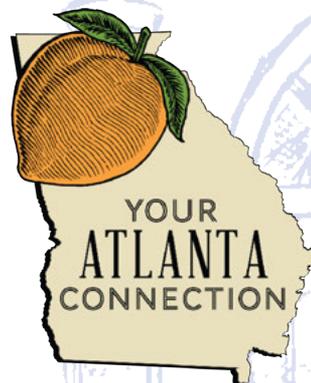


*The*  
**JERE BEASLEY REPORT**

*December 2018*



ATLANTA | MONTGOMERY



# I. CAPITOL OBSERVATIONS

## BEASLEY ALLEN LEGAL CONFERENCE

Beasley Allen held its 12<sup>th</sup> annual Legal Conference & Expo at the Renaissance Montgomery Hotel & Spa at the Convention Center last month. More than 1,600 Alabama lawyers in private practice registered for the event. These lawyers learned about cases our lawyers have successfully litigated over the past year. In addition there were presentations on a number of emerging legal issues. The event also featured a step-by-step explanation of the firm's talc litigation against Johnson & Johnson on behalf of women who develop ovarian cancer after using the company's talc products.

The trial-track presentation of an actual talc case helps reinforce takeaways for conference participants. Last year, attendees were taken through the steps of preparing for and litigating a products liability case that resulted in a severe disabling injury. Beasley Allen lawyer Leigh O'Dell, who is helping lead the talc litigation for the firm's Mass Torts Section, had this to say:

*The success of the 2017 case review reinforced the notion that attorneys want real-world examples to take with them. We are excited to bring the latest in mass torts litigation to our attendees and do not take lightly the opportunity to serve as a resource for our colleagues across the state in this area of litigation as well as the others we addressed this week.*

The November event is the largest of its kind in the state and one of the top five legal conferences in the country. It offered eight hours of free Continuing Legal Education (CLE) credit certified by the Alabama State Bar. As with years past, the conference topics emphasized emerging areas of litigation and practice areas that are crucial to trial lawyers' success in obtaining justice for their clients. Practice areas include Product Liability, Business Litigation, Consumer Fraud, Toxic Torts, and Medical Device and Drug litigation, as well as Legal Ethics. Beasley Allen lawyer Gibson Vance had this to say:

*We are excited to extend the opportunity for fellow Alabama attorneys another year. It is important to not only share experiences but also*

*network and build relationships for everyone's success. This year's event offered fresh insights for the Alabama legal community with a focus on case and trial preparation and legal marketing tips for private practice lawyers.*

I discussed in a question and answer setting the important role lawyers play in improving society and protecting consumers. Special guest speakers included the Honorable Keith Watkins, Chief Judge, Middle District of Alabama; Retirement Systems of Alabama CEO Dr. David Bronner; and Alabama State Bar General Counsel Roman Shaul.

Attendees also visited with more than 20 of the nation's top legal service providers along with this year's platinum sponsors, Jackson Thornton Valuation and Litigation Consulting Group, Physician Life Care Planning, Freedom Reporting, Inc., and Baker Reporting. Representatives from other legal and community groups, including the Alabama State Bar and the Alabama Association for Justice, were on hand to offer attendees information about how their organizations assist Alabama lawyers.

Dawn Hathcock, Vice President, Destination & Brand Development for the Montgomery Area Chamber of Commerce had this to say about the conference:

*It is an honor to once again welcome lawyers from across Alabama to Montgomery for the Beasley Allen Legal Conference. The Beasley Allen Legal Conference entertains around 1,500 lawyers from all over the state and each guest has an opportunity to see what Montgomery has to offer as a destination, translating into return visits for vacations, events or additional meetings. An added benefit of the state's largest legal conference being held in Montgomery is that it provides a huge economic impact in the River Region estimated to be roughly a million dollars.*

I wish all American citizens could have heard Judge Watkins discuss the importance of the rule of law in our country. He did a tremendous job. Dr. Bronner discussed our country's economic future and as usual he gave great insight into what we are facing. We were truly blessed to have had these two "giants" on the program.

We look forward to next year's conference. Each year I learn a great deal about "how to be a trial lawyer" and hopefully others feel the same way. I also want to thank all of the lawyers and employees who played a role in making this conference the best one so far.

## THE SADIE GRACE ANDREWS LAW

A new law requiring all restaurants and commercial food establishments to have safety features on their accessible outdoor grease traps to prevent injury or death is now in effect. Food service establishments that do not comply face daily monetary fines.

The law, called the Sadie Grace Andrews Act, is named for the 3-year-old daughter of Corrie and Tracy Andrews, of Auburn, Alabama, who died October 2017 after falling into a grease trap located in a grassy picnic area outside Bruster's Real Ice Cream in Auburn. As Sadie Grace ran across the grass, she stepped on the covering of a hidden grease trap and fell into the 6-foot-deep, inground grease-filled pit. The

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cover flipped back on top of the opening, concealing her body inside the trap. After a thorough search, her father discovered the pit's overturned cover and found her body inside. Resuscitation efforts were unsuccessful.

Senator Tom Whatley and Representative Joe Lovvorn, both of Auburn, sponsored the bill to require food establishments to have a lock or security mechanism and be heavy enough to prevent accidental opening or intrusion. In April, with the Andrews family standing beside her, Governor Kay Ivey signed the bill into law.

Grease traps are used by many food service establishments to collect used grease and solids products during cooking. They are inspected by the city to ensure that they are regularly emptied in order to prevent clogs in the city's wastewater system. Now the traps will also be checked to ensure restaurants are following the new safety standards established by the Sadie Grace Andrews Act. Among these provisions are:

- All restaurants and commercial food establishments that have accessible outdoor grease traps must have lids that can withstand loads from traffic and are inaccessible to children;
- The manhole covers on the grease traps must be constructed of materials that will hold up to heavy traffic AND be locked, bolted, heavy enough or otherwise secured to prevent unauthorized access;

The manhole covers must be secured at all times. During routine health inspections, the inspector will check the grease trap lid to ensure it is secure.

Earlier this year, Beasley Allen lawyers J. Cole Portis, Greg Allen and Jere Beasley filed a lawsuit in Lee County Circuit Court on behalf of the Andrews family, alleging the toddler's tragic death occurred because the grease trap was not properly constructed or maintained. Further, the grease trap's lid was unreasonably dangerous and defective. Cole has this to say:

*The Andrews family is a remarkable family with a deep and abiding faith in God. Corrie and Tracy Andrews care about others. They are pleased that this bill was signed into law and expect the lives of many will be saved. Sadie Grace Andrews died needlessly, but her death will not be in vain. Already, many lives have been impacted by the faithful testimony of the Andrews family. The lawsuit was filed to ensure other children do not needlessly die.*

The law went into effect June 1, 2018, but all restaurants and commercial food establishments had until Dec. 1, 2018 to be in compliance.

Sources: *Montgomery Advertiser*, AL.com, *Auburn Plainsman* and *OA News*

## II. AUTOMOBILE NEWS OF NOTE

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### **YOUNG BOY BURNED TO DEATH IN CAR CRASH**

The mother of a teenager who burned to death in a fiery car wreck in 2016 has filed a wrongful death lawsuit against General Motors (GM), saying the car was defective. Anthony Dunlap was killed after the 2006 Chevrolet Impala he was driving hit a curb and the base of a traffic sign before overturning and catching on fire. He burned to death in the car. The suit, filed in Jackson County Circuit Court by Terri Dunlap, the mother, alleges that the car was defectively designed and manufactured.

It was further alleged in the suit that those defects, "created a high probability that in the event of a crash that flammable materials from the engine compartment would spread to the passenger compartment causing death or injury, or in the alternative such spread would happen much faster eliminating or reducing the chance of occupants to escape before burning."

Derek Potts, the lawyer representing the family, in a written statement, had this to say:

*Unfortunately, this case is yet another example of a dangerously defective and unsafe vehicle on our roadways. A driver of a motor vehicle should not survive an auto accident and then burn to death after the fact.*

Greg Allen and Graham Esdale in our firm have handled a number of similar cases. Unfortunately, car crashes result in fires that in all too many cases kill occupants of the vehicle. The failure to have a "firewall" between the engine and passenger compartments is a major safety defect that presents severe safety problems.

Source: *Kansas City Star*

### **FLORIDA MAN SUES TESLA OVER INJURIES SUSTAINED IN AUTOPILOT CRASH**

A Florida man who suffered severe spine and brain injuries when his Tesla Model S car crashed into a disabled vehicle at highway speeds is suing the electric car maker. It's alleged that the car's autopilot feature lulls drivers into a false sense of security.

Shawn Hudson, a resident of Winter Park, Florida, alleges in his lawsuit that Tesla misleads its customers into thinking they can rely on the autopilot system with minimal driver input. It's alleged:

*Through a pervasive national marketing campaign and a purposefully manipulative sales pitch, Tesla has duped consumers ... into believing that the autopilot system it offers with Tesla vehicles at additional cost can safely transport passengers at highway speeds with minimal input and oversight from those passengers.*

At first skeptical of the Tesla dealership's claims that the car could essentially drive itself, Mr. Hudson says he was convinced of the car's autonomous and crash-avoidance capabilities after driving a loaner car the dealership provided to him one weekend. He paid \$5,000 for the autopilot upgrade.

Mr. Hudson was driving on Oct. 12 on the Florida Turnpike when, without stopping or slowing down, his Tesla Model S slammed into a broken-down Ford Fiesta in the left lane. The Model S was traveling about 80 mph at the point of impact.

It's claimed in the lawsuit that Tesla's autopilot has defective traffic awareness features, but that the real danger is hidden in the way the company describes its autopilot system as extra driver assistance intended as a safety backup. However, Tesla then sells it to drivers as more of a "self-driving feature."

Mr. Hudson's complaint echoes a number of other cases alleging Tesla's autopilot led cars into collisions. In his complaint, he blames Tesla for strict liability, negligence, breach of implied warranty, misrepresentation, misleading advertising, and violation of Florida's Deceptive and Unfair Trade Practices Act. There is also a negligence claim in the complaint against Oscar Gonzalez-Bustamante for allegedly failing to perform his duty to remove his disabled car from the left travel lane before the Hudson car crashed into it.

There have been other incidents involving Tesla. The following are some of them:

- A deadly incident involving a 2017 Tesla Model X in March on a California highway.

- A fatal 2016 crash outside Williston, Florida, in September.
- A woman sued the company in a Utah state court after she rear-ended stopped traffic while operating a 2016 Model S in autopilot mode
- In May, Tesla agreed to pay Model S and Model X drivers in California \$5.4 million to settle claims that the company delayed safety features and an expensive upgrade to its autopilot system, and instead rolled out cars with defective traffic awareness features.

Tesla Inc. has settled most of a purported class-action lawsuit filed by customers who alleged that their Model S and Model X vehicles would suddenly accelerate, which in some cases resulted in accidents. Six of the Plaintiffs in the lawsuit are dropping their claims. The remaining Plaintiff and his son will only pursue individual claims and will not pursue any claims on behalf of other Tesla drivers. At press time, the settlement terms had not been disclosed. However, the narrowing of the case to only a California Plaintiff means that Tesla can't be held liable for any alleged defects under the laws of other states, including Florida and New Jersey, that were part of the class-action complaint.

Mike Morgan, Steven E. Nauman and Branden Weber, lawyers with Morgan & Morgan PA, are handling the Florida case. The case is *Hudson v. Tesla Inc. et al.*, (case number 2018-CA-011812-O) in the Circuit Court for the Ninth Judicial Circuit of Florida.

Sources: Law360.com and Bloomberg

#### **TOYOTA CRASH VERDICT REDUCED TO MEET TEXAS DAMAGES CAP**

Toyota will have to pay \$209 million to a family after Judge Dale B. Tillery reduced a jury verdict in their case. The case involved two children who suffered head trauma when the front seats in a Lexus collapsed on them in a collision. Judge Tillery ruled that the Texas cap on damages required the verdict to be reduced by more than \$30 million to stay within the limit. As a result, Toyota Motor Corp. and Toyota Motor Sales will pay \$194.4 million and \$19.4 million, respectively—which amounts to \$208.9 million.

The Reavis children suffered skull fractures and traumatic brain injuries during a rear-end collision that happened two years ago. The front seats in the family's sedan, a 2002 Lexus ES 300, malfunctioned and fell backward on the children, who were 3 and 5 years old at the time. The family had

asked the Dallas County court to reduce the punitive damages part of the \$242 million award in order to stay within the state's damages cap. The Reavis family asked for the rest of the jury's decision to remain intact and Judge Tillery upheld it. It appears that the Toyota Defendants will continue their battle to overturn the entire verdict.

The Plaintiffs are represented by Frank L. Branson, Debbie Dudley Brason, Eugene A. "Chip" Brooker Jr. and Eric T. Stahl of The Law Offices of Frank L. Branson PC. The case is *Benjamin Thomas Reavis et al. v. Toyota Motor Sales USA Inc. et al.*, (case number DC-16-15296) in the District Court of Dallas County, Texas, 134<sup>th</sup> Judicial District.

Source: Law360.com

#### **BMW MUST FACE ENGINE DEFECT CLASS ACTION**

A New Jersey federal judge has ruled that BMW must face most all of a consolidated putative class action alleging the automaker knowingly sold vehicles with defective chain assemblies that caused premature engine failure and profited off repairs not covered under warranty. U.S. District Judge William H. Walls partly granted and partly denied a motion to dismiss from BMW of North America LLC and its German parent BMW AG. The consolidated putative class action involves 21 Plaintiffs in 14 states. Judge Walls kept alive most of the claims for breach of warranty, consumer fraud and unjust enrichment. However, the judge rejected a negligent misrepresentation and certain individual claims from Plaintiffs who did not have standing to sue.

The 21 vehicle owners accused BMW of concealing inherent design defects in the chain assemblies of engines in its model years 2012-15 vehicles with the N20 and N26 direct injection turbocharged engines, which are four-cylinder engines. Affected models include certain X3 SUVs, 528xi sedans and 328i sedans. Additionally, BMW only provided the owners with an original express warranty lasting four years or 50,000 miles, whichever came first, knowing full well that was not adequate and that the serviceable life of the vehicles should've lasted at least 15,000 miles or 10 years, whichever came first.

Judge Walls also ruled that the drivers' federal Magnuson-Moss Warranty Act claim would survive and move ahead. However, claims by one of the named Plaintiffs and the Wisconsin, Colorado, Oregon and North Carolina subclasses were rejected and dismissed by Judge Walls.

The consolidated complaint alleges that the primary chain (the timing chain) in BMW's vehicles had a plastic guide assembly made mostly of a defective polycarbonate composition that becomes brittle and breaks apart, lodging in the crankshaft drive sprockets and causing the chain to break or skip and damage or destroy the engine.

The secondary chain, which connects the oil pump and balance shaft assemblies to the crankshaft, was said to also fail prematurely because it is made of insufficient materials that are unable to prevent high-resistance wear. The drivers said this causes the chain to stretch out prematurely, damaging the chain sprocket and causing chain slippage. BMW says it has redesigned this secondary chain at least twice. The drivers claimed BMW has been concealing the problems with its primary and secondary chain assemblies since 2013.

The drivers have sought to represent a nationwide class of consumers as well as subclasses of consumers in New Jersey, Illinois, Florida, Utah, New York, Colorado, Texas, Alabama, Oklahoma, Massachusetts, California, Wisconsin, Oregon and North Carolina.

The Plaintiffs are represented by Joseph R. Santoli, Gary S. Graifman and Jay I. Brody of Kantrowitz Goldhamer & Graifman PC; Bruce H. Nagel and Randee M. Matloff of Nagel Rice LLP; and Thomas P. Sobran of Thomas P. Sobran PC. The case is *Gelis et al. v. Bayerische Motoren Werke Aktiengesellschaft et al.*, (case number 2:17-cv-07386) in the U.S. District Court for the District of New Jersey.

Source: Law360.com

#### **LAWSUIT SAYS FORD TRUCKS ARE 'TICKING TIME BOMBS'**

A group of drivers who bought Ford diesel trucks with high-pressure fuel pumps from 2011 onward have filed a proposed class action in a California federal court, claiming the automaker sold the vehicles knowing they were "ticking time bombs" prone to catastrophic engine failure. The pump, designed by auto parts manufacturer Bosch, is not designed to handle American diesel fuel. As a result, it shoots metal shavings into the fuel injection system, leading to engine failure without warning.

It appears that Ford Motor Company has known about the problem for a long time. The automaker did nothing to remedy the problems, while it falsely represented the vehicles as being durable. Bosch's CP4 pump worked well in Europe, the drivers said, but "unfortunately for the American

public, the easiest way for Ford to succeed was to cheat American consumers on durability and overall vehicle functionality by equipping the class vehicles with a defective fuel injection pump that dooms the modern Ford Power Stroke diesel engine system from day one.”

Zachary J. Farlow and 14 other California resident Plaintiffs, all current and former owners or lessees of 2011-2018 Ford diesel vehicles with a Power Stroke 6.7L engine and CP4 fuel injection pump, are claiming fraud by concealment, violations of California’s Unfair Competition Law and Consumer Legal Remedies Act and unjust enrichment, among other counts. The Plaintiffs are seeking compensation for diminished value of their vehicles, claiming they overpaid for them because of the defect and the cost of repairs.

It’s alleged further that Ford partnered with Bosch in 2004 and learned almost from the start that Bosch’s European fuel pumps did not work with American diesel fuel. Communications and correspondence also show that Ford was alarmed at the financial hit the company would sustain if the problem was covered under warranty.

It’s alleged that Ford has known that the pumps are incompatible with U.S. diesel fuel since about 2005 and that the engine failure can cost anywhere from \$8,000 to \$20,000 for owners to fix. The repairs are not covered by vehicle warranty. Consumers who choose diesel-engine pay a lot more for their vehicles because they promise to last longer—anywhere from 500,000 to 800,000 miles—and be more fuel-efficient and more powerful. Such was not the case here, the drivers said.

The drivers are represented by Jeff D. Friedman, Steve W. Berman and Sean R. Matt of Hagens Berman Sobol Shapiro LLP; and Robert C. Hilliard and Rudy Gonzales Jr. of Hilliard Martinez Gonzales LLP. The case is *Zachary J. Farlow et al. v. Ford Motor Company* (case number 3:18-cv-06967) in the U.S. District Court for the Northern District of California.

Source: Law360.com

#### **APPROVAL OF VW’S \$48 MILLION INVESTOR SETTLEMENT OVER EMISSIONS**

Volkswagen AG’s \$48 million settlement with investors in the multidistrict litigation (MDL) over its diesel emissions-cheating scandal was preliminarily approved by U.S. District Judge Charles R. Breyer, a California federal judge, on Nov. 28. This ends claims that VW knowingly issued false financial reports about its compliance with environmental laws.

Judge Breyer also conditionally certified the proposed class of investors who pur-

chased American depository receipts through VW between November 2010 and January 2016. He appointed the Arkansas State Highway Employees’ Retirement System and the Miami Police Relief and Pension Fund as class representatives. Bernstein Litowitz Berger & Grossmann LLP was selected as class counsel.

The litigation arose from the revelation in September 2015 that Volkswagen was equipping some of its diesel vehicles with devices that would allow the cars to pass government-mandated emissions tests, then emit more pollution once they hit the roads.

Soon after the U.S. Environmental Protection Agency (EPA) went public with the allegations, VW acknowledged it had installed the defeat device software in at least 11 million vehicles, nearly 600,000 of which had been sold in the U.S. The government filed a Clean Air Act suit against VW and its subsidiaries in January 2016.

Several class actions, filed by drivers, dealerships and stockholders, followed. The instant suit was first filed in Virginia federal court in September 2015 by the City of St. Clair Shores Police and Fire Retirement Systems. Along with several similar cases, it was moved to California in December 2015 by the U.S. Judicial Panel on Multidistrict Litigation.

The investors are represented by James A. Harrod, Jai Chandrasekhar, Adam D. Hollander, Ross Shikowitz and Kate W. Aufses of Bernstein Litowitz Berger & Grossmann LLP. The case is *In re: Volkswagen “Clean Diesel” Marketing, Sales Practices and Products Liability Litigation*, (case number 3:15-md-02672) in the U.S. District Court for the Northern District of California.

Source: Law360.com

## **III. OPIOID LITIGATION**

### **UPDATE ON OPIOID LITIGATION**

Judge Aaron Polster has extended the deadline for local governments to amend their complaints to add or remove Defendants in the Opioid multi-district litigation to March 16, 2019. Judge Polster previously had set the deadline as Nov. 16, 2018. However, many local governments have not had access to drug manufacturer market share data and have thus been unable to make an informed decision about what particular manufacturers were a problem in their region of the country. Simultaneously with the order extending the deadline, Judge Polster ordered the dis-

tribution of opioid market share data to the counties and cities in the litigation, so that they could make such a determination.

In other news, the bellwether trial Plaintiffs still await confirmation of the Report & Recommendation of Magistrate Judge David A. Ruiz. The report to District Court Judge Aaron Polster recommended 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. The dismissed claims are relatively narrow grounds based on nuances on local law rather than any overarching defect in the government’s claims.

Both sides in the litigation have filed numerous motions in the interim, including asking that Judge Polster certify certain pertinent questions to the Supreme Court of Ohio

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 March 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 this 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.

On a national level, the effects of the opioid epidemic 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 an opioid in 2016—a 292-percent increase since 2001. Due to the continued deterioration of the addiction crisis nationwide, the researchers con-

cluded the U.S. lost a total of 1,681,359 years of life in 2016 alone.

However, loss of life, as tragic as that is, 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.

More than 1,000 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 of medical care, creating a crippling financial burden to communities across the country.

In 2017, President Trump declared the opioid epidemic a national public health emergency. Earlier this year, then Attorney General Jeff Sessions announced a new Prescription Interdiction & Litigation (PIL) Task Force established by the U.S. Department of Justice 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. Attorney General Sessions also assigned 12 assistant U.S. attorneys to spend three years focusing exclusively on investigating and prosecuting health care and fraud related to prescription opioids.

Because of the enormity of the opioid litigation, and Alabama's personal involvement in the MDL, Beasley Allen Law Firm has put together an "Opioid Litigation Team," which includes attorneys Rhon Jones, Ryan Kral, Rick Stratton, Parker Miller, Will Sutton and Jeff Price. This team of lawyers represents the State of Alabama and numerous local governments and other entities in the MDL, as well as individual claims for victims.

Sources: Law360.com and U.S. District Court of Ohio

#### **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, as well as other

entities in the MDL, and 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.

## **IV. THE TALC LITIGATION**

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### ***AN UPDATE ON THE TALC LITIGATION***

A great deal of activity is ongoing in the massive talc litigation on several fronts. We will supply an update on the litigation in the January issue. Both the individual cases and the MDL are progressing extremely well. The cases are getting even stronger as additional discovery by lawyers in our firm and others is uncovering even more damaging information. When I thought the worst had been discovered, I find that I was wrong. The latest information is even worse than what we had previously learned.

### ***MISSOURI JUDGE ORDERS JOHNSON & JOHNSON CEO TO SUBMIT TO TALC DEPOSITION***

Johnson & Johnson Chairman and Chief Executive Officer Alex Gorsky will now have to appear for a deposition in a talcum powder lawsuit, which is currently pending in St. Louis, Missouri. In an Oct. 29 order, Judge Rex Burlison, who has presided over numerous talc trials, granted a motion filed by Plaintiffs' lawyers to compel Gorsky to present himself for deposition. In August, Plaintiffs' lawyers issued a deposition notice for Gorsky, but Johnson & Johnson's lawyers argued the notice was improper and that Gorsky would not appear without an order from the judge.

In their motion to compel, filed with the court on Sept. 11, Plaintiffs argued that Gorsky has "unique and personal knowledge regarding the safety of talc." In support of their argument, Plaintiffs cited several public statements by Gorsky defending the safety of talc and arguing that it does not contain asbestos. Additionally, Plaintiffs' motion referenced Gorsky's direct receipt of adverse event reports and emails relating to talc safety.

Plaintiffs argued that only Gorsky could testify regarding the basis of his public statements and his actions in response to the emails and adverse event reports. Johnson & Johnson opposed Plaintiffs motion to compel, stating:

- That Gorsky has no unique knowledge related to talc and that the deposition was an improper "attempt to harass and embarrass [Gorsky]."
- That Gorsky has never worked for Johnson & Johnson Consumer, Inc., the subsidiary responsible for talcum powder products and that any questions Plaintiffs might ask him would be better directed to lower level employees.
- That Gorsky's public statements referenced by Plaintiffs were only general statements made by the CEO in response to litigation and were not based on any personal knowledge of talc.
- That Gorsky's receipt of adverse event reports and emails related to talc safety were simply to apprise him of the status of the litigation.
- That the court should consider the burden on Gorsky and on the company if he had to prepare and appear for a deposition.

After reviewing the arguments of all parties, Judge Burlison has issued an order granting Plaintiffs' motion to compel the deposition. The judge found that Plaintiffs met their burden in demonstrating the deposition was necessary. The order specifically referenced an affidavit provided by Gorsky, which indicated that "he had discussions and communications regarding the talcum powder products at issue to ensure that he was aware of the decision-making process regarding the products and to convey Johnson & Johnson's corporate viewpoint."

Judge Burlison found that Plaintiffs' request to depose Gorsky on these products was proper and that the information needed could not be obtained from another source. However, the court's order also acknowledged the potential burden on Gorsky and Johnson & Johnson and ordered that the deposition be limited, both in time and content, to minimize that burden.

Beasley Allen lawyers continue to investigate new cases involving women who have suffered from ovarian cancer after using Johnson's Baby Powder and Shower to Shower. For more information, contact Ted Meadows, Leigh O'Dell or Melissa Prickett, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com, Leigh.Odell@

beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Sources: <https://www.bloomberg.com/news/articles/2018-10-31/j-j-ceo-must-face-questioning-over-public-defense-of-baby-powder>; Motions and Order, Young et al., v. Johnson & Johnson, et al., 1522-CC-09728-02, Division No. 10, Missouri Circuit Court, Twenty Second Judicial Circuit (St. Louis).

#### **STUDY FINDS LACK OF OVARIAN CANCER AWARENESS HEIGHTENS MORTALITY WORLDWIDE**

A recently published study of more than 1,500 women shows a “woeful” lack of awareness of the symptoms, causes and treatments for ovarian cancer. Research by the World Ovarian Cancer Coalition found that two-thirds of the women surveyed did not even know about the condition before being diagnosed with the deadly disease. With almost 250,000 new cases reported annually worldwide, ovarian cancer is the seventh-most common cancer diagnosis and the eighth-most common cause of female death worldwide.

The survey revealed women with ovarian cancer believe their treating physicians did not provide adequate consultation and information at the time of diagnosis. According to the study, there are wide-ranging regional disparities in the use of family history and genetic testing, factors that could help catch the disease earlier and help boost survival rates.

For instance, women in the U.S. waited more than three months on average after first experiencing symptoms before visiting a doctor. However, they were also the most likely to undergo genetic testing. In contrast, women in Japan have one of the shortest times to diagnosis, but very little access to genetic testing. The lack of awareness and delay in treatment contributes to the study’s conservative estimate that one in six women (40,000) will die within three months after diagnosis of the disease. Leigh O’Dell, a lawyer in our firm’s Mass Torts Section who is the Co-Lead Counsel for consolidated Multidistrict Litigation in a New Jersey federal court, says:

*This report is truly troubling and shows how much more needs to be done to make women and medical professionals aware of the science and symptoms surrounding ovarian cancer.*

Leigh is heavily involved in the MDL, which concerns talcum powder’s link to ovarian cancer. Approximately 10,000 cases are pending in the MDL, which is in the U.S. District Court in Trenton. Leigh says:

*Thousands of women are suffering and dying of ovarian cancer because of a lack of knowledge. Despite numerous credible scientific studies, companies such as Johnson & Johnson have never warned consumers about an increased risk of ovarian cancer stemming from genital talc use.*

While the report does not address causation, beyond the question of family history, numerous medical studies over the past four decades have documented how talcum powder applied to the genital area can travel to the ovaries and lead to ovarian cancer. That research shows that women who have used talcum powder for genital hygiene are at a 30-60 percent increased risk of developing ovarian cancer compared to those who have never used it. One medical expert calculates that this use of talcum powder leads to nearly 10 percent of the new ovarian cancer cases reported annually in the United States.

Source: PRNewswire.com

## V. PURELY POLITICAL NEWS & VIEWS

### **A LOOK AT THE NOV. 6 ELECTIONS AND THE EFFECTS ON AMERICA**

#### **National**

It was very clear that in most states the mid-term elections were a referendum on President Trump. It appears that the outcome was in large part a repudiation of the president. The House of Representatives, having picked up about 40 seats, will be firmly controlled by Democrats in January. However, the Republicans were able to hold the Senate.

A look at races for governor around the country reveals a move toward Democrats in a good number of states. Those wins by Democrats should greatly concern the president, who is already campaigning very hard for 2020.

The post-election responses from the White House have vacillated between shock and disbelief. Reportedly, it is most difficult for the president to feel good about the Nov. 6 outcome. From all accounts, it appears that the White House is in turmoil.

Regardless of the Nov. 6 outcome leaving Congress divided, I believe the American people want the Executive Branch and Congress to work together on

the many serious problems that face our country. The President must make a drastic change and, if possible, become a real leader. With or without the president, the leadership in both the House and Senate must find common ground and work together in all areas of concern. Hopefully, they will cast aside petty politics and consider the welfare and best interests of the people for a change.

#### **The State Of Alabama**

The statewide elections in Alabama came out pretty much as predicted. Interestingly, the voter turnout was much greater than I anticipated it would be. The victories by Gov. Kay Ivey, Lt. Governor-elect Will Ainsworth and Attorney General Steve Marshall were quite impressive. Justice Tom Parker’s election as Chief Justice of the Alabama Supreme Court was equally impressive. I believe the outcome in that race surprised some of our political pundits.

While state government in Alabama appears to be in very good hands, there are huge problems that must be dealt with and solved in the areas of public education, mental health and prison reform, and public infrastructure. It is quite apparent that our state’s tax structure must be reviewed and some badly needed changes made.

I have confidence in Governor Kay Ivey, Lt. Governor-elect Will Ainsworth, Senate President Pro Tem Dell Marsh and Speaker of the House Mac McCutcheon. However, they must provide leadership and develop programs that will solve the serious and lingering problems our state faces. As my friend Dr. David Bronner said recently: “we haven’t just kicked the can down the road in Alabama; instead, we have just ignored the problems.” I totally agree with David’s assessment. Hopefully, at the end of 2022, our state will be in much better shape and our future brighter than ever.

## VI. COURT WATCH

### **GEORGIA VOTERS APPROVE AMENDMENT TO ESTABLISH BUSINESS COURTS**

Georgia voters recently approved an amendment to establish a special business court with state-wide jurisdiction. It was reported that 69 percent of voters checked “Yes” to approve the amendment. Judges on the new court will be appointed. The amendment appeared on the ballot as follows:

*Shall the Constitution of Georgia be amended so as to create a state-wide business court, authorize superior court business divisions, and allow for the appointment process for state-wide business court judges in order to lower costs, improve the efficiency of all courts, and promote predictability of judicial outcomes in certain complex business disputes for the benefit of citizens of this state?*

Details for implementing the business court will be worked out in the upcoming legislative session. The governor will appoint judges for five-year terms, subject to confirmation by State House and Senate Judiciary committees.

We will be most interested in the implementation and development of the new business court.

Beasley Allen lawyers handle complex business cases. For more information on our business litigation practice, or to discuss a potential case, contact Dee Miles, Clay Barnett, Parker Miller, Archie Grubb or Lance Gould at 800-898-2034 or by email at [Dee.Miles@BeasleyAllen.com](mailto:Dee.Miles@BeasleyAllen.com), [Clay.Barnett@beasleyallen.com](mailto:Clay.Barnett@beasleyallen.com), [Parker.Miller@beasleyallen.com](mailto:Parker.Miller@beasleyallen.com), [Archie.Grubb@BeasleyAllen.com](mailto:Archie.Grubb@BeasleyAllen.com) or [Lance.Gould@BeasleyAllen.com](mailto:Lance.Gould@BeasleyAllen.com).

Source: [https://ballotpedia.org/Georgia\\_Amendment\\_2\\_Establish\\_a\\_State\\_Business\\_Court\\_Amendment\\_\(2018\)](https://ballotpedia.org/Georgia_Amendment_2_Establish_a_State_Business_Court_Amendment_(2018)), <https://www.wtoc.com/2018/10/23/amendment-proposing-statewide-business-court-georgia/> and <https://www.wabe.org/gop-gov-deal-wants-special-court-businesses-hell-need-aid-democrats/>

## VII. THE NATIONAL SCENE

### **JUDGE RESTORES CNN REPORTER'S WHITE HOUSE ACCESS**

I am a firm believer in a free and independent "press" and believe most Americans, if asked, would agree. We should have learned from history that when governments in foreign countries attempted to control the press, the public interest and people generally suffered. A recent event in our Nation's Capital put the issue in perspective. A federal judge has ordered the Trump Administration to restore CNN political reporter Jim Acosta's access to the White House after it revoked his press credentials over an alleged breach in decorum during a Nov. 7 press conference.

U.S. District Judge Timothy Kelly, whom Trump appointed to the federal trial bench

in September 2017, said that he "simply [had] no choice" but to apply a precedent set by the Washington federal appeals court in 1977. The court in that case found that the White House must provide due process when revoking a reporter's credentials.

Judge Kelly also said the White House had violated Acosta's Fifth Amendment right to due process by revoking his White House access without explanation or a chance for CNN to appeal.

In the Nov. 7 press conference, Acosta attempted to ask Trump a question about the Russia investigation. Trump repeatedly deflected the question. Instead of answering the reporter, Trump hurled insults at the reporter, calling Acosta "a rude, terrible person" and said CNN should be "ashamed of itself having you working for them."

Acosta and CNN sued to have the press credentials restored, alleging Trump violated the reporter's First Amendment rights and sought to punish him based on his affiliation with CNN, which Trump has publicly bashed as "fake news."

The Acosta lawsuit was widely supported by several major media outlets, which view Trump as hostile to the free press, particularly news organizations and reporters who are critical of Trump's policies. Trump called the FBI's Russia probe "a hoax" in claiming that he didn't hear Acosta's question.

Despite the court's restraining order, the Trump Administration wasted little time in renewing its attack on Acosta, saying after Judge Kelly's ruling that it planned to revoke Acosta's White House press badge permanently once the restraining order expired. The move prompted CNN to request an emergency hearing with the federal court.

But on Nov. 19, the White House walked back on its threat, saying it would not revoke Acosta's hard pass again, but would instead implement a set of new rules governing the protocol of reporters in White House press conferences. Maybe they need one for a president who is largely out of control.

Sources: *National Law Journal*, *USA Today*, YouTube and Fox News

### **BIG PHARMA REAPS GREAT BENEFITS FROM THE SO-CALLED TRUMP TAX REFORM**

President Donald Trump's tax reform has been a boon for Big Pharma. The new law cut corporate tax rates from 35 percent to 21 percent, which translated into a 96 percent tax break for pharmaceutical company AbbVie. In the first nine months of 2018, the Illinois-based drug maker paid just 4.5 percent of the income

taxes it paid during the same period last year.

Specifically, AbbVie paid \$1.28 billion in taxes in 2017. So far this year, the company only owes \$57 million. I don't believe consumers expected this from the so-called tax reform touted by President Trump.

Among the drugs fueling AbbVie's profits is its top-selling arthritis drug Humira, which brings in \$50 million in sales every day. Humira year-end sales for 2018 are expected to top \$6.3 billion. Even AbbVie's cancer drug Imbruvica, for which AbbVie partnered with Johnson & Johnson, has racked up \$972 million in sales. Its newly approved Oriliss to treat endometriosis pain is expected to reach billion-dollar blockbuster status by 2020, and \$2 billion by 2025.

Could this tremendous tax savings bestowed on Big Pharma companies like AbbVie mean lower drug costs, as promised by President Trump? It hasn't yet.

Since Trump took office in January 2017, the prices of more than 2,500 medications have increased by at least 10 percent and nearly 40 of them have increased by more than 100 percent, according to an analysis released earlier this year by Sen. Cory Booker. Booker's analysis involved an examination into fourth-quarter earnings calls, press releases and public statements from 10 U.S.-based drug companies, including AbbVie, as well as Johnson & Johnson, Pfizer, and Bristol-Myers Squibb.

All 10 companies said they would be announcing price reductions in light of Trump's generous tax cut. But Booker's report suggests that the drug companies have done nothing to lower the cost of their medications. In fact, one survey showed that Pfizer alone had 116 drug price increases during that time.

More than half of Americans say that slashing drug prices should be a "top priority" for Trump and Congress. However, the U.S. remains the only country among its peers that doesn't regulate the cost of prescription drugs. We are also one of the very few countries that allows drug companies to advertise prescription drugs direct to consumers. That is both dumb and hurtful.

Sources: FiercePharma and *USA Today*

### **PHARMACEUTICAL COMPANIES MUST BE FORCED TO DISCLOSE PRESCRIPTION DRUG PRICES ON ADVERTISING**

More than a decade ago Democrats in Congress attempted to pass legislation to require pharmaceutical companies to negotiate prices with Medicare and Medicaid. However, a contingent of Republicans was able to derail and defeat that legislation. Interestingly, most of the Republicans

and staff involved in that battle left Congress to work for the pharmaceutical industry as lobbyists. CBS had a great 60 Minutes show on the battle. President Trump has now entered the fray and says he wants to fight Big Pharma over drug pricing. The U.S. Department of Health and Human Services (HHS) has just released proposed rule-making to start up the battle.

On Oct. 15, the Centers for Medicare & Medicaid Services released a proposed rule regarding the disclosure of pricing information in direct-to-consumer television ads for prescription drugs and biologics reimbursable by Medicare and Medicaid. The proposed rule would amend relevant Medicare and Medicaid regulations to require Direct to Consumer (DTC) television ads (including broadcast, cable, streaming and satellite communication) of prescription drug and biological products for which reimbursement is available through or under Medicare and Medicaid to include the list price, defined as the wholesale acquisition cost (WAC), of that drug or biological product. More specifically, the proposed rule would:

- Apply to any prescription drug or biological product with a list price of at least \$35/month for a 30-day supply or typical course of treatment that is distributed in the U.S. and for which payment is available under Medicare or Medicaid;
- Require television ads for such covered pharmaceuticals to contain a textual statement indicating the WAC for a typical 30-day regimen;
- Require that the disclosure use the most current list price as of the date of publication/broadcast; and
- Allow the U.S. Department of Health & Human Services to maintain a public list of drugs and biological products advertised in violation of the rule.

CMS says it “anticipate[s] that the primary enforcement mechanism will be the threat of private actions under the Lanham Act” for unfair competition in the form of false or misleading advertising. CMS adds that “the Lanham Act ... is the most appropriate mechanism for enforcing against deceptive trade practices.”

Among other things, CMS seeks comments regarding the price disclosure statement’s content and various other aspects of the proposed rule. If the rule ultimately passes, we can expect extended litigation over the rule. The litigation will likely include these issues:

- **Scope of CMS Authority to Issue the Rule**—Despite the absence of specific

authority to issue regulations related to drug pricing transparency, CMS is issuing the proposed rule pursuant to sections of the Social Security Act that provide HHS with the authority to issue regulations “for the efficient administration of functions” under the act and “as may be necessary to carry out the administration of the insurance programs” under Medicare.

- **First Amendment Considerations**—Apparently anticipating that the proposed rule will elicit objections under the First Amendment, CMS takes the position that requiring the disclosure of pricing information in DTC television advertisements is consistent with First Amendment jurisprudence.
- **Lanham Act Considerations**—Enforcement of this proposed rule may be significantly limited due to the standing requirements and elements of a Lanham Act claim. With regard to standing, consumers do not have standing under the Lanham Act, and challenges would need to be brought by competitors or others who can demonstrate commercial harm caused by the Defendant’s advertising.
- **State Law Preemption**—With respect to preemption of state laws, CMS’s proposed regulations state that “[n]o State or political subdivision of any State may establish or continue in effect any requirement that depends in whole or in part on any pricing statement required by this subpart.” In the preamble, CMS explains that its proposed rule is intended to preempt state-law-based claims to enforce the new disclosure requirement as follows:

consistent with our not including any HHS-specific enforcement mechanism in this proposal, we are proposing ... that this rule preempt any state-law-based claim which depends in whole or in part on any pricing statement required by this rule.

The precise scope of preemption by the CMS rule is unclear. Some state-law-based claims, such as a claim brought under California’s well-known Unfair Competition Law, would potentially provide a more effective avenue for challenging a competitor’s omission of pricing information than the Lanham Act.

While there are many other considerations to work through, we can count on another big battle being waged by Big Pharma against many provisions of this proposed rule.

Our law firm has represented a number of states over the past several years in litigation involving the overpricing of medications to State Medicaid programs. We were successful in every State. Our firm did resolve many cases for the State of Alabama in the litigation but at the same time the Alabama Supreme Court reversed more than \$410 million in verdicts our fraud attorneys attained in four separate jury trials in Montgomery on behalf of Alabama’s Medicaid system.

HHS said that its rule may “counteract prescription drug increases” by arming consumers with more information about drug prices. That could allow Americans “to signal in some cases that prescription drug prices have risen beyond their willingness to pay,” the rule said.

The American Medical Association also got involved, saying that the rule would provide “a small dose of transparency.” The rule has a 60-day comment period and, if finalized, it would take effect 30 days later.

Source: Law360.com

#### ***‘SECRET’ GULF OIL LEAK ECLIPSING BP’S DEEPWATER HORIZON SPILL***

We all know about BP’s Deepwater Horizon oil spill, which played out like a nightmare for the U.S. when it erupted in 2010. The results were devastating. However, six years before that oil disaster, another uncontained oil release was flooding the Gulf of Mexico off the Louisiana Coast. That oil leak quietly continues to this day and is eclipsing BP as the one of the worst environmental disasters in U.S. history.

The Taylor Energy oil spill has been spewing between 300 and 700 barrels (12,600-29,400 gallons) of oil a day into the Gulf just 40 miles from where BP’s Deepwater Horizon rig once stood. The towering 40-story Taylor rig toppled in 2004 when Hurricane Ivan ripped through the area, damaging a system of 28 wells about 450 feet below the surface.

Taylor reported the spill to federal authorities in 2004, but the government didn’t disclose it to the public for more than half a decade. Only when researchers surveying the BP oil spill by air in 2010 noticed a second oil slick did the Taylor spill come to light.

When the U.S. Coast Guard’s National Response Center divulged the spill to the public using data from Taylor Energy, it estimated size of the leak was one to 55 barrels per day—drastically smaller than independent analyses showed.

Many of the Taylor Energy uncapped wells are now buried under 150 feet of mud from an underwater mudslide created

by Hurricane Ivan. Attempts to stop and contain the oil have failed. Federal officials now say the Taylor Energy site could continue to blast oil into the Gulf for the rest of this century.

Taylor Energy, now a one-person company, is unable to cover the enormous costs of cleanup and remediation, let alone whatever technologies are needed to stop the spill. Many of the smaller, financially at-risk offshore drillers could find themselves in the same boat as Taylor Energy one day. For every 1,000 wells in state and federal waters, there are about 20 blow-outs resulting in uncontrolled releases of oil—a stark fact to face as tropical storms become more frequent and violent than ever due to our dependence on fossil fuels.

When offshore oil drillers are not technologically and financially equipped to repair a blowout, U.S. taxpayers will be on the hook for remediation costs. The roughly 4,000 oil platforms from Texas to Mississippi also leave coastal communities prone to economic and environmental catastrophe.

Why hasn't this most serious environmental and economic disaster received widespread media attention? More importantly, why hasn't the federal government gotten more involved and taken the needed action? I believe because of the seriousness of this matter, these questions demand answers.

Sources: *Washington Post* and *RightingInjustice.com*

## VIII. WHISTLEBLOWER LITIGATION

### **DOJ'S EFFORTS IN STOPPING THE DISTRIBUTION OF UNAPPROVED AND MISBRANDED DRUGS**

The United States Department of Justice (DOJ) was recently successful in getting a federal court to permanently enjoin Defendants Just Enhance and R Thomas Marketing LLC from distributing unapproved and misbranded drugs to consumers in our country.

The DOJ brought suit against the Defendants in 2017 in the U.S. District Court for the District of New Jersey. DOJ's complaint was brought at the request of the U.S. Food and Drug Administration (FDA) and accused the Defendants of marketing and distributing drugs that were never approved by the FDA and failed to disclose pertinent safety information to consumers. The Complaint alleged that the Defendants were representing to consumers that their drugs can treat or prevent serious condi-

tions, including impotence, prostatitis, and erectile dysfunction, when in actuality the FDA never approved the drugs nor have there been clinical studies demonstrating the drugs' safety and effectiveness.

Apparently, the Defendants' drugs contain an undisclosed ingredient, sildenafil, which is the active ingredient in the prescription drug Viagra. The labeling on the Defendants' unapproved drugs did not reveal the potentially adverse consequences that may result from using a product containing sildenafil. Despite knowing their drugs have not been FDA approved and do not disclose vital safety information on the labeling, the Defendants have allegedly been using more than 100 different websites to market and distribute their unapproved drugs to consumers in the United States.

The DOJ's suit accused the Defendants of being in direct violation of the Federal Food, Drug, and Cosmetic Act (FDCA). The Defendants failed to respond to the DOJ lawsuit and never appeared before the Court. Therefore, the Court granted a default judgment and issued an injunction requiring the Defendants to cease the distribution of their unapproved and misbranded drugs.

Acting Assistant Attorney General of the Justice Department's Civil Division, Chad A. Readler, assured consumers by stating that "Compliance with the Food, Drug, and Cosmetic Act is necessary to ensure that consumers have complete confidence in the safety and effectiveness of the drugs they use," and "The Department of Justice and FDA will continue to work together to enforce labeling requirements and protect consumers from the dangers of undisclosed ingredients in drugs."

Lawyers in our firm's Consumer Fraud & Commercial Litigation Section have represented at least nine states through the states' attorney general's office in various pharmaceutical and health care litigation involving fraudulent, unfair and deceptive practices that cost the states millions in taxpayer dollars. Beasley Allen is currently representing Louisiana and Mississippi in seven different cases involving almost 100 Defendants involving similar "unapproved drugs" litigation. Our unapproved drugs cases have been filed against the nation's largest pharmaceutical manufacturers that have engaged in fraudulent and deceptive practices of falsely reporting their drugs as covered outpatient drugs approved by the FDA, causing Medicaid to reimburse for drugs that it never should have.

We are fortunate to handle these cases, and many other pharmaceutical fraud cases, for the state attorneys general and welcome the opportunity to investigate potential pharmaceutical fraud litigation for the states, municipalities, and

Employee Benefit Plans. If you have any question about our firm's pharmaceutical fraud practice, please contact Ali Hawthorne, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at [Alison.Hawthorne@beasleyallen.com](mailto:Alison.Hawthorne@beasleyallen.com).

Source: United States Department of Justice

### **U.S. SUPREME COURT WILL TAKE ON FALSE CLAIMS TIMELINESS UNCERTAINTY**

The U.S. Supreme Court will take on a three-way circuit split involving a False Claims Act timeliness rule. The outcome at the High Court will have practical ramifications for litigants. The contractors' petition said that by ruling that a whistleblower timely accused contractors of perpetrating a bid-rigging scheme, the U.S. Court of Appeals for the Eleventh Circuit Court of Appeals exacerbated the split with other circuit courts that would have rejected the case.

The case filed by a whistleblower, Billy Joe Hunt, gives the Supreme Court an opportunity to establish nationwide uniformity on false claims timeliness. That will be welcomed by all sides. Competing interpretations have caused uncertainty and accusations of "forum shopping."

A Plaintiff may file a False Claims Act complaint within six years of the date on which a violation occurred, or three years after the date when facts material to the alleged fraud are known or reasonably should have been known by a relevant government official.

Contractors Parsons Corp. and Cochise Consultancy Inc. claimed in their petition that the Hunt case would have failed in the Fourth, Fifth or Tenth circuits, which don't allow a whistleblower to rely on the three-year period if the government hasn't intervened against a Defendant. However, case filed in the Third or Ninth circuits may rely on the three-year period as long as the complaint is filed within three years of when the whistleblower knew or should have known about the alleged fraud.

The case is *Cochise Consultancy v. United States ex rel. Hunt, U.S.*, (No. 18-315). The petition was granted on Nov. 16 and the case is now in the Supreme Court.

### **ABBOTT AND ABbvIE PAY \$25 MILLION IN SETTLEMENT INVOLVING OFF-LABEL PROMOS AND KICKBACKS**

Abbott Laboratories and AbbVie Inc. will have to pay more than \$25 million to settle a whistleblower's False Claims Act (FCA) lawsuit alleging off-label promotion of the

triglyceride drug TriCor and unlawful kickbacks in the form of gift baskets and gift cards. The U.S. Department of Justice (DOJ) says the settlement ends a nine-year case brought by former Abbott sales representative Amy Bergman. The settlement—which stems from allegedly improper billing of Medicare, Medicaid and Tricare—is significant in amount for an FCA case that the government declined to join.

Amy Bergman, the whistleblower, will receive \$6.5 million from the settlement. The settlement resolves a case originally filed in 2009 and it covers conduct from 2006 through 2008. During that time, TriCor was approved to treat conditions related to elevated triglyceride levels, but Abbott promoted it for unapproved uses related to cardiac health risks. In addition, the DOJ says Abbott used kickbacks in the form of meals, gift baskets and gift certificates to encourage doctors to write prescriptions for TriCor and it improperly encouraged or rewarded prescribers with paid consulting and speaking arrangements.

Abbott now focuses on diagnostics, medical devices and brand-name generic drugs. AbbVie was spun off from Abbott several years ago and specializes in traditional brand-name drugs, including the immunosuppressant Humira, the world's best-selling drug. In 2014, a Pennsylvania federal judge said Ms. Bergman had supplied "myriad details of Abbott's marketing statements that contradict its FDA-approved label."

In 2012, Abbott agreed to a \$1.5 billion criminal and civil settlement that centered on kickbacks and off-label promotion of anti-seizure drug Depakote. This year, AbbVie has found itself involved in a noteworthy fraud case alleging "classic" kickbacks in the form of money and meals as well as "sophisticated" kickbacks in the form of marketing assistance for physician practices.

The U.S. is represented by Charlene Keller Fullmer, Elizabeth Rinaldo and Gregory B. David of the DOJ, Edward M. DeHarde of the U.S. Office of Personnel Management, Paul St. Hillaire of the Office of the Inspector General for the OPM, and Leigh A. Bradley of the U.S. Department of Defense.

Ms. Bergman is represented by Robert N. Nicholson and Parker D. Eastin of Nicholson & Eastin LLP, Marc S. Raspanti, Michael A. Morse and Pamela Coyle Brecht of Pietragallo Gordon Alfano Bosick & Raspanti LLP, and John J. Uustal and Cristina M. Pearson of Kelley Uustal PLC.

The case is *U.S. ex rel. Bergman v. Abbott Laboratories* (case number 2:09-

cv-04264) in the U.S. District Court for the Eastern District of Pennsylvania.

Source: Law360.com

#### **NORTHROP GRUMMAN SUBSIDIARY SETTLES AIR FORCE OVERBILLING INVESTIGATIONS**

Northrop Grumman Systems Corporation, a subsidiary of the defense contracting giant Northrop Grumman, has agreed to pay \$31.65 million to settle criminal and civil investigations into the fraudulent overbilling of the U.S. Air Force. The company admitted that its employees deployed to an airbase in the Middle East inflated the number of hours worked on its Battlefield Airborne Communications Node (BACN) contract. Hours were also padded for those working on the Dynamic Re-tasking Capability contracts. Both contracts are for battlefield communications systems. Northrop Grumman describes BACN on its website:

*In theater operations, mountainous terrain inhibited line-of-sight communications; diverse weapon systems were unable to communicate with each other; each operating unit could see only a limited set of the complete picture. BACN bridges the gaps between those systems, enabling essential situational awareness from small ground units in contact up to the highest command levels.*

From January 2011 to October 2013, employees charged exactly 12 or 13.5 hours a day, seven days per week, when employees were not actually working all those hours. The U.S. Attorney's Office in San Diego says that instead of working, employees were engaged in leisure activities during some of that time, including golfing, skiing, visiting local amusement parks, dining out, shopping or patronizing the five-star hotels where they were housed. The overbilling put money in the employees' pockets that they did not earn, authorities said. One employee in an email summed up the billing scam: "work about 6-8 hours and charge 13," and that pretty well tells the story!

It appears that employees at one site alone overbilled by more than \$5 million. The company has agreed to pay \$27.45 million to settle civil claims that it violated the False Claims Act. Additionally, the company agreed to forfeit \$4.2 million in a separate agreement to settle the criminal investigation into fraudulent billing on the BACN contract. "Federal contracts are not a license to steal from the U.S. Treasury," U.S. Attorney Adam Braverman said in a statement. Northrop Grumman said in a

statement to Reuters that the company investigated the overbilling by former employees and reported it to the government. The contractor added:

*The improper charging was in direct violation of company policies, procedures and training. There should be no doubt, the misconduct of those former employees does not reflect the values of our company.*

Even though Northrop Grumman admits the fraudulent conduct by its employees, and attempts to say those employees were more or less operating on their own, the sort of conduct described above cannot be tolerated. Surely the company has safeguards in place to prevent or at least "catch" that sort of activity. If they don't, it's time for the bosses at this company to make the necessary changes. Cheating the government and the American taxpayers cannot be tolerated and must be stopped.

Source: Reuters

#### **THE BEASLEY ALLEN WHISTLEBLOWER LITIGATION TEAM**

It has become abundantly clear that whistleblowers are the key to exposing corporate wrongdoing and government fraud. A person who has first-hand knowledge of fraud or other wrongdoing may have a whistleblower case. Before you report suspected fraud or other wrongdoing—before you "blow the whistle"—it is important to make sure you have a valid claim and that you are prepared for what lies ahead. Beasley Allen has an experienced group of lawyers dedicated to handling whistleblower cases. The lawyers on our firm's Whistleblower Litigation Team are Archie Grubb, Larry Golston, Lance Gould, Andrew Brashier and Paul Evans.

A lawyer on our Whistleblower Litigation Team will be glad to discuss any potential whistleblower claim either in person or by phone. You can reach these lawyers by phone at 800-898-2034 or by email at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com, Andrew.Brashier@beasleyallen.com or Paul.Evans@beasleyallen.com.

# IX. PRODUCT LIABILITY UPDATE

## **AUTOMOBILE FIRES KILL THOUSANDS**

Tens of thousands of lives have been lost globally in the last few decades due to car entrapment deaths. In this section, we will analyze the threat of vehicle fires and provide advice on how to act in these emergencies. Data from the United States reveals the importance of awareness about this threat to safety on the road:

- More people die in vehicle fires than in apartment fires each year in the United States where nearly 1 out of 5 fires involves motor vehicles.
- U.S. fire departments responded to an estimated 278,000 vehicle fires in the United States during 2006. These fires caused an estimated 490 civilian deaths and 1,200 civilian injuries.
- Of those fires, 75 percent were caused by bad maintenance, mechanical or electrical failures or malfunctions. Collisions or overturns caused only 3 percent of these fires but 57 percent of the associated deaths.
- Older teens and young adults are age groups at highest risk of highway vehicle fire death.
- One-third of non-fatal vehicle fire injuries occurred when civilians attempted to fight the fire themselves.

### Nature of the threat:

While explosions from car fires are rare, the true danger is the toxic fumes. Motor vehicles are made of many synthetic materials that emit harmful and deadly gases when they burn. A main by-product of fires is a lethal concentration of carbon monoxide, which is an odorless, colorless and tasteless gas.

Fire can cause fatal or debilitating burn injuries. A vehicle fire can generate heat upwards of 1,500 F. Flames in vehicles can often shoot out distances of 10 feet or more. Parts of the vehicle can burst because of heat, shooting debris great distances. Bumper and hatchback door unit, two-piece tire rims, magnesium wheels, drive shafts, grease seals, axle, and engine parts all can become lethal shrapnel. Fires may also cause air bags to deploy. Hazardous materials such as battery acid can cause injury even without burning.

## **CAUSE OF VEHICLE FIRES**

The National Fire Protection Association (NFPA) in the US reports that about one fifth of all fires reported are motor vehicle fires, and the majority of vehicle fires are not related to crashes. These fires do not seem to attract much attention or investigation because they do not usually result in injury or property claims beyond the vehicle replacement cost.

Vehicle fires usually progress slowly in the early stages, allowing occupants time to escape injury. Injury or fatalities usually occur in cases where an occupant is asleep, disabled, intoxicated or too young to escape.

Most vehicle fires start in the engine compartment. A motor vehicle contains many flammable materials, including flammable liquids like gasoline and oil as well as solid combustibles such as upholstery. Fuel leaks from ruptured fuel lines also can rapidly ignite.

Leakage of fuel, motor oil, transmission fluid, power steering fluid, brake fluid or even coolant can lead to engine fires, and the leakage of a flammable or combustible liquid in an engine compartment results from some kind of failure. The failure may be a result of normal wear and tear, failure of a mechanic to make repairs safely, design failure that leads to rupture or abrasion of hoses or manufacturing defects in hoses, gaskets or fluid connections.

When a brand new vehicle (or one that has had very recent repairs) burns, failure of the manufacturer (or a mechanic) to safely tighten all fluid connections is the most likely cause.

Car batteries pose a fairly unique hazard—hydrogen gas involved in the electrolysis reaction ignites readily in fire conditions and can result in an explosive dispersion of battery acid.

About 15 percent of motor vehicle fires originate in the passenger compartment. The main causes of these are electrical short circuits and cigarettes.

To prevent injuries and fatalities, road authorities recommend that vehicle owners should be equipped with auto escape tools. These simple tools could save lives, protect in case of emergencies and give peace of mind for travelers.

We are placing on our firm's website a number of recommendations concerning vehicle fires that you will need to be aware of. The recommendations will cover a number of specific areas. If you need more information on this subject contact Greg Allen or Graham Esdale, lawyers in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at [Greg.Allen@beasleyallen.com](mailto:Greg.Allen@beasleyallen.com) or [Graham.Esdale@beasleyallen.com](mailto:Graham.Esdale@beasleyallen.com).

Source: Arrive Alive

## **IMPROVING TIRE TECHNOLOGY**

Automobile technology has advanced in many ways over recent decades. The industry now has rollover activated air curtains, air pressure monitoring sensors, navigation systems, satellite radio, and electronic stability control to prevent vehicle rollovers just to name a few recent innovations. Rarely do you hear about new tire technologies that are being developed to enhance overall automobile safety. However, some tire manufacturers are looking at new developments in tire technology that could improve the driving experience.

One of the new technologies being examined is called "Contact Area Information Sensing," or CAIS. This technology would add a sensor to the interior of the tire that would provide monitoring information to the driver including telling the driver of roadway conditions such as dry, wet or icy pavement conditions. This information would appear on a visual screen located in the vehicle. CAIS could also provide interactive information informing the driver of tread conditions as well as air pressure data to help keep the driver up to date on current tire conditions.

It is well known within the tire industry that tires lose approximately two pounds of pressure a month from normal use and the expected permeation of air through the rubber tire components. Technology is currently being used in heavy machinery and military vehicles that automatically monitors tire pressure and has the ability to add or decrease air pressure depending on the conditions. A low-tech version of this technology is being considered for use in passenger vehicles. The technology would include a tire ring valve that squeezes the ring as the tire rotates. Squeezing of the ring would occur during rotation of the tire to allow it to determine whether to add or decrease tire pressure.

Because many consumers are not trained in evaluating when tires need to be replaced, a very low-tech technology is being considered to enhance driver safety. The "discolor tire" is a method that would be used to inform consumers about the condition of their tires through a color system on the outside of the tire. When purchased, the tire looks like any other normal black tire. However, as the tread wears down to a minimum level of safety, the outer surface turns a bright orange to indicate to the consumer that it is time to replace the tires. This is a technology that is simply baked into the tire during the normal manufacturing process.

Finally, some manufacturers are examining and experimenting with airless tires. Some consumers may have seen these types of tires being used on ATVs or lawn

equipment. These tires are not susceptible to punctures. The treads are supported by flexible rubber spokes that can absorb road impacts. However, this type of tire does not typically have as smooth of a ride as existing tire technology. Nonetheless, this type of tire uses less rubber than existing tires, has the ability to last up to three times longer than regular tires and has better resistance to hydroplaning. Due to the many benefits of this type of tire, a number of manufacturers are currently working to offer a version that has a better ride quality and is much more similar to existing tire designs in ride quality.

Tires are an important part of automotive safety. Hopefully manufacturers will begin to adopt some of these new technologies to enhance the overall safety of automobiles. If you need more information, contact Ben Baker, a lawyer in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at Ben.Baker@beasleyallen.com. He will be glad to talk with you.

Source: Nationwide.com, blog, January 8, 2018

#### **PROTECTIVE ORDERS CAN BE HARMFUL TO THE PUBLIC**

During litigation, a party to a lawsuit can request a Court to enter a Protective Order. Rule 26 (c) of the Federal Rules of Civil Procedure discusses the rules to follow before a protective order is entered. The Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense when providing discovery in a pending lawsuit. Additionally, the court might order that a trade secret or other confidential research, development, or commercial information not be revealed. The burden on the party seeking the protective order must establish a good cause for the Court to limit any discovery.

Corporate Defendants will often seek a protective order and include anti-sharing provisions in product liability cases. This means that the Defendant does not want the discovery to be shared with other lawyers who handle similar cases. To limit the disclosures is often without merit. Fortunately, Courts generally disfavor anti-sharing provisions. That's because sharing discovery makes courts more efficient, more transparent and more effective at finding the truth. One court stated:

*Of the courts that have considered protective orders of the nature proposed by the defendant, an overwhelming majority have refused to grant any type of protection from dissemination.*

Plaintiffs, like the folks we represent, have a right to obtain discoverable information through the rules of civil procedure. Sharing of such information (appropriately) not only effectuates an expedited and cost-effective discovery process, but also protects the public from defective products and corporate misconduct.

If you need more information on this subject contact Ben Keen, a lawyer in our Atlanta office, or Cole Portis or Ben Baker, lawyers in our Montgomery office, at 800-898-2034 or by email at Ben.Keen@beasleyallen.com, Cole.Portis@beasleyallen.com or Ben.Baker@beasleyallen.com.

#### **A LOOK AT CONFIDENTIAL SETTLEMENTS**

When our firm resolves lawsuits, the corporate Defendants often request confidentiality. For many reasons, we may also recommend to our clients that the amount of the settlement remain confidential. However, too often corporate Defendants will try to broaden the scope of the confidentiality. For example, a corporate Defendant may seek to keep its name, its documents, or even the fact there was a settlement confidential. To acquiesce to the corporate Defendants' demands will harm other victims of corporate wrongdoing and the public will remain in the dark about wrongful conduct.

There are several ways that lawyers and their clients can resist the use of blanket confidentiality clauses in settlements. First, stress the necessity of transparency. Typically, one of our client's main goals is to expose the wrongdoing of the Defendant. Thus, if corporate defendants insist on a harsh confidentiality clause then our clients are amenable to the idea of litigating the facts in an open court of law.

It is important for our clients and for the corporate defendants to understand early in the process that a strict confidentiality clause will never be considered. If a corporate Defendant attempts to insert such a clause into a release after the agreed upon settlement then we always strike the language. If the parties cannot resolve the dispute then Courts are not inclined to insist on confidentiality.

Proponents of confidentiality clauses in settlement agreements often argue that a reduced ability to make matters confidential will "chill" settlements. These commentators argue that restrictions in litigation secrecy will significantly impede the settlement process and strain courts as more cases are set for trial. Yet, there is not factual evidence to support these contentions. Actually, those studying this issue have found that more transparency in settlement agreements has not significantly

affected the number of cases bound for trial. See James E. Rooks, Jr., 55 S.C. L. Rev. 859 (2004).

At Beasley Allen, we believe that public knowledge of wrongdoing and dangers is essential to making our communities a safer place. We desire to see wrongdoers held accountable for their actions. We desire for the public to know about the wrongful conduct so that people can make wise and informed decisions about their safety.

If you need more information on this subject contact Cole Portis, who heads up our Personal Injury & Products Liability Section, or Dan Philyaw, a lawyer in our Atlanta office, at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Dan.Philyaw@beasleyallen.com.

#### **\$26 MILLION SETTLEMENT REACHED IN EXPLODING PRESSURE COOKER SUIT**

A \$26 million settlement with Lifetime Brands has been reached in a lawsuit involving an exploding pressure cooker. It was claimed that the company hid a faulty lock that caused a girl to suffer burns and multiple amputations. Samantha Gonzalez, now 5 years old, was badly burned by the contents of a Vasconia brand eight-quart pressure cooker that had a defective lock mechanism allowing it to open while under pressure. The company, realizing there was a problem with the pressure cooker, changed the part without informing the public or the Consumer Product Safety Commission (CPSC).

A Florida circuit court judge in Broward County approved the settlement last month. The child developed sepsis while she was hospitalized for her burns, resulting in the amputation of her left leg, most of her right foot, her left hand and all the fingers on her right hand.

The Plaintiff is represented by John Uustal, Michael Hersh and Catherine Darlson of Kelley/Uustal PLC. The case is *S. E.G. minor by and through her parents v. Lifetime Brands Inc.* (case number 16-016685) in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida.

Source: Law360.com

# X. MASS TORTS UPDATE

## THE ROLE OF ADVANCED DISCOVERY TECHNOLOGY IN THE BONE CEMENT LITIGATION

In 2018, Beasley Allen lawyers filed five HV Bone Cement cases in federal courts in North Carolina, Louisiana and Texas. These cases are now being primed for the discovery phase. Discovery will involve some of the world's largest medical device manufacturers, including DePuy, Stryker, Howmedica Osteonics, Biomet, DJO Global, and even some foreign manufacturers. Presently, the parties are discussing logistics to establish a protocol based on modern best practices for document production. One of the main concerns is how document production will be compatible with modern discovery technology.

Modern discovery technology is now capable of analyzing and categorizing millions of documents by predictive technologies. There are two basic types of e-discovery technologies: (1) search and (2) classification technology. Search technology uses keyword searches and returns "matching" documents based on the exact terms specified by the attorney. Search technology will not return a document unless the lawyer already knows or can figure out what terms are contained in the relevant document. In contrast, classification technology provides context by classifying documents into groups or categories based on predictive technology. One type of classification technology is known as "predictive coding."

Predictive coding is a type of technology-assisted review that relies on input from the attorney to predict how documents should be classified. Services our lawyers and staff use every day, such as Amazon and Netflix, already use similar technology to predict our choices. Similar to how Amazon uses input from you (your searches, views, purchases, and product ratings) to predict what you might like next, predictive coding software uses input from a lawyer's coding of a small set of documents to predict how that lawyer would code the rest of the documents. Once predictive review is complete, the technology's review can be measured for accuracy.

While this technology-assisted review is faster and more cost-effective (in large volume cases) than traditional document review, many lawyers might question whether those benefits give way to accuracy. Recent studies have shown that predictive coding is more accurate than

traditional manual document review. In one study, human reviewers missed between 20 percent and 75 percent of all relevant documents. Another study found that when one manual reviewer determined a document to be relevant, there was only about a 50 percent chance that a second reviewer would agree. Unlike manual review, predictive coding technology allows lawyers to objectively evaluate the computer's performance and adjust it if necessary.

The bone cement litigation will involve comprehensive discovery with millions of documents. Modern discovery technology, such as predictive coding, can dramatically reduce the number of documents that need to be reviewed manually, reduce costs and improve results. Our lawyers look forward to working with electronic discovery experts and utilizing this advanced technology in cases involving HV Bone Cement.

Beasley Allen lawyers continue to investigate cases involving early knee replacement failure due to high-viscosity 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 Torts Section, at 800-898-2034 or by email at Roger.Smith@BeasleyAllen.com or Ryan.Duplechin@BeasleyAllen.com.

Sources: American Association for Justice: Annika K. Martin, *How to Stop Worrying and Love Predictive Coding*, Trial (2016), South Carolina Law Review: Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. Rev. 633, 637 (2013), and American Bar Association: Aaron Goodman, *Predictive Coding: A Better Way to Deal with Electronically Stored Information*, 43 Litigation 23 (2016).

## XARELTO CLINICAL TRIAL HALTED BECAUSE OF INCREASED DEATHS AND BLEED EVENTS

There has been a halt in the clinical trials involving the drug Xarelto. Study 17938 (GALILEO) was a randomized, open label, active-controlled, multicenter, phase 3 trial that aimed to assess clinical outcomes after successful transcatheter aortic valve replacement (TAVR) in patients randomly assigned to receive either a Xarelto (rivaroxaban)-based anticoagulation strategy or an antiplatelet-based strategy. The first group was assigned to receive Xarelto 10 mg once a day and aspirin 75-100 mg once a day for 90 days followed by maintenance with Xarelto 10 mg once a day. The comparator group was assigned to receive Plavix (clopidogrel) 75 mg and aspirin

75-100 mg once a day for 90 days, followed by aspirin alone.

The trial was stopped in August 2018 on recommendation of the independent Data Safety Monitoring Board (DSMB) following a preliminary analysis of available data. The trial findings suggested an imbalance between the two study groups in all-cause mortality, thromboembolic, and bleeding events (see table).

These results are preliminary and based on incomplete data collection. The final study data will be assessed by regulatory authorities as soon as they are available, including an assessment of any implications for approved indications. Lawyers in our firm and others involved in the Xarelto litigation will promptly communicate all relevant updates from the assessment.

Table: Preliminary findings of Study 17938

Event	Rivaroxaban group (n=826)	Antiplatelet group (n=818)
Death or first thromboembolic events	117 (11%)	87 (9%)
All-cause death	56 (7%)	27 (3%)
Primary bleeding events	36 (4%)	21 (2%)
Data are number of events (% patients)		

Xarelto is not approved for prevention of blood clots in patients with prosthetic heart valves. In a letter to healthcare providers, Dr. Tristan P. Cooper, Medical Director of Bayer Ltd. instructed doctors that Xarelto treatment in patients who undergo transcatheter aortic valve replacement (TAVR) should be stopped and switched to standard of care. Xarelto is the subject of more than 16,000 lawsuits for various claimed injuries in a consolidated multidistrict litigation (MDL) in New Orleans. Andy Birchfield, who heads up our Mass Torts Section, is the co-lead counsel for the coordinated litigation in the MDL.

Source: UK MHRA website

## APPEALS COURT UPHOLDS \$2.5 MILLION RISPERDAL VERDICT

The Pennsylvania Superior Court upheld a \$2.5 million jury verdict against Johnson & Johnson in a lawsuit claiming the company's antipsychotic drug Risperdal caused an Alabama boy with autism to grow breasts. The case was returned to a lower court to determine whether the family was entitled to punitive damages as well.

The three-judge panel of the Superior Court of Pennsylvania rejected multiple arguments by J&J subsidiary Janssen Pharmaceuticals Inc., which sought to overturn the February 2015 verdict that the company had failed to warn Phillip Austin Pledger's family and physicians that Risp-

erdal elevated a hormone called prolactin and created an increased risk of gynecomastia, or breast-tissue growth in boys. Senior Judge Eugene B. Strassburger, writing for the unanimous panel, said:

*At the time Dr. [Jan] Mathisen initially prescribed Risperdal to Austin, Dr. Mathisen had no reason to believe that Risperdal would have any different effect on Austin's prolactin level than any other drug in its class. This is clearly not 'substantially the same' knowledge that the risk of gynecomastia was 23 times what Dr. Mathisen reasonably believed it to be.*

The Pledgers' case was considered a bellwether case for a large number of lawsuits nationwide connecting Risperdal to gynecomastia. It was the first case to go all the way to a verdict in the family's favor. Janssen sought to overturn the verdict on various grounds, including casting doubt on the qualifications of the Pledgers' expert witness linking Austin's use of Risperdal to his development of breasts.

The Pledgers filed their own appeal seeking a new trial exclusively on Janssen's punitive liability and any damages it might owe, since a lower court judge had said New Jersey law applied to punitive damages and outweighed Pennsylvania law, granting summary judgment on punitive damages to Janssen.

The Superior Court panel noted that the appeals court had remanded other similar Risperdal cases where the lower courts had only considered whether Pennsylvania or New Jersey law applied, rather than also considering the law of the Plaintiffs' home states. The court had remanded those cases to reconsider conflict-of-law principles between New Jersey and the home state and did the same for the Pledgers, whose home state was Alabama.

Tom Kline and Chip Becker, lawyers with Kline & Specter PC, who represent the Pledgers, said in a statement:

*We are pleased that the Superior Court has affirmed the jury verdict in favor of Austin Pledger, whose case was the first bellwether Risperdal trial. This is now the third plaintiffs' verdict in which the sufficiency of the evidence has been affirmed by the Superior Court and the case remanded for punitive damages proceedings, and the second published opinion where the court categorically rejects a Frye challenge to plaintiffs' expert causation testimony. This litigation has unquestionably turned strongly in the plaintiffs' favor with many additional listings ahead, including two*

*trials devoted solely to punitive damages.*

It appears Janssen has left the door open for another appeal. The Pledgers are represented by Stephen A. Sheller of Sheller PC, and Tom Kline, Chip Becker, Christopher A. Gomez and Ruxandra M. Laidacker of Kline & Specter PC. The case is *Pledger et al. v. Janssen Pharmaceuticals et al.*, (case number 2088 EDA 2016) in the Superior Court of Pennsylvania.

Source: Law360.com

#### **SETTLEMENT REACHED IN STRYKER HIP REPLACEMENT SUITS**

The makers of Stryker hip replacement components have reached a confidential settlement with patients who had surgery to replace those components. The confidential settlement includes a multidistrict litigation (MDL) case in Massachusetts federal court and a multicounty litigation in New Jersey state court. These cases were consolidated in 2017. About 125 cases dealing with Stryker's unique LFIT Anatomic Cobalt Chromium V40 femoral heads have been centralized in Massachusetts federal court since the U.S. Judicial Panel on Multidistrict Litigation decided in April to allow plaintiffs to consolidate their claims. More than 140 other cases have been consolidated in New Jersey state court.

The Stryker component, used for artificial hips, was manufactured by Howmedica Osteonics Corp. and was subject to two separate recalls after patients complained of pain, difficulty walking and tissue damage from corrosion of the products that required further surgery.

U.S. District Judge Indira Talwani wrote in an order last month that Archer Systems LLC will be the settlement administrator. Judge Talwani said discovery in the litigation will be stayed until July 31, 2019, unless Howmedica exercises its settlement walk-away rights. Judge Talwani previously had scheduled the first bellwether trial to begin in September 2019.

The Plaintiffs were represented in the settlement negotiations by Peter J. Flowers of Meyers & Flowers, Brenda S. Fulmer and C. Calvin Warriner III of Searcy Denney Scarola Barnhart & Shipley, Walter Kelley of Bernheim Dolinsky Kelley, Michael L. McGlamry and M.J. Blakely of Pope McGlamry Kilpatrick Morrison & Norwood, Joseph Osborne of Osborne & Francis, Ashleigh Raso of Meshbesh & Spence and Ellen Relkin of Weitz & Luxenberg

The cases are *In re: Stryker LFIT V40 Femoral Head Products Liability Litigation*, (case number 1:17-md-02768) in the

U.S. District Court for the District of Massachusetts, and *In re: Stryker LFIT CoCr V40 Femoral Heads Hip Implant Litigation*, (case number 624, docket number BER-L-7859-17) in the Superior Court of Bergen County, New Jersey.

Source: Law360.com

#### **DAVITA SETTLES DIALYSIS LAWSUITS**

National dialysis chain DaVita Healthcare Partners Inc. has reached a settlement with the families of three patients who won a \$384 million jury verdict in suits claiming their relatives died when DaVita knowingly used a dangerous solution during their treatment. A joint motion was filed in Colorado federal court by the families and DaVita telling U.S. District Judge R. Brooke Jackson the parties had reached a settlement in the three lawsuits. The motion asked for more time to get all the necessary signatures before filing the required dismissal paperwork.

A jury awarded the families of Irma Menchaca, Gary Saldana and Deborah Hardin, all DaVita patients, just under \$384 million. The jury found that DaVita was negligent and committed fraud by concealment when it used a solution during the patients' dialysis that it knew could cause life-threatening reactions. Each of the families received \$125 million in punitive damages in the verdicts. Hardin's family was awarded \$5 million in compensatory damages, Menchaca's family received \$2 million and Saldana's family received \$1.5 million.

The suits, which had a joint jury trial, claimed DaVita knew that the solution it was using during its patients' dialysis, GranuFlo, could cause cardiac arrest. It was alleged that DaVita learned about the risks before the U.S. Food and Drug Administration (FDA) did, but it failed to stop using GranuFlo and also failed to warn its physicians to watch for the reactions.

Menchaca and Hardin died in the middle of dialysis at their local DaVita clinics, and Saldana died shortly after he received dialysis at another DaVita clinic. The FDA recalled GranuFlo, which is made by Fresenius Medical Care North America, in 2012. The cases went to trial in June, and the jury came back with its verdict on June 27.

The Plaintiffs are represented by Molly Booker and Robert Carey of Hagens Berman Sobol Shapiro LLP and Stuart Paynter and Sara Willingham of Paynter Law Firm PLLC. The lead case is *White v. DaVita Healthcare Partners Inc.*, (case number 1:15-cv-02106) in the U.S. District Court for the District of Colorado.

Source: Law360.com

## **NHL NOW FACING LAWSUITS RELATING TO CTE ISSUES**

It has been quite evident that in many professional and amateur sports, athletes face a heightened risk of head impacts and traumatic brain injuries (TBI). A TBI is caused by a blow or other head trauma that changes how a brain normally functions. Without properly addressing TBIs, over time athletes can develop Chronic Traumatic Encephalopathy (CTE), which is caused by repeated head impacts over a number of years, or chronic TBIs. It is an incurable and fatal degenerative brain disease that can only be diagnosed after death, during an autopsy.

Recently, football has been front and center in the debate regarding concussions in both youth and professional sports. In fact, the NFL has responded to chronic traumatic encephalopathy concerns by paying out more than \$765 million to settle lawsuits brought by retired players, as well as scrambling to improve training and equipment, and even fundamentally changing rules to try to eliminate the most violent collisions.

Although it is discussed far less, the National Hockey League (NHL) is also facing criticism and lawsuits related to the League's complicated relationship with concussions and CTE. In 2013, former hockey players brought a lawsuit against the NHL claiming the League should have done more to educate them about concussion-related risks inherent in the sport. While the NFL has taken great effort to reduce the risk of concussions and CTE in players, the NHL is still fighting its lawsuit five years later.

NHL commissioner Gary Bettman has said the suit "doesn't have merit" and he denies a link between blows to the head and CTE. A series of trials is currently scheduled for 2019, but reportedly the parties are attempting to move closer to settlement.

While still not admitting a link between head injuries and CTE, the NHL has gotten more serious about brain injury along with the rest of the sporting world, banning checks to the head from a lateral or blind-side position and following the NFL in introducing designated "concussion spotters"—trained officials whose duty it is to watch games and identify players who may have suffered a head injury. The NHL has also updated its concussion protocol to include "central spotters" watching every game from NHL offices.

Although the NHL has a reticence to admit a link between CTE and blows to the head, it cannot be disputed that without proper rules and training, games can be dangerous for players. To date, there is a growing list of NHL players who have

already had a concussion this new season. But it's hard to track just how many concussions NHL players experience, because teams are not required by the league to publicly release injury news. As a result, it is difficult to ascertain just how well the NHL's updated policies and procedures are working.

A number of our firm's clients have suffered TBIs. It has been because of their experiences in litigation that our lawyers understand the severity of the injuries and the importance of access to services. In fact, some of our lawyers provide leadership and guidance on the Alabama Head Injury Foundation's state and local boards. If you have a case involving a traumatic brain injury, contact Mike Andrews, a lawyer in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com, or Rachel Boyd, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Rachel.Boyd@beasleyallen.com. .

## **NEW J&J PELVIC MESH TRIAL ORDERED IN PENNSYLVANIA**

Philadelphia Court of Common Pleas Judge Michael Erdos ordered a new trial in a woman's suit alleging she was injured by a pelvic mesh implant made by a Johnson & Johnson unit. Judge Erdos previously overturned part of the verdict that had been in the company's favor. A 2017 jury had found that while the Ethicon pelvic mesh Plaintiff Kimberly Adkins was implanted with was defectively designed, the company didn't cause the injuries that both sides acknowledged. Last year Judge Erdos ruled that the jury verdict was inconsistent and overturned that part of the verdict. He said the jury's finding that a design defect wasn't a proximate cause of the Plaintiff injury went against the weight of the evidence and entitled the Plaintiff to a new trial.

Both the Plaintiff's expert, obstetrician-gynecologist Dr. Bruce Rosenzweig, and her treating physician testified that Ethicon's so-called TVT Secur pelvic mesh, which Kimberly Adkins had implanted in July 2010 to treat her urinary stress incontinence, caused her pain, burning and irritation. Judge Erdos pointed out that Ethicon's own expert conceded that the mesh injured Adkins, necessitating surgery to remove it.

The jury also found that Ethicon's warnings were inadequate, but Judge Erdos said that a new trial was warranted on that claim, saying that the jury's findings on that issue don't necessarily mean that those warnings caused Adkins to be injured. The judge said there was evidence

that Dr. George Petit, her surgeon, kept up with medical literature and that complications from the device were well-known in the medical community. Judge Erdos added:

*Therefore, he may have known the true risks of harm associated with the TVT-Secure despite appellant's failure to warn pelvic floor surgeons directly. Moreover, it became clear at trial that Dr. Petit did not communicate to [Adkins] all of the risks that [Ethicon] did make known to surgeons like Dr. Petit.*

Judge Erdos said the jury could find that adequate warnings would not have changed Dr. Petit's decision to recommend the device or his discussion with Ms. Adkins. The lawsuit was filed in July 2013 seeking damages after a portion of the TVT Secur implant eroded into the woman's vaginal canal, leaving her in significant pain. The mesh erosion resulted in her undergoing surgery to remove a portion of the implant in September 2012.

Ethicon's victory at trial came after losses in four prior mesh-related cases dating back to December 2015 that have left the company facing nearly \$50 million in damages.

Ms. Adkins is represented by Bryan Aylstock, Daniel Thornburgh and James Barger of Aylstock Witkin Kreis & Overholtz PLLC and Lee Balefsky of Kline & Specter PC. The case is *Kimberly Adkins v. Ethicon Inc. et al.*, (case number 130700919) in the Court of Common Pleas of Philadelphia County, Pennsylvania.

Source: Law360.com

## **ONGLYZA CASES CENTRALIZED IN THE EASTERN DISTRICT OF KENTUCKY**

The Judicial Panel on Multidistrict Litigation (JPML) in February consolidated all Onglyza lawsuits in the United States District Court for the Eastern District of Kentucky. There are 220 lawsuits pending in the Onglyza MDL as of October 2018.

Onglyza was first introduced to the market in July 2009 as a treatment for Type II Diabetes Mellitus. The drug works primarily by attempting to reduce the A1C levels to a normal, healthy level. Onglyza has been the subject of recent litigation because of the drug's association with increased risk of congestive heart failure, acute hypoxic respiratory failure, and coronary artery disease (among other cardiovascular-related complications already common in Type II diabetics).

When Onglyza was first introduced to the market in 2009, it did not adequately warn patients or doctors about the link to

these significant side effects. It wasn't until after the drug was sold to patients across the country that the U.S. Food and Drug Administration (FDA) required additional warnings, which were added in April 2016.

Onglyza lawsuits have been filed in a number of federal courts across the country. At the time of consolidation, there were 84 cases pending in more than 30 federal district courts. The Judicial Panel on Multidistrict Litigation (JPML) decided to centralize these suits in the Eastern District of Kentucky because it was relatively accessible to both sides and the longest pending Onglyza action was already pending in this court.

Onglyza is just one of many Type II diabetes drugs facing litigation in recent years. Others include Invokana and Farxiga, which are in a class known as SGLT2 inhibitors. Invokana was manufactured and marketed by Johnson & Johnson and has been linked to a significantly increased risk for amputations, diabetic ketoacidosis and acute kidney injury. Johnson & Johnson recently agreed to settle a number of Invokana cases with the amounts of settlements being confidential. If you need more information, contact Liz Eiland, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at Liz.Eiland@beasleyallen.com.

Sources: United States Judicial Panel on Multidistrict Litigation, Onglyza US Consumers Website and Beasley Allen "Invokana"

#### **INCRETIN THERAPY (BYETTA, JANUVIA, JANUMET, VICTOZA) CONSOLIDATED STATE COURT CLAIMS UPDATE**

We will give you an update on the Incretin Therapy Litigation because of an important ruling on preemption. The California Court of Appeal (Second Appellate District) reversed the trial court's summary judgment order last month, reinstating approximately 300 cases involving Incretin therapy. Plaintiffs had alleged state-law claims asserting that pharmaceutical manufacturers failed to warn consumers that a class of diabetes medication commonly known as "incretin-based drugs" increases the risk of pancreatic cancer.

The manufacturers moved for summary judgment arguing that Plaintiffs' claims were preempted under *Wyeth v. Levine* (2009) 555 U.S. 555, saying the undisputed evidence showed the Food and Drug Administration (FDA) would not have permitted a warning for pancreatic cancer had one been submitted by the manufacturers.

Defendants' contentions were based primarily on a 2014 publication by FDA scientists suggesting that evidence for the proposed causal association between the

drugs and pancreatic cancer was "inconsistent with the current data" and that the "current knowledge is adequately reflected" in the product labels.

Plaintiffs contended that the FDA's position article was not determinative of the causation issue, and the article itself acknowledged as much, stating that the FDA had not reached a "final conclusion at this time regarding such a causal relationship."

The trial court agreed with Defendants' interpretation of the article and granted summary judgment in Defendants' favor. However, the appellate court saw things differently, and reversed the trial court. The court determined, among other things, that the evidence offered by Defendants did not reach the high bar of "clear evidence" needed to establish that the FDA would have rejected any proposed label warning by Defendants.

The California state court consolidated cases have now been reinstated and discovery has resumed. This outcome is consistent with the Federal multidistrict litigation (MDL) Court's ruling late last year. Those cases are again moving forward as well. If you need more information on this matter, contact David Dearing, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at David.Dearing@beasleyallen.com.

## **XI. PREMISES LIABILITY UPDATE**

### **LAWSUIT FILED OVER NATURAL GAS EXPLOSION**

The widow of a UGI Utilities employee who was killed in a July 2017 natural gas explosion that destroyed a house in Pennsylvania has filed a wrongful death suit over her husband's death. Plaintiff Kim Boudier sued Honeywell International Inc. and other Defendants in Philadelphia County Court. She says a defective part made by Honeywell caused the explosion. Richard Boudier, 54, was killed by flying debris when the explosion occurred as he investigated a gas leak at the home.

It's alleged in the complaint that the blast can be traced to a defective T coupling made by Honeywell that connected the home to the gas supply line. The gas was leaking from that tee, according to the suit, which also names Contractors Group Inc., a Wilkes-Barre firm that installed the tee, as a Defendant. It's alleged that PPL, a named Defendant, was at fault for not turning off the electricity to the home until after the blast.

The Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement has filed notice that it wants to fine UGI \$2.1 million over the explosion. The investigators claim UGI failed to properly react to the leak by shutting off the gas main to the neighborhood.

Source: Pennlive.com

### **WIFE OF WORKER KILLED IN EXPLOSION FILES SUIT**

The wife of Omar Solis, who was killed on Nov. 3 in an explosion in Chicago, has filed a wrongful death lawsuit against Metro Transit Co., the commuter rail agency in the city. Sandy Zavala filed her suit in Cook County claiming that Metro failed to provide her husband, who was a Metro track inspector, with a reasonably safe place to work.

The lawsuit also contends among other allegations that Metro violated engineering rules regarding the use of flammable gas tanks and failed to provide sufficient manpower to perform the assigned tasks. The Plaintiff filed an emergency motion to inspect and preserve evidence, including trucks, welding equipment and railroad tracks.

The decedent and another worker were using torches to make repairs to elevated tracks when the explosion occurred. Solis, a father of two boys, was pronounced dead at a local Illinois hospital about 30 minutes after the explosion. The second man working at the scene was taken to a local hospital in critical condition.

The decedent, who was from a railroad family, started working at Metra when he was 20 and had a 17-year-long career with the agency. It should be noted that railroad workers in Illinois are not subject to state workers' compensation laws.

## **XII. WORKPLACE HAZARDS**

### **WORKPLACE HAZARDS—TRANSPORTATION IS THE LEADING CAUSE OF ON-THE-JOB FATALITIES**

In 2016, 5,190 US workers were killed on the job according to Occupational Safety and Health Administration (OSHA). That averages out to approximately 99 people per week, or more than 14 people per day. Unfortunately, fatal work injuries have been on the rise for three consecutive years. Contemplating those stats likely

leads one to think about heavy industry and other seemingly “dangerous jobs.”

However, many of those deaths are suffered by those working much more innocuous occupations. In fact, the most common on-the-job cause of death is automobile accidents. Truck and delivery drivers along with traveling sales workers are among the occupations with the highest on-the-job fatality rates.

Forty percent of the 5,190 on-the-job fatalities were attributed to automobile accidents. Interestingly, this is more than construction and heavy industry deaths combined. Falls and deaths caused by machinery or equipment were beat out by violence as the second most likely cause of on-the-job deaths. The occupation with the second highest on-the-job death rate was farmers, ranchers and other agricultural workers.

In response to the high rates of automobile-related on-the-job fatalities, OSHA issued a safety bulletin titled “Safe Driving Practices for Employees.” It is not uncommon for OSHA to issue safety recommendations to employees; however, it is interesting in the context of safe driving. These OSHA recommendations overlap with many of the Department of Transportation’s recommendations and guidelines for commercial carriers, yet OSHA has no authority to enforce most of these recommendations. Moreover, many of the recommendations are common sensical and/or already law. Nevertheless, due to the staggering numbers of workers killed on the road, OSHA issued the following guidelines.

#### **Stay Safe**

- Use a seat belt at all times—driver and passenger(s).
- Be well-rested before driving.
- Avoid taking medications that make you drowsy.
- Set a realistic goal for the number of miles that you can drive safely each day.
- If you are impaired by alcohol or any drug, do not drive.

#### **Stay Focused**

- Driving requires your full attention. Avoid distractions, such as adjusting the radio or other controls, eating or drinking, and talking on the phone.
- Continually search the roadway to be alert to situations requiring quick action.
- Stop about every two hours for a break. Get out of the vehicle to stretch, take a walk, and get refreshed.

- Avoid aggressive driving.
- Keep your cool in traffic!
- Be patient and courteous to other drivers.
- Do not take other drivers’ actions personally.
- Reduce your stress by planning your route ahead of time (bring the maps and directions), allowing plenty of travel time, and avoiding crowded roadways and busy driving times.

Lawyers in our firm routinely see accidents resulting in serious injuries and death due to careless and distracted drivers. Hopefully OSHA’s campaign will decrease the number of on-the-job automobile accident fatalities. If you need more information, 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](mailto:Evan.Allen@beasleyallen.com).

Sources: <https://www.nsc.org/work-safety/tools-resources/infographics/workplace-fatalities> and [https://www.osha.gov/Publications/Safe\\_Driving\\_Practices.pdf](https://www.osha.gov/Publications/Safe_Driving_Practices.pdf)

## **XIII. TRANSPORTATION LITIGATION**

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### ***THE TRAGIC LION AIR CRASH: A RECIPE FOR DISASTER***

The crash of a two-month-old Boeing 737 MAX 8 jet claimed the lives of 189 passengers and crew members on Oct. 29, just 13 minutes after takeoff from Jakarta, Indonesia. The airplane for Lion Air Flight 610 had logged only 800 hours and is touted to be the “top of the line” and “one of the best you can buy.” So, its short life has raised grave concerns about several factors that seem to have contributed to the tragedy. At press time, the actual cause of the crash had not officially been determined. However, as the investigation unfolds, findings by the Indonesian Transportation Safety Committee appear to baffle many in the aviation industry.

#### ***MALFUNCTIONING HARDWARE AND SOFTWARE***

After recovering the flight data recorders, investigators zeroed in on malfunctioning angle of attack (AOA) sensors, according to Bloomberg. The AOA sensors tell the flight crew the plane’s angle or degree of ascent or descent. The sensors’ data is communicated to the plane’s flight

control system and tells it if the plane is in danger of stalling.

In its latest iterations of the 737 (MAX 8 and 9), Boeing incorporated a new automated stall-prevention system called a Maneuvering Characteristics Augmentation System (MCAS) as part of the flight control system. The MCAS can push the plane’s nose down unexpectedly, even when the aircraft is in the manual operational mode, CNN reported. While Boeing said pilots can override the automatic action by using extra force, safety experts and U.S. officials disagree. They explain that the automatic system can push the nose down so strongly that flight crews cannot pull it back up. In fact, new data released by Indonesian investigators showed pilots of Flight 610 were pulling back on the control column with a force of as much as 100 pounds of pressure, Fortune reported.

Within seconds after takeoff, numerous warnings began blasting in the cockpit of the doomed flight, including a stick shaker on the captain’s side. The stick shaker is a loud device that thumps and vibrates the control column to let pilots know they are in danger of losing lift on the wings. It appears that the device was activated by an erroneous reading from the malfunctioning AOA sensor on the captain’s side, which indicated that the plane’s nose was too high. Although the AOA sensor on the co-pilot’s side did not reflect the same reading, nor did it activate the copilot’s stick shaker, the erroneous reading triggered the MCAS to lower the aircraft’s nose.

Despite the fluctuations in altitude, the flight crew was able to control the plane for the first 10 minutes of the flight, but the crew was not able to override the system’s final plunge. It is clear that the pilots were fighting a losing battle trying to keep the plane in the air during the final minutes prior to the crash.

The initial findings prompted Boeing to issue warnings as part of the Operations Manual Bulletin. The U.S. Federal Aviation Administration (FAA) followed with Airworthiness Directive 2018-23-51. The warnings were issued to all owners, operators and air carriers using the 737 MAX about the potential for erroneous readings from flight-control software on the aircraft. The manufacturer claimed its warning reinforced procedures that were included in the aircraft’s flight manual.

#### ***BOEING’S ALLEGED FAILURE TO INFORM***

However, Bloomberg reported the three largest pilots’ unions in the U.S., including the Southwest Airlines Pilots Association, the Allied Pilots Association at American Airlines Group Inc. (APA) and the Air Line Pilots Association (representing United

Continental Holdings Inc.'s flight crews), along with Lion Air, refute Boeing's assertions about the warning. They claim that Boeing withheld critical information about the new system and that the first time they learned about it was through the warnings issued by Boeing and the FAA following the Lion Air crash. The discovery has prompted the unions and their members to question what other information they have not been privy to about the new 737 models and how they can operate a plane without knowing about all the systems on board.

The new MCAS system was designed to operate only in rare conditions while pilots are flying the aircraft in manual operational mode. It is, most likely, for this reason Boeing didn't include the critical information in the flight manual for the 737. The pilots are demanding that the information is added and have said Boeing's withholding of the information violated the aviation industry's "safety culture." Additionally, although it isn't clear why, the 737 is fitted with a separate component that makes it more difficult to pull back if a stall has been indicated.

#### **CLEARED TO FLY DESPITE PERSISTENT PROBLEMS**

Further, Flight 610 was not the first time the aircraft encountered problems. It experienced airspeed and altitude problems on its last four flights including a flight from Manado, in North Sulawesi, to Denpasar, Bali, the day before Flight 610. Airspeed problems prompted technicians to change the AOA sensors as instructed by the Boeing troubleshooting manual. The plane was then declared fit to fly. On its next flight, despite the roller-coaster takeoff, which would have sent some pilots back to the airport, the flight continued to its destination, Jakarta, Indonesia. Along the way, the plane experienced more of the same problems with airspeed, altitude and its AOA sensors. On the ground in Jakarta, maintenance crews addressed a problem with the pitot tubes, which measure air rushing over them to help determine air speed. The plane was, once again, declared fit to fly—sealing the fate of Flight 610 and the 189 souls on board.

#### **VICTIMS' FAMILIES SEEKING ANSWERS AND JUSTICE**

The investigation is just beginning and typically takes a year or longer to complete. Investigators will continue to examine the myriad factors that appear to have contributed to the deadly flight, in addition to understanding how separate flights with similar conditions and problems ended so differently, to give the families of those who perished the answers they are seeking.

At least one family has pushed for faster accountability and has filed the first of what will likely be many lawsuits. The family of Dr. Rio Nanda Pratama has filed suit against Boeing in the Circuit Court of Cook County Illinois, which serves as the headquarters for Boeing.

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: CNN, *Bloomberg*, *Fortune*, Boeing, Federal Aviation Administration (FAA) and *USA Today*

#### **JURY AWARDS \$260 MILLION IN WRONGFUL DEATH LAWSUIT**

A Texas jury has awarded \$260 million in a lawsuit involving the death of a man killed when his van ran into the side of a tractor-trailer positioned across all four lanes of a highway. On Feb. 13, 2016, the 21-year-old victim, Riley McPherson, was driving a 2008 Chevy Express van southbound on Highway 271 at 5:35 a.m. when a tractor-trailer driven by Eric Wayne Jefferson "suddenly" pulled out of a private driveway, positioning itself to back in once more. As Jefferson's truck sat blocking the two northbound and two southbound lanes, Riley McPherson crashed into the side of the trailer and was killed in the collision. The truck driver had been driving at that point for 17 hours, much longer than the maximum allowed by federal law.

The jury awarded \$80 million to the father, Eddie McPherson, for past and future loss of companionship and \$60 million for his past and future mental anguish; \$60 million to the mother, Karen Pearson, for past and future loss of companionship and \$60 million for her past and future mental anguish.

These amounts will be reduced by 5 percent to account for the percentages of fault assigned by the jury. The jury said that Eric Jefferson was 65 percent responsible for the crash, Jefferson Trucking was 20 percent responsible, Timothy Jefferson as Eric Jefferson's employer was 10 percent responsible and Riley McPherson was 5 percent responsible.

The jury also said that Eric Jefferson was an employee and acting as an employee of Jefferson Trucking and of Timothy Jefferson, and that all three Defendants and the decedent Riley McPherson were negligent. The lawsuit focused on Jefferson Trucking's negligence in hiring Eric Jefferson,

who was allegedly known to be a reckless driver.

Pearson and Eddie McPherson are represented by John Hull and Brent Goudarzi of Goudarzi & Young LLP. The case is *McPherson v. Jefferson Trucking et al.*, (case number 16-00247) in the District Court of Upshur County, Texas, 115<sup>th</sup> Judicial District.

Source: Law360.com

#### **THE OVERUSED DEFENSE IN 18-WHEELER TRUCK WRECK CASES OF SUDDEN MEDICAL EMERGENCY**

There seems to be an increased tendency in 18-wheeler drivers and trucking companies in civil litigation who blame their collisions on sudden medical emergencies. They often claim that medical complications such as syncope, heart attacks, diabetic events, seizures, strokes, severe sneezing, cramps, reactions to medicine, and even mental delusions caused the incident. Many of these events can be medically confirmed, but many go undiagnosed and cannot be confirmed with objective medical testing.

The Sudden Medical Emergency defense falls in the category of defenses known as an "Act of God." The thought is that those motor vehicle accidents are unavoidable and could not have been prevented with reasonable human care.

This defense is often an excuse for an event that was very avoidable. Lawyers in our firm have been litigating one such case for some time. In that case, the truck driver had a history of falling-asleep accidents, sleep apnea and excessive daytime sleepiness. Despite those facts, the truck driver instead claimed he had a syncope event that caused him to lose consciousness. The driver failed to tell anyone on the accident scene of his problem and his doctor could not confirm the diagnosis with any testing.

This defense attempts to show that the truck driver or trucking company was placed in a hazardous situation due to no fault of their own. This means that they went without any warning symptoms or knowledge that such an event could occur. However, showing that there were warning symptoms or knowledge defeats the Defense and puts liability on the truck driver and trucking company.

Quite often it's possible to show that the driver's so-called medical event was really driver fatigue. This can be accomplished through the driver's past driving record, medical records and driver logs.

Another avenue to defeat these claims is to show that the medical event was foreseeable to the driver or trucking company due to a history or signs of the problem.

Discovery aimed at the company can uncover some most interesting information.

Chris Glover, who heads up our Atlanta office, is one of the lawyers in the firm who handle truck wreck cases. Chris can be reached at 800-898-2034 or by email at [Chris.Glover@beasleyallen.com](mailto:Chris.Glover@beasleyallen.com).

## XIV. TOXIC TORT LITIGATION CONCERNS

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### **PLAINTIFFS THROUGHOUT THE COUNTRY CONTINUE TO FILE LAWSUITS ALLEGING THEIR USE OF ROUNDUP WEEDKILLER GAVE THEM CANCER**

Glyphosate (the main ingredient in Roundup) is the most commonly used weed killer in the world. In 2015, the International Agency for Research on Cancer (IARC) found that glyphosate is “probably carcinogenic to humans.” Since then, thousands of Plaintiffs throughout the country have filed lawsuits against Monsanto (now owned by Bayer) alleging that exposure to Roundup caused them or their relatives to develop Non-Hodgkins Lymphoma and that Monsanto failed to warn them of the risks.

The first such case to go to trial alleging that exposure to Roundup weedkiller causes cancer resulted in a combined \$289 million jury verdict in California state court in August 2018. Though that verdict was subsequently reduced by the court to \$78.6 million, the court upheld the jury’s finding that Roundup caused the Plaintiff’s cancer and that Monsanto had acted with malice.

At the end of August there were approximately 8,700 lawsuits pending against Bayer across the country, with this number having jumped to 9,300 filings as of late October. Bayer has disclosed that the number of lawsuits continues to rise and that it expects the filings to continue to grow. Bayer has continued to vigorously contest each lawsuit, arguing that scientific evidence does not establish a link between Roundup and cancer.

A California judge has granted a couple’s request to expedite the trial schedule for their lawsuit alleging Monsanto’s Roundup and Ranger Pro herbicides gave them cancer, saying their health could impact their ability to pursue their claims. The trial was set for March 18. The ruling could make it the third product liability case of its kind over Monsanto’s Roundup and Ranger Pro set to go to a jury.

If you would like more information about these cases, you can contact John Tomlinson or Grant Cofer, lawyers in our firm’s Toxic Torts Section, at 800-898-2034 or by email at [John.Tomlinson@beasleyallen.com](mailto:John.Tomlinson@beasleyallen.com) or [Grant.Cofer@beasleyallen.com](mailto:Grant.Cofer@beasleyallen.com).

Sources: WSJ.com and Law360.com

### **RECENT VERDICTS FIND ASBESTOS PRODUCT MANUFACTURERS RESPONSIBLE FOR DEVELOPMENT OF MESOTHELIOMA**

In recent months, Courts around the country have delivered awards to victims diagnosed with mesothelioma due to workplace and associated secondary exposure.

Recently, a jury in North Carolina Federal Court found Covil Corporation liable for the Plaintiff’s mesothelioma. The Plaintiff, Franklin Finch, worked at Firestone Tire factory from 1975-1995, insulating pipes. The insulation Mr. Finch worked with contained asbestos and he handled these materials daily for 20 years. Mr. Finch’s widow was awarded \$37.7 million in compensation for Covil Corp.’s negligence, which caused Mr. Finch’s death.

Similarly, a jury in New Orleans returned a verdict concerning asbestos containing insulation. In October, the family of the Plaintiff Donald Foret was awarded \$5.5 million for Mr. Foret’s exposure to asbestos while working as an insulator at Main Iron Works.

A jury in Oakland, California awarded a Plaintiff who developed mesothelioma due to a more indirect exposure to asbestos. The Plaintiff Barbara Barr and her husband owned and operated an automobile store in the 1980s. While Mrs. Barr worked in the office area, her husband performed the automotive work in the auto parts section of the store. Mrs. Barr’s exposure resulted from the changing of brakes made with asbestos, specifically ESI brakes, in the auto shop and from simply opening the boxes containing the brakes. The jury found the brake manufacturers, Parker-Hannifin and Standard Motor Products, strictly liable and awarded more than \$8.6 million to Mrs. Barr.

If you would like more information about these cases or have any questions concerning asbestos related illnesses, you can contact Ashtyne Traylor, a lawyer in the Toxic Torts Section. She can be reached at 800-898-2034 and by email at [Ashtyne.Traylor@beasleyallen.com](mailto:Ashtyne.Traylor@beasleyallen.com).

### **NEW YORK FIRST DEPARTMENT APPELLATE WIN AGAINST JENKINS BROTHERS**

Last month an Appellate Court in New York City affirmed a trial court’s decision

to grant *additur* in a mesothelioma verdict against asbestos product manufacturer Jenkins Bros. In the original trial, the jury awarded the family of Thomas McGlynn \$1.8 million in past pain and suffering. Mr. McGlynn died from mesothelioma caused by asbestos exposure before trial.

After the trial, Judge Martin Shulman granted a motion for *additur*, increasing both the awards for past and future pain and suffering, marking the first time in New York City Asbestos Litigation (NYCAL) history that a jury’s award was judicially increased.

Recently, New York’s First Department Appellate Division unanimously upheld Judge Martin Shulman’s post-trial decision to increase the award for past pain and suffering, raising the total value of the Plaintiff’s verdict to \$6.8 million (increasing the past pain and suffering award to \$4 million).

Additionally, the Court also affirmed the decision that Defendants cannot elicit testimony from Plaintiff’s expert witnesses to prove their specific causation burden. They will in fact now be forced to actually meet their burden of proof and potentially waive their medical defenses if they attempt to point their fingers at settled Defendants at trial. The Court also affirmed the recklessness finding and established a standard that the Defendant need not be aware of merely the hazards of their products to the Plaintiff, but also to similarly situated individuals. Finally, the Court denied the argument that all settled parties must appear on the verdict sheet.

For more information about asbestos exposure or mesothelioma, contact Beasley Allen mesothelioma lawyer Sharon J. Zinns, who is in our Atlanta office, at 800-898-2034 or by email at [Sharon.Zinns@beasleyallen.com](mailto:Sharon.Zinns@beasleyallen.com).

### **CALIFORNIA ISSUES NEW PFOA AND PFOS GUIDELINES**

The California State Water Resources Control Board has released its revised drinking water guidelines following the discovery of PFOA and PFOS in the state’s drinking water. PFOA and PFOS are used in the production of consumer products for waterproofing, stain-resistance, and non-stick surfaces as well as in firefighting foam used at airports and military bases. While effective, these chemicals pose risks to both the environment and human health.

The new guidelines established by the Board create a notification level of 14 parts per trillion (ppt) for PFOA and 13 ppt for PFOS. When the notification levels are exceeded, it is recommended that the water source be removed from service and

treated. Although this is merely a preliminary advisory, California is yet another state to set advisory levels far below the 70 ppt established by the U.S. Environmental Protection Agency (EPA) in 2016. The Board used the EPA's 70 ppt to set a response level which requires the water source to be removed from service entirely if it is unable to reduce PFOA and PFOS levels below the limit.

Newly promulgated regulations will also require businesses to adequately warn employees who may be exposed to PFOA or PFOS. Starting in November 2018, companies doing business in California with 10 or more employees are required by the California Office of Environmental Health Hazard Assessment to provide adequate warning to their employees before knowingly exposing them to PFOA or PFOS contaminants. These chemicals were included under the State's Proposition 65 list of contaminants known to cause reproductive toxicity. Regulation under Proposition 65 subjects businesses to civil penalties up to \$2,500 per violation per day as well as an award of attorneys' fees if they fail to conform to the new regulations.

Both states and the federal government have made significant progress in updating their toxicological profiles of PFOS and PFOA and recommending new or stricter exposure limits. As this occurs, we expect an increase in the number of lawsuits filed by water systems and individuals whose drinking water has been contaminated.

Our firm, along with Roger H. Bedford of Roger Bedford & Associates, has filed lawsuits on behalf of the water systems in Gadsden and Centre, Alabama. These complaints allege that carpet and textile companies, manufacturers, and chemical suppliers located upstream in Dalton, Georgia are responsible for contaminating the Coosa River and Weiss Lake. 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 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com or Ryan.Kral@beasleyallen.com.

Sources: *Bloomberg News*

#### **POTENTIAL CONSOLIDATION OF AQUEOUS FILM-FORMING FOAM LAWSUITS**

The manufacturers of aqueous film-forming foams (AFFF) have filed an appli-

cation with the Judicial Panel of Multidistrict Litigation (JPML) requesting that the fire-fighting foam lawsuits be designated as a multidistrict litigation (MDL). The use of AFFF during routine fire extinguishing exercises has contaminated drinking water supplies of local communities surrounding military bases around the country. There has been documented use of the firefighting foam at hundreds of sites where fire training and crash training exercises have been conducted for decades.

AFFF contains perfluorinated chemicals (PFCs), which are highly toxic and have been linked to neonatal death, liver toxicity, immunity problems, endocrine disorders and certain cancers. The Environmental Protection Agency (EPA) has suggested that exposure to PFCs may lead to adverse effects including, but not limited to, low birth weight, accelerated puberty, and immune and thyroid disorders. The Plaintiffs, including individuals and municipalities, allege that the manufacturers were aware of the hazardous nature of these toxic chemicals for decades.

The manufacturers seek the transfer of the cases to the U.S. District Court for the District of Massachusetts or to the Southern District of New York. The majority of Plaintiffs do not oppose the consolidation of the cases but did file a response with the JPML requesting that the cases be transferred to the Northern District of Alabama. Approximately 85 cases are currently pending in the district courts of several states. The number of court filings is growing steadily, and some cases have progressed into the discovery phase.

The JPML agreed to hear oral arguments on Nov. 29 over whether to consolidate and centralize the lawsuits. If the JPML granted the request for the creation of an MDL, the cases will be consolidated and transferred to one court for pretrial proceedings. Both parties agree that the consolidation and centralization of the cases in one court will prevent contradictory rulings and prevent duplicative discovery.

If you have any questions concerning this matter, contact Rhon Jones or Megan Robinson, lawyers in our firm's Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or Megan.Robinson@beasleyallen.com. .

#### **PLAINTIFFS RE-FILE BENZENE COMPLAINT IN NORTH CAROLINA COURT**

Recently, benzene Plaintiffs have re-filed their lawsuit in a North Carolina federal court after a Pennsylvania state court dismissed their claims on forum non conveniens grounds, arguing that a former

employee of Duke Energy Corp. developed Myelodysplastic Syndrome (MDS) as a result of exposure to benzene-containing products. In the complaint filed last month in the U.S. District Court for the Western District of North Carolina, the Plaintiffs stated that the exposure happened in North Carolina and, therefore, personal jurisdiction exists. *Rhyne, et al. v. U.S. Steel Corp., et al.*, No. 18-00587 (W.D. N.C.).

Plaintiffs Gordon E. and Carol Rhyne filed the lawsuit, noting that it was originally first filed in Pennsylvania state court. In their complaint, the Plaintiffs said that Gordon Rhyne was exposed to benzene-containing products in both an occupational and a non-occupational capacity. Mr. Rhyne in part said he came into contact with the products while working with Duke Energy Corp. at its Riverbend Facility from March 1970 to May 2006. During the course of his employment, he worked with penetrating solvents, oil, paint thinners, lubricating oil, and other benzene-containing products used for maintenance and mechanical activities.

As a result of the exposure, Mr. Rhyne said he developed MDS. While the complaint was pending in Pennsylvania state court, Defendant CRC Industries moved to dismiss the action, arguing that the Plaintiffs are residents of North Carolina and that all of the alleged exposures occurred in North Carolina. The Pennsylvania Court of Common Pleas for Philadelphia County sided with the Defendant and granted the motion to dismiss without prejudice with leave to re-file the action in North Carolina "or any other appropriate jurisdiction."

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

Source: *Harris Martin Publishing*

#### **WRONGFUL DEATH SUIT FILED AGAINST TURTLE WAX INC.**

A Plaintiff in Madison County, Illinois, has filed suit against Turtle Wax Inc. alleging that the car wax manufacturer's failure to exercise reasonable care in the development and sale of its car wax products caused the death of her husband Rodney Alford. According to the complaint, the decedent regularly applied Turtle Wax car polish on his vehicles throughout his lifetime, and thereby unknowingly exposed himself to benzene within the product through inhalation and dermal contact with the polish. The lawsuit alleges as a

result of years of using Turtle Wax's automobile polish, Mr. Alford was diagnosed with Acute Myeloid Leukemia in 2000 and subsequently died from the disease in 2016.

Benzene is one of the 20 most widely used chemicals in the United States, and is a naturally occurring part of crude oil and gasoline. Human exposure to benzene has been associated with a range of acute and long-term effects and diseases, including cancer and aplastic anemia. Benzene is a known carcinogen, based on evidence from both human and animal studies, and has been linked to the development of acute myeloid leukemia (AML), acute lymphocytic leukemia (ALL), chronic lymphocytic leukemia (CLL), and other blood-related cancers such as aplastic anemia or multiple myeloma.

Plaintiff Marilyn Alford, the decedent's surviving spouse, alleges that Turtle Wax is responsible for her husband's death because Turtle Wax used benzene in its products when safer substitutes were readily available, and furthermore failed to provide adequate warnings that its products contained hazardous substances such as benzene.

If you would like more information about these cases, you can contact John Tomlinson or Grant Cofer, lawyers in our Toxic Torts Section, at 800-898-2034 or by email at [John.Tomlinson@beasleyallen.com](mailto:John.Tomlinson@beasleyallen.com) or [Grant.Cofer@beasleyallen.com](mailto:Grant.Cofer@beasleyallen.com).

Source: <https://madisonrecord.com/stories/511622457-wrongful-death-suit-filed-against-car-wax-manufacturer>

## XV. UPDATE ON NURSING HOME LITIGATION

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### **BEASLEY ALLEN LAWYERS REPRESENT RESIDENTS INJURED BY NURSING HOME NEGLIGENCE**

Nursing homes and other long-term facilities serve an important role in the American health care system. However, nursing homes differ from most other segments of the health care system in that the goal of long-term care is not to cure illness, but to allow individuals who have lost some capacity for self-care because of chronic illness or disabling condition to be cared for. Long-term care encompasses a wide array of medical, social, personal and supportive, and specialized housing services.

Many of the 1.5 million Americans who live in nursing homes are helpless, vulner-

able and completely dependent upon nursing home staff to meet most or all their needs, including personal needs and obtaining needed medical care, treatment, and services. All nursing home residents have the right to live in a safe environment that supports each resident's individuality and ensures they receive care that meets or exceeds medical standards and are treated with respect and dignity.

Although many nursing homes provide good care to their residents, maltreatment, abuse and neglect of residents can and does occur. One type of neglect that occurs is when a nursing home fails to provide the resident with all the necessary medical care and services to meet the resident's unique health needs.

Beasley Allen lawyers have recently filed a number of nursing home lawsuits. Our lawyers also are handling cases involving catastrophic injury or death of nursing home residents resulting from delayed or poor nursing care. A brief summary of these cases are set out below:

A lawsuit was filed on behalf of the family of a Georgia woman who died because of extreme nursing home neglect. Ms. Janet Standley was a long-time resident of a nursing home in Clay County, Georgia. She suffered from a heart condition that required that she have a pacemaker. Tragically, the nursing home failed to ensure that Ms. Standley received periodic pacemaker checks and attended yearly follow-up visits to her cardiologist. Ms. Standley's pacemaker battery became depleted and she died from the resulting complications of her heart condition. The nursing home's failure to ensure Ms. Standley received the necessary medical care and services to keep her pacemaker functioning is especially egregious and heartbreaking. The case is currently pending in the Superior Court of Clay County, Georgia.

- Our lawyers represent the family of a Wilcox County man who died as a result of his nursing home failing to provide adequate care for his condition or transfer him to another medical facility where he could get the necessary medical treatment necessary to save his life.
- Another of our cases contains claims that the nursing home failed to adequately treat and care for our client's bed sore, causing her extreme pain and other injuries.
- Our lawyers 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.

- We are also handling 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.

Our firm is fighting to protect the safety and rights of elderly and infirm Americans and to promote better, more responsible care practices in nursing homes by representing those injured by abuse or neglect in litigation.

### **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](mailto:Chris.Boutwell@beasleyallen.com), [Susan.Anderson@beasleyallen.com](mailto:Susan.Anderson@beasleyallen.com) or [Leah.Robbins@beasleyallen.com](mailto:Leah.Robbins@beasleyallen.com).

## XVI. AN UPDATE ON CLASS ACTION LITIGATION

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### **GM 2014-2016 FULL SIZED TRUCK/SUV BRAKE DEFECT CLASS ACTION**

In October, a team of firms including Beasley Allen filed a class action on behalf of a California couple in California federal court alleging that General Motors (GM)

knowingly sold Cadillac, Chevrolet and GMC SUVs and pickups with dangerously defective brakes.

The California Plaintiffs claim GM has known for at least three years that the braking system installed in its full-sized SUV and pickup models contains a defective vacuum pump that can fail unexpectedly, causing the vehicles' brakes to suddenly lose vacuum assisted power.

The Plaintiffs purchased a new 2017 Chevrolet Suburban SUV that suffered from the defective power assisted brake system. Specifically, the Suburban's vacuum pump lost prime depriving the brake booster of the negative pressure needed to generate mechanical force on the master cylinder. Under healthy operation this vacuum-based force compounds the pedal pressure created by the driver, allowing for much shorter braking distances.

Plaintiffs claim that in April of 2018 their Suburban's brake pedal unexpectedly stiffened and lost responsiveness, the brakes did not slow the vehicle as expected and they struck another vehicle. Following the wreck a GM dealership inspected the vehicle. GM representatives denied the existence of a defect, despite the dealership's mechanics reporting brake booster malfunction due to loss of proper vacuum levels.

Service bulletins indicated that GM was aware of the defect since February 2015. In these internal documents, GM warned dealers about failure of vacuum pumps and brake boosters in 2015-2016 Suburbans, 2015-2016 Chevrolet Tahoes, 2015-2016 Cadillac Escalade SUVs, 2015-2016 GMC Yukon pickups, 2014-2016 Chevrolet Silverados and 2014-2016 GMC Sierra pickups.

Since 2014 the company has received brake failure complaints through the U.S. National Highway Traffic Safety Administration (NHTSA), Better Business Bureau (BBB), online forums, and their dealers and customers. The case, filed in the United States District Court, in the Central District Court of California, Eastern Division is *Scott and Samantha Peckerar v General Motors, LLC* 5:18-cv-0214.

Clay Barnett, from our firm, along with 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; and James C. Wyly and Sean F. Rommel of Wyly-Rommel PLLC make up the litigation team. If you have any questions about the case, contact Clay Barnett in our Atlanta office at 334-269-2343 or by email at Clay.Barnett@beasleyallen.com.

### **VIRGIN AMERICA FLIGHT ATTENDANTS ASK \$85 MILLION IN WAGE CLASS VICTORY**

A class of flight attendants have asked a California federal judge to make Virgin America Inc. pay \$85 million in damages, penalties and interest following a summary judgment in their favor. The airline failed to pay for hours worked and shorted their overtime pay. The largest portion of the requested amount would come from damages, restitution and interest for Virgin's failure to pay for hours worked, which total more than \$18 million for the class and an additional \$18 million for a California subclass. The California subclass is also seeking \$8.4 million for the failure to pay overtime. The class is seeking more than \$9.4 million in penalties for Virgin's failure to provide accurate wage statements and an additional \$12.3 million for a failure to pay on time. The class had won the summary judgment in July, leaving only the amount of damages to be determined.

Many of the requested payouts were reached in agreement with Virgin, but payments in other areas, notably the amount that should be paid under the Private Attorney General Act, are still in contention. In arguing for the penalties, the class said:

*Virgin received over \$10 million to train its employees and, in exchange, committed to hiring and training local workers and add jobs to the California economy. Yet Virgin has willfully failed to comply with even the most basic California wage protections and has engaged in massive wage theft from its California-based flight attendant workforce.*

In the suit, filed in 2015, lead Plaintiff Julia Bernstein claims Virgin failed to pay its flight attendants for all the time spent before, after and between flights, for writing up incident reports, for time spent in training and for undergoing required drug tests. The class also alleges Virgin does not allow flight attendants to take meal or rest breaks, failed to pay overtime and minimum wages and failed to provide accurate wage statements.

In November 2016, U.S. District Judge Jon S. Tigar certified a class that included California-based flight attendants who worked for the airline on or after March 18, 2011. His order also certified a California resident subclass and a "waiting time penalties" subclass for individuals who have left the job since March 18, 2012. Judge Tigar had rejected Virgin's summary judgment motion, ruling in January 2017 that California labor law applied to all work that happened in California and in situations where employment policies

were decided from Virgin's then-headquarters in the Golden State. Virgin has since been bought by Alaska Airlines, which is based in Seattle.

In July, Judge Tigar ruled that his previous rulings in the case and the weight of evidence provided by Plaintiffs entitled the flight attendants to summary judgment. The judge's orders indicated that future proceedings, either by the court or by a jury, will determine damages based on the flight attendants' regular rate of pay.

The flight attendants are represented by Monique Olivier of Olivier Schreiber & Chao LLP, Alison Kosinski and Emily Thiagaraj of Kosinski & Thiagaraj LLP and James E. Miller, Kolin C. Tang, Chiharu G. Sekino and James C. Shah of Shepherd Finkelman Miller & Shah LLP. The case is *Bernstein et al. v. Virgin America Inc.*, (case number 3:15-cv-02277) in the U.S. District Court for the Northern District of California.

Source: Law360.com

### **RECENT CLASS ACTION SETTLEMENTS**

There have been a number of recent settlements in class action litigation. The following is a brief summary of some of these settlements.

#### **UTILITY REACHES \$2 BILLION SETTLEMENT INVOLVING FAILED NUCLEAR PLANT**

SCANA Corp. and South Carolina Electric & Gas (SCE&G) Co. have reached a \$2 billion settlement with customers who claimed the utility charged them extra for years to finance a proposed nuclear plant before abandoning the project. Class representatives agreed to the settlement, which will create a common benefit fund with \$2 billion for future rate relief, as well as \$115 million that had originally been created as a fund for SCANA's executives. The real estate and proceeds from property sales will be added to the class fund.

The suit, filed in August 2017, said SCANA and SCE&G took advantage of the Base Load Review Act enacted by South Carolina in 2007 to charge customers extra, with the proceeds going to finance a nuclear power plant the company was planning to build with Westinghouse Electric Co. at the Virgil C. Summer Nuclear Station in Jenkinsville, South Carolina.

The case is *The State of South Carolina et al. v. South Carolina Electric and Gas Co.*, a Wholly Owned Subsidiary of SCANA, case number

2017CP2500335, in the Court of Common Pleas for Hampton County, South Carolina.

#### **JPMORGAN AND CITI REACH \$182.5 MILLION SETTLEMENT IN EURIBOR INVESTOR SUIT**

A \$182.5 million settlement by JPMorgan Chase & Co. and Citigroup Inc. along with several other big banks, which manipulated the Euro Interbank Offered Rate (Euribor). Deutsche Bank AG, Barclays PLC and HSBC Holdings PLC previously had their own combined \$309 million settlement with Euribor investors. The banks conspired to rig the interest rate benchmark. The total recovery is now up to \$491.5 million.

The proposed settlement involved a class of investors that purchased sold, held or traded Euribor-linked products between 2005 and 2011, comprising funds including the California State Teachers Retirement System.

Along with the settlement amount, the two banks have agreed to cooperate with the investors in pursuing claims against foreign Defendant banks that were dismissed from the action in February 2017 for a lack of personal jurisdiction.

#### **\$21 MILLION SIBOR RIGGING SUIT SETTLEMENT**

CitiGroup Inc. and JPMorgan Chase & Co. will pay nearly \$21 million to settle a putative class action over an alleged conspiracy to manipulate the Singapore Interbank Offered Rate (SIBOR). A settlement class of “at least hundreds, if not thousands” of those who purchased, sold, held, traded or otherwise had any interest in SIBOR or SIBOR-based derivatives from 2007 to 2011 would pull from a pool created by the \$9,990,000 payment from Citi and the \$10,989,000 from JPMorgan.

The suit, brought by Sonterra Capital Master Fund Ltd. and FrontPoint Asian Event Driven Fund LP, accuses some of the world’s top banks, including Bank of America, JPMorgan Chase and UBS, of manipulating both SIBOR and the Singapore Swap Offer Rate, or SOR, from 2007 through 2011. The banks allegedly submitted fraudulent rates daily in order to move the benchmarks in ways that would benefit their trading positions. Other banks were included in the suit because they allegedly transacted in

SIBOR- and SOR-linked derivatives in or around New York.

#### **\$432 MILLION SETTLEMENT IN AUTO PARTS MDL**

Dozens of auto parts manufacturers will pay a total of \$432.8 million to car buyers to settle cases in the pending multidistrict litigation (MDL). The companies were accused of conspiring to fix prices and rig the market for various auto parts. Of the 33 companies named in the monetary settlement of 29 cases, Japanese car part maker Mitsuba Corp. will pay the most, more than \$72 million, to end payors— consumers who bought cars made with the parts, or who purchased replacement parts - in suits over fan motors, radiators and other components. JTEKT Corp., at \$47.4 million, will be next in line on amounts to be paid.

This round of settlements is the latest in the MDL filed in the aftermath of the U.S. Department of Justice’s anti-trust investigation into price-fixing and bid-rigging in the auto parts industry, a probe that was launched in 2011 in conjunction with Japanese and European authorities.

This settlement also required the companies to cooperate with the Plaintiffs in related ongoing litigation, including sharing documents and data, and offering witness testimony. Other companies named in the settlement include Robert Bosch GmbH, which will pay more than \$33 million in suits over windshield wipers and spark plugs, among other parts, and Bridgestone Corp., which previously agreed to pay \$29.6 million to settle price-fixing allegations for anti-vibration rubber components.

#### **WALMART TO PAY \$160 MILLION TO SETTLE INVESTOR SUIT**

Walmart Stores Inc. will pay \$160 million to settle with a class of investors who sued the company after its stock fell sharply in the wake of claims that it had bribed officials in Mexico. The lawsuit involves a class of potentially thousands of members.

The suit alleged that the company withheld any and all information regarding the possible Foreign Corrupt Practices Act (FCPA) violations from the Securities and Exchange Commission (SEC), the Department of Justice and shareholders until it learned of *The New York*

*Times* investigation in 2011. *The Times’* investigation, published in early 2012, caused the biggest drop in Walmart’s shares in years. Multiple investigations by U.S. and Mexican authorities followed. Walmart also faces several billion dollars in losses from the suspected corruption, including legal fees and potential enforcement penalties.

#### **\$44 MILLION SETTLEMENT IN NIBCO LAWSUIT**

A class of consumers has reached a \$43.5 million settlement with NIBCO Inc., a plumbing products company, to end claims that its tubings, fittings and clamps are defective. The settlement comes after almost five years of litigation and numerous mediation sessions. The consumers claim the company’s polyethylene plumbing tubes, the brass fittings required to connect the tubing together, and the stainless steel clamps that join the tubing and fittings fail prematurely.

#### **WELLS FARGO SETTLES RMBS TRUSTEE LITIGATION FOR \$43 MILLION**

Wells Fargo Bank NA has agreed to pay \$43 million to settle claims it failed to protect investors from billions of dollars in losses as the trustee for hundreds of residential mortgage-backed securities (RMBS). The settlement was reached with certain institutional buyers, including funds affiliated with BlackRock Inc. and PIMCO. The settlement resolves two class action lawsuits in New York, in federal and state court, alleging that the bank failed to meet a contractual duty set forth in servicing agreements to require lenders to repurchase or cure delinquent or shoddy home mortgage loans bundled into the securities—which led to heavy losses during the 2008 financial crisis.

The settlement agreement, which is subject to approval by the court, resolves a significant portion of the claims asserted against the company in connection with its role as trustee for RMBS trusts. Specifically, it includes claims brought by the BlackRock and PIMCO plaintiffs for 271 RMBS trusts created between 2004 and 2008.

After the federal court dismissed some claims, the investors filed a new putative class action in New York state court in December 2016, which includes claims related to those dismissed in federal court. The state court case is also resolved in the settlement. In their suits, BlackRock, PIMCO and others claimed that the trustee

banks knew that the bonds they oversaw contained faulty loans because they saw evidence of widespread abuses by the loans' originators and substandard bond deals created by issuers.

The cases covered by the settlement agreement are *Blackrock Allocation Target Shares: Series S Portfolio et al. v. Wells Fargo Bank NA*, (case number 1:14-cv-09371) in the U.S. District Court for the Southern District of New York; and *Blackrock Core Bond Portfolio et al. v. Wells Fargo Bank NA*, (case number 656587/2016) in the Supreme Court of the State of New York, County of New York. Federal and state cases alleging similar claims filed by certain other institutional investors are not part of the settlement.

#### **MEDTRONIC UNIT AGREES TO \$54.5 MILLION SETTLEMENT**

Medtronic PLC unit HeartWare International will pay \$54.5 million to investors to settle claims that it misled them about the prospects of its MVAD heart pump and overstated its efforts to fix problems with the device. The settlement requires court approval. Investors who are members of the class will have the opportunity to object. After considering any objections, the judge will grant or withhold final approval.

#### **KYB AND MARUYASU GET APPROVAL FOR \$34 MILLION SETTLEMENT**

A Michigan federal judge has tentatively approved KYB Corp.'s \$29 million settlement and Maruyasu Industries Co. Ltd.'s \$5.3 million settlement to end proposed consumer class actions. It's alleged the companies conspired to fix the prices of shock absorbers and steel tubes in antitrust multidistrict litigation. The judge granted motions from end-payor Plaintiffs—consumers who bought or leased vehicles containing the KYB and Maruyasu-manufactured parts—seeking preliminary approval of the settlements.

Under the Maruyasu settlement, \$108,000 will be allocated to a class of individuals and businesses that had bought the parts in the fuel injection systems complaint and approximately \$5.2 million will be for the Plaintiff class for the steel tubes complaint.

#### **AMERITRADE AND INVESTORS REACH \$18 MILLION SETTLEMENT**

TD Ameritrade and an investor class have agreed to a \$17.95 million settlement in a derivative suit that chal-

lenged Ameritrade's \$2.7 billion share of a \$4.1 billion joint acquisition of Scottrade Financial. The agreement would end litigation over stockholder claims that Ameritrade's controlling shareholder and deal partner, TD Bank, secured an unfairly low \$1.375 billion price for its part of the transaction, forcing up the amount Ameritrade had to pay to meet the overall transaction amount.

Vero Beach Police Officers' Retirement Fund filed the derivative claims on behalf of TD Ameritrade, which provides securities brokerage services and other financial services to retail investors and advisers.

## **XVII. THE CONSUMER CORNER**

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#### **OKLAHOMA JURY HITS AETNA WITH A \$25.5 MILLION BAD FAITH VERDICT**

After 12 days of trial, a jury in Oklahoma awarded \$25.5 million to the family of a cancer patient denied coverage by Aetna. Jurors said the verdict was meant as a message for Aetna to change its ways.

The case involved the 2014 denial of coverage for Orrana Cunningham, who had stage four nasopharyngeal cancer near her brain stem, adjacent to multiple "critical structures" in her head including her brain, optic nerves and brain stem. Her doctors at MD Anderson Cancer Center submitted a request for coverage of proton beam therapy, a targeted form of radiation that could pinpoint her tumor without the potential for blindness or other side effects of standard radiation.

The Cunninghams' insurer, Aetna, the nation's third-largest insurer, denied Mrs. Cunningham's coverage by calling the therapy investigational and experimental. This was despite that proton coverage was clearly provided by contract under the Cunninghams' insurance plan.

According to the testimony of Mrs. Cunningham's treating oncologist at MD Anderson, the Aetna medical director responsible for denying Orrana's initial claim admitted during a "peer to peer" telephonic call that he knew the oncologist was right, but he had to deny the claim anyway. Evidence presented during the trial revealed the two medical directors who denied the subsequent appeals have never treated a single patient with radiation of any kind.

Mrs. Cunningham was able to receive the treatment at a cost of \$92,082.19 through personal funding. The Cunninghams mortgaged their home and set up a GoFundMe page to help pay the remaining balance. Before Mrs. Cunningham's death slightly more than a year from her initial diagnoses, scans showed that the tumor was shrinking and the treatment was working.

The evidence at trial showed that none of the medical directors at Aetna read the insurance contract before denying the claim. It was also revealed the Aetna doctors had never heard of the duty of good faith, never received any training related to obligations owed by Aetna to its insureds under Oklahoma law, and were receiving sizable bonuses each year, based in part on the profits of Aetna. All three medical directors acknowledged during the trial that they spent more time preparing for the lawsuit than reviewing the woman's medical case.

It was reported that Aetna lawyer John Shely said in closing arguments that the insurance giant was proud of the three medical directors who denied coverage. He even turned to thank them as they sat in the front row of the courtroom.

After considering the evidence, the jury determined Aetna breached its contract with the Cunninghams and recklessly disregarded its duty of good faith and fair dealing owed the Cunninghams in investigating and evaluating coverage for the requested proton therapy.

The jury awarded compensatory damages for out-of-pocket expenses and emotional distress caused by Aetna's repeated denials and awarded Mr. Cunningham \$500,000.00 individually and awarded Mrs. Cunningham's estate \$15,000,000.00. The jury awarded another \$10,000,000.00 in punitive damages. The total verdict was \$25,592,089.19. The award is believed to be the largest verdict in an individual "bad faith" insurance case in Oklahoma history. It could have major ramifications across the country for proton beam therapy.

The Plaintiffs are represented by Doug Terry of Doug Terry Law and Justin D. Meek and Tom Paruolo of DeWitt Paruolo Meek. The case is *Ron Cunningham et al. v. Aetna Life Insurance Company*, (case number CJ-2015-2826) in the District Court of Oklahoma County, State of Oklahoma.

Source: Law360.com

#### **SUIT FILED AGAINST APPLE INVOLVING AN EXPLODING IPHONE**

A New York City resident has filed a suit against Apple Inc. in a New York state

court alleging that he was “caused to suffer and sustain severe bodily injuries” when his iPhone 6S exploded. The Plaintiff, James Guerrero, said in his complaint that he was using the iPhone “in accordance with its intended use” on July 19, 2017, when the very popular smartphone “exploded,” causing him to suffer severe bodily injuries. Mr. Guerrero says he “suffered pain, shock and mental anguish, and that his injuries and their effects will be permanent.” As a result of the injuries, the Plaintiff says he has been “caused to incur, and will continue to incur, expenses for medical care and attention” and has been rendered “unable to perform [his] normal activities and duties.”

The Plaintiff is suing for breach of warranty, strict product liability and negligence and is seeking unspecified damages as a result of the incident. Ms. Guerrero says Apple “warranted” that its product was “safe to use in every respect,” and “warranted that it was good, safe and proper to use.” It’s alleged that Apple Inc. “breached its warranties of merchantability and fitness for intended use of the said product which warranties were both express and implied.”

Apple has been sued in similar litigation before, including one filed in August by a South Carolina man who said he was severely burned after an exploding iPhone 6 battery set his clothes on fire; and one by a Delaware woman who sued Apple years ago, claiming she was injured when her iPhone exploded in her back pocket. Nearly a decade ago, the French government took Apple to task over exploding iPhones, with then-Secretary of State for Trade and Consumer Affairs Herve Novelli meeting with Apple executives and questioning them over reports of shattering or cracking screens on iPhones.

The Plaintiff is represented by Mark E. Seitelman of Mark E. Seitelman Law Offices PC. The case is *James Guerrero v. Apple Inc.*, (case number 160390/2018) in the Supreme Court of the State of New York for the County of New York.

Source: Law360.com

## XVIII. CASES BEING LITIGATED IN BEASLEY ALLEN SECTIONS

We are again writing in this issue on the wide range of litigation that lawyers in the four sections at Beasley Allen are currently working on. A lawyer contact will be listed

in each instance. An email address for each lawyer is provided or you can call them at 800-898-2034.

### PERSONAL INJURY & PRODUCTS LIABILITY SECTION

**Product Liability**—Lawyers in the Section continue to focus on accident cases involving automobiles and heavy equipment. Cases involving consumer products are also being handled. Some of the motor vehicle cases involve single-vehicle crashes, while others involve multiple-vehicle accidents. Quite often the incident actually involves a defective product or component part. This gives rise to a Product Liability claim. Our lawyers would like to review any case involving catastrophic injury or death.

**Truck Accidents**—There are significant differences between handling an interstate trucking case and other car wreck cases. It is imperative to have knowledge of the Federal Motor Carrier Safety Regulations, technology, business practices, insurance coverages, and to have the ability to discover written and electronic records. Expert testimony is of utmost importance. Accidents involving semi-trucks and passenger vehicles often result in serious injuries and wrongful death. Trucking companies and their insurance companies almost always quickly send accident investigators to the scene of a truck accident to begin working to limit their liability in these situations. Our lawyers, staff and in-house accident investigators immediately begin the important task of documenting and preserving the evidence. We would like to review any case involving catastrophic injury or death. Contact: Chris.Glover@beasleyallen.com, Ben.Baker@beasleyallen.com or Ben.Locklar@beasleyallen.com.

**Takata Airbag Recall**—The largest automotive recall in history centers on the defective Takata airbags found in millions of vehicles manufactured by Honda, BMW, Chrysler, Daimler Trucks, Ford, General Motors, Mazda, Mitsubishi, Nissan, Subaru, and Toyota. The defect results in shrapnel-like metal shards and airbag components being propelled throughout the vehicle interior. This frequently results in lacerations and blunt force trauma that can cause injury or death. Our lawyers would like to review any claim involving injury or death.

Contact: Cole.Portis@beasleyallen.com or Chris.Glover@beasleyallen.com.

**Honda Air Bag Cases**—Our lawyers are also handling Honda airbag cases with smaller injuries that normally would not qualify for claims under our usual review process. That would include an injury that does not appear to be permanent or life-threatening. Contact: Chris.Glover@beasleyallen.com.

**Defective Tires**—Tire failure can result in a serious car crash and even a vehicle rollover accident, causing serious injury or death to vehicle occupants. Air, heat and sunlight can cause the rubber in tires to break down. When a tire is defective, potentially serious problems like detreads and blowouts can occur long before the tire would be expected to wear out. If the tire failure is the result of design or manufacturing defects, and the manufacturer is aware of the problem, they have an obligation to alert consumers to the potential danger. Contact: Ben.Baker@beasleyallen.com or Labarron.Boone@beasleyallen.com.

**Heavy Truck Product Liability Claims**—Tractor trailer and other heavy trucks are not required to contain many of the same protections for occupants as smaller passenger cars. They can contain dangerous defects putting the truck driver or passengers at risk of serious injury or death. These trucks many times have particularly weak roofs that crush in rollovers. The passenger compartments are often not protected by effective cab guards, and this allows loads to shift into the truck cab. Lawyers in the Section would like to review any case involving catastrophic injury or death. Contact: Ben.Baker@beasleyallen.com or Kendall.Dunson@beasleyallen.com.

**Aviation Accidents**—Aviation litigation can be extremely complex and often involves determining the respective liability of manufacturers, maintainers, retrofitters, dispatchers, pilots and others. In some circumstances, the age of the aircraft involved can limit or completely preclude an injured party from compensation. Soaring through the sky hundreds of miles an hour, thousands of feet above the ground in an airplane or helicopter leaves little room for error. One small mechanical problem, misjudgment or faulty

response in the air can spell disaster for air passengers and even unsuspecting people on the ground. Our lawyers are handling cases involving all types of aircraft, military and civilian. Contact: Mike.Andrews@beasleyallen.com.

**On-the-job Product Liability**—Many times product claims arise in work-related incidents that also have a worker's compensation claims. After we investigate the circumstances that caused the injuries, many times we discover a defective machine may be the cause of the injuries. Contact: Kendall.Dunson@beasleyallen.com or Evan.Allen@beasleyallen.com.

**Premises Liability**—In premises liability claims, patrons of establishments are often injured because the premises, for some reason, was unsafe. Premises liability claims can take many forms, including when severe injury or death results when a building or structure collapses, merchandise falls, during swimming pool accidents, due to poor lighting, falling debris, unsecured fixtures and furniture that falls or tips over, unsecure drainage that creates drowning or fall hazards, slippery surfaces, and inadequate maintenance. Beasley Allen has successfully handled a number of premises liability cases, and we would like to investigate any cases where severe injury or death results. Contact: Mike.Crow@beasleyallen.com, Chris.Glover@beasleyallen.com or Warner.Hornsby@beasleyallen.com.

**Negligent Security**—Under the law, owners of establishments owe a duty to patrons and guests to ensure that the premises are reasonably safe and secure from anticipated dangers. These cases normally take the form of shootings, fights, stabbings, or other physical violence (including sexual assault) where severe injury or death occurs due to the establishment owner's failure to take reasonable safety measures. When this occurs, the establishment owner, as well as those contractors charged with security, may be held responsible for the injuries suffered by individuals or groups of individuals on the premises. While the laws vary from state to state, our firm is actively investigating and litigating these cases where severe injury or death results. Contact: Parker.Miller@beasleyallen.com.

**Nursing Home Abuse and Neglect**—Nursing homes are sup-

posed to be in the business of providing skilled nursing care to elderly and disabled residents. Unfortunately, statistics indicate residents in nursing homes suffer abuse and neglect more and more frequently at the hands of nursing home corporations. In many cases residents have died or have been severely abused as a result of neglect. They may suffer physical abuse, emotional or psychological abuse, or neglect. We are investigating cases involving serious injury or death resulting from nursing home abuse or neglect. Contact: Chris.Boutwell@beasleyallen.com.

#### Mass Torts Section

**Opioids**—Opioid abuse has reached epidemic proportions in the United States. According to the Department of Health & Human Services, 12.5 million people misused prescription opioids and 33,091 Americans died from opioid overdose in 2015 alone. These medications provide important pain relief for many. However, over the years, drug companies inflated the effectiveness of delayed-release medications like OxyContin and downplayed their addictive properties, creating conditions ripe for abuse. Lawyers in the Section are investigating cases involving opioid-related deaths and overdose requiring hospitalization, as well as cases involving treatment for addiction to prescription opioids. Contact: Rhon.Jones@beasleyallen.com, Roger.Smith@beasleyallen.com or Liz.Eiland@beasleyallen.com.

**Opioids and Infants**—The opioid epidemic has also taken its toll on the most vulnerable among us. According to the National Institute on Drug Abuse, every 25 minutes a baby is born addicted to opioids—a condition called Neonatal Abstinence Syndrome (NAS). Babies with NAS suffer painful symptoms of opioid withdrawal in the hours and days after they are born and are more likely to suffer long-term complications like developmental delays and hearing or vision impairment, compared to babies born to mothers who did not use opioids. We are investigating cases on behalf of children who were born with NAS after their mothers were prescribed opioids before or during pregnancy. Contact: Liz.Eiland@beasleyallen.com.

**Talcum powder and ovarian cancer**—As many as 2,200 cases of ovarian cancer diagnosed each year may have been caused by regular use

of talcum powder. Talc is a mineral made of up various elements including magnesium, silicon and oxygen. Talc is ground to make talcum powder, which is used to absorb moisture and is widely available in various products including baby powder and adult products including body and facial powder. Talc products used regularly in the genital area increase the risk of ovarian cancer. In February 2016, a jury found Johnson & Johnson knew of the cancer risks associated with its talc products but failed to warn consumers, and awarded the family of our client \$72 million. She died of ovarian cancer after using J&J talc-containing products for more than 30 years. Contact: Ted.Meadows@beasleyallen.com or Leigh.Odell@beasleyallen.com.

**Zofran**—Manufactured by GlaxoSmithKline, Zofran (ondansetron) was approved to treat nausea during chemotherapy and following surgery. Zofran (ondansetron) works by blocking serotonin in the areas of the brain that trigger nausea and vomiting. Between 2002 and 2004, GSK began promoting Zofran off-label for the treatment of morning sickness during pregnancy, despite the fact the drug has not been approved for pregnant women and there have been no well controlled studies in pregnant women. The FDA has received nearly 500 reports of birth defects linked to Zofran. Birth defect risks include cleft palate and septal heart defects. Contact: Roger.Smith@beasleyallen.com.

**Xarelto**—Lawsuits filed against Johnson & Johnson subsidiary Janssen Pharmaceuticals and Bayer Corp. over the blood thinner Xarelto have been consolidated in Louisiana federal court. Xarelto has been linked to serious side effects including internal bleeding, gastrointestinal bleeding, brain bleed and death. The Xarelto lawsuits come on the heels of the recent \$650 million Pradaxa settlement. Researchers linked Pradaxa, also a blood thinning medication, to more than 500 deaths. Xarelto blood thinner litigation has been consolidated before U.S. District Judge Eldon Fallon in the Eastern District of Louisiana, who presided over suits against Merck & Co. over its medication Vioxx. The Vioxx litigation resulted in a \$4.85 billion settlement in 2007. Contact: David.Byrne@beasleyallen.com or Joseph.Vanzandt@beasleyallen.com.

**Testosterone Replacement Therapy (TRT)** products for men have been linked to an increased risk of death, heart attack and stroke. Researchers found men who used testosterone therapy were 30 percent more likely to have a heart attack, stroke, or die after three years of use. A second study found that men had a significant increase in risk of heart attack and stroke in just the first 90 days of testosterone therapy use. Furthermore, men who started the study with clear, unobstructed coronary arteries were just as likely to have a heart attack, stroke or die as men who entered the study with established coronary artery disease. Testosterone therapy, such as the prescription topical treatments AndroGel, Testim and Axiron, are used to help boost testosterone levels in men who have a deficiency of the male hormone. Symptoms of low testosterone include decreased libido and low energy. Contact: Matt.Teague@beasleyallen.com.

**Bone Cement**—The type of bone cement used during knee replacement surgery affects the outcome of that surgery. High viscosity bone cement (HVC) boasts shorter mixing and waiting times and longer working and hardening phases, meaning surgeons can handle and apply the cement earlier than with low- or medium-viscosity cements. Although HVC may be more convenient to use, there is mounting evidence that the bond it produces is not as strong. Researchers have observed more early failures with the use of HVC, even when used in combination with a previously well-performing implant. Complications associated with knee replacements performed with HVC include loosening and debonding (where the implant fails to adhere to the cement interface on the shin or thigh bone), which requires revision surgery. Other reported problems include new onset chronic pain and instability. Contact: Roger.Smith@beasleyallen.com or Liz.Eiland@beasleyallen.com.

**Proton Pump Inhibitors**—Proton pump inhibitors (PPIs) such as Nexium, Prilosec and Prevacid were introduced in the late 1980s for the treatment of acid-related disorder of the upper gastrointestinal tract, including peptic ulcers and gastrointestinal reflux disorders, and are available both as prescription and over-the-counter drugs. Beasley Allen lawyers are currently investigating PPI-induced Acute Interstitial Nephri-

tis (AIN), which is a condition where the spaces between the tubules of the kidney cells become inflamed. The injury appears to be more profound in individuals older than 60. While individuals who suffer from AIN can recover, most will suffer from some level of permanent kidney function loss. In rare cases individuals suffering from PPI-induced AIN will require kidney transplant. Contact: Navan.Ward@beasleyallen.com.

**Taxotere**—Taxotere (docetaxel) is a chemotherapy drug approved in the treatment of breast cancer along with other forms of cancer. It is administered intravenously through a vein, and is a member of a family of drugs called taxanes. In 2007, manufacturer Sanofi-Aventis issued a press release touting the efficacy of Taxotere based on a clinical study. However, Sanofi-Aventis failed to inform the FDA, health care providers, and the public that permanent hair loss was observed in a number of the patients taking Taxotere. In December 2015, the FDA announced it had ordered Sanofi-Aventis to change Taxotere's label to warn patients of the risk of permanent hair loss. While hair loss during chemotherapy is expected, patients undergoing chemotherapy with Taxotere were not warned they could potentially experience permanent hair loss. Permanent hair loss is an extremely debilitating condition, especially for women. We are currently investigating claims for women who suffered permanent hair loss following chemotherapy with Taxotere for breast cancer. Contact: Beau.Darley@beasleyallen.com.

**Risperdal**, an atypical antipsychotic drug used to treat schizophrenia and certain problems caused by bipolar disorder, has been linked to the development of gynecomastia in boys and young men. Gynecomastia is a condition that causes boys to grow breasts. The drug is manufactured by Johnson & Johnson. Contact: James.Lampkin@beasleyallen.com.

**Metal-on-Metal Hip Replacement parts**—The FDA has ordered a review of all metal-on-metal hip implants due to mounting patient complaints. Problems with metal-on-metal include, but are not limited to loosening, metallosis (ie: tissue or bone death), fracturing, and/or corrosion and fretting of these devices, which require revision surgery. Many patients that require revision surgery due to these devices suffer significant post-revision compli-

cations. We are investigating all cases involving metal-on-metal hip implants, including the DePuy Orthopaedics ASR XL Acetabular System and the DePuy ASR Hip Resurfacing System, recalled in August 2010; the Stryker Rejuvenate and ABG II modular-neck stems, recalled in July 2012; the Stryker LFIT Anatomic v40 Femoral Head (recalled August 29, 2016); the Zimmer Durom Cup, the Wright Conserve, and the Biomet M2A “38mm” and M2A-Magnum hip replacement systems, which have not been recalled. Reported problems include pain, swelling and problems walking. Contact: Navan.Ward@beasleyallen.com.

**IVC Filters**—Retrievable IVC filters are wire devices implanted in the vena cava, the body's largest vein, to stop blood clots from reaching the heart and lungs. These devices are used when blood thinners are not an option. Manufacturers include Bard, Cook and Johnson & Johnson. While permanent IVC filters have been used since the 1960s with almost no reports of failure, retrievable IVC filters were introduced in 2003, promoted for use in bariatric surgery, trauma surgery and orthopedic surgery. Risks associated with the retrievable IVC filters include migration, fracture and perforation, leading to embolism, organ damage and wrongful death. Contact: Matt.Munson@beasleyallen.com.

**Physiomesb**—Intended for hernia repair, Physiomesb is a flexible polypropylene mesh designed to reinforce the abdominal wall, preventing future hernias from occurring. Though there are several types of hernias, most occur when an organ or tissue protrudes through a weak spot in abdominal muscles. The condition often requires surgery where mesh, like Physiomesb, which is intended for laparoscopic use, is used to fill in a hole in the abdominal muscle or laid over or under it to prevent any further protrusions. Independent studies have found Physiomesb to lead to high rates of complications including hernia reoccurrence, organ perforation, mesh migration, sepsis and even death. In May 2016, Ethicon issued a market withdrawal of Physiomesb in the U.S. and recalled the product in Europe and Australia. We are currently investigating cases involving serious injury or death as a result of Ethicon's Physiomesb. Contact: Matt.Munson@beasleyallen.com.

## Consumer Fraud & Commercial Litigation Section

### False Claims Act / Whistleblower

We are handling and investigating whistleblower claims of government fraud ranging from Medicare/Medicaid to military contracts, and any other type of fraud involving a government contract. Under the False Claims Act (FCA) the whistleblower is entitled to a percentage of the recovery. Studies show that as much as 10 percent of Medicare/Medicaid charges are fraudulent. Common schemes involve double-billing for the same service, inaccurately coding services, and billing for services not performed. Additionally, the Commission on Wartime Contracting has warned that the lack of oversight of government contractors has led to massive fraud and waste. Contact: Lance.Gould@beasleyallen.com, Allison.Hawthorne@beasleyallen.com, Larry.Golston@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

**Life Insurance Fraud**—We have uncovered alleged fraudulent accounting practices by life insurance companies concerning premium increases. The accounting method may result in the policyholder being charged excessive insurance premiums. A client that has a life insurance policy and has been notified of a substantial increase in premium payments, or if they have been told their policy's "cost of insurance" has increased, they may have a valuable legal claim that our firm would like to investigate. Contact: Dee.Miles@beasleyallen.com, Andrew.Brashier@beasleyallen.com or Rachel.Boyd@beasleyallen.com.

**Pharmaceutical Pricing**—We are continuing to handle claims involving chain pharmacies falsely reporting their generic pricing transactions to state Medicaid agencies. This misconduct has led to millions of dollars in overpayments by Medicaid agencies for generic drugs to the chain pharmacies. Contact: Alison.Hawthorne@beasleyallen.com or Leslie.Pescia@beasleyallen.com.

**Self-funded Health and Pharmacy Insurance Plans**—Third Party Administrators and Pharmacy Benefit Managers may have been charging unauthorized fees to self-funded insurance health and pharmacy benefit plans. These extra fees may be in violation of the contracts with the self-funded plan and a breach of fiduciary

duty under ERISA. We are looking into these cases on behalf of self-funded plans. Contact: Alison.Hawthorne@beasleyallen.com.

### Supplemental Disability Insurance

**Denial**—Our lawyers have successfully litigated bad faith denial of benefits cases for years in the disability insurance area and we are interested in reviewing cases involving denial of Individual and Group disability insurance. These cases can be either employee sponsored benefit plan policies (ERISA), individually owned policies or non-ERISA governed supplemental insurance. Contact: Larry.Golston@beasleyallen.com.

**Auto Defect Class Actions**—We are continuing to work on numerous auto defect class actions against many of the major automobile manufacturers like VW, Toyota, General Motors, Ford and even some suppliers like Takata. These cases continue to be filed because of corporate misconduct in designing and manufacturing unsafe vehicles that are purchased by consumers, corporations and state agencies. We continue to investigate these automobile problems for class relief treatment. Contact: Dee.Miles@beasleyallen.com, Clay.Barnett@beasleyallen.com or Archie.Grubb@beasleyallen.com.

**Sexual Harassment**—Sexual harassment is outlawed by Title VII of the Civil Rights Act of 1964 because it is a form of discrimination, as explained by the Equal Employment Opportunity Commission (EEOC). The agency says "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment." We are looking at any claim involving extreme sexual harassment or sexual assault. Contact: Larry.Golston@beasleyallen.com.

**Antitrust**—We are handling claims related to the violation of federal and state antitrust laws. We are currently involved in claims alleging a wide array of anticompetitive conduct, including illegal tying, exclusive dealing, monopolization, and price fixing. Contact: Archie.Grubb@beasleyallen.com or Alison.Hawthorne@beasleyallen.com.

**Health Care Fraud**—Our lawyers are looking at cases of fraud in the health care industry. These may include cases dealing with pricing, off-label prescriptions, or other health care abuse. Contact: Alison.Hawthorne@beasleyallen.com.

**Employment Law**—The Section is handling employment cases. Situations that may be addressed in this area include minimum wage and overtime pay, unfair labor practices, all types of discrimination, employee benefits, and whistleblower claims. Contact: Lance.Gould@beasleyallen.com or Larry.Golston@beasleyallen.com.

**Fair Labor Standards Act (FLSA)**—We are working several cases involving FLSA violations. The FLSA cases are brought on behalf of clients whose job title is misclassified by their employers so that employees are not compensated for overtime worked. Cases may also involve unequal pay, where women are paid less for doing the same job as men. Contact: Lance.Gould@beasleyallen.com or Larry.Golston@beasleyallen.com.

## Toxic Torts Section

**Opioids**—In addition to individual cases of serious injury and death related to opioid abuse, Beasley Allen lawyers are representing a number of local governments in Alabama against both manufacturers and distributors of opioids for increased costs faced by local governments related to the opioid epidemic. Providing city and county resources to battle the opioid crisis causes local governments to sustain economic damages and ongoing significant financial burdens. The crisis was created by the pharmaceutical industry, which instead of investigating suspicious orders of prescription opiates, turned a blind eye in favor of making huge profits. They intentionally misled doctors and the public about the risks of these dangerous drugs. Municipal governments are left struggling to cope with the consequences. Contact: Rhon.Jones@beasleyallen.com or Ryan.Kral@beasleyallen.com.

**Mesothelioma**—Mesothelioma is a highly aggressive and rare form of cancer usually affecting the lining of the lungs (pleural) or abdominal cavity (peritoneal). Occasionally, it also may affect the lining of the heart (pericardial). The only known cause of mesothelioma is exposure to asbes-

tos. About 2,000 new cases of mesothelioma are diagnosed in the United States each year. For years, asbestos was widely used in many industrial products and in building construction for insulation and fire protection. When asbestos is broken or disturbed it can release microscopic fibers that can be inhaled or ingested, posing a health risk, including the development of asbestos diseases and mesothelioma. Contact: Sharon.Zinns@beasleyallen.com or Rhon.Jones@beasleyallen.com.

**Leukemia and Benzene exposure**—Benzene is widely used in a number of industries and products, yet many people remain unaware of the toxic danger of this chemical substance. Exposure to products containing benzene, whether through inhalation or skin absorption, can cause life-threatening diseases including Acute Myeloid Leukemia (AML), Myelodysplastic Syndrome (MDS), lymphomas and aplastic Anemia. Some of these diseases do not manifest themselves until several years after exposure to benzene. Due to certain statute of limitations for bringing a claim of this nature it is important to contact an attorney as soon as possible if you believe your condition is a result of benzene exposure. Contact: John.Tomlinson@beasleyallen.com or Grant.Cofer@beasleyallen.com.

**Roundup / glyphosate**—Roundup is the most widely used herbicide in the world and the second-most used weed killer for home and garden, government and industry, and commerce. It was introduced commercially by Monsanto Company in 1974 and is used by landscapers, farmers, groundskeepers, and commercial gardeners. The primary ingredient in Roundup is glyphosate, a chemical that kills weeds by blocking proteins essential to plant growth. It has been linked to a type of cancer called non-Hodgkin lymphoma. We are investigating cases involving non-Hodgkin lymphoma related to the commercial application of Roundup/glyphosate. Contact: John.Tomlinson@beasleyallen.com or Grant.Cofer@beasleyallen.com.

**Severe Lung Disease**—Beasley Allen lawyers are investigating numerous cases involving severe lung disease, including where a client has received any of the following diagnoses: any interstitial lung disease, pulmonary fibrosis (whether idiopathic or not), silicosis, black lung, bronchiolitis

obliterans, sarcoidosis, berylliosis or chronic beryllium lung disease, metal lung disease, hypersensitivity pneumonitis, pneumoconiosis, and non-smoker's lung cancer and emphysema. These are grave diseases that often times result in either death or a lung transplant, and they are frequently caused by exposure to dusts, fibers, metals, chemicals, vapors, food flavoring additives or other tiny particles in the workplace or as a result of a defective product. Often overlooked, these can be very good cases. Contact: Sharon.Zinns@beasleyallen.com or Rhon.Jones@beasleyallen.com.

**PFC Contamination in Water Systems**—In May 2016, the U.S. Environmental Protection Agency (EPA) issued new lifetime health exposure guidelines for perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) in the water supply. After the EPA issued the new exposure limits, an advisory warning was provided to eight water systems in Alabama and more than 50 nationwide. The EPA advisory focused on PFOA and PFOS, man-made chemical compounds that are used in the manufacture of non-stick, stain-resistant, and water-proofing coatings on fabric, cookware, firefighting foam, and a variety of other consumer products. Exposure to the chemicals over time, even in trace amounts, could promote serious health problems, the EPA warns. Contact: Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com or Ryan.Kral@beasleyallen.com.

**E-cigarette Explosions**—We are investigating cases involving severe injuries caused by exploding e-cigarette devices and exploding e-cigarette batteries. These explosions have been linked to faulty e-cigarette products, defective lithium-ion batteries, and insufficient warnings for users. Although these cases do involve personal injury including serious burn injuries, please contact our Toxic Torts section for assistance with cases you may have involving these devices. Contact: William.Sutton@beasleyallen.com.

#### **Representing State and Local Governments**

In addition to cases listed above, lawyers in our firm represent state governments and local governments in several areas of litigation. The following will set out those specific areas.

**Governmental Entity Litigation**—Lawyers in our firm have represented numerous states throughout the country in civil litigation. These cases have been handled through the attorneys general of the states and have involved various types of civil actions. Many times individuals are barred from bringing a consumer fraud type claim, but the state government is not. We recently successfully concluded litigation in six of eight states we represent for a recovery dealing with medical fraud, with two states remaining with litigation pending.

Our firm is currently representing the states of Alabama and Georgia in the opioid litigation. We also represent states and certain local governments in environmental or toxic exposure claims. These government cases may involve issues of environmental catastrophe, or some other type of pollution.

Some of the most notable cases handled by Beasley Allen lawyers on behalf of states and municipalities for environmental issues include the PFC water contamination and BP Oil Spill litigation.

For more information, contact Rhon.Jones@beasleyallen.com, Dee.Miles@beasleyallen.com or Alison.Hawthorne@beasleyallen.com.

#### **Alternative To Lawyer Contacts**

If you have difficulty reaching the contact lawyer listed for each Section and have an urgent need, you can contact the Section Director who will put you in touch with a lawyer appropriate for your contact. They can be reached at 800-898-2034 or by their email address listed below. These Directors are listed below:

- Sloan Downes, Director, Personal Injury & Products Liability—Sloan.Downes@beasleyallen.com;
- Melissa Prickett, Director, Mass Torts—Melissa.Prickett@beasleyallen.com;
- Sandra Walters, Director, Toxic Torts—Sandra.Walters@beasleyallen.com;
- Michelle Fulmer, Director, Consumer Fraud & Commercial Litigation—Michelle.Fulmer@beasleyallen.com.

Our Directors do a tremendous job of making sure the sections operate effectively and have the resources available to handle the cases on behalf of clients. Each

section has support staff, including legal assistants and investigators, which is critical to the mission of the section.

## XIX. 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 November. 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

**Ford Motor Company** is recalling certain 2018 Ford Explorer vehicles equipped with 2.3L or 3.5L GTDI engine. Due to an assembly error, the fuel pressure sensor may leak fuel. A fuel leak in the presence of an ignition source can increase the risk of a fire.

**Ford Motor Company** (Ford) is recalling certain 2010 Ford Fusion, Mercury Milan and 2010-2012 Lincoln MKZ vehicles that previously received a replacement passenger air bag under recall 16V-384, 17V-024 or 18V-046. In the event of a crash requiring deployment of the passenger air bag, the bracket that secures the air bag inflator to the module housing may deform, allowing the gas that inflates the air bag to leak out. If the air bag does not inflate as intended, there is an increased risk of injury in the event of a crash.

**Honda** (American Honda Motor Co.) is recalling certain model year 2018 and 2019 Honda Odyssey vehicles. The latch assemblies for the power sliding doors may stick and not properly latch to the door strikers. If the power sliding door fails to latch, the doors may open while moving, increasing the risk of injury.

**Honda** (American Honda Motor Co.) is recalling certain 2017-2019 Acura MDX, 2017-2018 Acura MDX Sport Hybrid, 2018-2019 Honda HR-V and Honda Odyssey, and 2016 **Honda HR-V vehicles**. The rear brake caliper pistons may have an insufficient coating, causing gas pockets to form, reducing brake performance. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 135, "Light Vehicle Brake Systems." A reduction of braking performance increases the risk of a crash.

**Chrysler** (FCA US LLC) is recalling certain 2018 Jeep Wrangler four-door vehicles. The right rear passenger door latch may not be in the correct location, possibly preventing the door from latching properly. If the right rear passenger door opens unexpectedly, it can increase the risk of injury.

**Chrysler** (FCA US LLC) is recalling certain 2018 Jeep Grand Cherokee Street and Racing Technology (SRT) and Trackhawk vehicles. The driver's floor mat may have insufficient clearance between the mat and the accelerator pedal, possibly preventing the pedal from returning to the idle position. If the floor mat prevents the accelerator pedal from returning to idle, there would be an increased risk of a crash.

**Eaton Corporation** (Eaton) is recalling certain ECA heavy-duty truck clutches, part numbers 122002-35, 122002-35A, 122002-42, and 122002-42A, for use in automated manual transmission vehicles. An internal component in the clutch assembly may fail, possibly resulting in unintended vehicle movement. Unintended vehicle movement can increase the risk of a crash.

**National Van Builders, Inc.** (National Van) is recalling certain 2015-2018 Ford Transit vehicles equipped with Freedman GO-ES Foldaway Seats, part numbers 43705, 45467, 48923, and 75719. When the back seat cushion is rotated from the stowed position to the upright position, the seat cushion may not remain locked into place when under load, such as in a crash or a sudden stop. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 207, "Seating Systems." In the event of a crash, if the seat back moves, the seat occupant has an increased risk of injury.

**Lotus Cars Limited** (Lotus) is recalling certain 2018 Lotus Evora vehicles. Due to an assembly error, in the event of a frontal collision the steering column may not properly collapse to absorb some of the impact energy. If the steering column does not collapse as intended in a crash, it can increase the risk of injury.

**Toyota Motor Engineering & Manufacturing** (Toyota) is recalling certain 2004-2006 Toyota Scion xA vehicles. The air bag control module for the supplemental restraint system (SRS ECU) may experience an internal short, possibly causing the air bags to unintentionally deploy, or become deactivated. If the air bags and/or seat belt pretensioners unintentionally deploy, it can increase the risk of a crash. If the air bags and/or seat belt pretensioners

are deactivated, it can increase the risk of injury in the event of a crash.

**General Motors LLC** (GM) is recalling certain 2019 Buick Encore, Chevrolet Spark, Traverse, and Trax vehicles. The Sensing Diagnostic Module (SDM) on these vehicle may not have been turned off of "manufacturing mode," preventing the air bags from deploying in the event of a crash. If the air bags do not deploy in the event of a crash, it can increase the risk of injury.

**Subaru of America, Inc.** (Subaru) is recalling certain 2018 Subaru Legacy and Outback vehicles. Due to a software error, the low fuel warning light may not illuminate at the intended remaining fuel level and the miles-to-empty display may incorrectly indicate a positive number despite the tank being empty. The inaccurate fuel display may cause a driver to unexpectedly run out of fuel and the vehicle to stall, increasing the risk of a crash.

**Subaru of America, Inc.** (Subaru) is recalling certain 2012-2014 Subaru Impreza, 2012-2013 Impreza Stationwagon, 2013 Subaru BRZ, XV Crosstrek and Toyota Scion FR-S vehicles. The engine valve springs in these vehicles may fracture causing an engine malfunction or a possible engine stall. An engine stall can increase the risk of a crash.

Suzuki Motor of America, Inc. (Suzuki) is recalling certain 2010-2013 Suzuki Kizashi vehicles. Dust can enter the vent line that provides fresh air to the carbon canister restricting its air flow and possibly creating excessive negative pressure in the fuel tank which may result in the fuel tank cracking. A cracked tank may leak fuel, increasing the risk of a fire.

**Kia Motors America** (Kia) is recalling certain 2018 Kia Stinger vehicles. The front wiring harness located in the engine and passenger compartment may get damaged from contacting a burr on the left fender body panel. The damaged wiring harness may short circuit, increasing the risk of a fire.

**Kia Motors America** (Kia) is recalling certain 2019 Kia Forte vehicles equipped with LED headlights. The headlights may not have been manufactured with the correct low beam aiming. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 108, "Lamps, Reflective Devices, and Associated Equipment." If the headlights are not properly aimed, the driver may have reduced visibility, increasing the risk of a crash.

**Hickory Springs Manufacturing Company** (HSM) is recalling certain HSM NextGen 45" 3PT school bus seats, part number GenQ3-45 LH. The bolts that secure the rear of the seat pedestal to the floor may fracture, allowing the pedestal to detach from the bus floor. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 210, "Seat Belt Assembly Anchorages." If the floor pedestal disconnects from the floor during a crash, it can increase the risk of injury.

**Mercedes-Benz USA, LLC** (MBUSA) is recalling certain 2019 Mercedes-Benz C300, C300 4Matic, C300 4Matic Cabrio, C300 4Matic Coupe, C300 Coupe, C300 Cabrio, C43 AMG, C43 AMG Cabrio, C43 AMG Coupe, CLS450, CLS450 4Matic, CLS53 AMG 4Matic, E53 AMG 4Matic, E450 4Matic, E450 4Matic Coupe, E53 AMG 4Matic Coupe, G550, and G63 AMG vehicles. The Central Powertrain Controller (CPC) control unit could reset while driving, possibly causing an engine stall. An engine stall can increase the risk of a crash.

**Daimler Trucks North America** (DTNA) is recalling certain 2017-2018 Freightliner Cascadia vehicles. The brake lights on these vehicles may remain activated after the brake pedal is released. If the brake lights remain activated, other drivers may be unaware that the vehicle is actually slowing or stopping, increasing the risk of a crash.

**Daimler Vans USA, LLC** (DVUSA) is recalling certain 2018 Freightliner Sprinter 2500 and 3500 and Mercedes-Benz Sprinter 2500 and 3500 vehicles. The right side door latches may have been built with incorrect components. As a result, when the doors are electronically unlocked, the right-side doors may not be able to be opened from inside or outside of the vehicle. In the event of a crash, if the right side doors cannot be opened, it could increase the risk of injury.

**Isuzu Technical Center of America, Inc.** (Isuzu) is recalling certain 2018-2019 Chevrolet Low Cab Forward 6500XD and Isuzu FTR vehicles. The cab may not provide an adequate warning to lock the cab tilt-lock after servicing. If the cab tilt-lock is not engaged, the cab can tilt forward while driving. If the cab tilts forward while driving, it can increase the risk of a crash or injury.

**Pierce Manufacturing** (Pierce) is recalling certain 2017-2018 Pierce Arrow XT, Dash, Enforcer, Impel, Quantum, Saber, Velocity, and Commercial vehicles

equipped with Whelen accessory brake lights. Depending on the specific wiring of the vehicle, these brake lights may illuminate when the brake pedal has not been pressed. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 108, "Lamps, Reflective Devices, and Associated Equipment." If the brake lights incorrectly illuminate, it can confuse other drivers, possibly increasing the risk of a crash.

**BMW of North America, LLC** (BMW) is recalling certain 2013-2018 BMW 328d and 328d xDrive, 2014-2018 328d Sports Wagon and 328d xDrive Sports Wagon, 2014-2016 535d and 535d xDrive, 2015 740Ld xDrive, 2015-2017 X3 xDrive28d SAV and 2014-2017 X5 xDrive35d SAV vehicles equipped with an Exhaust Gas Recirculation (EGR) module with an integrated cooler. If the EGR cooler leaks internally, the coolant can mix with diesel engine soot. The high EGR temperatures may result in these particles possibly smoldering and melting the intake manifold. The melting intake manifold can increase the risk of a fire.

**Southeast Toyota Distributors, LLC** (SET) is recalling certain 2017-2019 Toyota 4Runner vehicles that SET modified to be equipped with a TRD wheel package. The Gross Vehicle Weight Rating (GVWR) on the certification label may be incorrect, possibly resulting in the vehicle being overloaded. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 110, "Tire Selection and Rims." An overloaded vehicle can increase the risk of a crash.

**Porsche Cars North America, Inc.** (Porsche) is recalling certain 2019 Porsche Cayenne vehicles. The passenger side rear seat belt buckle may break under load, such as in the event of a crash. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 209, "Seat Belt Assemblies." If the seat belt buckle breaks in the event of a crash, the occupant will not be properly restrained, increasing their risk of injury.

**Proterra** is recalling certain 2016-2017 Proterra Catalyst 40 transit buses equipped with axles with radial air disk brakes. Surface roughness of a guide pin in the radial brake calipers may cause the brake carriage guide pin support bolt to break. Breakage of the guide pin can cause loss of braking ability or loss of tire pressure, increasing the risk of a crash.

## Other Motor Vehicle Recalls

**Ducati North America** (Ducati) is recalling certain 2017-2019 Ducati Supersport motorcycles. Vibrations may distort the images in the mirrors, reducing the driver's visibility. Reduced rearward visibility can increase the risk of a crash.

**Kidde Technologies, Inc.** (Kidde) is recalling certain fire extinguishers, model number 83-133002-500 with part numbers 421220-11 and 421220-12, used in certain fire suppression systems installed in buses and passenger coach vehicles. The actuator of the extinguisher may not function properly, preventing the fire extinguisher from discharging the fire suppression agent. If the fire suppression system does not work as intended, it can increase the risk of injury in the event of a fire.

**Dexter Axle Company** (Dexter) is recalling certain D28H, D35, D40, and D44 trailer axles. The inner hub bearings may not have been sufficiently greased, which can cause the bearings to overheat and fail. If the bearings overheat, the hub may fail, affecting handling and increasing the risk of a crash.

**Keystone RV Company** (Keystone) is recalling certain 2019 Keystone Montana recreational trailers with the Legacy package. The fasteners that secure the disc brake assembly may fail. If the fasteners fail, the trailer would lose all braking ability, increasing the risk of a crash.

**Triple E Recreational Vehicles** (Triple E) is recalling certain 2019 Triple E Unity motorhomes, models U24MB, U24CBB, U24TB, U24IX and U24FX. The driver-side front trans-mount leveling jack support bracket may contact the brake line causing a brake fluid leak, thereby reducing braking ability. A reduction in braking ability can increase the risk of a crash.

**Thor Motor Coach** (TMC) is recalling certain 2018-2019 Thor Four Winds, Chateau, and Freedom Elite vehicles. The liquid propane (LP) hose may not have adequate space between the floor and the metal plate on the refrigerator, causing damage to the hose and possibly creating a propane leak. A propane leak can increase the risk of a fire.

**Thor Motor Coach** (TMC) is recalling certain 2017 Tuscany XTE and 2017-2019 Venetian, Aria, Tuscany, and Palazzo motorhomes built on Freightliner Custom Chassis Corporation chassis. The Power Distribution Module (PDM) may have been damaged during manufacturing, possibly resulting in the rear marker lights, brake lights, or turn signals not functioning.

Nonfunctioning lights can increase the risk of a crash.

**Forest River, Inc.** (Forest River) is recalling certain 2018-2019 Forest River Berkshire recreational vehicles and StarTrans PS2 transit buses and 2019 Glaval Legacy transit buses. The brake caliper mounting bolts may have been insufficiently tightened. Loose brake caliper mounting bolts can reduce brake effectiveness, increasing the risk of a crash.

Forest River, Inc. (Forest River) is recalling certain 2018-2019 Cherokee Alpha Wolf and 2019 Cherokee Arctic Wolf recreational trailers. The awnings may have been mounted with fasteners that are insufficient in length and/or quantity, possibly resulting in the awning arm detaching from the wall. If the awning arm detaches, it can increase the risk of injury or a crash.

**Forest River, Inc.** (Forest River) is recalling certain 2017-2019 Forest River Georgetown and FR3 motorhomes, 2018-2019 Berkshire motorhomes and 2018 Charleston motorhomes. The motorized windshield roller shade at the driver's seating position may unroll without warning while driving. If the windshield roller shade unrolls while driving, it could block the driver's visibility, increasing the risk of a crash.

**Keystone RV Company** (Keystone) is recalling certain 2019 Crossroads Cruiser recreational trailers with the water heater installed under the slide out. The exhaust location for the water heater may result in carbon monoxide or propane gas entering the living quarters. If carbon monoxide or propane gas enters the living quarters, it can increase the risk of injury.

**Grand Design RV, LLC** is recalling certain 2018-2019 Reflection fifth wheel trailers, models 28BH and 29RS. The circuit for the power converter does not have over-current protection. An electrical short circuit in the unprotected circuit can increase the risk of a fire.

**Silverstone Associates LLC** (Silverstone) is recalling certain Ride Eazy DOT Sleek helmets, sizes M and XL. These helmets may not adequately protect the wearer in the event of a head impact during a motorcycle crash, or the helmet may detach from the wearer. As such, they fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 218, "Motorcycle Helmets." A helmet that does not adequately protect the wearer from an impact or becomes detached can increase the risk of injury in the event of a crash.

**Altec Industries** (Altec) is recalling certain 2014-2018 DHH and DHB Digger Derrick vehicles. The Zone Rating System may not alert the operator that the load being handled exceeds the rated load for the unit's specific position. Without an alert, there is a greater risk of unit instability or a loss of load control, increasing the risk of injury.

**Altec Industries, Inc.** (Altec) is recalling certain 2018 Altec DM45, DM47B, DC45 and DC47 Digger Derricks and TA50 and TA60 Aerial Devices. The high strength fasteners used to secure the pedestal to the turn table may fail. If the fasteners fail, the pedestal may separate from the turn table, increasing the risk of injury.

**Heartland Recreational Vehicles, LLC** (Heartland) is recalling certain 2019 Heartland Pioneer recreational trailers, model BH280. A flexible liquid propane (LP) hose was installed on the outside cooktop running into the firebox of the stove instead of a rigid metal tube supply line. Heat from the cooktop can damage the hose, increasing the risk of a fire.

#### Other Consumer Recalls

##### **BLACK & DECKER RECALLS HAMMER DRILLS**

Black & Decker (U.S.) Inc., of Towson, Maryland, has recalled about 641,000 Black & Decker, Bostitch and Porter-Cable Hammer Drills and Drill Drivers. The side handle sold with the drill can slip or break, leading to a loss of control of the tool, posing an injury hazard. This recall involves side handles supplied with Porter-Cable brand model PC70THD ½ Inch VSR 2-Speed Hammer Drills, Black & Decker brand model DR560 ½ Inch Drill/Drivers, and Bostitch brand models BTE140 and BTE141 ½ Inch Hammer Drills. The side handles are black plastic and attach to the drill to help provide stability. The Porter-Cable hammer drills are gray with red accents, the Black & Decker drill/drivers are orange with black accents, and the Bostitch hammer drills are yellow with black accents. Black & Decker has received 11 reports of side handles slipping or breaking and one report of a torn rotator cuff injury.

The tools were sold at The Home Depot, Lowe's, major home and hardware stores nationwide, and online at Amazon.com and other online retailers from January 2010 through July 2018 for between \$50 and \$100. Consumers should immediately stop using the drills and contact Black & Decker for a free replacement side handle. Contact Black & Decker at 888-284-3070 from 8 a.m. to 5 p.m. ET, Monday through Friday, at recall@sbdinc.com or online at www.portercable.com click Safety Notices

and Recalls, [www.blackanddecker.com](http://www.blackanddecker.com) click Safety Recalls, or [www.bostitch.com](http://www.bostitch.com) click Safety Recalls for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2019/Black-and-Decker-Recalls-Hammer-Drills-Due-to-Injury-Hazard>.

**Altec Industries Inc.** (Altec) is recalling certain 2009 Altec LSS 60 or LSS 70 Elevator Aerial devices. The elevator riser assembly may crack and fail. If the elevator riser fails, it can increase the risk of injury or death.

##### **MCS INDUSTRIES RECALLS GLACIER BAY MEDICINE CABINETS**

About 15,400 Glacier Bay Bi-View medicine cabinets have been recalled by MCS Industries Inc. of Easton, Pennsylvania. The mirror can detach from the medicine cabinet door, posing a laceration hazard to consumers. This recall involves Glacier Bay bi-view medicine cabinets. The medicine cabinets are 30 inches wide x 26 inches high and contain a silver beveled mirror. Only medicine cabinets that have one-piece, plastic brackets for the inside shelves are included in this recall. MCS has received 94 reports of mirrors detaching and breaking, including two reports of lacerations to hands and fingers and six reports of property damage.

The cabinets were sold at The Home Depot stores nationwide and online at [homedepot.com](http://homedepot.com) from January 2018 through August 2018 for about \$185. Consumers should immediately stop using the recalled medicine cabinets and contact MCS for instructions on sending the product back to MCS free of charge and receiving a free replacement. MCS is contacting all known purchasers directly. Contact MCS Industries at 800-833-3058 (select option 6) from 8:30 a.m. to 5 p.m. ET Monday through Friday or email [recalls@mcsframe.com](mailto:recalls@mcsframe.com) or online at [www.mcsframes.com](http://www.mcsframes.com) and click on "Recalls" on the bottom of the page for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2019/MCS-Industries-Recalls-Glacier-Bay-Medicine-Cabinets-Due-to-Laceration-Hazard-Sold-Exclusively-at-The-Home-Depot>

##### **MORE THAN 600,000 A. O. SMITH WATER HEATERS RECALLED**

A.O. Smith Corporation, out of Milwaukee, Wisconsin, has recalled about 616,000 of their Ultra-Low NOx water heaters due to fire hazard. According to the company, the heater's gas burner screen develops tears and can create excess radiant heat,

posing a fire hazard if the water heater is installed directly on a wood or other combustible floor. Included in the recall are 30-, 40- and 50-gallon natural or propane gas-fired Ultra-Low NOx emission gas water heaters with the first four digit serial numbers between 1115 and 1631. The heaters were sold under the American, A.O. Smith, Kenmore, Reliance, State, U.S. Craftsman and Whirlpool brand names and manufactured from April 8, 2011, through Aug. 1, 2016. The brand name, model number and serial number can be found on the data plate on the product located next to the gas control valve/thermostat while the brand name is printed near the top of the water heater.

If you do happen to have one of the recalled products, you are advised to immediately turn off and stop using it and contact A.O. Smith to determine if a free repair is necessary. So far, A.O. Smith has received six reports of fires occurring from a water heater installed directly on a combustible surface. No injuries have been reported. Consumers can look up their water heater's serial number to see if it is affected by this recall at [www.waterheater-recall.com](http://www.waterheater-recall.com).

#### **IKEA RECALLS DINING TABLES**

IKEA Supply AG, of Switzerland, has recalled about 8,200 GLIVARP extendable dining tables. The table's glass extension leaf can detach and fall unexpectedly, posing a laceration hazard. This recall involves IKEA GLIVARP extendable dining tables in white. The recalled tables have four steel legs and a glass table top with an extension that can be pulled out to the side. They measure about 29 inches tall by 49 inches long. The glass table top extension measures about 25 inches long. The supplier number (12003) is printed on a sticker on the underside of the table frame. "GLIVARP" and the IKEA logo are also printed on the sticker. IKEA has received three reports of the table's glass extension leaf detaching and falling unexpectedly, one of which included a minor injury where no medical attention was needed.

The tables were sold exclusively at IKEA stores nationwide and online at [www.ikea-usa.com](http://www.ikea-usa.com) from February 2017 through October 2018 for about \$300. Consumers should immediately stop using the recalled dining tables and return them to any IKEA store for a full refund or free replacement table. Contact IKEA toll-free at 888-966-4532 anytime or online at [www.ikea-usa.com](http://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. Pictures available here: <https://www.cpsc.gov/Recalls/2019/IKEA->

#### **Recalls-Dining-Tables-Due-to-Laceration-Hazard**

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

## **XX. FIRM ACTIVITIES**

### **EMPLOYEE SPOTLIGHTS**

#### **ANDREW BANKS**

Andrew Banks is a lawyer in the firm's Toxic Torts Section. Currently, Andrew is handling cases for municipalities whose water systems have suffered various forms of environmental harm after exposure to corporate pollution. Prior to joining Beasley Allen, Andrew worked as a law clerk for the Jefferson County District Attorney's Office in Birmingham, Alabama, where he gained valuable trial experience. Andrew was also selected as a judicial intern for U.S. District Judge Madeline Haikala in the Northern District of Alabama.

Andrew says he knew from a very young age that he wanted to do something with his life that had a positive impact on the community. He began to understand there are many people who, when facing real problems, do not have the ability to make their voices heard. Andrew says he has made it his duty to be there for them, giving them a voice. He wants to use his skills and knowledge to help them to the best of his ability. Andrew says:

*When I go to bed each night, I hope to feel confident that what I did that day had a positive impact on another person's life.*

The Maitland, Florida, native now calls Montgomery home. He made his way to the Capital City and to Beasley Allen by way of Florida State University where he earned his Bachelor of Science degree in

2015 and Samford University's Cumberland School of Law. While at Cumberland, Andrew was a member of the law school's nationally ranked trial team, a member of Cumberland's arbitration team, an executive officer of the law school's trial advocacy board and an Associate Justice for the Cumberland Honor Court.

Although a relatively new lawyer with the firm, Andrew says he has observed the firm's fundamental goal is to achieve the best possible outcome for clients and he believes that's what sets the firm apart. Andrew says:

*Every single person at this firm has a goal to achieve the best possible outcome for our clients and works hard every day to reach that goal. While some firms are just about making a profit, we are about making a difference to people.*

Andrew is an avid Florida State Seminoles fan and enjoys playing golf in his spare time. He is a hardworking lawyer who does outstanding work. We are fortunate to have Andrew with the firm.

#### **TYNER HELMS**

Tyner Helms, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, marked his first anniversary with the firm in October. He is primarily working on litigation related to Fiat Chrysler emission cheating software and the *quintam* litigation. Prior to joining Beasley Allen, Tyner was a law clerk for a private practice attorney and two civil litigation law firms.

Tyner says he became a lawyer because of the challenge practicing law presents to the professional and the impact it has on people's daily lives. He says:

*Lawyers can be movers and shakers in society and they have the potential to change the status quos through the legal process. Lawyers are often in unique positions to help people resolve problems, restore their clients' lives, and are often the only thing standing between their client and an injustice.*

Tyner says these same principles drive his passion for practicing law as a trial lawyer. He adds:

*The feeling that I am doing something meaningful that impacts people's day-to-day lives is my favorite part about practicing law. I also love the challenge that practicing law presents. As a lawyer, you have to apply a wide variety of skills to be good at your job and, in that sense, you will never get to a point where you have 'seen it all'. It forces you to*

*keep learning and developing personally as you progress in your career.*

A 2017 graduate of the University of Alabama School of Law, Tyner served as senior editor of the Civil Rights and Civil Liberties Law Review, interned at the school's Elder Law Legal Aid Clinic and assisted a professor in developing a journal article on the False Claims Act's application to customs fraud. He earned his accounting degree from Auburn University in 2013.

In describing our firm, Tyner says that the value Beasley Allen places on providing a benefit to the community through its legal services is what makes the firm unique. Tyner says:

*The firm takes the mindset that no problem is too small to listen to, and no case is too big or intimidating to take on. It takes the approach that if you focus on working hard, treating people fairly, and maintaining good character, the other things will come into place.*

Tyner resides in Montgomery and attends The First Baptist Church. We are most fortunate to have Tyner in the firm. He is an outstanding young lawyer who is truly committed to his work and the clients he represents.

#### **JEFF PRICE**

Jeff Price, a lawyer in our Toxic Torts Section, joined the firm in 2012. He is currently a member of our Opioid Litigation Team. The team represents the State of Alabama and the State of Georgia in the opioid litigation. The opioid crisis, which has reached epidemic proportions, was created by the pharmaceutical industry. Responding to the crisis has caused local and state governments to incur tremendous economic losses, which are continuing as a significant financial burden.

Jeff is also a member of the firm's Nursing Home Litigation team. Previously, Jeff represented individuals, property owners and business owners across the Gulf Coast, helping them recover millions of dollars in compensation for the losses they suffered following the explosion of the Deepwater Horizon oil rig.

The Montgomery native is also a (non-practicing) Certified Public Accountant in Alabama. He graduated with a B.A. from Tulane University and holds a J.D. from Cumberland School of Law, and an LL.M. in federal taxation from the University of Miami School of Law.

Jeff said he chose to become a lawyer because he believes in justice and fairness and, he added, he also likes to argue. He says that practicing law allows him the

opportunity to ensure his clients are treated fairly and receive the justice they deserve. He said his favorite parts of practicing law are "working with good folks and successfully resolving cases." Jeff also says he enjoys working at the firm because of "the great staff who are very passionate about what they do."

Jeff is married to the former Kathleen Crawley of Prattville, Alabama, and they enjoy spending time with their dog, "Lilly." They now reside in Prattville, Alabama. Jeff is a very good hard-working lawyer, who is passionate about what he does. He is a valuable asset to the firm. We are fortunate to have Jeff with us.

#### **BEN KEEN**

Ben Keen, a lawyer in the firm's Personal Injury & Products Liability Section, is in our Atlanta office. He handles cases involving serious injuries and defective products including tractor trailer accidents. Prior to joining the firm and during his time in law school, Ben gained experience as a law clerk for law firms practicing in civil litigation and criminal defense.

The Samford University Cumberland School of Law graduate's desire to practice law was shaped by his father, also a lawyer. Ben says:

*After observing my father practice law for decades, my admiration transformed into an understanding of the responsibility and commitment necessary to successfully practice law. My observations made my decision to practice an easy one. Today, I honor my responsibility and commitment as an attorney.*

While at Cumberland, Ben studied at Cambridge University, Sidney Sussex College in Cambridge, England, as part of the law school's study abroad program. He was consistently included on the Dean's List and was a member of Cumberland's National Arbitration and National Trial teams, an Associate Judge of the law school's Trial Advocacy Board, a member of the Cordell Hull Speakers Forum and a member of the Judge James Edwin Inn of Court. During his senior year of law school, Ben served as class President and Graduation Commencement Speaker.

Earlier in his life, Ben earned his Screen Actors Guild (SAG) card after landing the role of Wingate quarterback, Tony, in Warner Brothers Entertainment, Inc.'s "The Blindside." Now, Ben loves practicing law and following in his father's footsteps. He says what he admires about practicing law is the privilege of advocating for others. Ben says:

*As a lawyer, I have a duty to seek the best interest for my clients. Unfortu-*

*nately, many of our clients have experienced traumatic life events. I am particularly passionate about helping our clients through these events. Being able to provide the relief our clients need is my favorite part about practicing law.*

As with many of the firm's lawyers, Ben's approach to his law practice mirrors that of the firm's—keeping a client's interest at the forefront and treating them as part of the Beasley Allen family. He appreciates the family-style culture the firm fosters. Ben says:

*Beasley Allen is unique in that the firm considers their clients and employees part of the Beasley Allen family. I find the word family to be an accurate representation because Beasley Allen, like a family, gives equal attention and diligence to any issue whether it be legal, within the community, or personal.*

The Georgia native enjoys spending his free time with family and close friends. He also enjoys listening to music, watching Ole Miss football, hunting and fishing.

We are most fortunate to have Ben in our firm and especially in our Atlanta office. He is a most welcome addition there. Ben is dedicated to helping others and making sure his clients are well-represented and have an opportunity to obtain justice. We also predict a bright future for Ben in Georgia as a trial lawyer.

#### **DAN PHILYAW**

Dan Philyaw is a lawyer who also is in the firm's Atlanta office. He represents injured individuals and their families in a wide range of serious injury cases as a member of the firm's Personal Injury & Products Liability Section. Prior to joining the firm, Dan gained practical experience by serving as a summer clerk for then-Judge Charlie Bethel at the Court of Appeals of Georgia. As a student at the University of Georgia School of Law, Dan also represented survivors of family violence in the law school's Family Justice Clinic.

Dan graduated *cum laude* from Georgia Law in May. In addition to his work in the law school's Family Justice Clinic, Dan was a standout advocate in both moot court and mock trial competitions while at Georgia Law. He won Best Oralist at the 2017 Georgia Intrastate Moot Court Competition and was also named Best Oral Advocate at the 2017 Billings, Exum & Frye National Moot Court Competition.

Additionally, Dan won Georgia Law's J. Melvin England Mock Trial Tournament in 2016 and finished as runner-up in the J. Ralph Beard Closing Argument Competition during the same calendar year. Due to

these successes, Dan was inducted to the Order of Barristers upon graduation as one of the 10 best advocates in his law school class.

Ben also served as a research assistant to evidence scholar Ronald L. Carlson and studied as a pupil in the Joseph Henry Lumpkin American Inn of Court. Dan earned bachelor's degrees in finance and international studies from the University of Missouri in 2014, graduating *magna cum laude* and *cum laude*, respectively.

Dan says giving a voice to others who cannot advocate for themselves is what drew him to the practice of law. He says: "I want to use my strengths to help others in their time of need."

Practicing law at Beasley Allen, Dan said, allows him to pursue his passion of advocating for those with the greatest need because of the firm's commitment to its clients and community. Dan says:

*Beasley Allen has the size and strength of a large law firm but treats its clients and employees like family. The members of the firm are truly committed to making a positive impact in the lives of those around them.*

Additionally, Dan said the practice of law allows him to be a life-long learner and he appreciates the opportunity to continually learn about the law, industry, technology and the community.

In his spare time, Dan enjoys writing music and plays guitar, piano and cello. He is also a long-distance runner and a proud Eagle Scout. Dan enjoys watching SEC sports and worked for a sports marketing firm before going to law school.

Dan is a great addition to our Atlanta office. He is an extremely talented individual who works very hard for his clients. We are pleased to add Dan as a lawyer in our firm. It's our belief that Dan has an extremely bright future as a trial lawyer in Georgia.

### **SHAYNEA WILLIAMS**

Shaynea Williams is an E-Discovery Specialist who joined the firm in August 2017. She advises lawyers and legal staff on discovery processes to ensure legal compliance in the development, implementation and support of efficient and cost-effective discovery processes. Shaynea has developed best practices and procedures for database management and provided guidance in selection of appropriate software and vendors. Additionally, Shaynea helps with electronic document productions, provides support during hearings, depositions and trials, and coordinates lawyer and legal staff trainings.

A graduate of Spelman College, Shaynea earned her Bachelor of Arts degrees in

Political Science and Psychology. She earned her law degree from Thomas M. Cooley School of Law and holds a Master of Business Administration from American Public University.

Shaynea is mother to 5-year-old Dallas who she says is "an amazing and brilliant boy." She is also a newlywed. She and her husband, Terry Willis, were married in June. Since March 2017, Shaynea is an aspiring comedian and has performed in several major venues.

## **XXI. SPECIAL RECOGNITIONS**

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### **GIBSON VANCE HONORED BY TROY UNIVERSITY**

Gibson Vance has been named a 2018 Troy University Distinguished Alumni of the Year. Gibson, a 1987 graduate, now provides leadership to the University as a member of its Board of Trustees. Gibson had this to say:

*I am honored by this recognition. The education and fundamental professional values I acquired while at Troy placed me on a path full of opportunities. I am proud to represent the school and to support its work in preparing the next generation of professionals and leaders.*

Troy Chancellor Jack Hawkins presented the award during the Homecoming football game last month. A long-time supporter of Troy University, Gibson and his wife, Kate, will soon establish the Kate and Gibson Vance Study Abroad Scholarship, enabling students who wish to expand their learning experience beyond the classroom to do so by helping offset certain expenses. Previously, Gibson established an endowment to the College of Arts and Sciences, which launched a Distinguished Lecturer Series to provide students interested in pursuing a career in the legal profession the opportunity to hear from the field's most influential figures.

Gibson joined Beasley Allen in 2000 and he practices in the firm's Personal Injury & Products Liability Section and Consumer Fraud & Commercial Litigation Sections. His law practice focuses on actions against those who negligently or intentionally harm others. Gibson has participated in dozens of jury trials in his legal career, many of which have resulted in extremely large verdicts for his clients.

Gibson is the President of the Southern Trial Lawyers Association and a past-presi-

dent of the following organizations: American Association for Justice, Montgomery Trial Lawyers Association, the Alabama Civil Justice Foundation and the Montgomery County Bar Association. Gibson is also an Alabama State Bar Commissioner, representing the 15<sup>th</sup> Judicial Circuit. Gibson and Kate have two children, Carter and Andrew and they attend First Baptist Church in Montgomery.

### **FAULKNER UNIVERSITY'S JONES SCHOOL OF LAW CELEBRATES 90 YEARS**

We are featuring Jones School of Law this month. For those who don't already know, the school, which was established in 1928, is located in Montgomery on the campus of Faulkner University. We asked Charles Campbell, Interim Dean at Jones School of Law, to write a piece on the law school for this issue of the *Report*. He obliged and we appreciate it very much. Because of the importance of the law school to our state, and specifically to the legal community in our area, the entire article appears below.

Faulkner University's Jones School of Law is celebrating 90 years of legal education in Montgomery this year. Established in 1928, the school is named in memory of Thomas Goode Jones (1844-1914).

Thomas Goode Jones was a Montgomery Civil War veteran who first came to prominence after the war by urging national reconciliation. "We can bequeath our children nobler legacies," he said, "than discord and hate." He served in the Alabama legislature and two terms as governor of Alabama. President Theodore Roosevelt appointed him to be a federal district judge for the Northern and Middle Districts of Alabama in 1901, on the recommendation of Booker T. Washington. As a federal judge, Jones was known for attempting to end the peonage system and for encouraging the use of federal law to punish lynching.

Judge Jones's son, a Montgomery County circuit judge for many years, began holding law classes in the county courthouse in 1924, and he officially established the law school in 1928, naming it after his father. Leading Montgomery attorneys and judges taught the classes, which quickly moved out of the courthouse and into a series of locations in downtown Montgomery. Early students recalled having keys to the capitol building so that they could use the

Alabama Supreme Court's library to study. Eventually, the law school found a home (and its own library) in a building on Hull Street, right behind the Jones home on Adams Avenue.

After the death of its founder in 1963, the law school passed through a series of owners. Faulkner University purchased it in 1983 and, in 1996, constructed a new building for it that was expanded in 2001 and again in 2011. The law school obtained provisional approval from the American Bar Association in 2006, followed by full approval in 2009, making Jones the third ABA-accredited law school in Alabama.

After 90 years, Jones has more than 2,500 alumni, many of whom have risen to the top of the Alabama bench and bar. Four graduates have served on the Supreme Court of Alabama, and three more have served on the state courts of appeals. Nearly 40 Jones graduates have served as state and federal trial judges; nine currently serve as district attorneys. Hundreds of Jones alumni are employed in public service. Many more are in private practice at some of the best firms in the state, such as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., where, led by Greg Allen, more than 30 Jones graduates now practice.

Students at Jones come from a variety of backgrounds—from careers in business, the military, education, and law enforcement, in addition to those coming straight from college. They engage in substantial public service while in law school through the elder law, family violence, and mediation clinics, as well as other pro bono service opportunities and student organizations. In fact, the school's legal clinics recently won the Gold Medallion award from the Montgomery County Bar Foundation Volunteer Lawyers Program for the third year in a row.

The law school has built a national reputation in trial advocacy. The most recent U.S. News rankings rated the trial advocacy program 17<sup>th</sup> in the nation. The faculty continue to build solid reputations for scholarship, teaching, and service, and regularly participate in academic conferences and publish in top law reviews. Over the past two years, the law school has significantly improved the entering qualifications of its incoming students, with the current first-year class

having some of the best undergraduate grades in the law school's history.

As Jones celebrates its 90<sup>th</sup> anniversary, it is also looking forward to its next 90 years. It is launching a capital campaign and exploring reopening a part-time program. For more than 70 years, Jones operated as a part-time evening program; students attended classes in the afternoon and evening, while most maintained their full-time jobs. The law school added a traditional full-time program in 2000. With ABA approval, the full-time day program became so popular that the school began phasing out the part-time program in 2008.

Now, a decade later, technology is transforming legal education. In August 2018, the ABA doubled the number of credit hours that may be offered online. A third of the 90 hours required to graduate from Jones may now be taken online, from home. Online distance education makes it possible to design a curriculum that would allow part-time students to complete much of their coursework from home, with much less commuting to campus. A part-time program could serve students throughout Alabama as well as Georgia, Mississippi, and the Florida panhandle, making legal education available to many more students, especially those working full time and those from rural areas. The school has therefore commissioned a market research study to gauge interest in such a program.

The law school's 90<sup>th</sup> anniversary will culminate with a celebration at its annual Barristers' Dinner at 6 p.m. on Thursday, March 7, 2019, at the Warehouse and Ballroom at Alley Station in downtown Montgomery. All alumni and friends of Jones School of Law are invited. All of us at Beasley Allen are very proud of the many successes and accomplishments achieved by Jones School of Law and its graduates. The school is very important to the Capital City and to the State of Alabama without a doubt. It has definitely been very good for Beasley Allen.

If you are interested in supporting Jones School of Law, contact Interim Dean Charles Campbell at [ccampbell@faulkner.edu](mailto:ccampbell@faulkner.edu) or 334-386-7528.

## XXII. FAVORITE BIBLE VERSES

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Allison Hunnicutt, a lawyer in our firm, furnished two verses for this issue. Allison says that she was led to 1 Peter 5:8 by a friend who was helping her deal with a problem in her life. Allison says she is now having good success in her battles involving spiritual warfare.

*Be alert and of sober mind. Your enemy the devil prowls around like a roaring lion looking for someone to devour. 1 Peter 5:8*

Recently, Allison says that she received independent confirmation that God hears her prayers! After a particularly disturbing encounter, Allison says she felt the weight of her burden and lifted her eyes and prayers heavenward with overwhelming sadness in her heart. She then asked God to please lift her heavy burden and to help her. Allison says:

*I remembered to do something important. I prayed that the Lord would bless my enemies. Less than an hour later, here is the message from another friend that came across my computer email with the subject line "Prompted."*

Good Afternoon! Sending love and blessings to you and asking the Father to wrap His arms around you to refresh and overwhelm you. Love you.

Allison says:

*Wow! God heard me, He is listening, He knows and He is with me! I believed it before because of my faith, but to experience independent real world confirmation that my tearful request was routed by the Holy Spirit to God and then transmitted in some heavenly communique to another person who reached out and pinged me with that knowledge—I was and am still truly overwhelmed. This doesn't mean that I won't encounter further trials and trouble. It just means that if I depend on God, I know He bears my prayers and He will deliver me from all of them, in His own time.*

The following are several verses from Lamentations (3:22-26) that Allison says remind her of God's great and unending compassion for us:

*Because of the Lord's great love we are not consumed, for his compassions never fail. They are new every morning; great is your faithfulness. I say to myself, "The Lord is my portion; therefore I will wait for him." The Lord is good to those whose hope is in him, to the one who seeks him; it is good to wait quietly for the salvation of the Lord. Lamentations (3:22-26)*

Angie Taylor, a legal secretary in our Mass Torts Section, sent two verses for this issue. She says God led her to this scripture not long after her Dad went home to be with the Lord. Angie says as it comforts her, she prays that it comforts others. She wants us to know that Jesus is **always** with us and we are **never** alone.

*But I would not have you to be ignorant, brethren, concerning them which are asleep, that ye sorrow not, even as others which have no hope. For if we believe that Jesus died and rose again, even so them also which sleep in Jesus will God bring with him. For this we say unto you by the word of the LORD, that we which are alive and remain unto the coming of the LORD shall not prevent them which are asleep. For the LORD himself shall descend from heaven with a shout, with the voice of the archangel, and with the trump of God: and the dead in Christ shall rise first: Then we which are alive and remain shall be caught up together with them in the clouds, to meet the LORD in the air: and so shall we ever be with the LORD. Wherefore comfort one another with these words. 1 Thessalonians 4:13-18*

Angie says, as a Christian, she struggles with jumping ahead of God. She says she does it often enough that God gave her a new life scripture this year. This scripture is on her desk and on the wall of her home as a reminder that she should always wait patiently on the Lord for all things.

*Be still and know that I am God. Psalm 46.10*

Lauren Miles, a lawyer in our Consumer Fraud & Commercial Litigation Section, furnished several verses for this issue. Lauren had this to say:

It's so easy to let myself wallow in the terrible things that happen in the world, like the fraud and corruption rampant with greed, and the ugliness of "fake news" and political propaganda. I know I can't change every wrong I witness. Philippians 4:8 offers some respite to the temptation

to wallow, knowing that God himself is the final test for truth. He is an invariable moral standard; His truth is not always convenient or personally beneficial. God inspires dignity and a love that belies the best about ourselves and others. Mother Teresa gracefully explains why this Philippians verse is so resonating and sustaining to me: "In the final analysis, it is between you and God. It was never between you and them anyway." Philippians 4:8

Though he heard his prayers, God allowed Paul to endure this suffering in order to keep him humble. His grace is enough to "enlighten and enliven us, sufficient to strengthen and comfort in all afflictions and distresses. His strength is made perfect in our weakness." I constantly must remind myself that God doesn't give you more than you can handle, and even the worst day is an opportunity to learn, grow and better yourself in order to better those around you. It's also very much like a biblical version of every rap song telling you to embrace your haters and get after your goals, and I like the link to modernity. 2 Corinthians 12:10

When I was applying to law schools, I was originally placed on waiting lists for my two top choices. Despite my parents' assurances I should try to pursue law school by either waiting to hear from these schools or reconsider any of the other schools I had already been accepted into, I couldn't see past what I perceived as rejection. I felt that waiting was beneath me, and because I had exceeded these schools' stated standards for admission, if they hadn't said yes to me immediately, I should just consider pursuing some other profession. Apparently, God found my hubris amusing as the day after expressing these sentiments to my parents, we went to Mass together and I first heard the story of Matthias. Acts 1:12-26: The Story of Matthias:

Acts reveals that Matthias accompanied Jesus and the Apostles from the time of the Lord's Baptism to his Ascension and that, when it became time to replace Judas, the Apostles cast lots between Matthias and another candidate, St. Joseph Barsabbas. St. Jerome and the early Christian writers Clement of Alexandria and Eusebius of Caesarea attest that Matthias was among the 72 disciples paired off and dispatched by Jesus. Soon after his election, Matthias received the Holy

Spirit with the other Apostles (Acts 2:1-4).

Matthias was basically on "the waiting list" to be an Apostle. This verse helped me understand God's plan doesn't always align with the timing we expect, but our time will come if you have faith. And, hearing his story made me realize God listens to you, and responds if you pay attention.

## XXIII. CLOSING OBSERVATIONS

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### ***DAANGEROUS SHORTAGE OF STATE TROOPERS CREATING UNSAFE ALABAMA HIGHWAYS***

Traffic accidents and resulting fatalities have surged across Alabama in the last four years alongside a "dangerously low" level of state troopers. In August, Alabama State Trooper Sgt. Steve Jarrett told Birmingham's WBRC that there were 352 state troopers patrolling all of Alabama. By November, that number had plummeted even further to 250.

The Alabama State Troopers Association (ASTA) told the *Montgomery Advertiser* that recent studies suggest a state the size of Alabama needs 1,000 state troopers to effectively patrol the highways and keep motorists safe. Currently, there is just one state trooper patrolling every 214 square miles in Alabama.

ASTA data shows that funding for Alabama's state troopers has declined by nearly 25 percent in the last four years. At the same time, auto accidents have increased by 18 percent and fatalities have shot up by 28 percent.

With the number of personnel in decline, state troopers have to work increasingly larger territories and longer work days—as many as 12 to 16 hours per day in some circumstances, such as when severe weather blows through the state.

The aging fleet of patrol vehicles is also another enormous problem Alabama state troopers face. With longer shifts and larger patrol areas, wear and tear has taken a toll on the cars, many of which are a decade old and have more than a quarter million miles.

The predicament is not just deadly for Alabamians and other motorists passing through the state, it's also taking its toll on the troopers. Senator Cam Ward of Alabama told WBRC in August:

*It's a big stress on troopers. They have a very dangerous job. They are*

*trying to cover more territory than what was intended for their jobs. They are stressed to a breaking point.*

ASTA President David Steward told the Advertiser that ASTA Executive Director Neil Tew has called on Alabama's government officials to increase funding to bring patrols up to needed levels. But if Governor Kay Ivey's proposed investment of \$3.2 million—enough to fund a new class of 30 additional state troopers—is any indication, it's unlikely Alabama will reach the appropriate level of funding for state troopers any time soon.

I am hopeful that Gov. Ivey will increase the budget request and help to make Alabama highways safer. I believe that the Governor will do this and she should have the support of legislative leaders in both the House and Senate. Safety on our state's highways and saving lives should be a top priority in 2019.

Sources: Montgomery Advertiser and WBRC

#### OUR MONTHLY REMINDERS

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

*I am still determined to be cheerful and happy, in whatever situation I may be; for I have also learned from*

*experience that the greater part of our happiness or misery depends upon our dispositions, and not upon our circumstances.*

Martha Washington (1732—1802)

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

Louis Brandeis, 1937  
U.S. Supreme Court Justice

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

Vincent Lombardi

*Kindness is a language which the deaf can bear and the blind can see.*

Mark Twain (1835-1910)

*"I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country...corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed."*

U.S. President Abraham Lincoln,  
Nov. 21, 1864

*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."*

*The 'Machine politicians' have shown their colors..I feel sorry for the country however as it shows the power of partisan politicians who think of nothing higher than their*

*own interests, and I feel for your future. We cannot stand so corrupt a government for any great length of time."*

Theodore Roosevelt Sr., December 16, 1877

## XXIV. PARTING WORDS

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Thanksgiving Day has passed and we find ourselves in early December. This is a great time to look back as the year is nearing its end and count our many blessings. We all have so much to be thankful for. I believe it is appropriate for us to put our entire focus now on how good and faithful God really is. The good news is that God is readily available to each of us on a daily basis.

I am truly blessed to be a part of God's family. He has been so good to me and to my family that words alone are insufficient to express how thankful and eternally grateful I am for all of those many provisions and blessings. I must confess that all too often I take God's goodness and mercy for granted. We should all sit back, take stock of things, and then acknowledge all that God has done for us. God is our provider and the supplier of all that is good and helpful in life. He will sustain us at all times in all things and under every circumstance.

My prayer for the upcoming New Year is for a return to unity in our country, an end to the rampant racism that plagues the United State and further divides our people, and for love to replace what appears to be hate in the hearts of a few of the leaders in our nation's capital. It is important for all who truly love America to stand up to those in government who would do damage to our country by their recklessness and irresponsible actions. We must demand that the rule of law be upheld in all instances and that morally based decency be the order of the day for all of our elected leaders.

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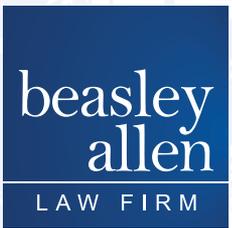
On January 15, 1979, Jere L. Beasley established a one-lawyer firm in Montgomery, Alabama, which has grown into the firm now known as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.

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.*



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