King had received the Nobel Peace Prize in 1964.

On April 4, 1968, Dr. King was assassinated on the balcony outside his Memphis, Tennessee, hotel room. In a posthumously published essay titled “A Testament of Hope,” Dr. King urged black Americans to continue their commitment to nonviolence. However, he also cautioned that “justice for black people cannot be achieved without radical changes in the structure of our society.”

In a 1959 radio address during his visit to India, Dr. King said: “Today we no longer have a choice between violence and nonviolence; it is either nonviolence or nonexistence.” Dr. King inspired others to change their societies through nonviolent means, from the Solidarity movement’s cracking of Soviet occupation in Poland to Nelson Mandela’s struggle to end apartheid in South Africa.

Dr. King’s legacy was created by his relentless and courageous fight to end prejudice and his pursuit of social justice. During the 1963 March on Washington, Dr. King declared that all people should be judged not “by the color of their skin, but by the content of their character.” The King Center in Atlanta is a living memorial to the man’s vision of a free and equal world dedicated to expanding opportunity, fighting racism and ending all forms of discrimination.

The Martin Luther King Jr. Research and Education Institute at Stanford University is home to the King Papers Project, a comprehensive collection of all of King’s speeches, correspondence and other writings. The institute is also involved with the Liberation Curriculum Initiative and the Gandhi-King Community, both of which use King’s life and ideas to connect social activists around the world working to promote human rights.

Dr. King’s legacy also is based on the principle of service to others. In the U.S., Martin Luther King Day is designated a national day of service. Americans are urged to celebrate “a day on, not a day off” in honor of Dr. King’s commitment to improving the lives of others. President Obama promoted volunteerism as a way to help meet the challenges facing our world. This was based largely on the life of Dr. Martin Luther King.

A national memorial to King was built near the Lincoln Memorial, where Dr. King delivered his “I Have a Dream” speech. The memorial invites visitors to reflect on Dr. King’s life and legacy. At a time in our country when racism has once again raised its ugly head, it would benefit all of us to take a long hard look at the life and legacy of Dr. Martin Luther King. Liberty and justice for all can be achieved, but it will require persons in positions of authority to take the steps necessary to make Dr. King’s dream a reality. We must replace all of the hate that exists in America with true love and compassion for each other.
II. AUTOMOBILE NEWS OF NOTE

FIAT CHRYSLER TO PAY UP TO $884 MILLION TO SETTLE EMISSIONS CLAIMS

We are pleased to announce that Fiat Chrysler Automobiles NV has agreed to pay up to $884 million to settle claims that it illegally equipped diesel fuel-powered vehicles with software that enabled them to cheat emissions standards. The U.S. Department of Justice (DOJ), state officials and our firm along with 10 other law firms assigned to the Plaintiffs Steering Committee (PSC) for consumers made the announcement on Jan. 10. The company and parts maker Robert Bosch GmbH— which settled its part in the matter with payments of up to $131 million—are the latest auto companies to settle claims involving the use of defeat devices. Volkswagen AG has paid almost $23 billion to settle its liabilities.

Fiat Chrysler will pay a $305 million civil penalty to settle claims it violated the Clean Air Act that will be divided between the federal government and California. The state will receive a total of $78.4 million, including $42.7 million from the CA portion. Fiat Chrysler also will pay $6 million to settle U.S. Customs and Border Protection claims that it illegally imported 1,700 noncompliant vehicles, according to the DOJ. In addition, the department said Fiat Chrysler will recall the vehicles and fix the emission problems in a program that could cost the company up to $185 million.

Separately, the company settled with consumers who had filed a class action in a deal that could reach up to $280 million. The company also agreed to pay $72.5 million that will be divided up among the 49 states other than California to settle various state law claims. The DOJ and U.S. Environmental Protection Agency (EPA) said the settlements do not resolve any potential criminal liability. EPA acting Administrator Andrew Wheeler said in a statement:

Fiat Chrysler deceived consumers and the federal government by installing defeat devices on these vehicles that undermined important clean air protections. Today’s settlement sends a clear and strong signal to manufacturers and consumers that EPA will vigorously enforce the nation's laws designed to protect the environment and public health.

The DOJ’s suit, originally filed in Michigan federal court before it was consolidated with the consumer class action in California, was prompted by testing conducted by the EPA that revealed the company failed to disclose that auxiliary emissions control devices (AECDs) were built into nearly 104,000 3-liter EcoDiesel-powered Jeep Grand Cherokee and Dodge Ram 1500 vehicles. Those AECDs, also known as defeat devices, were made by parts supplier Bosch and kept the vehicles’ nitrogen oxides emission levels within legal limits during test conditions to fool regulators but then allowed the NOx emissions to spike during normal driving conditions.

The company failed to disclose the AECDs when it applied for certificates of conformity as required under the Clean Air Act. The law requires automakers to get those certificates before selling automobiles in the U.S. As part of their applications, they have to disclose all AECDs and explain why those that reduce the effectiveness of emissions controls aren’t defeat devices, because vehicles with defeat devices can’t be certified. Bosch was not targeted by the federal government, but faced claims in the related consumer class action. Their portion of the class action settlement could reach $27.5 million, according to the consumers’ consent decree.

As part of the settlement with the states, Bosch agreed to pay an additional $98.7 million to settle consumer protection and environmental law claims and make a separate $5 million payment to the National Association of Attorneys General “for training and future enforcement purposes.” The Plaintiffs in the class action sought to represent a class of people nationwide bringing claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act who purchased or leased a vehicle at issue. For the other claims under the federal Magnusson Moss Warranty Act, common law fraud, and state consumer protection statutes, the Plaintiffs were looking to represent subclasses of people in the state or jurisdiction where they purchased their vehicle and currently reside.

The nationwide class would have included drivers of roughly 100,000 vehicles in all 50 states and Washington, D.C., while each of the state classes would have spanned roughly 100 to 14,000 members and most would have had more than 1,000 members. Our co-counsel, Elizabeth Cabraser, who was appointed lead counsel and chair of our Plaintiffs’ Steering Committee, said in a statement:

By holding FCA and Bosch accountable for their diesel emissions cheating, consumers will now receive the vehicle they were promised plus cash compensation, while protecting our environment.

Dec Miles is our firm’s Consumer Fraud & Commercial Litigation Section Head and serves on the Plaintiffs Steering Committee for this consolidated litigation. He said “using cheat devices on trucks and automobiles to deceive regulators and consumers in order to sell vehicles that pollute the environment is egregious corporate behavior that can’t be tolerated.”

Our firm is honored to have been part of the solution in partnership with the federal government in reaching a very satisfactory result for all victims of this misconduct.

New York state had alleged Fiat Chrysler, in addition to installing defeat devices, misled consumers about the environmental impact of the vehicles and lied to the state that it complied with state laws. New York Attorney General Letitia James, in a statement, said:

Fiat Chrysler and Bosch attempted to pull the wool over the eyes of American consumers, and pollute their way to the bank, but the Office of Attorney General will not stand for that type of behavior from any company.

The government is represented by Zachary Moor, Emily C. Powers, Leigh P. Rende and Joseph W.C. Warren of the U.S. Department of Justice. As mentioned earlier, the consumers are represented by lead counsel Elizabeth J. Cabraser, David S. Stellings, Kevin R. Budner, Phong-Chau G. Nguyen and Wilson M. Dunlavey of Lieff Cabraser Heimann & Bernstein LLP and steering committee members who include Dee Miles of Beasley Allen Crow Methvin Portis & Miles PC; Roland K. Tellis of Baron & Budd PC; Lesley E. Weaver of Bleichmar Fonti & Auld LLP; and Stacey P. Slaughter of Robins Kaplan LLP, among others.

New York, Alabama, Connecticut, Illinois, Maryland, Massachusetts, Oregon, Texas and Washington are represented by their respective attorney general offices. The MDL is In re: Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices and Products Liability Litigation, (case number 3:17-md-02777) in the U.S. District Court for the Northern District of California.

Source: Law360.com
Toyota is recalling 1.7 million vehicles in North America to replace potentially deadly Takata front passenger air bag inflators. The recall includes 1.3 million vehicles in the U.S. and is part of the largest series of automotive recalls in the nation’s history. As we have reported, Takata inflators can explode with too much force and hurl shrapnel into drivers and passengers. At last count, at least 23 people have been killed worldwide and hundreds more injured.

The recall covers Toyota models including the 2010 through 2016 4Runner, the 2010 through 2013 Corolla and Matrix, and the 2011 through 2014 Sienna. Also covered are Lexus models including the 2010 through 2012 ES 350, the 2010 through 2017 GX 460, the 2010 through 2015 IS 250C and 350C, the 2010 through 2013 IS 250 and 350 and the 2010 through 2014 IS-F. The 2010 through 2015 Scion XB also is included.

Takata used the chemical ammonium nitrate to create a small explosion to inflate the air bags. The chemical can deteriorate over time due to high humidity and cycles from hot temperatures to cold. The most dangerous inflators are in areas of the South along the Gulf of Mexico that have high humidity.

Toyota and Lexus dealers will either replace the inflator or the entire air bag assembly with equipment made by other manufacturers that does not contain ammonium nitrate. Owners were to have been notified by mail or other means in late January.

Owners can check to see if their vehicles have been recalled by going to https://www.toyota.com/recall or https://www.airbagrecall.com and entering license plate or vehicle identification numbers. Toyota’s recall is part of a phased-in replacement of Takata inflators. Automakers are scheduled to replace 10 million starting in January.

Ford and Honda have already announced recalls. Even though more than three years have passed after the U.S. National Highway Traffic Safety Administration (NHTSA) took over management of recalls involving Takata inflators, one third of the recalled inflators still have not been replaced. This is according to an annual report from the government and a court-appointed monitor last year. The report says 16.7 million faulty inflators out of 50 million under recall have yet to be fixed. Safety advocates say the completion rate should be far higher given the danger associated with the inflators. The recalls forced Takata of Japan to seek bankruptcy protection and sell most of its assets to pay for the fixes.

**FOR SaID TO HAVE HIDDEN DEFECTS IN SUPER DUTY TRUCK ENGINES**

Consumers who bought certain Ford Super Duty trucks have filed suit against Ford Motor Co. in a state court in California. The automaker is accused in the suit of publicly promoting a fuel-efficient six-liter diesel engine that was in fact a liability, plagued with chronic leaking problems the auto giant allegedly knew about, but hid for years. It’s alleged that Ford and its top officers deliberately put off acknowledging the problem and offered “band-aid” type fixes to reduce warranty costs. The suit has been removed to California federal court. The customers were stuck with repeated breakdowns, and having to pay more and more for repairs beyond the warranty period, according to the suit. It’s alleged:

Despite its knowledge of the (six)-liter engine’s many flaws and quality concerns, Ford trained its dealers throughout the country to specifically tout the supposedly superior attributes of the engine, without ever mentioning its troubled history of design, manufacturing, and reliability defect.

Those defects included injector malfunctions, cold start and idling problems, and resulting engine stalls. Despite first learning of the engine problem during pre-production, Ford Motor Co. proceeded to install the engines on certain model trucks, including the plaintiffs’ 2006 Ford F-350 vehicle that they purchased in 2005 from Sunrise Ford in California.

In January 2007, Ford sued Navistar International Transportation Corp.—the company that designed and supplied the engine—for exceptionally high repair rates and warranty costs due to quality problems attributable to Navistar.

During the production and the sales period of the defectively equipped trucks from 2002 to 2006, Ford continued to advertise the engines as high efficiency and realized significant profits. None of those profits were invested into fixing the underlying engine problem and warning potential customers what they were in for.

The drivers’ complaint contained counts of fraud in the inducement, intentional misrepresentation and concealment of certain facts necessary for the consumer to make an informed decision; and fraud in the performance of warranty contract. They also seek punitive and other damages under California state consumer protection laws.

Drivers Jacques Powers and Angel Powers, on behalf of Big Island Climbers on the Mainland Inc., are represented by Steve Mikhov of Knight Law Group LLC. The case is Jacques Powers et al. v. Ford Motor Company et al, (case number 5:18-cv-02687) in the U.S. District Court for the Eastern District of California.

**INJURED DRIVER FILES SUIT OVER FAULTY IGNITION SWITCH**

Corey Jackson has sued General Motors LLC and a Chicago-based auto dealership in Illinois state court in another defective ignition switch case. It’s alleged in his complaint that the defect caused him to crash and suffer injuries after the vehicle’s airbags failed to deploy. Jackson sued GM and F&H Cars Inc. alleging that his 2006 Buick LaCrosse contained a faulty ignition switch that in May 2017 caused his car to suddenly lose power, disable the airbags and throw him off a roadway and into a tree. He accused GM of failing to recall his car even after knowing about the safety defect when he bought it in October 2016.

GM assumed liabilities linked to the ongoing ignition switch defect scandal after it emerged from Chapter 11 in July 2009. As of August 2018, there were fewer than 1,000 cases left in the long-running multidistrict litigation (MDL) over the faulty switches. It’s alleged in the complaint in the Jackson suit:

Old GM knew about the safety-related defects in the vehicles at issue in this case and did nothing to recall the cars, fully remedy the defects and/or warn users of the defects. Rather, Old GM intentionally, purposely, fraudulently and systematically concealed the defects from the Plaintiffs, the National Highway Traffic Safety Administration and the motoring public.

GM had known about its ignition switch problems for over a decade. Jackson contends that GM’s concealment of the defects should toll any statutes of repose that could affect his case. The defective design of the ignition switch, as well as the
positioning of the key lock module and slot design for the key, can result in vehicles inadvertently switching off. This can cause the engine and power steering to shut down and deactivate steering, airbags and brakes.

As we have mentioned previously, the ignition switch defect was discovered by Lance Cooper in the Brooke Melton case. Even though there had been ample time and reason for NHTSA to have discovered the defect, which had been hidden for 10 years, the agency failed to do so. Brooke was killed in a collision caused by the defective ignition module defect. There would have never been an MDL or the hundreds of settlements in litigation involving this defect had not Brooke’s parents, Ken and Beth Melton, had the courage to take on GM allowing Lance to discover the hidden defect. Beasley Allen was asked by Lance to join in the lawsuit in Georgia and the rest is history.

I believe it would be good to recap the ignition switch litigation for those who aren’t familiar with it. The following has occurred since the Melton case discovered the defect and GM’s fraud and got the ball rolling.

In May 2014, GM agreed to pay NHTSA $35 million linked to the ignition switch defects—the largest fine that could have been imposed for failing to timely report the problem. The automaker would go on to pay $900 million in a federal criminal case over wire fraud and false statements linked to the scandal. GM selected Kenneth Feinberg to administer its recall response in April 2014. While GM has publicly acknowledged at least 13 deaths connected to the faulty ignition switches, the Center for Auto Safety—an independent safety group founded by consumer advocate Ralph Nader—has linked more than 300 deaths to the problem. GM and one of its ignition switch suppliers knew as far back as 2001 in preproduction testing of other vehicles that some of its switches could suddenly turn off and cause car crashes.

In the instant case, Jackson says he suffered injuries to his head, neck and torso after losing control of his car. He alleged four counts in his suit against GM and FJH Cars, including strict liability, negligence and fraudulent concealment. Jackson is represented by Mark Emison of Langdon & Emison Attorneys at Law. The case is Corey Jackson v. General Motors LLC and FJH Cars Inc., (case number 2018-L-013981) in the Circuit Court of Cook County. Source: Law360.com

**VEHICLE SAFETY WATCH LIST RELEASED BY THE SAFETY INSTITUTE**

The Safety Institute’s Vehicle Safety Watch List Analytics and NHTSA [National Highway Traffic Safety Administration] Enforcement Monitoring Program is sponsored by Ken and Beth Melton in memory of Brooke Melton, who died in a 2010 crash caused by the sudden failure of the ignition in her 2005 Chevy Cobalt. Brooke died when she skidded into another vehicle after the ignition module of her 2005 Cobalt slipped into the accessory position. Documents and evidence developed in the Melton case found that GM knew about the ignition switch problem as early as 2001. Ken and Beth Melton, of Cobb County, Georgia, decided to provide ongoing support to the significant research and analysis that the Watch List provides. This was done in an effort to prevent future tragedies.

The Safety Institute last month released the latest report from its Vehicle Safety Watch List, covering the last quarter of 2018. This is the most current of the quarterly reports monitoring potential vehicle defect trends and NHTSA’s recall and enforcement activities.

The Quarterly Vehicle Safety Watch List, launched in 2014, is a product of the Institute’s Vehicle Safety Watch List Analytics and the NHTSA Enforcement Monitoring Program. The Watch List is compiled using peer-reviewed analytic methods, with support from Quality Control Systems Corp. These reports are intended to help the public recognize emerging problems in the U.S. fleet and to identify continuing failures potentially associated with known problems.

Beginning with this quarter, The Safety Institute, in consultation with statistician Randy Whitfield of Quality Control Systems Corp., has refined its methodology by restricting the pool of EWR claims analyzed to those with incidents that occurred within the same four-quarter lookback period in which the claims were made. This lessens the dominance of older, potential defects that are already well-known. Whitfield says: “It’s an improvement, because the listed issues better reflect claims of more recent death and injury incidents.”

For the third quarter in a row, exhaust problems in Ford Explorers, and Honda Odyssey seats that fold over and fail to lock in place claimed the most spots on the Watch List—seven out of the 15 spots. The Subaru Outback in model years 2016 and 2018 with unintended braking problems has emerged as a potential new defect trend. These braking problems associated with the forward collision feature that is a part of Subaru's EyeSight Driver Assist Technology. The Subaru Outback, in model years 2016 and 2018, has claimed the 13th and 14th spots respectively, but with a scant (two) Vehicle Owner Questionnaire (VOQ) complaints to NHTSA. The most recent complaint is from a Tipp City, Ohio owner of a 2016 Outback, lodged in December:

*While driving approximately 45 mph on a local roadway, the eyesight pre-collision brake assist suddenly activated and caused the vehicle to completely stop. The brakes released shortly after the failure.*

An examination of the larger universe of Eyesight complaints from drivers’ forums and NHTSA VOQs shows that unintended brake application is among the more prominent malfunctions of the system. Should NHTSA take an interest in this problem, ferreting out the root cause(s) would be challenging. The Eyesight system uses the camera exclusively for forward collision braking. There are no redundant radar sensors. As a result, everything from the windshield/camera lens condition/cleanliness to the camera lens calibration, to the application of non-OE windshield replacements to encounters with external elements and objects could affect proper operation. In addition, there are hundreds of other parts/components/systems that could fail and potentially cause false activation.

Subaru has touted Eyesight as “the culmination of everything Subaru engineers know about safety, and Subaru has sold over 1 million Eyesight-equipped vehicles. Adding confidence to every trip, Eyesight monitors traffic movement, optimizes cruise control, and warns you if you sway outside your lane.” Eyesight has been found to reduce rear-end crashes with injuries by up to 85 percent. However, Subaru does not reveal how many rear-end crashes Eyesight might have caused with abrupt unintended braking.

Carbon monoxide problems in late model Ford Explorers dominate the list for the seventh consecutive quarter, with four spots on the list. The 2017 model is in first place; the 2015 Ford Explorer is in second place; the 2016 Explorer is in seventh place; and the 2013 Explorer in eighth place in the “engine and engine cooling” categories. Once again, complaints to NHTSA as recently as late December...
indicate that the Explorer vehicles continue to spew carbon monoxide into the SUV’s cabin. This complaint from a Burke, Virginia owner of a 2015 model is typical:

When accelerating, smell fumes and onset of dizziness and blurred vision while driving. Immediately slowed down (almost to a stop) in mid-traffic and opened windows, allowing fresh air to blow in. Dizziness went away after a minute or two. Happened twice…very scary experience. Carbon monoxide poisoning? Never experienced this before nor outside of vehicle. Already had exhaust problem fix by dealer…still having issues. This is getting dangerous.

Last July, the Center for Auto Safety again demanded that Ford launch an immediate recall, as the government investigation entered into its second year. That same month, the agency upgraded a probe to an Engineering Analysis, with 2,842 complaints to Ford and NHTSA. The investigation now covers 2011-2017 Explorers. It remains open, with nothing in the public file to indicate what information has been provided. In November, Ford continued to claim, this time to NBC News that it had the problem well in hand:

We continually monitor customer concerns, including those to NHTSA. We are confident our complimentary service procedure is effective.

Second-row seating problems in the Honda Odyssey are now on the Watch List for the fifth consecutive quarter—again, with three model years claiming a spot on the Safety Watch List. This quarter, the 2015, the 2016 and 2013 model years occupied the fourth, ninth and 12th spots respectively. Honda has twice recalled the minivans, in December 2016 and December 2017. The most recent recall involved 806,936 2011-2016 minivans with second seating that failed to latch in place or could tip over.

The seats are nightmares for parents who have children strapped into the second row, and the complaints about the unavailability of recall repair parts continue. In April, the owner of a 2013 Honda Odyssey from Harker Heights, Texas reported:

2nd seat flipped over a kid seated on the right middle row passenger seat while car was driving/in motion. This has been ongoing and this is the 2nd time this has happened. The kid became trapped, folded at the waist in a seated position until we were able to pull over the van to reset the seat.

Toyota Sienna minivans with a power sliding door defect made the Safety Watch List for the second consecutive quarter, with the 2013 model year ranked 11th. This may be linked to a November 2016 recall for 744,437 2011-2016 Toyota Siennas whose doors suddenly slide open while the vehicle is underway. In its Defect and Noncompliance Report, Toyota stated:

Under certain limited conditions which impede the opening of the door, such as when the door becomes frozen with ice, the sliding door motor could stall when the door is operated. If the motor stalls, high current in the door motor circuit could be generated, operating the fuse for the door motor. If the fuse is operated with the sliding door latch mechanism in an unlatched position, the door could open while driving, increasing the risk of injury to a vehicle occupant.

There are no identifiable trends in the few complaints concerning structural problems in the 2017 Audi 4—even though this model moved up from the 11th to the fifth place on the Watch List. Likewise for the 2015 and 2016 Volkswagen Golf, which occupies the third and 10th spots, respectively. There are only a handful of complaints to NHTSA in each case, although a smattering of drivers complained of exploding sun roofs. Both Audi and Volkswagen have launched sunroof recalls in the past, but not for these models.

The listing set out below contains how the vehicles ranked. However, the Safety Institute does not claim this chart is a list of defects, but rather these are areas that potentially need more investigation and to prioritize limited resources. The chart is based on Death and Injury Claims in the Early Warning Reports System to the National Highway Traffic Safety Administration.

Hopefully, our readers will find this information helpful. Ken and Beth Melton are to be commended for all they have done to help others from a highway safety

<table>
<thead>
<tr>
<th>Rank</th>
<th>Period</th>
<th>Vehicle and Component</th>
<th>Component Definition</th>
<th>Notes</th>
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<tbody>
<tr>
<td>1</td>
<td>2017</td>
<td>FORD EXPLORER Engine &amp; Engine Cooling</td>
<td>Engine &amp; Engine Cooling</td>
<td>Investigation, recall</td>
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<td>2015</td>
<td>FORD EXPLORER Engine &amp; Engine Cooling</td>
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<td>3</td>
<td>2015</td>
<td>VOLKSWAGEN GOLF Structure</td>
<td>Structure</td>
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<td>2015</td>
<td>HONDA ODYSSEY Seats</td>
<td>Seats</td>
<td>No investigations, but recalls</td>
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<tr>
<td>5</td>
<td>2017</td>
<td>AUDI A4 Structure</td>
<td>Structure</td>
<td>No investigations, but recall</td>
</tr>
<tr>
<td>6</td>
<td>2014</td>
<td>CHEVROLET SILVERADO 1500 Steering</td>
<td>Steering</td>
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</tr>
<tr>
<td>7</td>
<td>2016</td>
<td>FORD EXPLORER Engine &amp; Engine Cooling</td>
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<td>2013</td>
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<td>2016</td>
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<td>2013</td>
<td>TOYOTA SIENNA Structure</td>
<td>Structure</td>
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<td>12</td>
<td>2013</td>
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<td>2016</td>
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<td>Forward Collision</td>
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<td>14</td>
<td>2018</td>
<td>SUBARU OUTBACK Forward Collision</td>
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<tr>
<td>15</td>
<td>2013</td>
<td>TOYOTA AVALON Other</td>
<td>Other</td>
<td>No investigations, but recall</td>
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</table>

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Involves sensitive information. Consequently, Judge Polster imposed a gag order on settlement discussions and the Plaintiffs on all fronts to ensure this information does not see the light of day.

For example, U.S. District Judge Dan Polster denied a motion by several Defendants seeking a gag order precluding Plaintiffs’ lawyers and a sitting governor from speaking outside the court about the litigation based on evidence obtained thus far. Several Defendants in the MDL sought the gag order and asked for sanctions after former Ohio Attorney General Mike DeWine, who is currently governor, and two Plaintiffs’ lawyers in the MDL appeared in a “60 Minutes” segment about the opioid epidemic. The Defendants argued that Gov. DeWine and the lawyers disclosed data shielded by protective order and improperly inflamed public opinion (and the potential jury pool) in advance of bellwether trials scheduled to take place in September of 2019.

Judge Polster denied the motion without issuing an order discussing the merits of the Defendants’ contentions. As you can imagine, high-stakes litigation such as this involves sensitive information. Consequently, Judge Polster imposed a gag order on settlement discussions and entered a strict protective order barring disclosure of prescription opioid data maintained by the U.S. Drug Enforcement Agency.

Judge Polster has done an excellent job balancing the need to keep certain information confidential while ensuring the full extent of the opioid crisis is brought to the public’s attention. If the Court entered the gag order sought by the Defendants, it would have likely chilled Plaintiffs’ lawyers from discussing publicly made allegations with the media. The opioid crisis is an issue of national importance, so the public must know exactly how it started and how to address it. However, all lawyers are bound to follow rules and ethical standards when discussing pending litigation. Additionally, any gag order from the court must be followed to the letter.

Also, West Virginia is set to play a more prominent role in the Opioid MDL. Judge Polster named lawsuits filed by Cabell County and City of Huntington in West Virginia as Track Two bellwether cases. This designation is designed to further assist the Court and the parties in analyzing the potential liability of the Defendants in the litigation.

Judge Polster informed that fact discovery and motion practice completed to date in the Track One cases included “a large, but incomplete, fraction of the issues and parties relevant to the MDL.”

One of Judge Polster’s main concerns was that the Track One cases did not include all the retail pharmacies named in the MDL. Moreover, as the last issue of the Report discussed, several issues mentioned in Judge Polster’s order on motions to dismiss concerned Ohio-specific causes of action and laws that do not apply to other states.

Specifically, the order concluded that the Ohio Product Liability Act did not abrogate Plaintiff Summit County’s common law public nuisance claim. It also held that the County’s statutory public nuisance claim is limited to injunctive relief. Finally, Judge Polster adopted the dismissal of the City of Akron’s drug-related nuisance claim for lack of standing.

Because thousands of lawsuits filed nationwide have been consolidated in the MDL, Judge Polster requested additional briefing to “better understand state-specific variations in the law” and to address the “viability of statutory and/or common law claims for public nuisance in each State and territory where any MDL Plaintiff is located.”

The Court had also ordered the parties to meet and confer and submit a proposed case management deadline to Special Master Cohen on or before Jan. 15, 2019. Fact discovery was set to begin on Jan. 25, 2019.

Finally, Special Master Cohen continues to oversee specific discovery disputes between the Plaintiffs and Defendants. According to the Special Master, the most “vexing” concerns the Plaintiffs’ responses to interrogatories propounded by the manufacturer and pharmacy Defendants, which ask the plaintiffs to identify “(1) specific, inappropriate opioid prescriptions, and (2) specific persons who became addicted due to those prescriptions.” Special Master Cohen ruled that the Plaintiffs must either answer the interrogatories fully with the specific information or refuse to answer them on the condition that they will not assert that any specific prescriptions were unauthorized but will, instead, rely solely upon aggregate proof at trial.

Likewise, the Plaintiffs are seeking more information regarding the Defendants’ claim that intervening, supervening, and superseding causes (e.g. criminal activities) are to blame for fueling the opioid crisis. If Purdue plans to use this defense, Special Master Cohen’s Discovery Ruling 13 requires Purdue to state how that cause intervened or supervised and identify 10 specific examples of each cause.

On Jan. 29, Judge Polster continued the trial of the first bellwether case. It will now start on Oct. 21, which is only a 7 week delay in the trial. We expect to see the opioid litigation progress significantly this year. We will, of course, keep you updated along the way.

### Georgia Files Opioid Lawsuit

Beasley Allen is honored to have been selected to join Attorney General Chris Carr and other Georgia law firms on behalf of the State of Georgia in filing a lawsuit to combat the opioid epidemic. For more information, we are including below the news release from the Office of Attorney General Chris Carr.

#### Georgia Lawsuit Against Opioid Manufacturers And Distributors

The Office of Attorney General Chris Carr today filed a lawsuit in the Superior Court of Gwinnett County against opioid manufacturers and distributors* to seek justice for their alleged role in fueling the opioid crisis and its catastrophic effects on Georgia citizens. “No Georgia community is a stranger to the devastating effects of the opioid crisis,” said Attorney General Chris Carr. “We are bringing this lawsuit quite simply to seek justice for the citizens of Georgia. It is imperative that we recover for the widespread damage that has been caused by this epidemic.”

The lawsuit alleges that, in an effort to increase opioid use and thereby increase profits, the named opioid manufacturers embarked on a false and deceptive marketing campaign that grossly understated the dangerous addiction risks of opioids, while overstating their benefits. The complaint also alleges that to promote and add credibility to these false and

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**JereBeasleyReport.com**
We look forward to working on this case with some very good lawyers on behalf of the Attorney General and the citizens of Georgia. We will update this litigation as it progresses.

Source: Attorney General Office Release

**Opioids May Not Really Do That Much For Chronic Pain**

A new meta-analysis (a comprehensive review of prior studies), published in the *Journal of the American Medical Association*, indicates the use of opioids provides negligible benefit for chronic pain patients. It appears, given the risks associated with opioids, there is little justification for preference of opioids for treatment of chronic pain over nonsteroidal anti-inflammatory drugs (NSAIDS), which offer similar relief with generally lesser risks. Common NSAIDS include aspirin, ibuprofen and naproxen.

According to the meta-analysis, only 12 percent more patients treated with opioids experienced pain relief, 8 percent more had improvements in physical functioning and 6 percent more had improvements in sleep quality compared to those given a placebo.

In addition, it is believed that the analgesic effect of opioid drugs wanes over time, and the study confirms that. In practice, to counteract the declining efficacy of opioid analgesic effects, doctors often increase the dose, which increases the risks of side effects, including respiratory depression and death.

The study does not delve into whether opioids are appropriate for treatment of cancer pain or palliative care for the dying; rather, it indicates for the treatment of recurring pain such as chronic pain, there is little justification for prescribing opioids as opposed to over-the-counter pain relievers.

The study also analyzed information clinical trials that specifically compared opioid drugs with NSAIDs. Results showed that people who received opioid drugs reported about the same amount of pain relief as those who received NSAIDs, demonstrating, in other words, that NSAIDs appear to work just as well for pain relief.

Source: https://www.livescience.com/64329-opioids-chronic-pain.html

**Significant Changes In Opioid Addiction Treatment**

The effects of the opioid epidemic on a national level are quite 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 opioid in 2016—a 292-percent increase since 2001. Due to the continued deterioration of the addiction crisis nationwide, the researchers concluded the U.S. lost a total of 1,681,359 years of life in 2016 alone.

But loss of life isn’t the only toll the opioid crisis takes on communities. According to the Centers for Disease Control and Prevention (CDC), the opioid epidemic costs the U.S. about $78.5 billion a year in lost productivity, criminal justice involvement, health care and addiction treatment. For decades, patients who have come to the ER seeking care for chronic conditions such as heart disease and diabetes typically meet with a specialist quickly to start a long-term care plan to manage their health condition. For those with opioid addiction, the path to long-term care and recovery has been almost nonexistent.

In the past, a patient with opioid addiction seeking care would be sent home with a pamphlet containing words of support and a list of rehab facilities, but not much else. That is now changing thanks to recent actions taken in several states that are bringing this essential care to their hospitals and particularly their emergency rooms. In the wake of this opioid crisis, a new, highly effective medication called buprenorphine is being introduced in emergency rooms and providing a critical aid to ER doctors to tackle and treat opioid addiction head on. Buprenorphine is a medication used to mitigate withdrawal symptoms and cravings for the addictive drugs in patients.

States are now looking to build programs to treat addiction like any other medical condition and build a long-term treatment plan between the patients and their doctors as would be done with most chronic conditions. The goal of these programs is to expand access to addiction treatment across the United States. Rather than an opioid addict having to go to a rehab facility for care and recovery (which typically require out-of-pocket payment rather than insurance), opioid addicts seeking care could go to their local hospital for help where health insurance is accepted, making treatment significantly more affordable.

The central problem, however, lies in the limited access to treatment options available to those with opioid addiction.
According to the White House Opioid Commission’s 2017 report, 47 percent of U.S. counties and 72 percent of the most rural counties have no physicians who can prescribe buprenorphine. While doctors can prescribe opioids quite easily, only about 5 percent of doctors in the United States are licensed to prescribe buprenorphine.


THE BEASLY ALLEN OPIOID LITIGATION TEAM

Because of the enormity of the opioid litigation, and Alabama’s personal involvement in the multidistrict litigation (MDL), our firm 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

AN UPDATE ON THE TALC LITIGATION

In early January, Beasley Allen lawyers returned to St. Louis to begin another talcum powder trial. This trial was a multi-Plaintiff trial involving 13 Plaintiffs—consisting of women who were either diagnosed with ovarian cancer or the surviving family members of women who died of ovarian cancer after years of using Johnson & Johnson talcum powder products. Jury selection had been scheduled to begin on Jan. 17.

However, in a last-minute bid to halt the trial from going forward, Johnson & Johnson filed a writ of prohibition to the Missouri Supreme Court, asking it to review Circuit Court Judge Rex Burlison’s ruling denying J&J’s motion to sever the Plaintiffs’ claims and force each Plaintiff to go to trial separately.

On Jan. 14 the Missouri Supreme Court issued a one-paragraph order granting J&J’s writ and giving the Plaintiffs 30 days to respond. This order also stayed the trial a mere three days before jury selection was scheduled to begin. The Supreme Court had not ruled before this issue was to go to the printer. This means the trial will be continued and reset for another date. This trial will stay on hold until the Supreme Court rules.

Johnson & Johnson has been exposed on so many different fronts, including products other than talc, and the public is becoming aware of how truly bad this drug company has been over the years. We look forward to getting back into the courtroom and moving forward with the legal claims of thousands of more victims whose lives have been catastrophically changed by ovarian cancer. Beasley Allen has multiple talcum powder trials set to take place this year. Additional trials are scheduled in St. Louis, Georgia and Pennsylvania.

On another front, the activity in the talc multidistrict litigation (MDL) is moving steadily ahead. Currently, discovery is ongoing and our lawyers, led by Leigh O’Dell, are heavily involved. We will give a detailed report on the MDL in the March issue.

MEET THE EXPERTS IN THE TALC LITIGATION

The talcum powder multidistrict litigation (MDL) in federal court continues to proceed toward a June 2019 general causation hearing. During this general causation hearing, the court will consider whether there is sufficiently reliable scientific evidence to conclude that talcum powder products increase the risk of ovarian cancer. Moving toward this upcoming hearing, Plaintiffs disclosed their experts on Nov. 16, 2018. Defendants Johnson & Johnson (manufacturer of Baby Powder and Shower to Shower talc products), Imerys Talc America (talc mining company), and Personal Care Products Council (trade organization), must file their expert reports this month on Feb. 15.

While many areas of expertise must be covered for Plaintiffs to meet their burden of proof for general causation, we will highlight Plaintiffs’ gynecologic oncologists (board certified obstetrician gynecologists with a subspecialty in gynecologic oncology). Doctors Daniel L. Clarke-Pearson, Ellen Blair Smith, and Judith Wolf are Plaintiffs’ expert gynecologic oncologists.

Daniel L. Clarke-Pearson, MD, has focused his clinical practice, teaching and research for the past 40 years on the care of women with gynecologic cancers (cancers of the ovary, fallopian tube, uterus, cervix, vagina and vulva). He also cares for complex gynecologic surgical problems. He is currently Chair of the Department of Obstetrics and Gynecology at the University of North Carolina (Chapel Hill).

Dr. Clarke-Pearson received his bachelor’s degree in biology from Harvard. He attended medical school at Case Western Reserve University (Cleveland, Ohio). He completed residency in Obstetrics and Gynecology at Duke University, and then completed his fellowship in Gynecologic Oncology there as well. Over the next five years, he served as an assistant professor at Duke (Division of Gynecologic Oncology), and then as the Director of Gynecology and Gynecologic Oncology at the University of Illinois (Chicago). He then returned to Duke as Director of Gynecologic Oncology and Director of the Gynecologic Oncology Fellowship program. He was granted tenure and awarded a Distinguished Professorship in 1993.

In 2005, Dr. Clarke-Pearson was appointed Chair of the Department of Obstetrics and Gynecology at the University of North Carolina (Chapel Hill). In that role, he has administrative responsibilities over 75 faculty, 28 residents in obstetrics and gynecology and 29 fellows receiving subspecialty training. He provides clinical care to women with gynecologic cancers including surgery, administration of chemotherapy, conducting clinical trials and educating residents in Obstetrics and Gynecology and Fellows in Gynecologic Oncology.

Further, Dr. Clarke-Pearson published more than 200 peer-reviewed manuscripts in medical literature, wrote over 50 chapters for medical textbooks and edited three medical textbooks. He served on the editorial boards of two peer-review journals (Obstetrics and Gynecology and Gynecologic Oncology), and served as a board examiner for the American Board of Obstetrics and Gynecology for 18 years.

Finally, Dr. Clarke-Pearson is actively involved with medical organizations
including the American College of Obstetricians and Gynecologists (ACOG), the Society of Gynecologic Oncology (SGO), the American College of Surgeons (ACS) and the Gynecologic Oncology Group (GOG). He led numerous ACOG continuing education courses, served on ACOG committees, served on the ACOG Executive Board, and chaired the Gynecologic Management Committee.

Further, Dr. Clarke-Pearson served on a number of SGO Committees and the Executive Board, and he was SGO President in 2010. As a member of ACS, he presented lectures and served on the Obstetrics and Gynecology Advisory Committee. The GOG is a cooperative group organization sponsored by the National Cancer Institute to conduct clinical trials investigating new treatments to improve the outcomes of women with gynecologic cancers. Many of his publications derive from participation in these clinical trials.

**Ellen Blair Smith, MD**, received a bachelor's degree in biology from the University of North Carolina (Greensboro). She graduated from medical school at the University of North Carolina (Chapel Hill). She completed her residency in Obstetrics and Gynecology at University of Texas Health Science Center—San Antonio, Texas, and she completed her fellowship in Gynecologic Oncology at Duke University.

**Dr. Smith** practiced gynecologic oncology from 1984-1987 as an assistant professor at the University of Virginia (Chattanooga). Thereafter, she began private practice in gynecologic oncology in Austin, Texas. Her practice cared for women known or suspected to have gynecologic cancers for more than 28 years. In her practice, Dr. Smith was responsible for all aspects of the care of hundreds of women with epithelial ovarian cancer. Her care involved diagnosis, preoperative, surgical, and postoperative care, chemotherapy selection and administration and post-treatment care and surveillance. Often, post-treatment surveillance led to the diagnosis of recurrent cancer and treatment cycles resumed. Often, after months or years, she provided end-of-life care for her patients.

Dr. Smith's dissatisfaction with the inadequacies of screening systems to detect ovarian cancer early led her to follow the discoveries of genes increasing ovarian cancer risk and to promote the detection of such genes. Before these tests were commercially available, she worked with geneticist-physicians at the University of Pennsylvania and Duke University to detect such genes in her ovarian cancer patients and their daughters. She was an early advocate of risk-reducing salpingo-oophorectomy.

In 2004, Myriad Genetics (which patented the BRCA test) asked Dr. Smith to be its first gynecologic oncologist speaker. Until roughly 2011, she delivered many lectures to gynecologic colleagues throughout the U.S.

To enhance the end of life care of her patients, she became board certified in Hospice and Palliative Care in 2010. She retired from gynecologic oncology practice in December 2015. In April 2017, she returned to patient care as medical director of Halcyon Home Hospice. In that role, she continues to care for patients with ovarian and other cancers.

**Judith Wolf, MD**, has specialized in the care of women with cancer for over 30 years. She attended medical school at Northeast Ohio Universities College of Medicine and completed residency in Obstetrics and Gynecology at the University of Texas San Antonio. She completed her fellowship in Gynecologic Oncology at MD Anderson Cancer Center where she remained on faculty for more than 20 years as Professor in the Department of Gynecologic Oncology. Dr. Wolf's area of expertise is ovarian cancer—diagnosis, research, treatment, and patient advocacy.

Dr. Wolf authored or co-authored more than 100 peer-reviewed research articles and was the principal investigator or co-investigator for 11 research grants related to gynecologic cancers. She also served as principal investigator, co-principal investigator, or collaborator on 84 protocols, and presented at more than 50 conferences, numerous scientific exhibitions and seminars (mostly on the topic of ovarian cancer).

In addition to her Gynecologic Oncology fellowship training, Dr. Wolf spent two years working in the lab and getting her Master's degree in Biomedical Science from The University of Texas School of Biomedical Sciences (Houston). Her research as a graduate student investigated targets for therapy in ovarian cancer. One of these led to a phase I Clinical trial for women with ovarian cancer using a targeted therapy. After completing training, Dr. Wolf kept a research lab for over 10 years, investigating gene therapy for the treatment of ovarian and cervical cancer. Her lab research in ovarian cancer led to a Clinical trial of gene therapy for women with ovarian cancer. She became involved in both investigator initiated and NCI cooperative group clinical trials—Phase II and III trials of new therapies for ovarian cancer.

After many years as Professor at MD Anderson Cancer Center, in 2014 Dr. Wolf left to join the biomedical industry as a Chief Medical Officer at a diagnostic company focused on the early detection of ovarian cancer. Dr. Wolf co-authored several publications and helped the company gain U.S. Food and Drug Administration (FDA) clearance for its second-generation multiprotein biomarker assay for ovarian cancer detection. Two years later, she joined another diagnostic company, again as Chief Medical Officer. That company used multi-protein assays and combined them with antibodies, trying to detect both breast and detection area. Its first publication used this combined technology for ovarian cancer detection. In mid-2018, she left her position to have more time to focus on volunteer and advocacy work for women's health—with a large focus on ovarian cancer.

In 2014, Dr. Wolf joined the board of the Society for Women's Health Research, a nonprofit dedicated to promoting research on biological differences in disease and improving women's health. She also began working with Health Volunteers Overseas. She volunteered in Vietnam, Honduras and Haiti training physicians to care for women with gynecologic cancers. She is heading a project training young surgeons in Nepal to care for women with ovarian, cervical and uterine cancers. To continue to improve women's health in the U.S., she works part time in Indianapolis, Indiana as a Gynecologic Oncologist.
Expert testimony is vital to helping a jury understand the complex scientific data that will be presented at the MDL talcum powder trials. In addition to testifying about how talcum powder is linked to the development of ovarian cancer, Drs. Clarke-Pearson, Smith, and Wolf will also educate the jury about the diagnosis and treatment of ovarian cancer.

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 Melissa Prickett or Brittany Scott, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@BeasleyAllen.com or Brittany.Scott@BeasleyAllen.com.

THE BEASLEY ALLEN TALC LITIGATION TEAM

The following lawyers are on the Beasley Allen Talc Litigation Team: Ted Meadows, Danielle Mason, David Dearing, Ryan Beattie, Mallory Bullard and Jimmie Birley. In addition to the lawyers, the following staff members are involved in the trials: Katie Tucker, Stephanie Bailey, Brandi Dawkins and Gary Spigner.

In addition to the trial team, there are lawyers and many staff members who support the litigation effort from our Montgomery office. The lawyers are Brittany Scott and Lauren Razick. The work of these lawyers, along with that of support staff in Montgomery, are very important to the successes in the Talc Litigation.

There are also lawyers from Beasley Allen whose involvement is solely on the talc multidistrict litigation (MDL) in New Jersey. Leigh O’Dell (who serves as co-lead counsel for the MDL), Jennifer Emmel and Jenna Fulk are the lawyers involved from our firm. Staff member Lisa Bruner is also working on the MDL Litigation.

V. THE NATIONAL SCENE

CARBON EMISSIONS ROSE SHARPLY IN THE U.S. IN 2018

New research has shown that after three years of decline, climate-change-causing carbon emissions rose sharply in the United States last year. Carbon emissions increased 3.4 percent in 2018, which was the second-largest annual gain in more than two decades. This comes from preliminary power generation data analyzed by the Rhodium Group, an independent economic policy research provider. A Global Carbon Project report in December had said global carbon emissions were estimated to rise by 2.7 percent for all of 2018.

The new research indicated that U.S. power sector emissions as a whole rose by 1.9 percent and that the transportation sector “held its title as the largest source of U.S. emissions for the third year running,” due to a growth in demand for diesel and jet fuel offsetting a modest decline in gasoline use. The construction and industry sectors also saw sizable emission increases. Trevor Houser, who leads Rhodium Group’s Energy and Climate team, said: “Most of the increase last year was directly attributable to an increase in economic growth.” He added that “it does not have to be the case that a rising economy results in rising emissions.”

Houser said affordable technology exists to grow the economy while reducing emissions, “but that requires policy to deploy those technologies in the market. And we’ve seen a freeze in that kind of policy at the federal level over the past few years.” The research says the lack of strategy in the country’s decarbonization efforts has contributed to the gap in meeting the goal set in the Paris Agreement on climate change, a landmark 2015 accord that the U.S. Trump administration has promised to abandon.

There are all too many politicians like President Trump who simply deny the basic science of climate change with no real basis for their doing so. Rejecting science on this issue is inexcusable. It is quite clear that burning coal, oil and natural gas produces emissions that trap heat in the atmosphere and warms the planet. The sad state of affairs is that it has become increasingly clear that warming is happening faster than even the experts previously thought and with worse results.

In November, the Trump Administration released its fourth national climate assessment outlining the dire environmental and economic impacts of climate change, stating that thousands of Americans could die and gross domestic product could take a 10 percent hit by century’s end. Trump, who has called climate change a “hoax,” has rejected the report’s conclusion that climate change could be devastating for the economy, saying, “I don’t believe it.” The Trump Administration has since made a series of policy and diplomatic decisions or statements that run counter to all of the warnings in the report. None of these decisions are designed to reduce fossil fuel emissions, as the report said is needed to combat extreme climate change.

In December, the Environmental Protection Agency (EPA) proposed relaxing regulations for newly built coal-fired power plants, which, combined with another proposal to replace the Obama-era Clean Power Plan, would overhaul the way coal-fired plants are built and regulated. This is a political signal that the Trump administration is dedicated to shoring up the coal industry and other energy interests regardless of the adverse consequences. Environmentalists are concerned that the proposed rule suggests the EPA will set new standards that would weaken the requirements that the agency uses to regulate other types of pollution.

At the G20 meeting in Argentina, just days after the release of that dire climate report, U.S. diplomats insisted on noting that the United States reaffirmed its intention to withdraw from the Paris accord. When the U.S. Geological Survey announced a major discovery of oil and natural gas underneath Texas and New Mexico in December, Interior Secretary Ryan Zinke called it a gift.

It’s impossible for me to understand how any reasonable person who has access to the excellent work done by reputable scientists can deny the existence of climate change and the severe consequences that will result from it. We badly need a wake-up call in Washington on this most serious matter.

Source: CNN

TEVA AGREES TO $135 MILLION SETTLEMENT IN MEDICAID FRAUD CASE

Teva Pharmaceutical Industries Ltd. will pay $135 million to the State of Illinois to settle claims that the Israeli drugmaker cheated the government by inflating prices for medicines covered by the state’s Medicaid program. A lawsuit was filed in 2005 that has involved dozens of major pharmaceutical companies in claims of price inflation. Illinois Attorney General Lisa Madigan, in a statement announcing the agreement, said:

I am pleased that today’s settlement will provide $135 million for the state. In total, as a result of my 2005 lawsuit, my office has recovered more than $436 million for the state of Illinois from drug companies that engaged in unfair conduct.

The agreement took effect on Oct. 4, 2018, the document indicates. Under the terms of the settlement, Teva was required to pay $90 million of the total settlement
VI.  **THE CORPORATE WORLD**

**SUPREME COURT WILL REVIEW NEGLIGENCE STANDARD IN MERGER & ACQUISITIONS SUIT**

The U.S. Supreme Court has agreed to hear Emulex Corp.'s challenge to a Ninth Circuit finding that investors must show the company was merely being negligent rather than intentionally engaging in wrongdoing when it was said to have misled shareholders about a merger offer. The justices will review the Ninth Circuit's revival of a proposed securities class action alleging Emulex concealed that Avago Technologies Ltd.'s $606 million acquisition offer was too low. Avago said it completed the tender offer for $8 a share in May 2018. The Supreme Court granted Emulex's petition without comment.

The Ninth Circuit departed from past rulings in the Sixth, Second, Eleventh, Third and Fifth Circuits, and determined U.S. District Judge Cormac J. Carney wrongly concluded that claims under Section 14(e) of the Exchange Act related to tender offers must allege intent.

The Ninth Circuit said in its April decision reviving Gary Varjabedian's proposed class action that the district court's dismissal order, based on the earlier decisions by the five circuit courts, was centered on similarities in the texts between Rule 10b-5 and Section 14(e) of the Securities Exchange Act. But a 1976 Supreme Court decision in *Ernst & Ernst v. Hochfelder* "acknowledged that the wording of Rule 10b-5(b) could reasonably be read as imposing a scienter or a negligence standard," though the Supreme Court ultimately concluded that Rule 10b-5(b) required intent.

"Significantly, the court’s conclusion that scienter is an element of Rule 10b-5(b) had nothing to do with the text of Rule 10b-5," the Ninth Circuit opinion said. The Ninth Circuit stated further that the Supreme Court decision in *Ernst & Ernst v. Hochfelder* "acknowledged that the wording of Rule 10b-5(b) could reasonably be read as imposing a scienter or a negligence standard," though the Supreme Court ultimately concluded that Rule 10b-5(b) required intent.

The remaining $45 million is due by Jan. 10, 2020. Prosecutors accused the companies of violating Illinois’ Consumer Fraud Act, Whistleblower Act and Public Assistance Fraud Act by falsely providing the state with inflated wholesale prices for drugs covered under the Medicaid program. Since the state sets reimbursement amounts for those drugs based on the wholesale price information, the inflated figures meant the medical assistance programs paid out more than they should have.

In addition to paying the $135 million, Teva promised as part of the settlement to report to the state confidential drug pricing information, including the average sales price and average manufacturer price for drugs covered by the Medicaid program, for the next five years.

Other companies have also reached settlements with Illinois in order to get out of the long-running lawsuit. For example, in 2009, Amgen Inc. and subsidiary Immunex Corp. agreed to pay $7.8 million, and Baxter Healthcare Corp. agreed to pay $6.8 million to settle allegations they participated in the price inflation scheme.

Teva has previously come under fire for allegedly scamming medical assistance programs in Illinois. In 2014, for instance, Teva agreed to pay $27.6 million to settle claims the company paid a doctor to push prescriptions of a risky antipsychotic drug used to treat schizophrenia, resulting in thousands of false claims to the national and Illinois Medicare programs. Medicaid fraud has been a priority for Illinois authorities in recent years. In 2016, Illinois Gov. Bruce Rauner assigned a task force to root out "wasteful spending" in the state's Medicaid program, which he claimed cost the state more than $50 million per year.

The state is represented by Brent D. Stratton of the Illinois Attorney General's Office and Robert S. Libman of Miner Barnhill & Galland PC. The case is *Illinois v. Abbott Laboratories et al.*, (case number 2005-CH-02474) in the Circuit Court of Cook County, Illinois.

Source: Law360.com

**CHANCERY JUDGE APPROVES $50 MILLION SOUTHERN COPPER INVESTOR SETTLEMENT**

A $50 million settlement of class claims brought by minority shareholders of Southern Copper Corp. over the purchase of two of its power plants by a Mexican mining giant has been approved by a Delaware Chancery judge. Vice Chancellor Sam Glasscoo III said in his order that the settlement between the shareholders and director Defendants of Southern Copper was approved consistent with a decision articulated by the court during a Dec. 27 telephonic hearing. During that hearing the Vice Chancellor explained his reasoning for overruling the opposition filed by shareholder Cindy B. Hunt.

The $50 million agreement included a $13.5 million award of attorneys' fees for class counsel as well as a $5,000 incentive award for lead Plaintiff Carla Lacey. The settlement amount is to be distributed to class members as a cash dividend based on their shares in Southern Copper. It was reported that Southern Copper, an Arizona-based, Delaware-incorporated company, has mining and minerals processing facilities in Mexico and Peru. More than 87 percent of the company's shares are held by Grupo Mexico, a family-controlled holding company based in Mexico City.

The shareholder suit, filed in December 2015 after an earlier class books and records investigation, claimed that Grupo Mexico paid $300 million for the $350 million pair of plants, then improperly arranged a 20-year agreement to supply electricity to Southern Copper's Mexican facilities as well as possible third parties.

The shareholders said in their complaint that those terms assured that Grupo Mexico would incur little risk, with a prospect of collecting “hundreds of millions, or even billions, of dollars in revenue” on power sales, at the expense of Southern Copper. David Tejtel of Friedman Oster & Tejtel PLLC, counsel to the class, told the court in November there was no required prior review by independent directors for the power plant deal.

The shareholder class is represented by Peter B. Andrews, Craig J. Springer and David M. Sborz of Andrews & Springer LLC, and Jeremy Friedman, Spencer Oster and David Tejtel of Friedman Oster & Tejtel PLLC. The case is *Lacey v. Mota-Velasco et al.*, (case number 11779) in the Court of Chancery of the State of Delaware.

Source: Law360.com

**ATTORNEY GENERAL STEVE MARSHALL ANNOUNCES MULTISTATE SETTLEMENT WITH JOHNSON & JOHNSON AND MEDICAL DEVICE BUSINESS SERVICES INC. REGARDING DECEPTIVE PRACTICES IN PROMOTION OF HIP IMPLANT DEVICES**

Attorney General Steve Marshall announced last month that he and 45 other Attorneys General reached a $120 million settlement with Johnson & Johnson and Medical Device Business Services Inc. to resolve claims of unlawful promotions of metal-on-metal hip implant devices, the ASR XL and the Pinnacle
Ultamet. Medical Device Business Services Inc., a subsidiary of Johnson & Johnson, is the consolidation of several companies formerly known as DePuy Inc., DePuy Orthopedics (or Orthopaedics) Inc., DePuy Products Inc., DePuy Synthes Inc., and DePuy Synthes Sales Inc., which are collectively referred to in the settlement document as DePuy.

The Attorneys General allege that DePuy engaged in unfair and deceptive practices in its promotion of the metal-on-metal hip plant devices, ASR XL and Pinnacle Ultamet, by making misleading claims about their longevity, also known as survivorship. Specifically, DePuy advertised that the ASR XL hip implant had a survivorship of 99.2 percent at three years when the National Joint Registry of England and Wales reported a seven percent revision rate at three years. Similarly, DePuy promoted the Pinnacle Ultamet as having a survivorship of 99.8 percent and 99.9 percent survivorship at five years when the National Joint Registry of England and Wales reported a 2.2 percent three-year-revision rate in 2009 increasing to a 4.28 percent five-year-revision rate in 2012.

Some patients who required hip implant revision surgery to replace a failed ASR XL or Pinnacle Ultamet implant experienced persistent groin pain, allergic reactions, tissue necrosis, as well as a build-up of metal ions in the blood. The ASR XL was recalled from the market in 2010. DePuy discontinued its sale of the Pinnacle Ultamet in 2013. Attorney General Marshall, in a statement, said:

'It is imperative for surgeons and their patients to have reliable, honest and accurate data to determine which hip implants are appropriate for a serious procedure such as this. I am pleased that this agreement puts in place reformed practices to provide information upon which doctors and their patients may better rely."

As part of the Consent Judgment, DePuy has agreed to reform how it markets and promotes its hip implants. Under its provisions, DePuy will:

- Base claims of survivorship, stability or dislocations on scientific information and the most recent dataset available from a registry for any DePuy hip implant device.
- Maintain a post-market surveillance program and complaint handling program.
- Update and maintain internal product complaint handling operating procedures including training of complaint reviewers.
- Update and maintain processes and procedures to track and analyze product complaints that do not meet the definition of Medical Device Reportable Events.
- Maintain a quality assurance program that includes an audit procedure for tracking complaints regarding DePuy Products that do not rise to the level of a Medical Device Reportable Event but that may indicate a device-related serious injury or malfunction.
- Perform quarterly reviews of complaints, and if a subgroup of patients is identified that has a higher incidence of adverse events than the full patient population, determine the cause and alter promotional practices as appropriate.

The investigation was led by the Attorneys General of Texas and South Carolina with an Executive Committee consisting of the Attorneys General of Florida, Indiana, North Carolina, Ohio, Pennsylvania, and Washington. Also participating in the settlement are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia and Wisconsin. Under the settlement, the State of Alabama will receive $2,050,825.91.

As we have previously reported, there have been lots of civil litigation involving the hip implants. There is also an ongoing and very active multidistrict litigation (MDL) in the Northern District of Texas. The bulk of the recent hip implant litigation against DePuy involves the Pinnacle Ultamet. We have previously reported on several trials that have been completed with jury verdicts being returned against DePuy. Thus far the highest has been $1 billion. As of December 31, 2018, there were 9,797 cases pending in the MDL.

**Device Maker Ev3 Admits Improper Sales and Will Pay $18 Million**

Medical device company ev3 Inc. has pleaded guilty to a misdemeanor in Boston federal court and agreed to pay nearly $18 million. It appears this was something new for the magistrate judge overseeing the case, despite her nearly 20 years on the bench. Ev3’s in-house counsel entered the guilty plea on behalf of the company, which admitted to the marketing of a device for unapproved uses and agreed to pay the government almost $18 million in a fine and forfeiture. U.S. Magistrate Judith G. Dein, made this most significant statement: ‘I’ll admit this is a first for me, taking a plea of a corporation.”

The event doubled as a plea hearing and a sentencing after the government and ev3, a subsidiary of Medtronic PLC, reached a settlement in December whereby ev3 agreed to plead to the charge, pay the penalties and implement internal reforms. Prosecutors agreed not to recommend a sentence of probation. The company could have been put on probation for up to five years.

In a criminal information filed in December, prosecutors said ev3 marketed Onyx — a device meant to block blood flow in patients undergoing surgery for a rare disorder known as brain arteriovenous malformation — for uses outside the brain from 2005 to 2009, even though Onyx was unapproved for such uses. The U.S. Food and Drug Administration (FDA) had warned the company about safety concerns when the device was used outside the brain. Assistant U.S. Attorney Christopher Looney told the judge:

'Senior officials at ev3 directed company sales representatives to seek out surgeons who would use Onyx for procedures outside the brain.

In 2008, ev3 executives met with FDA scientists, who warned of the risks of using Onyx for procedures outside the brain and said another clinical trial would be required for any additional approvals. But ev3 continued to market the device for outside-the-brain uses. From August 2005 through 2009, ev3 took in $6 million from Onyx being sold for unauthorized uses.

The government is represented by Christopher R. Looney and Matthew Lash of the U.S. Attorney’s Office for the District of Massachusetts. The case is U.S. v. ev3 Inc., (case number 1:18-cr-10461) in the U.S. District Court for the District of Massachusetts.

Source: Law360.com
VII. WHISTLEBLOWER LITIGATION

$2.88 BILLION RECOVERED FROM FALSE CLAIMS ACT CASES IN 2018

According to statistics released by the Department of Justice (DOJ), the DOJ recovered more than $2.88 billion in judgments and settlements under the False Claims Act (FCA) in fiscal year 2018. Consistent with past years, lawsuits filed by whistleblowers accounted for the vast majority of the total amount of FCA recoveries in 2018. Since Congress amended the FCA to strengthen the government and whistleblowers' ability to combat fraud against the government and taxpayers in 1989, more than $59 billion has been recovered under the FCA.

An FCA claim can be brought by a relator on the government’s behalf under the FCA’s qui tam provisions or by the government directly. In fiscal year 2018, 645 qui tam lawsuits were filed by relators compared to 122 lawsuits filed by the government. Notably, qui tam lawsuits filed by relators accounted for more than $2.11 billion of the total $2.88 billion recovered under the FCA in 2018, while government-initiated lawsuits accounted for the remaining $767 million.

Unfortunately, the $2.88 billion recovered under the FCA in 2018 is the lowest amount of recoveries since 2009 and represents a more than $584 million decrease in recoveries compared to the prior fiscal year. The DOJ did not comment on the reasons for the decrease in recoveries. However, FCA cases involving health care fraud saw an increase of more than $329 million in recoveries compared to the prior fiscal year and accounted for more than $2.5 billion of the total $2.88 billion in recoveries. The FCA recoveries involving health care fraud included lawsuits against drug and medical device manufacturers, care providers, pharmacies, hospitals, hospice care providers, and laboratories. In many of these cases, state Medicaid programs were able to recover millions of dollars, in addition to the DOJ recovering federal funds under the FCA.

Of the recoveries in fiscal year 2018, the largest came from the drug and medical device industry. The largest recovery, totaling $625 million, came against drug manufacturer AmerisourceBergen Corporation and certain subsidiaries for evading drug supply safeguards and repackaging drugs supplied to cancer patients. Of the $625 million settlement, AmerisourceBergen Corporation and certain subsidiaries paid $581.8 million to the federal government and it paid $43.2 million to state Medicaid.

In its Press Release containing the fiscal year 2018 statistics, the DOJ stated that it continued to emphasize enforcement of the Anti-Kickback Statute (AKS). The AKS contains safeguards to ensure medical decisions and services provided to patients are grounded in medical necessity rather than providers’ improper financial objectives, such as illegal kickbacks. In addition to the FCA recoveries involving health care fraud, the DOJ recovered fraudulently obtained federal funds in cases involving a wide range of other areas, such as defense, national security, import tariffs, and small business programs.

In addition to combatting health care fraud, the False Claims Act serves as the government’s primary civil remedy to redress false claims for federal funds and property involving a multitude of government operations and contracts. These areas range from defense and national security to import tariffs and small business programs.

A relator who files a lawsuit on behalf of the government under the qui tam provisions of the FCA is entitled to an award based on the total amount recovered, if the lawsuit is successfully resolved. In 2018, relators who blew the whistle on fraud and false claims by filing successful qui tam actions were awarded $301 million in total. As recognized by Assistant Attorney General Jody Hunt, “Whistleblowers have played a vital role in unmasking fraudulent schemes that might otherwise evade detection.”

If you would like to have a copy of the complete press release issued by the U.S. Department of Justice, which has much more detailed information, let Shanna Malone know. She can be contacted at Shanna.Malone@beasleyallen.com and she will be glad to send you a copy.

Our clients have endured tremendous burdens to aid the government in protecting the public and deserve a fair chance to have their case decided by a jury under the Seventh Amendment.

The whistleblowers, Jeffrey and Sherilyn Campie, will almost certainly get a chance to challenge the DOJ’s dismissal. Hopefully, the DOJ will not dismiss the case. Unfortunately, they may have an uphill battle. That’s because under Ninth Circuit precedent, the government generally just needs to show that dismissal of a whistleblower FCA case would be “rationally related to a legitimate government interest.” Based on our firm’s involvement in whistleblower litigation, I have great difficulty finding such an interest in this case. While discovery is needed in any case, and critically important in a whistleblower case, it is an absolute necessity.

The Ninth Circuit revived the case in mid-2017 against Gilead, finding that the whistleblowers adequately alleged regulatory violations—concealment of active ingredient sourcing and contamination—that could have been “material” to government reimbursement under the Supreme Court’s Escobar standard. Gilead then sought review at the Supreme Court, which requested the government’s position on the case. In response, the DOJ agreed with the Ninth Circuit’s application of Escobar, but surprisingly said it would dismiss the case.

The planned dismissal is widely seen as an outgrowth of the DOJ’s so-called Granston memo, which emerged in early 2018 and directed government lawyers to
more readily consider dismissing whistleblower FCA cases when needed “to advance the government’s interests, preserve limited resources and avoid adverse precedent.”

The whistleblowers are represented by Tejinder Singh and Erica Oleszczuk Evans of Goldstein & Russell PC, Andrew S. Friedman and Francis J. Balint Jr. of Bonnett Fairborn Friedman & Balint PC and Ingrid M. Evans of Evans Law Firm Inc. The case is Gilead Sciences Inc. v. U.S. ex rel. Jeffrey Campie et al., (case number 17-936) in the Supreme Court of the United States.

Source: Law360.com

**Retaliation Claim Is Reinstated For United Airlines Whistleblower**

A federal appeals court has reinstated a whistleblower’s claim that he was unjustly fired by United Airlines after he complained repeatedly about the company failing to properly perform repair work on U.S. Air Force cargo planes. A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit overturned a decision by a federal judge dismissing the retaliation claim.

A majority of the appeals court, however, did affirm the trial judge’s decision to dismiss the False Claims Act claim against United for failure to state a claim. But the appeals court said there was sufficient evidence to show that United did, in fact, retaliate against Plaintiff David Grant by firing him after he made his complaints. Judge Allyson Duncan, writing for the court, said:

> Here, Grant’s termination, falling close on the heels of his numerous complaints, represents the ultimate action that an employer can take against a reasonable worker for whistle-blowing.

Judges J. Harvie Wilkinson III and Barbara Keenan joined in that portion of the ruling. Judge Keenan said she would reinstate Grant’s FSA claim, saying he presented enough evidence for the case to go to a jury. Grant worked for United from 2008 until 2014 at Charleston Air Force Base in South Carolina. At the time he was a lead aviation maintenance technician whose job was to care for the engines for the Air Force’s locally based fleet of C-17 Globemaster III cargo planes. The engines are manufactured by Pratt & Whitney and, according to the ruling, United is the only company in the world with the expertise to properly maintain them.

In his complaint, Grant alleged that he observed that United superiors “pencil-whipped” through reports that said maintenance work was done when, in fact, the work was not done; that United workers used the wrong tools; and that maintenance was performed by United workers who had failed to complete eye and training exercises.

United fired Grant on May 6, 2014, after he once again complained to his superiors. His lawsuit was filed in February 2015. U.S. District Judge David Norton, sitting in Charleston, dismissed the lawsuit on summary judgment. The federal government has since intervened in the lawsuit, although it did not participate in the appeal. Even though the majority agreed with Norton the FCA claims should be dismissed, it did agree with Grant to some extent. Judge Duncan said:

> Taking the facts alleged as true, it was objectively reasonable for Grant to believe that United had committed fraud. Finally, the complaint supports a reasonable inference that Grant’s actions were designed to stop one or more violations of the FCA.

Source: Law.com

**FCA Settlements Of Note In January**

There have been several significant settlements in False Claims Act litigation recently. We will give a brief summary of some of them.

**Walgreens Pays $269 Million In Milestone FCA Settlements**

Walgreens Boots Alliance Inc. has agreed to settlements worth $269 million to end False Claims Act (FCA) allegations of egregious overbilling for various drugs. The settlements mark some of the largest FCA payouts ever by a retail pharmacy. Last month Walgreens’ parent company agreed to $269 million in settlements ending False Claims Act suits alleging the pharmacy overbilled for insulin pens and other drugs. The settlements resolve unrelated fraud allegations in two cases that were filed by former Walgreens pharmacists and subsequently joined by the U.S. Department of Justice (DOJ). One of the complaints alleges excessive dispensing of insulin pens, and the other complaint alleges widespread overcharging of Medicaid programs through bogus price reporting.

In the case involving insulin pens, Walgreens will pay $209 million, a sum that appears to rival any prior FCA settlement involving a traditional brick-and-mortar pharmacy business.

Diabetes patients pair insulin pens with needles to inject insulin. According to the DOJ, Walgreens reaped improper payments from Medicare, Medicaid and other programs by understating the amount of treatment days covered by supplies of insulin pens. That allowed it to bill for prescriptions that should have been denied as premature, the DOJ said.

In the case involving Medicaid price reporting, Walgreens will pay $60 million. That also appears to be one of the larger FCA settlements involving a traditional pharmacy, as opposed to a pharmacy that focuses on drug compounding or a pharmacy that concentrates on a niche range of patients or products. The settlement resolves allegations that Walgreens flouted a requirement to seek Medicaid reimbursement no greater than certain price points, including its “usual and customary” price for various drugs. According to the DOJ, Walgreens obtained excessive reimbursement because it didn’t disclose discounted drug prices in its Prescription Savings Club.

This isn’t the first time Walgreens has found itself accused of fraud in connection with the Prescription Savings Club. Two years ago, the company had a $50 million FCA settlement over alleged kickbacks to enrollees in the PSC. That settlement was part of the same case that generated the $60 million settlement, which brought the case’s total value to $110 million.


**State Of New York Recovers $330 Million From Sprint**

The State of New York has recently made what appears to be the largest recovery ever by a single state in a case brought under the state’s False Claims Act (FCA). In 2011, a whistleblower claimed that Sprint, a well-known telecommunication
conglomerate providing numerous communication services nationwide, had been underpaying taxes in New York since at least 2005.

According to the whistleblower complaint, Sprint deliberately failed to collect and intentionally failed to pay millions of dollars in New York state and local taxes. These taxes were to be paid based upon flat rate wireless telephone plans.

Notably, the State of New York Attorney General’s office intervened in the case in 2012. This was the first enforcement by the Attorney General’s office regarding tax fraud under the New York False Claims Act. The New York False Claims Act was amended to cover tax claims back in 2010. This large recovery indicates that the State of New York will be pursuing future claims against entities that are defrauding the state by failing to pay taxes.

UNIVERSITY OF MICHIGAN SETTLES EMPLOYEE WHISTLEBLOWER LAWSUIT

On Dec. 3, 2018, The University of Michigan agreed to settle a former employee’s whistleblower lawsuit. The lawsuit was filed by Amy Wang, a former executive in the university’s Department of Technology Services and Finance Department. In her complaint, Wang alleges that she was asked to lie to U.S. Customs and Immigration Services officials regarding the duties of an employee who worked at the university under a NAFTA-created program. Pursuant to the rules of the program, the unidentified employee was only allowed to work at the university on a temporary work visa. However, the employee was working in a permanent, managerial role at the university, which was prohibited by the rules of the program.

Specifically, Wang was asked by her supervisor to “fraudulently misrepresent” the employee’s title and job duties to government officials to help the employee renew their visa. Instead of making the misrepresentations, Wang worked with human resources personnel to revise the employee’s title and job duties. The revisions to the employee’s job title included removing the employee from a managerial role—which would result in a reduction of salary. The attempt to reduce the employee’s salary caused conflict between Wang and her supervisor—the associate Vice President of Finance.

Wang claims that after she refused to make the fraudulent misrepresentations to the government, she was asked to resign or face termination because of a “failure to meet expectations.” Wang declined to resign, and the matter was submitted to a disciplinary review board. Wang was ultimately terminated on July 13, 2018. Wang, who earned nearly $200,000 annually, sued the university and agreed to settle the matter for $300,000.

$900 MILLION CARD SWIPE FEE SETTLEMENT GETS INITIAL APPROVAL

A Brooklyn federal judge has given initial approval for a revised settlement between Visa, Mastercard, a group of banks and the merchants accusing them of charging excessive swipe fees, potentially adding $900 million to the $5.3 billion already paid out over the claims. U.S. District Judge Margo Brodie issued an order granting preliminary approval for the settlement after the sides submitted changes to the class notice and agreed to notify entities that are excluded from the settlement.

The multidistrict litigation is based on allegations that Visa, Mastercard and several banks — including Bank of America, Barclays and JPMorgan Chase — maintained a series of network rules that enabled the companies to charge merchants higher transaction fees than the retailers would have tolerated in a competitive market.

The sides first settled the case in 2012 for $7.25 billion, only to have the Second Circuit upend the settlement in 2016, after finding issues with the same counsel representing merchants seeking damages and those seeking changes to the network rules moving forward.

Nevertheless, about $5.4 billion had already been placed in escrow by the card companies and banks when they agreed to a new settlement with merchants in September that would see them pay out up to $900 million more. The settlement now bottoms out at a minimum of $5.56 billion and tops out at $6.26 billion, depending on the number of large retailers that chose to pursue claims on their own. Visa will be responsible for $600 million of the new $900 million, Mastercard will pay $108 million and the rest will come from the banks. The amended settlement only covers damages claims and retailers seeking an injunction to alter the rules are proceeding separately.

The case is In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, in the U.S. District Court for the Eastern District of New York.

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 Brasher 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.Brasher@beasleyallen.com or Paul.Evans@beasleyallen.com.

VIII. PRODUCT LIABILITY UPDATE

A LOOK AT AUTOMATIC EMERGENCY BRAKING SYSTEMS

With the rise of technological advances in the automobile industry comes the implementation of Automatic Emergency Braking (AEB) systems. The intended utility of AEB systems is that vehicles will detect an impending forward crash with another vehicle in time to avoid the crash. Upon detecting a forward impending...
crash, the brakes are independently and automatically applied. It is undisputed that foolproof AEB systems would be beneficial in reducing automobile accidents; however, that is not the current state of the available technology.

There have been several reports that evidence failures in AEB systems. In an article published by Consumer Affairs, one individual stated that “It was amazing that nobody hit me” after her car traveling between 45-50 mile per hour suddenly stopped on the highway. Another consumer stated that a large metal slate covering a pothole in the road way unjustifiably triggered the consumer’s AEB system within the vehicle, suddenly stopping the vehicle.

AEB systems and failures associated with braking are just the beginning now that autonomous vehicles are being introduced. American Association of Justice published an article about self-driving cars being fooled by the shadows of tree branches thinking they were objects on the road. The article further stated that piles of leaves would also confuse the cars into stopping.

As illustrated above, faulty automatic emergency braking is dangerous for all on the road. When a product is not adequately tested considering real-world road obstacles or other foreseeable obstacles, it creates a peril for everyone on the road. Beasley Allen lawyers have experience handling cases involving faulty and defective automobiles. If you have questions, contact Cole Portis or Ben Keen at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Ben.Keen@beasleyallen.com.

**RECALL ON CERTAIN HARLEY-DAVIDSON MOTORCYCLES**

During the latter part of 2018, Harley Davidson announced that it would recall more than 238,000 motorcycles for a potential clutch defect issue. This recall signals the fourth recall over certain potential clutch defect issue. This recall itself from Harley Davidson lists the “Possible Effects” in this manner:

*When the engine is running and the motorcycle is in gear, if the clutch cannot be fully disengaged, the motorcycle may move unexpectedly, increasing the risk of a crash.*

With accidents being reported with prior recalls, it is conceivable that similar accidents may occur with these later models if the issue is not properly and timely resolved. Harley Davidson issued the voluntary recall and is encouraging owners of the recalled 2017 and 2018 models to take their bikes into local dealers to have the issue addressed. If you need a list of the vehicles being recalled, contact Shanna Malone at Shanna.Malone@beasleyallen.com.

If accidents occur where clutch failures are suspected to be a factor, consumers are encouraged to notify Harley Davidson and to submit an online report to the National Highway Traffic Safety Administration (NHTSA.gov). The complaint form can be found at www.nhtsa.dot.gov/VehicleComplaint. The information needed will be a valid email address, the VIN of the motorcycle at issue, and the make/model/year of the motorcycle. Once this information is entered, a description of the issue can be provided to NHTSA for further investigation. It is important to make these reports in the event that others are seriously injured or hurt.

If you have questions, contact Ben Locklar, a lawyer in our firm’s Personal Injury & Products Liability Section, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

**MASSACHUSETTS CASE SUCCESSFULLY PROVE THAT SMOKING AND ASBESTOS EXPOSURE COLLECTIVELY CAUSED LUNG CANCER**

In October, a Massachusetts lawsuit claimed tobacco and asbestos exposure both caused the lung cancer of Louis Summerlin. The suit, brought by Levy Konigsberg and Shepard Law, was successful, with the Boston jury awarding $43.1 million to the family of Mr. Summerlin.

The Summerlins argued that defectively designed cigarettes, fraudulent misrepresentations by the tobacco industry and asbestos exposure through brakes used in automotive work collectively caused Mr. Summerlin’s lung cancer and wrongful death in 2015. Mr. Summerlin smoked Marlboro, Salem and Kools menthol cigarettes for more than 50 years and worked as a brake mechanic for almost 25 years. During that time, Mr. Summerlin purchased asbestos-containing brakes from Hampden Automotive Sales Corporation.

During the trial, doctors testified that both cigarette smoking and exposure to asbestos can independently cause lung cancer; however, when both are present, there is a greater chance of developing lung cancer than when only one is present. Plaintiffs presented evidence that the cigarettes smoked by Mr. Summerlin contained extremely high levels of nicotine, tar, carcinogens and menthol and the combination led to a greater difficulty for a smoker to quit smoking.

In light of this evidence, the jury found the Salem and Kool cigarettes were unreasonably dangerous, defectively designed and therefore a substantial factor in causing Mr. Summerlin’s lung cancer. The jury further concluded that the manufacturer of Salem and Kool, R.J. Reynolds, committed fraud by failing to inform the public of known smoking dangers such as addiction and a cause of cancer.

When a person is exposed to asbestos and smokes cigarettes, there is a synergistic effect between the carcinogens, increasing greatly a person’s risk of developing lung cancer. Regular exposure increases a person’s risk of lung cancer by 50 percent. Along with this synergistic effect, the jury learned of industry knowledge that asbestos exposure was a proven cause of lung cancer. As a result, they determined the brakes sold by Hampden were defectively designed due to a lack of adequate warning detailing the dangers of asbestos exposure. In addition, R.J. Reynolds was held responsible for $30 million in punitive damages due to findings of grossly negligent and malicious, willful, wanton and reckless behavior.

As early as before the 1950s and during the time Mr. Summerlin smoked cigarettes and worked with these automotive products, cigarette and asbestos producing companies knew their products had the ability to cause lung cancer.
If you would like more information about this case or have any questions concerning asbestos-related illnesses, you can contact Sharon Zinns or Ashtyne Traylor, lawyers in our firm's Toxic Torts Section at 800-898-2034, or by email at Sharon.Zinns@beasleyallen.com or Ashtyne.Traylor@beasleyallen.com.

IX. MASS TORTS UPDATE

REMAINING TESTOSTERONE MANUFACTURER
ABBVIE SIGNS MASTER SETTLEMENT AGREEMENT

On Nov. 27, 2018, AbbVie, manufacturer of the highest-selling brand-name testosterone drug in the United States, signed a Master Settlement Agreement with members of the Plaintiff Steering Committee (PSC) to settle claims brought against it by thousands of men alleging the drug caused them to suffer a heart attack, stroke, blood clot, and/or death. The litigation began in late 2013 when multiple scientific studies showed that Androgel and similar drugs greatly increased the risk of severe cardiac injuries, even after relatively short periods of use.

Beasley Allen lawyers represented hundreds of men in this litigation and began filing cases soon after the publication of these adverse studies. Further, Matt Teague, who is in our Mass Torts Section, served on the Plaintiff Steering Committee and represented the first bellwether Plaintiff to receive a compensatory and punitive verdict against AbbVie in only the second trial nationally.

These lawsuits highlighted AbbVie’s use of direct-to-consumer marketing to encourage aging men to ask their doctors if they were a candidate for testosterone treatment. The testosterone manufacturers also created a condition called “Low T,” with symptoms such as low sex drive, muscle loss, weight gain and mood swings, and promoted their testosterone products off-label as a treatment for these conditions. Each year, AbbVie spent millions of dollars to promote its drugs as treatments for so-called Low T. Sales of these drugs, particularly Androgel, skyrocketed as a result of these aggressive marketing practices. However, AbbVie failed to test Androgel for cardiac risks prior to introducing the drug to the marketplace and continued to avoid testing even after multiple, credible reports by non-biased doctors showed such a risk to be statistically significant.

In March 2015, the Food and Drug Administration (FDA) issued a Drug Safety Communication cautioning that prescription testosterone products are approved “only for men who have low testosterone levels caused by certain medical conditions,” and not by age-related hypogonadism because the safety and efficacy for this use had not been evaluated. The agency required testosterone manufacturers to update the safety labels of their products to reflect this clarification in prescribing. At that time, the FDA also ordered testosterone makers to add warnings about an increased risk of cardiovascular events, including heart attacks and strokes.

AbbVie is the last of the brand-name manufacturers involved in this litigation to settle, thus signaling a likely end to this litigation. Other drugmakers settling this year include Eli Lilly, which manufactures Axiron; Endo & Auxilium, which manufactures Testopel, Fortesta, and Delatestryl; and Actavis, which manufactures Androderm. In early September 2018, AbbVie entered into a confidential term sheet regarding a potential global settlement, finally signaling the beginning of the end of this litigation for the thousands of men who suffered cardiovascular injuries or death after using Androgel and other testosterone replacement therapies.

With nearly 4,000 Plaintiffs with claims against AbbVie, this settlement marks the end of a long and difficult journey for those trying to seek justice and demand accountability from the largest and most formidable testosterone replacement therapy manufacturer. The lawyers at Beasley Allen are proud to represent plaintiffs from across the country who stood up against these very powerful drug manufacturers. Their courage and willingness to fight this matter in court led to improved warnings on this class of drug, successful results in the courtroom, and the compensation of thousands of cardiac injuries suffered by those using these testosterone drugs.

Matt Teague is handling the Testosterone Replacement Therapy litigation for Beasley Allen and he serves on the Plaintiffs Steering Committee for the MDL. For more information, call him at 800-898-2034 or contact him by email Matt.Teague@beasleyallen.com.

IBC FILTER CASE SELECTED FOR TRIAL

IVC filters are devices that are implanted in the inferior vena cava, the body’s largest vein, to catch blood clots that form in the legs before they reach vital organs like the heart and lungs. Retrieveable IVC filters were introduced in 2003 and promoted for use in bariatric surgery, trauma surgery and orthopedic surgery—situations where patients are at higher risk for developing blood clots. Retrieveable IVC filters have a higher failure rate than their permanent counterparts. Potential complications include migration, fracture and perforation, leading to embolism, organ damage and wrongful death.

A bellwether trial involving a Beasley Allen client who was severely and permanently injured by a defective Option Elite IVC filter manufactured by Argon Medical is scheduled to begin in early December 2019. The Plaintiff in this case was implanted with an Option Elite IVC filter as a prophylactic measure to prevent pulmonary embolism following gastrointestinal bypass surgery. Less than two months later, this individual’s doctors attempted to retrieve the IVC filter, but they discovered that a leg on the filter had broken off and embedded in her inferior vena cava wall.

After another unsuccessful attempt to remove the defective IVC filter, the Plaintiff was referred to a doctor in California who specializes in complex IVC filter removal. The specialist found that the broken IVC filter leg had migrated to the individual’s renal veins and punctured those veins and her kidney, which resulted in kidney failure.

Beasley Allen lawyers continue to investigate new cases involving people injured by IVC filters. If you or a loved one has been injured by a defective IVC filter, contact Melissa Prickett at 800-898-2034 or Melissa.Prickett@BeasleyAllen.com. She will have one of the lawyers handling these cases contact you.

A LOOK AT THE COBALT HV BONE CEMENT LITIGATION

Lawyers in our firm are involved in the Bone Cement Litigation. Currently, this litigation involves four models of bone cements used in total knee replacement surgeries:

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

Beasley Allen lawyers are involved in the Cobalt HV Bone Cement with Gentamicin (G-HV) litigation. Our lawyers have filed a lawsuit involving this model.
This case is currently in the discovery phase.

**Cobalt HV Bone Cement** is manufactured and sold by Biomet, Inc., Biomet Orthopedics, DJO Global, Inc., and Encore Medical, L.P., doing business as DJO Surgical. These companies manufacture “Cobalt” bone cements, which also includes Cobalt HV Bone Cement with Gentamicin (G-HV). In June 2015, Encore Medical/DJO Surgical acquired the line of Cobalt Bone Cement from its parent company, Zimmer Biomet Holdings. Today, Biomet and DJO continue to sell Cobalt Bone Cements, including Cobalt HV and Cobalt G-HV.

The line of Cobalt Bone Cements also includes medium-viscosity cements called Cobalt MV or Cobalt G-MV. Unlike Cobalt HV, Cobalt MV is a “non-HV” cement because it comes in low or medium viscosity forms. Thus far, the medical literature is not as critical of MV bone cements. For that reason, Beasley Allen is not currently investigating potential cases involving these MV cements.

Both Cobalt HV and Cobalt MV also come in “Gentamicin” varieties. Gentamicin is an antibiotic outer layer of the bone cement. Although gentamicin can help guard against potential infections, medical research shows that it does not affect the structural strength of the bone cement. The case we filed this past year involved Cobalt HV Bone Cement with Gentamicin (G-HV).

In May 2018, Beasley Allen lawyers filed a case in federal court in New Orleans, Louisiana against the manufacturers of Cobalt HV Bone Cement, specifically Cobalt G-HV Bone Cement. This case arises out of Carla Ducombs’s complications involving loosening of the tibial component, leading to revision surgery in mid-2017. In this procedure, the surgeon assessed the implant components and found the tibial component was “grossly loose.”

On Feb. 14, the parties in Ducombe case have a hearing set before Chief U.S. Magistrate Judge Karen Wells Roby in New Orleans. At this hearing, the parties will discuss how discovery should proceed in the case. Specifically, discussions will include how likely millions of documents and data will be produced electronically. Over the past several months, both Plaintiff and Defense counsel have proposed detailed plans on exactly how documents should be produced. Hopefully, this effort will lead to streamlined and efficient discovery in this case, as well as future cases involving Cobalt HV Bone Cements.

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 Dupplechin, lawyers in our firm’s Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com or Ryan.Dupplechin@beasleyallen.com.

**Breast Implants Linked To Rare Cancer**

In November of 2018, NBC reported that more than 400 breast implant patients reported a diagnosis of ALCL, Anaplastic Large Cell Lymphoma, to the U.S. Food and Drug Administration (FDA). The FDA states that BIA-ALCL (Breast Implant-Associated ALCL) is not breast cancer. Instead, it is a type of non-Hodgkin's lymphoma—cancer of the immune system. In most cases, BIA-ALCL is found in scar tissue and fluid near the implant, but in some cases, it can spread throughout the body. Of the 414 cases reported as of September 2017, nine patients have died.

An estimated 10 to 11 million women worldwide have breast implants. Since its report addressing a possible association published in 2011, the FDA has been following the issue. The number of actual cases of BIA-ALCL is difficult to determine due to significant limitations in worldwide reporting and lack of global breast implant sales data.

Currently, most data indicate occurrence more frequently in implants with a textured surface than in smooth-surface implants and shows that ALCL can occur in both saline and silicone implants. The FDA cautions that patients with smooth surface implants are still at risk of developing ALCL. The reality is most patients are not likely to be aware of what surface their implants consist of, and multiple factors may contribute to the develop of ALCL, including patient characteristics, operative procedure history, implant characteristics and duration of placement.

Currently in the United States, there are FDA-approved implants manufactured by Ideal Implant, Inc.; Allergan; Mentor (Johnson & Johnson); and Sientra, Inc. Lawsuits have been filed against Allergan and Johnson & Johnson on behalf of breast implant patients diagnosed with BIA-ALCL.

**Supreme Court Grants Review In Kisor—The Future Of Auer And Seminole Rock Defe rence Will Be Before The Court**

On Dec. 10, 2018, the Supreme Court of the United States granted review in Kisor v. Wilkie, specifically agreeing to consider the issue of whether to overrule Auer v. Robbins, 519 U.S. 452 (1997) and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). Those are the two main Supreme Court cases directing courts to give binding deference to a federal agency’s interpretation of its own regulations—generally called Auer deference or Seminole Rock deference.

The Auer/Seminole Rock deference doctrine has been followed by courts in giving power to agencies to interpret their own regulations for more than seven decades since Seminole Rock (1945). The Auer/Seminole Rock deference gives agencies the highest level of deference by giving their interpretation “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”

For this reason, perhaps the Auer deference has been one of the most controversial topics in the area of administrative law. Defenders of Auer deference argue that agencies have the expertise in their fields and therefore are in the best position to interpret their own regulations. However, the Auer deference has been criticized by various legal scholars, conservatives, business groups and judges, including the late Justice Antonin Scalia, who actually authored the Auer opinion and then later became one of the fiercest critics, questioning the Auer deference doctrine’s place in administrative law.

In his dissent in Decker v. Northwest Environmental Defense Center (NEDC), 133 S. Ct. 1326 (2013), Justice Scalia attacked Auer because it effectively places “the power to write a law and the power to interpret it in the same hands” and thus violates the Constitution’s separation of powers. Justice Scalia also expressed concern that the Auer deference incentivizes agencies to promulgate
ambiguous regulations. He pointed out that “the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect.”

The pending U.S. Supreme Court case Kisor vs. Wilkie brings the exact same question before the Court—the interpretation of its own regulations by a federal executive agency, in this case, the U.S. Department of Veterans Affairs. In Kisor, a Vietnam veteran who had developed post-traumatic stress disorder (PTSD) from his service submitted a claim for disability benefits in 1982. Initially, the agency rejected the claim, disputing his PTSD diagnosis. The case was reopened in 2006 with additional documentation, and this time the Board of Veterans’ Appeals granted benefits, but starting from 2006, rather than 1982.

The meaning of the term “relevant” in the applicable regulation (38 C.F.R. § 3.156(c)(1)) became the key issue in this case because, according to the agency’s interpretation, the additional documents submitted in 2006 were not “relevant” to the original claim in 1982. On appeal, despite acknowledging the ambiguity of the regulation, the U.S. Court of Appeals for the Federal Circuit deferred to the VA’s interpretation, applying the Auer deference, and affirmed the agency’s decision.

The Supreme Court will likely hear this case in March or April and will decide whether to preserve the Auer deference. In the aforementioned Decker case, Chief Justice Roberts and Justice Alito, concurring in part with Justice Scalia, also expressed their willingness to reconsider the Auer doctrine. Other conservative Justices such as Justice Thomas and Justice Gorsuch have also expressed their concerns about the Auer deference in their earlier cases.

With the recent appointment of Justice Kavanaugh, who has already shown his skepticism on the Auer deference and is known as more conservative than Justice Gorsuch, to the Supreme Court, it will be interesting to see how the future of the Auer deference will wind up. If you need more information, contact Soo Seok Yang, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at SooSeok.Yang@beasleyallen.com.

X. PREMISES LIABILITY UPDATE

APPEALS COURT RULES IN FLINT WATER SUIT

The Sixth Circuit Court of Appeals has refused to dismiss the suit alleging Michigan state officials and the City of Flint violated the bodily integrity of residents by exposing them to contaminated water. However, the court dismissed certain claims against other officials. The appeals panel, in a 2-1 published opinion, rejected arguments that certain state and city officials were protected by qualified immunity from claims in the suit brought by Flint residents Shari Guertin, her child and Diogenes Muse-Cleveland seeking to hold officials in various capacities responsible for the lead-contaminated water.

As with the Flint defendants, these MDEQ defendants created the Flint water environmental disaster and then intentionally attempted to cover up their grievous decision. Their actions shock our conscience.

The residents’ 2016 suit claims that city, the state and their officials caused the lead in the water to rise to dangerous levels and actively concealed that fact from residents, who then drank and washed in the water for weeks and months. The panel did, however, dismiss claims against the former director of Michigan’s Department of Environmental Quality, reversing a lower court’s ruling. The panel said at most, the residents claimed that then-MDEQ Director Dan Wyant knew about some of the issues with the water supply after the switch and admitted his department’s “colossal failure” after Flint reconnected to the Detroit water and sewage department.

The appeals panel also rejected Flint’s argument that the lower court erred in denying it sovereign immunity under the Eleventh Amendment, which restricts the ability of individuals to bring suit against states in federal court. During the water crisis, Flint was in such dire straits that the state had taken over its day-to-day local government operations. The city argued that this meant it was protected by the Eleventh Amendment as an arm of the state. The panel disagreed stating:

The problem with Flint’s argument is that Michigan courts have rejected the notion that a city’s emergency management status transforms a city into a state entity.

The residents are represented by Paul T. Geske of McGuire Law PC, Steven Hart of Hart McLaughlin & Eldridge LLC, and John Sawin of Sawin Law Firm Ltd. The case is Guertin et al. v. State of Michigan et al., (case numbers 17-1698, 17-1699, 17-1745, 17-1752 and 17-1769) in the U.S. Court of Appeals for the Sixth Circuit.

Source: Law360.com

CHEVRON SETTLES GAS ADDITIVE DAMAGES SUIT FOR $11 MILLION

Chevron USA and Union Oil Co. of California have reached a settlement with a California water district. This came prior to a Phase 1 trial scheduled to start this month. The companies will pay $11 million to end claims over alleged drinking water contamination from gasoline releases. The two companies (the Chevron Defendants) were slated to defend themselves against allegations involving eight of the 27 sites that were to be the focus of a Jan. 15 trial. A motion was filed for an order determining a good faith settlement by the Chevron Defendants. The Orange County Water District accused the Chevron Defendants and several other companies of releasing the gasoline additive methyl tertiary butyl ether and causing harm.

The case was filed in 2003 and concerns MTBE, which was used as an additive to gasoline. The water district says MTBE has “contaminated or threatens to contaminate drinking water production wells within the district.” This is said to be the largest settlement reached to date in this case.

In reaching this amount, the parties considered the Chevron USA defendants’ potential legal defenses and OCWD’s lack of evidence of


BeasleyAllen.com
companies to boost the octane level in
the upcoming trial would involve sites
for which the Chevron USA defendants have strong defenses to liability and damages.

Other Defendants, including ExxonMobil Corp., remain in the case and
clean up and remediate any releases or
contamination and those efforts
have been effective. Seven of the
eight sites have received regulatory
closure, and closure at the eighth site
is imminent.

The motion stated further that closure
means regulators have “determined that
any remaining, low-level contamination at
the site is not a threat to groundwater or
the environment.” The two sides differed,
however, on damages. “OCWD claims
that it seeks damages to investigate and
remediate off-site MTBE at each of these
sites, but the Chevron USA Defendants contend that the minimal testing
performed by OCWD confirmed that the
Chevron USA Defendants’ sites have been
successfully remediated and that there are
no threats—on-site or off-site—to drinking
water,” the motion said.

The energy companies say that the
water district hasn’t incurred costs related
to groundwater contamination at the eight
sites in question. But these aren’t the only
sites in which the Chevron Defendants
might be involved. “For many of these
sites, OCWD’s claims may not yet be ripe.
The parties dispute the number of sites for
which the Chevron USA Defendants could
be liable that remain in the MDL,” the
motion said.

Based on the dispute over liability, the
motion said the result was fair and asked
the judge to agree. The motion stated:

The parties considered the possible
damage claims arising from future
investigation and remediation at
these sites, as well as potential
liability and damages at all stations
in the MDL that OCWD claims
received gasoline refined by the
Chevron USA defendants, even if
many of these claims are not yet
ripe. The settlement amount takes
into account all of these factors
and others.

MTBE was used in the 1980s by the two
companies to boost the octane level in
their gasoline. California eventually
banned the substance’s use. The OCWD is
represented by Duane C. Miller, Michael
Axline and Tracey O’Reilly of Miller &
Axline PC. The case is Orange County
Water District v. Unocal Corp. et al., (case
number 8:03-cv-01742) in the U.S. District
Court for the Central District of California.
Source: Law360.com

XI.
WORKPLACE
HAZARDS

TRENDS IN WORKPLACE SAFETY

Unfortunately, millions of American
workers are injured and thousands more
lose their lives every year in job-related
incidents. It is important to document
these incidents to understand why they
occur and to take steps to improve
workplace safety. The Bureau of Labor
Statistics (BLS) is the source for
information regarding reportable
workplace injuries and deaths. In
November of 2018, the BLS released the
2017 statistics on nonfatal workplace
injuries (statistics for 2018 will be released
in November or December of 2019). The
raw data provided in the release provides
insight into whether the laws and systems
in place to protect workers are serving
their purpose.

According to the BLS, there were
approximately 2.8 million nonfatal
workplace injuries and illnesses reported
for 2017. Reportable nonfatal workplace
injuries are broken down into those
resulting in time missed from work (the
more serious injuries) and those that do
not require time off work (minor injuries).
In 2016, manufacturing injuries and
illnesses to production workers accounted
for 64 percent of the total missed work
days due to workrelated incidents. These
numbers remained unchanged in 2017. A
third of all nonfatal injuries in 2017 were
attributable to serious injuries requiring
at least one day away from work. The median
days away from work in manufacturing
was eight, one day fewer than in 2016. It
should be noted that production workers
in manufacturing are likely working with
or around industrial machinery.

BLS reported 5,147 fatal workplace
injuries in 2017. Other interesting findings
from the 2017 statistics include:

• Fatal falls were at their highest levels
  accounting for 887 or 17 percent of
  worker deaths;
• Transportation incidents remained the
  most frequent fatal event in 2017 with
  2,077 or 40 percent of
  workplace deaths;
• Violence and other injuries by persons
  or animals decreased by 7 percent in 2017;
• Fifteen percent of the workplace
  fatalities in 2017 involved workers age
  65 or older;
• Workplace deaths in the private mining,
  quarrying and oil/gas industry increased
  by 26 percent; and
• A total of 27 states had fewer workplace
deaths in 2017 than in 2016, while 21
  states and the District of Columbia
  had more.

When a worker dies in an on-the-job
injury the loss extends beyond the
workplace to the family that lost a loved
one and a provider. Likewise, serious
nonfatal injuries require significant time
from work and, in some instances, reduce
the injured employee’s earning capacity.
For non-fatal injuries, the worker’s income
ability to earn income will be
negatively affected temporarily. Some
injuries are severe enough to negatively
affect a worker’s earnings for their entire
work life expectancy.

Because many of the deaths and serious
nonfatal injuries are caused by interactions
with some form of industrial machinery, it
is important for manufacturers to ensure
that robots and other machines are
designed with adequate safety devices in
place. In turn, the employer has a
responsibility to properly train employees
and ensure that manufacturer-provided
safety devices are installed and properly
maintained. Safer industrial machines will
result in a reduction of deaths and nonfatal
injuries requiring days off work.

It should be no surprise that the current
administration took steps to reduce the
Occupational Safety and Health
Administration’s (OSHA) ability to enforce
workplace safety requirements. OSHA’s
purpose is to emphasize worker safety and
many of the rules apply specifically to
safeguarding industrial machinery. Without
OSHA’s constant oversight, manufacturers and employers might be
tempted to sacrifice worker safety for
profits which will lead to more deaths
and serious injuries.

Lawyers at Beasley Allen will continue
to monitor workplace injury statistics. We
will use them to inform our readers about
workplace safety. If you need more
information, contact Kendall Dunson, a
lawyer in our Personal Injury & Products
Liability Section, at 800-898-2034 or by
email at Kendall.Dunson@beasleyallen.com. On behalf of the firm, Kendall has successfully handled workplace litigation over a lengthy period of time.

Alabama Workers’ Compensation Overview

As most know, employees injured on the job are often entitled to workers’ compensation benefits. However, our clients rarely know what to expect or what they are entitled to under Alabama’s workers’ compensation laws. Each on-the-job injury is different and must be investigated thoroughly to determine what remedies are available, but the typical benefits one can expect in a workers’ compensation case are lost wages and payment for all related medical treatment.

Workers’ compensation is often referred to as an exclusive remedy, meaning that it is an injured employee’s only option for recovering damages as a result of their accident. If the employer maintains workers’ compensation insurance, the injured employee will receive benefits for lost wages, medical care and rehabilitation, even if the worker plays some role in causing the injuries. This is often referred to as the “no fault” principle associated with workers’ compensation benefits.

Under Alabama law, an injured employee is not entitled to the full value of their lost wages. Instead, the employee’s weekly earned wages are averaged out for the past year and they are paid two-thirds of that amount. The injured employee can also expect for all of their medical expenses including doctors’ appointments, prescriptions, medical devices and physical therapy to be paid for by workers’ compensation. The most commonly overlooked benefit is mileage to and from doctors’ appointments and visits. The injured employee should request to be reimbursed for mileage.

As with most rules, there are exceptions to workers’ compensation being the exclusive remedy for an employee. It is important to have a firm grasp on these exceptions to the workers’ compensation exclusive remedy principle when investigating an on-the-job injury. Whether or not an exception to the rule applies often hinges on the facts and circumstances surrounding the injury.

Minor injuries are where the exclusive remedy provision of workers’ compensation laws often works to the benefit of the injured employee. Conversely, if an on-the-job injury is severe in nature, it is important to investigate the accident to determine if there is a claim that may be brought outside of workers’ compensation. If the injured party played some role in their injury, workers’ compensation benefits may still be the best bet for recovering for those injuries due to the no-fault principal.

However, if the accident was the fault of others, one or more of the exceptions to the exclusive remedy principle may apply. Those exceptions are:

- One of the most common exclusions is third-party liability. If some third party (other than the employer) caused or contributed to the injured employee’s accident, the employee may have a cause of action in tort against that party. Third party liability is commonly seen in the form of products liability. When an employee is injured on the job by a defective or unreasonably dangerous product, the employee likely can bring a products liability action.

- A common exception stems from injuries caused by third parties working on the premises of the employer. Because there is no employment relationship between the injured and the third party, workers’ compensation does not apply.

- In Alabama, there is another often overlooked exception to the workers’ compensation exclusive remedy principle. Under Ala. Code § 25-5-11(b), an employer that would be covered by workers’ compensation may be sued in tort if any injury is caused by the employer’s willful conduct.

- Although this is an extremely difficult burden to carry, Ala. Code § 25-5-11(c)(2), is more easily proven. Under Ala. Code § 25-5-11(c)(2), an injured employee may bring an action in tort if a safety device is intentionally removed from a machine.

These cases are very common and are easily overlooked unless a detailed investigation is conducted. It is imperative to investigate all on-the-job injuries with an eye toward bringing a claim outside of workers’ compensation.

Because Alabama’s workers’ compensation laws and pay schedules have not been updated in decades, the available damages for a given injury are alarmingly low. In fact, Jefferson County Circuit Judge Pat Ballard recently ruled the Alabama Workers’ Compensation Act unconstitutional. Essentially, Judge Ballard found that injured workers were often paid well below both minimum wage and poverty levels following an accident. Hopefully Judge Ballard’s Order will be the catalyst needed to re-write the Alabama Workers’ Compensation Act. Until then, it is important to thoroughly investigate each on-the-job injury to ensure no viable claims or remedies are left on the table.

If you need more information on this subject, contact Evan Allen, a lawyer in our firm’s Personal Injury & Products Liability Section, at 800-898-2034 or by email at Evan.Allen@beasleyallen.com. Evan handles workplace litigation for the firm.

XII. Transportation Litigation

Government Shutdown Stalls Aviation Accident Investigations

The federally funded National Transportation Safety Board (NTSB), charged with civil transportation accident investigations, had to pass up investigating at least a dozen incidents that it would have otherwise handled since the partial government shutdown went into effect Dec. 22, 2018. Literally thousands of existing investigations and research and engineering efforts were put on hold as well until the government reopened. However, some NTSB investigators were called in—without pay—to assist in three international plane crash investigations in Indonesia, Mexico and South Korea.

The NTSB investigates transportation accidents and incidents to find the probable cause and to formulate safety recommendations to improve transportation safety in the United States. For example, NTSB investigated Lion Air Flight 610, which in October crashed off the coast of Indonesia killing all 189 people on board. It was later determined that the Boeing 737 Max 8 had a design defect that allowed misinformation to direct flight sensors to send the plane into a nosedive that the pilots were unable to pull out of.

Lion Air Flight 610 was the single most deadly aviation accident in 2018. While 556 people died in 15 fatal aviation accidents in 2018—a 12-fold increase in the number of people killed in plane crashes in 2017—the Aviation Safety Network (ASN) deemed 2018 as one of the safest in commercial aviation history. For example, in 2000, there were 64 fatal aviation accidents reported.

Of the aviation accidents in 2017 and 2018, 12 involved passenger flights and three involved cargo flights. Three of the planes were operated by airlines that have been banned by the European Union for...
failing to meet regulatory oversight standards. If you need more information on aviation matters contact Mike Andrews, a lawyer in our firm’s Personal Injury & Products Liability Section, at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com. Mike handles aviation litigation for our firm.

Sources: Righting Injustice and Politico

XIII.
TOXIC TORT LITIGATION CONCERNS

$5 MILLION VERDICT RETURNED IN FATAL MESOTHELIOMA TRIAL

A South Carolina jury has found that a former power plant employee’s fatal mesothelioma was caused by asbestos in valves made by Fisher Controls International LLC. The widow of the deceased employee, Rita Joyce Glenn, was awarded $5.1 million in damages. The jury found Fisher Controls liable for breaching the implied warranty in selling its products, and found further that the breach caused the mesothelioma that killed Thomas Harold Glenn, a former Duke Energy employee.

The jury awarded $2 million in compensatory damages for Glenn’s injuries before his death and his wrongful death and $1 million for Mrs. Glenn’s loss of consortium with her husband. Two other companies, Crosby Valves LLC and Carboline Co., were cleared of liability. The jury also found that Fisher’s conduct was willful, wanton or reckless, and awarded Glenn’s estate $2.1 million in punitive damages from Fisher.

Glenn was exposed to asbestos during his 27 years of work as a pipe fitter and instrumentation technician at Duke Energy, from 1970 to 1997. He worked at several different Duke power plants, including three nuclear power plants, doing work that involved the removal and inspection of pumps and valves from pipelines, working with asbestos gaskets and routinely working around others who were replacing parts of valves made by Fisher.

Glenn was in close proximity of individuals removing and installing asbestos gaskets supplied by Fisher. He died of the disease in February 2015 at age 69, several months after his diagnosis in late 2014.

Fisher and Crosby contended they could not be held liable because the dangers of asbestos were known to Glenn, and that Duke, as a sophisticated company, had the responsibility of ensuring the safety of its employees. The companies said:

The evidence shows Duke Power was knowledgeable about the bazaars of asbestos leading up to and during Mr. Glenn’s career at its power plant. Similarly, Duke Power documents indicate that Duke was warning its employees about the bazaars of asbestos.

Glenn is represented by Jonathan M. Holder, Jessica M. Dean and Charles W. Branham III of Dean Omar Branham LLP, and Theile B. McVey and John D. Kassel of Kassel McVey. The case is Rita Joyce Glenn v. Air & Liquid Systems Corp. et al. (case number 2015-CP-04-01607) in the Court of Common Pleas for Anderson County, South Carolina.

COURT ORDERS THE BIFURCATION OF ROUNDUP MDL BELLWETHER TRIALS

In early January, U.S. District Judge Vince Chhabria of the Northern District of California, overseeing the multidistrict litigation (MDL) concerning Roundup’s carcinogenicity, issued a pretrial order bifurcating the upcoming bellwether trials. Judge Chhabria’s order states that the first phase of each trial will concern direct causation evidence only, with all evidence concerning liability and damages to come later in the second phase.

The court justified its decision to bifurcate the upcoming trials by stating that evidence concerning Monsanto’s attempts to influence regulatory agencies and manipulate public opinion regarding glyphosate are distractions from the central question as to whether glyphosate could have caused a given Plaintiff’s Non-Hodgkin’s Lymphoma. The court said that the Plaintiffs’ concerns regarding juror knowledge of the regulatory process could be assuaged through the use of jury instructions, and that bifurcation of the bellwether trials increases the informational value of each case.

The first federal Roundup bellwether trial currently scheduled for trial is Edwin Hardeman v. Monsanto. This case is scheduled to begin jury selection in San Francisco on Feb. 20, with trial to begin on Feb. 25.

If you would like more information about these cases, you can contact Grant Cofer, a lawyer in our Toxic Torts Section.

He can be reached at 800-898-2034 or by email at Grant.Cofer@beasleyallen.com.

Sources: Pretrial Order No. 61 Re: Bifurcation (Doc. 2406)

PENNSYLVANIA COURT REFUSES TO DISMISS BENZENE CASE

A Pennsylvania state court recently denied Defense efforts to dismiss a benzene lawsuit on forum non conveniens grounds, rejecting the Defendants’ position that the case had no “legally significant connection” to the state of Pennsylvania. The Pennsylvania Court of Common Pleas for Philadelphia County denied the Defense motion in a one-page order. In their motion, Defendants CRC Industries Inc., Sunoco, and U.S. Steel Corp. moved to dismiss the complaint on forum non conveniens grounds, contending that the Plaintiff has lived his entire life in South Carolina and the alleged injuries occurred there.

The Plaintiff, William Hill, asserted the underlying claims, containing that he developed non-Hodgkin’s lymphoma after he was exposed to benzene-containing products while employed as a maintenance technician at Duke Energy from 1970 to 1993. According to the Defense motion, however, Hill is a lifetime resident of South Carolina and his alleged site of exposure is in South Carolina as well. The motion stated:

Plaintiff’s co-workers at the Duke Energy facility in South Carolina are critical fact witnesses to the circumstances surrounding Plaintiff’s work there, including the products Plaintiff used and bow he used them.

Additionally, the Defendants argued that the Plaintiff received all medical treatment for his alleged injuries in the state and “has identified five treating physicians as witnesses to his injuries and treatment, all of whom are located in South Carolina.” “If this case is tried in Pennsylvania, there would be no way for Defendants to compel the South Carolina-based co-workers’ and theatres’ appearance at trial,” the motion maintained. Hill v. U.S. Steel Corp., et al., March Term 2017, No. 01021 (Pa. Ct. Comm. Pls., Philadelphia Cty.).

Benzene is listed as a known carcinogen by organizations including the International Agency for Research on Cancer, the National Toxicology Program, the Centers for Disease Control and Prevention, the Food and Drug Administration, and the Environmental Protection Agency. More than 5 million
people in the U.S. continue to be exposed to dangerous levels of benzene in the workplace.

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

ARIZONA CITIES JOIN PFC LITIGATION

In December 2018, the city of Tucson and the town of Marana filed suit in Pima County Superior Court against 3M Company and four other companies that manufactured, marketed, and sold aqueous film-forming foam (AFFF). The decades use of AFFF at the Davis-Monthan Air Force Base has contaminated the public water supply wells in Tucson and Marana.

AFFF contains certain perfluorinated compounds (PFCs), including perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS).

Epidemiological studies have suggested an association between the exposure to PFOA to kidney and testicular cancers. Other studies have linked exposure to forms of developmental and reproductive problems. Unfortunately, the United States Environmental Protection Agency (EPA) has not established regulatory limits for these toxic compounds. However, the EPA did issue a drinking water health advisory that levels should not exceed 70 parts per trillion.

In August 2018, Tucson Water discovered its water supply contained levels of PFCs that reached 29 to 30 parts per trillion. In order to keep these toxic compounds below the EPA's recommended level, it has been blending water from other wells. The levels of PFCs in several other wells sampled ranged from 97 parts per trillion to 3,320 parts per trillion. Due to the high levels of PFC contamination, several wells surrounding the base have been closed. For two of its affected water systems, the Town of Marana intends to construct new water treatment facilities.

The Town of Marana and the City of Tucson seek to recover all costs incurred from the PFC contamination, including the costs associated with treating and removing the toxic compounds from the contaminated water supply wells and the costs of constructing new water treatment facilities.

STATE OF NEW YORK RECOMMENDS NATION’S STRICTEST DRINKING WATER QUALITY STANDARD

The New York State Departments of Health and Environmental Conservation announced that the state Drinking Water Quality Council recommended that the Department of Health adopt the nation’s most protective maximum contaminant levels (MCLs) for three unregulated contaminants in drinking water. The Council proposed recommended MCLs of 10 parts per trillion for PFOA and PFOS as well as an MCL of 1 part per billion for 1,4-dioxane.

An MCL is the maximum level of a contaminant allowed in public drinking water that, once established, creates a legally enforceable standard that requires water systems to monitor, report findings, and keep the contaminant below the established limit. Any exceedances of the limit must be reported to the public and mitigated by the impacted water system.

New York joins a growing list of states taking action to regulate contaminants that are not regulated by the EPA, which is responsible for setting regulatory limits under the Safe Drinking Water Act. PFOA was commonly issued to make non-stick, stain resistant, and water repellent products. PFOS is a chemical that has been used in fire-fighting foam that is effective in fighting fuel-fed fires. 1,4-dioxane has been used as a stabilizer in solvents, paint strippers, greases, and wax.

Exposure to PFOA and PFOS has been linked to a number of health issues. These include testicular cancer, kidney cancer, ulcerative colitis, thyroid disease, high cholesterol and pregnancy-induced hypertension. As a result, individuals and water systems across the county have been filing suit to ensure their drinking water is decontaminated. Through its Superfund program, the State of New York has invested millions of dollars to install granular activated carbon filtration systems that are effective at removing these chemicals.

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, were 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 is investigating other PFC contamination cases. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, or Ryan Kral, lawyers in our firm's Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, or Ryan.Kral@beasleyallen.com.

Source: New York Department of Health, European Food Safety Authority

TESTING ADVANCEMENTS MAY LEAD TO EARLIER DETECTION OF MESOThELiOMA

Persons experiencing potential mesothelioma symptoms such as chest pain, coughing, shortness of breath and difficulty breathing usually undergo an extensive testing process that can span months, in order to determine a diagnosis.

Imaging tests, blood tests and biopsies are customary diagnostic procedures used for mesothelioma. Examining a sample of tissue or fluid extracted during a biopsy has been the most efficient and definitive method for doctors to diagnose a patient with mesothelioma. However, new less invasive procedures are being developed for certain types of cancers and could lead to an earlier diagnosis of mesothelioma.

Recently, a new test currently in clinical trials at the Cancer Research United Kingdom Cambridge Institute, allows cancer to be diagnosed through a breath test. Using a simple breath, the cancer screening tool looks for the presence of distinctive, volatile organic compounds present in cells. These compounds act as a signature of different types of cancer and would enable a quicker, less-invasive diagnosis of mesothelioma. A study conducted in 2018 took breath samples from 64 subjects and the test was able to distinguish asbestos-exposed individuals from malignant pleural mesothelioma patients with 97 percent accuracy.

Researchers in Australia recently announced a “10-minute cancer test” that involves a detection of a unique DNA structure when placed in water, boasting a 90 percent accuracy. Alternatively, physicians have found that those diagnosed with mesothelioma contain high levels of certain substances, such as fibulin-3 and soluble mesothelin-related peptides, in their blood.

Researchers continue to study how these marked substances could lead to an earlier diagnosis through a simple blood test. Due to the devastating prognosis mesothelioma patients receive, typically six to 18 months, these tests could drastically improve a patient's treatment plan and quality of life.

For more information about asbestos exposure or mesothelioma, contact Sharon Zinns or Ashtyne Traylor, lawyers in our firm's Toxic Torts Section at 800-898-2034.
or by email at Sharon.Zinns@beasleyallen.com or Ashlyne.Traylor@beasleyallen.com.

**XIV. GOVERNMENTAL REGULATORY NEWS**

**FDA RELEASES GUIDANCE ON CLEARING NEW MEDICAL DEVICES**

The U.S. Food and Drug Administration (FDA) has released final guidance outlining an updated pathway for bringing medical devices to market that uses objective performance criteria to show that the devices are safe and effective. The FDA said the guidance establishes a framework for a “safety and performance-based pathway” that manufacturers can use to show that their new products are substantially equivalent to ones already on the market. The FDA in November announced it was updating its 510(k)-clearance pathway, which is used to review most medical devices to keep up with the rapid evolution of health technology.

Manufacturers going through the 510(k) pathway usually rely on comparisons to older devices already on the market, known as predicate devices, to show that a new device is as safe and effective as that older product. The FDA said in a press release:

> It’s important to note that devices using this pathway will still have to meet our current standards for reasonable assurance of safety and effectiveness before they can be marketed. The benefit of this approach is that the pathway will benchmark modern technology against modern standards while, at the same time, offering a potentially more efficient way to demonstrate that a new device is substantially equivalent to devices already on the market, and thereby ensure patients have timely access to beneficial products.

In the guidance, the FDA said it would only be appropriate to use performance criteria when the agency believes that a new device’s uses and technical characteristics don’t raise different safety or efficacy questions than its predicate. Additionally, the performance criteria have to align with the performance of at least one device on the market, and the new device also has to meet all the performance criteria, the FDA said. The Agency added:

> Allthough FDA may recommend test methodology for the performance criteria, a submitter may choose to use an appropriate testing methodology other than what is specified or recommended to demonstrate the performance characteristics.

The FDA also said it intends to keep a list of what types of devices would be appropriate for the safety and performance pathway, as well as documents laying out the performance criteria for each device type. It is further asking for public comment on what else it could do to encourage the medical device industry to make medical devices safer. One step the FDA has proposed is focusing on using more modern devices as predicates.

The FDA is also asking for the public to weigh in on whether it should make public a list of devices or device manufacturers that rely on older predicates that have been on the market for a certain number of years and, if so, an appropriate length of time for inclusion on the list. It is also seeking comment on if there are other actions it could take to promote the development or marketing of safer and more effective devices. Finally, the FDA wants comments on whether it should consider taking actions that would require more authority to carry out, like making some older devices ineligible to be predicates. The public had 90 days to comment.

**XV. UPDATE ON NURSING HOME LITIGATION**

**TURMOIL IN THE NURSING HOME INDUSTRY**

The nursing home industry is facing tremendous turmoil because some operators are undertaking risky financial deals in an attempt to squeeze out larger profits from their facilities. This is true even when these deals could potentially harm residents. The recent collapse of several nursing home chains around the country also raises serious concerns about the quality of states’ licensure processes and the industry’s ability to meet the care needs of a vulnerable population.

In a recently published article, *The Washington Post* examined the impact that a private-equity firm had on one nursing home chain. After the Carlyle Group bought HCR ManorCare, the number of health deficiencies at the chain “each year rose 26 percent between 2013 and 2017.” During this period, the Carlyle Group sold ManorCare’s real estate empire for about $6.1 billion dollars, in an arrangement which then required to the chain to pay rent to the new owners. Unable to pay the escalating rent, the chain was forced into bankruptcy in 2018.

ManorCare’s financial troubles are not isolated. Other nursing home chains have collapsed as a result of risky financial decisions and poor management. Skyline Healthcare’s nursing homes in several states were taken over through receiverships and rapid-fire sales after poor management placed residents in danger. Skyline acquired many of its facilities from Golden Living, a nursing home chain that was sued by the Pennsylvania attorney general in 2015. In the lawsuit, the attorney general stated that “Golden Living was guilty of deceptive advertising in Pennsylvania in that it promised decent care but did not deliver.”

Such examples of risky financial arrangements and poor management are in addition to cases of related-party transactions that can siphon money away from resident care. Nearly three-quarters of nursing homes in the U.S. employ such practices and these nursing homes tend to “have fewer nurses and aides per patient, they have higher rates of patient injuries and unsafe practices, and they are the subject of complaints almost twice as often as independent homes.”

Nursing home residents need to be protected from bad actors who place their lives in danger. Without proper oversight and accountability, resident care will continue to take a backseat to profits. Beasley Allen lawyers continue to fight for residents and their families and hold nursing homes accountable for bad acts and poor care.

Source: www.nursinghome411.org

**MEDICARE ORDERS MORE WEEKEND INSPECTIONS AT NURSING HOMES WITH LOWER STAFFING LEVELS**

The Centers for Medicare Services (CMS) recently announced that nursing
homes with lower-than-average weekend staffing will face more frequent weekend inspections by state survey agencies checking up on quality of care and resident safety. The CMS will use payroll-based staffing data to identify facilities with reduced weekend staffing and require the agencies to conduct at least 50 percent of off-hours surveys of those facilities on weekends. This is up sharply from the previously required 10 percent of surveys performed on weekends or during non-business hours.

The action grows out of research showing that nursing homes with higher nurse staffing levels tend to have fewer resident hospitalizations. The CMS said that while most facilities have somewhat fewer staff on weekends, certain facilities have significantly lower weekend staffing. Some report days with no RNs on site.

The Centers for Medicare Services has been under congressional pressure to increase its oversight of nursing home quality and safety following reports by Kaiser Health News and other news organizations of abuse, neglect and substandard care at facilities across the country.

The intensified weekend inspections at selected nursing homes are part of a broader range of CMS regulatory actions aimed at improving quality and safety. It is also revising Medicare payments to skilled-nursing facilities based on how often residents are hospitalized within 30 days of discharge, with penalties for poorer performers and bonuses for better performers.

The nursing home industry criticized the CMS’ move to increase weekend inspections at selected facilities, arguing the agency should focus on addressing the national workforce shortage rather than taking a punitive approach. But patient advocates said the action is needed to push state survey agencies to properly enforce the rules for protecting resident safety.

Source: Modern Healthcare

XVI. AN UPDATE ON CLASS ACTION LITIGATION

FEDERAL COURT PRELIMINARILY APPROVES SETTLEMENT IN TOYOTA SIENNA CLASS ACTION

In June 2017, lawyers in our firm, along with co-counsel, filed a class action lawsuit, referred to as the Combs litigation, in U.S. District Court for the District of California Western Division on behalf of owners and lessees of 2011-2017 Toyota Sienna minivans. Later that month a similar class action, referred to as the Simerlein litigation, was filed in U.S. District Court for the District of Connecticut. For months, the two cases progressed independently until Beasley Allen lawyers and co-counsel representing the Combs Plaintiffs joined with counsel for the Simerlein Plaintiffs.

This coordinated effort produced a jointly proposed settlement in December 2018. Following a hearing last month, U.S. District Judge Victor A. Bolden preliminarily approved a global settlement agreement, reached on behalf of all purchasers and lessees in the United States of an estimated 1,190,000 2011-2018 Siennas. Shortly thereafter, United States District Judge Virginia Phillips stayed the Combs action pending final approval of the Simerlein class settlement.

Class Plaintiffs assert that a defect with the vans’ rear power sliding doors places passengers at risk of injury or death. The defect affects the latches, hinges, cables, motors and circuitry that control movement, latching and locking of the power sliding doors. The defect can cause the sliding doors to grind and pop during operation, spontaneously open without any input from the occupants, stall out and freeze during operation, and give the appearance of being latched when they are in fact not—a dangerous status not evident to the occupants.

Sienna owners and lessees have filed hundreds of complaints with the National Highway Transportation Administration (NHTSA) and with Toyota dealerships regarding the defect. In response, Toyota issued three Technical Service Bulletins (TSBs) from May 2011 forward and instituted a national Safety Recall in November 2016. The TSBs and Safety Recall G04 informed auto dealers of the defect, but only offered a partial solution. For instance, despite receiving G04 Recall repairs, many Siennas continued to suffer door defect symptoms as the recall failed to offer a complete fix.

One of the Beasley Allen clients, a mother of two and a resident of Woodstock, Alabama, was driving with her two children ages 11 and 15 when the van’s left rear power sliding door opened spontaneously and independently. She described the situation as “one of the scariest things” she has ever experienced. It frightened her so much that she stopped driving the van altogether. Incidentally, she too received the G04 Recall repair, resumed use of the van and soon after experienced continued unpredictable sliding door operation.

The proposed settlement offers a complete remedy to the defect, as its terms incorporate the G04 Recall remedy yet go far beyond it. If given final approval, the settlement will provide two distinct types of relief:

- First, Toyota will create a Customer Confidence Program for Class Members that offers free dealership inspection of their Siennas’ sliding doors and, on an as-needed basis, replacement of latches, locks, hinges, cable sub-assemblies and fuel door assemblies. These replacement parts and the GO4 Recall efforts are warranted for 10 years from date of first use and the Customer Confidence program travels with the car, meaning subsequent owners are also protected.

- Second, the proposed settlement offers Class Members reimbursement for prior out-of-pocket repair costs associated with the defect. And Class Members whose vehicles’ power sliding doors require repair will receive a complementary loaner vehicle.

Judge Bolden’s Ruling and Order on Motion for Preliminary Approval, among other provisions, conditionally certifies the proposed Settlement Class; appoints the class representatives and class counsel, including Beasley Allen’s Consumer Fraud Section Head, Dee Miles; approves the proposed Direct Mail Notice and Long Form
Notice; appoints Jeanne C. Finegan as the Settlement Notice Administrator; and appoints Patrick A. Juneau and Thomas Juneau as Settlement Claims Administrators.

A final approval hearing is scheduled for June 4, 2019, in the Connecticut Federal District Court. Beasley Allen lawyers Clay Barnett, Chris Baldwin and Dee Miles are prosecuting this class along with co-counsel firms DiCello, Levitt & Casey of Chicago and Wolf Haldenstein of New York. If you need more information, contact Clay Barnett at 800-898-2034 or by email at Clay.Barnett@beasleyallen.com.

APPEALS COURT DECISION PROVIDES INSIGHT FOR WELLS FARGO ERISA APPEAL

In December, the Second Circuit Court of Appeals reinstated a claim for breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA) brought by participants in IBM’s 401(k) plan who suffered losses from their investment in IBM stock. The Second Circuit’s decision in Jander v. Retirement Plans Committee of IBM, et al. provides favorable analysis for future ERISA lawsuits, including a similar suit in which lawyers at Beasley Allen are representing employees against Wells Fargo.

In the IBM case, employees alleged that the Defendants knew of, and should have disclosed to plan participants, certain accounting irregularities—for which the Defendants themselves were allegedly responsible. According to the complaint, the failure to disclose left IBM’s stock price artificially inflated and harmed employees when the irregularities were eventually disclosed and the price of the stock declined.

The Second Circuit held that employees sufficiently supported their claims that Defendants breached their fiduciary duty by keeping employees’ savings invested in company stock while secretly knowing that its microelectronic business was overvalued. The Second Circuit found that employees satisfied the “more harm than good” pleading standard established by the U.S. Supreme Court in Fifth Third Bancorp v. Dudenhoeffer in 2014. The decision reversed a lower court’s finding that the pleadings failed to meet the Dudenhoeffer standard because a prudent fiduciary could have believed that taking another course of action, such as notifying workers about the microelectronic business’ losses, would do more harm than good.

Beasley Allen is one of the firms that filed a similar suit on behalf of Wells Fargo employees after it was revealed that millions of fake accounts had been opened in customers’ names to meet sales quotas at the bank. Wells Fargo employees claimed that it caused financial losses to employees’ 401(k) accounts by keeping company stock as an investment option despite knowing that its value was artificially inflated because of the 10-year ongoing scheme.

Similar to the IBM case, Wells Fargo employees alleged that the failure to disclose company irregularities resulted in artificially inflated stock prices, which declined significantly once Wells Fargo’s scheme became public and caused employees financial harm. Much like the lower court in the IBM case, the lower court in the Wells Fargo case found that employees had not shown that the bank did more harm than good by failing to disclose problems surrounding its sales practices and dismissed the claims.

Plaintiffs appealed that decision to the Eighth Circuit and recently brought the court’s attention to the Second Circuit’s December ruling, arguing that the decision demonstrates that ERISA prudence claims should survive if Plaintiffs pled facts making it plausible that a prudent fiduciary could not reason that a corrective disclosure would do more harm than good. Plaintiffs further pointed out that they alleged all five of the facts that the Second Circuit had relied on in reaching its decision in the IBM case and that some of their pleadings even exceeded those of the IBM employees in both “scope and degree.” The appeal is still pending before the Eighth Circuit, which will decide what, if any, impact the Second Circuit’s decision will have on the case.

Beasley Allen lawyers handling this litigation on behalf of Wells Fargo employees are Dee Miles Dee.Miles@beasleyallen.com and Leslie L. Pescia Leslie.Pescia@beasleyallen.com. The employees are also represented by Samuel E. Bonderoff of Zamansky LLC, Robert K. Shelquist and Rebecca A. Peterson of Lockridge Grindal Nauen PLLP, and Adam J. Levitt and Daniel R. Ferri of DiCello Levitt & Casey LLC.

AN ARBITRATION VICTORY FOR WORKERS IN THE U.S. SUPREME COURT

The United States Supreme Court ruled last month that a trucking company, New Prime Inc., cannot compel arbitration in a “class action alleging it failed to pay independent contractor truck-driver apprentices the proper minimum wage, saying transportation workers engaged in interstate commerce, including those classified as independent contractors, are exempt from the Federal Arbitration Act.” The Court affirmed a First Circuit ruling that the Federal Arbitration Act’s (FAA) exemption for interstate transportation workers applies to all workers whether they’re classified as employees or independent contractors.

Section 1 of the FAA exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from arbitration. In a unanimous opinion, Justice Gorsuch wrote for the court that in 1925, when Congress enacted the Arbitration Act, the term “contracts of employment” referred to agreements to perform work.

The justices debated two main questions: Whether an arbitrator must resolve any dispute over the applicability of the Section 1 exemption based on a valid delegation clause or by a court, and whether independent contractors are covered by the Section 1 exemption. As to the first question, “the justices explained that while a court’s authority under the Federal Arbitration Act to compel arbitration may be considerable, it isn’t unconditional. And that authority doesn’t extend to all private contracts, no matter how emphatically the parties may have expressed a preference for arbitration, according to the ruling.” In disputes of this type, courts should first decide whether the contract falls under the FAA or under the exemption Section 1 before ordering arbitration, according to the opinion.

With regard to the second question on whether Section 1’s exemption encompasses contractor agreements, the Court discussed the meaning of the term “contracts of employment” and what Congress intended the term to cover in enacting the FAA in 1925. “At that time, a ‘contract of employment’ usually meant nothing more than an agreement to perform work,” Justice Gorsuch explained. “As a result, most people then would have understood Section 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work.” The Court said Congress’ use of the term “workers” in Section 1 rather than “employees” suggested it was meant to be interpreted broadly.

The Court rejected New Prime’s attempts to draw distinctions between employees and independent contractors for exemption purposes. Whatever “employee” meant in 1925, and however it may have later influenced the meaning of “employments,” the Court held that it is clearly understood that in 1925, contracts of employment did not necessarily imply...
the existence of an employer-employee relationship. The court stated:

New Prime sought to overturn what it viewed as a remarkably broad May 2017 First Circuit ruling that the applicability of the Section 1 exemption is always a question for the court and that the term “contracts of employment” should be read to also include independent contractor agreements like the one that Oliveira signed with New Prime when he joined its apprentice program.

Meanwhile, Oliveira told the Supreme Court that the contract between him and New Prime is indisputably a transportation worker’s agreement that is exempt from the FAA. He argued that the justices should reject New Prime’s bid to force arbitration by insisting that independent contractors—like Oliveira and other truck-driver apprentices—don’t count as workers under the exemption. The Court sided with Oliveira in a decision that will have massive implications for a transportation industry that relies heavily on the independent contractor model.

Lawyers in our firm’s Consumer Fraud & Commercial Litigation Section are handling Fair Labor Standards Act (FLSA) cases. They are currently working on 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. If you have a potential case or just need more information, contact Lance Gould, Larry Golston, or Tyner Helms lawyers in our firm’s Consumer Fraud & Commercial Litigation Section, at Lance.Gould@beasleyallen.com Larry.Golston@beasleyallen.com or Tyner.Helms@beasleyallen.com.

Source: Law360.com

Wells Fargo Has To Live With Class Arbitration Ruling

A New York federal judge has rejected a bid by Wells Fargo Advisors LLC to undo an arbitrator’s decision letting financial advisers pursue class arbitration of their unpaid overtime claims. U.S. District Judge Paul A. Engelmayer said the bank chose the binding arbitration process and must now live with the result. The judge denied a petition by Wells Fargo to vacate a decision by arbitrator Edith Dineen that three workers can pursue claims that they weren’t properly paid overtime on a classwide basis. By interpreting the workers’ employment contracts as allowing class arbitration, Judge Engelmayer said the arbitrator “neither exceeded her powers nor manifestly disregarded the law,” while adding that Wells Fargo has to live with the outcome of the arbitration since it chose that process to resolve employment disputes. Judge Engelmayer said:

Wells Fargo may now rue that the arbitral forum it chose has reached this outcome, and that this court’s review is limited to determining only whether the arbitrator exceeded her broad authority, not whether she was right or wrong. But that was a risk Wells Fargo accepted when it selected arbitration as the forum in which it would litigate employment disputes with the respondent financial advisors.

The federal court dispute began in July when Wells Fargo filed its challenge to the arbitrator’s decision allowing Reagan Tucker, Benjamin Dooley and Marvin Glassgold to pursue wage claims in arbitration on behalf of a class of similar employees. The workers claimed that Wells Fargo didn’t pay them for overtime work and had in place a policy in which it didn’t correctly add up hours worked by financial advisers in its training program in violation of the Fair Labor Standards Act and New York state law, according to Thursday’s decision.

In his order, Judge Engelmayer said the arbitrator’s decision was “rooted in the text” of the workers’ employment contracts. He also called “baseless” Wells Fargo’s argument that the arbitrator manifestly disregarded the law, saying that argument to the latter “borders perilously on the frivolous.” “Far from manifestly disregarding clearly applicable law, the arbitrator identified the relevant law, parsed it thoughtfully, and endeavored to apply it with considerable care,” Judge Engelmayer said.

Moreover, Judge Engelmayer rejected Wells Fargo’s argument that the arbitrator was wrong to infer that the workers’ contracts allowed for class arbitration, and that the arbitrator also ignored the U.S. Supreme Court’s 2010 decision in Stolt-Nielsen. In that decision, the justices held that class arbitration is blocked when there’s no “contractual basis for concluding” that the parties to an arbitration agreement agreed to it. Judge Engelmayer said:

Wells Fargo misreads Stolt-Nielsen and, therefore, mischaracterizes the arbitrator as having exceeded her authority under that decision. Wells Fargo portrays Stolt-Nielsen to bar finding an agreement to allow class arbitration except where an explicit statement to that effect appears in an arbitral agreement. However, as the arbitrator rightfully explained, Stolt-Nielsen does not say that.

The ruling in the instant case comes as the Supreme Court nears a decision in a case involving lighting retailer Lamps Plus Inc. on whether arbitration agreements must explicitly call for class arbitration for parties to use that process. The Lamps Plus case would address a question left open by the high court in Stolt-Nielsen over whether courts can infer that a contractual basis that parties agreed to class arbitration exists in situations where an arbitration agreement doesn’t explicitly block class arbitration. The justices heard oral arguments in the case in October and a decision is expected this term.

The employees are represented by Justin M. Swartz and Paul W. Mollica of Oットen & Golden LLP and Paolo C. Meireles of Shavitz Law Group PA. Wells Fargo is represented by Kenneth J. Turnbull, Ashley Hale and Peter Shadzik of Morgan Lewis & Bockius LLP. The case is Wells Fargo Advisors LLC v. Tucker et al., (case number 18-cv-6757) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

Proposed Class Action Over Fuel Pumps Filed Against GM

A proposed class action has been filed against General Motors (GM) in a California federal court by drivers alleging that some of the company’s diesel trucks are “ticking time bombs” because their European-made injection pumps are incompatible with American fuel. In the latest suit against GM over the pumps, the drivers said the so-called CP4 pumps made by auto parts maker Bosch have made quite a name for themselves in terms of self-destruction. They added that the chronic malfunction created a cottage industry in independent car repair shop circles. It’s alleged in the suit:

The failures are so routine that those in and around the industry have termed the ‘common problem,’ a ‘ticking time bomb’ and have said it’s literally just a matter of time until your CP4 pump fails.

The drivers said in their suit that the repair measures commonly include
superficial but nonetheless expensive fixes like installing a lift pump or replacing the CP4 pump with a CP3 pump. They say the repairs are not offered at GM dealerships for free and the owner must shoulder the costs. The complaint states the following:

• GM began manufacturing and selling trucks with the Bosch-made CP4 pumps in 2011 as a cost-saving step, as the pumps help the vehicles consume less fuel.

• The problem is that U.S. diesel fuel doesn’t contain enough lubrication to keep the CP4 pump working properly.

• Pump failure can cost the driver as much as $10,000 in repairs as it scatters metal particles throughout the fuel system and requires replacing not just the pump itself but the fuel injection lines, injectors and rails.

• The same pump failure and collateral damage can happen after repairs.

• Despite GM being well aware of the problem for years, company officials never warned the general buying public.

The vehicles listed in the complaint include the 2011-2016 Chevrolet Silverado 2500 and 3500 and GMC Sierra 2500 and 3500 trucks, which come factory-equipped with 6.6-liter V-8 turbocharged Duramax engines. The suit cites numerous examples of problems drivers said they suffered. Many of these problems include the vehicle suddenly shutting down or decelerating rapidly while on a high-speed freeway, putting motorists in precarious positions in steering out of traffic and causing a loss of power braking and steering as a result of the sudden stalls. The following is a brief summary of complaints by the named Plaintiffs:

Named Plaintiff Calvin Smith's 2012 Chevrolet Silverado, which he bought new from a dealer in California, experienced "catastrophic fuel line failure" in October of 2017. At that time the truck had about 143,000 miles on it, according to the suit. He says he was told by his GM dealership that the dealership refused warranty coverage. As a result she spent more than $10,000 in out-of-pocket costs to fix the vehicle and says she never would have bought it—or would have bought it for less than what she paid—if she had known of the alleged defect.

The suit, which seeks to represent anyone from California or Texas who bought one of the class vehicles, claims unfair and unlawful business practices, violations of the Consumers Legal Remedies Act and violations of the Song-Beverly Consumer Warranty Act for breach of implied warranty and other civil infractions.

The drivers are represented by Eric H. Gibbs, David Stein and Steven Lopez of Gibbs Law Group LLP. The case is Calvin Smith et al. v. General Motors Company, (case number:19-cv-00021) in the U.S. District Court for the Northern District of California.

Source: Law360.com

TAKATA ALLOWS $53 MILLION CHAPTER 11 CLAIM TO END PRICE-FIXING SUIT

Takata has agreed to carve out a $53.2 million unsecured claim in its Chapter 11 for a proposed class of car owners accusing the Japanese auto parts maker of conspiring with others to fix prices. The class of end-payers asked a Michigan federal judge last month to grant preliminary approval to the settlement. If approved, it will resolve the class’ claims against Takata Corp.’s U.S. subsidiary. Takata filed for Chapter 11 in June 2017. This came after the company was subject to the largest auto recall in U.S. history. The recall involved faulty airbag inflators that have been linked to more than a dozen deaths.

In February, the auto parts giant got approval on its reorganization plan, which centers on a $1.6 billion sale to Key Safety Systems Inc. and would use proceeds to pay victims of the defective inflators. Representing car owners who bought automobiles that contained airbags, seatbelts and other “occupational safety restraint systems” allegedly sold at hiked-up rates, the proposed class is one of many folded into the multidistrict litigation (MDL). The filing of lawsuits began after the U.S. Department of Justice (DOJ) launched an investigation into the auto parts industry. To date, the government inquiry has resulted in more than $1 billion in fines. The suits were consolidated into an MDL, which was then broken into separate proceedings for different automotive parts.

Toyota Gosei settled in September for $4.8 million to end claims that it was part of a conspiracy to fix the prices of six types of auto parts. Tokai Rika agreed to a similar deal for $34.2 million settlement in April.

The end-payor Plaintiffs are represented by Robins Kaplan LLP, Cotchettt Pitre & McCarthy LLP and Susman Godfrey LLP and The Miller Law Firm PC. The suit is In re: Automotive Parts Antitrust Litigation, (case number 12-md-02311) and In re: Occupant Safety Systems - End-Payer Actions, (case number 2:12-cv-00605) (case number 2:12-cv-00605) in the U.S. District Court for the Southern District of Michigan.

Source: Law360.com

CLASS ACTION FILED AGAINST JOHNSON & JOHNSON

A class action lawsuit has been filed against Johnson & Johnson stating that the company has cost its workers millions by allowing them to invest their retirement savings in overvalued company stock while hiding the fact that its talcum powder contains asbestos. The proposed class action complaint was filed in New Jersey federal court.

Michael Perrone, the plan participant leading the suit, accused Johnson & Johnson and some of its senior leadership of flouting their fiduciary duties under the Employee Retirement Income Security Act by failing to act in the best interests of their retirement plans. Perrone says that the fiduciaries knew about the presence of asbestos in the powder for decades, but chose to keep the fact a secret from the public. Instead, Johnson & Johnson let retirement plan participants invest in the inflated company stock.

Perrone is seeking to represent a class of all the participants and beneficiaries in Johnson and Johnson’s retirement plans with investments in company stock from April 2017, estimating the class to be in the hundreds or thousands.


At press time we learned that a second ERISA suit has been filed against Johnson & Johnson with basically the same claims.
It will be interesting to see how this litigation develops. It’s quite likely there will be a great deal of media attention to this most significant development. 

Source: Law360.com

XVII.
THE CONSUMER CORNER

PROTECTING YOUR FAMILY FROM WINTER FIRE HAZARDS

When most people think of winter storms, they think of relaxing snow days filled with soup and snowball fights. While trying to keep warm, the last thing on anyone’s mind is that their source of heat could be fatal. However, heating is the second leading cause of U.S. home fires, deaths and injuries. December, January and February are the peak months for heating fires. In 2011-2015, U.S. fire departments responded to 54,030 home structure fires that involved heating equipment.

These fires caused 480 civilian fire deaths, 1,470 civilian fire injuries, and $1.1 billion in direct property damage. Space heaters are the type of equipment most often involved in home heating equipment fires, figuring in two of every five fires (40 percent). The leading factor contributing to ignition for home heating fire deaths (53 percent) was heating equipment too close to flammable items, such as upholstered furniture, clothing, mattress or bedding.

To avoid heating source fires, the National Fire Protection Agency (NFPA) recommends keeping anything that can burn at least three feet away from any heat source like fireplaces, wood stoves, radiators or space heaters. Plug only one heat-producing appliance (such as a space heater) into an electrical outlet at a time. Have a qualified professional clean and inspect your chimney and vents every year. Store cooled ashes in a tightly covered metal container, and keep it outside at least 10 feet from your home and any nearby buildings.

Another winter fire hazard is carbon monoxide, an odorless, colorless gas created when fuels such as gasoline, wood, coal, propane, etc. do not burn completely. In the home, heating and cooking equipment that burn fuel are potential sources of CO. Portable generators, while useful during power outages, present a risk of carbon monoxide poisoning.

According to a 2013 Consumer Product Safety Commission (CPSC) report, half of the generator-related deaths happened in the four coldest months of the year, November through February, and portable generators were involved in the majority of carbon monoxide deaths involving engine-driven tools. Keep portable generators outside, away from windows, and as far away as possible from your home.

The NFPA recommends installing carbon monoxide alarms and testing them at least once a month. If you need more information on this subject, contact Stephanie Monplaisir, a lawyer in our firm’s Personal Injury & Products Liability Section, at 800-898-2034 or by email at Stephanie.Monplaisir@beasleyallen.com.

CAREER EDUCATION CORP. SETTLEMENT WIPES OUT $494 MILLION IN STUDENT DEBT

An investigation led by eight states including Connecticut and Pennsylvania ended with a for-profit education company changing how it does business and entering a $493.7 million settlement. The settlement agreement requires Illinois-based Career Education Corp. to change its enrollment practices and forgo collection of $493.7 million in debt owed by 179,529 students nationally. The states leading the five-year investigation were Connecticut, Pennsylvania, Iowa, Illinois, Kentucky, Missouri and Oregon. Every other state, with the exception of New York and California, signed onto the settlement.

The investigation, the states said, was started after complaints from students of predatory and deceptive practices. There was also a critical report on the for-profit education sector by the U.S. Senate’s Health, Education, Labor and Pensions Committee. Career Education operates many brick-and-mortar schools across the country, including American...
InterContinental University, Colorado Technical University and Briarcliffe College. Connecticut and Pennsylvania attorneys general applauded the settlement. Outgoing Connecticut Attorney General George Jepsen in a statement said:

For far too long, unscrupulous for-profit colleges have put money before people, engaged in deceptive recruiting practices, and left students with a burden of crushing debt while providing them with useless degrees that wouldn’t lead them to gainful employment. Today, we are holding Career Education Corp. responsible for the misrepresentations it made to these students. It is my hope that this debt relief will help ease the burden on students who were trying to better themselves, their careers and their livelihoods but were instead tricked into programs and degrees that were sometimes worthless.

About 1,415 Connecticut residents will get $6.8 million in student debt relief. In Pennsylvania, 12,600 students will have $38.6 million in education debt relieved and, in New Jersey some 6,400 eligible students will receive relief totaling about $19.6 million. Pennsylvania Attorney General Josh Shapiro stated:

The settlement I am announcing today ensures that thousands of Pennsylvanians who were misled and deceived by the false promises of this for-profit corporation will see their loan debt eliminated. Students who pay tuition to attend these or any other college deserve a fair deal and an honest representation to them of what they’re paying for. This corporation and its colleges failed to do that, and we’re holding them accountable.

New Jersey Attorney General Gurbir Grewal, in a statement concerning the settlement, stated:

Career Education Corp. was among the companies that put its own profits ahead of its students’ best interests. Today’s settlement helps right that wrong by securing debt relief for thousands of New Jersey residents who attended Career Education Corp. schools.

The states found that Career Education used emotionally charged language to pressure students into enrolling in CEC schools and deceived students about the total costs of enrollment. Admissions representatives were instructed to inform prospective students only about the cost per credit hour without disclosing the total number of required credit hours. The settlement agreement also calls on the company to, among other things, cease enrolling students in programs that do not lead to state licensure in professions that require licenses for employment. It also requires Career Education to establish a risk-free trial period for undergraduate students.

Source: Law.com

**The Federal Circuit Rejects Vaccine Act Case**

The full Federal Circuit has refused to reconsider denying National Childhood Vaccine Injury Act relief to a family whose son developed a seizure syndrome after being vaccinated. This came despite strong objections from two judges who accused colleagues of undermining the act’s purpose. The court’s majority didn’t expand on its decision to reject the family’s rehearing request. However, Circuit Judge Pauline Newman reiterated her dissent from the August panel decision, joined by Judge Jimmie V. Reyna. Judge Newman warned that the court’s ruling will bar children with genetic mutations, like the son, “E.O.,” from Vaccine Act relief, which doesn’t have backing in the law. Judge Newman wrote:

This ruling negates the purpose of the Vaccine Act, for E.O. was required to be vaccinated and be was injured thereby. He is directly within the letter and the purpose of the Vaccine Act.

Laura and Eddie Oliver turned to the U.S. Court of Federal Claims after their son developed a seizure condition the night he received his vaccinations for diphtheria-tetanus-acellular pertussis, hepatitis B, inactivated poliovirus, pneumococcal conjugate and rotavirus. They say the 6-month-old was healthy when they brought him to his pediatrician in April 2009, but they had to take him to the emergency room after the vaccinations. The child would eventually be diagnosed with Dravet syndrome, which the court noted is a form of epilepsy that starts around 6 months of age.

The chief special master of the Federal Claims Court said the Olivers were not entitled to compensation because they “failed to show by preponderant evidence that [the son’s] injuries were caused by his... vaccinations,” rather than the genetic mutation. The Federal Circuit panel majority then said the couple failed to provide enough medical evidence that the series of vaccines caused their son to develop Dravet.

Judge Newman said it has been conceded that the vaccinations triggered the child’s reaction, proving the family deserves relief. Judge Newman wrote:

The only difference between this case and a compensable case was that E.O.’s parents bad biv DNA analyzed. Modern science is starting to explain what bad previously been inexplicable. In retrospect, bad E.O.’s mutation been known before his routine six-month vaccination, the vaccination might not have occurred. But DNA analysis before vaccination is not compulsory—vaccination is compulsory.

Judge Newman pointed to research that says 20-30 percent of people with Dravet don’t have the genetic mutation, but claimed her colleagues wouldn’t look at it because it was published after the special master ruled on the case. The dissent states:

Nonetheless the government argues, and my colleagues affirm, that E.O. would have been gravely injured due to his SNCIA mutation—that it is his ‘destiny’—and that it is irrelevant that the DTaP vaccinations initiated the seizures. However, this is precisely the event at which the Vaccine Act is aimed, lest concerned parents withhold vaccinations, and concerned manufacturers cease production of vaccines.”

The Olivers are represented by Clifford John Shoemaker of Shoemaker & Associates. The Department of Health and Human Services is represented by Daniel A. Principato of the U.S. Department of Justice’s Civil Division. The case is Oliver v. HHS, (case number 17-2540) in the U.S. Court of Appeals for the Federal Circuit. Source: Law360.com

**There Are More E-Cigarette Explosion And Burn Injuries Than Previously Estimated**

Electronic cigarette (e-cigarette) battery failures have resulted in explosions and burn injuries across the country. These fires and explosions have even resulted in severe injuries including: loss of body parts (e.g., eye, tongue, teeth), hole blown through the roof of mouth and third degree burns to the face, legs and hands. In May 2018, an e-cigarette explosion
wound to the head was determined to be the cause of death for a male in his 30s.

Although e-cigarette explosion and burn injuries are considered rare or isolated events, they have not been well monitored across the country. The U.S. Food and Drug Administration (FDA) Center for Tobacco Products (CTP) has used media sources, information from federal agency reports and incidents recorded in the peer-reviewed research literature to attempt to estimate injuries caused by e-cigarettes. Using these methods, CTP noted 92 incidents that injured 47 people between 2009 and September of 2015.

A report by the U.S. Fire Administration that included media reports through 2016 identified 195 separate incidents involving e-cigarettes, 133 of which resulted in acute injuries and one-half of which occurred in the year 2016 alone. This rapid increase in incidents and injuries in a single year suggests that e-cigarette fire and explosion injuries have become more common in recent years.

Currently, there is no specific national reporting system monitoring e-cigarette-caused explosions and burn injuries. However, the number of e-cigarette explosions and burn injuries have been underestimated by federal agencies, according to a new George Mason University study. The new report published in Tobacco Control found that there are far more e-cigarette explosion and burn injuries in the U.S. than estimated in past reports.

This study led by Dr. Matthew Rossheim in the Department of Global and Community Health used data from the U.S. Consumer Product Safety Commission and found an estimated 2,035 emergency department visits from e-cigarette explosion and burn injuries from 2015 to 2017. This number, in all likelihood, is an underestimate of total injuries since not all injured people report to emergency departments.

The report calls for improved monitoring of e-cigarette injuries and better regulation of the products by the Food and Drug Administration’s Center for Tobacco Products. In the meantime, users and bystanders continue risk serious bodily injury from unregulated e-cigarette batteries exploding. If you need more information on this subject, contact Will Sutton, a lawyer in our Toxic Torts Section, at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Source: BMJ Journals

CONSUMERS IN ALL 50 STATES SUPE MARRIOTT OVER DATA BREACH

A total of 176 Plaintiffs from all 50 U.S. states have filed suit against Marriott International Inc. in a Maryland federal court. This lawsuits comes after a recent announcement that attackers in a 2016 data breach swiped about 5.25 million passport numbers left unencrypted by the Starwood Hotels unit’s guest reservation system.

The 50-state proposed class action also follows Marriott’s recent bid before the U.S. Judicial Panel on Multidistrict Litigation (JPML) to combine in the hotel giant’s home state of Maryland dozens of consumer class actions already filed over the data breach. These are claims that Starwood Hotels & Resorts Worldwide LLC failed to secure personally identifiable information such as passport information, customers’ names, mailing addresses and payment card data, including credit and debit card numbers. The complaint alleges:

Marriott disregarded plaintiffs’ and class members’ rights by intentionally, willfully, recklessly or negligently failing to take adequate and reasonable measures to ensure its data systems were protected, failing to take available steps to prevent and stop the data breach from ever happening, and failing to disclose to its customers the material facts that it did not have adequate computer systems and security practices to safeguard customers’ personal information.

Plaintiffs include persons from the District of Columbia, Puerto Rico and the U.S. Virgin Islands. The hotel giant on Jan. 4 said it now believes that information for fewer than 383 million unique guests was involved in the breach first announced Nov. 30, compared with the earlier reported number of 500 million guests. Marriott also said approximately 20.3 million encrypted passport numbers and 8.6 million encrypted payment card numbers were stolen in addition to the 5.25 million unencrypted passport numbers.

As of Dec. 21, Marriott has faced nearly 60 federal putative class actions filed after it announced the breach that targeted Starwood, which Marriott acquired in 2016 for $13.6 billion. In its Jan. 7 request before the JPML for consolidation, Marriott urged the panel to follow what it described as a precedent it set in other data breaches by moving existing and future cases to the home of its company headquarters.

The new 50-state complaint contends that Marriott and Starwood could have prevented the breach that purportedly occurred undetected over the course of four years, saying they haven’t adopted technology to help make transactions and databases more secure, which many retailers, banks and card companies have done in response to recent breaches. The complaint said that the Plaintiffs’ and class members’ personal information was improperly handled and stored without required cybersecurity protocols in place.

The matter in controversy exceeds $5 million, asserting 85 counts of negligence, breach of implied contract and breach of the duty of good faith and fair dealing, among other counts. It seeks compensatory and statutory damages as well as injunctive relief under consumer protection and privacy laws in all 50 states. It also asks for independent oversight of Marriott’s security systems. The proposed class seeks to represent all people in the United States whose personal information was compromised in the Marriott data breach.

Vickie Vetter and the other named plaintiffs are represented by Amy E. Keller of DiCello Levitt & Casey LLC, James J. Pizzirrusso of Hausfeld LLP, Andrew N. Friedman of Cohen Milstein Sellers & Toll PLLC, Melissa H. Maxman of Cohen & Gresser LLP and James Ulwick of Kramon & Graham PA. The case is Vetter et al. v. Marriott International Inc., (case number 8:19-cv-00094) in the U.S. District Court for the District of Maryland, Southern Division.

Source: Law360.com

RECALLS UPDATE

We are reporting several safety-related recalls in this issue that were issued in January. If more information is needed on any of the recalls, readers are encouraged to contact Shanna Malone, the Executive Editor of the Report. We weren’t able to access information from the federal government before this issue went to the printer due to the shutdown of the government. Therefore, I suspect we likely missed a number of recalls in January. If we have missed any safety recalls that should have been included in this issue send them to us.
Automobile Recalls

Toyota Recalls 1.7 Million Vehicles to Fix Air Bags

Toyota is recalling 1.7 million vehicles in North America to replace potentially deadly Takata front passenger air bag inflators. The move includes 1.3 million vehicles in the U.S. and is part of the largest series of automotive recalls in the nation’s history. Takata inflators can explode with too much force and hurl shrapnel into drivers and passengers. At least 23 people have been killed worldwide and hundreds have been injured.

The recall covers Toyota models including the 2010 through 2016 4Runner, the 2010 through 2013 Corolla and Matrix, and the 2011 through 2014 Sienna. Also covered are Lexus models including the 2010 through 2012 ES 350, the 2010 through 2017 GX 460, the 2010 through 2015 IS 250C and 350C, the 2010 through 2015 IS 250 and 350 and the 2010 through 2014 IS-F. The 2010 through 2015 Scion XB also is included. Takata used the chemical ammonium nitrate to create a small explosion to inflate the air bags. But the chemical can deteriorate over time due to high humidity and cycles from hot temperatures to cold. The most dangerous inflators are in areas of the South along the Gulf of Mexico that have high humidity. Toyota and Lexus dealers will either replace the inflator or the entire air bag assembly with equipment made by other manufacturers that does not contain ammonium nitrate. Owners will be notified by mail or other means in late January.

Owners can check to see if their vehicles have been recalled by going to https://www.toyota.com/recall or https://www.airbagrecall.com and entering license plate or vehicle identification numbers. Toyota’s recall is part of a phased-in replacement of Takata inflators. Automakers are scheduled to replace 10 million starting in January. Ford and Honda have already announced recalls. More than three years after the U.S. National Highway Traffic Safety Administration took over management of recalls involving Takata inflators, one third of the recalled inflators still have not been replaced, according to an annual report from the government and a court-appointed monitor last year. The report says 16.7 million faulty inflators out of 50 million under recall have yet to be fixed. Safety advocates say the completion rate should be far higher given the danger associated with the inflators. The recalls forced Takata of Japan to seek bankruptcy protection and sell most of its assets to pay for the fixes.

Ford Expands Air Bag Recall to Nearly 1 Million Vehicles

Ford Motor Co. has recalled nearly 1 million vehicles in the U.S. and Canada to replace potentially deadly Takata air bags, as well as certain EcoSport vehicles that may not meet seat-back strength requirements. The automaker said the air bag recall would affect about 782,384 vehicles in the U.S. and 149,652 vehicles in Canada. The recall concerns certain frontal air bag inflators on the passenger side, according to the automaker. Ford said it wasn’t aware of any injuries resulting from the inflators included in the recall expansion. “This action represents a planned expansion of previously recalled vehicles to additional model years within the geographic zones defined earlier by National Highway Traffic Safety Administration (NHTSA),” Ford said in its release.

The recall stems from the NHTSA’s “fourth planned expansion” of the vehicles in the Takata recalls, according to the release. Drivers won’t have to pay for the inflator or module replacements, the release said. The other recall announced by Ford will affect about 63 vehicles in the U.S. and 13 vehicles in Canada, according to the release. The automaker said certain front-seat back had an “insufficient weld” but that it was unaware of any accidents or injuries stemming from the issue.

The Takata air bag recall is the largest recall in U.S. history, according to the NHTSA, involving about 37 million vehicles, 50 million air bags and 19 automakers. Roughly 16.7 million recalled Takata air bag inflators have yet to be repaired as of October, and nearly 10 million more were added to the recall in January, according to a December report by the agency. There have been 15 confirmed fatalities in the U.S. relating to the inflators, the most recent in July 2017, the December report said.

The inflators sparked massive litigation, with consumers first filing suit against Takata and auto manufacturers in 2014. Ford became the seventh automaker to reach a settlement in the multidiistrict litigation (MDL) in September when it agreed to pay $299.1 million to exit the MDL. Takata pled guilty to wire fraud in February 2017, agreeing to pay $1 billion in fines and restitution for falsifying testing data and reports about its inflators. The company filed for bankruptcy in Delaware and Japan in June.

Hyundai Issues Recall and Engine Software Update for Certain Sonata and Santa Fe Sport Vehicles

In addition to two previous engine recalls, Hyundai has issued a subsequent recall to inspect the fuel tube installation of approximately 100,000 2011-2014 Hyundai Sonata and 2013-2014 Hyundai Santa Fe Sport vehicles whose engines were replaced under the previous two recalls. The recall is being conducted to inspect and confirm proper reinstallation of the fuel tube to the high-pressure fuel pump.

In addition, Hyundai has developed a new engine monitoring technology called a knock sensor detection system. The technology uses software innovations and leverages existing engine sensors to continuously monitor for symptoms that may precede an engine failure. More details on Hyundai’s engine recalls and the knock sensor product improvement campaign can be found at www.hyundayengineinfo.com.

The knock sensor technology will be installed through a free software update performed by Hyundai dealers and is rolling out through a product improvement campaign to approximately 2 million Hyundai vehicles, including all model year 2011-2018 Sonata and 2013-2018 Santa Fe Sport vehicles with engines produced in the U.S.

The knock sensor detection system software continuously monitors engine vibrations for unusual dynamic patterns that develop as an engine connecting rod bearing wears abnormally in a way that could later cause engine seizure. If vibrations caused by bearing wear start to occur, the malfunction indicator lamp will blink continuously, an audible chime will sound (in certain models) and the vehicle will be placed in a temporary engine protection mode with reduced power and acceleration. In this temporary mode, drivers maintain full control of the vehicle as brakes, steering and safety devices such as airbags remain operational.

According to Hyundai, the vehicle can continue to be operated for a limited time in engine protection mode to enable the customer to safely drive it to a Hyundai dealer for inspection and repair, but acceleration will be slower, with a reduced maximum speed of approximately 60 to 65 mph and a limited engine speed of approximately 1,800 to 2,000 rpm. Hyundai’s knock sensor technology has been evaluated by an independent, leading engineering and scientific consulting firm. When tested using a fleet of vehicles specifically prepared to test the knock sensor technology, the knock sensor system successfully detected failing
As part of this product improvement campaign, Hyundai will extend the warranty to 10 years and 120,000 miles (up from 100,000 miles) for original and subsequent owners of 2011-2018 Sonata and 2013-2018 Santa Fe Sport vehicles for engine repairs needed because of excessive connecting rod bearing damage. In close coordination with the National Highway Traffic Safety Administration (NHTSA), Hyundai voluntarily recalled more than 1 million vehicles (certain model year 2011-2014 Sonata and 2013-2014 Santa Fe Sport vehicles) in 2015 and 2017 (NHTSA 15V-568 and 17V-226) to address a manufacturing issue that could lead to excessive bearing wear and engine failure. While the majority of incidents among affected vehicles are limited to engine knocking, there have been instances of stalling and in certain circumstances an engine fire. Typically, as an engine becomes inoperable, drivers are alerted by warning lights and sounds, and while the engine may experience some hesitation, drivers should have time to safely move the vehicle off the road. When a vehicle is brought in for the recall repair, Hyundai dealers inspect, and if necessary, replace the engine. To date, these recalls have completion rates of 87 and 73 percent respectively, versus an industry average of 69 percent for recalled engines.

In January 2019, Hyundai issued a subsequent recall (NHTSA to post shortly) to inspect the fuel tubes of 100,000 2011-2014 Hyundai Sonata and 2013-2014 Hyundai Santa Fe Sport vehicles whose engines were replaced under the previous two recalls to ensure proper reinstallation of the fuel tube to the high-pressure fuel pump. In some cases, during engine replacements the high-pressure fuel pipe may have been damaged, misaligned or improperly torqued during the engine replacement procedure and this could allow fuel to leak. Hyundai says it is not aware of any fires caused by this issue, but that it is conducting the follow-on recall out of an abundance of caution. In addition to the recalls, and as discussed with NHTSA, Hyundai developed the knock sensor software update to deliver early warning to customers of excessive bearing wear before a more serious problem, such as engine failure occurs. The software update is being added to vehicles beyond the recalled population because it can benefit all vehicles and serve as a preventive measure.

**OTHER CONSUMER RECALLS**

**NAVIEN RECALLS TANKLESS WATER HEATERS**

Navien America Inc., based in California, has recalled about 13,000 Instantaneous or Tankless Water Heaters. An unstable connection can cause the water heater's vent collar to separate or detach if pressure is applied. A detached vent collar poses a risk of carbon monoxide poisoning to the consumer. Navien tankless hot water heaters are white with “T-Creator” and “NAVIEN” on the front. Recalled model numbers are CR-180(A), CR-210(A), CR-240(A), CC-180(A), CC-210(A) and CC-240(A) manufactured in 2008. A label on the side of the water heater lists the model number along with the manufacturing year in YYYY format.

The heaters were sold at wholesale distributors to in-home installers nationwide from February 2008 through March 2009 for between $1,500 and $2,100. Consumers should immediately stop using and check the model and manufacture year information on their Navien water heater. Consumers with recalled water heaters should immediately contact Navien to schedule a free repair. Navien will replace all Nylon 66 vent collar with PVC collars. Consumers who continue use of the water heaters while awaiting repair should have a working carbon monoxide alarm installed outside of sleeping areas in the home. For additional information, contact Navien at 800-244-8202 between 8 a.m. and 5 p.m. PT Monday through Friday, or visit the company’s website at http://us.navien.com.

Hopefully, we didn’t miss any significant safety recalls in January. We will try to include any of them we missed in the March issue. You can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

**XIX. FIRM ACTIVITIES**

**EMPLOYEE SPOTLIGHTS**

**ALISON HAWTHORNE**

Alison “Ali” Hawthorne is a lawyer in the firm's Consumer Fraud & Commercial Litigation Section and focuses her practice primarily on national, complex litigation. She has helped people fight the unfair and deceptive business practices of greedy companies attempting to pad their bottom line. Most recently, Ali has been involved in several different litigations in multiple states that seek to recover money on behalf of the states that paid for pharmaceutical products and devices as a result of fraudulent and deceptive acts against the states. She also handles class action litigation involving consumer fraud in the health care and cosmetics industries.

Long before she started practicing law at Beasley Allen, the Kennesaw, Georgia, native had the desire to help populations vulnerable to the schemes and deception of others. Ali had this to say:

*When I first began working at a law firm at the age of 16, I realized the unique opportunity lawyers have to help a wide range of people. I realized there were people in our country with circumstances far beyond their control and lawyers were some of the only professionals that could fight for them when they could not fight for themselves.*

Helping others is an overarching theme in Ali’s life, both professionally and personally. She is a member of the Junior League of Montgomery and has donated her time to young children, many of whom are girls aspiring to be lawyers, as a volunteer trial team coach for the YMCA’s Youth Judicial competition for high schoolers throughout the state of Alabama. Ali’s work through the Montgomery County Bar Association, where she now serves on the Board of Directors after wrapping up her term as president of the Young Lawyers Section, as well as House to House provides low-income women and families information and tips on a number of law-related issues. As a member of the Alabama State Bar’s Volunteer Lawyers Program, Ali also donates her time and expertise in assisting low-income citizens, whom other programs often cannot serve, on a pro bono basis. Ali says being a lawyer is both challenging and rewarding to her and that she appreciates both aspects of practicing law. She had this to say:

*Everyone wants to be able to “change the world” and by being a lawyer, you are able to do that. I love that being a lawyer allows you to bring about positive changes and make a major difference in society.*

Ali explained that unfortunately making a difference isn’t always easy and she understands that in order to be successful,
you have to be pushed outside of your “comfort zone.” Ali says:

Oftentimes, it would be much simpler to give up, or not attempt the challenge at all. I have learned in my life, however, that it is necessary to take on those challenges. That is how great things are accomplished and being a lawyer allows me to do that while I’m also serving our clients.

Ali earned her Bachelor of Science in business administration from Auburn University and her Juris Doctor from Faulkner University’s Thomas Goode Jones School of Law. The award-winning lawyer joined the firm as a law clerk in 2008 and then as a lawyer in 2010.

Ali was selected in 2014 and 2015 as the Beasley Allen Lawyer of the Year for the Consumer Fraud & Commercial Litigation Section. The following year Ali was named a Principal at the firm. She has been named to the Super Lawyers “Rising Stars” list each year since 2016 and was also honored to be selected for the Alabama State Bar Leadership Forum Class 13.

As an alumnus of the Leadership Forum, Ali now serves as the Director of Service. She also currently serves on the Board of Directors for the Montgomery County Bar Association. Ali is a member of the Alabama Association for Justice and the group’s Emerging Leaders, the American Association for Justice and the Hugh Maddox American Inn of Court.

Ali says she is happy to be a part of the firm and is proud to know that the tireless work the firm does on cases throughout the country has resulted in tremendously positive changes in the world in which we live. She says:

Beasley Allen is unique in that while we have a large number of lawyers and staff, everyone here shares a common desire to do what is right and to work hard in order to accomplish a common goal—help those who need it most. Our clients are our No. 1 priority, we never take shortcuts, we do not step over others to get our clients the results they deserve, we are always prepared, and we handle all of our affairs in the most professional manner.

Ali also appreciates how the firm’s employees recognize the need for maintaining high standards in the profession and strive to model the utmost ethical behavior. She is thankful that the firm maintains a unique balance of being a national law firm, yet still is active in the local community and has an internal culture strongly rooted in faith, family and compassion for others.

In addition to avidly serving her community and managing the high demands required of a lawyer handling complex litigation on a national level, Ali also juggles being a mother to two very young boys—1 year and 5 years old. She enjoys being a mother and understands the challenges of being pulled in so many directions both professionally and personally. While it is not an easy job, she works hard to be the best mother, employee and community member she can be with grace and passion.

Throughout her many different roles in life, Ali desires to be a positive role model both in and out of the office. Her husband, Ray Hawthorne, Jr., is also a lawyer in Montgomery. She and her family are members of First United Methodist Church, located in downtown Montgomery. We are blessed to have Ali at Beasley Allen.

KIMBERLY MICHELLE HART

Kimberly Hart joined the firm in June 2017 and is currently a Legal Secretary for LaBarron Boone in the firm’s Personal Injury and Products Liability Section. She works with Michelle Shamblin and Kimberly says she enjoys being part of a team that works well together. Kimberly says everyone is encouraged to think creatively, collaborate and bounce ideas off each other. Day-to-day, Kimberly specifically handles the calendaring, correspondence, pleadings, travel, organizing files, document review, research, communicating with clients and lawyers, and helps to investigate cases, among other responsibilities.

Before joining the firm, Kimberly worked for a small family-owned medical equipment business where she was certified and worked as a fitter of therapeutic shoes. After 13 years working in the “shoe business,” Kimberly decided to return to school to become a paralegal. She briefly worked at a law firm specializing in Social Security Disability just before joining Beasley Allen.

The Auburn University graduate earned a degree in Apparel Merchandising, Design and Production. When she returned to school, Kimberly earned a Master’s Degree from Auburn University Montgomery in Justice and Public Safety: Legal Studies. She also earned her paralegal certificate and maintained a 4.1 GPA. After graduating from AUM, Kimberly was asked and continues to serve on the university’s Legal Studies and Paralegal Programs Advisory Committee.

Kimberly is married to Shane and they have two daughters. Sydney is 18 years old and is a Senior at Saint James School in Montgomery, Alabama. She plans to attend Auburn University in the Fall and will study Marine Biology. Sydney has a 2-and-a-half-year-old sister, Sophie, who Kimberly said keeps everyone on their toes!

Away from the office, Kimberly enjoys playing with Sophie and loves creative projects including cooking and gardening. She also enjoys projects that are art- or fashion-related such as painting furniture and sewing. Kimberly also enjoys reading and loves to travel. Kimberly is a very hard working employee who is dedicated to helping our clients receive justice. We are fortunate to have her at Beasley Allen.

TAMI J. LEE

Tami Lee joined the firm in June 2017 and is Legal Assistant to Leslie Pescia and Rachel Boyd in the firm’s Consumer Fraud & Commercial Litigation Section. Tami files pleadings and discovery for both state and federal cases, maintains files, updates clients about their cases, organizes and reviews discovery, researches various issues, and assists in deposition preparation, among other tasks.

Prior to joining Beasley Allen, Tami worked for other law firms throughout her career and worked on cases involving medical malpractice, wrongful death, personal injury, nursing home litigation, family law, criminal law, Chapter 7 bankruptcy, estate planning, education, and general civil litigation.

Tami earned her real estate license in Missouri after graduating from high school then decided to pursue a career in the medical field. She graduated from the Medical Office Assistant program at Vatterott College in Joplin, Missouri, in 2004. While at Vatterott College, Tami supported herself by working as a legal secretary at a prominent medical malpractice firm located in Joplin. The position helped Tami realize her calling and she decided to follow in her mother’s footsteps as a legal secretary and was later promoted to Paralegal. She had previous experience in the profession.

At age 14, Tami helped at the law firm where her mother worked preparing Chapter 7 bankruptcy petitions. Tami says she knew that this career was the right fit for her. In 2008, she earned her Accredited Legal Secretary (ALS) designation through the National Association of Legal Secretaries (NALS) and received her Paralegal Certificate through Auburn University in 2017.

The Joplin, Missouri, native is married to Jason, and their daughter, Cheyenne, is 9 years old. The family moved to Alabama in 2012 and lived in the Florence area
before relocating to Prattville in 2017. Their three dogs (two Boxers and a Beagle), along with a cat, round out the family and provide the two-legged family members with hours of entertainment. They are members of Prattville Church of Christ.

Tami spends most of her time away from the office watching Cheyenne play softball. Tami says when she isn’t at the ballfield, she enjoys fishing, traveling, music, and spending time with family and friends. She also enjoys all kinds of crafts including scrapbooking, sewing and making t-shirts. Tami is a very hard-working employee who is dedicated to helping our clients receive justice. We are fortunate to have her at Beasley Allen.

**MEREDITH KAYE WEST**

Meredith West, who will mark her second anniversary with the firm in June, is the receptionist for the 218 Building on Commerce Street at the firm’s headquarters location in Montgomery. As a receptionist, Meredith is one of the first faces people see when they visit and one of the first voices they hear when they call. She answers and routes calls on the firm’s multi-line telephone system. Meredith also maintains the waiting area, lobby and conference rooms in the building, as well as greets and assists employees and guests handling firm matters in the 218 building.

Meredith studied Fashion Merchandising at Bauder Design College in Atlanta, Georgia. She then met and married her husband who worked for United Airlines and the couple lived in Chicago and New York before settling in New Orleans. While living in New Orleans, Meredith worked as a receptionist for a local law firm until Hurricane Katrina forced her and her husband to relocate to Montgomery.

Meredith does a very good job for our firm in a most challenging position. She is a definite asset and we are fortunate to have her at Beasley Allen.

**XX. SPECIAL RECOGNITIONS**

**BEASLY ALLEN’S 40th ANNIVERSARY RIBBON CUTTING**

As you now know, this year marks the 40th anniversary of our firm. A lot has changed since I started out as a sole proprietor on a cold January day in 1979. But one thing remains the same, and that is everybody at Beasley Allen is dedicated to helping folks in need. We were honored to have Mayor Todd Strange, County Commission Chairman Elton Dean, several Chamber of Commerce Executives, and other distinguished guests join us for a ceremonial ribbon cutting last month. I was a bit surprised as both Mayor Strange and Chairman Dean read proclamations announcing Jan. 7, 2019, as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. Day. That was greatly appreciated. It was a great day for the firm, and I look forward to many years to come!

**COMMUNITY HEROES ARE HONORED**

Throughout 2018 our firm was proud to sponsor the Montgomery Advertiser’s inaugural Community Heroes awards. The Advertiser folks selected one River Region citizen each month. Each honoree has dedicated their life to the betterment of our society; they are truly making a difference. Each month the honoree was announced and celebrated with a detailed account of the work they do. I know several of the winners and can vouch for their dedication. In January they brought all of the winners together for a final event and named LaDonna Brendle the Community Hero of the Year. LaDonna founded Reality & Truth Ministries to minister to Montgomery’s poor and homeless residents. The event was held at the Alabama Shakespeare Festival and I was honored to be included in the festivities. Everybody who attended the event was deeply touched by the dedication and service of all of the honorees. It was an emotional ceremony and all of us at Beasley Allen were privileged and highly honored to be a part of this endeavor.

**BILLY BEASLEY STARTS ANOTHER TERM IN THE ALABAMA SENATE**

My brother, William M. “Billy” Beasley, has had a highly successful career in Alabama politics. Billy is a Democratic member of the Alabama Senate, representing the 28th district. He graduated from Auburn University in 1962 and then served in the U.S. Army in the Medical Corps for two years. He was elected to the Alabama House of Representatives in 1998. After being consistently reelected, Billy ran for the State Senate in 2010. He defeated Tuskegee Mayor Johnny Ford and has been reelected twice, in 2014 and 2018. Billy considered running for Governor of Alabama in the 2014 election, but decided to stay in the Senate.

Billy is very smart, a tremendous hard worker, and is totally dedicated to serving the people who send him to Montgomery. He has consistently put their interest first and has served them extremely well. Being a pharmacist and a small business owner has helped Billy understand the needs of people in his Senate District. I am very proud of Billy and I have been blessed to have him as my brother. By the way, Billy would have been a great governor.

**XXI. BEASLY ALLEN CASES THAT HAVE MADE A DIFFERENCE**

I am asked constantly why I continue to actively practice law as a trial lawyer. The answer to that question is quite simple. I enjoy being a trial lawyer and I have been a part of our firm’s being able to make a huge difference in bringing about a tremendous number of significant changes in how Corporate America operates. Those are generally safety changes involving the auto and the drug industries. There have also been significant changes that involve commercial business-related issues.

I spoke recently to a group in Birmingham that included judges, law professors, lawyers and law students. I had been asked to give some examples in my talk of cases handled by Beasley Allen that brought about significant changes in Corporate America. With very little effort, I came up with over 25 such cases and there are many more. The following are a few of these cases that truly have made a difference.
**ROPs protection for tractors—Roll bars and seat belts**—After a trial in the 1980s that resulted in a $10 million settlement and the discovery of documents that revealed some very bad corporate conduct. Kubota totally changed its corporate emphasis on safety. Kubota made the necessary changes and soon claimed to lead the industry in requiring ROPs (protection on tractors) *Spivey v. Kubota*

**The GM Silent Recalls Program**—There was a defect that caused GM vehicles to stall while traveling at highway speeds. A computer chip defect caused the stalling problem. We discovered the silent recall program that GM had been using. NHTSA had never been notified. *Johnson v. GM*

**GM’s $2500 Program**—GM reduced costs and created safety hazards in certain of its vehicles. GM reduced the weight of steel in both the shotgun rail and the side rails. It also reduced the length of the side rails. This created less-safe vehicles. Each car's costs had been reduced by $2,500, but the retail price remained the same. However, the vehicles were **made less crashworthy**. *Jernigan v. GM*

**GM Ignition switch defect**—Another 10-year cover up by GM was exposed. This led to a multidistrict litigation (MDL) and settlement of hundreds of cases. Delphi, the supplier of the ignition switch, gave us documents needed to prove the defect and a 10-year cover up by GM. *Mellon v. GM*

**Sudden acceleration defect**—Toyota had a sudden acceleration problem with its vehicles and the company had known about the defect for 10 years. The cover-up was exposed in our case in Oklahoma. The result in that trial resulted in massive settlements in the multidistrict litigation (MDL). The case was tried in Oklahoma and led to a successful MDL and a large number of settlements. *Bookout v. Toyota*

**School Buses now have Detection Devices**—Sensors that protect children after a child was killed in front of bus because sensors in place on the bus were inadequate. There was a blind spot in front of the bus. Discovery showed how the industry knew of the defect and failed to remedy it. *Amanda Hartley for Rissiab Shamier Hedges, deceased v. IC Bus, LLC, Navistar, Inc., et al.*

**Cab guards on log trucks**—This case involved cab guards on log trucks. Summary judgment was granted for Plaintiff on defective product. The cab guard on the log truck was worthless as a safety device. Significant safety changes were made after the verdict. *Harkness v. Road Gear*

**Bad Boy Buggies**—These off-road vehicles were recalled on three separate occasions in 2010 and 2011. That happened after we handled a death case in Tuscaloosa, Alabama. The vehicles had sudden acceleration problems and other structure defects. No testing had ever been done prior to production. This vehicle was one of the most dangerous to ever be on the market. *Pike v. Textron, Inc. and Bad Boy Buggies, Inc.*

**Helicopters**—This was a wrongful death case involving a Sikorsky helicopter involving throttle and windshield defects. A strike by one bird caused loss of power to the helicopter. Changes were made after our lawsuit and the problem appears to have been corrected. *Ballenger v. Sikorsky*

**Toyota SUV suspension defect**—Toyota 4-Runner—recalls resulted—*Neloms v. Toyota*

**Back-Up Alarm Cases**—Our firm handled a case against Goldkist involving the death of a farmer. A Goldkist truck backed up and ran over the man, killing him. Goldkist had modified its delivery trucks, adding feed tanks on the back obstructing a driver’s rear view. But Goldkist did not add back up alarms to the trucks. The lack of a backup alarm and convex mirrors created a major hazard.

On appeal, after a trial and a multi-million dollar verdict, in an attempt to get the Alabama Supreme Court to reduce the damages, Goldkist, in between the date of the verdict and the filing of the appeal, outfitted its entire fleet of delivery trucks with backup alarms to make them safe when backing up. Its delivery fleet consisting of thousands of trucks in the Southeast, were retrofitted. *Clark v. Goldkist*

**Vioxx MDL**—Beasley Allen filed the original Vioxx suit in 2001 and it started this massive litigation. There was a $485 billion settlement in the multidistrict litigation (MDL). Andy Birchfield from our firm was lead counsel for the Plaintiffs in the MDL. Vioxx was pulled from the market in 2004—Merck had failed to report strokes and heart attacks during testing by the company to the FDA.

**XXII. FAVORITE BIBLE VERSES**

Ben Locklar, a lawyer in the firm, sent in his favorite verse (John 6:66-69) for this issue. Ben had this to say:

Recently, in my study of John, this passage stood out to me. Jesus was preaching to the people that they must eat of his flesh and drink of his blood. The Pharisees ridiculed him and called him crazy. Many of his followers declared that such a teaching made no sense, and they abandoned him. What kind of man would teach that, to believe in him, you must eat his flesh and drink his blood?

After most of those who were with him left him, Jesus turned to his disciples and asked, “Do you also want to go away?” Peter, the consummate spokesman, replied: “Lord, to whom shall we go? You have the words of eternal life.” What Peter was saying was, “Lord, we may not understand everything now, but we know you are the Savior. We know that if we follow you and have faith, one day we will fully understand your teachings.”

This is a lesson for all of us. There are many things about God and His ways that I cannot fully comprehend. But I will follow Him regardless. Besides, where else can I go? Who else holds the truth of life? Only peace, love, joy, mercy, and grace are found in Christ, and only by Him may I bear this fruit in my own life and exhibit it in a dying world.

We are not called to always understand. We are only called to faithfully follow. Our Lord is in control. That is all we need to know.

*From that time many of His disciples went back and walked with Him no more. Then Jesus*
said to the twelve, “Do you also want to go away?” But Simon Peter answered Him, “Lord, to whom shall we go? You have the words of eternal life. Also we have come to believe and know that You are the Christ, the Son of the living God.” John 6:66-69

Brenda Russell, a legal assistant in our Consumer Fraud & Commercial Litigation Section, says her favorite scripture is from Proverbs. She said it was one of her Dad’s favorite verses as she was growing up. Brenda says:

He was gentle and kind and faithful to the Lord. As I got older, I truly understood the meaning of this scripture. I keep it on my desk as a reminder of him and that God always knows what is best for us when we can’t see it.

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

Sandra Moates, a staff assistant in our Mass Torts Section, says Psalms 23 is one of her favorite memory verses she learned as a child at bible school. She says there is no peace and no comfort without the Shepherd.

The LORD is my shepherd; I shall not want. He maketh me to lie down in green pastures: he leadeth me beside the still waters. He restoreth my soul: he leadeth me in the paths of righteousness for his name’s sake. Yea, though I walk through the valley of the shadow of death, I will fear no evil: for thou art with me; thy rod and thy staff they comfort me. Thou preparest a table before me in the presence of mine enemies: thou anointest my head with oil; my cup runneth over. Surely goodness and mercy shall follow me all the days of my life: and I will dwell in the house of the LORD for ever. Psalms 23

My friend, Dr. Terry Stallings, a dedicated Christian and a great medical doctor, furnished two of his favorite scriptures for this issue.

In the beginning was the Word, and the Word was with God, and the Word was God. He was with God in the beginning. Through him all things were made; without him nothing was made that has been made. In him was life, and that life was the light of all mankind. John 1:1-4
He is before all things, and in him all things hold together. Col. 1:17

XXIII.
CLOSING OBSERVATION

U.S. SENATOR ASKS J&J FOR SAFETY INFORMATION ON ITS TALC

U.S. Senator Patty Murray, a ranking member on the Senate’s Health, Education, Labor and Pensions Committee, sent a letter to Johnson & Johnson CEO Alex Gorsky last month asking for documents and other information dating back to 1966 regarding the safety of the consumer health care company’s flagship product, Johnson’s Baby Powder. In particular, Sen. Murray wants to know whether the company was aware for decades that the talc it used in its products contained cancer-causing asbestos, as alleged by a recent Reuters investigation. Sen. Murray posed in the letter:

Given that the company does not test all of its products before they are sold, how can the company be confident that trace amounts of contaminants are not present in its products?

In December, Reuters published a Special Report in which it claimed J&J was aware that the talc it used in some of its baby powders and body powders from the 1970s through the early 2000s tested positive for asbestos. However, the company never reported the information to regulators, nor did it warn consumers.

Asbestos is a mineral mined from the earth in much the same fashion and, often in the same geologic formations as talc. The use of asbestos was significantly restricted in the 1980s. It had been known for decades that people exposed to asbestos were at greater risk of developing diseases like lung cancer; mesothelioma, a rare but deadly form of cancer that develops in the lining of the lungs, abdomen or chest; and the chronic and incurable lung disease asbestosis. The International Agency for Research of Cancer (IARC) has also found that asbestos causes ovarian cancer.

Asbestos is only one of the numerous cancer-causing constituents of Johnson’s Baby Powder. In addition to asbestos, it contains fibrous talc, fragrance chemicals and for many years, excessive levels of nickel and chromium, all of which are recognized human carcinogens by IARC. Lastly, but importantly, platy talc when it reaches the ovary has been shown in scientific studies to cause chronic inflammation which results in ovarian cancer.

Johnson & Johnson has repeatedly denied that its talcum powder products cause cancer, despite tens of studies supporting the causa connection and more than 11,700 lawsuits blaming the products for causing cancers like mesothelioma and ovarian cancer. Last July, the company was hit with a record-breaking $4.69 billion verdict in a case brought by 22 women who proved at trial that J&J knew its talcum powders contained asbestos, which the woman all said led to their ovarian cancer diagnoses.

In December, shortly after the Reuters report was published, Senator Edward Markey (D-Massachusetts), a member of the U.S. Senate’s Environment and Public Works Committee, called on the U.S. Food and Drug Administration (FDA) to conduct an investigation into the allegations raised in the Reuters article.

Due to our heavy involvement in the talc litigation, Beasley Allen lawyers have known about the internal studies prepared for Johnson & Johnson and all of the incriminating documents. The jurors who have awarded billions of dollars of compensation to women who have been diagnosed with ovarian cancer as a result of the carcinogen have seen these same documents and heard trial testimony. Ted Meadows from our firm is the leader of the trial team in the ongoing talc litigation, and Leigh O’Dell is serving as co-lead counsel for consolidated multidistrict litigation (MDL) in New Jersey federal court concerning talcum powder’s link to ovarian cancer. Additionally, another Beasley Allen lawyer, Sharon Zinns, is heavily involved in cases of mesothelioma related to asbestos-containing talc products.

Now that the truth is becoming well known by the general public concerning the association of J&J’s talc products and cancer, Congress is now getting involved. While the bosses at J&J have lied repeatedly to the media and even in trials, they can’t afford to lie to Congress. We urge Congress to proceed with hearings quickly. J&J should be held accountable; compensating the thousands of women who have suffered or families who have lost their mothers, wives and sisters due to talcum-powder induced ovarian cancer. J&J should also remove Johnson’s Baby Powder from the shelves immediately or
provide a robust warning to all users of the increased risk of cancer.

XXIV. 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 hear 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 enroned 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

XXV. PARTING WORDS

Judge Frank M. Johnson, a great American jurist, played a major role in the civil rights movement in this country. While his decisions at the time were not popular in Alabama and in much of the U.S., they were critically important and badly needed.

The Frank M. Johnson, Jr. Centennial Celebration & Symposium was held in Montgomery on January 23 and 24. It was an exciting time as we celebrated this historic milestone. I was honored to have been selected as a member of the committee that planned and carried out the events.

Judge Johnson was a jurist, who in spite of death threats and intense societal pressure, made civil rights decisions that helped change the segregationist practices of the south. In a time when Jim Crow laws oppressed African Americans and peaceful people protests were met with violence from both governmental authorities and the public, Judge Johnson stood firm in the defense of civil liberties.

Judge Johnson’s influence was not confined just to the Southern states. His decisions on voting rights, equal opportunity employment, affirmative action, human conditions for prison inmates and the rights of mental patients to adequate care affected the nation and the world. In 1995, President Bill Clinton awarded Judge Johnson the Presidential Medal of Freedom, saying that “his unwavering commitment to equality under the law helped dismantle segregation and bring our nation closer to the ideals upon which it was founded.” Now 20 years after Judge Johnson’s death we still remember this trial jurist of his resolve to secure civil rights for all. He was truly a legal and social giant in every sense of the word.
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.