug.

Historically, a pharmacy’s “usual and customary” price would be much higher than the FUL, AWP or WAC; therefore, pharmacies were virtually always reimbursed at one of the lesser reimbursement formula rates. However, around May of 2006 the historical “usual and customary” pricing model underwent a drastic change when large chain stores like Walmart and Kmart introduced their nationwide discount generic drug programs, offering hundreds of generic drugs at $4 for a 30-day supply. Because the discount drug program was so popular, by 2007 many other pharmacy chains implemented their own discount drug programs to stay competitive. Today, nearly all chain pharmacies maintain a discount drug program that offers thousands of commonly prescribed drugs at prices as low as $4 to $15 to the cash-paying customer.

The litigation we have filed for a number of states alleges that these large chain pharmacies should be reporting the lower prices to the states as their “usual and customary” price for the discounted drugs. The requirement of reporting the discounted price has been federally mandated by the government since at least Oct. 11, 2006, when the Centers for Medicare and Medicaid Services (CMS) released a memorandum titled “Lower Cash Price Policy,” stating:

For example, Wal-Mart recently introduced a program offering a reduced price for certain generics to its customers. The lower Wal-Mart price on these specific generic drugs is considered Wal-Mart’s ‘usual and customary’ price, and is not considered a one-time ‘lower cash’ price. Part D sponsors consider this lower amount to be ‘usual and customary’ and will reimburse Wal-Mart on the basis of this price.

The 2006 CMS memo confirms that every day, reduced prices are considered to be the pharmacy’s “usual and customary” price and should be reported as such. Even though the pharmacies with discount drug programs are required to report the $4, $10, or other discounted price as their “usual and customary” price, we have discovered that several major pharmacies are in fact not doing so. Instead, these pharmacies are reporting “usual and customary” prices much higher than their everyday discounted prices.

Pharmacies with discount drug programs that report inflated “usual and customary” prices are knowingly and systematically defrauding states and their Medicaid programs. By engaging in such conduct, these pharmacies are knowingly submitting false and fraudulent claims to states in order to obtain larger amounts in reimbursement. As a result of this conduct, the states are paying excessive Medicaid reimbursements with taxpayer dollars to the pharmacies.

**Unapproved Drugs Litigation**

Pharmaceutical manufacturers have taken advantage of the enormously complicated and non-transparent market for prescription drugs by engaging in an unlawful scheme to cause states by and through their individual Medicaid Programs to pay for drugs that have not received approval by the U.S. Food & Drug Administration (FDA). The scheme involves the publication of phony National Drug Codes (NDCs) by the Defendant Pharmaceutical manufacturers to publishers, which are relied on by the State in approving the reimbursement for providers of prescription drugs, such as physicians and pharmacies.

The Defendants marketed these unapproved drugs to health care providers as being FDA-approved drugs, and therefore reimbursable by state Medicaid programs. The Defendants’ fraudulent marketing of their unapproved prescription drugs has resulted in the States’ Medicaid agency paying hundreds of millions of dollars for the Defendants’ products, which would otherwise not be covered by Medicaid.

Many of the Defendants in these particular cases have been sued for the same or similar Medicaid fraud scheme in an unsealed qui tam case, and a number of the states have moved to intervene in that action. Published opinions and other public record documents generated in the course of the parallel federal litigation revealed that these Defendants marketed unapproved drugs with false NDCs.

Additionally, federal criminal actions have been instituted against manufacturers related to unapproved drugs. As part of the criminal proceedings, various drug companies that manufacture drugs at issue in this lawsuit pled guilty to and/or agreed to settle criminal charges of having engaged in unlawful marketing with respect to certain of their prescription drugs reimbursed under federal programs, such as Medicare, and state programs, such as Medicaid.

These Defendants paid fines and civil penalties for this admittedly wrongful conduct. The guilty pleas, settlements and admissions of fault by the criminal Defendants implicate some of the Defendants named in the lawsuits we have filed for several AGs, in what is becoming known as a far-reaching and widespread scheme in the pharmaceutical industry to unlawfully market unapproved drugs to increase profits for their products.

For example, in 2010 Defendant Forest Pharmaceuticals, Inc. agreed to settle the federal criminal investigation into Forest’s marketing of unapproved drugs, paying $14 million to the federal and state governments. Forest pleaded guilty to distributing unapproved drugs into interstate commerce.

Government investigations by the FDA also revealed fraudulent drug approval schemes by various Defendants. The FDA has publicly stated that unapproved drugs pose significant harm to the public, including state Medicaid recipients. In fact, the FDA has acknowledged that there are unapproved drugs being marketed without FDA approval:

The Agency has serious concerns that drugs marketed without required FDA approval may not meet modern standards for safety, effectiveness, quality, and labeling. Physicians and other health care practitioners, along with consumers, cannot assume that all marketed drugs have been found by the FDA to be safe and effective. For a variety of historical reasons, some drugs, mostly older products, continue to be marketed illegally in the U.S. without required FDA approval. The manufacturers of unapproved drug products have not received FDA approval and do not conform to a monograph for making over-the-counter (OTC) drugs. The lack of evidence demonstrating that these unapproved drugs
are safe and effective is a significant public health concern. www.fda.gov

In short, the existence of the scheme is just being revealed, but its illegality has been established. Pharmaceutical manufacturers who report false NDCs are knowingly and systematically defrauding states and their Medicaid programs. By engaging in such conduct, these pharmaceutical manufacturers are knowingly submitting false and fraudulent claims to states in order to obtain reimbursements for products inherently illegal and unsafe in nature. As a result of this conduct, the states are paying Medicaid reimbursements with taxpayer dollars to the pharmaceutical manufacturers for products that not only endanger their citizens, but would never have been allowed in the Medicaid system. The states want their money back.

Lawyers in our Consumer Fraud & Commercial Litigation Section are working with several state attorneys general and are currently pursuing actions under both designs of fraud against state Medicaid programs, as well as investigating several other potential fraudulent behaviors of similar circumstances. By utilizing diverse Consumer Protection and Medicaid Fraud statutory laws, in addition to common law fraud and unjust enrichment to recover the undue payments made to Defendants, we are seeking to recover taxpayer dollars fraudulently reimbursed to these bad actors, as well as injunctive relief to halt the Defendants’ pilfering of these important and vital state programs.

Our firm is honored to have represented a number of state attorneys general in the past and equally honored to represent them on these more recent cases against corporations that have taken advantage of a system designed for the betterment of our poorest and most needy fellow citizens. We will continue to keep our readers posted on any new developments with these AG cases.

If you have any question about the state attorney general litigation, contact Dee Miles at Dee.Miles@beasleyallen.com, Ali Hawthorne at Alison.Hawthorne@beasleyallen.com, Lance Gould at Lance.Gould@beasleyallen.com or Lauren Miles at Lauren.Miles@beasleyallen.com. You can also reach them by phone at 800-898-2034.

III. AUTOMOBILE NEWS OF NOTE

**DEE MILES WILL HELP LEAD FORD F-150 CLASS ACTION LAWSUIT**

Dee Miles, head of the firm’s Consumer Fraud & Commercial Litigation Section, has been appointed Interim Co-Lead Class Counsel in the class action litigation filed against Ford Motor Company. Also named were E. Powell Miller of The Miller Law Firm, P.C. and Adam J. Levitt of DiCello Levitt & Casey LLC. The lawsuit is filed in the United States District Court of the Eastern District of Michigan with U.S. District Judge Gershwin A. Drain presiding.

The lawsuit involves a defective braking system in Ford’s F-150 for model years 2013-2018, which can result in brake failure. The lawsuit alleges that the vehicles’ brake master cylinders contain piston cup seals that roll within their grooves and become unseated. This allows brake fluid to escape from the master cylinder, resulting in loss of brake fluid, which leads to loss of hydraulic pressure on the brake system, and eventually resulting in loss of brake function on the class vehicles. Dee had this to say:

*With the far-reaching, dangerous consequences of this defective product, we are honored to have been appointed interim co-lead counsel of this important class action lawsuit. We look forward to working with our co-counsel and liaison counsel as we expose the issues that continue to put so many consumers at risk and seek to hold Ford accountable for failing to adequately address the situation it created.*

The National Highway Traffic Safety Administration (NHTSA) began investigating reports of brake fluid leaking from the master cylinder in 2013-2014 Ford F-150 models with the 3.5-liter engines in February 2016. Three months later, Ford admitted the existence of the master cylinder defect when it issued a safety recall. However, the recall only addressed a small portion of the affected models, specifically those with the F-150 3.5 liter “EcoBoost Engine” that were built between Aug. 1, 2013, and Aug. 31, 2014.

The proposed remedy is also grossly inadequate. It merely calls for the replacement of the master cylinder with a new master cylinder that is internally identical to the one that failed. In other words, the recall simply calls for the replacement of one defective part with another defective part.

Despite its awareness of the master cylinder defect and the danger it posed to consumers—vehicle owners, operators and those who share the roads with class vehicles—Ford continued to sell hundreds of thousands of F-150s. Several incidents reported to the National Highway Traffic Safety Administration depict some dangerous close calls. For example:

- One customer reported experiencing sudden brake failure and, as a result, “crossed the street, went up the curb and struck my neighbor’s landscape wall, damaging it severely.”
- Another customer reported to the NHTSA crashing into an 18-wheeler truck after the brakes suddenly failed.

The suit says that Ford committed an unlawful business act or practice in violation of the California Business Professional Code by systematically breeching its warranty obligations, and other state consumer law violations.

The case is Roy Naasz v. Ford Motor Co., (case number 2:18-cv-13165) in U.S. District Court for the District of Eastern Michigan. If you feel you have a claim or would like to discuss this matter, contact Dee Miles or Clay Barnett at 800-898-2034 or by email at Dee.Miles@beasleyallen.com or Clay.Barnett@beasleyallen.com.

**GM HID KNOWLEDGE OF FAULTY BRAKES IN SOME CARS**

Our law firm and several other firms have filed a putative class action in a California federal court alleging General Motors (GM) knowingly sold Cadillacs, Chevrolets and GMC SUVs and pickups with dangerously defective brakes. The Plaintiffs, Scott and Samantha Peckerar, allege that GM has known for at least three years that the braking system installed in several of its SUV and pickup models contained a defective component that can fail unexpectedly, causing the vehicles’ brakes to suddenly become much more difficult to engage. However, GM failed to disclose this serious safety problem to the public. It’s alleged in the complaint:

*GM chose and continues to choose financial gain at the expense of consumer safety by concealing and omitting a disclosure of this critical safety defect to consumers who purchase or lease class vehicles.*

In January 2017 the Plaintiffs purchased a 2017 Chevrolet Suburban SUV, which
came equipped with a brake booster powered by a vacuum pump in the car's engine. In April 2018, Samantha Peckerar was driving the vehicle when the brake pedal unexpectedly became much harder to press, resulting in a collision with another car. GM representatives they contacted denied there was a defect and refused to do field testing, but mechanics at the dealership where they bought the vehicle found the brake booster was not functioning properly due to a problem with the vacuum pump.

GM was aware of the defect when they were sold the vehicle. Since February 2015, the automaker has been sending bulletins to dealers detailing problems with the vacuum pumps and brake boosters for 2015-2016 Suburbans, 2015-2016 Cadillacs Escalade SUVs, 2015-2016 GMC Yukon pickups, 2014-2016 Chevrolet Silverados and 2014-2016 GMC Sierra pickups. The complaint states:

As part of GM's overall strategy to engage in material omission and deception upon plaintiffs and the class members, these bulletins contain false, misleading or deceptive information about the potential for curing the defects because the purported repairs do not fix the defect and the statements are designed to mislead dealers and technicians who repair class vehicles.

GM has been receiving complaints about brake defects since 2014, in those and later models, through the National Highway Traffic Safety Administration (NHTSA), Better Business Bureau, online forums, and their dealers and customers. It’s alleged:

Despite defendant GM’s wealth of knowledge relating to the class defect in the class vehicles’ defective braking system and its clear safety implications, GM has and continues to suppress and conceal this knowledge and has failed to disclose that its class vehicles’ braking systems are defective and dangerous.

Leaks caused by a defective seal on the vacuum pump was the “most likely culprit” in the brake system failures. The Peckerars are represented by Paul R. Kiesel, Jeffrey A. Koncius and Nichole Ramirez of Kiesel Law LLP; F. Jerome Tapley, Ryan Lutz and Adam W. Pittman of Cory Watson PC; James C. Wylly and Sean F. Rommel of Wylly-Rommel PLLC; and Clay Barnett from Beasley Allen. The case is Scott Peckerar et al. v. General Motors LLC (case number 5:18-cv-02153) in the United States District Court for the Central District of California. Source: Law360.com

**TOYOTA RECALLS 2.4 MILLION PRIUS HYBRIDS FOR STALL RISK**

Toyota Motor Corp. is recalling 2.43 million Prius hybrid vehicles worldwide that could lose power and stall while being driven at high speeds. About 807,000 of these vehicles are in the United States. The Japanese automaker said the recall applies to some Toyota Prius and Auris hybrids made from October 2008-November 2014 that were designed to enter a “failsafe driving mode” in response to certain hybrid system faults. When announcing the recall, the company stated:

*Toyota has found that in rare situations, the vehicle may not enter a failsafe driving mode as intended. If this occurs, the vehicle could lose power and stall.*

The recall is the second Prius-related recall recently for Toyota. The company had recalled 192,000 vehicles in the U.S. in September that it said were at risk of catching fire due to a flaw in the connection of an engine-wire harness. Toyota dealers will update the software for all of the vehicles that are involved in the latest Prius recall at no charge. The company will notify the involved customers when the software update is available. Prius owners can call the Toyota Customer Experience Center at 800-331-4331 or the Lexus Guest Experience Center at 800-255-3987 for more information.

Source: The Detroit News

**VW WILL HAVE TO DEFEND CLAIMS OF DRIVERS WHO SOLD CARS PRE-SCANDAL**

Our firm continues to be heavily involved in the VW multidistrict litigation (MDL) in San Francisco. While the bulk of the case has settled, there are still a few moving parts that must be handled by the Plaintiffs Steering Committee (PSC), and Dee Miles and Archie Grubb from our firm are completing various tasks for the court as the case winds down to conclusion. Last month the MDL Judge, U.S. District Judge Charles Breyer, largely rejected bids by Volkswagen AG (VW) and Robert Bosch (Bosch) to dismiss putative class claims from former owners who sold class vehicles prior to news of an emissions-cheating scandal breaking out. Judge Bosch ruled that the drivers alleged sufficiently concrete injuries to survive the Motion to Dimiss stage of the case. This decision is a win for the proposed class, which could potentially include more than 100,000 members.

The former owners allege the price of their cars was inflated because of VW’s deceit, and due to depreciation they failed to recover all of their overpayment when they sold the vehicles. Judge Breyer also ruled the suit’s racketeering claims against Bosch were sufficiently pled and therefore those will go forward.

The August 2017 suit alleges claims of fraud and Racketeer Influenced and Corrupt Organizations (RICO) Act violations and is part of multidistrict litigation in California. Volkswagen had been selling diesel cars in the United States since 2009 that were equipped with emission-cheating software. The buyers resold their cars or ended their leases before the revelations came to light in September 2015 and were not included in a series of settlements for consumers who still owned their vehicles. Volkswagen admitted to installing the defeat devices on more than 600,000 vehicles in the U.S.

The PSC still has some work to do. We will keep our readers posted on any new developments in the MDL. If you need additional information contact Dee Miles or Archie Grubb, lawyers in our firm’s Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com or Archie.Grubb@beasleyallen.com.

Source: Law360.com

**CRASH IN NEW YORK THAT KILLED 20 IS A CALL FOR MORE REGULATION**

The horrific limousine crash that killed 20 people in upstate New York last month has caused a great deal of media attention. Hopefully, it has also gotten the attention of the National Transportation Safety Board (NTSB), National Highway Traffic Safety Administration (NHTSA) and Congress. While investigators continue searching for the cause of the crash, there is an urgent need for more stringent safety regulations for limousines. Sen. Chuck Schumer of New York has called on the NTSB to investigate all future limousine crashes nationwide in order to gather the information needed to create stricter safety regulations for the vehicles. Sen. Schumer said at a news conference:

*Stretch limos exist in a gray area. They’re not a car. They’re not a bus. And that’s the problem. They fall through the regulatory cracks and there are no safety standards for them. That has to change.*
The federal government must do a better job of regulation. Most of the scrutiny has focused on vehicles that are modified after they leave the factory, like the 2001 Ford Excursion involved in this crash. This was the deadliest transportation accident in the United States in almost a decade. The vehicles are often cut in half and then extended, which eliminates some of the vehicle's original protections. For example, side rollover pillars and airbags are typically removed or rendered useless.

In 2015, the NTSB agreed to investigate limousine accidents on a case-by-case basis. This came after four women were killed on Long Island in a collision between a pickup truck and a stretch limousine. A Long Island grand jury issued a report in 2016 that concluded stretch limousines were underregulated. It appears that NHTSA has not thoroughly investigated any limousine accidents since then. Data from those accidents are essential to issue new safety recommendations and change the laws.

There were 12 limousine crashes resulting in a dozen deaths in the United States between 2012 and 2016. NTSB is still investigating the latest accident, but the safety investigators have been unable to conduct a full examination of the limousine crash because local prosecutors are investigating it as part of their case against the limousine company's operator. The limo remains in the possession of New York State Police after the limousine company's operator was charged as mentioned above with criminally negligent homicide. The modified limousines are usually exempt from rigorous federal safety requirements, and inspection systems vary from state to state.

The Ford vehicle involved in the New York crash was built for nine people and was then elongated to fit 18 people. It had repeatedly failed New York State inspections, including one as recently as September. Numerous violations, some related to the vehicle's braking system, had resulted in the limousine being ordered off the road on two occasions. Officials also said that the limousine's driver, Scott Lisinicchia, who died in the crash, was not properly licensed to drive the vehicle. The operator of the limousine company, Nauman Hussain, has been arrested by the State Police and charged with criminally negligent homicide.

Hopefully, after the NTSB does a thorough investigation of this incident, it will take all steps necessary to regulate the industry. There is a critical need for more and better regulation.

Source: New York Times

### IV. PURELY POLITICAL NEWS & VIEWS

#### THE NATIONAL SCENE

This has been a very strange election season on the national scene. Whether you like him or not, Donald Trump has been the main political attraction so far. It appears Trump has made the mid-term congressional races largely an ultimatum on him. While the Democrats have several strong issues to run on, it appears they lack an effective messenger. The Republicans should be in trouble on a number of “people” issues, such as health care, social security, Medicaid and Medicare, the Trump tax breaks for the rich and the powerful, education, and the economy. But the lack of a strong messenger seems to be a big-time problem for the Democrats.

According to reports, early and absentee voting around the country has been very strong. Frankly, I am not real sure who that helps. While I have to believe that a really heavy turnout will help Democratic candidates, only time will tell. The election is only days away.

This may be an election where people who don’t have highly paid lobbyists working for them in Washington finally decide to really make a difference. If the latest polling is accurate, the GOP will keep a majority in the Senate, but lose the House. I believe that female voters will be the difference in a good number of states. We will find out if that is true on Nov. 6.

#### ALABAMA

The general election in Alabama has been very much like the primaries were and that is it appears there is very little interest. I predict another low turnout in my state. Based on polls that I trust, Republicans will win all of the statewide races by fairly large margins.

While there are lots of good candidates on the ballot this year, I have been very impressed with a relative newcomer, Will Ainsworth, a member of the Alabama House of Representatives. He has the ability to really connect with people. It appears that this candidate fully believes what he says publicly and that is very good.

Most political pundits predict a Republican sweep in Alabama and I believe that will happen. Voter apathy could be a factor and that is difficult to assess. One thing is for sure, however, and that is we will all know how things turn out on Nov. 6.

#### AUDI FINED $925 MILLION IN GERMANY OVER DIESEL EMISSIONS

German authorities have levied a $925 million fine against Volkswagen’s luxury division, Audi AG, for selling cars rigged to pass emissions tests despite their emissions being higher than allowable standards. The fine is a result of a breach of duty under the Regulatory Provisions Act in connection with the vehicles, which did not meet nitrogen oxide emissions standards. Prosecutors said EA 189 and EA 288 engines, as well as V6 and V8 diesel engines manufactured by the company and installed in Audi, Volkswagen and Porsche vehicles between 2004 and 2018, were the subject of the investigation that led to the fine. A total of 4.9 million vehicles were sold in the U.S., Europe and elsewhere.

Audi has waived its right to appeal. Prosecutors said the fine does not impact other investigations into the issue, and civil law claims—particularly those already pending in civil courts—will also not be affected. The $925 million, or 800 million, fine was calculated based on the economic benefits Audi had as a result of cheating on the emissions tests. It took into account the costs the company incurred retrofitting the affected vehicles and the penalties and settlements from U.S. court litigation. The company said that by accepting the fine and waiving its right to appeal, it admits its responsibility in the scandal.

Source: Law360.com

#### A BRIEF LOOK AT THE OPIOID CRISIS

I am reasonably sure all of our readers now know what opioids are. However, for those who don’t, opioids are a highly addictive class of painkillers that include street drugs like heroin as well as prescription medications like OxyContin, codeine, morphine and fentanyl. Legal versions of these drugs provide necessary treatment for people suffering from severe pain due to cancer or serious injuries. However, more and more often, these potent drugs have been prescribed for lesser ailments.

According to the U.S. Department of Health & Human Services (HHS), about 21...
to 29 percent of patients prescribed opioids for chronic pain misuse them. Around 80 percent of people who use heroin first misuse opioids. Questionable marketing techniques and misleading information about the addictive powers of opioids from drug manufacturers and distributors has led to a significant increase in the number of people addicted to opioids, as well as a spike in the number of overdose deaths.

According to HHS, 11.2 million people were misusing opioids in 2016, and more than 2 million were classified as having opioid use disorder (OUD). More than 42,000 people died from opioid overdose that year.

The financial toll is also devastating. In 2015, the Council of Economic Advisors, the agency charged with advising the President on economic issues affecting the U.S., put the cost of the opioid crisis for substance abuse treatment, criminal justice, reduced productivity, and lives lost at more than $500 billion.

The opioid epidemic is a public health crisis that has affected every state in the nation. In Alabama, more opioid prescriptions were written per capita than in any other state in the country, according to HHS. In 2013, Alabama providers wrote 141.1 opioid prescriptions for every 100 people—about 6.8 million prescriptions. This is almost two times higher than the average U.S. rate of 79.3. Despite a near-17 percent decline in opioid prescriptions written in the state in 2015, an estimated 120.3 prescriptions per 100 persons were still doled out. This translated into 756 overdose deaths in the state the following year.

**UPDATE ON OPIOID LITIGATION**

Governments in the opioid litigation scored a huge victory in October when U.S. Magistrate Judge David A. Ruiz released his report and recommendation on the motions to dismiss filed by manufacturer, distributor, and retail chain pharmacy defendants. This came in the suit filed by Summit County, Ohio. Several Ohio cities were also included in the motion, including the city of Akron. Summit County is one of three bellwether trial cases in the multidistrict litigation (MDL) and the first to face a motion to dismiss in the MDL court.

The report to District Court Judge Aaron Polster recommends that the bulk of the claims against the Defendants survive the motion to dismiss. Judge Ruiz recommended dismissing one claim and partially dismissing another of the complaint’s 11 claims. He recommended dismissing the county’s common law nuisance claim, finding that the State’s Product Liability Statute abrogated common law nuisance law involving a nuisance caused by a manufacturer or seller’s product.

The judge also recommended dismissing drug-related nuisance claims brought by the City of Akron, because the statute vested enforcement authority with counties, the State, and the Board of Pharmacy but not city governments. These are relatively narrow grounds based on nuances on local law rather than any overarching defect in the government’s claims.

The other nine claims for relief, including claims under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 et seq, also known as RICO, remain. The RICO claims, in a nutshell, involve allegations that Defendants cooperated in their marketing of opioid products despite the dangers these drugs pose to the population.

Earlier that same week, the State of New Jersey’s case against Purdue Pharma also survived a motion to dismiss largely intact. However, the court found that New Jersey’s nuisance claim was foreclosed by the State’s Product Liability Act, and that the statute of limitations foreclosed any liability for the Defendant’s actions prior to Oct. 31, 2007. That case is proceeding in the Essex County Superior Court in New Jersey. New Jersey’s case is one of the first states to receive a ruling on a motion to dismiss in the nationwide opioid litigation.

The State of Alabama, the counties of Summit (Ohio); Cabell (West Virginia); Monroe, Michigan, and Broward (all Florida) and the City of Chicago were all selected as bellwether cases for motion to dismiss practice to determine the viability of threshold legal issues that may assist in the settlement negotiations and to prepare the test cases for trial in the event that a settlement does not occur. Judge Polster selected cases that represent a variety of jurisdictions, Plaintiffs, Defendants and issues. Summit and Cuyahoga counties and the City of Cleveland were selected to conduct discovery and prepare their cases for trial, which has tentatively been set for late 2019. The State of Alabama is gearing up in expectation that it will be appointed as a bellwether case in the second round of bellwether trials. Alabama is the only state currently litigating its case in the MDL.

Alabama has been particularly hard hit by the crisis. The state has one of the highest prescription rates for opioids in the nation, with 1.2 prescriptions per person, nearly twice the national average of 0.72 prescriptions per person. According to the National Institute on Drug Abuse, there were 343 opioid-related overdose deaths in Alabama in 2016, and at least 282 deaths were attributed to opioid overdoses in Alabama the previous year.

The effects of the opioid epidemic on a national level are startling. A study published in the journal *JAMA Network Open* suggests opioid abuse in the U.S. is now responsible for 20 percent of deaths among young adults—up from just 4 percent in 2001—a far greater pace than any other age group. Comparatively, one in every 65 adults in the U.S. suffered deaths associated with opioids in 2016—a 292-percent increase since 2001. Due to the continued deterioration of the addiction crisis nationwide, the researchers concluded the U.S. lost a total of 1,681,359 years of life in 2016 alone.

But loss of life isn’t the only toll the opioid crisis takes on communities. According to the Centers for Disease Control and Prevention (CDC), the opioid epidemic costs the U.S. about $78.5 billion a year in health care, lost productivity, addiction treatment, and criminal justice involvement.

Hundreds of cases are currently pending in the opioid MDL filed by cities, counties, states and even Indian tribes accusing manufacturers and distributors of the powerful painkillers, and pharmacies, of inflating the effectiveness of the medications and downplaying their addictive properties, creating conditions ripe for abuse and misuse. As a result, the lawsuits claim, tens of thousands of citizens have died or required medical care, creating a crippling financial burden to communities across the country.

In 2017, the U.S. government declared the opioid epidemic a national public health emergency. Earlier this year, Attorney General Jeff Sessions announced a new Prescription Interdiction & Litigation (PIL) Task Force established by the U.S. Department of Justice (DOJ) to aggressively coordinate all available criminal and civil law enforcement tools to reverse “the tide of opioid overdoses in the United States.” The task force will focus on the activities of opioid manufacturers and distributors. Twelve assistant U.S. attorneys were assigned to spend three years focusing exclusively on investigating and prosecuting health care and fraud related to prescription opioids.

**OPIOID MDL GOVERNMENTS MUST IDENTIFY PRESCRIPTIONS OR LIMIT EVIDENCE**

U.S. District Judge Dan Aaron Polster ruled last month that local governments suing drug companies must either identify specific prescriptions that were improper or limit their use of related evidence. The
ruling left intact a special master’s recent discovery decision, which required identification of various painkiller prescriptions and drew a challenge from the governments. But Judge Polster “tweaked” the discovery decision to let the governments sacrifice certain evidence instead of identifying prescriptions.

Under the judge’s ruling, the governments must agree to two conditions if they don’t identify prescriptions. The conditions are:

• First, they must agree not to assert at trial that specific prescriptions “were unauthorized, medically unnecessary, ineffective or harmful” or that “the filling of any specific prescriptions caused or led to harm for which plaintiffs seek to recover.”

• Second, the governments must commit to relying “solely on a theory of aggregate proof” during a bellwether trial set for September 2019, Judge Polster ruled. Aggregate proof refers to proving a case by convincingly describing an illicit scheme in broad terms, as opposed to focusing on particular prescriptions, physicians and patients.

The governments accuse drugmakers of exaggerating the benefits of prescription opioids and downplaying their risks. They accuse pharmacies of ignoring suspicious prescriptions.

In their objection to the discovery decision, the local governments said that they “intend to prove their case with aggregate proof.” Judge Polster gave the governments until Oct. 22 to decide whether to identify specific prescriptions or eschew certain evidence. The discovery decision required the Ohio cities and counties to identify hundreds of opioid prescriptions that they believe were written based on misleading marketing by drugmakers or indicative of improper conduct by pharmacies.

The case is In re: National Prescription Opiate Litigation, (case number 1:17-md-02804) in the U.S. District Court for the Northern District of Ohio.

Children And Babies Are Opioid Victims

The opioid epidemic spares no demographic, not even with our most vulnerable citizens—our children and babies. From 2000 to 2012, an estimated 21,732 babies were born suffering from opioid withdrawal—which represents a five-fold increase during this time period. This is the equivalent to one baby born with newborn abstinence syndrome (NAS) every 25 minutes, according to the National Institute on Drug Abuse. Babies born addicted stay in the hospital longer than babies who were not exposed to opioids in utero—16.9 days compared to just 2.1. Hospital costs are also greater for NAS babies—$66,700 on average compared to $3,500 for those who were not exposed.

Most babies born addicted begin to suffer symptoms of opioid withdrawal within 72 hours of birth, but some may not show signs until weeks later. Symptoms of NAS can last from one to six weeks and include tremors, seizures, and overactive reflexes; fussiness, excessive crying or having a high-pitched cry; poor feeding or slow weight gain; breathing difficulties including breathing fast; fever, sweating or blotchy skin; trouble sleeping and yawning a lot; diarrhea or vomiting; and congestion and sneezing.

NAS also increases a baby’s risk of being born low birthweight and jaundiced. These babies are also more likely to require treatment in a neonatal intensive care unit (NICU). Long-term complications from NAS include behavioral and cognitive problems, developmental delays, motor development problems, hypersensitivity, and hearing or vision impairment. Compared to babies born to mothers who did not use opioids, NAS babies are at greater risk of child abuse and neglect, future drug use, sudden infant death syndrome (SIDS) and sudden unexpected infant death (SUID).

Oftentimes, babies born with NAS are forced into foster care. Of the estimated 465,000 babies and children in the country’s foster care program in 2016, 92,000 of them were there due to opioid-related issues, according to the Department of Health and Human Services (HHS).

Higher rates of opioid prescriptions also correlate to a higher incidence of newborn abstinence syndrome. In the South, NAS is three times higher than the national average, according to Dr. Stephen Patrick, a researcher at Children’s Hospital at Vanderbilt University. In Alabama, cases of NAS increased from 170 in 2010 to 345 in 2013. The counties with the highest percentage of babies born addicted were Chilton, Winston, Shelby, Cullman and Walker.

In June, U.S. District Judge Dan Aaron Polster rejected a motion by lawyers representing NAS babies for them to get a separate track in the multidistrict litigation (MDL). The separate track would provide these babies with a trust to fund treatment and research related to NAS, as well as direct compensation to victims to cover out-of-pocket costs for opioid-weaning treatments required for babies born addicted.

The Beasley Allen Opioid Litigation Team

Because of the enormity of the opioid litigation, and Alabama’s personal involvement in the multidistrict litigation (MDL), our firm has put together an “Opioid Litigation Team,” which includes these lawyers: Rhon Jones, Parker Miller, Ryan Kral, Rick Stratton, Will Sutton and Jeff Price. This team of lawyers represents the State of Alabama, the State of Georgia, and numerous local governments and other entities in the MDL, as well as individual claims on behalf of victims. If you need more information on the opioid litigation contact one of these lawyers at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Parker.Miller@beasleyallen.com, Ryan.Kral@beasleyallen.com, Rick.Stratton@beasleyallen.com, Will.Sutton@beasleyallen.com, or Jeff.Price@beasleyallen.com.

VI. COURT WATCH

Florida Supreme Court Rejects Law That Mandated Daubert Standard

The Florida Supreme Court ruled last month that a 2013 law that mandated use of the Daubert standard for screening expert witness testimony infringed on the court’s rulemaking authority. The court reinstated an $8 million verdict for a mesothelioma patient based on its continued support for the current Frye standard. The case has been closely watched by Florida’s legal community. Cigarette smoker Richard DeLisle challenged the Fourth District Court of Appeals’ decision reversing a jury verdict against R.J. Reynolds Tobacco Co. and Crane Co. The issue on appeal was whether the state’s highest court would abandon the Frye standard, in use since 1980, in favor of the Daubert standard used in federal courts.

The Florida Legislature had voted in 2013 to require the Daubert standard in state courts. In upholding the Frye standard, Justice Peggy A. Quince wrote on behalf of the 4-3 majority:

This rule—that expert testimony should be deduced from generally accepted scientific principles—has been the standard in Florida cases and, today, we reaffirm that it is still the standard.

The Frye standard, based on the D.C. Circuit’s 1923 decision in Frye v. U.S., calls for a judge to gauge whether to allow expert testimony based only on whether it represents principles that have gained
The case is *DeLisle v. Crane Co. et al.*, (case number SC16-2182) in the Supreme Court of the State of Florida.

Source: Law360.com

### VII. THE NATIONAL SCENE

#### TRUMP AND THE EPA PROPOSED RULE EASES METHANE MONITORING AND LEAK REPAIR REGULATIONS

In September, during the Global Climate Action Summit, President Donald Trump announced his latest anti-environment assault that is detrimental to the fight against climate change. Trump and Acting Environmental Protection Agency (EPA) Administrator Andrew Wheeler proposed easing Obama-era requirements for oil and gas companies regarding the monitoring and repairing of methane leaks.

It is universally recognized that methane is one of the most powerful greenhouse gases and the second-biggest driver of climate change after carbon dioxide. One pound of methane traps more than 80 times the heat in the atmosphere than a pound of carbon dioxide. Methane not only wreaks havoc on the atmosphere, it also can harm human health, triggering asthma attacks and increasing cancer risks for those who live or work near leaks.

It has been clearly established that oil and gas wells are notorious for methane leaks. President Obama pushed for the expedient repair of methane leaks in an effort to curb the devastating effects of climate change. But President Trump’s proposed rule will allow much more methane to leak from oil and gas drilling operations, causing more damage to the environment.

The new rule will require most drilling sites to perform leak inspections on their drilling equipment once a year instead of every six months, and to repair leaks within 60 days instead of 30. If passed, the new rule will save the oil and gas industry an estimated $484 million by 2025. The cost to our environment can only be measured in time. Rhea Suh, president of the National Resources Defense Council (NRDC), an environmental advocacy group, had this to say:

**Trump’s attempt to weaken these methane protections is a blatant giveaway to his fossil fuel allies at the expense of the American people, our clean air, our health, and the future of our planet.**

Those in positions of power in governments throughout the world must take a strong stand in the ongoing battle to curb the man-made causes of climate change. We cannot allow our leaders to ignore scientific findings by the experts in the field.

Sources: NRDC, RightingInjustice.com, The New York Times

#### FDA TO UPDATE CYBERSECURITY GUIDANCE

The U.S. Food and Drug Administration (FDA) will significantly update cybersecurity guidance for medical devices, warning that the threat of cyberattacks is no longer theoretical. In the coming weeks, the FDA will publish an overhaul to the guidance it finalized in 2014 on how medical device manufacturers should build safety controls to protect against data breaches and viruses. The new draft guidance will highlight the importance of providing users with a “cybersecurity bill of materials.” Such a list could help make sure that medical device customers and users can quickly respond to potential threats, according to the agency.

In the past few years, cybercriminals have successfully attacked a number of organizations, including financial institutions, government agencies and, now, health care systems, the FDA said. Even in instances where medical devices aren’t deliberately targeted, they could be affected by a cyberattack if they are connected to a hospital network, the FDA said. FDA head Scott Gottlieb said in a statement: “As the number of cyberattacks has increased, we’ve heard concerns about the potential for cyber criminals to attack patient medical devices.”

The FDA said it’s not aware of any reports that a hacker gained unauthorized access to a medical device in use by a patient, but there is still a risk. Additionally, Gottlieb said that the MITRE Corporation, a federally funded research group, has released a cybersecurity “playbook” for health care organizations that outlines steps organizations can take to be better prepared for a cyberattack that involves medical devices. These include steps such as developing a medical device inventory and conducting training exercises, Gottlieb said. The FDA has also developed its own internal playbook to help staff respond to cybersecurity threats, vulnerabilities and incidents.

Gottlieb said that the FDA believes that manufacturers that participate in these organizations signal that they are being proactive about tackling cybersecurity. He added: This transparent sharing of information is believed to “help manufacturers address issues earlier and result in more
protection for patients,” according to Gottlieb.

If you need additional information on this subject, contact Chad Cook, a lawyer in our firm, at 800-898-2034 or by email at Chad.Cook@beasleyallen.com.

Source: Law360.com

VIII. WHISTLEBLOWER LITIGATION

ELEVENTH CIRCUIT BROADENS THE STATUTE OF LIMITATIONS ON WHISTLEBLOWER CLAIMS

The Eleventh Circuit has recently extended the prospect of “whistleblower” lawsuits, known as “qui tam” lawsuits, but statutorily known as False Claims Act (FCA) lawsuits for relators under 31 U.S.C. § 3731(b)(2). This particular section deals with the statute of limitations and extends the limitation period permitting actions for “3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed”.

Traditionally, several courts have viewed the extended limitations period as applying only to cases where the government is a party or intervenes in qui tam actions. See, e.g., United States ex rel. Sanders v. North American Bus Inc., 546 F.3d 288, 295 (4th Cir. 2008); United States ex rel. Sikkenga v. Regence Bluescross Bluesield of Utah, 472 F.3d 702, 725–26 (10th Cir. 2006).

The Eleventh Circuit has now split, correctly we believe, from those other Circuit Courts of Appeals and held that § 3731(b)(2) applies to all relators regardless of whether the government decides to intervene or not. United States ex rel. Hunt v. Cochise Consultancy Inc., 887 F.3d 1081, 1089 (11th Cir. 2018). The Eleventh Circuit expanded the statute of limitations to apply to relators doing business with the government.

In Hunt, the FCA claim was filed more than six years after the alleged fraud occurred, but was only three years after the fraud was disclosed to the government. Id. at 1083. Hunt alleged that the contractors defrauded the United States Department of Defense for work they performed as contractors in Iraq. Id. Hunt had two theories under the FCA: first, it alleged that Defendant Cochise fraudulently induced the government to enter into the subcontract to purchase services by providing illegal gifts. Id. at 1085. Second, Hunt alleged that the contractors had a “legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States, but failed to do so.” Id.

This issue was a matter of first impression for the Eleventh Circuit, but the court was clear that the decision was supported in multiple ways. For one, the court found that “nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the government declines to intervene.” Id. at 1089. When the text is viewed in context, the statute shows the remedy is available to relators. Id. at 1090. In addition to the textual support, the court also states that “legislative history provides no convincing support” that the period is only available for the government. Id. at 1097.

Even though the decision may be “at odds with other circuits, other circuits have failed to consider the “unique role that the United States plays even in a non-intervened qui tam case.” Id. at 1092. Though the limitations period is broadened, the court also held that the period is only triggered by the knowledge of a government official, not the relator. Id. at 1096.

Anyone considering blowing the whistle on wrongdoing occurring with a contractor doing business with the government is strongly urged to seek legal counsel before doing so. Our firm’s Consumer Fraud & Commercial Litigation Section has been handling these cases for years with good success. This new development in the law will aid these claims substantially.


If you have any whistleblower / qui tam / FCA claim inquiries please feel free to contact our firm, specifically Andrew Brasher at Andrew.Brasher@beasleyallen.com; Archie Grubb at Archie.Grubb@beasleyallen.com; Lance Gould at Lance.Gould@beasleyallen.com; and Larry Golston at Larry.Golston@beasleyallen.com or at 800-898-2034 or 334-269-2343.

AMERISOURCE SETTLES FCA ‘SHAM PHARMACY’ LITIGATION FOR $625 MILLION

AmerisourceBergen Corp. will pay $625 million to settle False Claims Act (FCA) litigation accusing it of avoiding federal oversight in a massive “sham pharmacy” scheme to repack and resell drugs used by cancer patients. The U.S. Department of Justice (DOJ) announced the settlement on Oct. 1. The settlement resolves a number of whistleblower claims that include drug contamination, kickback payments and labeling of drugs with bogus patient names. It appears the scheme lasted for 13 years and saw Amerisource unlawfully produce millions of drug doses using an Alabama-based entity called Medical Initiatives Inc.

Amerisource said in the settlement agreement that it failed to register with the U.S. Food and Drug Administration (FDA) as a drug repackager and “did not qualify” for an exemption that applies to certain pharmacy operations. In a statement, Amerisource acknowledged that “some of its practices at [Medical Initiatives] were not consistent with AmerisourceBergen’s approach to corporate compliance.”

This False Claims Act settlement was the result in no small part of misconduct uncovered by whistleblowers outside the company. This shows that anyone with knowledge of “shady business practices” may be able to put together a massive fraud case under the FCA.

The mammoth payout—among the 10 largest FCA deals in history involving pharmaceuticals—resulted from three suits filed by four whistleblowers. One of those whistleblowers was a consummate insider: Michael Mullen, a former chief operating officer at AmerisourceBergen Specialty Group who was also a member of Amerisource’s corporate ethics committee. The other three whistleblowers were not employed at all by Amerisource. Instead, they worked in health care settings where patients used drugs from a purported Amerisource pharmacy.

The fourth whistleblower was a Florida physician group called Omni Healthcare Inc. In its complaint, Omni said that “personal observation and documents” helped it recognize a scheme to sell unlawfully repackaged drugs that were used by cancer patients. The whistleblowers all became concerned that the drugs were being mass-produced in ways that violated federal law, and they eventually compiled detailed allegations that the U.S. Department of Justice credited when announcing the settlement on Oct. 1.

FCA whistleblowers tend to be employees of companies accused of fraud. To the extent that nonemployees bring FCA cases, they often have some sort of professional relationship, such as a consulting contract, that gives them an official window into a company’s billing shenanigans.

The primary claim against Amerisource was that Medical Initiatives purchased vials of various drugs, including anti-anemia drug Procrit, and transferred the drugs into prefilled syringes that it later sold. The DOJ said that by doing so, the company was able to capture “overfill” from the vials and ultimately produce more doses than it purchased, creating roughly $100 million in total profit.

BeasleyAllen.com
According to the government, Amerisource “excluded the entire [prefilled syringe] program from its standard regulatory audit and pedigree compliance programs.” While Medical Initiatives avoided FDA regulation, it nonetheless operated as a large-scale drug operation.

The DOJ says that Medical Initiatives was a “sham pharmacy” that often didn’t bother to obtain valid prescriptions. Instead, it would label drugs with the names of staff members at physician offices or patients who had died.

The government also accused Amerisource of preparing drugs in an “unclean environment” where drugs were contaminated with actual filth.” In addition, Amerisource allegedly incentivized the purchase of its prefilled syringes by enticing doctors with kickbacks in the form of pharmacy rebates. Medical Initiatives shut down in 2014.

This settlement is in addition to a $260 million criminal fine and forfeiture that Amerisource agreed to last year in connection with the same scheme. Amerisource over the past year disclosed in securities filings that it expected to pay a large FCA settlement.

The government is represented by Richard P. Donoghue, Deborah B. Zwany, Matthew Silverman, Sanjay M. Bhambhani and John Heneberry of the DOJ. The whistleblowers are represented by J. Marc Vezina and Monica Navarro of Vezina Law PLC, Robert Thomas Jr. of Thomas & Associates, Suzanne Durrell of Durrell Law Office, Silvija Strikis, Joseph Hall and Andrew Shen of Kellogg Hansen Todd Figel & Frederick PLLC and Patricia Stamler of Hertz Schram PC.


Source: Law360.com

**Florida Pharmacy Hit With False Claims Suit Over Kickbacks**

The federal government has filed suit against a Florida pharmacy alleging the business engaged in illegal kickback schemes with marketers that resulted in the federal Tricare program paying more than $21 million in reimbursements for prescriptions induced in violation of the False Claims Act (FCA). The lawsuit against Z Stat Medical LLC, which operates as Oldsmar Pharmacy, company President Larry Smith and an affiliated entity stems from a whistleblower suit filed in 2015 by Jennifer Silva and Jessica Robertson, former employees of companies owned or operated by Smith.

The U.S. Attorney's Office for the Middle District of Florida filed the suit on behalf of the U.S. Department of Defense (DOD), including its Defense Health Agency (DHA). The DHA administers the Tricare program, which provides health insurance for active duty military personnel, military retirees and their dependents. The government is seeking treble damages, civil penalties and restitution, based on its claims that Smith and Oldsmar submitted claims to Tricare for reimbursement for prescriptions for costly compound medications that they knew were fraudulent under the FCA because of the kickbacks paid to marketers. The complaint alleges:

Smith had conducted his own independent research into the anti-kickback laws. Specifically, Smith was aware that no pharmacy could pay a commission per prescription to any marketing firm in connection with government-funded insurance claims because it was illegal. Smith also understood this to be a norm in the pharmacy industry.

The claims cover two schemes allegedly carried out between September 2014 to February 2015 by Smith and Oldsmar and different pharmacy services administration organizations. A brief summary of those schemes follow:

**Centurion Compounding**

In November 2014, Oldsmar entered into a kickback arrangement with Centurion Compounding Inc., the complaint claims. Centurion initially rejected an offer from Smith to receive 25 percent of Oldsmar's revenue from prescriptions it referred and entered into a similar scheme with LifeCare Pharmacy that paid it 50 percent of referrals, but ultimately worked out a deal to evenly split 85 percent of Oldsmar's revenue after LifeCare started withholding payments due to an audit by a private insurer.

The owners of LifeCare and a doctor have entered guilty pleas in connection with that scheme, and Centurion’s two co-owners have been indicted on multiple charges, according to the complaint.

Centurion hired sales representatives as independent contractors who marketed costly compound medications—usually creams for pains and scars—to Tricare beneficiaries. Patients recruited by the sales representatives were directed to send their prescriptions to Centurion, which then directed them to Oldsmar to fill.

From November 2014 to February 2015, Tricare paid about $18 million for approximately 4,000 claims for compound prescriptions that Centurion procured for Oldsmar to fill as part of the kickback scheme, according to the complaint. Oldsmar paid Centurion more than $6.1 million in kickbacks, a share of which was distributed to the individual sales representatives.

**Scott Roix Companies**

Prosecutors also claim that Smith entered into a second kickback scheme with companies owned by Scott Roix, including Health Savings Solutions and Vici Marketing. According to the complaint, Health Savings Solutions published online advertisements offering free consultations for pain creams. Respondents would call telemarketers at Vici who followed a script to screen for customers who had insurance that would cover compounded medication. Those customers would then be put in touch with a telemedicine company and issued prescriptions without ever seeing the doctor in person. The prescriptions would be sent to one of Roix's companies, which would then send them to Oldsmar to fill. Oldsmar paid a 41 percent kickback to Health Savings Solutions, the complaint says.

From September 2014 to February 2015, Oldsmar filed 700 prescription claims with Tricare based on referrals from Health Savings Solutions, resulting in Tricare paying out about $3.4 million, the government says. Oldsmar made $5.5 million in payments to Health Savings Solutions, including three payments of about $1 million each after federal authorities executed a search warrant at Oldsmar's facility.

Prosecutors also allege that Vici telemarketers encouraged patients to agree to automatic refills before they had even spoken with a medical professional and that the scheme “improperly influenced the selection of ingredients in compound formulas” as a result of efforts to induce Tricare patients to place more expensive orders. As part of both schemes, Oldsmar also sometimes waived
IX. PRODUCT LIABILITY UPDATE

**Silvi Concrete Settles Final Crash Lawsuit Claims After $12 Million Verdict**

A lawsuit involving a tragic vehicle crash resulted in a large jury verdict and a number of settlements. A series of settlements with tire companies Bridgestone, Bandag McCarthy, and the driver of the struck vehicle, Mrs. Reed, were liable for the $1.7 million jury verdict for compensatory damages and interest, made for a record recovery for a New Jersey woman and her infant daughter. Each suffered horrific injuries in a crash caused by a defective truck tire.
Another lawsuit involves the case of Charlotte Blankenship, who died in Spartanburg County, South Carolina, in April 2017 after the SUV her husband was driving went off the side of the interstate and hit an X-LITE guardrail, which “pierced(d) through the GMC’s exterior and frame,” all the way through to the back-passenger seat. The evidence shows that the guardrails are defective and should be removed from U.S. roadways, Mr. Elmers says. “We can never bring my daughter Hannah … back, but we can honor (her life) by ensuring no other family shares in this horrific grief.”

If you need more information on this subject, contact Graham Esdale or Parker Miller, lawyers in our Personal Injury & Products Liability Section, at 800-898-2034 or by email at Graham.Esdale@beasleyallen.com or Parker.Miller@beasleyallen.com. Sources: U.S. News, Knox News, WSMV, WJHL

**PLANE CRASH LAWSUIT NOT PREEMPTED**

The Third Circuit Court of Appeals has revived Jill Sikkelee’s state law claims against Avco Corp. alleging a defective engine design caused the plane crash that killed her husband. The panel found a Pennsylvania federal court improperly concluded the claims were preempted by federal law. In a precedential opinion, U.S. Circuit Judges Patty Shwartz and Marjorie O. Rendell said the district court erred in ruling that Mrs. Sikkelee’s strict liability and negligence claims were conflict-preempted because Federal Aviation Administration (FAA) regulations made it “impossible” for an Avco unit to unilaterally implement design changes that were allegedly required under state law.

The split panel ruled that since Avco’s Textron Lycoming Reciprocating Engine Division has not provided clear evidence that the FAA would not have allowed it to alter the design of the attachment system in the engine’s carburetor, the claims are not preempted. The FAA knew that “the carburetor’s screws loosened in some cases and caused fuel to leak” and, consequently, had asked Lycoming to review the problem, the judges noted. Judge Shwartz wrote in the majority opinion:

*Based on this record, the FAA likely would have approved a proposed change to the attachment system. Thus, it was not ‘impossible’ for Lycoming to change its allegedly defective design, and Lycoming’s conflict-preemption defense fails.*

There was a dissent by U.S. Circuit Judge Jane R. Roth who argued in the dissenting opinion that the claims were preempted because FAA regulations barred Lycoming from implementing the purportedly requisite change without prior agency approval.

Mrs. Sikkelee’s husband, David, was flying a Cessna 172N plane in July 2005 when it crashed soon after taking off from a North Carolina airport, killing him. She has alleged that the plane lost power and crashed because the screws that held together the engine’s carburetor came loose, court documents state.

Mrs. Sikkelee initially filed her lawsuit in May 2007 against Avco, Lycoming and other Defendants. U.S. District Judge Matthew W. Brann ultimately held that her state law claims against Avco and Lycoming were “field-preempted” by FAA regulations, but the Third Circuit in April 2016 upended that finding and remanded the matter for Judge Brann to consider whether the claims were “conflict-preempted.”

In granting summary judgment bids by Avco and Lycoming, Judge Brann in August 2017 concluded that the claims fall short on conflict-preemption grounds. On Sikkelee’s appeal of that decision, she relied on the U.S. Supreme Court’s 2009 *Wyeth v. Levine* opinion. Avco and Lycoming primarily relied on the Supreme Court’s 2011 *PLIVA, Inc. v. Mensing* decision and its 2013 *Mutual Pharmaceutical Co. v. Bartlett* decision. The following is a brief look at those opinions.

In *PLIVA* and *Bartlett*, the court found that state law claims against generic drug manufacturers—who must use the same labels as their brand-name counterparts—were “conflict-preempted because it would be impossible to comply with the federally mandated label and the modified label purportedly required by state law.

The Supreme Court in *Wyeth* held that a state law claim against a brand-name drug manufacturer was not pre-empted, because “changes being effected,” or CBE, regulation permitted that company to unilaterally change a warning label before receiving approval from the U.S. Food and Drug Administration (FDA).

The court concluded that “absent clear evidence that the FDA would not have approved a change to [the drug’s] label, [the Court could] not conclude that it was impossible for Wyeth to comply with both federal and state requirements.

Judges Shwartz and Rendell determined that the principles of *Wyeth* applied to Mrs. Sikkelee’s claims since Avco and Lycoming could have adjusted the engine design in question. The majority opinion said:

*Thus, Lycoming is in a position more akin to that of the brand-name manufacturer in Wyeth than that of the generic manufacturers in PLIVA and Bartlett, who were unable to deviate from the brand-name manufacturers’ labels.*

For Lycoming to be entitled to an impossibility preemption defense, it must present “clear evidence that the [FAA] would not have approved a change,” the opinion said, quoting Wyeth. “This it cannot do.”

Judge Roth agreed with her two colleagues that the district court properly granted summary judgment in favor of Avco and Lycoming on Sikkelee’s failure-to-notify-the-FAA claim and that the lower court erred in finding the Defendants were entitled to summary judgment on the merits of the state law claims.

The case is *Sikkelee v. Precision Airmotive Corp. et al.*, (case number 17-3006) in the U.S. Court of Appeals for the Third Circuit.

Source: Law360.com

**X. AN UPDATE ON THE TALC LITIGATION**

**REMEDY FOR ONE, PLEADING NOTES FOR ALL: J&J TALC-OVARIAN CANCER SUIT SENT BACK TO STATE COURT**

United States District Judge Freda L. Wolfson recently remanded to a Pennsylvania state court one of the thousands of cases currently pending in the talcum powder federal multidistrict litigation (MDL) in New Jersey. Until her case was remanded in October 2018, Bernadine Moore was one of more than 8,500 cases rolled into the federal MDL where women were suffering with or died from ovarian cancer.
XI.
MASS TORTS UPDATE

J&J UNIT SETTLES RISPERDAL LAWSUIT ON THE EVE OF TRIAL

Janssen Pharmaceuticals Inc., a Johnson & Johnson unit, has agreed to settle claims by a Mississippi family who says their son developed breast after taking the antipsychotic drug Risperdal to treat a conduct disorder. The settlement came as Janssen was about to face the prospect of punitive damage awards in Risperdal cases in Delaware County following a Superior Court ruling in January that upended a global order barring punitive damages for any claims related to the drug.

The case involved claims that the Plaintiff, identified only as J.T., developed “large, female-like breasts” as a result of a hormone spike caused by his use of Risperdal beginning when he was 7 years old. J.T. was prescribed the drug in March 2004 as his family sought treatment for his possible bipolar disorder, which was later described as just a conduct disorder. Soon after he started taking the drug, however, the boy’s family said he started to experience massive weight gain, including breast growth that invited ridicule from his peers at school. The boy was ultimately diagnosed with gynecomastia, or the abnormal growth of female breast tissue in males, in May 2013.

Warning labels for Risperdal before October 2006 indicated that gynecomastia was a rare side effect in adults, occurring in fewer than 1 in 1,000 patients, but Plaintiffs have claimed that J&J had data showing that incidence of the side effect was much more common in adolescent boys. The label was subsequently updated, alongside an approval from the U.S. Food and Drug Administration (FDA) for use treating children with autism, showing there was a 2.3 percent rate of gynecomastia in adolescents taking the drug.

The J.T. case was one of some 6,700 cases pending in the Philadelphia County Court of Common Pleas as part of a mass tort program created to consolidate Risperdal claims. A series of Risperdal trials have resulted in a combined total of some $75 million in damages against Janssen. A global order in the Risperdal mass tort had found that, as a result of the company’s significant business ties to New Jersey, J&J was entitled to rely on a provision of state law there that shielded it from punitive damages.

However, the Pennsylvania Superior Court reversed the order in January and ruled instead that Plaintiffs should be given a chance to argue that the law of their home states should be brought to bear on the issue of punitive damages. Since then, a judge has agreed that Plaintiffs in two cases should be allowed to move ahead with claims for punitive damages.

The Plaintiffs are represented by Thomas Kline and Christopher Gomez of Kline & Specter PC, Jason Itkin and Kala Sellers of Arnold & Itkin LLP and Stephen Sheller of Sheller PC. The case is J.T. et al. v. Janssen Pharmaceuticals Inc. et al., (case number 130701267) before the Court of Common Pleas of Philadelphia County, Pennsylvania.

Source: Law360.com

AN UPDATE ON THE XARELTO LITIGATION—DISCOVERY CONTINUES IN 1,200 INDIVIDUAL CASES

Earlier this year, U.S. District Judge Eldon Fallon, the presiding judge in the Xarelto multidistrict litigation (MDL), issued a Case Management Order (CMO 6) that addressed the Court’s plan for conducting pre-trial discovery in a portion of the cases pending in the MDL. Under this plan, 600 cases were selected in April (Wave 1) and another 600 cases were recently selected (Wave 2). For both waves, Plaintiffs and Defendants each selected 200 cases for inclusion. The Court then randomly selected an additional 200 cases to round out the Wave.

As previously discussed, the Remand process is an important next step in moving the Xarelto litigation forward. Case-specific discovery is currently underway for each of the 1,200 cases selected for Waves 1 and 2. After the completion of pre-trial discovery depositions in the Wave 1 and 2 cases, Judge Fallon may choose to select more cases for additional pre-trial discovery Waves. He may also choose to remand some or all of the Wave 1 and 2 cases to their home districts for trial. Either way, we will keep you posted on the Judge’s plans for the MDL litigation.

Andy Birchfield, the head of Beasley Allen’s Mass Torts Section, continues to serve as Co-Lead Plaintiff Counsel for the Xarelto MDL. The federal court MDL litigation in the Eastern District of Louisiana now contains approximately 22,000 Xarelto cases. Nearly 2,000 cases have been filed in the parallel Pennsylvania state court Xarelto litigation, which is based in the Philadelphia Court of Common Pleas. The next Pennsylvania state court Xarelto trial is scheduled to begin in early December.
Beasley Allen lawyers continue to work in both the MDL and the Philadelphia litigations on behalf of thousands of individuals injured by Xarelto. If you need more information on this litigation, please contact Joseph VanZandt or Sonny Wills, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Joseph.VanZandt@beasleyallen.com or Sonny.Wills@beasleyallen.com.

AN UPDATE ON THE PROTON PUMP INHIBITOR LITIGATION

The multidistrict litigation (MDL) for proton pump inhibitor (PPI) products was established August 2017. The MDL is located in New Jersey and is presided over by U.S. District Judge Claire C. Cecchi. Beasley Allen’s Navan Ward, Jr., is a member of the Plaintiffs Executive Committee. There are currently more than 2,000 actions pending in the PPI MDL. There are also actions pending in Delaware and Missouri state courts.

There were 32 named Defendants when the MDL was initially formed. The large number of Defendants was one of the issues the U.S. Judicial Panel on Multidistrict Litigation (JPML) cited when it initially declined the motion to form an MDL. The JPML foresaw complications in discovery because each individual action named a unique set of Defendants and because the named Defendants are competitors. Since then, several motions have been filed to reduce the number of named Defendants in the MDL and to streamline service of process.

After the Court dismissed certain Defendants, there are 17 remaining named Defendants:

Abbott Laboratories; AstraZeneca Pharmaceuticals LP; AstraZeneca LP; GlaxoSmithKline Consumer Healthcare Holdings (US) LLC; Merck & Co. Inc. d/b/a Merck, Sharp & Dohme Corporation; Novartis Corporation; Novartis Pharmaceutical Corporation; Novartis Vaccines and Diagnostics, Inc.; Novartis Institutes for Biomedical Research, Inc.; Novartis Consumer Health, Inc.; Pfizer, Inc.; The Procter & Gamble Company; Procter & Gamble Manufacturing Company; Takeda Pharmaceuticals USA, Inc.; Takeda Pharmaceuticals America, Inc.; Takeda Development Center Americas, Inc. f/k/a Takeda Global Research & Development Center, Inc.; and Takeda Pharmaceutical Company Limited.

The parties have stipulated that these Defendants are sufficient to satisfy any potential judgment in these cases. The first bellwether trial for the MDL is scheduled to begin September 2020. A plan for bellwether case selection has not yet been finalized.

Beasley Allen lawyers are investigating cases involving PPI-induced Acute Interstitial Nephritis (AIN), a condition where the spaces between the tubules of the kidney cells become inflamed. If you or a loved one has suffered from PPI-induced AIN after taking PPI medications, contact Melissa Prickett or Navan Ward, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com or Navan.Ward@beasleyallen.com.


AN UPDATE AND OVERVIEW OF THE VALSARTAN RECALL

Since July 2018, the Food and Drug Administration (FDA) has announced recalls of several common medications containing the generic drug valsartan, which is classified as an Angiotensin II Receptor Blocker (ARB). Valsartan is regularly used in the treatment of high blood pressure and heart failure. As reported in a prior issue of this Report, the recall came after an impurity, a chemical known as N-Nitrosodimethylamine (NDMA), was found in valsartan-containing products manufactured by the China-based company Zhejiang Huahai Pharmaceuticals. In September 2018, the FDA announced that an additional impurity, N-Nitrosodiethylamine (NDEA), had been identified in certain valsartan products manufactured by both Zhejiang Huahai and India's Torrent Pharmaceuticals.

According to both the FDA and the Environmental Protection Agency (EPA), NDMA is an environmental contaminant formerly used in the production of rocket fuel and is considered a probable human carcinogen that may cause and increase the risk of cancer. Likewise, the second impurity identified in the valsartan-containing products, NDEA, is also classified by the EPA as a probable human carcinogen and may increase the risk of cancer.

Although small amounts of NDMA are considered reasonable, the FDA has conducted testing and determined amounts found in recalled valsartan products exceeded acceptable levels with some impurities being in the products for as long as four years. Recently, the FDA put this into perspective, stating that consuming 0.096 micrograms (mcg) of NDMA per day is considered reasonable; however, the majority of the tainted batches of valsartan products tested contained high levels of NDMA per tablet, ranging from 5-20 mcg/tablet.

It is believed that the potentially cancer-causing impurities found in Zhejiang Huahai Pharmaceutical's valsartan products resulted from changes to the way the ingredients were manufactured. In fact, the FDA announced on Sept. 28, 2018, that it was halting imports from Zhejiang Huahai Pharmaceutical after an inspection of its facilities revealed serious problems with Huahai’s quality management systems, procedures for evaluating and documenting changes to its manufacturing process, and inadequacy of laboratory sampling plans and testing procedures among other things.

This import alert stops all active pharmaceutical ingredients (API) manufactured by Huahai and finished drug products made using Huahai’s API from legally entering the United States. According to the FDA, the import alert will remain in effect until Huahai can pinpoint how the probable cancer-causing impurities were introduced into the company's products and improve its quality control.

For a full list of the recalled products, pharmaceutical companies that have recalled and/or sold the tainted valsartan products, and FDA product testing analysis, visit the FDA's website at www.fda.gov.

Beasley Allen lawyers are investigating claims where valsartan users taking a minimum of 80 milligrams (mg) regularly have subsequently been diagnosed with cancer of one of the filtering organs. Currently, our attorneys are investigating the following injuries: colorectal cancer, kidney cancer, bladder cancer and spleen cancer. For more information, contact Melissa Prickett or Lisa Littell Courson, lawyers in our firm’s Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com or Lisa.Courson@beasleyallen.com.

Bone Cement Litigation Update

Recent medical studies have linked high-viscosity (HV) bone cement to increased loosening, leading to early failures and additional surgeries. These studies often compared HV bone cements to low-viscosity (LV) or medium-viscosity (MV) bone cements and found statistically significant results that HV cements were not as strong. These HV bone cements have been the subject of recent lawsuits. Beasley Allen’s Mass Torts Section is out in front of this litigation with five HV bone cement cases filed across the country. Two of the cases are filed in federal court in Dallas, Texas; two cases are filed in federal court...
in Louisiana; and one case is filed in federal court in North Carolina. Currently, these cases are heading into the discovery phase.

Discovery is the process in which the parties obtain information in preparation for trial through demands for production of documents, depositions of parties and potential witnesses, written interrogatories (questions and answers written under oath), written requests for admissions of fact, and potentially motions to enforce discovery rights. In these HV bone cement cases, there are several Defendants that took part in manufacturing these products, including DePuy, Stryker, Howmedica Osteonics, Biomet, DJO Global, and even some foreign manufacturers. Plaintiffs will engage in discovery efforts with each of these Defendants. Depositions of the corporations’ designated agents are scheduled to take place within the next few months.

Beasley Allen lawyers are investigating four HV bone cements used in total knee replacement surgeries:

• CMW 1 Bone Cement;
• Cobalt HV Bone Cement;
• Simplex HV Bone Cement; and
• SmartSet HV Bone Cement.

If you or a loved one has experienced complications from knee replacement surgery requiring revision surgery, contact Roger Smith or Ryan Duplechin, lawyers in our firm’s Mass Tort Section, in at 800-898-2034 or by email at Roger.Smith@beasleyallen.com or Ryan.Duplechin@beasleyallen.com.

WEST VIRGINIA JURY AWARDS $1.2 MILLION IN PRADAXA BLOOD THINNER CASE

A West Virginia federal jury has awarded $1.2 million to the family of a woman who died while taking Boehringer Ingelheim’s blood thinner Pradaxa. This is the first time a jury has awarded damages to a consumer alleging injuries from the drug. The jury found that Boehringer Ingelheim committed fraud by misrepresenting facts about Pradaxa in the death of Betty Knight. The jury’s award included $1 million in punitive damages. The jury’s $250,000 fraud verdict, together with the $1 million punitive damage award, was the maximum amount allowed under West Virginia law.

The jury found in the company’s favor on other claims brought by Mrs. Knight’s children, Claude R. Knight and Claudia Stevens. Those claims were failure to warn and breach of express and implied warranty.

Knight was prescribed Pradaxa in October 2011 to treat nonvalvular atrial fibrillation, a common heart rhythm disorder. In May 2013, Mrs. Knight experienced uncontrollable bleeding and had to be hospitalized for 20 days. The Knight family claimed that Boehringer Ingelheim represented Pradaxa as just as safe or safer and as effective or more effective than other blood thinners on the market, but concealed that the drug had statistically significant increases in irreversible bleeds and did not have any known reversal agents. The jury found that the drug was a proximate cause of Mrs. Knight’s injuries, but did not cause her death, according to the verdict.

The win by the Virginia Plaintiffs follows three bellwether victories for Boehringer Ingelheim in consolidated litigation in Connecticut state court. Boehringer Ingelheim agreed to pay roughly $650 million to settle claims in multidistrict litigation that Pradaxa caused serious injuries, including severe bleeding. The settlement resolved roughly 4,000 state and federal cases in the U.S.

The Knight family is represented by Neal Moskov of Ury & Moskov LLC, Andrew Childers and Emily Acosta of Childers, Schluter & Smithand and Hunter Linville of Ferrer Poirot & Wansbrough. The case is Knight et al v. Boehringer Ingelheim Pharmaceuticals Inc., (case number 3:15-cv-06424) in In Re: Pradaxa (Dabigatran Etxelate) Products Liability Litigation in the U.S. District Court for the Southern District of West Virginia.

Source: Law360.com

XII. AN UPDATE ON SECURITIES, INSURANCE AND FINANCE LITIGATION

HSBC FINALIZES $765 MILLION MORTGAGE-BACKED SECURITIES SETTLEMENT

HSBC Holdings PLC has finalized a $765 million settlement that resolves the U.S. Department of Justice’s (DOJ) allegations that the bank hid risks associated with residential mortgage-backed securities (RMBS) sold in the years preceding the 2008 financial crisis. The DOJ accused the London-based bank of having shortcomings with its due diligence program that allowed it to issue RMBS that were backed by low-quality loans without investors’ knowledge.

Between 2005 and 2007, HSBC allegedly touted its due diligence procedures to investors even after a risk manager expressed concerns about them. The bank would test at least 25 percent of a pool of subprime loans for “credit and compliance” issues, though it often tested fewer than the advertised 5 percent at random and the process for choosing the other 20 percent was subject to manipulation, according to the DOJ.

Through this testing process, HSBC became aware of more than 7,400 loans that were flagged as low quality that the bank either “waived” through or reclassified as higher quality, the DOJ said. HSBC employees, according to the DOJ, apparently were aware of the alleged wrongdoing, with one trader saying in 2007 that an RMBS the bank was issuing “will suck.”

In another instance, employees in HSBC’s risk management group warned that a loan pool had a high number of early payment defaults, but the bank nonetheless issued the RMBS and continued to securitize loans from the same source, the DOJ said. The bank sometimes issued the RMBS before receiving the results of quality control reviews, the DOJ said. Bob Troyer, U.S. attorney for the District of Colorado, said in a statement:

“HSBC made choices that hurt people and abused their trust. When deals went south, investors who trusted HSBC suffered. And when the mortgages failed, communities across the country were blighted by foreclosure.”

The DOJ alleged HSBC violated the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). The settlement follows recent similar FIRREA settlements with the DOJ by Wells Fargo Bank NA and the Royal Bank of Scotland. The government in this case is represented by Kevin Traskos, Jasand Mock, Ian J. Kellogg, Hetal J. Doshi and Lila M. Bateman of the U.S. Attorney’s Office for the District of Colorado.

Source: Law360.com

UBER AGREES TO PAY RECORD $148 MILLION TO SETTLE DATA BREACH COVERUP

Uber will pay $148 million to settle an investigation into a massive 2016 data breach that the ride-hailing company covered up by paying off the hackers. The nationwide settlement, led by California, is the largest ever multi-state data breach settlement. Funds from the settlement will be divided equally among all 50 states and the
District of Columbia. Alabama will receive a $2 million share of the settlement.

The data breach exposed the names, email addresses, phone numbers and other personal information of 57 million Uber passengers and drivers, but the company did not disclose the hack until late 2017—a year after it first discovered the breach. Uber managed to keep the data breach out of public view until late 2017, when it admitted that it paid two hackers $100,000 to destroy the data they stole.

Uber revealed the hackers “accessed a private GitHub coding site used by Uber software engineers and then used login credentials they obtained there to access data stored on an Amazon Web Services account that handled computing tasks for the company,” according to Bloomberg. “From there, the hackers discovered an archive of rider and driver information. Later, they emailed Uber asking for money …”

Uber also agreed to take a number of other measures, including boosting its cybersecurity practices; complying with state laws governing data collection, maintenance and storage; as well as reporting requirements for security incidents. Additionally, Uber must report data security issues on a quarterly basis over a two-year period. California Attorney General Xavier Becerra said in a statement:

Uber’s decision to cover up this breach was a blatant violation of the public’s trust. The company failed to safeguard user data and notify authorities when it was exposed. Consistent with its corporate culture at the time, Uber swept the breach under the rug in deliberate disregard of the law. Companies in California and throughout the nation are entrusted with customers’ valuable private information. This settlement broadcasts to all of them that we will hold them accountable to protect their data.

Uber became available statewide in Alabama on July 1, 2018, after Governor Kay Ivey signed a bill into law requiring Uber and other transportation network companies to obtain permits from the Alabama Public Service Commission, which now regulates them statewide.

Previously, Uber operated in Alabama’s major cities only under a patchwork of local rules and regulations. The new law has greatly expanded Uber’s reach in Alabama, opening up small towns and rural areas to ridesharing services.

Sources: California Department of Justice, RightingInjustice.com and Bloomberg

XIII.
AN UPDATE ON CLASS ACTION LITIGATION

RECENT CLASS ACTION SETTLEMENTS

There have been a number of significant settlements in class action litigation since our last issue. A brief summary of some of the more significant cases will be set out below.

TRANSMERICA SETTLES INSURANCE CLASS ACTION

Transamerica Life Insurance Company (Transamerica) recently entered into a settlement with Plaintiffs from several class actions that were joined together as one action in the Central District of California. See Feller v. Transamerica Life Ins. Co., Case No. 2:16-cv-01378-CAS-GJXs, (C.D. Cali. Feb. 28, 2016 filed). This settlement requires Court approval since it is a class action.

The class settlement establishes a $195 million settlement fund from which existing and lapsed policyholders will have the opportunity to submit a claim and receive a pro rata portion of the “monthly deduction rate” (MDR) charge that increased starting in 2015 through 2016 for several “waves” of policyholders. The total number of policies that experienced an increase to their MDR is approximately 70,000.

These policies were issued between 1983 and 2008 and class members witnessed their policy account values plummet after experiencing massive increases in the MDR to their policies. Increases on policies varied and included increases of 40 percent and upwards to 100 percent. Policyholders may choose to opt out of the proposed class settlement should they wish to pursue their claims individually.

If approved, Transamerica would be barred from increasing the MDR on the class policies for a period of five years. Additionally, the payout to policyholders will be a partial refund for overcharges as to the MDR since increases began in 2015 and 2016. Likewise, cash credits are available to in-force policies to alleviate their policy cash values, which were depreciated by the increased MDR.

Upon approval, not only would policyholders be protected from MDR increases for another five years, but any future increases would be required to be based upon “the collective effect of the cost factors assumed when the policies were originally priced” and no increase can be above “the expected future profitability of policies within the same plan to a higher level than projected based on original policy pricing assumptions.” This provision is to ensure that Transamerica does not attempt to recover past losses.

Persons who own one of the covered life insurance policies will receive correspondence giving them the option to participate in the settlement. If a policyholder does not opt out, then they will be required to release all claims against Transamerica relating to the MDR increase. Notably, a separate case involving MDR increases on Transamerica policies occurring in 2017 has not been settled and continues to be litigated.


DEUTSCHE BANK AND HSBC AGREE TO $340 MILLION SETTLEMENT TO EXIT LIBOR MDL

Deutsche Bank AG and HSBC Inc. received final approval last month of two settlements totaling $340 million that allow them to exit multidistrict litigation (MDL) accusing numerous banks of manipulating one of the world’s leading benchmarks for interest on short-term loans, the London Interbank Offered Rate (Libor). U.S. District Judge Naomi Reice Buchwald signed off on the $100 million HSBC agreement and $240 million Deutsche Bank agreement with a class of over-the-counter investors who were subject to Libor outside of a stock exchange.

The MDL was 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.

Judge Buchwald granted class certification to the over-the-counter Plaintiffs, such as Baltimore, in late
February, finding that investors between 2007 and 2010 made similar claims about Libor suppression and other common issues.

The case is In Re: Libor-Based Financial Instruments Antitrust Litigation, (case number 1:11-md-02262) in the U.S. District Court for the Southern District of New York.

**Courts Back Investors in Claims Over Bad Merger Deals**

Last month, actions taken by Delaware courts in favor of investors put executives on notice that striking deals in a manner to undercut investors would not be tolerated.

In a class action lawsuit filed in a Delaware Chancery Court against Lions Gate Entertainment Corp., the company ended the class action by agreeing to pay $92.5 million pursuant to a proposed settlement to former shareholders of Starz Entertainment LLC. The settlement stemmed from a $4.4 billion acquisition of Starz in 2016. In a stipulation and agreement of settlement, Lions Gate and the suing shareholders said the settlement had been reached less than two weeks before a trial over Starz’s December 2016 acquisition by Lions Gate was scheduled to begin in the Chancery Court. Extensive fact discovery and several mediation sessions had taken place.

Series A holders filed half a dozen lawsuits in Chancery Court challenging the deal, alleging that Starz controlling shareholder John C. Malone, who is also a Lions Gate board member, engineered the deal for his own benefit. Malone owned about 88 percent of Starz Series B shares at the time of the deal. The action also includes several appraisal petitions filed in Delaware after the deal that was consolidated with the class claims. The case is In re: Starz Stockholder Litigation (case number 12584) in the Court of Chancery of the State of Delaware.

Similarly, a Delaware federal judge has certified a class of Lionbridge Technologies Inc. investors’ claim that the globalization specialist shortchanged them by signing off on last year’s nearly $360 million go-private deal with HIG Capital. The class action had been dismissed but was revived earlier this year. U.S. District Judge Colm F. Connolly appointed Laborers’ Local #231 Pension Fund as lead counsel and Robbins Geller Rudman & Dowd LLP as lead counsel. The judge said that the federal requirements were satisfied to certify a class of investors who owned Lionbridge shares on Jan. 27, 2017—the date that a majority of shareholders voted in favor of the merger.

What the company failed to disclose before that vote, according to the investor class, is that Lionbridge’s heady acquisition-driven growth projections were not reflected in the fairness opinion provided to shareholders through a proxy statement filed with the U.S. Securities and Exchange Commission. The investors said:

*Because of their failure to incorporate acquisition-based growth, the fairness opinion and underlying analyses understated Lionbridge's prospects. As a result, the proxy statement misled stockholders into supporting the merger despite its inadequate price.*

The case is Laborers’ Local 231 Pension Fund v. Cowan, et al., (case number 1:17-cv-00478) in the U.S. District Court for the District of Delaware.

Source: Law360.com

**Consumers in Roof Shingle MDL Seek Approval Of $30 Million Settlement**

Roof shingle maker IKO Manufacturing and a proposed class of customers who say the company’s shingles deteriorated earlier than promised have reached a $30 million settlement to end the multidistrict litigation (MDL). The settlement will end the litigation over the faulty shingles and will cover a class of more than 1 million customers. An additional five years will be given on their warranty. The class members will have the option to choose cash or replacement shingles if they fail within that period.

The agreement to end the nine-year-old MDL also restricts the claims released by a customer who utilizes the warranty on just part of their roof. In addition to the extended warranty and increased options for customers with damaged roofs, IKO agreed to pay no more than $7.5 million to cover attorneys’ fees, costs and awards for the named Plaintiffs. The class representatives will collect either $3,000 or $7,500, although the motion for approval doesn’t explain why some will receive more than others.

The Judicial Panel on Multidistrict Litigation centralized several suits against IKO in Illinois’ Central District in 2009, with customers saying they were promised the company’s shingles could last as long as 50 years and were backed by an “iron-clad” warranty. In reality, the shingles were susceptible to water damage and failed much earlier than that. It was alleged that when the customers tried to utilize their warranties, IKO made it difficult to file a claim and insisted that a customer complaining about tiles on a portion of their roof would have to release claims on the entire roof.

The case is In re: IKO Roofing Shingle Products Liability Litigation, (case number 2:09-md-02104) in the U.S. District Court for the Central District of Illinois.

Source: Law360.com

**Och-Ziff Reaches $29 Million Settlement In Securities Class Action**

Och-Ziff Capital Management Group LLC has agreed to pay $28.75 million to settle a class action lawsuit filed by investors. It was alleged that the hedge fund downplayed investigations by the U.S. Securities and Exchange Commission and the Department of Justice into an African bribery scheme. The proposed settlement would end claims under federal securities law. The suit, brought in 2014, alleged that Och-Ziff, CEO Daniel S. Och and former CFO Joel M. Frank concealed the bribery scheme and subsequent investigations by U.S. regulators that ultimately cost the company $412 million and caused its stock price to fall, harming investors.

The parties reached an agreement-in-principle to settle the claims just three days after U.S. District Judge J. Paul Oetken, on Sept. 14, certified a class of investors who purchased shares of Och-Ziff between Feb. 9, 2012, and Aug. 22, 2014. Judge Oetken estimated the class would include thousands of investors.

Source: Law360.com

**Settlement Up To $41 Million Approved In Aviva Annuity Suit**

U.S. District Judge Nathaniel M. Gorton, a Massachusetts federal judge, has approved a class action settlement guaranteeing the annuities of 5,000 Aviva PLC customers at a value of up to $41 million. Despite a lack of evi-
dence that plaintiffs lost money when Aviva canceled capital maintenance agreements promising the financial stability of certain annuities, the intangible losses were substantial. The presence of that guarantee had an impact on the value of the annuities.

The settlement class includes everyone who purchased a structured settlement annuity from Aviva PLC subsidiaries Aviva Life Insurance Co. of North America or Aviva Life Insurance Co. of New York between 2002 and 2009, when the annuities were guaranteed by CGU International Insurance Co., now known as Aviva International Insurance Co.

The case is Griffiths v. Aviva London Assignment Corp. et al., (case number 1:15-cv-13022) in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

YAHOO EMAIL USERS SEEK APPROVAL FOR $50 MILLION DATA BREACH SETTLEMENT

Yahoo has agreed to pay $50 million to settle proposed consumer class claims in California federal and state courts over a trio of data breaches that affected billions of U.S. and Israeli accounts. Reportedly, this would provide the largest available cash fund for data breach class members in history. Under the terms of the proposed settlement, which if approved by U.S. District Judge Lucy H. Koh would bring an end to both multidistrict litigation in California federal court as well as parallel state court proceedings, Yahoo will establish a $50 million nonreversionary settlement fund for consumers and provide at least two years of credit monitoring by the three major credit bureaus and identity theft protection services from AllClear ID for all settlement class members.

Yahoo sold most of its internet business to Verizon Communications Inc. in 2017. The full $50 million settlement fund will be available to compensate settlement class members for out-of-pocket costs stemming from the data breaches, to reimburse users and small businesses who paid for email services up to 25 percent of what they paid out each year, and to fund “alternative compensation” for class members that already have credit monitoring.

Improvements under the settlement include encryption of the company’s user database and backups, enhanced intrusion detection tools, increased information security team headcount and budget, and the implementation of the National Institute of Standards and Technology’s cybersecurity framework, according to the consumers.

The case is In re: Yahoo Inc. Customer Data Security Breach Litigation (case number 5:16-md-02752) in the U.S. District Court for the Northern District of California.

Source: Law360.com

USC SETTLES SEX ABUSE CLASS SUIT FOR $215 MILLION

The University of Southern California has reached a $215 million deal in principle to resolve a proposed class action accusing a former staff gynecologist of sexually abusing potentially thousands of women. The women claim Dr. George Tyndall, a longtime USC gynecologist, committed sexual abuse, molestation and unwanted touching, among other allegations, over a period of decades and with the school’s knowledge, according to the putative class action filed in California federal court.

The proposed settlement will pay each woman a minimum of $2,500, while each class member is eligible for a maximum of $250,000. To be eligible for the higher payout, a class member must be willing to be interviewed by a forensic psychologist and other experts regarding their experience with Dr. Tyndall.

The tentative settlement is earmarked for “all current or former female students who were seen for treatment by Dr. George M. Tyndall at USC’s student health center for women’s health issues.”

The proposed settlement has a three-tiered structure for payouts. The $2,500 payment will be made to any patient who was treated by Tyndall between July 1997 and June 2016 as verified by patient records or other evidence. A payment of $7,500 to $20,000 will be made after a class member provides a written description of her experience and its impact; a court-appointed special master will then recommend the payment amount.

The third and highest tier has a minimum of $7,500 and a maximum of $250,000 and requires a claimant to be interviewed by a forensic psychologist or other experts regarding her experience and its impact. The expert will then make a report to the special master, who will assess “emotional distress and/or bodily injury” damages and recommend an award accordingly.

The case is Doe A.T. et al. v. University of Southern California et al., (case number 2:18-cv-4940) in the U.S. District Court for Central California.

Source: Law360.com

XIV.

EMPLOYMENT AND FLSA LITIGATION

NINTH CIRCUIT DESTROYS UBER DRIVERS MISCLASSIFICATION SUITS

The Ninth Circuit Court of Appeals has dismantled a class of hundreds of thousands of Uber drivers alleging they were misclassified as independent contractors instead of employees. A three-judge panel ruled unanimously that Uber Technologies Inc.’s arbitration agreements with its drivers are enforceable, based in part on the recent U.S. Supreme Court ruling in Epic Systems Corp. v. Lewis (employers can legally include class waiver provisions in employee arbitration agreements). The ruling deals a body blow to the hundreds of thousands of current and former Uber drivers who sought to band together to gain employee status, but will now have to pursue their misclassification claims through individual arbitration.

This Ninth Circuit ruling reversed the decision in the lead misclassification case, known as O’Connor v. Uber, issued by the U.S. District Judge Edward M. Chen in December 2015. That decision expanded a class of drivers, which was certified in September 2015, to include a 240,000-driver subclass who had originally accepted arbitration agreements with class action waivers.

The panel stated that the O’Connor v. Uber case should have been sent to arbitration. Circuit Judge Richard R. Clifton wrote that “[t]he class as certified includes drivers who entered into agreements to arbitrate their claims and to waive their right to participate in a class action with regard to those claims.” The panel further added that “the question whether those agreements were enforceable was not properly for the district court to answer.
The question of arbitrability was designated to the arbitrator. “This ruling is a huge victory for Uber because it means the ride-hailing service does not have to worry about large-scale class actions over whether the company misclassified its drivers as independent contractors to avoid wage and hour obligations and thus evaded various labor laws. If you need additional information, contact Lance Gould at 800-898-2034 or by email at Lance.Gould@beasleyallen.com.

Source: Law360.com

**Harvey Weinstein Faces Five Sexual Assault Charges**

Recently, a judge in New York dismissed one of six pending criminal charges against Harvey Weinstein, the infamous Hollywood mogul who has been accused of sexual assault and/or sexual harassment by more than 80 women. After the dismissal, Weinstein still faces five charges of sexual assault in connection with two women—one in 2013 and the other in 2006. At least nine women have filed civil lawsuits against Weinstein and his affiliated companies.

In October 2017, New York Attorney General Eric Schneiderman opened a civil rights investigation into The Weinstein Company (TWC). In that case, Schneiderman issued a subpoena for records related to sexual harassment and discrimination complaints at TWC. The scores of accusations against Weinstein ignited the global #MeToo movement and the #TimesUp movement related to the entertainment industry. Since the Weinstein allegations began pouring in, women and men all over America have publicly shared their experiences of sexual harassment and assault in the workplace.

If you are currently, or have been in the past, a victim of sexual harassment or sexual assault, or know someone who was a victim, we encourage all victims to come forward and tell their story. Lawyers in our firm have taken an active role in helping victims of sexual assault and harassment to seek and find justice. Larry Golston, Leon Hampton and Lauren Miles are investigating these cases. They can be contacted by email at Larry.Golston@beasleyallen.com, Leon.Hampton@beasleyallen.com, Lauren.Miles@beasleyallen.com or at 800-898-2034.

**XV. RECENT DEVELOPMENTS RELATING TO ARBITRATION**

**Arbitration Can Backfire on Corporate America**

Arbitration has long been the “darling” of the corporate world and has been used to circumvent the well-established court system, where consumers and corporations are on more equal footing. Most lawyers and consumer groups recall back in 1995 when the United States Supreme Court, in a case from Alabama, Allied Bruce v. Dobson, 513 U.S. 265 (1995), essentially endorsed the use of mandatory binding arbitration in consumer contracts.

Since that time, arbitration has quietly creeped into virtually every consumer contract. Terminix International Company, L.P was one of the pioneer companies to utilize and enforce mandatory binding arbitration agreements in its consumer contacts.

For decades, Terminix spent huge amounts of money to convince courts that the company should be allowed to avoid juries. Terminix's insistence to arbitrate is well documented, such as in Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332 (11th Cir. 2005), and until recently has almost always benefitted the corporation and severely impaired ordinary consumers from seeking warranted recourse on individual cases and also prohibited the use of class action litigation.

By signing the Terminix contract a consumer gives up their right to a trial by jury regardless of the conduct by Terminix. The consumer also gives up the right to bring a class action on behalf of others for wrongful conduct.

Well, as fate would have it, the tables have recently been turned on the pro-arbitration crowd and specifically on Terminix, the originator of this draconian practice of mandatory consumer arbitration. We will mention several arbitration awards that were rendered in favor of consumers against Terminix and others in this issue. However, these cases are the exception. Arbitration is still controlled by the corporate world.

Arbitration was never intended to be part of consumer contracts as a general matter. The legislative history clearly demonstrates that arbitration was intended for sophisticated business men and women involved in complicated transactions, who by agreement can choose to have their disputes decided by an arbitrator. Arbitration should be a purely voluntary contract term. It was never intended to be forced on consumers in a “take it or leave it” mandatory fashion in ordinary everyday consumer transactions. A prime example is a pest control contract on your home. Unfortunately, with corporate power and influence that’s where arbitration is today in our consumer market, forced upon consumers. Accept it or you can't purchase a given product or service. It’s mandatory. It’s unfair.

Again, while it is refreshing to see some relief being found in the arbitration world, that should be distinctly understood to be the exception and not the rule. Arbitration has no place in consumer contracts and it certainly should not be mandatory and binding.

Until we are able to obtain some meaningful federal legislative relief from Congress, consumers will have to either resist the mandatory arbitration when they enter into a contract (draw a line through the clause), or buy a product that does not have mandatory binding arbitration. Otherwise, the only choice is to give up your right to trial by jury and in most cases, your right to bring a class action if necessary on behalf of others who are similarly situated, by agreeing to mandatory binding arbitration.

As some have said, arbitration has been a license to steal by corporate America. Like others from the past have warned about things that are bad for you, “just say no” to mandatory binding arbitration. It’s your right. If you need more information on this subject, contact Lauren Miles at 800-898-12034 or by email at Lauren.Miles@beasleyallen.com.

**Terminix and Other Pest Control Companies Fail to Provide Sufficient Termite Protection and Are Finding That Arbitration Can Work Favorably For Home and Business Owners**

Home and business owners have found success in a string of recent cases alleging fraudulent misrepresentation and suppression, as well as violations of state deceptive trade practices acts in some instances, against pest control companies. In each of the awards, most of which exceeded a million dollars in damages, the pest control companies were found liable for failing to provide or maintain adequate preventative termite treatments for homes and businesses.

These deficient termite treatments include failing to provide enough pesticide to protect against termites; failing to apply
the pesticides to all areas of the home or business needing protection; failing to adequately assess the extent of termite damage during repairs; and allowing pesticide treatments to wear off without replacing the chemical barriers that are intended to protect against termite damage.

Damages in these recent cases have included recovery for the diminished value of the home or business as a result of the termite damages, emotional distress damages, incidental expenses such as relocations, and punitive damages as well as attorneys fees in some instances. Most of the cases have involved Terminix International Company, L.P (Terminix). The following is a brief summary of the successful awards in cases handled by Tom Campbell, a Birmingham lawyer:

• $1,973,910 award against Terminix for failing to apply appropriate preventative termite treatments, which it fraudulently concealed during repairs of the building on two prior occasions. The insufficient preventive treatments included incomplete treatments and failure to re-apply pesticide treatments that had worn off over time.

• $1,616,265 award against Terminix for fraud and for deceptive trade practices. Terminix was found to have failed to appropriately re-apply the pesticide used as a chemical barrier to prevent against termites after it had worn off.

• $1,035,000 award against Terminix for failing to provide a sufficient amount of pesticide to protect against termites. Also, Terminix failed to adequately assess the extent of the termite damage during prior two repairs and provided deficient annual inspections of the home.

• $1,000,000 award against Terminix for failing to adequately protect a home against termite damage due to incomplete termite treatments and for fraudulent misrepresentations concerning the termite treatments.

• $557,000 award against Orkin, LLC for failing to replace pesticide barriers that had worn off and for providing incomplete termite treatments. The incomplete termite treatments included the failure to use the correct amount of pesticide to protect against termite damage.

Tom Campbell has successfully utilized arbitration for his clients in these cases. I seriously doubt that these pest control companies anticipated this development.

Lawyers in our firm are currently investigating claims against pest control companies that have fraudulently failed to provide adequate termite protection to homes and businesses. Andrew Brashier and Paul Evans, lawyers in our Consumer Fraud & Commercial Litigation Section, are handling these cases. If you have any inquiries, they can be reached at 800-898-2034 or by email at Paul.Evans@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

ENDING FORCED ARBITRATION IN SEXUAL HARASSMENT CASES

As we have stated on numerous occasions, arbitration clauses are commonplace in employment contracts. These clauses allow companies to keep lawsuits out of the court system and away from the public’s view and scrutiny. However, a recent push lead by Sen. Kirsten Gillibrand is aiming to end the enforcement of arbitration clauses when an employee asserts a claim of sexual harassment or sexual assault. In December 2017, Sen. Gillibrand, along with Sen. Kamala Harris and Rep. Cheri Bustos introduced the “Ending Forced Arbitration of Sexual Harassment Act” in both the U.S. Senate and House of Representatives.

While this legislation has yet to come up for a vote, it appears to be gaining strong bipartisan support. In February 2018, all 50 state attorneys general (plus the attorney general for District of Columbia and five U.S. territories), signed a letter to Congress demanding that lawmakers end mandatory arbitration in sexual harassment and sexual assault cases.

The attorneys general wrote that “[v]ictims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.” In August 2018, Sen. John Kennedy of Louisiana signed on as a co-sponsor of the bill.

Some opponents of the act argue that, as written, the act would amend the Federal Arbitration Act (FAA) to exclude all employment contracts from arbitration. Specifically, the opponents of the act state that certain language would be stricken from Section 1 of the FAA to broaden what is now the transportation worker’s exclusion to include all employment contracts. However, as it stands, the legislative intent of the proposed legislation is to only exclude claims of sexual harassment from forced arbitration.

Furthermore, the act, if passed, would not prevent victims from consenting to arbitration after their claims arise. If signed into law, the “Ending Forced Arbitration of Sexual Harassment Act” would simply ensure that victims of sexual harassment in the workplace would get a chance to tell their stories in a court of law. If you need information, contact Leon Hampton, a lawyer in our firm’s Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Leon.Hampton@beasleyallen.com.


JURY AWARDS $6.3 MILLION TO FAMILY OF MAN KILLED AT A FARMERS MARKET

A jury has awarded $6.3 million to the family of a 74-year-old man who died after being hit by a car at a Whittier, California farmers market. The wrongful death lawsuit arose from a 2016 incident in which Armando Martinez was knocked down by a Ford station wagon at the Whittier Uptown Association’s Farmers Market. Martinez injured his head in the fall and later died at a local hospital. The female driver of the station wagon was a vendor at the market. In 2016, the family of Martinez sued, alleging that the vehicle that hit Martinez should not have been allowed on the market property at the time of the incident.

The claim was based on the association’s own rules, which had been enacted after other incidents at the market when shoppers were hit by vehicles. It was alleged that the “Defendants were fully aware and on notice of their own rules, polices, procedures, which said that no vehicles of any kind were permitted on and/or within the market property for a minimum of 30 minutes prior to the market opening business to the public at 8 a.m. on every Friday. Martinez was hit by the vehicle at around 8:17 a.m.

During the trial, the Whittier Uptown Association attempted to place most of the legal responsibility on the driver. However, the association was aware of its rules regarding vehicles at the farmers market and failed to uphold them. The driver of the vehicle, who worked at the market for several years selling eggs, had never been made aware of these rules.

The jury awarded $6.3 million to the family of Martinez, putting 99.5 percent of
the responsibility on the Whittier Uptown Association and assigning 0.5 percent to the driver. Martinez, a former deacon at his church and a member of various charity organizations, is survived by his wife and two adult daughters. The Whittier Uptown Association is a nonprofit trade association that promotes the Uptown Whittier community. David Rudorfer, a lawyer with Panish Shea & Boyle in Los Angeles County, represented the family and did an excellent job.

**JACKSONVILLE LANDING SHOOTING SURVIVORS**

**FAULT BUSINESSES FOR LAX SECURITY**

Multiple negligent security lawsuits have been filed by the victims of an Aug. 26 mass shooting that left three people dead and several others wounded at a gaming competition in Jacksonville, Florida. The lawsuits name as Defendants the Jacksonville Landing shopping, dining, and entertainment complex, a Chicago Pizza restaurant, the GLHF (Good Luck Have Fun) Game Bar inside the pizza restaurant, Electronic Arts (EA), which organized the competition, and other parties.

The Plaintiffs allege that the Defendants failed to take adequate security measures to ensure the safety of the gaming contestants, who arrived from all over the country to participate in the Madden NFL 19 video game competition. The gunman, 24-year-old David Katz of Baltimore, loaded his car with weapons at his Baltimore home and made the long drive to Jacksonville Landing. He then walked into the Chicago Pizza restaurant where the gamers were deep in competition and started spraying the premises with bullets.

The attack killed two people and 10 others sustained gunshot wounds. The shooter, who had been hospitalized twice in the past for mental illness problems, ultimately turned the gun on himself.

Jacksonville Landing and the City of Jacksonville are no stranger to deadly shootings—an unfortunate fact that event organizers and host facilities should have understood and addressed. Just last year, a shooting outside the Jacksonville Landing development killed a 16-year-old boy and critically injured a 13-year-old. That deadly shooting was connected to another shooting that injured two teens earlier the same month, January 2017, at the city’s the Art Walk event.

As the epidemic of gun violence, mass shootings, and domestic terrorism worsens in the U.S., more and more businesses, event organizers, and property owners find themselves facing negligent security lawsuits and other premises liability complaints.

The first lawsuit in connection to the shooting was filed by three injured survivors in early September. Since then, three additional negligent security lawsuits have been filed by victims of the shooting.

Sources: RightingInJustice.com, Lariat News, First Coast News, The Florida Times-Union, News4JAX, ESPN, Baltimore Sun, CNN

**XVII. WORKPLACE HAZARDS**

**FOOD PROCESSING INDUSTRY EXPOSES LINE WORKERS TO AMPUTATION INJURIES**

Prior to 2015, the Occupational Safety and Health Administration (OSHA) only required employers to report workplace fatalities and events requiring hospitalization of three or more employees. Since Jan. 1, 2015, employers have been required to report all work-related hospitalizations along with amputations. The amended reporting requirements provided OSHA with more information with respect to amputation injuries in the workplace. The newly obtained data has revealed an average of seven amputations per day! The vast majority of the amputation injuries involved fingers; however, lost hands, feet and other body parts were also reported.

Amputation injuries result in some of the most serious and life changing workplace injuries. OSHA statistics reveal that food processing workers are three times more likely to suffer serious injury than the average American worker. The food processing industry consists of workers that process chickens, cows and pigs for human consumption. These facilities are equipped with machines designed to transport, shear, crush and cut to effectuate the processing of meat for restaurants and grocery stores.

Since OSHA’s jurisdiction extends only to the employment arena, its regulators focus solely on what the employer can do to minimize amputation injuries. OSHA citations following amputation injuries normally discuss lockout/tagout and training procedures for employees. Additionally, since most food processing jobs are production based, the employees are more prone to make mistakes, and/or the employers are less likely to stop the process to deal with obvious dangerous conditions.

In some investigations, OSHA will cite the lack of adequate guarding on certain equipment. Defectively designed machines that lack adequate guarding and other safety mechanisms are largely responsible for amputations in the workplace setting. However, since OSHA has no authority over the designers, manufacturers and/or installers of machinery, the employer is left holding the bag.

While guarding can be added to machines in the field, the most effective way to prevent injuries is for the actual designer, manufacturer and/or installer to identify and guard hazards before the machines are placed into the stream of commerce.

Lockout/tagout procedures and training rely on human conduct to prevent injuries while guarding techniques do not. If a hazard is properly guarded and/or eliminated, the need for human observance of procedures is eliminated. Beasley Allen lawyers have handled amputation cases where the employee failed to follow a machine procedure that led to an injury.

Our lawyers have also handled cases when management directed employees to disregard procedures to maintain production numbers. When guards and other presence-sensing devices are in use, the likelihood for injury is greatly reduced whether procedures are followed or not.

Industry management should take action to ensure they do not expose employees to unnecessarily hazardous conditions in an effort to secure corporate profits. For the sake of their employees and their companies, they should look to identify practices and procedures that will allow employees to work in an environment that is both safe and efficient. When properly maintained and used, guarding techniques and other safety devices offer the most consistent and effective protection for all workers, whether in the food processing industry or beyond. If you have any questions, or would like to discuss a possible case, contact Kendall Dunson, a lawyer in our firm’s Personal Injury & Products Liability Section, at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com.

**OSHA LOCKOUT/ TAGOUT BASICS**

Lockout/tagout is a common practice used in industrial settings and is intended to reduce the risk of injury due to machinery or equipment starting unexpectedly.

The Occupational Safety and Health Administration (OSHA) is very specific regarding lockout/tagout procedures. The specific requirements of the Control of Hazardous Energy can be found in Title 29 Code of Federal Regulations (CFR) Part 1910.147. The lockout/tagout procedures set forth establish the employer’s responsi-
ability to protect workers from hazardous energy.

Employers are also required to train each worker to ensure that they know, understand, and are able to follow the applicable provisions of the hazardous energy control procedures. Failure to enact or enforce lockout/tagout procedures are some of the most commonly cited OSHA violations in the industrial setting. More importantly, failure to properly enact and enforce lockout/tagout procedures can lead to serious injury and death. Failure to control hazardous energy accounts for nearly 10 percent of the serious accidents in industry according to OSHA.

OSHA defines lockout/tagout as a specific practice and procedure to safeguard employees from the unexpected energization or startup of machinery and equipment, or the release of hazardous energy during service or maintenance activities. The first step in setting lockout/tagout procedures is identifying hazardous energy sources. Hazardous energy sources can take many forms. The most common are electrical, mechanical, hydraulic, pneumatic, chemical, thermal, or other sources that can cause machines and equipment to move.

Once the hazardous energy source has been identified, it is imperative to set a plan of action to de-energize and mitigate that hazard. Specifically, OSHA requires the three things set out below that an employer must do as part of an energy-control plan.

1. First, the employer must establish energy control procedures for removing the energy supply from machines and for putting appropriate lockout/tagout devices on the energy-isolating devices to prevent unexpected reenergization. This requires that the machinery or equipment is disconnected from the energy source by isolating the energy to prevent the release of hazardous energy. Lockout devices hold energy-isolation devices in a safe or off position. The devices are positive restraints that can only be removed with a key or unlocking mechanism.

2. Next, the employer must train employees on the energy-control program, including the safe application, use and removal of energy controls.

3. Finally, the employer must inspect these procedures at least once per year to ensure that they are being followed and that they remain effective in preventing employees’ exposure to hazardous energy.

All employers requiring employees to work around energized equipment should follow OSHA guidelines for lockout/tagout to ensure the safety of their employees. If that is not enough incentive, OSHA citations and fines are another motivating force. OSHA fines for failing to follow lockout/tagout can range from minor warnings all the way to criminal charges and major fines. The level of fines is explained below:

OSHA may cite an employer for a ‘de minimis’ violation if it is found that an OSHA regulation is violated, but it does not directly impact safety. A de minimis violation does not come with a fine, or even a written citation. Typically, an OSHA inspector that notes de minimis violations will simply inform the employer.

The next level of citation is the “other than serious” violation. This is an unsafe condition that has little chance to cause harm or injury. These will often result in written warnings.

The next rung on the OSHA citation ladder is a “serious violation.” When an OSHA inspector notes a violation of a specific OSHA standard and considers the violation to possibly lead to harm or death, the citation is noted as serious and the fine can be up to $70,000 depending on how egregious the violation is.

Finally, there are repeated serious violations and willful violations at the top end of the spectrum. Willful lockout/tagout violations can lead to fines between $250,000-$500,000 and potentially even result in criminal charges.

Employers have an obligation to understand the OSHA regulations regarding hazardous energy control and lockout/tagout. If employees fail to follow these standards, they can be subject to serious fines, criminal penalties, and loss of human life. If you have any questions on this subject, contact Evan Allen, a lawyer in our firm’s Personal Injury & Product Liability Section, at 800-898-2034 or by email at Evan.Allen@beasleyallen.com.

Source: OSHA.gov

**Distracted Driving Is A Very Serious Safety Issue**

Distracted driving is an epidemic that results in fatalities across the world every day. This issue, although completely preventable, continues to exist and accounts for approximately 25 percent of all motor vehicle fatalities. Distracted driving is so prevalent that 80 percent of drivers admit to engaging in hazardous activity while driving. Further, the Department of Motor Vehicles stated that nine people in the United States are killed each day in distracted-driving-related accidents.

Although distracted driving is certainly not limited to cellular devices and consumer vehicles, it is an issue that states are trying to combat. In an effort to do so, several states including Georgia have implemented “Hands Free Laws.” Georgia law mandates that a driver not have a phone in their hand or use any part of their body to support their phone. Drivers can only use their phones to make or receive phone calls by using speakerphone, earpiece, wireless headphone, when the phone is connected to a vehicle or an electronic watch. GPS navigation devices are allowed. Exceptions to this law include reporting an emergency such as a crash, medical emergency, criminal activity or a hazardous road condition. See O.C.G.A §40-6-241.

The effort is not uniform across the country and no state has implemented an “all cell phone ban” while driving. However, all states have banned texting while driving with the exception of Alaska, Montana and Missouri for individuals 21 years of age or younger.

The mission is to decrease fatalities that result from distracted driving, namely distraction caused by improper cell phone use. The best course of action as an individual is to abide by the laws of your state and practice and/or learn defensive driving techniques to protect you and you loved ones. Despite the widespread knowledge of the dangers created by driving distracted, individuals continue to engage in this reckless behavior.

Beasley Allen lawyers have experience handling cases involving this reckless disregard for safety known as distracted driving. If you have questions, contact Greg Allen, Cole Portis, Ben Baker, Mike
• October 2016—American Airlines Flight 383 aborted takeoff at Chicago’s O’Hare International Airport after an uncontained engine failure started a fire beneath the right wing, according to USA Today. The NTSB announced later that day that the engine fire on the Boeing 767 bound for Miami was caused by a defect in the engine turbine disk caused by metal fatigue. The CF6-80 engine was manufactured by GE.

• August 2016—A Southwest Boeing 737-700 was forced into an emergency landing in Pensacola, Florida, after an uncontained engine failure sent debris from a broken fan blade slashing through the fuselage, wing and tail. The plane lost cabin pressure. The NTSB preliminarily determined there was evidence the blade from the CFM56 engine, manufactured by GE, had experienced metal fatigue.

• September 2015—A British Airways Boeing 777-200ER jet aborted takeoff from the Las Vegas airport. Bloomberg explained that the left power plant broke apart setting off an immense fire that burned through the wing and the fuselage as the 170 people aboard, 20 of whom were injured, attempted to deplane from the aircraft as black plumes of smoke billowed from the fire. The NTSB traced the engine failure to a fractured disc in the (General Electric) GE90-85B11 engine. The federal inspectors faulted the lack of inspection requirements for allowing the disc’s crack “to grow for years without detection.”

Underlying issues

Industry experts have questioned the thoroughness of the inspection process, along with the safety of engine designs as factors in the growing number of uncontained engine failures. Findings from the investigations of the incidents that have occurred over the last three years support this theory.

The inspection process is conducted primarily by the Federal Aviation Administration (FAA), which regulates aviation in the U.S., and the NTSB to determine the cause of crashes. The information collected during investigations is used to help protect future air passengers. The FAA and some manufacturers have taken steps to strengthen the inspection process.

For example, in May the FAA issued an Airworthiness Directive ordering updated guidelines for inspecting the CFM56-7B model engine, which powered the fatal Southwest Airlines Flight 1380. The agency first required initial inspections be conducted of all planes with the CFM56-7B model with 30,000 flights, according to Bloomberg. It later lowered the number of flights to 20,000 for initial inspections and ordered future inspections to be conducted for every 3,000 flights.

As inspections continued and more issues were identified, the FAA once again reduced, by half, the number of flights for planes with the model engine. Planes with a CFM56-7B model engine must now be inspected every 1,600 flights, based on the FAA’s latest Airworthiness Directive issued last month. The agency also has mandated conducting ultrasonic inspections, which can more easily detect microscopic cracks. Some of the updated inspection requirements are being implemented for other model engines as a precaution.

Additionally, because of the fatal outcome of the Flight 1380 incident, the NTSB has scheduled a hearing about the incident later this month. Still, the issues surrounding the flawed engine designs persist.

As technology has improved and the engineering knowledge and capacity of the designers and manufacturers have increased, they have “stretch[ed] the designs and materials to their limit,” as described by the Economist. The new generation of engines is on the cutting edge, yielding better fuel efficiency and increasing the thrust of the aircraft, among other benefits. However, that edge, with such a small margin of error, is where some industry experts say the design is dangerously close to catastrophic failure. It is equally incumbent on the manufacturers to address their products’ engineering defects as aggressively as they have the problems concerning the inspection process.

If you need additional information on the above subject, or any other matter dealing with aviation litigation, contact Mike Andrews, a lawyer in our Personal Injury & Products Liability Section, at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com. Mike, who leads the team of lawyers handling aviation litigation for the firm, will be glad to talk with you.

Sources: New York Times, Bloomberg, USA Today, and Economist

100 MPH Vehicle Crash Kills A Man And His Dogs

There can be no doubt that the combination of drinking and driving causes bad things to happen on our highways. It is being reported that a driver in Florida who was responsible for killing a 74-year-old man as he walked his dogs was traveling
more than 100 mph in a 40 mph zone when the incident occurred, resulting in disaster. Reportedly, the driver of the striking car was so drunk he didn’t realize he had broken his wrist. A bone was actually seen protruding from his arm.

Jason Keenan Carter, 47, of Wellington, Florida, faces charges of DUI manslaughter, vehicular homicide, DUI causing serious bodily injury and reckless driving in the death of John J. Stermer. It should be noted that Carter had two previous DUI arrests, in 1998 and 2008, and also had six felony convictions, including for grand theft, dealing in stolen property, and forgery.

Stermer was struck as he walked his three dogs on the sidewalk of Big Blue Trace, not far from an elementary school. According to reports, Carter, who was driving a 2014 Ford Mustang, was traveling south on Big Blue Trace and “failed to reduce his speed or take evasive action to avoid a collision” with a 2015 Jeep Wrangler. The Mustang rear-ended the Wrangler, causing both cars to go off the road. The Wrangler went onto the sidewalk and hit the man and his dogs. Stermer and two of his dogs were killed. The driver of the struck car was seriously injured in the wreck. Ironically, Carter sustained minor injuries.

A blood test showed an alcohol level for Carter of 0.28, about three and a half times the threshold for impaired driving. A wrongful death lawsuit has been filed asserting out of the incident. The Baltimore native, known as “Jay,” was a musician who as a teenager formed the nine-piece band “The Admirals,” which played backup for musicians such as Aretha Franklin, Stevie Wonder and Ray Charles. The band was inducted into the Maryland Entertainment Hall of Fame in 2016. Stermer and his wife moved to Florida in 1985 and opened a dry-cleaning business. This man’s death was the tragic result of a drunk driver speeding on a public highway with no regard for others in his path.

Source: Palm Beach Post

XIX.
TOXIC TORT CONCERNS

EQUIPMENT CASES AND THE UPCOMING SUPREME COURT HEARING ON THE ‘BARE METAL’ DEFENSE

Navy veterans, boilerworkers, and many factory maintenance workers often worked with asbestos-containing gaskets, packing, and insulation on boilers, turbines, generators, pumps, valves and other pieces of equipment. That material was frequently specified to be used by the manufacturers of the equipment and often the equipment could not be used without being insulated or without the replacement of gaskets and packing. The use of asbestos-containing insulation, gaskets and packing exposed workers to injurious levels of asbestos and caused mesothelioma and lung cancer in many.

The manufacturers of that equipment put forth a defense that they did not make the specific gaskets, packing and insulation being used and, therefore, they should not be held liable to warn about the foreseeable use of their equipment. This viability of this defense came before the United States Supreme Court for argument on Tuesday, Oct. 11, 2018. The Court heard arguments in Air and Liquid Systems Corp., et al v. Roberta G. DeVries, Individually and as the Administrator of the Estate of John B. DeVries, et al. The additional parties involved included equipment manufacturers Ingersoll Rand, IMO, Warren Pumps, CBS, General Electric, Foster Wheeler, and Shirley McAfee, on her own behalf and on behalf of the estate of Kenneth McAfee.

John DeVries served in the United States Navy as an engineering officer aboard U.S.S. Turner from 1957-60. He supervised the crew in the fire and engine rooms. The fire rooms contained boilers (with economizers), pumps, and blowers that generated high pressure steam. The engine rooms contained the ship's steam condensers and propulsion turbines that converted the superheated steam into mechanical energy. From 1969-1989, Mr. McAfee served as a boatswain’s mate in the U.S. Navy aboard numerous ships. Especially from 1977-1980, Mr. McAfee was exposed to asbestos from the process of removal and replacement of gaskets and packing from Ingersoll Rand compressors on the U.S.S. Wannamassa. He was similarly so exposed aboard the U.S.S. Commodore.

The United States Supreme Court will decide based on this case whether, under maritime law, the manufacturer of equipment that requires the use of gaskets and packing can be held liable for the failure to warn of the hazards of the replacement of gaskets and packing on that equipment. Certainly, this decision will impact the law across states, not just maritime law, when it is issued.

LANDMARK ROUNDUP VERDICT SURVIVES

A California judge has denied Monsanto’s attempt to get the jury verdict won by retired groundskeeper DeWayne “Lee” Johnson in August thrown out. However, San Francisco County Superior Court Judge Suzanne Bolanos did reduce the verdict by roughly $211 million. The $289 million jury verdict was won by a groundskeeper who alleged that Monsanto’s Roundup weedkiller caused his lymphoma.

Judge Bolanos ruled that the jury’s punitive damages award must be limited to protect the agrochemical giant’s due process rights. The jury had found Monsanto’s herbicides were a substantial factor in causing Johnson’s non-Hodgkin’s lymphoma. The judge, however, ruled that the jury’s $250 million punitive damages award must be reduced to $39.25 million, the amount awarded in compensatory damages, taking the total award to $78.5 million.

Judge Bolanos ruled that Johnson had established an “inference” that Monsanto had acted maliciously, and that the court had found no case in which a “series of corporate actions and decisions” was found to be insufficient to support punitive damages. Judge Bolanos wrote:

When the entire organization is involved in acts that constitute malice, there is no danger a blameless corporation will be punished for bad acts over which it had no control.

The judge added that it was also reasonable for the jury to conclude that Monsanto acted with malice by continuing to market and sell a dangerous product without a warning.

The lawsuit, the first ever over the alleged Roundup-cancer link to go to trial, was filed in 2016. Johnson was diagnosed with non-Hodgkin’s lymphoma four years ago after spraying Monsanto’s Ranger Pro and Roundup products in schoolyards in Benicia, California. Johnson alleged Monsanto knew of the purported health risks associated with Roundup since the 1990s, when studies began showing a correlation between the product and lymphoma. Because the company downplayed the science and didn’t put a warning label on its products, the worker thought it was safe. He alleged that soon after an equipment malfunction that left him soaked in blistersing lesions.

Johnson is represented by Brent Wisner of Baum Hedlund Aristei & Goldman PC, and Michael Miller and David Dickens of The Miller Firm LLC. The case is Johnson v. Monsanto Co. et al., (case number CGC16550128) in the Superior Court of the State of California, County of San Francisco.

Source: Law360.com
GAS STATION BENZENE EMISSIONS MUCH HIGHER THAN PREVIOUSLY EXPECTED

It is no secret that underground storage tanks at gas stations lose fuel as the gasoline evaporates out of the tank vent pipes. The lost fuel, called an evaporative loss, can account for multiple gallons of fuel being lost from a storage tank each day. While environmental groups can use estimated figures to reach assumed evaporative loss numbers for individual gas stations, researchers from Columbia University, Johns Hopkins University, and Arid Technologies set out to determine if the assumed numbers used by these groups accurately reflect real-world vent pipe emissions. Their study, the first of its kind, found that gas stations could lose up to seven gallons of motor fuel per day to evaporative losses.

At two large gas stations, one in the Midwest and another in the Northwest, these researchers measured vent pipe emissions from underground storage tanks for three consecutive weeks. Flow meters on the vent pipes recorded daily evaporative losses, which ranged from three gallons per day up to seven gallons per day. These figures correspond, at the high end, to approximately 1.4-1.7 pounds of fuel lost per 1,000 gallons dispensed at the pump.

The California Air Pollution Control Officers Association currently estimates that an average gas station loses approximately 0.11 pounds of fuel to evaporative losses, a figure adopted by the California Air Resources Board and many other state environmental groups that look to the Board for precedent. In California, there is a setback regulation of 300 feet from gas stations. Since this study shows that emissions are 10 times higher than the estimates upon which the setback is based, people may be exposed to harmful levels of benzene emissions even when they’re more than 300 feet away.

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

PFC CONTAMINATION UPDATES

Two important developments in the fight against perfluorinated compounds (PFC) contamination have occurred in recent weeks. First, the Third Circuit Court of Appeals allowed a lawsuit seeking medical monitoring to proceed against the Navy while it cleaned up former military bases contaminated with PFCs. Second, Congress passed legislation that will give commercial airports the discretion to use firefighting foam that does not include PFCs.

Aqueous film-forming foam (AFFF) has been used by branches of the U.S. military, members of NATO, and fire departments around the world to extinguish fuel-fed fires. AFFF coats a pool of hydrocarbon fuel with a layer of foam, which acts as a thermal and evaporation barrier to inhibit and eventually extinguish combustion. The film-forming characteristic refers to the fact that, even after the foam has dissipated, the aqueous layer formed from the mixture can coat a liquid hydrocarbon surface.

Although effective, AFFF contains PFCs, which are hazardous to human health. In 2016, the EPA established a lifetime health advisory of 70 parts per trillion, warning that exposure to elevated levels of these compounds, which accumulate over one’s lifetime, can lead to a number of health problems including testicular cancer, kidney cancer, ulcerative colitis, thyroid disease, high cholesterol and pregnancy-induced hypertension. As a result, individuals and water systems across the county have been filing suit to ensure their drinking water is decontaminated.

One such lawsuit was filed by two families in Pennsylvania who sued the U.S. Navy for contaminating their drinking water. Both families live near former military bases where the use of AFFF contaminated the groundwater with PFCs at levels well over the EPA’s lifetime health advisory. The families requested that the Navy fund the medical monitoring of their health conditions as a result of the exposure. They also sought a large-scale study to determine the extent of the PFC contamination in the community, which totals approximately 70,000 people across three townships.

The U.S. District Court ruled that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which established the Superfund program, protected the Navy from having to take action until its cleanup operations at the former bases were completed. The Third Circuit Court of Appeals overturned this decision, holding that the medical monitoring portion of the lawsuit could proceed because that form of relief does not interfere with the Navy’s ongoing cleanup efforts. The important takeaway is that the federal government is not immune from lawsuits seeking “medical monitoring.” This ruling is beneficial to numerous lawsuits filed nationwide by individuals alleging similar contamination issues.

The federal government has finally begun to wake up to the seriousness and extent of PFC contamination nationwide. Earlier this year, the U.S. Agency for Toxic Substances and Disease Registry released a highly anticipated report that recommended lowering the lifetime health advisories significantly from their present-day levels as well as establishing an advisory for PFHxS. Congress has also decided to act by passing legislation giving commercial airports the option to switch to AFFF that does not contain PFCs, overturning a

NEW BENZENE LAWSUIT NAMES NEARLY TWO DOZEN COMPANIES

Travis Bergeron has filed a lawsuit in the Jefferson County District Court of Texas naming more than 20 companies as Defendants, including Sinclair Koppers (being sued as Atlantic Richfield), BP, Chevron, ExxonMobil, Shell Oil, Texaco and Marathon Oil. The Plaintiff claims the companies knew the benzene products they exposed workers to could cause cancer, but acted with utter indifference, refusing to warn those who worked with or around the chemical of the risks.

Travis Bergeron began working for a chemical company in Port Arthur, Texas more than 50 years ago, staying on the job for more than a decade. He claims that while working for Sinclair Koppers from 1967 to 1978, he was exposed to benzene, the toxic volatile, flammable liquid chemical byproduct of coal distillation that is used as an industrial solvent in various products. Bergeron was diagnosed with multiple myeloma, a cancer of plasma cells. Tina Bradley of Hobson & Bradley in Nederland, Texas, represents the Plaintiff in this case.

As reported last month, a new study funded by the National Institute of Environmental Health shows that exposure to benzene, toluene and xylene was associated with increased risk of multiple myeloma.

Benzene is listed as a known carcinogen by organizations including the International Agency for Research on Cancer, the National Toxicology Program, the Centers for Disease Control and Prevention, the Food and Drug Administration, and the Environmental Protection Agency. More than five million people in the U.S. continue to be exposed to dangerous levels of benzene in the workplace.

John Tomlinson, a lawyer in our firm, is currently investigating Benzene exposure cases. If you need more information on these cases, you can contact John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

Source: Southeast Texas Record

BeasleyAllen.com
law that required AFFF with PFCs to be used.

Both developments are welcome signs that our nation is becoming aware of the harmfulness of PFCs and the extent they have polluted our drinking water. Lawyers in our firm, along with Roger H. Bedford of Roger Bedford & Associates, have filed lawsuits on behalf of the water systems in two Alabama municipalities, Gadsden and Centre. The complaints in those cases allege that carpet and textile companies, manufacturers, and chemical suppliers located upstream in Dalton, Georgia are responsible for contaminating the Coosa River and Weiss Lake. The lawsuits were filed to ensure that these entities, not ratepayers in Gadsden and Centre, would pay to decontaminate their drinking water.

Beasley Allen lawyers are investigating other PFC contamination cases. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, or Ryan Kral, lawyers in our firm’s Toxic Torts Section, at 800-959-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, or Ryan.Kral@beasleyallen.com.

Sources: WESA 90.5, Pittsburgh’s NPR News Station; and Ewg.org

**RAMIFICATIONS FROM DECADES USE OF THE “FOREVER CHEMICALS” CONTINUE**

As mentioned above, the manufacturers and suppliers of perfluorinated compounds (PFCs) have over the past several years faced numerous lawsuits for the irreparable harms that they have caused and will continue to cause by the release of these toxic chemicals into the environment. Litigation involving PFCs, dubbed the “forever chemicals,” seems to be growing steadily with no end in sight.

Recently, a class action lawsuit was filed in the Southern District of Ohio on behalf of everyone in the United States who has been exposed to these toxic chemicals. The suit, brought by an Ohio firefighter, Kevin Hardwick, seeks relief on behalf of everyone in the U.S. having a “detectable level” of PFCs in their blood.

Manufacturers 3M, DuPont, and Chemours have all been named as well as eight other companies that produce PFCs and the “replacement” chemicals, such as GenX. The relief sought, however, is not compensatory. The suit seeks to compel the Defendants to fund the creation of an independent science panel that would perform in-depth studies in order to confirm the health effects that can be caused by the presence of PFCs in human blood.

In the recently filed complaint, Defendants claim that there is a lack of definitive evidence to prove that exposure to PFCs can cause adverse health effects. However, the creation of this new panel would offer the opportunity to fill in the many gaps caused by the overwhelming lack of research and to gain the ground needed to hold these Defendants fully liable for their actions. The panel would be much like the C8 Science Panel that was created in a prior a class action in West Virginia.

The work of the C8 Science Panel resulted in many published studies and established probable links to several diseases including kidney and testicular cancer. DuPont was unable to contest the links found by the science panel due to a stipulation in the settlement agreement. Here, the named Defendants will face the same fate because the determinations of this panel “shall be deemed definitive and binding on all parties.”

The pathways in which people are exposed to PFCs are all encompassing making avoidance an impractical possibility. Most people are exposed through the food that they eat, the water they drink and/or the air that they breathe. Detectable levels are found in most humans. Clearly, PFCs have an insidious nature and the true depth of this contamination crisis is profound.

Source: https://theintercept.com/2018/10/06/dupont-pfas-chemicals-lawsuit/

**XX. UPDATE ON NURSING HOME LITIGATION**

**BEASLEY ALLEN LAWYERS BATTLING CORPORATE GREED TO PROTECT NURSING HOME RESIDENTS**

In his December 1902 State of the Union address, Theodore Roosevelt said of corporations: “We are not hostile to them; we are merely determined that they shall be so handled as to subserve the public good. We draw the line against misconduct, not against wealth.” That principle should be followed today both by government regulators and by the corporate world. Nursing homes should be no exception.

Since the 1990s, for-profit corporate chain ownership of nursing homes has grown steadily and now dominates this multi-billion-dollar industry. Today 70 percent of all nursing homes are for-profit businesses. As many as three in four nursing home corporations earn additional revenues through subsidiaries or related companies that provide supplemental services to their nursing facilities. The net result is much larger profits for the nursing home corporations.

Higher profits are not a bad thing, but when greed and indifference to the needs of others get involved, bad things generally happen. A Kaiser Health News analysis of federal inspection and quality records reveals that facilities owned by large for-profit nursing home corporations tend to have significant shortcomings that relate to the drive for higher profits at the expense of resident care. Many of these facilities have fewer nurses and aids per patient, they have higher rates of patient injuries and unsafe practices, and they are the subject of complaints almost twice as often as independent homes.

Those of us at Beasley Allen believe our lawyers have a duty to stand up for the consumers of the long-term and skilled nursing care industry in an attempt to balance the industry’s desire for profit and its obligation to provide quality care. We have found that litigation is the mechanism best suited to accomplish this goal. Although litigation is sometimes viewed as addressing injuries after they happen, litigation can, and should, serve as a powerful tool for prevention. For businesses and corporations whose sole purpose it to maximize profit, the desire to avoid paying monetary damages can be a powerful motivating factor to correct and eliminate wrongful behavior that endangers consumers. Changing the practices of one company can lead to change in the entire industry.

Lawyers in our firm are fighting to protect the safety and rights of elderly and infirmed Americans and to promote better, more responsible care practices in nursing homes and other long-term care facilities by representing in litigation those injured by abuse or neglect. We are currently handling cases involving catastrophic injury or death of nursing home residents resulting from delayed or poor nursing care. Our cases include many of the common types of abuse or neglect typically occurring in nursing homes. The following are pending cases:

- One of our cases, filed in Wilcox County, involves the death of a man whose nursing home failed to adequately identify, monitor and communicate the resident’s true condition to physicians, or to provide adequate care or transfer him to another medical facility where he could get the medical treatment necessary to save his life.

- Another of our firm’s cases involves a nursing home failing to adequately treat and care for our client’s bed sore,
causing her extreme pain and other injuries.

- We also represent a family of a deceased woman in Jefferson County, Alabama, in a lawsuit alleging that the nursing home failed to take the necessary precautions to prevent her from choking, including providing adequate supervision and monitoring while she was eating.

- Currently our lawyers are also working on a case for the family of a Georgia woman who because of the nursing home’s failure to prevent, properly treat, and seek additional medical care allowed her to develop a bed sore that became septic causing her to suffer tremendous pain and suffering for more than two years and ultimately caused her death.

Many recent studies indicate that residents in nursing homes suffer abuse and neglect more and more frequently at the hands of nursing home corporations. If you have suffered serious injury, your loved one has been catastrophically injured or died, or you have any questions about nursing home abuse and neglect, please contact Chris Boutwell in our office at Chris.Boutwell@beasleyallen.com or by phone at 800-898-2034.

Sources: Non-Profit Quarterly and Seeking Alpha

NURSING HOME RESIDENT DIES AS A RESULT OF NURSING HOME NEGLECT

Many of the 1.4 million people in the United States who reside in nursing homes are helpless, vulnerable, and completely dependent upon nursing home staff to meet most or all of their needs. Though many residents are well cared for, nursing home neglect is more widespread than most people are aware.

Neglect is the refusal or failure to provide the care and services necessary to ensure a person’s freedom from harm or pain. In the nursing home setting, neglect most commonly occurs when a resident does not receive proper medical, physical or emotional care. Neglect can also be a failure to react to a potentially dangerous situation causing the resident harm. Unchecked, neglect can pose a serious risk of harm or even death to some nursing home residents.

Medical neglect occurs in nursing homes when the facility’s staff fails to provide adequate care, attention, prevention, medication, or treatment to properly address a resident’s individual and unique health concerns.

Lawyers in our firm are fighting to protect the safety and rights of nursing home residents by representing the injured in litigation to hold long-term care facilities accountable for their acts of negligent care, abuse and neglect. Recently, the firm filed a lawsuit on behalf of the family of a Georgia nursing home resident who died as a result of negligent care provided by a skilled nursing facility in Johnson County, Georgia.

The complaint, filed in Superior Court of Telfair County, Georgia, alleges that our client was a known choking and aspiration risk, and that despite this knowledge, Wrightsville Nursing Home failed to take the proper precautions to prevent him from aspirating on his food, or to identify and adequately treat his signs of aspiration. Because our client aspirated—inhaled food into his lungs—he developed an infection in his lungs, leading to pneumonia, sepsis and, ultimately, his death.

THE BEASLEY ALLEN NURSING HOME LITIGATION TEAM

Lawyers in our firm continue to fight to protect the safety and well-being of nursing home residents in facilities around the country. Our nursing home lawyers represent the victims or families of those who have suffered death or serious injury because of nursing home negligence, abuse and neglect. The team of lawyers in our firm handle nursing home litigation on a regular and recurring basis. Chris Boutwell heads up the Nursing Home Litigation Team; other members of the team currently are Susan Anderson and Leah Robbins. Handling nursing home litigation requires lawyers and support staff to have specific experience in this type case.

If you have suffered serious injury, a loved one has been catastrophically injured or died, or you have any questions about nursing home abuse and neglect, contact one of the team members at 800-898-2034 or by email at Chris.Boutwell@beasleyallen.com, Susan.Anderson@beasleyallen.com or Leah.Robbins@beasleyallen.com.

XXI. THE CONSUMER CORNER

Pfizer to Pay $700,000 in Penalties Over Drug Pricing Claims

The New York State Attorney General’s Office announced last month that Pfizer Inc. agreed to pay more than $700,000 to settle an investigation into claims it let customers think their drug copay coupons provided more savings than they actually did. The Attorney General’s office said the drug giant distributed coupons promisingly claiming eligible consumers would “pay no more than” a stated amount for certain of the company’s products, but that less prominently displayed terms and conditions limited the total savings, resulting in some customers unexpectedly paying substantially more when they used the coupons. Attorney General Barbara Underwood said in a press release:

Pfizer misled customers by promising a low copay for prescription drugs—only to leave them with major bills at the cash register. Now, they must take responsibility and provide restitution to the New Yorkers they deceived.

The settlement concerns co-payment coupons for Pfizer’s birth control Estrace, ADHD medication Quillivant and pain-killer Flector Patch. The Attorney General’s Office said the coupons had large, bold text claiming customers would pay no more than a set out-of-pocket amount for the product, but that conditions that placed limits on total savings were not prominently disclosed, resulting in customers frequently paying more than the “pay no more than” amount.

The investigation was sparked by a complaint by a New York resident. In that case the customer received an Estring coupon that prominently claimed her copay would be no more than $15 when using the coupon. However, when she presented the coupon she was charged $144.62. After the investigation was launched by the Attorney General’s office Pfizer agreed to change the wording on the coupons to state customers could pay “as little as” the stated amount, and that this change was fully in effect by early 2018.

Under the settlement, Pfizer will pay more than $200,000 in restitution to affected customers and $500,000 in penalties, fees and costs. Pfizer has confirmed the settlement and said customers who used the coupons within three years of Sept. 21, 2018, and paid more than $15 to $25 out-of-pocket are eligible for reimbursement.

Source: Law360.com

Costco Settles CPSC Claims Including Payment of A $3.85 Million Civil Penalty Relating To Trash Cans

The U.S. Consumer Product Safety Commission (CPSC) announced last month that Costco Wholesale, Corp. (Costco), of
Ohio, Washington, has agreed to pay a $3.85 million civil penalty. The settlement resolves charges by the CPSC that Costco knowingly failed to report to the agency, as required by law, that the EKO Sensible Eco Living Trash Cans (EKO Trash Cans) contained a defect or created an unreasonable risk of serious injury.

CPSC staff charged that the black plastic protective collar in the opening on the back of the EKO Trash Can receptacle can become dislodged and expose a sharp edge, posing a laceration hazard to consumers. Costco received 92 complaints about the EKO Trash Cans, including 60 complaints from consumers who received injuries, some serious, but did not notify the CPSC immediately of the defect or risk.

On July 17, 2015, CPSC announced a recall with the manufacturer of 367,000 EKO Trash Cans. Costco sold the EKO Trash Cans nationwide between December 2013 and May 2015, for about $50. In addition to paying the $3.85 million civil penalty, Costco has agreed to maintain a compliance program designed to achieve compliance with the Consumer Product Safety Act. The company also agreed to a system of internal controls and procedures to ensure that Costco discloses information to the Commission in accordance with applicable law.

Source: CPSC

FDA INSPECTS LARGEST E-CIG MANUFACTURER’S HEADQUARTERS

The Food and Drug Administration (FDA) recently conducted a surprise inspection of the headquarters of the e-cigarette maker Juul Labs as part of the FDA’s ongoing efforts to curb teen use of e-cigarette products. The FDA confirmed that it was looking into the company’s sales and marketing practices and that it had seized more than 1,000 pages of documents during the surprise inspection. The FDA said it wants to find out whether Juul deliberately targeted minors as consumers.

Juul, which controls about 73 percent of the market, has been at the center of the FDA’s attention this year as e-cigarette use continues to increase among teens. The e-cigarette trend has driven the largest increase of teen nicotine use in decades. That follows years of cigarette smoking among teens dropping to record lows.

Over the past year, the number of high school students who have used e-cigarettes in the past 30 days rose by about 75 percent according to persons familiar with the preliminary data from the Centers for Disease Control and Prevention’s annual National Youth Tobacco Survey. That means roughly 3 million, or about 20 percent of high school kids, have used e-cigarettes, up from 1.73 million, or 11.7 percent, in last year’s National Youth Tobacco Survey. The complete data set is expected to be published later this year.

In April, the FDA requested information from Juul about its marketing practices to teens and announced an effort to stop youth from using tobacco products, particularly e-cigarettes. The surprise inspection came weeks after the FDA formally announced a crackdown that requires e-cig manufacturers, including Juul, to submit plans to address youth use of their products within 60 days. The agency also threatened to ban some flavored nicotine liquids, which critics say attract kids to e-cigarettes.

The Juul product, which is shaped like a USB drive, has surged in popularity among high school students. Advocates against teen vaping say some of the e-liquid flavors, including mango and creme, make the product especially appealing to minors. Vaping proponents counter by claiming such flavors are crucial to helping adult smokers switch from traditional cigarettes to safer e-cigarettes. The attention on Juul ratcheted up when the Centers for Disease Control and Prevention issued a new report in October showing that the company’s sales grew more than sevenfold between 2016 and 2017.

If you need more information on this subject, contact Will Sutton, a lawyer in our Toxic Torts Section, at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Source: FDA and CNBC

LAWSUIT FILED AGAINST JUUL

A proposed class action lawsuit says Juul Labs Inc. tailors its advertising to appeal to minors and hides the high amounts of nicotine that users get from vaping with its products. The suit, filed in Florida federal court by a 16-year-old identified as J.Y. in the suit and his mother, Barbara Yannucci, says that Juul Labs uses the same sort of advertising that cigarette companies use to entice teens and children into using their products, despite the documented negative effects of nicotine on developing youths.

The complaint alleges that in addition, Juul’s social media—which includes Facebook, Twitter and Instagram pages with photos of young, attractive people vaping that urge users to post about their usage—is tailored to draw in a young audience, which claims thatJuul is well aware that many of the people following its social media accounts are minors. Ms. Yannucci says:

Defendant created an online culture and community targeted to young people and designed to encourage Juul use. Young people are flocking to this enticing and dangerous device.

According to the complaint, J.Y. began using Juul e-cigarettes when he was 15 because he thought it would be fun, and his friends were doing it. As a minor, he could not appreciate the dangers posed by nicotine and was not aware of how much the devices contained, Ms. Yannucci claims, saying that one “pod” of Juul vape juice is equal in nicotine value to about a pack of cigarettes.

The availability of various flavors—mint is J.Y.’s favorite, the suit says—and the colorful customization options for the Juul e-cigarettes appeal to minors as well. Ms. Yannucci added that J.Y. has been able to purchase Juul products on his own at stores. She also cites the price point as appealing to minors, saying a pack of four pods—equivalent to four packs of cigarettes—costs $19.99, while a single pack of cigarettes in Florida costs between $6 and $8.

In addition to marketing to youth, the suit accuses Juul of hiding how much nicotine the products deliver to users and how much more effectively it does so than regular cigarettes or other e-cigarettes. The complaint cites a blood plasma study included in Juul’s patent, that it says shows the product creates a peak nicotine blood concentration 36 percent higher than Pall Mall cigarettes and increases the heart rate faster.

Despite the higher doses of nicotine, which make the e-cigarettes highly addictive, Juul has marketed its e-cigarettes as an alternative to smoking, implying that it’s safer, the suit claims. The company added labels in 2018 stating the products contain nicotine and calling it an addictive substance. However, this came too late for many youngsters, including J.Y.


Source: Law360.com

FDA SEEKS MARKETING INFORMATION FROM MORE E-CIG MAKERS

The U.S. Food and Drug Administration (FDA) has asked 21 e-cigarette companies, including the makers and importers of
Vuse Alto and myblu, to supply information about whether more than 40 products are being illegally marketed. The FDA, as mentioned above, is continuing its crackdown on youth vaping by giving the companies 30 days to tell the agency when their products were first commercially marketed in the U.S.

Source: Law360.com

XXII.
RECALLS UPDATE

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

Auto Recalls

Toyota Motor Engineering & Manufacturing (Toyota) is recalling certain 2018-2019 Toyota Tundra and Sequoia vehicles and 2019 Toyota Avalon and Avalon Hybrid vehicles. The air bag electronic control unit (ECU) may erroneously detect a fault during the vehicle start-up self-check. If this occurs, the ECU may not deploy the airbags as intended in the event of a crash. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 208, “Occupant Crash Protection.” If the child seat is not properly secured, allowing the child seat to come off, resulting in a sudden loss of power steering assist, increasing the risk of a crash.

General Motors LLC (GM) is recalling certain 2017-2018 Kia Niro hybrid electric vehicles. The Main Relay within the Power Relay Assembly (PRA) may have inadequate connections between its contacts, possibly preventing a child seat from being properly secured. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 208, “Occupant Crash Protection.” A reduction in the driver’s visibility can increase the risk of injury.

Other Consumer Recalls

Yamaha Recalls Golf Carts and Personal Transportation Vehicles

Owners of Yamaha golf carts should take a close look at their model number. The Consumer Product Safety Commission (CPSC) announced last month that the manufacturer was recalling certain models of golf cart and personal transportation vehicles due to problems with the accelerator pedal. A spring in the pedal can break, leading to a possible crash hazard. A full list of affected models can be found at the CPSC website. The CPSC has received 417 reports of failures, although no injuries were reported. Those affected should stop using their cart immediately and contact Yamaha for a free repair at any Yamaha dealer.

Marker Recalls Kingpin Ski Bindings Due to Fall Hazard

Marker USA, of Lebanon, New Hampshire, has recalled about 4,100 Kingpin 10 and Kingpin 13 alpine touring ski bindings. The steel pins in the toe unit can break and reduce the release force of the binding, causing a fall hazard. This recall involves 2017-2018 Kingpin models 10 and 13 ski binding, with a black body and gold
or copper accent coloring. The bindings are used with alpine touring ski boots with metal pintech inserts in the toe of each boot. The recalled toe units have heel units with serial numbers on the back in the following ranges: Kingpin 10 (337804—418632) and Kingpin 13 (337798—411728).

The ski bindings were sold at specialty ski and backcountry equipment stores nationwide and online at evo.com, backcountry.com, and theskimonster.com from March 2017 through April 2018 for between $500 and $650. Consumers should immediately stop using these bindings and return them to a Marker authorized retailer to obtain a free replacement toe unit. Consumers should bring their boots to be sure their bindings are adjusted correctly. Contact Marker USA at 800-453-3862 from 8:30 a.m. to 5 p.m. ET, email at kingpin.exchange@mdv-usa.com or online at https://www.marker.net/ en-us/ and click on More Info in the recall section for more information. Pictures available here: https://www.cpsc.gov/Recalls/2019/Marker-Recalls-Kingpin-Ski-Bindings-Due-to-Fall-Hazard

AAA INNOVATIONS RECALLS PROMOTIONAL COOLER/GRILLS DUE TO FIRE HAZARD

About 275 Cooler/Grills have been recalled by AAA Innovations, of Norwood, New Jersey. The wooden cabinet surrounding the grill can catch fire. This recall involves a wooden cabinet, and comes with a separate cooler and grill compartment. The grills are used as display enhancers in retail, liquor, convenience and other stores and may have been received by consumers as promotional giveaways and at charity auctions. The cooler/grill units measure approximately 35 inches high 44 inches wide and 16 inches deep. The words “Tito’s Handmade Vodka” are inscribed on the front of the product. The company has received two reports of the wood surrounding the grill burning. No injuries have been reported.

The coolers were used as display enhancers in retail, liquor, convenience and other stores from June 2016 through September 2016 and may have been received by consumers as promotional giveaways and purchased at charity raffles after that time. Consumers should immediately stop using the recalled cooler/grills and contact AAA Innovations to receive a $125 incentive or a full refund. Contact AAA Innovations online at www.aaainnovations.com and click on Cooler/Grill Recall or call 800-426-7466 from 8 a.m. to 6 p.m. ET Monday through Friday for more information. Pictures available here: https://www.cpsc.gov/Recalls/2019/AAA-Innovations-Recalls-Promotional-Cooler-Grills-Due-To-Fire-Hazard

GOLD RECALLS EDDIE BAUER INFANT CARRIERS DUE TO FALL HAZARD

Gold Inc., dba Goldbug Inc., of Denver, Colorado, has recalled about 22,000 Eddie Bauer fabric infant carriers. The buckles on the infant carriers can break, posing a fall hazard to children. This recall involves Gold Inc.’s Eddie Bauer fabric infant carriers. They are worn by the parent or caregiver with the baby strapped into the front. The recalled carriers are black with “Eddie Bauer” and “First Adventure” printed in gray lettering on the front, outside of the carrier. The company is aware of eight reported incidents of broken buckles. No injuries have been reported.

The carriers were sold exclusively at Target stores nationwide and online between December 2017 and August 2018 for about $70. Consumers should immediately stop using the recalled carriers and contact Gold Inc. to verify that the product is subject to this recall. Once the product is verified, consumers will receive replacement products of comparable value or a full refund. Consumers who purchased this recalled product must cut off and return both straps and tag with their name, address, and phone number to receive selected replacement products, free of charge, or a full refund. Contact Gold Inc. toll free at 866-600-7205 Monday through Friday 9 a.m. to 5 p.m. MT or email customerservice@goldbuginc.com or online at www.goldbuginc.com and click on Recalls for more information. Pictures available here: https://www.cpsc.gov/Recalls/2019/Gold-Recalls-Eddie-Bauer-Infant-Carriers-Due-to-Fall-Hazard-Sold-Exclusively-at-Target

KIKKERLAND RECALLS WIRELESS CHARGER BEDSIDE POCKETS DUE TO FIRE AND BURN HAZARD

About 3,600 wireless charger bedside pockets have been recalled by Kikkerland Design Inc., of New York. The wireless charger bedside pockets can overheat, posing fire and burn hazards. This recall involves Kikkerland’s wireless charger bedside pockets used for recharging mobile phones and devices. The recalled chargers have a wireless charging pocket in which a mobile phone or other electronic device is placed. The recalled charger pockets have the configuration of an expanding v-shaped file folder with a single pocket and a rigid flap that is pivotally attached on one side. The pocket is typically placed between the mattress and the bed frame. They are made of a dark gray felt material and were sold with a power cord. In operation, the cord is plugged into an electronic outlet and the mobile phone is placed into the pocket for recharging. Kikkerland has received three reports of smoke coming from the charger pockets. No injuries have been reported.

The chargers were sold at Annie’s Blue Ribbon, Kowalski’s, SF MOMA, Therapy stores and other stores nationwide from March 2018 through August 2018 for about $35. Consumers should immediately stop...
using the recalled charger pockets and contact Kikkerland for instructions on how to receive a full refund. Contact Kikkerland at 800-766-8523 from 9 a.m. to 5 p.m. ET Monday through Friday, email at info@kikkerland.com or online at www.kikkerland.com and click on “Recalls” for more information. Pictures available here: https://www.cpsc.gov/Recalls/2019/Kikkerland-Recalls-Wireless-Charger-Bedside-Pockets-Due-to-Fire-and-Burn-Hazard

IKEA RECALLS CEILING LAMPS DUE TO IMPACT AND LACERATION HAZARDS

IKEA Supply AG, of Switzerland, has recalled about 37,000 CALYPSO Ceiling Lamps. The glass shade on the ceiling lamp can detach and fall, posing impact and laceration hazards to consumers. This recall involves IKEA CALYPSO ceiling lamp units with manufacturing date codes between 1625 and 1744. The manufacturing date code is printed on a sticker on the light bulb socket base plate. Use caution when removing the lamp shade to see the sticker and code. IKEA has received 19 reports of the glass shade detaching and falling, resulting in three minor injuries, including bumps and cuts.

The lamps were sold exclusively at IKEA stores nationwide and online at www.ikea-usa.com from August 2016 to July 2018 for about $30. Consumers should immediately stop using the recalled ceiling lamps and return them to any IKEA store for a full refund or replacement lamp. Contact IKEA toll-free at 888-966-4532 anytime or online at www.ikea-usa.com and click on Press Room at the bottom of the page, then on Product Recalls at the top of the page for more information.

FLUSHMATE® RECALLS FLUSHMATE II 501-B PRESSURE-ASSISTED FLUSHING SYSTEMS DUE TO IMPACT AND LACERATION HAZARDS

About 1.4 million Flushmate II 501-B pressure-assisted flushing systems have been recalled by Flushmate, of New Hudson, Michigan, a division of Sloan Valve Company. The system can burst at or near the vessel weld seam releasing stored pressure. This pressure can lift the tank lid and shatter the tank, posing impact and laceration hazards to consumers and property damage. Thisrecall is for Flushmate II 501-B pressure-assisted flushing systems installed inside toilet tanks that were manufactured from Sept. 3, 1996, through Dec. 7, 2013. The units are rounded oval, black, two-piece vessels made of injection molded plastic. Recalled units have a date code/serial number that is 15 characters long and is located on the label on top of the Flushmate II 501-B unit. The first six numerals of the serial number are the date code. The date code range for units included in this recall in MMDDYY format is 090396 (Sept. 3, 1996) through 120713 (Dec. 7, 2013). The model code is 10 characters long and is located on the same product label. The model code starts with M and ends with F. Units included in this recall were sold individually and installed in toilets manufactured by American Standard, Corona, Crane, Kohler and Mansfield. Flushmate has received 1,446 reports in the U.S. and 7 reports in Canada of the units included in this recall bursting, resulting in property damage, totaling about $710,000, including 23 injury reports with one requiring foot surgery.

The systems were sold at Home Depot and Lowe’s stores, Toilet manufacturers, distributors and plumbing contractors nationwide and online at www.grainger.com, www.hdsupply.com, www.homedepot.com and other online retailers from September 1996 through December 2015 for about $108 for the units without toilets. Consumers should immediately stop using the recalled Flushmate II 501-B systems, turn off the water supply to the unit and flush the toilet to release the internal pressure. Consumers should contact Flushmate to request a free Flushmate replacement unit and installation by a technician. Contact Flushmate toll-free at 844-621-7538 between 8 a.m. and 10 p.m. ET Monday through Friday and between 8 a.m. and 6:30 p.m. ET Saturday, or online at www.flushmate.com and click on “501-B Recall” in the blue box on the top of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2019/Flushmate-Recalls-Flushmate-II-501B-PressureAssisted-Flushing-Systems-Due-to-Impact-and-Laceration-Hazards

WALMART RECALLS CAMP AXES DUE TO INJURY HAZARD

About 246,000 Ozark Trail camp axes have been recalled by Walmart Inc., of Bentonville, Arkansas. The axe head can detach from the handle, posing an injury hazard. This recall involves Ozark Trail camp axes. The steel shaft tubular axes measure about 14 inches long from handle to axe head, and weigh about 1.25 lbs. The axes have a black, non-slip rubber grip and claw feature. “Ozark Trail” and model number 60111140 are printed on the product packaging. Walmart has received two reports of axe heads detaching from the handle, resulting in minor cuts and abrasions.

The axes were sold exclusively at Walmart stores nationwide and online at www.walmart.com from January 2017 through July 2018 for about $8. Consumers should immediately stop using the recalled axes and return them to Walmart for a full refund. Contact Walmart at 800-925-6278 from 7 a.m. through 9 p.m. CT any day or online at www.walmart.com and click on “Product Recalls” for more information. Pictures available here: https://www.cpsc.gov/Recalls/2019/Walmart-Recalls-Camp-Axes-Due-to-Injury-Hazard

ABOND GROUP RECALLS TUBEEZ BABY BATH SUPPORT SEATS DUE TO DROWNING HAZARD

About 80 Tubeez Baby Bath Support Seats have been recalled by Bealls Outlet of Bradenton, Florida, and La Bebe Boutique of Midland, Texas. The bath support seat fails to meet the federal safety standard including the requirements for stability. The bath seat can tip over or an infant can slip underneath the front support, posing a drowning hazard. This recall involves the Tubeez Baby Bath Support Seats. The baby bath support is a rigid plastic seat attached to a foam mat for use in the bathtub. The foam mat is either blue, with the model code B9150BL, or gray, with the model code B9150GY, and features multiple suction cups on the underside. The affected seats have the date codes 1251-0916-enj-nacn or 1434-0617-enj-nacn printed on the underside of the mat.

The seats were sold at Bealls Outlets nationwide and La Bebe Boutique in Midland, Texas, from October 2017 through March 2018 for about $40. Consumers should immediately stop using the recalled bath support seats and contact Abond Group for a full refund. Contact Abond Group at 800-886-7947 from 9 a.m. to 5 p.m. ET, Monday through Friday or online at www.abondcorp.com and click on Safety Alerts and Recalls at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2019/Abond-Group-Recalls-Tubeez-Baby-Bath-Support-Seats-Due-to-Drowning-Hazard

CRACKER BARREL OLD COUNTRY STORE RECALLS DECORATIVE PINEAPPLES DUE TO LACERATION HAZARD

CBOCS Distribution Inc., doing business as Cracker Barrel Old Country Store, of Lebanon, Tennessee, has recalled about 1,500 decorative driftwood pineapples. The metal leaves on top of the pineapples have sharp edges, posing a laceration
hazard. This recall involves decorative driftwood pineapples. They are shaped from tan driftwood spikes, have spiked, galvanized metal leaves at the top and measure approximately 19 inches high by 9.5 inches wide by 9.5 inches in diameter. Cracker Barrel Old Country Store has received two reports of consumers cutting their fingers on the metal leaves on the pineapples, resulting in one injury that required stitches.

The pineapples were sold exclusively at Cracker Barrel Old Country Store locations nationwide and online at www.crackerbarrel.com from June 2018 through August 2018 for about $40. Consumers should immediately stop using the recalled pineapples and return them to any Cracker Barrel Old Country Store® for a full refund. Online purchasers will be contacted directly. Contact Cracker Barrel Old Country Store at 800-333-9566 Monday through Friday from 8 a.m. to 5 p.m. CT or online at www.crackerbarrel.com and click on “Product Recalls.” Pictures are available at: https://www.cpsc.gov/Recalls/2019/Cracker-Barrel-Old-Country-Store-Recalls-Decorative-Pineapples-Due-to-Laceration-Hazard

**Hydrolevel Recalls Controllers for Slant/Fin Boilers Due to Fire Hazard**

About 3,900 HydroStat Model 3000 boiler controllers for Slant/Fin boilers have been recalled by Hydrolevel Company, of North Haven, Connecticut. A malfunction in the recalled controller can cause the boiler to overheat, posing a fire hazard. This recall involves the Hydrolevel HydroStat Model 3000 boiler controller, which is a black rectangular control unit for residential Slant/Fin VSPH boilers. The unit has six small LED lights and the word ‘Hydrostat’ on the front. The controller says HydroStat on the front and HydroStat Model 3000 on the back. Hydrolevel has received five reports of the recalled controllers failing to shut down the boilers after they reach the high temperature limit. No injuries or property damage have been reported.

The boilers were sold by Slant/Fin distributors, residential boiler contractors and boiler distributors nationwide from May 2012 through July 2018 for about $185 for the boiler controller. Consumers with Slant/Fin model VSPH boilers should immediately contact a contractor to schedule a free repair. For assistance in locating a contractor, go to http://www.slanthin.com/locator/. Contact Slant Fin at 800-873-4346 from 9 a.m. to 5 p.m. ET, Monday through Friday or Hydrolevel at 800-654-0768 from 8 a.m. to 5 p.m. ET, Monday through Friday or online at www.hydrolevel.com and click Contact Us for more information. Pictures available here: https://www.cpsc.gov/Recalls/2019/Hydrolevel-Recalls-Controllers-for-Slant-Fin-Boilers-Due-to-Fire-Hazard

**Brookstone Wireless Speakers Recalled Due To Fire Hazard**

Brookstone Purchasing Inc., of Merri-mack, New Hampshire, has recalled about 164,000 Big Blue Party wireless indoor/outdoor speakers. The lithium ion batteries in the wireless speakers can overheat and catch fire, posing a fire hazard. This recall involves Brookstone Big Blue Party™ indoor/outdoor wireless speakers. The recalled speakers are silver or gray colored and measure about 6 inches wide by 6 inches deep by 16 inches tall. The SKU is printed on the bottom underside of the speaker. The speaker may also have “Brookstone” printed at the bottom on one side of the speaker, as well as on the label on the underside of the speaker.

Brookstone has received 12 reports of the speakers overheating and catching fire, resulting in five reports of property damage totaling about $2,000. The speakers were sold at Ace Hardware, Bloomingdale’s, Bon-Ton, Brookstone, Macy’s, Patriot stores and other stores nationwide, on the Home Shopping Network and online at Amazon.com, Brookstone.com, RueLaLa.com, Wayfair.com, Zulily.com and other websites from December 2013 through August 2018 for about $200. Consumers should immediately stop using the recalled speakers and properly dispose of the lithium-ion battery packs according to state and local regulations. Brookstone has filed for Chapter 11 bankruptcy protection. Contact the toll-free number or visit the Omni Management Group website for information about a possible refund. Contact Brookstone toll-free at 866-576-1688 from 8 a.m. to 5 p.m. and 666-76-1688 from 8 a.m. to 5 p.m. CT or online at www.omniaignt.com/BrookstonerecallFAQ/ for more information.

**Huish Outdoors Recalls Buoyancy Control Devices (BCDs) Due To Drowning Hazard**

Huish Outdoors LLC, dba Zeagle, of Salt Lake City, Utah, has recalled Zeagle Sport buoyancy control devices (BCDs). Buttons on the Zeagle Sport BCD inflators can break or fracture leading to a rapid loss of air or auto inflation of the BCD, posing a drowning hazard to scuba divers. This recall involves Zeagle Sport BCD inflators. BCDs are used to help a diver maintain buoyancy underwater during scuba diving. Models include Sport Base, Sport Resort Plus, Sport Resort Plus, and Sport Focus. Serial numbers are located on the inside of BCD pocket. Affected serial numbers:

- 6201500000—6201508000
- 2015081625—2015080921
- 2016035830—2016034676
- 1030062—1030001
- 2015114475—2015112942
- 1012775—1012051
- 2015092740—2015091746
- 1011765—1011001

The company has received 23 reports of the button on the BCD breaking. No injuries have been reported. The vests were sold at Zeagle dealers and scuba diving equipment stores nationwide from August 2015 through July 2018 for between $320 and $430. Consumers should immediately stop using the recalled BCDs and call Zeagle for instructions on how to receive a free replacement. Contact Zeagle toll-free at 888-270-8595 from 8 a.m. to 5 p.m. MT Monday through Friday, or online at http://www.zeagle.com and click on Recalls for more information.
UBERSCIENTIFIC RECALLS TOPICAL ANESTHETIC DUE TO FAILURE TO MEET CHILD RESISTANT CLOSURE REQUIREMENT

UberScientific LLC, of Kissimmee, Florida, has recalled about 76,000 units of Uber Numb topical anesthetic cream and spray. The packaging is not child resistant as required by the Poison Prevention Packaging Act. The pain relieving cream and spray contain lidocaine, posing a risk of poisoning to young children if they put it on their skin or ingest it. This recall involves UberScientific Uber Numb Topical Anesthetic Cream and Uber Numb Spray. The recalled cream is in a white jar with a smooth, rounded cap and a green label with “Uber Numb Topical Anesthetic Cream” printed on the front.

The cream was sold in one-, two- and four-ounce sizes with the lot numbers printed on the bottom of the jar and the UPC number printed on the label to the left of the product name. The brand name UberScientific is printed on the label below the net weight.

The recalled spray is in a green bottle with a white cap and has a white label with “Uber Numb Spray” printed on the front. The spray was sold in four-ounce size with the lot numbers printed on the bottom of the bottle and the UPC number printed on the label to the right of the product name. The brand name UberScientific is printed on the label to the left of the product name.

The spray was sold online only at Amazon.com and Ubersonline.com from February 2017 through April 2018 for between $20 and $40. Consumers should immediately place the recalled topical anesthetic out of reach of children and contact UberScientific for instructions on how to receive a free replacement or full refund. Consumers with the recalled cream can receive a free replacement cap that is child-resistant. Consumers with the recalled spray can receive a free replacement cream with the new child-resistant cap or a full refund. Contact UberScientific toll-free at 877-289-1367 anytime or online at www.ubersonline.com and click on “Recall Information” for more information. Pictures available here: https://www.cpsc.gov/Recalls/2019/UberScientific-Recalls-Topical-Anesthetic-Due-to-Failure-to-Meet-Child-Resistant-Closure-Requirement-Risk-of-Poisoning

Once again, there have been a large number of recalls since the last issue. While we haven’t included 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 BeasleyAllen.com or our consumer blog at RightingInjustice.com. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

XXIII.
FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

MALLORY BULLARD

Mallory Bullard recently joined the firm’s Mass Tort Section where she works on cases involving Johnson & Johnson and ovarian cancer. Prior to coming to Beasley Allen, Mallory worked in the Constitutional Defense Division in the office of Alabama Attorney General Steve Marshall.

The Auburn University graduate finished summa cum laude in August 2015, earning a B.A. in political science and a minor in psychology. Mallory obtained her Juris Doctorate from Samford University’s Cumberland School of Law in May, realizing a life-long dream. Mallory says:

I was one of those people who had a “plan” from the time that I could form words—and it always involved growing up, going to law school, and following in my grandfather’s footsteps.

Mallory explained that while growing up, family dinner conversations revolved around court proceedings, depositions, and the latest in law enforcement because her grandfather is a lawyer and her mother is a court reporter. She also has uncles who work in law enforcement. As she learned more about the legal profession, Mallory’s desire to go to law school was confirmed. She says she inspired to seek the truth in every situation, actively pursue justice, and to be dedicated to the pursuit of fairness that is so often clouded by contrasting agendas.

While at Cumberland, Mallory was Senior Research and Writing Editor of the American Journal of Trial Advocacy and authored two legal blogs. She also has an upcoming publication in the Journal titled Put Your Money Where Your Medicine Is?—An Overview and Update on Manufacturers’ Duty to Warn and Direct-to-Consumer Advertising of Prescription Drugs. Additionally, Mallory was a finalist in the Henry C. Strickland Negotiation Competition, landing her a place on Cum-berland’s National Negotiation Team. She was also a member of the Trial Advocacy Board (2016 to 2017) and as a student Ambassador, Mallory represented the law school and assisted with recruitment efforts.

Mallory says her favorite part of practicing law is knowing that she is helping someone every day. She says:

As plaintiffs’ attorneys, many of our clients come to us after they have been through the hardest times of their lives and just want help. There is nothing more rewarding than being able to give a voice to clients who may not otherwise be heard, and to assist those who have suffered injuries, financially or physically, or who have been treated unfairly in some manner.

The passionate advocate also is active in her community. Since law school, Mallory has volunteered with Project Homeless Connect in Birmingham, Alabama. Each year, lawyers, law students and local judges volunteer their time and experience to assist people within the city’s homeless population with their legal issues. She helps provide the Project’s clients with legal assistance involving warrants, traffic citations, and divorce and child-support issues. She has also helped clients obtain a driver’s license or state identification card so that they can participate in the voting process.

The Alabama native of Rockford maintains a relationship with the Rockford Baptist Church and enjoys spending time with family, friends and her Goldendoodle, “Bexley.”

We are most fortunate to have Mallory with us. While she is relatively new in the
firm, Mallory will be a very good lawyer. Mallory has a passion for the firm’s work and the clients we represent.

SLOAN DOWNES

Sloan Downes is the Director of the firm’s Personal Injury Section and, this month, will mark her 22nd anniversary with the firm. Sloan works closely with Personal Injury & Products Liability Section Head Cole Portis to coordinate staff and lawyers in the firm’s Atlanta and Montgomery offices. She ensures the lawyers have support staff and that all employees in the section have the resources needed to do their jobs daily. Additionally, Sloan serves as Legal Assistant on several cases handled by lawyers in the Section. Sloan says she cannot imagine working anywhere else or doing any other job.

Sloan earned her bachelor’s degree from the University of South Alabama. She is married and has three boys, ages 15, 17 and 19. Her two younger sons attend Montgomery Catholic Preparatory in Montgomery, Alabama, and her oldest son is a student at Auburn University. When she isn’t at work, most of Sloan’s time is devoted to her sons and their sporting activities and events. She loves spending time with them and the rest of her family. If she has any additional spare time, Sloan enjoys gardening and spending time at Lake Martin.

Sloan is a hard-working employee who is totally dedicated to the work of the Section and the clients the lawyers represent. She has a most important position and does excellent work. We are blessed to have Sloan with us in a most important position.

SYDNEY EVERETT

Sydney Everett recently joined the firm as a lawyer in the Mass Torts Section where she previously worked as a law clerk. She is working primarily on the litigation surrounding the blood thinner Xarelto, manufactured by Johnson & Johnson subsidiary Janssen Pharmaceuticals and Bayer Corp. Xarelto has been linked to serious bleeding risks including gastrointestinal bleeding, brain bleed and death. Prior to joining the firm and while in law school, Sydney worked for a Vestavia Hills, Alabama, law firm that practices, primarily, corporate law and estate planning.

The native of Montgomery currently resides in Birmingham, where she is an active member of Church of the Highlands and volunteers with the Lakeshore Foundation. Sydney graduated from Samford University’s Cumberland School of Law, earning her Juris Doctorate in May. While at Cumberland, she was a Merit Scholarship recipient, a Scholar of Merit for Products Liability, and a member of the Christian Legal Society.

Sydney earned her undergraduate degree from the University of Alabama in May 2015 with a B.A. in Communication and Information Sciences and a minor in Spanish. Sydney was a Presidential Scholarship Recipient, active in the Honors College and the Sustained Dialogue Program. She served in various leadership roles in organizations such as Alpha Chi Omega Sorority, The Alabama Panhellenic Association Executive Board, and the Public Relations Council of Alabama.

Sydney said her decision to become a lawyer was predicated on her desire to learn and to help those who can’t help themselves. She said there are so many things she loves about practicing law but narrowing it down she said, “I love learning—every day is something new. I love the challenge—it constantly requires the best of me.” But above all, Sydney loves helping people who have been wrongfully taken advantage of by large corporations and other Defendants.

After joining the firm and having been with us for a while, Sydney says she has learned quickly that everybody at Beasley Allen really cares about the people the firm helps. She says:

Beasley Allen is warm and welcoming and every attorney in the whole firm genuinely cares about the best interest of their respective clients and they are wonderful people at work and outside of the office.

We are most fortunate to have Sydney, a hard worker who will be a very good lawyer. She is dedicated to helping folks and that is very important.

KATHY ECKERMANN

Kathy Eckermann is marking her 18th year with the firm this month. Kathy joined the firm as a Relief Recepcionist before agreeing to become this writer’s Executive Assistant. She assists with a variety of firm and non-firm related projects including typing, editing and distributing the daily “Today” devotional emails; maintaining the “Today” email distribution list; managing this writer’s calendar; scheduling meetings, such as Board meetings; handling incoming phone calls; managing the firm’s Auburn football ticket orders, including ticket distribution, as well as miscellaneous ticket orders throughout the year; handling requests for firm sponsorships and charity donations; maintaining this writer’s files; and assisting in developing this Report as needed.

The Huntingdon College graduate earned a B.A. in music education and graduated cum laude. Kathy and her husband, Eddie, have been married for 38 years and attend Eastmont Baptist Church where she is involved in the music ministry as one of the keyboard players. Eddie is a retired teacher and currently works as a part-time charter bus driver. Their son, Aaron, is married and lives on Coronado Island near San Diego, California. Their daughter, Leah, is married and has a 2-year-old daughter (Kathy and Eddie’s first grandchild), and is expecting a boy in early 2019. Kathy says “Bryant,” Kathy and Eddie’s cute Maltese, completes their family.

When she is away from the office, Kathy enjoys spending time with Eddie whether it is traveling or just walking around the neighborhood. She also loves spending time with her family and especially her granddaughter. Kathy says being a grandmother is one of the greatest blessings in her life! She loves music and playing the piano at home and the keyboard at church. She also enjoys DIY projects like making soap when she has any spare time. In the fall, Kathy cheers on her favorite team, the Alabama Crimson Tide.

Lots of folks say Kathy has the hardest job in America and that is working for me. I will have to agree with that assessment. Kathy has learned to handle all of the varied contacts that came our way. In addition to complex legal matters, Kathy has to deal with politics, community affairs, church-related activities and a multitude of other matters. I am blessed to have Kathy in charge of my office.

LEON HAMPTON

Leon Hampton, Jr., a native of Choctaw County, Alabama, is a lawyer in the firm’s Consumer Fraud & Commercial Litigation Section. Leon first worked for the firm as a law clerk before joining the Montgomery County District Attorney’s office as part of the Violent Crimes Unit and serving as a lead counsel on homicide cases. He returned to Beasley Allen in August 2017 and currently handles class action, employment and whistleblower claims.

In less than a year after returning to the firm, Leon has helped secure verdicts for clients totaling more than $16 million. His courtroom experience was integral to the trial team that obtained a $1.9 million verdict on behalf of Leon Battle and exposed the Defendant’s fraudulent efforts to hide unsafe working conditions. Battle lost four fingers on his left hand while working to repair a hydraulic hose on a chicken dumper machine at Koch Foods in Montgomery, Alabama, after the machine suddenly started operating when it should have been shut down. Leon also was heavily involved in a whistleblower case that recovered $14.7 million for Barry Taul. As we previously reported, Taul uncovered
and reported an illegal kickback and false billing scheme that defrauded the Alabama Organ Center and taxpayers.

Leon says he has found that the firm stands out because it handles cases that not only affect our clients, but those cases affect the world around us. He says:

**Many of the issues that we face in practice are novel, complex and require creativity to resolve—which makes every day at the firm interesting. Additionally, the firm has a set of core values that guides the way our attorneys practice law: We are encouraged to be honest, forthright, and congenial in our dealings with the court, opposing counsel, referral attorneys and others that we encounter during the practice of law. Overall, it’s a great place to work.**

While he has proven to be a strong litigator, Leon once thought he was destined to follow in the footsteps of his mother and grandmother and become an educator. Yet, a lecture during his junior year of college by now Alabama Senator Doug Jones led Leon to the courtroom instead. Leon says:

*I became an attorney because I recognized the unique opportunities that we have to help others within society. People generally seek the help of an attorney during a difficult time in their life. I thought it would be fulfilling to use my skill set and education to help counsel individuals through their legal problems.*

In 2010, Leon graduated Magna Cum Laude from Alabama A&M University with a bachelor's degree in secondary education. He then earned his Juris Doctor in 2013 from Samford University’s Cumberland School of Law. Leon clerked for the Attorney General’s Office, in addition to clerkng at our firm, before he joined the firm as a lawyer.

**Fact-finding to build the strongest case possible for his clients is Leon’s favorite part of practicing law. Leon said:**

*When clients come to us, they generally only have their story and a few other pieces of evidence to corroborate that story. I enjoy sifting through discovery and finding small pieces of evidence that moves the client’s case towards a solution. I also enjoy putting that evidence together and creating a seamless story to present to the jury.*

Leon currently serves as the Vice President of the Alabama Lawyers Association, an organization that recognized him as the 2017 board member of the year. He also serves on the Alabama State Bar’s 2017-2018 Election Procedures Review Task Force and is a member of the Alabama State Bar, Montgomery County Bar Association and the Hugh Maddox Inns of Court.

A member of the Alpha Phi Alpha Fraternity, Inc., Leon now serves as the Montgomery Alumni Chapter Martin Luther King Jr.’s Scholarship Breakfast Committee Chairman. Leon is married to Dr. Tonquita Hampton, and they have one daughter, Kori Skye. The family attends True Divine Baptist Church, where they serve together as young adult directors. We are blessed to have this talented and dedicated lawyer in the firm.

**BOBBY MOZINGO**

Bobby Mozingo will mark his 25th anniversary with the firm in December. As one of the firm's seven highly qualified investigators, Bobby works closely with firm lawyers investigating claims, primarily handled by the firm's Personal Injury and Products Liability Section, to help the lawyers determine the merits of a claim, or whether there is enough evidence to pursue the case.

Initially, Bobby and the other in-house investigators inspect the scene of the accident and the product or vehicles involved. They collect information such as photo and video documentation, markings and other evidence at the scene, witness accounts, downloadable information from vehicles' crash data retrieval systems, accident reports, incident offense reports, driver's license history reports and other reports as they relate to the particular case. When a case is filed, investigators then work throughout the process to collect additional information and witness statements to strengthen the client's claim. Additionally, the team created and maintains a system that allows them to help attorneys, firmwide, locate witnesses.

Prior to joining the firm, Bobby graduated from the Montgomery Police Academy in 1982 and worked with the Montgomery Police Department (MPD) for 11 years, including five years in the Detective Division. Bobby received extensive investigative training, specifically in accident investigation, through various courses and investigative schools, in addition to the MPD.

Bobby and his wife, Vicki, have been married for 33 years and they have two daughters, Amy and Paige. They also have three grandchildren, Carter, Kaylie and Rhett. When he isn’t investigating cases for the firm, Bobby enjoys hunting, fishing and cheering on his beloved Alabama Crimson Tide during football season.

Bobby is a most valuable employee who does excellent work. He is totally dedicated to the firm and its mission. We are blessed to have Bobby with us.

**MATT TEAGUE**

Matt Teague, a lawyer in our firm’s Mass Torts Section, leads the firm’s Testosterone Replacement Therapy litigation, representing men who suffered significant injuries such as death, heart attack, stroke, blood clots and related conditions. Use of the heavily marketed drugs designed to increase men’s testosterone levels has proved to be very dangerous. Matt has been appointed to the Plaintiffs Steering Committee (PSC) for the Testosterone Replacement Therapy multidistrict litigation (MDL). He is also involved in the firm’s Transvaginal Mesh (TVM) litigation and previously represented hundreds of women who developed breast cancer after taking certain hormone therapy drugs, including Premarin, Prempro and Provera.

It is evident that Barry Teague, Matt’s father, was a role model for his son. Barry was a great lawyer and an even greater person. Following in his father’s footsteps, Matt said he was inspired to become a lawyer by his father’s legal career and public service as an assistant Montgomery County District Attorney, an assistant state Attorney General, a state Senator and the U.S. Attorney in Alabama’s Middle District during President Jimmy Carter’s Administration. Matt says:

*I took great pride in my dad’s ability to offer advice and counsel to those who needed his help, so I decided at a very early age that I too would become a lawyer and do my best to help people.*

Matt says he enjoys being a lawyer at Beasley Allen because he sees the same qualities in the firm that he saw in his father’s work as a lawyer. He says that the firm’s core principles—God, family, and practicing law to help those who need it most—remain constant even as it grows, and as the practice of law continues to change. Matt says he is thankful for the opportunity to do work he believes in and being part of a great, unique team at Beasley Allen.

A graduate of Samford University’s Cumberland School of Law, Matt earned his undergraduate degree from the University of Alabama where he was a member of the Crimson Tide football team from 1994 to 1998 under the direction of College Football Hall of Fame head coach Gene Stallings. Matt lettered for the Tide and was named to the Academic All-Southeastern Conference team in 1996.
Matt is active in a number of professional and charitable organizations. He served two terms as an elected member of the Birmingham Bar Association's Young Lawyers Executive Committee and is a member of the Montgomery County Association for Justice. He has also served as a volunteer committee member for several Cystic Fibrosis Foundation fundraising events, the Jimmy Hitchcock Award Committee, and coached soccer at the YMCA, basketball in the Upward League and baseball in Southeastern Dixie Youth. Above all of his work and philanthropy-related projects, Matt loves spending time with his family including his wife, the former Erin Stiebing, and coaching their sons, (Meagher, Miller and Butler) in football, baseball and basketball.

Matt is a very good lawyer, who is dedicated to his clients and works hard to see that they receive justice in their cases. Matt is a definite asset to our firm. We are blessed to have him with us.

ASHTYNE TRAYLOR

Ashtyne Traylor, a lawyer in our firm’s Toxic Torts Section, is currently handling cases involving asbestos-related illnesses such as mesothelioma, lung cancer and asbestosis. She first joined the firm as a law clerk. Ashtyne also served as a Congressional Intern for Alabama Congresswoman Martha Roby, during law school.

In May 2018, Ashtyne received her Juris Doctorate from Samford University’s Cumberland School of Law where she was a Merit Scholarship Recipient, a Scholar of Merit: Real Estate Transactions, Vice President of Phi Alpha Delta law fraternity, a member of the Mediation Team and consistently included on the Dean’s List. Ashtyne earned a bachelor’s degree in journalism and political science from Auburn University in 2015 and was a recipient of the Spirit of Auburn Scholarship. While at Auburn, Ashtyne was a member and Risk Management Chairman of the Delta Delta Delta Greek organization. She was also a reporter and an Editor for The Auburn Plainsman, the University’s official newspaper for three years.

A love of reading, rigorous writing courses and her involvement in the YMCA-sponsored Alabama youth government shaped Ashtyne’s decision to become an attorney. Her desire to help others drove her to realize her dream of becoming an attorney. She said:

I became an attorney to be a voice for those who struggle to be heard, a fighter for those who feel they have lost their battles and an advocate for those that truly need help.

The opportunity to continue learning along with the new and different challenges lawyers face daily is what Ashtyne says she enjoys most about practicing law. She explains that the law is fluid and ever changing so lawyers must always be on their toes. She describes how the way laws work together for, or against, a case can resemble a puzzle and that she enjoys the process of researching, learning and formulating a plan to succeed.

While working at the firm, Ashtyne said she has been encouraged by the supportive and close-knit environment she has experienced. This dedicated lawyer says:

There’s a saying that ‘Alabama fans love Alabama football; Auburn fans love Auburn’ and I think the analogy works well for Beasley Allen as a firm, from what I have experienced thus far. Some lawyers love to work, but Beasley Allen attorneys love their work and working at Beasley Allen. The culture here extends to client relations where it is clear from the beginning of a case that the attorneys are a team and will work together to help a client. I look forward to continuing my career in such an uplifting environment.

She adds, “War Eagle!”

Ashtyne is a Montgomery native, but she resides with her husband, Cameron, and their Goldendoodle, Khaki, in Birmingham. Cameron is a Civil Engineer with Gresham Smith. Ashtyne and Cameron are members of Church of the Highlands.

Ashtyne is another of our relatively new lawyers in the firm. She is dedicated to carrying out the mission statement of the firm, “Helping those who need it most.” Ashtyne will be a very good lawyer. We are most fortunate to have her with us.

XXIV.
SPECIAL RECOGNITIONS

SENATE CONFIRMS ALABAMA JUDGE TO SIT ON FEDERAL BENCH

The U.S. Senate has confirmed Liles Burke of Arab, Alabama, to serve as U.S. District Judge for the state’s northern district. Burke is currently serving as an associate judge in the Alabama Court of Criminal Appeals. His confirmation to the federal judgeship was announced on Oct. 11 by Sen. Richard Shelby, who said:

I am proud to have voted tonight to confirm Judge Liles Burke to be a District Judge for the Northern District of Alabama. He is extremely qualified for this high honor, having served as a judge in Alabama for over a decade. I congratulate Judge Burke on this prestigious achievement and am confident he will serve our nation well.

Judge Burke was nominated by President Trump in September 2017. According to the announcement from Sen. Shelby, Burke was named to the appeals court in 2011 and was elected without opposition to a full term on the Court in 2012. Judge Burke has authored the decision of the Court of Criminal Appeals in more than 1,200 cases. During his years on the bench, he has served as President of the Alabama Appellate Judges Association and has been officer in both the Alabama District Judges Association and the Alabama Juvenile Judges Association.

Prior to serving on the Court of Appeals, Burke was appointed to be a District Judge for Marshall County. Following this appointment, he was elected to a full term on the district court beginning in 2008 without opposition. During his time as a trial judge, he created Marshall County’s first family drug court and started one of the state’s first domestic violence courts. Judge Burke received his undergraduate and law degrees from the University of Alabama.

LESLIE PESCIA COMPLETES THE 2018 AMERICAN ASSOCIATION FOR JUSTICE LEADERSHIP ACADEMY

Leslie Pescia, a lawyer in the firm’s Consumer Fraud & Commercial Litigation Section, is one of only 16 lawyers around the country to complete the 2018 American Association for Justice (AAJ) Leadership Academy. She was chosen to participate following a highly competitive application process from an applicant pool that was one of the program’s largest since it was launched. The Academy included three two-day sessions beginning in April in New York City. Participants learned and practiced specific skills needed to become effective professional leaders. Leslie said she was honored to have been selected. Leslie says:

The skills I have gained over the past several months are already helping me be a more effective leader and a better colleague. I was able to learn things about myself and gain invaluable tools that have helped me become an even better advocate for our clients.
Currently, Leslie’s practice focuses on consumer protection issues and complex litigation, including anticompetitive conduct in antitrust claims and national class actions. She has extensive experience handling multidistrict litigations (MDLs) including representing banks and credit unions that suffered damages resulting from the Target data breach, which settled for $39.3 million, and the Home Depot data breach, which settled for $25 million. Leslie is also currently working in the Blue Cross Blue Shield antitrust MDL, which seeks to hold the BCBS entities accountable for their anticompetitive agreements throughout the country. In 2017, she helped secure one of the largest single-case settlements in the history of the Consumer Fraud Section.

XXV.
FAVORITE BIBLE VERSES

Tom Methvin, the lawyer who manages our firm, furnished the following verses. Tom had this to say:

Two of my favorite Bible verses are Romans 8:28 and Matthew 25:40. Romans 8:28 really speaks to me because it deals with the sovereignty of God. It says that “And we know that in all things God works for the good of those who love the Lord and are called according to his purpose”. This means “all” things. Therefore what is good and what is bad is good. How many times have we seen things look bad from our viewpoint but actually turned out to be for our good? That is because the Lord is sovereign and He is in complete control. As Sara Beasley once told me, “God still sits on the throne”.

If we can ever get our brains around the sovereignty of God, and how He controls everything, we can really rest in that and have peace. Helping the poor is personal to God and Jesus in Matthew 25:40 Jesus says, if you help the least of these, It was just like helping me. By the same token, in Jeremiah 22:16 the Lord says that helping the poor, isn’t that what it means to know me? This shows how personal it is to God and Jesus that we help the poor.

Kelly Allen, a Legal Assistant in our firm, sent in the following verse. Kelly, who works in litigation technology for the firm, says: “I have always leaned on this verse as a guide and a reminder. Peace should be the ultimate goal of everyone and we should strive everyday to find and promote it in any way that we can—in our families, in our jobs, and in our communities. Live in the light of peace and not in the darkness of evil and let your light be a beacon to others!”

Decent is in the hearts of those who plot evil, but those who promote peace have joy. Proverbs 12:20

Melinda Henderson, a legal secretary working with Greg Allen, sent in a verse for this issue. She says: “This verse means so much to me at this moment in my life. My mother recently died and I have felt brokenhearted and crushed in spirit many times since that day. Knowing that God is near gives me the peace I need to make it through this difficult time.”

The Lord is near to the brokenhearted and saves the crushed in spirit. Psalm 34:18

Talmadge Butts, a law clerk in our Consumer Fraud & Commercial Litigation Section, sent in a bible verse this month. He said “by reminding us of how fleeting our lives in this material world are, James reminds us that we cannot be content in ourselves, but to always strive to honor Christ’s virtue and sacrifice in all we do. God’s grace does turn off, and we must always act to better ourselves so that we may better help those around us.”

Whereas you know not what shall be on the morrow. For what is your life? It is even a vapour, that appeareth for a little time, and then vanisheth away. James 4:14 KJV

Holly Busler, a Legal Secretary working with Lance Gould in our Consumer Fraud & Commercial Litigation Section, furnished the following verses. Holly says: “I have had to have patience and ask for patience a lot over the year. And I am sure people have had to have patience with me many times also. But the biggest thing I try to do is be kind, show kindness to others and teach my children kindness.”

Be humble and gentle. Be patient with each other, making allowance for each other’s faults because of your love. Ephesians 4:2

Be kind and compassionate to one another, forgiving each other, just as in Christ God forgave you. Ephesians 4:32

My dear brothers and sisters take note of this: Everyone should be quick to listen, slow to speak and slow to become angry. James 1:19

I am sure of this, that he who began a good work in you will bring it to completion at the day of Jesus Christ” or this shortened version “Have patience, God isn’t finished yet. Philippians 1:6

XXVI.
CLOSING OBSERVATIONS

Gun Violence Solutions Are In Sight

Nearly 550,000 acts of gun violence occur every year in the U.S., resulting in about 35,000 deaths and more than 124,000 serious injuries. For those who survive gun violence without physical injury, the emotional trauma is usually deep and long-lasting.

In the U.S. we usually refer to our deadliest problems as epidemics. Those include: the epidemic of opioid abuse and addiction, the distracted driving epidemic, and the epidemic of teen vaping. Yet politicians seldom use the term epidemic to describe rampant gun violence in the U.S., even when 342 people are shot every day. Worse still, our president and U.S. lawmakers remain the biggest obstacle to getting America’s rampant gun violence problem under control.

According to the Brady Campaign, 96 people a day die of gunshot wounds, including eight children and teens. Another 242 are shot and survive with injuries, which in many cases are debilitating and lifelong. On average, 39 children and teens survive gunshot wounds every day in the U.S.

Despite these staggering numbers, the problem of gun violence in the U.S. continues to worsen. Year after year, citizens groups and victims’ families demand action to keep schools and other public spaces safe. But every year the voices demanding sensible gun controls are squashed by the gun lobby and its supporters.

Public support for stricter gun laws usually nudges up after each widely publicized mass shooting—it rose to 58 percent following the 2016 Pulse nightclub shooting in Orlando that killed 49 people; 64 percent in the wake of the 2017 mass shooting that killed 58 people at a country music festival in Las Vegas; and 60 percent in November 2017, after a domestic terrorist killed 26 people inside a Texas church.

BeasleyAllen.com
But it wasn’t until the mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, earlier this year that bipartisan voter support for stricter gun control hit record highs. That school shooting, which killed 17 students and school staff and maimed many others, drove up public support for better gun laws to 68 percent. Have Americans finally had enough?

The push for better gun laws is often framed by the NRA as an attack on the Second Amendment. The truth is, however, that proponents seek measures that will help keep guns out of the hands of mentally ill people, former convicts, and gang members, much the same way freedom is taken away from those who commit a punishable crime.

Since the Brady law went into effect on Feb. 28, 1994, background checks have stopped more than 3 million gun sales to prohibited purchasers, including convicted felons, domestic abusers, fugitives from justice, and other dangerous individuals. But more can be done.

Millions of guns are sold in the U.S. every year in “no questions asked” transactions. Experts estimate that one out of five guns now sold in America is done so without a Brady background check.

It’s quite obvious that the president and congress, if the NRA will let them, can change that.

According to the Brady Campaign, a small but dangerous group of “bad apple” gun dealers—about 5 percent of gun sellers—are responsible for 90 percent of the guns used in crime across the country, many through sales to “straw purchasers” and traffickers.

These gun sellers, who hold their gun profits and those of gun manufacturers above public safety, have successfully lobbied Congress to provide them with impunity from civil liability, even going so far as to prohibit the release of gun trace data that would expose them and the gunmakers and distributors that supply them.

Closing this gigantic loophole would drastically reduce gun violence. Together with other measures, such as educating more gun owners about responsible gun ownership and recognizing the signs of a planned attack, would go far in restoring safety and peace of mind to our homes, schools, businesses, places of worship, and streets. The politicians who take NRA money and oppose all forms of reasonable gun control have had control in Washington for way too long. It’s time that people who want the senseless gun violence to end demand that reasonable control of guns in American must happen.

Sources: BradyCampaign.org, The Atlantic, Politico, SandyHookPromise.org, NPR

**OUR MONTHLY REMINDERS**

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732—1802)

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

Louis Brandeis, 1937

U.S. Supreme Court Justice

**XXVII. PARTING WORDS**

I am writing this part of the Report about a week before the General Election voting will take place on Nov. 6. The state of politics in America has become something we should all be greatly concerned over. There is more division in our country today than at any time during my lifetime.

Sadly there is a strong element of hate involved in that division and truly that is a sad state of affairs.

Within a week we have experienced bombs being mailed to a number of public figures and to at least one news organization. At the end of that week there was another mass killing and this time at a Jewish Synagogue in Pittsburgh. That was a hate crime of the worst sort and is actually beyond description. There are also gun-related killings in every state that are reported on the evening news about daily.

I have asked this question before—what is it going to take to bring all this hatred and senseless violence to a stop? All public officials, and especially the president, have a moral obligation to take a strong stand against the “haters” who are literally destroying our country. It will take more than reading a message for the media, prepared by others, from a teleprompter. Leaders must lead and in the right direction.

My prayer today is for America and all of its people. We must become united and work for the common good. The very existence of this nation depends on it.
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.