



THE
JERE BEASLEY REPORT

APRIL 2017

Beasley Allen

BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
Attorneys at law



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I. CAPITOL OBSERVATIONS

ACCESS TO JUSTICE CRUCIAL TO CONSUMER PROTECTIONS

Much of today's political discussion primarily involves social issues. I doubt that many people ever think very much about a critical category of laws that protect all Americans every single day. For those who fall in that category, I will attempt to explain why certain laws, as well as the courts, are so important. Lawyers at Beasley Allen have litigated a large number of product liability cases over the years. During that time, we have found that product liability litigation has helped and protected millions of people in the U.S. Most folks don't think much about the courts until they have a real need for justice.

We have learned in our practice that all too many manufacturers will cut corners on safety and will make profits their main priority. Cutting corners on safety by manufacturers costs innocent lives. Many more companies would cut corners on safety if the product liability laws, and our ability to seek justice by enforcing those laws and judicial precedents in the courts, did not exist.

The judicial system establishes an equilibrium of sorts because it protects the assumptions we all make in our everyday lives—that the products we use are safe and will work as we intend them to. We rarely think about these assumptions because to think otherwise would be too scary to consider. Nobody should ever expect a product to be defective and to fail as a result.

Unfortunately, product liability law, and the right to a trial by jury, have been under attack for years and those attacks continue today. In fact, the attacks have greatly intensified. The U.S. Chamber of Commerce, oftentimes mistaken by the public as a branch of government instead of the corporate special interest group that it really is, constantly seeks to erode products liability law and the right to a trial by jury. The Chamber is not concerned with safety. Instead, its goal is to protect huge companies and to increase corporate profits. On almost a daily basis, lawyers in our firm see the cost of those efforts—in money, pain and many times the loss of human life. Our lawyers see this pain and heartbreak when representing clients.

More often than not, the results of corporations putting profits over safety can be catastrophic.

In our world of global commerce and trade, one defectively designed product can touch thousands—if not millions—of lives. Most of the time, recalls and corrective action can stop defects in new products and, on occasion, can catch older defective products before they injure or kill consumers. However, we find instances where products have slipped through the cracks and folks are hurt far too often. As a result, the best defense against product liability heartbreak is prevention by way of product liability law and enforcement of those laws in court. Of course, this hinges on a strong, fair and independent judicial system.

The American people should be entitled to assume the products they use are safe. We shouldn't have to be concerned about the safety of the water we drink, the food we eat, the automobiles we drive, the machines we operate at work, the planes we fly in, air we breathe, the consumer products we use, and the various safety devices we expect to protect us. We must never take those safety assumptions, and the laws that allow us to make the assumptions, for granted. It's critically important to continue our fight to keep our courts independent, fair and open for all of our citizens.

II. MORE AUTOMOBILE NEWS OF NOTE

AUTONOMOUS VEHICLES

A primary question today in automotive litigation is just how far the development of autonomous vehicles will advance and how quickly. While it's clear that the new technologies will, if used properly, reduce the number of injuries and deaths from motor vehicle crashes, the ultimate question is how far should we go with this technology? Another question is if vehicles are completely autonomous, who will be responsible for accidents and injuries that do occur?

There have been news reports of two Tesla drivers that have died in crashes while their vehicle was in the auto pilot position. In January of 2016, a 23-year-old Chinese man died when his Tesla S model

crashed into a road sweeper south of Beijing. Joshua Brown, a 40-year-old, was killed when his Tesla S model crashed into a semi-trailer that had made a turn in front of it. There was a determination that the sensing system failed to distinguish the white side of the trailer against the sky and it did not apply the brakes.

Other questions become even more complicated when you think about the possibility of a purely autonomous vehicle. As an example, we, as drivers, make value decisions every time we get behind the wheel. If a choice is between running over four schoolchildren or swerving and striking one older pedestrian, which choice is better? These are questions that a com-

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puter can never be properly programmed to answer, in our opinion.

The National Highway Traffic Safety Administration (NHTSA), which regulates safety of vehicles on the road, is pushing hard to advance the new technologies with the idea that it will promote safety. However, the NHTSA is not ready, in our opinion, to regulate this new technology because it's so new and advancing so rapidly. While the NHTSA has issued guidelines for enforcement of their authority to regulate these vehicles, there are no regulations currently. There is simply a warning that manufacturers should try to iron out all of the problems with their system before bringing it to market.

However, history teaches us that no matter how much testing or planning occurs, in the real world things happen that are not covered by testing. This often-times results in somebody being severely injured or killed. We, as a firm handling products cases for many years, have not yet found any automotive technology to be foolproof. When you look at the Toyota sudden acceleration problem, the Takata airbag problem, and the GM ignition switch litigation, you easily see that there are often flaws in design. Unfortunately, when these design flaws show up, they can appear in large numbers, often resulting in serious injuries or deaths.

Another potential negative issue with this emerging technology is unprotected networks that hackers may access. There will probably be many vulnerabilities to hacking that are yet to be discovered. There is also a question of whether NHTSA actually has authority over cyber security in its role to protect the public from dangerous vehicles. There are numerous legal issues that will have to be resolved as we go forward.

NHTSA has published the Federal Automated Vehicles Policy as a guide to the industry for best practices. This, however, does not equate to rule making. It only recommends a robust design and encourages a strong validation process on the systems.

In summary, while there are amazing new technologies on the horizon that could make us all safer, we foresee additional hidden risks that are yet to be determined. There will also be big legal issues over who has responsibility when those injuries do occur. It will be interesting to watch the development of this new technology over the coming years and the attending legal issues that will arise as a result.

TIRE SIZE IS CRITICAL TO PROPER VEHICLE HANDLING

Most of us can relate to driving an interstate littered with shredded pieces of rubber, the remnants of a tire someone was depending on to get them to work or to school, and the cause for a day gone unexpectedly sour. Good ways to prevent a tire from ruining your day include heeding good advice from a tire service center and ensuring tires are the proper size for your vehicle.

In the driver's side door of your vehicle, a tire label states what the ideal tire size is for your car. It is the tire size for which your vehicle was specifically designed. For example, the handling of your car is designed specifically for the size tire listed on that label.

Increasing a tire's size, known as plus-sizing, too far from the manufacturer recommendation can cause risks. Consumer Reports states plus-sizing can sacrifice ride comfort and traction in inclement weather conditions such as snow or rain. Larger tires can increase grip, which also increases tipping risk, because the wheels are "sticking rather than sliding under hard cornering forces and also during emergency road maneuvers—a major reason some auto manufacturers advise owners to stay with the tire size and type the vehicle came with," Consumer Reports cautions.

Again, check with a tire professional when considering plus-sizing or if you are in need of any tire-related advice for your vehicle. Ensuring your tires are within manufacturer standards is a simple, time- and cost-effective way to ensure everyone in your vehicle makes it to their destination. Ben Baker, a lawyer in our Personal Injury & Products Liability Section, handles tire litigation for our firm. If you have any questions contact him at 800-898-2034 or by email at Ben.Baker@beasleyallen.com.

VOLKSWAGEN PLEADS GUILTY IN EMISSIONS CHEATING SUIT

Volkswagen AG formally pled guilty on March 10 in a Michigan federal court to three criminal charges. The automaker agreed to pay \$4.3 billion in criminal and civil penalties as part of the agreement with the U.S. Department of Justice (DOJ). This was from the automaker's diesel emissions cheating scandal.

During a hearing in Detroit federal court, Manfred Doess, general counsel for the German car manufacturer, entered a guilty plea to counts of conspiracy to defraud the United States, wire fraud and violations of

the Clean Air Act. The settlement agreement initially reached in January was with the DOJ and the U.S. Customs and Border Protection. The agreement also contains measures to fortify the company's compliance systems.

The company's guilty plea is a step toward ending the emissions cheating maelstrom that started in September 2015, when the U.S. Environmental Protection Agency (EPA) and the California Air Resources Board (CARB) accused the company of using the defeat devices to evade federal emissions tests for diesel vehicles. Volkswagen admitted fault and disclosed that the software was equipped in millions of diesel vehicles worldwide, nearly 600,000 of which were sold in the United States. The defeat devices allowed the vehicles to emit more toxins into the air after they left testing labs and were out on the roads. The government hit VW and its subsidiaries with a Clean Air Act suit over the emissions cheating in January 2015.

A number of Volkswagen executives were also involved in the scheme to cheat relating to emissions. A day after VW entered into the draft agreement on Jan. 10, one executive, Oliver Schmidt, was arrested in Miami and charged with conspiring to defraud the U.S. in connection with the scandal. Schmidt was the general manager of VW's environmental and engineering office in Michigan. It's contended that he knew the vehicles had software installed that would recognize when the car was being tested and alter emissions output. Five others were charged with wire fraud and are still believed to be in Germany.

The case is *United States of America v. D-8 Volkswagen AG* (case number 2:16-cr-20394) in the U.S. District Court for the Eastern District of Michigan.

Source: Law360.com

TAKATA PLEADS GUILTY TO WIRE FRAUD

Takata Corp. pled guilty to wire fraud in a Michigan federal court recently and agreed to pay \$1 billion over its defective air bag inflators. This was over objections from drivers suing Takata and automakers who say that the car makers had also long known about the defect. The Japanese auto parts maker entered a guilty plea to one count of wire fraud before U.S. District Judge George Caram Steeh. This was part of the settlement with the U.S. Department of Justice (DOJ) that the company reached in January. The settlement requires Takata to pay nearly \$1 billion for falsifying testing

data and reports about its inflators and to repay anyone injured by them.

As we have previously reported on numerous occasions, the company's air bag inflators have been linked to at least 11 deaths in the U.S. and caused the largest auto recall in the nation's history. Takata has faced massive global recalls of its air bag inflator, which had a tendency to explode. The cheap but volatile ammonium nitrate that inflates the bags can misfire, especially in humid conditions, blasting chemicals and shrapnel at passengers and drivers.

Kevin Dean of the Motley Rice firm, one of the lawyers representing drivers in the multidistrict litigation (MDL) in Florida over the Takata airbags, appeared in the Detroit court to object to the plea agreement on grounds that it didn't address the culpability of TK Holdings Inc., Takata's U.S. subsidiary. He also contended that the DOJ had been misled in its investigation. The drivers in the civil litigation say that automakers Ford, Nissan, Honda, Toyota and BMW knew for years that the air bag inflators weren't safe, but still kept equipping their cars with the "ticking time bombs" because they were cheaper than alternatives. Takata's scheme started sometime around 2000 and ran for at least 15 years, with the company fraudulently persuading customers to buy air bag systems by giving them information that hid the accurate test results for the air bag inflators.

Judge Steeh said during the hearing that the plea agreement will not affect the liability of the car makers in the civil litigation, making it clear the settlement is not a shield. Honda's internal documents and emails show that the automaker chose Takata inflators because they were relatively inexpensive. During testing in 1999 and 2000 at its own facilities, two of the inflators ruptured—and again in 2004, a decade before the national recall. As we have reported, other automakers chose Takata's inflators. For example, Ford did so over the objections of its own inflator expert, who was opposed to the use of ammonium nitrate because it is sensitive to moisture.

Under the terms of the settlement, Takata also agreed to pay a \$25 million criminal fine and to establish a \$125 million restitution fund for people who were injured or will be injured by a malfunctioning Takata air bag inflator. The company also agreed to create an \$850 million fund to benefit automakers who received the falsified data and reports or who purchased the potentially dangerous inflators. A little more than a year ago,

NHTSA levied a \$200 million fine on Takata—its largest ever—in a deal that saw the company admit that it failed to tell the agency about the defect despite knowing about it and withholding important information. At the time, NHTSA estimated that the exploding inflators had caused about 98 injuries.

The cases are *United States of America v. Takata Corp.* (case number 2:16-cr-20810) in the U.S. District Court for the Eastern District of Michigan, and *In re: Takata Airbag Products Liability Litigation* (case number 1:15-md-02599) in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

JAPANESE AUTOMAKERS CALL FOR TAKATA TO PAY AIR BAG COSTS

Nissan, Mazda and Mitsubishi have asked a Florida federal court to order Takata Corp. to reimburse the automakers for all costs they incur as a result of pending multidistrict litigation (MDL) over Takata's faulty air bag inflators. As a basis for their claims, the automakers cite existing contractual obligations. The cross-claims filed by the automakers assert that the supply contracts they signed with Takata require the air bag maker to indemnify them for any costs or damages stemming from any parts made or sold by Takata, including the air bag inflators at the center of the current litigation.

The automakers are Defendants in the pending federal MDL in Miami and they deny any liability to the Plaintiffs in the MDL. The automakers claim that if there is a settlement or judgment against them, Takata is responsible for any payment. The automakers in their cross-claims say the pertinent contract provisions cover indemnification for all types of damages, including settlements, as well as costs related to recalls, replacement parts and attorneys' fees.

The three cross-claims contain counts for contractual indemnity, common law or equitable indemnity, and fraudulent concealment and misrepresentation. Interestingly, there is a claim for punitive damages. All three of the automakers use Takata's \$1 billion January settlement with the U.S. Department of Justice as support for their indemnification arguments. Takata agreed to a statement of facts in the settlement. Those facts included Takata's acknowledgment that it ran a scheme to use false reports and other misrepresentations to convince automakers to buy air bag

systems that contained faulty, inferior or otherwise defective inflators.

The case is *In re: Takata Airbag Products Liability Litigation* (case number 1:15-md-02599) in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

FREEZING WEATHER MAY FORCE FAILURE IN FORD F-150 DOORS

A putative class action has been filed on behalf of all Ford F-150 owners and lessees in New York State. The complaint alleges that the F-150 pickup truck doors fail in sub-freezing temperatures. Specifically, the complaint claims that the doors won't latch closed, electric locks won't open, door handles won't move, and locks won't release if the truck is submitted to sub-freezing temperatures, which occur frequently in the northeast.

The Ford F-150 is the best-selling pickup truck in America, with nearly 58,000 vehicles sold in January, compared to Chevrolet's Silverado model, which reported sales of around 35,500. The Silverado is the second highest selling truck in the market.

These defects and failures run in direct contradiction of Ford's advertising of their F-150, in which Ford claims that their F-150s are "built Ford tough"—an advertising campaign that Plaintiff Brandon Kommer claims led him to believe that the F-150 was tough and durable. Mr. Kommer says he has had multiple problems with his F-150's doors not latching and the locks not functioning as intended. He points to multiple instances on online forums of similar complaints and problems.

Ford has issued two technical service bulletins to service providers and dealers concerning the latch issue. In those bulletins, Ford advised its service providers and dealers on how to correct the malfunction as early as March of 2015. Then, in November 2016, Ford sent the second service bulletin suggesting even more ways in which the defect could be remedied. Ford F-150 owners were not notified after these service bulletins were issued.

Relief sought in the complaint includes injunctive relief over false advertising, damages, attorneys fees, costs, and interest. The Plaintiffs in this class action are represented by Jeffrey Carton of Denlea & Carton LLP. If you need more information, contact Warrner Hornsby, a lawyer in our Personal Injury & Product Liability Section, at 800-898-2034 or by email at Warner.Hornsby@beasleyallen.com.

III.

COURT WATCH

SUPREME COURT REFUSES APPEAL OVER \$7.25 BILLION VISA AND MASTERCARD FEE SETTLEMENT

The U.S. Supreme Court has turned down an appeal by big banks and retailers to revive a \$7.25 billion class action anti-trust settlement with Visa and MasterCard over interchange fees. This leaves in place a Second Circuit Court of Appeals ruling determining that the settlement did not adequately represent the interests of some of the merchants who are members of the class. In June, the Second Circuit overturned the settlement, concluding that the class counsel and representatives didn't adequately stand for merchants who would accept Visa and MasterCard credit cards in the future. The Second Circuit, though, took issue with having the same counsel negotiating for both classes, saying that the rule changes would have little value to some merchants, like those in New York, who are banned by state law from surcharging consumers.

The settlement, reached in 2012, attempted to resolve claims that Visa and MasterCard had 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 settlement offered up to \$7.25 billion in compensation for merchants who accepted Visa or MasterCard from January 2004 to November 2012. For merchants that would accept the cards after Nov. 28, 2012, the settlement promised some changes in Visa and MasterCard rules, including allowing retailers to charge customers more for paying with those credit cards. However, the Second Circuit said the rule changes would have little value to some merchants like New York retailers, which are banned by state law from surcharging. The appeals court also objected to the fees for class counsel, which were calculated based solely on the value of the settlement fund.

In November, retailers who stood by the settlement asked the Supreme Court for review, saying there was no guarantee the objectors could get a better deal settlement. The petition further argued that the Second Circuit's refusal to let the same counsel represent injunctive and damages classes that do not perfectly align would offer little benefit and substantial difficulties in the future.

Big banks including Citigroup Inc., Bank of America NA, Barclays Bank PLC, Capital One Bank NA, HSBC Financial Corp. and JPMorgan Chase & Co., along with Visa and Mastercard, backed the petition for review by the high court. The National Retail Federation, a trade group that opposed the settlement, said it welcomed the Supreme Court's decision. "Retailers were skeptical of this settlement from the beginning," NRF vice president and general counsel Mallory Duncan said in a statement. "It would have done nothing to keep swipe fees from rising in the future." For consumers, it is unclear what this denial will mean. The inability for retailers to surcharge consumers is certainly a good thing, but businesses should not be forced by MasterCard and Visa to pay higher prices to process these transactions either. In any case, the litigation now goes back to the drawing board, so to speak, and the parties will again attempt to negotiate a settlement that will better compensate all class members.

Source: Law360.com

IV.

THE CORPORATE WORLD

A REPORT ON THE \$1 BILLION LAWSUIT BY COMMERZBANK AGAINST BNY MELLON

A New York federal judge has refused to dismiss Commerzbank AG's billion-dollar lawsuit against Bank of New York Mellon Corp. The complaint alleges that the bank failed to vet residential mortgage-backed securities it was supposed to oversee. Commerzbank says it had expected trusts full of bundled home mortgages to yield steady cash flows. However, it says the banks that oversaw the trusts fell asleep at the wheel around the time of the financial crisis. BNY Mellon was among the banks involved.

Commerzbank, a German company, is seeking more than \$1 billion from BNY Mellon for allegedly shirking duties to act in its interests and to notify it of nonpayment issues for 72 trusts and another financial instrument known as a credit default obligation. Judge Daniels' order stated:

Plaintiff alleges that BNYM received at least three written notices of servicing violations, which viewed in the light most favorable to plaintiff, plausibly alleges knowledge of events of default. Additionally, plaintiff alleges that BNYM discovered breaches through, among other

things, BNYM's involvement in other litigation where loan-level reviews revealed systemic breaches of representations and warranties.

However, several of the Plaintiff's claims were dismissed. Judge Daniels said Commerzbank's claims for breach of fiduciary duty and breach of the covenant of good faith and fair dealing were pretty much the same as the breach-of-contract claim and dismissed them. The claim to make BNY Mellon pay out under a state law known as the Streit Act was also thrown out. That law is meant to remove trustees, according to Judge Daniels, and didn't fit the claim against the bank.

Commerzbank's claim under the federal Trust Indenture Act was also pared down to apply to just four of the 72 trusts at issue. The remainder are so-called pooling and service agreement trusts, which Judge Daniels said the Second Circuit has concluded are not covered by the TIA. The case is *Commerzbank AG v. Bank of New York Mellon* (case number 1:15-cv-10029) in U.S. District Court for the Southern District of New York.

Source: Law360.com

VERIZON SETTLES LAWSUIT OVER HOSTAGES' FAILED 911 CALLS

A lawsuit filed in Mississippi against Verizon over an allegedly faulty 911 system has been settled. The terms of the settlement between Verizon Communications Inc. and James and Jessica Wendell have not been disclosed. The claims are based on what was described as a faulty 911 system. U.S. District Judge David Bramlette dismissed the pending lawsuit after the settlement was announced. The Wendells sued Verizon in June, alleging that their calls for help went unanswered as they and their child were being held hostage by an escaped inmate accused of rape and murder. It was alleged in the complaint that their repeated 911 calls were rerouted through Tallulah, Louisiana.

In January, Judge Bramlette ruled that the family's claims should be in private arbitration rather than in the courts. In their attempts to keep the claims in federal court, the family had argued their contract with Verizon was "substantively unconscionable" and therefore unenforceable under Mississippi law. The Wendells also claimed that the contract containing the arbitration clause was "one of adhesion wherein all bargaining power is held by Verizon." The Wendells failed to convince the Judge Bramlette.

It was alleged that James Wendell managed to call 911 several times while being held captive by capital murder suspect Rafael McCloud, who had escaped from jail in March 2016. McCloud, the subject of a manhunt, forced his way into the Wendells' home armed with a knife and held them and their 4-year-old son hostage.

After repeatedly dialing 911 on his pocketed cell phone with no police response, James Wendell made a failed attempt to subdue McCloud. After the inmate stabbed James Wendell in the back, beat Jessica Wendell and threatened to rape her, Mrs. Wendell managed to get a hidden handgun from a guest bathroom and she shot the escaped convict. James Wendell then fatally shot McCloud.

The couple claims Verizon and Safety and Security Technologies Inc. acted negligently and in breach of warranty in failing to correctly program the emergency 911 call system in Vicksburg-Warren County, causing James Wendell's repeated 911 calls to be rerouted to a neighboring state.

The Wendells are represented by Ed Blackmon, Jr. and Bradford J. Blackmon of Blackmon & Blackmon PLLC. The case is *Wendell et al. v. Verizon Communications Inc. et al.* (case number 5:16-cv-00050) in the U.S. District Court for the Southern District of Mississippi.

Source: Law360.com

ELECTRONICS GIANTS TO PAY \$49 MILLION TO SETTLE BATTERY ANTITRUST SUIT

Panasonic, Toshiba, Hitachi Maxell and NEC, all electronic giants, have agreed to pay \$50 million to settle litigation by direct purchasers of lithium-ion batteries. It had been claimed that the companies colluded with other electronics manufacturers to fix battery prices for more than a decade. The settlements add to the \$19 million deal that Sony Corp. made with the direct buyers to settle the claims last February, bringing the total recovered by the group to nearly \$69 million. These new settlements are substantially similar to the Sony agreement.

The multidistrict litigation (MDL) arose from claims that consumers and resellers paid higher prices as a result of a price-fixing conspiracy involving Sony, LG Chem America, Toshiba Corp. and other makers of rechargeable lithium ion batteries. As you may know, these batteries are widely used in laptop computers and other electronic devices. The buyers allege that the conspiracy ran from the beginning of 2000 through May 2011.

The companies have also agreed to settlements with indirect purchasers, includ-

ing a \$19.5 million settlement with Sony. U.S. District Judge Yvonne Gonzalez Rogers, who is overseeing the MDL, granted final approval last month to the Sony settlement but denied indirect purchasers' requests for almost \$4 million in expenses, because they were unsubstantiated. Judge Rogers said in an order:

No invoices, billing records, or other supporting documents were provided. Given the lack of evidentiary support for the request and the Court's inability to discern the impact if the recovery of expenses here relative to the ongoing litigation, the Court denies Plaintiffs' request.

Earlier this year, Hitachi Maxell Ltd. and NEC Corp. agreed to pay \$3.45 million and \$2.5 million, respectively, to settle the indirect purchasers' claims. In December, LG Chem Ltd. agreed a \$39 million settlement with the IPPs.

The direct purchasers are represented by Saveri & Saveri Inc., Pearson Simon & Warshaw LLP, Berman DeValerio, Zelle LLP, Barrack Rodos & Bacine, Grant & Eisenhofer PA and Polsinelli PC, among others. The indirect buyers are represented by Joseph W. Cotchett, Nancy L. Fineman, Demetrius X. Lambrinos, Joyce Chang and Steven N. Williams of Cotchett Pitre & McCarthy LLP and Jeff D. Friedman, Steve W. Berman and Shana E. Scarlett of Hagens Berman Sobol Shapiro LLP.

The MDL is *In re: Lithium-Ion Batteries Antitrust Litigation* (case number 4:13-md-02420) in the U.S. District Court for the Northern District of California.

Source: Law360.com

JAM MAKER WINS \$2.5 MILLION VERDICT IN FIRST CASE UNDER DEFEND TRADE SECRETS ACT

Maia Magee, who has a secret recipe for her popular Dalmatia fig jam, and Dalmatia Import Group, sued a distributor last year who allegedly sold counterfeit Dalmatia jam and a competing product based on her recipe. It's noteworthy that Ms. Magee has received the first jury verdict under the 2016 Defend Trade Secrets Act. A Pennsylvania jury found trade secret misappropriation, along with trademark infringement and counterfeiting, and awarded about \$2.5 million in damages. The award is expected to exceed \$5 million after the trademark damages are trebled due to counterfeiting. The jury absolved Dalmatia's supplier and distributor of willfulness on all claims and declined to award punitive damages.

The law firm McDermott Will & Emery represented the Plaintiff. Michael Nadel led the Plaintiff's litigation team, along with Natalie Bennett and associate Jennifer Routh, all from the firm's Washington, D.C. office. Lauren Handel of the Handel Food Law Firm was also on the team.

Source: *The National Law Journal*

V. WHISTLEBLOWER LITIGATION

BLOWING THE WHISTLE: A WHISTLEBLOWER'S RIGHTS AND MAP TO RECOVERY

When it comes to the government's battle against fraud, no current whistleblower law matches the power of the False Claims Act (FCA). This act is an American federal law that imposes liability on persons and companies (typically federal contractors) who defraud governmental programs. It is the federal government's primary litigation tool in combating fraud against the government. The law includes a *qui tam* provision that allows ordinary citizens, known as "relators," to file actions on behalf of the government. This has come to be known as "whistleblowing." The FCA prohibits:

- knowingly presenting, or causing to be presented a false claim for payment or approval;
- knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;
- conspiring to commit any violation of the FCA; falsely certifying the type or amount of property to be used by the government;
- certifying receipt of property on a document without completely knowing that the information is true;
- knowingly buying government property from an unauthorized officer of the government; and knowingly making, using, or causing to be made or used a false record to avoid, or decrease an obligation to pay or transmit property to the government.

The FCA also contains an anti-retaliation provision. This provision allows a relator to recover, in addition to his award for reporting the fraud, double damages plus attor-

ney fees for any acts of retaliation resulting from reporting fraud against the government.

Procedurally, an FCA claim may be brought by the government directly or by a relator pursuant to the FCA's *qui tam* provision. In the case of *qui tam* relators, the FCA requires the relator to follow special filing procedures in initiating a *qui tam* lawsuit. Prior to filing a *qui tam* suit, the relator must prepare and serve a copy of the complaint and a written disclosure of all material evidence within his possession on the U.S. Attorney General.

In contrast to the way most civil actions typically proceed, the Defendant is not served with the complaint until the government decides whether to intervene and the court orders service. If the government intervenes in the *qui tam* action, it is responsible for prosecuting the lawsuit. If, however, the government ultimately declines to intervene, the *qui tam* Plaintiff may move forward with the lawsuit on his or her own. Some of the most common reasons why the U.S. government may choose not to intervene include: lack of relator credibility; insufficient or immaterial evidence; or limited government resources that are better devoted to larger or stronger cases.

The strength of the FCA lies in the statute's *qui tam* and damages provisions. Following the Department of Justice's issuance of an "Interim Final Rule with Request for Comments" in 2016, FCA penalties have increased to between \$10,781.40 and \$21,562.80 per claim, plus three times the amount of damages that the government sustains because of the false claim. It should be noted, however, that if the government conducts the action, a relator is entitled to receive no less than 15 percent and no more than 25 percent of the proceeds. If the government does not conduct the action and the relator is successful in obtaining recovery, the relator is then entitled to receive between 25 percent and 30 percent of the recovery.

In fiscal year 2016, the Department of Justice recovered more than \$4.7 billion in settlements and judgements through cases brought under the FCA. Despite such massive success, however, as many as 10 cases might fail for every one whistleblower case that succeeds.

If you would like more information on FCA claims, contact Lance Gould, a lawyer in our Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Lance.Gould@beasleyallen.com. You can order a copy of Lance's book, *Whistleblowers: A Brief History & A Guide to Getting Started*. The book is available free to

lawyers. For your copy, visit lancegould-law.com/whistleblower-book.

JUDGE TRIPLES NURSING HOME COMPANIES' FRAUD PENALTY TO \$347 MILLION

A Florida federal judge has trebled a \$115 million damages award for the government in a whistleblower case to \$347 million. This came after a jury found that the operators of 53 nursing facilities submitted claims to Medicare and Medicaid for unnecessary care. U.S. District Judge Steven D. Merryday affirmed the jury's verdict against four defendants—CMC II LLC; Salus Rehabilitation LLC; 207 Marshall Drive Operations LLC; and 803 Oak Street Operations LLC—and trebled the damages under the False Claims Act to more than \$347 million. The judge ordered Sea Crest and CMC to pay \$291,160,608 to the U.S. government and \$39,897,291 to the Florida government. Salus Rehabilitation will have to pay \$484,000 to the federal government; 207 Marshall Drive and 803 Oak Street will have to pay \$6,266,424 and \$10,055,961, respectively, to the U.S.

The jury had found that the four Defendants had artificially increased the amount of resources they claimed their patients needed in order to get more money from Medicare and Medicaid. The most affected defendant was CMC II, as successor to Sea Crest Health Care Management, doing business as LaVie Management Services of Florida, which submitted 123 false Medicare claims using more than 130 false statements and the jury said should be held liable for \$109.8 million in damages.

The jury found that Oak Street, which was doing business as Governor's Creek Health and Rehabilitation Center, submitted four false claims, backed up by about 50 false records, and is liable for \$3.3 million in damages. Marshall Drive, which was doing business as Marshall Health and Rehabilitation Center, followed closely with one false claim backed up by about two dozen false records and is liable for \$2 million in damages, the jury said. Salus, which was doing business as LaVie Rehab, submitted 44 false claims backed up by an equal number of fraudulent records, was not required to pay anything, the jury said. I am not sure why they won't have to pay.

The lawsuit was brought by whistleblower Angela Ruckh, a nurse who worked at two of the facilities. Ms. Ruckh is represented by The Cohen Law Group, Kellogg Huber Hansen Todd Evans & Figel PLLC and Delaney Kester LLP. The case is U.S. ex rel. Ruckh v. CMC II LLC et al. (case

number 8:11-cv-01303) in the U.S. District Court for the Middle District of Florida.

Source: Law360.com

NEW YORK CITY DOCTORS CHARGED IN \$57 MILLION INSURANCE FRAUD SCHEME

Federal prosecutors last month accused doctors and staffers associated with a New York City clinic of running a "massive" insurance fraud scheme worth at least \$57 million. The alleged 12-year scheme bilked insurers for medically unnecessary tests that prosecutors say were often not even performed as described. Before he was forced out of office, Manhattan U.S. Attorney Preet Bharara had brought a series of charges against interventional cardiologist Asim Hameedi of Manhattan, neurologist Emad Soliman of Westchester County, and employees of a Queens clinic. The charges include health care fraud, wire fraud, conspiracy and making false statements. In addition, the U.S. Attorneys office has joined a whistleblower's False Claims Act suit against Hameedi, Soliman, Queens clinic City Medical Associates PC and others.

Prosecutors say the doctors and clinic staffers lied to unnamed insurance companies, including providers paid through Medicaid and Medicare, in order to obtain preauthorization for medical tests. They say further that the Defendants submitted false claims for testing and procedures that were medically unnecessary or not performed. Dr. Hameedi and others are also alleged to have paid "exorbitant" kickbacks to primary care offices in exchange for patient referrals. They are accused of illegally accessing patients' health records from an unidentified hospital to locate recruits for City Medical Associates.

In order to hide the huge volumes of claims being submitted by the clinic, prosecutors say the conspirators falsely told insurers that some medical tests had been ordered or performed by doctors who didn't work at the clinic.

The case is *U.S. v. Asim Hameedi et al.* (case number 17-cr-00137) in the U.S. District Court for the Southern District of New York. The civil case is *U.S. ex rel. Dr. Patricia A. Kelley et al. v. City Medical Associates et al.* (case number 1:15-cv-07261) in the same court.

Source: Law360.com

VI. CONGRESSIONAL UPDATE

MULTIPLE ANTI-CONSUMER BILLS INTRODUCED IN THE U.S. HOUSE OF REPRESENTATIVES

Over the past few weeks, we have seen Congress push a series of bills that will make it difficult for Americans harmed by corporate misconduct to seek and obtain justice in our nation's courts. Many of these bills have passed the House of Representatives, and are awaiting Senate consideration. Careful observation of these bills is necessary. You should contact your Senators and Representatives to ask them to vote against such anti-consumer legislation. The bills to watch closely include:

- H.R. 720, the "Lawsuit Abuse Reduction Act," which forces a court to impose sanctions on attorneys who bring novel cases. H.R. 720 passed in the House on March 10, 2017 and is currently awaiting Senate consideration.
- H.R. 725, the "Innocent Party Protection Act," which makes it easier for corporate Defendants to move a case into a more favorable forum. H.R. 725 passed the House on March 9, 2017 and is currently awaiting Senate consideration.
- H.R. 732, the "Stop Settlement Slush Funds Act," which prohibits non-profits and charities from being able to receive compensation from corporations found to have committed widespread harm to the public. H.R. 732 has not yet come to a vote in the House.
- H.R. 906, the "Furthering Asbestos Claims Transparency Act," which helps the asbestos industry in delaying and denying compensation to asbestos victims dying of asbestos disease, and threatens the privacy of asbestos victims and their families. H.R. 906 has not yet come to a vote in the House.
- H.R. 985, the "Fairness in Class Action Litigation Act," which will strip Americans of the ability to join with others to bring consumer, worker, or civil rights class actions against corporations. H.R. 985 passed in the House on March 9, and is currently awaiting Senate consideration. More will be said on this bill below.
- H.R. 1215, the "Protecting Access to Care Act," which undermines state law and eliminates the rights of Americans to

bring certain health care claims when they are injured by medical malpractice and dangerous drugs and devices, or when they or their families are injured by medical malpractice and dangerous drugs and devices, or when they or their families are injured or killed in a nursing home. H.R. 1215 has not yet come to a vote in the House.

Before Congress votes on these bills, it is imperative that they hear from the folks who would be severely impacted the most by this legislation. Actually, all Americans will be hurt if these bills pass and become law. Please write your members of Congress and ask them to vote against these bills.

Sources: Takejusticeback.com and Congress.gov

VII. BEASLEY ALLEN PERSONAL INJURY & PRODUCT LIABILITY SECTION UPDATE

Lawyers in our firm's Personal Injury & Product Liability Section have been very busy over the past several months. They handle cases involving catastrophic injuries and deaths arising out of any type of accident, including car crashes, 18-wheeler accidents, and industrial and workplace accidents. Over the years, we have learned that strong product liability claims can be overlooked by lawyers, who don't routinely handle that sort of case, when they investigate accidents. For example, in many motor vehicle crashes, some defect—either design or manufacturing—may have played a major role in causing the accident. A product liability claim focuses on whether or not the product is defective. It's very important to never overlook a potential product liability claim when investigating a serious injury or death case that arises from a motor vehicle crash, a workplace accident, or even an accident that happens in the home.

An entire product may be defective or it may be that a component part of the product contains the defect. The product may well contain design, manufacturing or warning defects. In some cases, it will be a combination of these problems.

In addition to the products cases our lawyers in the Section are handling, they are also handling bodily injury claims, which include heavy truck litigation, auto-

mobile accidents, and nursing home litigation. I will set out below some types of cases lawyers in our firm handle on a regular basis.

TAKATA AIRBAGS

In late February, Takata pled guilty and agreed to pay \$1 billion for concealing a defect in millions of its airbag inflators. At least 11 deaths in the U.S. have been linked to the defective airbags. "For over a decade, Takata lied to its customers about the safety and reliability of its ammonium nitrate-based airbag inflators," Acting Assistant Attorney General Kenneth Blanco said in a statement.

The potential dangers posed by these air bags are that the airbags can unexpectedly explode with excessive force, causing serious injury or death to occupants. The defect is linked to the air bags' inflator systems, which can shoot metal fragments from the devices into the car like shrapnel. Airbags on both the driver's and passenger's side can explode, even as a result of a fender bender or other minor collision. Tokyo-based Takata is one of the world's largest automotive suppliers. It manufactures airbags, safety belts, steering wheels and other auto parts for a variety of automakers. Vehicles containing the defective airbags include certain models made by Toyota, Honda, Mazda, BMW, Nissan, Chrysler, Audi, Volkswagen and General Motors. Cole Portis and Ben Baker in our Products Liability Section are involved in these cases.

GM IGNITION SWITCH LITIGATION

General Motors (GM) has recalled more than 17 million vehicles related to a defective ignition switch problem, which can leave a vehicle without power and the driver unable to control the vehicle in sudden and dangerous situations. Court documents and other evidence reveal that GM knew about the ignition switch problem as early as 2001.

Lawyers in our Personal Injury & Product Liability Section have handled numerous claims involving the GM ignition switch defect. Some of those claims were settled through the GM Ignition Switch Compensation Fund. Others are still pending in federal and state courts. Greg Allen, Cole Portis, Graham Esdale, Mike Andrews and

Ben Baker in our Products Liability Section are involved in these cases.

HEAVY TRUCKING ACCIDENTS

There are significant differences between handling an interstate trucking case and other car wreck cases. It is imperative to have knowledge of the Federal Motor Carrier Safety Regulations, technology, business practices, insurance coverages, and to have the ability to discover written and electronic records. Expert testimony is of utmost importance. Accidents involving semi-trucks and passenger vehicles often result in serious injuries and wrongful death. Trucking companies and their insurance companies almost always quickly send accident investigators to the scene of a truck accident to begin working to limit their liability in these situations.

Chris Glover, a lawyer in the firm's Product Liability & Personal Injury Section, has represented numerous folks who have been seriously injured or lost a family member as a result of the wrongful conduct of a trucking company. He most recently wrote and had published a book that explains how to properly litigate a heavy trucking case. The Book is titled *An Introduction to Truck Accident Claims: A Guide to Getting Started*. The book covers topics including the basics of trucking regulations and requirements, how to prepare for your case, potential defendants including the carrier, the broker and the driver; and common issues that arise in commercial vehicle litigation, such as hours of service, fatigue, maintenance and products liability. This book is available free to attorneys in either hard copy or downloadable digital format. For your free hard copy, call us at 800-898-2034. The book also can be downloaded at <http://www.chrisglover-law.com/book>.

TIRE DEFECTS

Tire failure can result in a serious car crash causing serious injury or death to the car's occupants. Air, heat and sunlight can cause the rubber in tires to break down. When a tire is defective, potentially serious problems like detreads and blowouts can occur long before the tire would be expected to wear out. If the tire failure is the result of design or manufacturing defects, and the manufacturer is aware of the

problem, they have an obligation to alert consumers to the potential danger.

One serious problem with tires is that they wear down on the inside as they age, but they look brand new on the outside. Despite the dangers of tire aging, the National Highway Traffic Safety Administration (NHTSA) has still refused to establish a tire aging standard. A tire aging standard would make it easier for consumers to determine the tire's age. Right now, the only way to determine the age of a tire is to decipher the cryptic code on the tire's sidewall. Also, a tire aging standard would make it mandatory for tire centers to take tires out of service at a specified date, regardless of what the tire looks like on the outside.

Our lawyers are also seeing a huge influx of defectively designed tires from China. We recently filed a case in North Carolina where a Chinese brand tire failed causing a wreck and a life-long truck driver to suffer serious injuries. As more and more of the products we buy, including tires, are being made in China and other foreign countries, the "importers" role is becoming more critical. In too many instances, "importers" are not taking the appropriate steps to assure that foreign tire makers' tires are safe, despite the National Highway Traffic Safety Administration standards requiring them to do so.

Under Federal law, "importers" must take steps to assure that the tires they import are free of defects. Good manufacturing processes require "importers" to conduct on-site inspection(s) of a foreign tire makers' facilities to assure that adequate testing, manufacturing, quality control and other measures are in place. Further, "importers," once they import tires into this country, should perform random sampling, testing and inspection of foreign tires before they distribute and/or sell the tires to consumers in this country.

In one recent case, we learned that, while a company was importing more than 400,000 tires a month, it was doing nothing to insure that the Chinese tires it imported, sold and profited from, were safe. The importer never inspected the manufacturing plant, never observed any tire testing and never checked to see if the

Chinese manufacturer employed any quality control measures for its tires and plants. Further, the importer never performed one post "import" inspection, test and/or took any other step relative to one single tire it sold despite the Federal requirements to do so. This conduct is particularly troubling when you consider how important tires are to our safety. Companies that import tires, or any product for that matter, should be held accountable when they do nothing to insure these products are safe for American consumers. Our lawyers have handled numerous claims against both tire manufacturers and importers of the defective Chinese tires. If you have questions regarding a potential tire case, contact Cole Portis or Ben Baker at 800-898-2034 or by email at Portis@beasleyallen.com or Ben.Baker@beasleyallen.com.

BAD BOY BUGGY LITIGATION

Lawyers in our firm continue to handle cases involving injuries from the off-road vehicle known as the Bad Boy Buggy. The Buggy was initially designed by a gentleman who owned an auto salvage yard in Natchez, Mississippi, but the company was sold a couple of times and now is owned by Textron, Inc.

The Bad Boy Buggies are currently marketed for hunting and utility work but they are designed very poorly. They are unstable on uneven terrain. The static stability factor of the Bad Boy vehicles is very low, which is caused by a design that has a narrow track width and a high center of gravity. The vehicles are also very heavy primarily because of the weight of the numerous batteries located internally. When the Bad Boy vehicle turns over, it has the potential to cause significant injuries.

As of today, the Bad Boy Buggies are still not equipped with doors or adequate measures to prevent "leg-out injuries." Yamaha performed a recall on all of its Rhino vehicles in 2007 because it was seeing numerous leg-out injuries when the vehicles tipped over. The primary problem was that, in a side-by-side vehicle, the driver or passenger will reflexively put their foot out as the vehicle tips. The vehicle typically still has forward momentum as the tip-up occurs, so as the occupant plants his foot on the

ground, the foot/leg will be pulled under the backside of the vehicle. Quite often, this causes severe fractures and even amputations.

While Bad Boy has now upgraded its design to add a shoulder net and seatbelt, its foot-out protection is still very bad. Textron added a trip bar in the foot well area, which it claims is a foot-out preventative device. But Textron has performed no testing on the vehicle to see if the trip bar is effective. The vehicles have no protection for occupants who are younger, or of short stature, because their legs may not be long enough to reach the area where the leg-out device is located. These vehicles need doors and netting to prevent leg-out and arm and hand-out injuries.

Hopefully, Textron, Inc. and its subsidiary Textron Specialty Vehicles, Inc. will recognize the design flaw and start equipping their vehicles with doors and other proper safety devices to reduce the danger. In the meanwhile, some very bad and defective vehicles are in use and are an extreme hazard for folks who use them.

If you have any questions about a specific Bad Boy accident or need information on the ongoing litigation, contact Greg Allen, our firm's Senior Product Liability lawyer, at 800-898-2034 or by email at Greg.Allen@beasleyallen.com. Greg has successfully handled a number of cases involving the Bad Boy Buggy and currently has several pending in court.

INDUSTRIAL ACCIDENTS AND WORKPLACE DEFECTS

Each year, thousands of workers are injured or killed at their workplace. Although a state's workers' compensation system places limitations on the ability of employees to hold employers accountable for these work-related injuries, many people do not realize that there may be another available source of recovery. Injuries in the work place are often caused by defective products, such as a machine where a dangerous nip-point is not properly guarded nor is the employee warned of the dangerous nip-point. If a product causes an on-the-job injury, a product liability suit may be brought against the product's manufacturer. Catastrophic injuries, deaths, and amputations unfortunately too com-

monly occur from defective products found in the workplace.

Our firm handles numerous product cases each year that arise in the context of an accident that occurred on the job or in the workplace. Currently, Kendall Dunson is handling a tragic case that occurred in Tennessee. While working in the maintenance department for his employer, the employee was setting up a roll stack on an extruder. The roll stack is one machine in an entire line. The roll stack consists of three large rollers. The middle roller is the master and the other two are slaves. While working to get the rollers in sync, he was pulled through the rollers and his head was crushed, leading to his death. No one saw the incident but the rollers were found spinning at maximum rate. The rollers have in-running nip points that should have been guarded, but, in this tragic case, the nip-points were not guarded. The manufacturer outfitted the rollers with a stop pull cord along the edges and at the top and bottom of the roll stack. But the roll stack is so large that someone standing in the middle of the roll stack cannot reach the pull cord. The roll stack was defective and unreasonably dangerous for lack of adequate guarding and/or a presence sensing device that would have prevented this needless death.

AVIATION ACCIDENTS

Soaring through the sky at hundreds of miles an hour, thousands of feet above the ground in an airplane or helicopter leaves little room for error. One small mechanical problem, misjudgment or faulty response in the air can spell disaster for air passengers and even unsuspecting people on the ground. This is why it's crucial for the aviation industry, including manufacturers, pilots, mechanics and air traffic controllers, to adhere to the highest possible standards at all times.

Statistics indicate mechanical failures cause up to 22 percent of aviation crashes. Historically, aircraft manufacturing defects, flawed aircraft design, inadequate warning systems and inadequate instructions for safe use of the aircraft's equipment or systems have contributed to numerous aviation crashes. In such cases, the pilot may follow every procedure correctly but still be unable to avert disaster. Mike Andrews, a lawyer in our firm, has

handled numerous cases involving defects found in aircrafts.

Currently, Mike is pursuing two defective aviation cases. One case involves a crash of the V22 Osprey in Hawaii resulting in death of a young marine. The Osprey has a long history of defects involving the aircraft's hydraulics and software. This crash resulted from the engines ingesting sand that was kicked up into the air by the downwash from the Osprey's rotor-blades as it attempted to land. The aircraft is equipped with a filtration system referred to as an engine air particle separator, which is intended to prevent sand and other particle ingestion. However, the system is faulty. Bell and Boeing have tried various iterations and designs but have not yet implemented a safe and effective filter. Several crashes have resulted in deaths and serious injuries.

The other case involves the crash of a light aircraft off the coast of Georgia. Two inexperienced pilots were attending flight school in North Carolina and were assigned to fly an aircraft to Jacksonville, Florida, to the flight school maintenance facility. Unfortunately, the aircraft was dispatched with inoperable equipment. Specifically, the pilots were sent up in an aircraft that had faulty vacuum pumps—one was completely inoperable and the other failed in flight. The vacuum pumps provide the pilots' horizon and orientation information while in flight. Without such information, pilots lose spatial awareness and become disoriented. Due to the inoperable and faulty equipment, the plane crashed, killing both student pilots.

NON-AUTO PRODUCT DEFECTS

Lawyers in our Personal Injury & Product Liability Section also handle other types of defective products, including smoke detectors, flammable clothing, industrial equipment, and heaters, just to name a few. Most of the time, family members do not suspect that a defective product is the cause of a death or injury, and manufacturers readily blame the victim's actions. Our firm has discovered that defective products are increasingly a major cause of unexpected deaths and injuries. LaBarron Boone has successfully handled several of these types of cases and has been leading a campaign to make smoke detectors safer and more

effective. Contact LaBarron if you have any questions about a potential case.

NURSING HOME LITIGATION

One of the most vulnerable segments of society is our senior citizens. As our population ages, more and more individuals are admitted to nursing homes and long-term care facilities. Our firm reviews and files cases in state courts, federal courts, and arbitration tribunals against nursing homes as a result of negligent medical and nursing care provided to nursing home residents. Currently, our lawyers are handling cases involving bed sores, falls, chokes, and medication errors. Ben Locklar has handed numerous cases involving patients who have died or been severely injured by the negligent acts of nursing homes. If you have any questions regarding these types of claims, Ben would be happy to discuss them with you.

PREMISES LIABILITY LITIGATION

Premises Liability Cases can involve claims arising out of falls caused by a foreign substance on the premises, falls caused by a part of the premises, as well as injuries caused by falling items. Specifically, in a case involving a foreign substance on a floor, a Plaintiff must establish that the foreign substance caused the fall and that the defendant premises owner had notice or should have had notice of the substance at the time of the accident. The law is different when injuries are caused by part of the premises that is in a dangerous condition, such as part of a doorway, curb, or stairs, or where the injury is caused by a display created by a store employee. In situations where the injury is caused by part of the premises or a display that was set up by the store, proof of notice is not a prerequisite but the Plaintiff must still prove the injury was caused by a defective or dangerous condition. Injuries caused by falling objects most often involve items falling from displays that are either part of the premises, or were set up by the store. If the falling object is the result of a display set up by the store or some part of the premises falling, then the customer does not have to prove notice. Mike Crow and Julie Beasley have extensive experience in handling premises liability cases. If you need any guidance or have any questions, please contact Mike or Julie

CONCLUSION

If you would like to discuss any type personal injury or product liability case, contact Sloan Downes, Section Administrator, at 800-898-2034 or by email at Sloan.Downes@beasleyallen.com. Sloan will put you in touch with a lawyer in the firm who handles the type case you are seeking information about. We would like to work with anybody who needs assistance on a potential case.

VIII. PRODUCT LIABILITY UPDATE

HOVERBOARD BLAMED FOR FIRE THAT KILLED 3-YEAR-OLD GIRL AND CRITICALLY INJURED TWO OTHERS

A 3-year-old girl was killed and two family members critically injured in a Harrisburg, Pennsylvania, house fire caused by a charging hoverboard. The death is believed to be the first such fatality linked to the two-wheeled, gyro-balanced mobile devices, which have been blamed for dozens of fires since mid-2015.

Harrisburg authorities investigating the deadly fire said that the fire started some time shortly before 8 p.m. in a home just north of the downtown area. Windy conditions fueled the flames, and the first floor of the residence was engulfed in fire by the time firefighters reached it. Red Cross officials have said that 21 people were displaced by the fire.

The girl killed in the blaze was identified as Ashanti Hughes. Rescuers retrieved two other girls who were trapped on the second and third floors, and two other family members escaped onto a porch roof. The two girls were taken to a burn center and were said to be in critical condition.

U.S. regulators recalled more than half a million Chinese-made hoverboards in July amid a mounting number of reports that the devices, powered by rechargeable lithium-ion batteries, suddenly exploded. "We've concluded pretty definitively that these are not safe products the way they were designed," said U.S. Consumer Product Safety Commission (CPSC) Chairman Eliot Kaye in July, urging consumers to stop using the devices.

CPSC spokesman Scott Wolfson told NBC News that the agency has investigated more than 60 hoverboard fires since the fall of 2015. He said that the CPSC would also investigate the Harrisburg fire, which

local authorities said occurred while the device was charging.

Mr. Wolfson said further that potential buyers should ensure that hoverboards display markings showing the products meet "Underwriters Laboratories standard 2272" before buying. The code means that the device meets the best fire-prevention safety standards. Anyone who continues to use a hoverboard should never recharge it overnight and should always make sure there is a fire extinguisher nearby, Mr. Wolfson added.

Source: *NBC News*

A FORMAL INVESTIGATION IS NOW UNDERWAY BY THE CPSC

The U.S. Consumer Product Safety Commission (CPSC) has formally opened an investigation into the house fire mentioned above. The investigation comes eight months after the CPSC announced a recall of about half a million hoverboards, following just under 100 reports of the lithium-ion battery packs exploding or catching fire that the agency said caused burn injuries and damage to property in some incidents. The lithium-ion packs in the two-wheeled hoverboards are susceptible to overheating, which presents a risk of the self-balancing scooters smoking or catching on fire, the agency said. The 501,000 recalled products include hoverboards made or imported by a variety of companies, including Swagway LLC and Razor USA LLC. The hoverboards in the recall were made both overseas and in the U.S.

A number of online and brick-and-mortar retailers sold the hoverboards, including Amazon.com Inc., which was hit with a \$30 million lawsuit in October, brought by a Nashville family who said the retailer was responsible for a dangerous counterfeit hoverboard that caused their house to burn down. At the end of 2016, U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection announced a new joint effort aimed at stopping counterfeit and possibly dangerous consumer electronics at the border. The operation, named "Surge Protector," is focusing on electronics such as digital media devices, power adapters and devices powered by lithium-ion batteries that are vulnerable to counterfeiting and present health and safety hazards from overheating.

Sources: *NBC News* and *Law360.com*

WORK ROBOT BLAMED FOR MICHIGAN WOMAN'S DEATH

A wrongful death lawsuit has been filed against five robotics, automotive and welding companies in a Michigan federal court. Wanda Holbrook, a Journeymen maintenance technician, was killed. It's alleged that the five companies didn't properly design, manufacture or test their products that were in place at a Michigan auto parts facility. The complaint alleges that the defects failed to prevent a robot from crushing Ms. Holbrook's skull while it was trying to place a hitch assembly in an already occupied fixture. The complaint states:

Wanda Holbrook was working for automotive parts maker Ventra Ionia LLC on July 7, 2015, when a robot entered a section of the weld department in which it did not belong. While trying to place a hitch assembly piece in an occupied fixture, the robot bit and crushed Holbrook's head between the piece and the fixture. She was pronounced dead by first responders on the scene after being found unresponsive.

The robot from section 130 should have never entered section 140, and should have never attempted to load a hitch assembly within a fixture that was already loaded with a hitch assembly. A failure of one or more of defendants' safety systems or devices had taken place, causing Wanda's death.

FANUC America Corp., Nachi Robotic Systems Inc. and Lincoln Electric Co. manufactured the equipment in the section that Holbrook was servicing during the incident, the complaint says. Flex-N-Gate LLC and Prodomax Automation Ltd., along with Lincoln Electric, performed the installation, integration, engineering and servicing of the section's automation system. The five companies are responsible for Ms. Holbrook's death due to their failure to properly design, manufacture and test their products. Because of those failures, Ms. Holbrook was not properly warned about their dangers. The automation system in the area of the facility she was in also failed to meet state and federal workplace safety requirements as well as welding and robotic industry standards.

The complaint sets out claims of design and manufacturing defects, breach of

implied warranty, failure to warn and negligence. William Holbrook, who sued on behalf of his wife's estate, is represented by Matthew L Wikander and Charissa Huang of Smith Haughey Rice & Roegge PC. The case is *Holbrook v. Prodomax Automation Ltd. et al* (case number 1:17-cv-00219) in the U.S. District Court for the Western District of Michigan.

Source: Law360.com

PRESSURE COOKER DANGERS

Over the past year, lawyers in our office have seen an incredible influx of cases involving defective pressure cookers. As most will know, pressure cookers are not new products and have been on the market for decades. For as long as pressure cookers have been on the market, there have been those that malfunction, causing injuries. However, the failure rate of certain models on the market today are alarmingly high.

To understand why pressure cookers cause injuries, it is important to understand the intended use and function. Pressure cookers are sealed cooking pots that use steam to build pressure inside the vessel. Food and liquid are placed in the sealed pot and heated until steam pressure builds. The steam pressure tenderizes the food and cooks quicker than conventional methods. Pressure cookers are equipped with pressure release valves that release steam when the pressure within the vessel reaches a certain level. Problems arise when the pressure release valve fails and the vessel over pressurizes. As is the case with any over-pressurized vessel, the vessel fails at the weakest point. Often this results in the lid of the pressure cooker exploding upward, spewing hot steam, liquid and food contents in a bomb-like manner. The liquid can cause horrific second- and third-degree burns to anyone near the cooker.

For years, the traditional pressure cooker resembled any other kitchen pot that a person would place on the stove. The only difference was a locking lid and pressure relief valve. So long as the pressure relief valve was functioning properly, the pressure cooker functioned safely. Today, many companies manufacture electric pressure cookers. These cookers more closely resemble a "Crock-pot" or slow cooker. The function and utility of these electric cookers are the same as the stovetop variety. However, the electric variety is failing at an alarming rate. Since 2012, more than 30 incidents of pressure cooker failures have been reported to saferproducts.gov. Based on the number of cases that have been reported to our office alone,

there can be no doubt that the 30 reported incidents are just the tip of the iceberg.

The danger with pressure cookers stems from the very characteristic that gives them utility, and that is pressure. If the pressure is released slowly, the hazard is mitigated. But, the failure to release pressure can lead to over-pressurization, which causes the explosion of steam and liquids. The most common defects are inadequate pot lid seals and gaskets, along with inadequate venting of steam. All too often the pressure release valve clogs or sticks causing an over pressurization. Without a slow release of steam, the pressure builds until an inevitable blow out.

Many companies are recalling electric pressure cookers due to defects. In 2015, Breville recalled 35,600 "Fast Slow Cookers" due to the unexpected release of built-up pressure. Similarly, pressure cookers sold by Welbilt Electronic on QVC were recalled in 2006 due to the cookers opening prematurely, expelling hot liquids. Despite these recalls, many other manufacturers continue to sell defective pressure cookers.

One of the most popular pressure cookers on the market is the "Power Pressure Cooker XL." This product is advertised and sold on TV, but is also sold at many large nationwide department stores. Not only is the Power Pressure Cooker XL one of the most popular electric pressure cookers, it appears it may be the most dangerous. Despite countless accidents involving this product, Tristar Products Inc., the manufacturer of the Power Pressure Cooker XL, continues to sell the product. Several lawsuits have been filed against Tristar related to the faulty pressure relief valves. It is time that Tristar takes these defective cookers off the market and removes them from department store shelves and recalls those already sold. Until this action occurs, I have no doubt that these accidents will continue to rise.

Sources: CPSC, Breville and saferproducts.gov

FDA TO DISCUSS E-CIGARETTE SAFETY CONCERNS

The U.S. Food and Drug Administration (FDA) and the Center for Tobacco Products (CTP) have an upcoming workshop scheduled to look at the safety of e-cigarettes. In particular, they will discuss the safety concerns of the lithium-ion batteries used to power electronic cigarettes.

The two-day public workshop will include presentations and panel discussions about the safety concerns of lithium-ion batteries as well as how potential safety

hazards and risks are communicated to consumers and the public. In conjunction with the public workshop, FDA is establishing a public docket to gather data and information on hazards and risks associated with the use of batteries in electronic cigarettes.

Hundreds of reported incidents across the country where consumers have been badly hurt prompted the FDA and CTP to organize the workshop. These incidents include situations where batteries have exploded in pockets, faces, hands and other parts of the body. The explosions have reportedly caused fractured bones, damage to eyesight and severe burns that sometimes need surgery or skin grafting procedures. A recent example occurred in Alabama where an e-cigarette explosion seriously burned a man when the device exploded in his pocket, covering his leg in flames and causing second- and third-degree burns.

By holding the workshop, the FDA and CTP seek to gather information about the factors that contribute to lithium-ion battery failure. The FDA's website lists several concerns to be discussed at the workshop including the fact that the lithium-ion batteries are often cheaply made, lack adequate protection, and are sold to be used in electronic cigarettes that do not offer proper ventilation.

The FDA's website also references specific issues that can cause overheating in these lithium-ion batteries, which is of importance because overheating is believed to be one of the primary causes of the explosions. Some of the more prevalent issues are over-charging, over-discharging, and short circuits. If the heat cannot dissipate faster than it generates, a thermal runaway situation will occur, which is the uncontrollable chemical reaction that causes heat to build up and the battery to explode. Most lithium-ion batteries used in electronic cigarettes are "unprotected," meaning they have inadequate safety features to prevent this type of overheating.

The e-cigarette industry has had little to no oversight by government agencies until this past year when the FDA finalized a rule that brought e-cigarettes and their component parts under their regulatory authority. At this point, it is too soon to know whether the FDA's new authority will sufficiently address the potential hazards of e-cigarette devices and their lithium-ion batteries. These types of workshops are a good sign.

If you would like more information about these cases, you can contact Will Sutton, a lawyer in our firm's Toxic Torts Section. Will can be reached at 800-898-

2034 or by email at William.Sutton@beasleyallen.com.

Source: FDA.gov and Righting Injustice

IX. MASS TORTS UPDATE

TALCUM POWDER LITIGATION UPDATE

In early February 2017, Beasley Allen lawyers returned to St. Louis to begin our fourth talcum powder trial, which was a "Defense pick." Our Plaintiff in the case was Nora Daniels, who was diagnosed with ovarian cancer in May 2013 after having used Johnson & Johnson talcum powder products for more than 30 years. On March 3, after a multi-week trial, the jury returned a Defense verdict for both Johnson & Johnson and Imerys Talc America, the manufacturer that supplies talc to Johnson & Johnson. This was the first time a jury decided in favor of Johnson & Johnson.

As you will recall, three previous St. Louis juries returned verdicts for the Plaintiff and awarded damages totaling nearly \$200 million. While disappointed with the outcome in this case, lawyers in the Mass Torts Section at Beasley Allen continue to evaluate and file cases on behalf of women who were diagnosed with ovarian cancer after using Johnson & Johnson Baby Powder and/or Shower to Shower products. We all feel badly for Ms. Daniels and we know all that she has gone through.

Four additional talc trials are currently set to take place in St. Louis later this year. Additional trials are scheduled in Washington, D.C. and California later this year. Beasley Allen lawyers return to St. Louis to begin our fifth St. Louis talcum powder trial on April 10. Our Plaintiff in this case is a 61-year old Virginia resident, who was diagnosed with ovarian cancer in August 2012 after using Johnson & Johnson talcum powder products for more than 40 years. This trial, like the prior trial, is also a "defense pick." We also have another talc trial in St. Louis scheduled for June 2017. Our lawyers look forward to trying both of these cases.

The lawyers from our firm who are involved in these cases include Ted Meadows, Danielle Mason, David Dearing, Roger Smith, Brittany Scott, Lauren Razick, and Ryan Beattie. We look forward to getting back into the courtroom and moving forward with the legal claims of

thousands of victims whose lives have been catastrophically changed by ovarian cancer.

If you have any questions regarding the Talc litigation, or if you would like for us to review a potential claim, contact Brittany Scott or Lauren Razick, lawyers in the Mass Torts Section, at 800-898-2034 or by email at Brittany.Scott@beasleyallen.com or Lauren.Razick@beasleyallen.com.

FIRST XARELTO TRIALS SET FOR APRIL AND MAY 2017

Beasley Allen lawyers Andy Birchfield, David Byrne and Joseph VanZandt are preparing for the nation's first trials involving the blood thinning medication Xarelto. The two trials, set for April 24, 2017, and May 30, 2017, in New Orleans, will be the first "bellwether" trials in the multidistrict litigation (MDL). The MDL is pending before U.S. District Court Judge Eldon Fallon of the United States District Court for the Eastern District of Louisiana. The two trials in New Orleans will be followed by a third bellwether trial in the Southern District of Mississippi and a fourth trial in the Northern District of Texas.

Approximately 16,000 lawsuits have been filed in the U.S. against German drug manufacturer Bayer AG and Johnson & Johnson's Janssen Pharmaceuticals. Of that number, approximately 14,000 are pending in the MDL, while another 2,000 cases are pending in state courts in California, Delaware, Missouri and Pennsylvania.

Xarelto is an anticoagulant (blood thinner) initially approved in 2011 to reduce the risk of deep vein thrombosis (DVT) and pulmonary embolism (PE) following knee and hip replacement surgery. It was later approved to reduce the risk of stroke in patients with non-valvular atrial fibrillation (A-fib) and for treatment of DVT and PE. Xarelto carries a significant risk of severe, uncontrolled internal bleeding. Xarelto has been linked to gastrointestinal bleeds, rectal bleeds, brain bleeds, strokes, and bleeding-related deaths.

Louisiana native Joseph Boudreaux, Jr. is the Plaintiff in the first Xarelto trial. In January 2014, Mr. Boudreaux was diagnosed with atrial fibrillation (A-fib), and he was prescribed Xarelto to thin his blood to reduce the risk of stroke associated with A-fib. After taking Xarelto for less than a month, Mr. Boudreaux experienced severe, life-threatening gastrointestinal bleeding. Upon discovery of his severe internal bleeding, Mr. Boudreaux's doctors discontinued Xarelto and admitted him to the intensive care unit of a local hospital. Mr. Boudreaux was hospitalized for six days,

during which he received several blood transfusions, an Esophagogastroduodenoscopy (EGD), and a colonoscopy. Moreover, because of the gastrointestinal bleeding he experienced while on Xarelto, Mr. Boudreaux subsequently underwent two invasive heart procedures to treat his recurrent A-fib condition.

The second Xarelto bellwether trial involves Joseph Orr, Jr., another Louisiana resident, who filed suit on behalf of his deceased wife, Sharyn Orr. Tragically, Mrs. Orr suffered a fatal brain bleed while taking Xarelto. She was just 67 years old at the time of her death. Mrs. Orr started taking Xarelto in February 2014 for treatment of chronic A-fib. On April 24, 2015, she suddenly became severely ill. She was transported to the hospital by ambulance, where her condition continued to deteriorate to the point that she became non-responsive.

A CT scan of her head revealed Mrs. Orr was suffering from an extensive, acute hemorrhage in her brain and a hemorrhagic stroke. Because of the Xarelto in her system and the lack of a reversal agent for Xarelto, Mrs. Orr was not a surgical candidate upon her arrival at the hospital. The next day, after Xarelto had the chance to clear her system, her doctors performed a procedure to drain the excess blood from her brain. Unfortunately, the procedure came too late and Mrs. Orr's neurologic condition continued to worsen until she passed away on May 4, 2015, with her family by her side.

In the upcoming trials, the Plaintiffs' claims center on Bayer and Janssen developing and marketing Xarelto as a blood thinner that does not require coagulation monitoring, as well as the Defendants' conduct surrounding Xarelto's clinical trials. The Plaintiffs assert that the Defendants defectively designed Xarelto by failing to develop a coagulation-monitoring test specifically calibrated to Xarelto that would allow doctors to assess the coagulation status of patients. Further, Defendants failed to warn and adequately instruct doctors about the ability to measure Xarelto's anticoagulant effect on patients' blood through currently available tests.

The ability to measure Xarelto's effect on a patient's blood can identify patients at high risk of bleeding and allow for the risk of bleeding to be avoided by taking the patient off Xarelto. Further, in an emergent bleeding patient, the ability to measure Xarelto's effect on the patient's blood can identify whether that patient has been anticoagulated with Xarelto and accelerate the time when it is known to be safe to initiate life-saving surgery. Of course, the ability to

measure Xarelto's effect on a patient's blood is particularly important given the lack of an available antidote for Xarelto.

In addition to participating in the four MDL bellwether trials, discussed above, the lawyers in our Mass Torts Section will continue to review and file cases involving serious injuries or death related to Xarelto use. For more information, contact Andy Birchfield, David Byrne, Joseph VanZandt or Melissa Prickett, all lawyers in our Mass Torts Section, at 800-898-2034 or by email at Andy.Birchfield@beasleyallen.com, David.Byrne@beasleyallen.com, Joseph.VanZandt@beasleyallen.com, or Melissa.Prickett@beasleyallen.com.

JUDGE APPROVES \$12 MILLION CALDERA PELVIC MESH SETTLEMENT

Despite three dozen objectors, a California federal judge has approved Federal Insurance Co.'s proposed \$12.25 million settlement agreement, which will resolve thousands of insurance claims alleging Caldera Medical Inc.'s transvaginal mesh implant caused injuries in more than 2,700 women. Under the non-opt-out settlement, Federal Insurance agreed to distribute \$10.58 million among 2,710 class member claimants and to pay class counsel \$670,020 in attorneys' fees and costs. In exchange, the claimants will release Caldera and Federal Insurance from all future claims.

U.S. Judge Stephen V. Wilson said in his order that the settlement is fair, reasonable, adequate and "consistent with due process." The settlement brings to an end the federal interpleader suit that Federal Insurance filed against Caldera and a class of claimants in January 2015. At the time, multiple lawsuits had been filed against Caldera in California state court over its transvaginal mesh implant used to treat pelvic organ prolapse and stress urinary incontinence in women.

The suits, which were consolidated in state court, alleged that Caldera knew or should have known that the transvaginal mesh devices it manufactured and sold were hazardous and dangerous. The Plaintiffs sought damages from Caldera, which in turn filed insurance claims with Federal Insurance. Federal Insurance claimed that Caldera was depleting its \$25 million policy cap by fighting the litigation in state court, and noted that it had already paid out more than \$6.3 million in settlements even though there were thousands of additional claims pending.

Federal Insurance asked the court to certify a class of claimants and enjoin the

claimants from pursuing further suits affecting the insurance policy. The state litigation was stayed pending the resolution of the insurance suit. In December 2015, the parties reached a settlement under which Federal Insurance would pay a \$12.25 million lump sum, including a \$500,000 holdout, to resolve pending claims against it and end its policy with Caldera. Under the proposed settlement, claimants could not opt out of the settlement. However, 36 women objected to the settlement in June.

The claimants are represented by Gordon W. Renneisen of Cornerstone Law Group and David Bricker of Waters Kraus & Paul. The state litigation is *In Re. Transvaginal Mesh Litigation* (case number JCCP 4733) in the Superior Court of the State of California for the County of Los Angeles. The instant case is *Federal Insurance Co. v. Caldera Medical Inc. et al.* (number 2:15-cv-00393) in the U.S. District Court for the Central District of California.

Source: Law360.com

SERIOUS OR REPEATED EPISODES OF VERTIGO CAUSED BY DEXILANT

Dexilant (dexlansoprazole delayed-release capsule) and Dexilant Solutab are prescription drugs manufactured by Takeda Pharmaceutical Company Ltd. Dexilant and Dexilant Solutab are in a class of drugs known as proton pump inhibitors (PPI). Dexilant is approved for the following indications in patients 12 years of age or older:

- Healing of all grades of erosive esophagitis (EE);
- Maintenance of healed EE and relief of heartburn; and
- Treatment of symptomatic non-erosive gastroesophageal reflux disease (GERD).

Dexilant Solutab is approved for the following indications in patients 12 years of age or older:

- Maintenance of healed EE and relief of heartburn;
- Treatment of symptomatic non-erosive GERD.

Dexilant was first approved in 2009 for adults for indications of EE, maintenance of healed EE and treatment of heartburn associated with symptomatic non-erosive GERD. The adult dosages were dependent on the indication: 60 mg once daily up to eight weeks was the approved dosing for

healing of EE; 30 mg once daily for up to six months was approved dosing for maintenance of healed EE; and once daily for up to four months was approved dosing for treatment of heartburn associated with symptomatic non-erosive GERD. Dexilant Solutab was first approved by the U.S. Food and Drug Administration (FDA) in 2016.

In 2015, Takeda sought approval to include children aged 12 to 17 years in the approved indications for Dexilant. In July 2016, the FDA approved Dexilant for children aged 12 to 17 years.

From 2009 through 2016, there have been 5,635 reports to the FDA concerning side effects related to Dexilant. Of those, 331 (5.87 percent) of the people reporting side effects have reported vertigo. Fifty-five percent of the people reporting vertigo involved usage of less than one month, and 20 percent involved usage between one and six months. Seventy-five percent of the people reporting vertigo are female. More than 90 percent of the people reporting vertigo are older than 40.

In the prescribing information for Dexilant, the serious adverse reactions are identified as acute interstitial nephritis, *Colostridium difficile*-associated diarrhea, bone fracture, cutaneous and systemic lupus erythematosus, cyanocobalamin (Vitamin B-12) deficiency and hypomagnesemia. Common adverse reactions included diarrhea, abdominal pain, nausea, upper respiratory tract infection, vomiting and flatulence. Common adverse reactions are defined as those occurring > 2 percent.

The prescribing information identifies "less common adverse reactions" as those with an incident of less than 2 percent and includes dizziness under nervous system disorders. However, the prescribing information fails to provide any warnings or precautions that serious or repeated vertigo is a potential adverse reaction. Serious adverse events of hypertension have also been reported in association with twice daily doses of DEXILANT 60 mg, increasing the risk of stroke.

There have been reports of serious or repeated vertigo associated with the use of Dexilant. Lawyers in our firm's Mass Torts Section are currently investigating cases involving serious or repeated vertigo and Dexilant use. If you need more information, contact Leigh O'Dell or James Lampkin, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Leigh.Odell@beasleyallen.com or James.Lampkin@beasleyallen.com.

PROTON PUMP INHIBITOR LITIGATION UPDATE

As we previously reported, six federal-court Plaintiffs filed a Motion for Consolidation and Transfer in October requesting that the U.S. Judicial Panel on Multidistrict Litigation (JPML) consolidate 15 proton pump inhibitor (PPI) cases filed in 12 federal district courts. A multidistrict Litigation (MDL) transfers all cases pending in federal court to a single venue for consolidated pre-trial discovery. The JPML heard oral arguments from the Plaintiffs, as well as from Defendants AstraZeneca Pharmaceuticals LP, Takeda Pharmaceuticals USA Inc., Pfizer Inc., and Procter & Gamble Co. Jan. 26, 2017. Plaintiffs argued for a single MDL to avoid inconsistent rulings and because many Plaintiffs have used multiple PPI medications manufactured by different companies. Additionally, much of the research is not brand-specific, so a single MDL could also prevent duplicative Daubert hearings.

The seven-member JPML panel raised several concerns with the Plaintiffs' approach. The panel felt consolidating cases involving Defendants that are competitors in the marketplace could lead to the inadvertent disclosure of trade secrets during discovery. The panel was also concerned about bogging the MDL court down with Daubert hearings on the admissibility of scientific expert witness testimony for each individual product. At one point during oral arguments, U.S. District Judge Sarah Vance stated, "It just seems to be to be nightmarishly complex." Ultimately, the JPML agreed and declined to create a PPI MDL.

Despite the denial, Plaintiffs continue to file lawsuits alleging that PPI medications caused them to develop kidney disease. Thus far, more than 100 cases have been filed, with law firms, including our firm, currently investigating thousands more. With an estimated 15 million Americans depending on these medicines for relief from acid reflux, those numbers will likely continue to grow. PPIs are a group of drugs that block the production of gastric acid. Among the most-used PPIs are Prilosec, Prevacid and Nexium.

Beginning in the 1990s, studies have linked PPIs to a type of kidney disease called Acute Interstitial Nephritis (AIN). This is a condition where the spaces between the tubules of the kidney cells become inflamed. Later studies have suggested that PPI users are also at an increased risk of Chronic Kidney Disease (CKD).

Research linking PPIs to kidney disease continues to grow. In February 2017, a five-year study was published in the journal

Kidney International, which found that PPI users were at a higher risk for CKD and acute kidney injury than users of H2 blockers like Zantac or Pepcid.

Lawyers in our firm's Mass Torts Section are currently investigating cases involving PPI use and Acute Interstitial Nephritis (AIN), Acute Kidney Injury (AKI or Acute Renal Failure), and Chronic Kidney Disease (CKD). If you would like more information, contact Roger Smith or Liz Eiland, lawyers in the Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com or Liz.Eiland@beasleyallen.com.

Sources: Law360.com and CBS News

AN UPDATE ON 3M BAIR HUGGER LITIGATION

Beasley Allen lawyers Megan Robinson and Matt Munson continue to investigate and file lawsuits involving 3M's Bair Hugger warming device. A multidistrict litigation (MDL) is currently underway in the United States District Court for the District of Minnesota with Judge Joan N. Ericksen presiding over the litigation.

I doubt that all of our readers are familiar with the 3M Bair Hugger. It is a forced hot air warming blanket, used primarily to help maintain a patient's body temperature during surgery. The 3M Bair Hugger pushes warm air through a flexible hose into a blanket draped over a patient. However, warming blankets can recirculate contaminated air over a patient's body, including over an open surgical site. This may result in infections like MRSA or sepsis. In particular, patients undergoing knee or hip replacement surgery are at risk of infections deep in the joint, which are very difficult to treat. Complications from these infections include hospitalization, implant revision surgery, limited mobility, permanent disability, amputation, and death.

Bair Hugger inventor Dr. Scott Augustine expressed concern that his invention could have an increased risk of spreading infection and spoke out against its continued use in 2010. Dr. Augustine told *The New York Times* in a December 2010 interview: "I am very proud of the old technology... But I am also proud to spread the word that there is a problem." Dr. Augustine presented studies proving his device can increase infections, which were dismissed by 3M as flawed and inconclusive. Nevertheless, the Bair Hugger has not been recalled. It is still in widespread use in hospitals and surgery centers around the country.

Generally, to move forward with a case, there must be proof that the Bair Hugger was used on the patient intraoperatively,

usually during an open orthopaedic procedure such as a total hip or total knee arthroplasty, and the patient did not have any preexisting joint problems or prior infections or contraindications for Bair Hugger. Patients affected by Bair Hugger usually manifest symptoms within one to two years following use, and injuries can include but are not limited to periprosthetic joint infections requiring additional surgeries to remove infected devices and tissue, and, potentially, amputation.

If you need more information or believe you may have a potential Bair Hugger claim, please contact Megan Robinson or Matt Munson at 800-898-2034 or by email at Megan.Robinson@BeasleyAllen.com or Matt.Munson@BeasleyAllen.com.

Source: *The New York Times*

APPEALS COURT AFFIRMS \$2.1 MILLION JURY VERDICT IN WRIGHT HIP IMPLANTS SUIT

The Eleventh Circuit Court of Appeals has affirmed a \$2.1 million jury verdict in favor of a patient who won the first bellwether trial against Wright Medical Technology over its defective metal hip implants. The three-judge panel agreed with U.S. District Judge William Duffey's determination that the jury's findings on the verdict form were inconsistent and indicated that the jurors did not understand the instructions on the verdict sheet. The panel found that Judge Duffey acted within his discretion in directing the jurors to deliberate further and make sure they fully understood those instructions.

Ms. Christiansen is represented by Michael McGlamry, William Norwood, N. Kirkland Pope and C. Neal Pope of Pope McGlamry PC, Helen Zukin of Kiesel Law LLP, and Ray Boucher of Boucher LLP. The case is *Christiansen v. Wright Medical Technology Inc.* (case number 16-12162) in the U.S. Circuit Court of Appeals for the Eleventh Circuit. The underlying MDL is *In re: Wright Medical Technology Inc. Conserve Hip Implant Products Liability Litigation* (case number 1:12-md-02329) in the U.S. District Court for the Northern District of Georgia.

Source: Law360.com

X. AN UPDATE ON SECURITIES LITIGATION

ANTHEM CIGNA MERGER

Recently, a federal judge blocked Anthem's \$54 billion acquisition of Cigna, saying the merger of two of the nation's largest insurers would make it harder for large national employers to get competitive rates for health insurance. The injunction has been big news because it is so rare to happen. "The evidence has shown that the merger is likely to result in higher prices," U.S. District judge Amy Berman Jackson wrote in the ruling. The order said further:

Anthem is encouraging the Court to ignore the risks posed by the proposed constriction in the health insurance industry... on the grounds that consumers might benefit from the large size of the new company in other way at the end of the day.

Judge Jackson agreed with the Department of Justice's argument that the combination of Anthem and Cigna would reduce the number of health insurers able to provide coverage on a national level from four to just two.

Analysts have said for months that the two firms faced an uphill battle because of their overlap in the employer market. "This merger was really a tough one to get through from the get go, because of the concentration of national accounts and there really wasn't any way to remedy anti-competitive effects," said antitrust lawyer Matthew Cantor, a partner at the law firm of Constantine Cannon.

The American Medical Association, one of a number of health care groups that had opposed the merger, welcomed the judge's ruling. "The significant absence of health insurer competition in most markets is detrimental to patients and poses an important public policy problem," said Dr. Andrew Gurman, president of the American Medical Association, in a statement.

Lawyers at Beasley Allen are working with other firms on the Blue Cross Blue Shield Antitrust multidistrict litigation (MDL) where a major focus is the national accounts market. National accounts are large employers that have employees living in more than one state. Anthem, as a Blue Cross Blue Shield licensee, is a heavy-hitter in that market. According to the opinion, enjoining the merger is necessary because

the "high level of concentration in the market that would result from the merger is presumptively unlawful." By enjoining the merger, Judge Jackson gave a big win to individuals and employers affected by the national accounts market.

If you need more information, contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud & Commercial Litigation, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Sources: opinion and CNBC

XI. INSURANCE AND FINANCE UPDATE

LINCOLN FINANCIAL GROUP SETTLES CLAIMS FOR \$52 MILLION

Lincoln Financial Group Inc. has agreed to pay \$52 million to settle a New York regulator's claims that it lost track of thousands of insurance policies after its 2006 merger with Jefferson-Pilot Corp., causing severe delays in settling some claims. The company agreed to pay \$50.7 million as compensation to customers and a \$1.5 million fine to the New York State Department of Financial Services (DFS). This settlement comes after customers in some cases experienced years of delays on their claims due to processing problems caused by the combination of Lincoln and Jefferson-Pilot's claim management systems. Simply put—Lincoln lost track of the customers' policies. DFS Superintendent Maria T. Vullo said in a news release:

While we appreciate the steps that Lincoln has taken towards making beneficiaries whole, we stress the importance of keeping consumers from falling through the cracks during mergers and other types of business interruptions. Consumers must be confident that their insurers are taking the necessary steps to maintain records, communicate claims processes, and make payments to beneficiaries.

The DFS said, due to technical problems integrating the two companies' claim systems and a failure to properly train employees, some policyholders had to wait weeks, months and even years before their claims could be processed. Approximately 1,000 New York residents were affected, according to the DFS. The agency alleged that beginning with an internal audit com-

pleted in June 2008, employees repeatedly reported backlogs of unpaid claims to mid-level management, but that no action was taken until early 2014. At that time an internal investigation was started, but the DFS was not notified until April 2015. The agency said the company did fully cooperate with its investigation after making the report. An agency spokesman said in an email that all policies held by New York residents have been recovered. The DFS said it is also requiring Lincoln to enhance its policies and procedures to avoid problems with claims processing system compatibility in any future mergers.

Technical problems cost the company \$650,000 last year, when it agreed to pay a fine from the Financial Industry Regulatory Authority over a security breach at a subsidiary. Indiana-based Lincoln Financial Securities Corp. paid the fine after hackers in mid-2012 accessed its cloud server and lifted the confidential records of about 5,400 customers. The current case is *In the Matter of Lincoln National Corp. et al.*, before the New York State Department of Financial Services.

Source: Law360.com

XII. EMPLOYMENT AND FLSA LITIGATION

SECURITY GUARDS' \$110 MILLION "ON-CALL" BREAK SETTLEMENT "CLOSE" TO APPROVAL

A California state judge has requested unopposed changes to ABM Security Services' \$110 million settlement to resolve claims that 15,000 guards were unlawfully required to carry radios and stay "on call" during rest breaks. Judge John Shepard Wiley Jr. said during a preliminary approval hearing that the 12-year-old case "is getting very close to final resolution."

Lead Plaintiff Jennifer Augustus filed suit back in 2005 alleging that ABM's policy requiring the guards to carry radios during breaks violated the state's Labor Code because an employee who is on call is not on a break. A lower court awarded the guards \$89.7 million in damages, but the Court of Appeal later reversed the decision, saying that being on call didn't violate the requirement to have a rest break.

The guards took the case to the California Supreme Court. In December, that Court ruled for the guards, finding that the Industrial Welfare Commission's Wage

Order 4 prohibits on-duty and on-call rest periods.

The case returned to Los Angeles County Superior Court, with the parties seeking preliminary approval of ABM's \$110 million settlement, which represents the original judgment plus interest. In addition, while the previous award provided for attorneys' fees of 30 percent of the settlement fund for work performed up through the \$89.7 million judgment, the agreement before the court included an additional 5 percent for additional work performed postjudgment at the court of appeal and the Supreme Court.

Judge Wiley told the parties he was putting off the decision until April, and asked for a few changes to the settlement agreement. Specifically, the Judge awarded charges to the notice that would be provided to the class members. However, Judge Wiley wrapped the proceedings up on a positive note, thanking counsel "for everyone's very long and sustained efforts on this case, which is getting very close to final resolution." These are the changes requested by Judge Wiley:

- The lawyers were told to "consider removing the word 'federal' from the release or creating a mechanism for class members to opt in for the purpose or releasing [Fair Labor Standards Act] claims."
- The lawyers were asked to simplify the objection procedure so objections need only be mailed to the claims administrator, "who can promptly forward the objections to counsel," instead of requiring class members to submit their concerns to both the administrator and counsel.
- The parties were to remove any requirement restricting those class members or their representatives who wish to be heard at the final approval hearing to those who submit written objections.
- The class notice should be amended to "provide that the parties will provide responses to any objections at the time the motion for final approval is filed" and sought to have the check cashing deadline extended from 120 days to 180 days.
- Counsel were asked to address the issue of whether class members should be given another opportunity to opt out.

Despite the list of requested changes, based on comments from Judge Wiley, it appears the settlement will be approved this month. The single certified class in the matter is defined as all persons employed

by ABM in any security guard position from July 12, 2001, to July 1, 2011, who worked a shift exceeding four hours without being allowed to take an uninterrupted rest period.

The Plaintiffs are represented by Michael Breen Adreani, Drew E. Pomerance and Marina N. Vitek of Roxborough Pomerance Nye & Adreani LLP; Jeffrey Isaac Ehrlich of The Ehrlich Law Firm; Monica Balderrama and G. Arthur Meneses of the Initiative Legal Group LLP; Scott Edward Cole and Matthew R. Bainer of Cole & Associates; and Alvin L. Pittman. The case is *Jennifer Augustus v. American Commercial Security Services et al.* (number BC336416) in the Superior Court of the State of California, County of Los Angeles.

Source: Law360.com

XIII. WORKPLACE HAZARDS

JURY AWARDS \$1.2 MILLION IN CHEVRON FATAL FALL SUIT

A federal jury has returned a \$1.2 million verdict in favor of Sharon Coffey in her suit against Chevron USA Inc. for the wrongful death of her husband. The jury found the company was at least "partially at fault" for his death. Thomas Coffey died in 2014 when he fell into Chevron's Glencoe Junction Sulfur Terminal in Wyoming. The jury found Chevron to be 63 percent at fault. Coffey, a truck driver for Bonneville Transloaders Inc., was at Chevron's facility to pick up a load of molten sulfur. Tyson Logan, one of Mrs. Coffey's lawyers, told Law360:

The jury recognized that Chevron broke some really basic safety rules, and its own safety rules, and caused this man's death. After hearing a week and a half's worth of evidence, the jury recognized his life was valuable and wanted to make it right for Sharon.

It was reported that Thomas Coffey was working inside Chevron's safety cage using Chevron's sulfur-loading equipment when he fell to his death. The safety cage was originally designed to include three safety rails, but was missing the bottom third rail. The Plaintiff contended that Chevron was negligent for failing to keep its property in a reasonably safe condition, saying that Chevron was negligent by removing the

bottom guardrail of its safety cage and not providing proper fall-protection equipment. The Plaintiff claimed that Chevron's employees knew of the missing bottom rail before the fall and had both the time and the opportunity to eliminate the unsafe condition and guard against the fall hazard.

Chevron contended that the Glencoe Junction Sulfur Terminal was properly maintained in a reasonably safe condition for use by drivers loading molten sulfur into the tankers. It said that Thomas Coffey's employer, BTI, didn't provide him with the proper training and that he made several mistakes that caused the accident.

The Plaintiff is represented by Noah W. Drew and Tyson Logan of the Spence Law Firm. The case is *Coffey v. Chevron USA Inc.* (case number 2:16-cv-00001) in the U.S. District Court for the District of Wyoming.

Source: Law360.com

SLEEP DEPRIVATION CAN INCREASE RISK FOR WORKPLACE INJURY

Some folks fall asleep as soon as their heads hit their pillows, while others are often left "counting sheep." But regardless of where a worker falls on that spectrum, chances are they are still not getting enough sleep. A study released by RAND Europe late last year estimated, according to EurekAlert, lack of sleep among U.S. workers costs the economy \$411 billion a year, with an estimated 1.2 million working days lost each year due to missed work or a lack of productivity. And while losing money is a definite negative, sleep deprivation can also have adverse effects on safety. After all, sleep deprivation likely would not help prevent safety violations, like a missed inspection or forgotten safeguard. Lacking sleep can be as dangerous as alcohol impairment. Industrial Safety & Hygiene News (ISHN) reports lack of sleep can impede judgment, manual dexterity, and alertness, all increasing safety risks.

According to a 2010 study reported by ISHN, Canadians who worked night and rotating shifts were almost twice as likely to be injured at work when compared with those working regular day shifts. If one in three adults does not get enough sleep, which is considered at least seven hours each night, as the Centers for Disease Control and Prevention found in 2016, then the problem of industries sacrificing safety due to sleep deprivation is likely widespread. Sleep deprivation can also affect safely getting to and from a job, not just at the job itself.

Drowsy driving directly results in an estimated 100,000 vehicle crashes and 71,000 injuries each year, according to the National Sleep Foundation. No regulations from the Occupational Safety and Health Administration (OSHA) directly address sleep deprivation, but knowing who is fit for duty and encouraging employees to be well rested can help them better adhere to safety regulations and make for a more productive work environment, a win-win situation.

If you need additional information, contact Kendall Dunson, a lawyer in our firm's Personal Injury & Product Liability Section, at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com.

XIV. TRANSPORTATION

TRUCK DRIVER FATIGUE INCREASES CRASH RISKS

While driving down the road, many of us have witnessed a car swerve from its lane. When that happens, we hold our breath, hoping the car returns safely back to its place in the traffic pattern. But what happens when the swerving vehicle is larger than a car? What if it is a heavy truck, hauling freight hundreds or thousands of miles? The vehicles might not make it back on the road due to truck driver fatigue. Truck driver fatigue is becoming a more apparent issue, but efforts to protect truck drivers and other travelers on America's roadways are often thwarted.

In December 2011, the U.S. Federal Motor Carrier Safety Administration (FMCSA) published a new federal rule that reduced the maximum workweek for truckers to 70 hours and required drivers to take 34 hours off duty before starting another workweek, according to FMCSA Hours of Service Regulations. The rule also required the off-duty time to include two periods between 1 a.m. and 5 a.m.

The New York Times reported the regulation received strong opposition from the trucking industry, where time on the road translates directly to profits. Critics said the new regulation placed more drivers on the road during heavy traffic times without addressing safety concerns, and the specific off-duty time periods have been suspended pending further research.

There is clear and convincing evidence that fatigued heavy truck driving is undoubtedly a safety concern. In the expla-

nation of its December 2011 regulations, the Department of Transportation wrote:

Additionally, new research available on the subject demonstrated that long work hours, without sufficient recovery time, lead to reduced sleep and chronic fatigue. That fatigue leads drivers to have slower reaction times and a reduced ability to assess situations quickly ... Too often, fatigued drivers fail to notice that they are drifting between lanes.

Safety investigators told *The New York Times* that sleepy or drowsy driving is far more problematic than it is perceived to be. The exact number of accidents caused by heavy trucks is difficult to determine. For example, a 2007 FMCSA Large Truck Crash Causation Study found, "Fatigue, drinking alcohol, and speeding are major factors in motor vehicle crashes overall," but the study lumped falling asleep with being physically impaired for other reasons, such as a heart attack, all under the "non-performance" causes of crashes.

The problem of drivers falling asleep at the wheel is cited as the specific cause of many crashes involving tractor trailers. *The New York Times* cites a 2009 crash that killed 10 people in Missouri due to a 76-year-old truck driver falling asleep at the wheel at 2:30 a.m. as an example. Certainly, making a profit is a crucial goal for the trucking industry and the merits of potential regulations should be evaluated, but doing so at the expense of the safety of truckers and the public is cause for concern.

Truck drivers need rest for their own safety and that of the public, and guaranteeing them that rest saves lives. Beasley Allen lawyer Chris Glover, who is in our Atlanta office, handles cases of personal injury and death involving heavy trucks, log trucks, 18-wheelers and other commercial vehicles. For more information about these types of claims, contact Chris by email at Chris.Glover@beasleyallen.com. Chris also recently wrote a book about trucking litigation, *An Introduction to Truck Accident Claims: A Guide to Getting Started*. This book is free to lawyers. To get your copy, visit www.chrisglover-law.com/book.

Sources: Federal Motor Carrier Safety Administration, Department of Transportation

RECENT INCREASE IN SMALL AIRPLANE CRASHES RAISES QUESTIONS ABOUT SAFETY

In a span of one week in February (19-26) two small airplanes crashed in the

New York Metro area. The crashes and 18 similar crashes that occurred throughout the state last year prompted Senator Charles Schumer (D-NY) to call for a special National Transportation Safety Board (NTSB) investigation, according to *Flying Magazine*. A press release from Senator Schumer's office included the text of a letter from the senator to NTSB Chairman Christopher A. Hart. The letter requested that the agency conduct a "comprehensive safety review" of the crashes "in order to help develop recommendations that could prevent future incidents." It emphasized the need for the NTSB to look at the crashes as a whole and consider all related safety issues in New York and nationwide.

Citing information from the U.S. Federal Aviation Administration (FAA), NewsDay reports that the number of fatal small plane accidents dropped from 272 in 2010 to 238 in 2015. However, in the first two months of the year, NTSB data shows there have been 30 fatal crashes in the United States involving small planes and helicopters compared with 20 fatal crashes during the same period in 2016. So, while data shows that general aviation safety has improved, the spike in crashes over the last 14 months supports Senator Schumer's call for a deeper look at the more recent crashes.

The New York Times notes that small, private planes, which are under the general aviation classification for aircraft regulated by the FAA, have been responsible for a majority of the fatal crashes for a number of years. In 2014, which is the latest data available, nearly 95 percent of the fatal crashes occurred under the general aviation classification. General aviation is regulated by a different set of the Federal Aviation Regulations (FARs) than commercial aviation. Some industry experts argue the general aviation FARs are less stringent than what is necessary to encourage a culture of safety.

While significant resources and public-private partnerships between the federal government and industry groups have been dedicated to reducing general aviation accidents and the number of accidents have declined, industry experts say that the number is still "unacceptably high." The NTSB cites loss of control as the cause of nearly half of the general aviation crashes, according to AIN Online citing NTSB data.

A fatal crash due to loss of control occurs every four days based on the NTSB's latest data. In response to the data it collects each year, the NTSB also publishes a Most Wanted list of safety recommendations it believes will help improve safety and further reduce the number of crashes. A

number of those recommendations focus on reducing pilot error. The article underscores that while it is incumbent upon pilots to be better trained and to make more prudent decisions, the industry as a whole must embrace a culture of safety.

Senator Schumer summed it up this way, "The bottom line... is when small planes are crashing smack in the middle of neighborhoods... you've got to start demanding answers."

Mike Andrews, a lawyer in our Personal Injury & Product Liability Section, handles aviation litigation for our firm. If you would like to talk with Mike about a case, call him at 800-898-2034 or email Mike.Andrews@beasleyallen.com. He will be glad to talk with you.

Sources: Charles E. Schumer United States Senator for New York, *Flying Magazine*, *NewsDay*, AIN Online

XV. HEALTHCARE ISSUES

FDA PROBING ABBOTT DEVICE'S HIGHER RATE OF CARDIAC EVENTS

The U.S. Food and Drug Administration (FDA) recently told health care providers that there is an increased rate of major cardiac events seen in patients treated with an Abbott Inc. medical device implanted during heart surgery. Providers were told to be sure to follow recommendations for its implantation. In a March 18 letter, the FDA said that there is a higher rate of adverse cardiac events seen in patients treated with Abbott's Absorb GT1 Bioreabsorbable Vascular Scaffold, or BVS, compared to those treated with another Abbott-made device, the Xience stent. The BVS is implanted during an angioplasty and it gradually dissolves over time and is absorbed by the body. The BVS is used to open coronary arteries blocked by scar tissue in order to increase blood flow to the heart muscle. The FDA approved the device in July of last year.

In its initial review of two-year data from a pivotal study of the BVS, the FDA said that there is an 11 percent rate of major events like heart attacks or the need for another procedure to reopen the heart vessel, compared with a nearly 9 percent rate in patients treated with the Xience stent. The study also shows a close to 2 percent rate of developing blood clots with the BVS, compared to a lower than 1 percent rate with the Xience stent, the FDA said. "These

observed higher adverse cardiac event rates in BVS patients were more likely when the device was placed in small heart vessels," the FDA wrote in the letter.

Another analysis suggests that there's a lower rate of complications when health care providers follow the recommended implantation methods, the FDA said. The agency told health care providers to avoid using the BVS in small heart vessels, as per its instructions, and to tell patients who experience new cardiac symptoms such as irregular heartbeats, chest pain or shortness of breath to seek medical attention.

The FDA also told providers to follow the instructions for best device implantation, which are included in the BVS physician labeling. An Abbott spokeswoman told Law360:

The FDA's letter to health care providers emphasized the importance of following instructions for use when implanting Absorb. When implanted in appropriately sized vessel sizes and following current instructions for use, the results for Absorb are comparable to the leading metallic drug-eluting stent—with the added feature of leaving no metal behind once it dissolves.

The FDA said that it is working with Abbott to carry out more analyses to better understand the causes of higher cardiac events and blood clots in patients treated with BVS compared with those treated with the Xience stent. "The FDA will continue to monitor the performance of the BVS in ongoing clinical studies and in reports submitted to FDA through MedWatch," the agency said. The FDA urged providers to report any adverse events related to the BVS that comes to their attention and to submit a voluntary report through MedWatch, its safety information and adverse event reporting program, if they suspect any problems with the device.

Source: Law360.com

IMMUNOTHERAPY AS A POSSIBLE STRATEGY FOR PLEURAL MESOTHELIOMA PATIENTS

Researchers have been investigating the viability of immunotherapy as a therapeutic strategy for the treatment of malignant pleural mesothelioma. While immunotherapy is an important emerging strategy for many types of cancer, results are still inconclusive as to whether it will become a viable approach for mesothelioma.

Researchers at the University of Salford in the United Kingdom have published a new report calling the use of immunother-

apy drugs “largely questionable” for pleural mesothelioma treatment. While the clinical efficacy of these drugs has been called into question, researchers have also expressed concern over the safety and tolerability of drugs such as tremelimumab in mesothelioma patients. Tremelimumab is an immune checkpoint inhibitor designed to interrupt a mechanism that helps mesothelioma cells avoid detection by the immune system. By binding to a protein called CTLA-4, tremelimumab helps the immune system recognize and kill mesothelioma cells.

The problem is, in malignant mesothelioma this blocking mechanism is only moderately effective. Multiple studies have shown mixed results. A recent meta-analysis of tremelimumab studies concluded that the drug tended to trigger immune related adverse events in mesothelioma patients. These events led the Salford team to express concern over the drugs’ cost-benefit ratio, and observe that, at the very least, tremelimumab should not be used to fight mesothelioma on its own. An Australian study published in the fall of 2016 called the recent studies on immune checkpoint inhibitors disappointing and also recommended that the drugs be used in combination with other treatment options.

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

Source: <https://survivingmesothelioma.com/immunotherapy-for-pleural-mesothelioma-does-it-work/>

XVI. ENVIRONMENTAL CONCERNS

BP CLAIMS PROCESSING UPDATE

The *Deepwater Horizon* Economic & Property Damages Settlement Program (Settlement Program) continues to make significant progress since it opened in June 2012. As of January, it has resolved 90 percent of the nearly 388,000 claims filed and paid almost \$9.7 billion to eligible claimants. Of the 10 percent of claims remaining, only 1.6 percent have not been reviewed. Processing continues to pick up in pace as Claims Administrator Patrick Juneau seeks to resolve all claims by the end of the year. Statistics released from his office illustrate the progress made and work that remains:

- Business Economic Loss Claims comprised nearly 35 percent of the claims filed and received the lion’s share of the payments, totaling to more than \$6.3 billion.
- The Seafood Compensation Program was allotted \$2.3 billion and is reserved for commercial fishermen. More than \$2.2 billion has been paid to 5,357 claimants. Residual payments of this fund have also been made, completing the review of these claims.
- Individual Economic Loss claimants (i.e. lost wage claims) have been paid \$90.4 million.
- Subsistence claimants received \$296 million. Unlike other claims which can corroborated by third party documentation, subsistence claims are based on a claimant’s sworn testimony. This necessarily requires a thorough investigation and follow-up interviews with claimants to confirm the accuracy of the information. Despite these hurdles, only 1.1 percent of these claims is still under review.
- The review of Coastal Real Property and Real Property Sales claims has been completed, with payments totaling \$160.5 million and \$40.5 million, respectively. Nearly 12 percent of the Wetlands Real Property claims are still under review while the other 88 percent have received \$204.4 million.

These statistics show the impressive job Claims Administrator Juneau has done in overseeing and implementing the largest private settlement claims process. Sifting through the sheer volume of claims while simultaneously addressing the concerns of both claimants and BP is no small feat. As the Settlement Program nears its fifth year of operation, all parties are ready to move on to the Halliburton and Transocean Settlements.

At this point, not all of the details are known about how these settlements will be implemented. The Halliburton and Transocean Settlement Program will distribute \$1,239,750,000 according to the Claims Administrator’s Distribution Model, which was approved by Judge Carl Barbier on Feb. 15, 2017. This model will pay a vast majority of these funds (72.8 percent) to “New Class” claimants, which includes owners whose property was physically oiled, local governments, entities who opted out of the BP settlement, and those who submitted certain BP claims (coastal wetlands, fishermen, subsistence, and property claims). The remaining funds will

go to “Old Class” members, which include hundreds of thousands of businesses and individuals who previously filed claims and were compensated under the BP settlement.

Most payments will be distributed *pro rata* and will be based on what was received in the BP settlement. As a result, the BP Settlement Program should wrap up before the Halliburton and Transocean Settlement Program can get underway.

Source: www.deepwaterhorizoneconomicsettlement.com

INDIANA RESIDENTS PETITION EPA OVER LEAD-TAINTED WATER

Residents of East Chicago, Indiana, have petitioned the U.S. Environmental Protection Agency (EPA) to take emergency action due to the high levels of lead and arsenic in the city’s drinking water. The residents have requested the EPA to take emergency steps to remove the contaminants because city and state efforts have been insufficient to secure an immediate, safe drinking water source.

Exposure to elevated levels of lead can cause increased blood pressure and incidence of hypertension and decreased kidney function in adults; reduced growth of the fetus and premature birth in pregnant women; and behavior and learning problems, lower IQ, hyperactivity, and slowed growth in children.

According to the petition, more than 40 percent of homes tested at East Chicago’s USS Lead Superfund Site had elevated levels of lead in their drinking water. The EPA had issued a report in January 2017 stating that 30 homes in that area had lead levels in their tap water exceeding the “action level” of 15 parts per billion. According to the EPA, there is no safe level of lead exposure, even at levels below 15 parts per billion.

The city’s lead problem is exacerbated because its contamination is systemic, caused by lead service lines and insufficient corrosion control treatment by the water system. While the City has publicly stated that it does not have sufficient resources to conduct continued water testing, the EPA has informed residents that they should simply assume the presence of lead service lines in their homes and should use certified water filters to reduce exposure.

If you would like more information about these cases, you can contact Grant Cofer, a lawyer in our firm’s Toxic Torts Section. Grant can be reached at 800-898-

2034 or by email at Grant.Cofer@beasley-allen.com.

Source: Law360.com

INDIANA HOMEOWNERS CONTINUE TO FIGHT FOR REMAND IN GROUNDWATER POLLUTION CASE

In May of 2014, Indiana residents filed a class action lawsuit arising out of alleged environmental contamination that originated at a plant formerly operated by defendant Johnson Controls, Inc. Another Defendant, Tocon Holdings LLC, had purchased the plant from Johnson Controls and later demolished it, allegedly knowing it was contaminated. It was alleged that Tocon Holdings did nothing to stop the pollution from flowing onto the homeowners' properties or to warn them of the potential danger. The Plaintiffs, a number of individuals who own property or reside in an adjacent neighborhood, alleged that contamination primarily consisting of trichloroethylene (TCE) entered the groundwater and migrated onto their properties.

The Plaintiffs filed the action in state court, asserting a number of claims arising under state law, including common law claims for trespass, nuisance, negligence, negligent infliction of emotional distress, and punitive damages, and a statutory environmental legal action claim. The proposed class consisted of individuals who have owned, rented, or occupied properties affected by the contamination. After litigating the case in state court for nearly a year, Johnson Controls filed a notice of removal, invoking federal jurisdiction under the Class Action Fairness Act. In response, the Plaintiffs moved to remand this action back to state court. However, that request was denied in July 2016. That was because the Plaintiffs had not yet satisfied their final requirement that two-thirds of the class have citizenship within Indiana.

Recently, the Plaintiffs fought back against Johnson Controls' efforts to keep the proposed class action in federal court, claiming they have the evidence to prove their case belongs in state court and that the company is improperly fighting to block them from proving the citizenship requirement has been met. The Plaintiffs hired a statistician who they say can show the proposed class of more than 772 people met the standard. The Plaintiffs have filed a renewed motion to remand. Johnson Controls filed a motion to strike that motion, which the Plaintiffs say is not the proper response.

According to the Plaintiffs, the district court's previous order did not find that less than two-thirds of the proposed class

resides in Indiana, but rather that the Plaintiffs failed to present "statistically reliable methodology" to prove the citizenship of the class. The Plaintiffs state that the renewed motion to remand presents the type of statistically reliable evidence the court said it would need to assess the citizenship of the class.

Sources: Law360.com

VERMONT RESIDENTS FIGHT TO KEEP PFC CLASS ACTION ALIVE

Residents of North Bennington and Bennington, Vermont, have filed a class action lawsuit against Saint-Gobain Performance Plastics Corp. (Saint-Gobain), accusing the company of releasing perfluorooctanoic acid (PFOA) into the atmosphere, from which point the chemical contaminated local soil and drinking water. As we have previously reported, PFOA is a synthetic chemical that has been linked to kidney cancer, testicular cancer, and ulcerative colitis, among other diseases.

According to the class action filings, the Vermont Department of Environmental Conservation has sampled drinking wells and found that nearly two thirds of the wells within a 1.5 mile radius of the company's plant were contaminated with PFOA. The complaint has alleged claims of negligence, trespass, private nuisance, and battery against Saint-Gobain.

Saint-Gobain has filed a motion to dismiss, arguing that these claims should be thrown out in part because groundwater is state (not private) property under Vermont law, and therefore no individual Plaintiff can state a claim for physical injury to their property or person. However, the putative class claims that PFOA contamination has diminished their personal property values and has caused real damages actionable under Vermont law. The Plaintiffs argue that the Vermont Groundwater Protection Act not only creates a right of action for private Plaintiffs, but expressly reaffirms that private landowners can continue to bring common law tort claims.

Landowners in the Vermont cities claim a property interest in their drinking wells, and argue that the contamination of those wells constitutes an invasion of their property rights. The class further wants Saint-Gobain to pay for medical monitoring for city residents given the link between PFOA and multiple forms of cancer.

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

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

Source: Law360.com

CHICAGO AIRPORT SAYS HONEYWELL MUST PAY FOR CLEANUP COSTS

The Gary/Chicago International Airport Authority has sued Honeywell International, Inc., seeking compensation for cleanup costs related to hazardous waste that contaminated its property. The lawsuit, filed in Indiana federal court, alleges that the company is responsible for an estimated \$2.5 million in past and future cleanup costs pursuant to the Comprehensive Environmental Response, Compensation and Liability Act. Various hazardous wastes, including petroleum constituents and volatile organic compounds, allegedly migrated onto the airport's property and spread to groundwater and into an adjoining ditch.

The Authority's lawsuit is the most recent action in an ongoing effort to remedy contaminated property adjacent to the airport. The Conservation Chemical Company of Illinois (CCCI) operated a 4.1-acre parcel next to the airport's main runway until 1985. Shortly after CCCI vacated the premises, the Environmental Protection Agency (EPA) tried to clean up contaminated soil and groundwater at the site. The EPA named Honeywell as a potential responsible party since it discharged these chemicals onto CCCI's former site.

The EPA's efforts did not include off-site groundwater or the Boeing Ditch, which eventually discharges into the Grand Calumet River. In 2014, the Indiana Department of Environmental Management required the Authority to investigate and mitigate this offsite contamination. Thus far, it has spent \$500,000 and expects future costs to total more than \$2 million.

The Authority has struggled to keep the airport property free of hazardous chemicals. Two years ago, it sued former owners of land annexed by the Authority that was formerly a storage site for hazardous chemicals when. The Authority incurred almost \$2 million to address those concerns.

Sources: Law360.com and *Chicago Tribune*

ASBESTOS-RELATED DEATHS ARE NOT DECREASING DESPITE EFFORTS TO REDUCE EXPOSURE

In early March 2017, the U.S. Centers for Disease Control and Prevention (CDC) released a report stating that the number of deaths related to malignant mesothelioma

increased from 2,479 in 1999 to 2,597 in 2015. While the largest increase in number of deaths was seen amongst those older than 85, younger populations continue to be affected as well. During the 16-year period studied, there were 16,914 people 75-84 years old who died of malignant mesothelioma; in that same period, 682 people between the ages of 25 and 44 died of the disease. Researchers at the CDC are currently unable to explain why younger populations continue to suffer from asbestos-related issues, as there is insufficient information regarding exposure among those age groups.

Asbestos is composed of six naturally occurring minerals. Because of their flexibility, resistance to heat, and low cost, these mineral fibers became popular for use in manufacturing during the 20th century. Asbestos was used in home insulation, car brakes, hair dryers, cigarette filters, and many other common products. When it was discovered that asbestos fibers could become embed in lung tissue, potentially causing mesothelioma, the EPA banned most asbestos-related products. However, almost 40 years after the fact, folks born after the mineral was banned continue to fall victim to asbestos-related mesothelioma.

Occupational exposure to asbestos is the most common method of exposure. The likelihood of developing mesothelioma after exposure to asbestos cannot be accurately predicted, and unfortunately the prognosis upon diagnosis is rather grim. There do not yet exist any available methods proven to reliably improve a patient's survival rate through early detection of malignant mesothelioma. However, there are many methods currently being investigated. Hopefully, those will be successful.

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

Source: CNN.com

OKLAHOMA TRIBE ATTRIBUTES PROPERTY DAMAGE TO FRACKING

The Pawnee Nation claims the fracking operations of two oil companies triggered a record-breaking earthquake that caused significant damage to its tribal government buildings. The lawsuit, filed in tribal court against Eagle Road Oil, LLC and Cummings Oil Co., alleges that damages were attributable to more than 53 earthquakes over a two-month span, including a record 5.8

magnitude earthquake that occurred Sept. 3, 2016.

Fracking involves using water and other fluids under high pressure to fracture deep rock formations to reach previously untapped pockets of natural gas. The specific contents of fracking fluids are unknown because drillers consider them to be proprietary, but they are generally comprised of water and other chemicals such as friction reducers, surfactants, gelling acids, corrosion inhibitors, antibacterial agents, sand, and clay stabilizers. Approximately 90 percent of all natural gas wells in the United States now use fracking to improve production rates.

The tribe claims the companies' injection of wastewater caused "unnatural seismic activity" or manmade earthquakes. These earthquakes allegedly caused cracks to interior and exterior walls, plaster, ceilings, windows, and mortar of Pawnee governmental buildings, some of which are more than 100 years old and carry historical significance. Typical operations and activities have also been disrupted or suspended due to the damage. The complaint seeks property damages, market value losses to the property, and punitive damages.

The tribe has already sued the Department of the Interior and its Bureau of Indian Affairs and Bureau of Land Management for approving permits without fully considering their impact on the environment as required by the National Environmental Policy Act and other federal statutes. As reliance on natural gas increases, we can expect to see a commensurate increase in fracking operations. Hopefully, oil and gas companies will continue to improve their operations, so that surrounding landowners are not adversely impacted.

Source: Law360.com

FORMER EMPLOYEE FILES BENZENE EXPOSURE LAWSUIT AGAINST 57 COMPANIES

Joe and Roxanne Pena filed suit earlier this year against 57 companies, 62 Defendants in total, in Jefferson County, Texas, District Court over benzene exposure, which they say led to a life-threatening blood disorder. Several of the defendants named in the suit are oil and petroleum giants including: American Oil, Amoco, Atlantic Richfield, Ashland Oil, BP, Chevron Phillips, Chevron USA, Dow Chemical, DuPont, Exxon Mobil, Huntsman, Motiva, Shell Chemical, Texaco, Union Carbide, and Valero.

Joe Pena worked at Bayer Material Science as a chemical process helper for 12 years. During the course of his employment, he claims he was "needlessly" exposed to toxic benzene. As a result of his exposure, Pena says, he developed aplastic anemia, a blood condition in which the body can no longer produce new blood cells. The illness causes fatigue, uncontrolled bleeding and a higher risk of infection. In Pena's case, a bone marrow transplant was required.

The lawsuit includes accusations of gross negligence and "placing unreasonably dangerous products into the stream of commerce." Occupational exposure is a high risk factor in the development of benzene-related illnesses and injuries such as Acute Myeloid Leukemia (AML), Myelodysplastic Syndrome (MDS), lymphomas and Aplastic Anemia. The most common way that benzene enters the body is through inhalation, but it can easily be absorbed by skin contact. When the chemical reaches the bloodstream, it damages bone marrow and blood-forming cells, which directly affects white and red blood cells, as well as platelets.

Workers in the petroleum industry are at particular risk for excessive exposure, including those who work in refining and extraction positions as well as those responsible for product shipping and transport.

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

Source: *Righting Injustice*

SPRAY FOAM INSULATION WORKERS MAY FACE HEALTH RISKS FROM TOXIC EXPOSURE

Spray polyurethane foam (SPF) is a widely used insulation and air sealant. However, exposures to isocyanates, SPF's key ingredient, can cause a number of serious health problems for folks working with or around SPF. Spray application of SPF insulation generates isocyanate vapors and aerosols that can migrate throughout a building if it is not isolated and properly ventilated. Both inhalation and skin exposures can lead to the worker suffering serious health effects.

Adverse health effects caused by isocyanate exposure include asthma, chemical sensitization, liver damage, other respiratory and breathing problems, serious allergic reactions, and severe skin and eye irritation. If workers experience breathing

problems or other adverse health effects following exposure to SPF, they should seek immediate medical attention.

The National Institute for Occupational Safety and Health (NIOSH) has found that isocyanates are a leading chemical cause of work-related asthma. According to NIOSH reports, some workers who become sensitized to isocyanates are subject to severe asthma attacks if they are exposed again. Death from severe asthma in some sensitized persons has been reported. Sensitization may result from either a single exposure to a relatively high concentration or repeated exposures to lower concentrations over time. If a worker is allergic or becomes sensitized to isocyanates, even exposure to low concentrations can trigger a severe asthma attack or other lung effects, or cause a potentially fatal reaction. There is no recognized safe level of exposure to isocyanates for sensitized individuals.

According to the U.S. Environmental Protection Agency (EPA), research data indicate that inhalation exposures during SPF application will typically exceed Occupational Safety and Health Administration (OSHA) occupational exposure limits and require skin, eye, and respiratory protection. Because of this, the EPA suggests the work site be restricted to persons wearing appropriate personal protective equipment. Moreover, OSHA requires all workers be trained so that they are aware of the potential hazards and follow safe work practices.

Even after application and curing, people working around existing SPF may be at risk from isocyanates and other toxic exposures. Cutting or trimming the foam as or after it hardens may generate dust containing unreacted isocyanates and other dangerous chemicals. Workers who could experience toxic exposure to existing SFP include plumbers, electricians, building renovators, demolition workers, and even firefighters. To reduce the risk of exposure workers should always wear personal protective equipment and not heat or grind SPF insulation.

Despite the known dangers, some advertising claims made by SPF manufacturers and sellers do not warn of potential health hazards or that these products contain hazardous chemicals. These reckless and intentionally misleading marketing claims are dangerous because they result in workers not understanding the need for adequate personal protective equipment and other personal safety precautions. This can lead to workers needlessly being exposed and suffering severe health effects.

Lawyers in our firm's Toxic Torts Section are currently investigating potential claims on behalf of workers exposed to isocyanates and other dangerous chemicals during or after the application of SPF insulation and who now suffer from occupational asthma or other related illnesses. If you would like more information or have questions you can contact Chris Boutwell, a lawyer in our firm's Toxic Torts Section, at 800-898-2034 or by email at Chris.Boutwell@beasleyallen.com.

UNSEALED DOCUMENTS RAISE SAFETY CONCERNS OVER ROUNDUP

Roundup, whose active ingredient is the world's most widely used weed killer, incurred a setback recently when a federal court unsealed documents raising questions about its safety and the research practices of its manufacturer, Monsanto. Roundup and similar products are used around the world on everything from row crops to home gardens. It is Monsanto's flagship product, and industry-funded research has long found it to be relatively safe. A lawsuit in federal court in San Francisco has challenged that conclusion, building on the findings of an international panel that claimed Roundup's main ingredient might cause cancer.

The documents in question were unsealed by Judge Vince Chhabria, who is presiding over litigation brought by folks who claim to have developed non-Hodgkin's lymphoma as a result of exposure to glyphosate. The litigation was touched off by a determination made nearly two years ago by the International Agency for Research on Cancer (IARC), a branch of the World Health Organization, that glyphosate was a probable carcinogen, citing research linking it to non-Hodgkin's lymphoma.

The court documents included Monsanto's internal emails and email traffic between the company and federal regulators. The records suggested that Monsanto had ghostwritten research that was later attributed to academics and indicated that a senior official at the Environmental Protection Agency (EPA) had worked to quash a review of Roundup's main ingredient, glyphosate, that was to have been conducted by the United States Department of Health and Human Services.

The documents also revealed that there was some disagreement within the EPA over its own safety assessment. The Court records also show that Monsanto was tipped off to the determination by Jess Rowland, a deputy division director at the

EPA, months beforehand. That led the company to prepare a public relations assault on the finding well in advance of its publication.

Monsanto executives, in their internal email traffic, also said Rowland had promised to beat back an effort by the Department of Health and Human Services to conduct its own review. Dan Jenkins, a Monsanto executive, said in an email in 2015 that Rowland, referring to the other agency's potential review, had told him, "If I can kill this, I should get a medal." The review never took place. In another email, Mr. Jenkins noted to a colleague that Mr. Rowland was planning to retire and said he "could be useful as we move forward with ongoing glyphosate defense."

To this day, Monsanto continues to state that glyphosate is not a carcinogen and also rebuts suggestions that the disclosures highlight concerns that the academic research it underwrites is compromised. In one unsealed e-mail, William F. Heydens, a Monsanto executive, told other company officials that they could "ghostwrite research" on glyphosate by hiring academics to put their names on papers that were actually written by Monsanto. "We would be keeping the cost down by us doing the writing and they would just edit & sign their names so to speak," Mr. Heydens wrote, citing a previous instance in which he said the company had done this. These disclosures are the latest to raise concerns about the integrity of academic research financed by agrochemical companies.

The issue of glyphosate's safety is not a trivial one for Americans. In the last two decades, Monsanto has genetically re-engineered corn, soybeans and cotton so it is much easier to spray them with the weed killer, and some 220 million pounds of glyphosate were used in 2015 in the United States.

John Tomlinson, a lawyer in our Toxic Torts Section, has filed cases involving Roundup exposure in both state and federal courts and is currently investigating other potential cases. If you need more information on this contact John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

Source: *New York Times*

XVII. UPDATE ON NURSING HOME LITIGATION

AN UPDATE ON NURSING HOME LITIGATION

Most of our focus on nursing home care focuses on the care provided by a nursing home to its patients (or residents as the nursing homes call them). It is important to peel back the hierarchy of those who actually provide care and take a look at some of the issues facing these individuals.

Nursing homes, for the most part, are corporate entities, meaning they are owned and operated for the purpose of making a profit. Some nursing homes are locally owned, but more often than not we are seeing nursing homes that are owned by out-of-state entities. More significant, perhaps, there are multiple entities that own or operate different aspects of the nursing homes. For example, there will be a company that owns the building; a separate company that employs the staff at the nursing home; another company that manages the money that comes in; etc.

At the top of this corporate set up, quite often, is a holding company that owns similar companies in various states and by various, but related entity, names. It is not unusual in depositions that a nurse or an administrator will be asked who their technical employer is and oftentimes they do not really know the name of the company that actually employs them. It's more disconcerting when administrators are asked about related corporate entities and who owns and operates what aspect of the nursing homes, and many claim they do not know.

With this as a background, the top of the hierarchy begins with a corporate body (or bodies) that oversee and manage the actual business. Locally, a regional manager may be responsible for ensuring that a number of nursing homes in a region (or state) are complying with the corporate mandates, which in some instances means cutting costs and maximizing profit.

At the nursing home itself, the top-level manager is referred to as an administrator, who will have varying backgrounds of training. For example, a recent administrator testified that her training and background was as a dietician, and she worked her way up through the ranks to become the head of the nursing home. Most administrators have a nursing and/or a management background.

The administrator oversees the various departments within a nursing home, which would include administration, nursing, therapy, social services, dietary, housekeeping, maintenance, and the like. The administration department is typically a patient or a patient's family member's first exposure to a nursing home. The administration department (or business office) has the new patient or his/her family member to sign the admission documents and will assist with obtaining Medicare, Medicaid, and insurance payment benefits.

The nursing department is the one most involved in terms of patient care where issues arise. The nursing department is typically headed up by a Director of Nursing (DON), an Assistant Director of Nursing (ADON), floor or wing registered nurses (RNs), charge nurses, and floor nurses (RNs and LPNs). Also included in this group are Certified Nursing Assistants (CNAs). The RNs and LPNs are required to do the hands-on nursing care, which includes assessments, providing medications, and evaluating the patient on admission and throughout his or her stay. Often a wound care nurse will also provide care for bedsores or ulcers that may develop during a patient's stay at a nursing home. The CNAs bathe patients, change diapers or bedding, take patients to the bathroom, and help with transferring the patient from the bed to wheelchairs and the like.

Most nursing homes will also have a therapy department. The primary therapists at nursing homes are physical therapists, occupational therapists and speech therapists. Quite often, the therapists are not employees of the nursing home; instead, they operate under a separate corporate structure and perform services pursuant to a contract with the nursing home. Patients and their family members almost never know this significant fact, but it is important in the care process because the therapists are usually not subject to the same rules and policies that apply to the other employees of the nursing home.

The other departments, such as dietary, housekeeping and maintenance are rarely involved in the cases our lawyers investigate and pursue. Occasionally, a dietary issue will arise and on the rarest occasion other issues may arise (such as whether the property was maintained appropriately and/or created hazards), but these incidents are the exception rather than the rule.

Fortunately there are some nursing homes that hire quality individuals who have their patients' best interests at heart. But unfortunately that is not always the case. Many nursing homes have problems

staffing their facilities with quality people at all levels. This could be the result of poor pay, inadequate benefits, or a subpart corporate culture that does not place value on its employees. Of note, OSHA reports that nursing homes workers are among the top to report injuries and illnesses, and the nursing home employees are among the most to have "lost workday injury and illness (LWDII) rates." The average LWDII is 1.8 for private industry, while this number is as high as 4.9 for nursing homes.

CNAs, who do most of the lifting and moving of patients, were among the highest in the nation to report musculoskeletal disorders (such as back injuries). In 2010, for example, the national average for these types of injuries was 34 per 10,000 workers. Among CNAs (and similar-level employees), this rate was 249 for 10,000 workers, or more than seven times the national average!

What all of the above means is that in nursing homes lots of employees are calling in sick or injured. The natural result is that nursing homes may be understaffed—staff may have to work overtime or extra shifts, and the risk of injury to residents without a doubt increases exponentially.

This corporate structure and the corporate history are important for people to understand when choosing a nursing home. Occasionally, we will hear of rampant issues of abuse or neglect in a particular nursing home. Who owns that nursing home? What other nursing homes do they own? Is the problem a corporate-wide problem or is it isolated to that one home? These are questions we should all ask before we agree to have our loved ones admitted to a nursing home for short-term or long-term care and treatment. If you need more information on nursing home litigation, contact Ben Locklar, a lawyer in our Personal Injury & Products Liability Section, who handles nursing home litigation, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

Source: <https://www.osha.gov/SLTC/nursinghome/>

XVIII. AN UPDATE ON CLASS ACTION LITIGATION

HOME DEPOT AGREES TO SETTLE DATA BREACH LITIGATION

In March, Home Depot agreed to resolve a class action brought by financial institu-

tions following the 2014 data breach that compromised nearly 56 million credit and debit card numbers. As part of the settlement, Home Depot agreed to pay \$25 million and promised to strengthen data security to reduce the risk of a future data breach.

The financial institutions alleged that the breach was “the inevitable result” of Home Depot’s lackluster data-security practices “characterized by neglect, incompetence and an overarching desire to minimize costs.” The Home Depot data breach occurred not long after a similar breach at Target, and the financial institutions alleged that Home Depot ignored red flags, warnings and industry standards. Home Depot filed a motion to dismiss the financial institutions’ claims, but the Northern District of Georgia denied the motion and allowed the majority of the claims to proceed.

According to the proposed settlement, Home Depot will pay \$25 million into a non-revisionary fund to be distributed to financial institutions that have not released their claims against Home Depot for the 2014 breach. Home Depot also agreed to spend \$2.25 million to compensate entities whose claims were released after receiving misleading information in connection with MasterCard’s ADC program, and separately pay for the cost of notice, administration, and attorneys’ fees and expenses. Further, Home Depot agreed to strengthen security measures including implementing safeguards to manage risk and an appropriate industry recognized security control framework.

Financial institutions can receive a fixed payment of \$2 per compromised card without needing to submit documentation of losses; however, those who submit documentation of losses are also eligible to receive a supplemental award of up to 60 percent of their uncompensated losses. Class representatives will also apply for service awards of up to \$2500 for each class representative, which Home Depot agreed not to oppose.

Dee Miles, who heads up our firm’s Consumer Fraud and Commercial Litigation Section, was appointed to the Plaintiffs’ Steering Committee for Home Depot multi-district litigation concerning the data breach in 2015. Dee says:

This is very important litigation that exposes the critical flaws in the way credit and debit card systems operate in the United States. Because Home Depot failed to maintain adequate computer data security, it exposed millions of people to the risk of fraud and identity theft, and violated their

privacy rights. Unless something is fundamentally changed, consumers will continue to be at risk.

If you need more information, contact Dee Miles or Leslie Pescia (also a lawyer in the Section) at 800-898-2034 or by email at Dee.Miles@beasleyallen.com or Leslie.Pescia@beasleyallen.com.

WELLS, DEUTSCHE BANK AND RBS TO PAY \$165 MILLION IN NOVASTAR SETTLEMENT

Wells Fargo & Co., Deutsche Bank AG and the Royal Bank of Scotland PLC have agreed to pay \$165 million to settle a class action lawsuit over their underwriting of \$7.7 billion worth of mortgage-backed securities issued by bankrupt subprime lender NovaStar.

The proposed settlement, filed in federal district court in Manhattan, requires approval from U.S. District Judge Deborah A. Batts. If that approval is granted, the settlement would resolve longstanding claims from investors, including union pension funds, who allege that Deutsche Bank Securities Inc., RBS Securities Inc. and Wachovia Capital Markets LLC, (Wells Fargo Advisors LLC) lied in offering documents on securities issued by NovaStar Mortgage Inc.

When the bulk of the mortgages underlying those securities went into default during the financial crisis, the investors lost significant amounts of money. The settlement comes after years of litigation.

According to the settlement documents, Plaintiffs would receive \$30.84 per \$1,000 of face value of the securities they purchased, bringing it in line with previous residential mortgage-backed securities settlements. Holders of around \$2.2 billion worth of NovaStar-issued mortgage-backed securities are expected to opt out of the settlement, according to the settlement documents. The settlement, if approved, would bring to an end litigation that started in June 2008.

The dispute arose in 2006, when NovaStar issued six securities tied to residential mortgage-based securities. The securities, which together held more than \$7.7 billion in assets, were underwritten by Deutsche Bank, RBS and Wachovia. By June 2009, more than half the mortgages behind the securities had defaulted amid the housing collapse, causing massive investor losses, according to the suit, which a pension fund filed in June 2008.

The New Jersey Carpenters Health Fund, which had invested \$100,000 in one of the securities, filed suit against subprime lender NovaStar, the underwriting banks,

and ratings agency Defendants such as Moody’s and Standard & Poor’s. The ratings agencies were dismissed from the suit in April 2011. The class action alleged that offering documents filed when the securities were issued failed to disclose that NovaStar had “abandoned its underwriting standards” to increase the number of mortgages it could originate. After a pair of dismissals, the Second Circuit revived the suit in March 2013. Judge Batts then granted class certification.

The Plaintiffs are represented by Joel P. Laitman, Michael B. Eisenkraft and Christopher Lometti of Cohen Milstein Sellers & Toll PLLC. The case is *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group PLC et al.* (case number 1:08-cv-05310) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

CONSUMER GOODS COMPANIES GET APPROVAL FOR \$250 MILLION IN NEWS CORP. SETTLEMENT

A federal judge in Manhattan has approved the settlement reached by a class of major consumer goods makers with News Corp. over its alleged monopolization of in-store advertising. U.S. District Judge William H. Pauley III agreed to distribute the funds from the \$244 million settlement consumer goods giants including the Dial Corp. and Kraft Heinz Foods Co., reached with News Corp. and its in-store ad unit. The released funds also include another \$6 million in fees going to class counsel from the \$30 million in settlements News Corp. reached with five large absent class members shortly before this trial was set to begin in February 2016.

The payments will go to 400 class members, which accounts for more than 96 percent of the class by volume, according to the Plaintiffs lawyers. Steven Benz, a lawyer with Kellogg Hansen Todd Figel & Frederick PLLC, stated:

This is what class actions were meant to be because we had a monopolization of a market that needed to be remedied. It’s very rare to have six corporate class representatives who fund a case and see there’s a problem in the marketplace that they want to remedy, and they band together to assist in remedying that through antitrust.

The case dates back to 2012, when Dial, Kraft Heinz, Foster Poultry Farms, Smithfield Foods Inc., HP Hood LLC and BEF Foods began filing what eventually became the current suit accusing News Corp. of

working for years to shut would-be rivals out of the market for in-store advertising services like coupon dispensers and shopping cart advertisements.

Judge Pauley sent the case to trial, where the class ultimately settled just as opening arguments got underway. The \$244 million settlement the class reached came just days after News Corp. signed separate settlement agreements with absent class members Johnson & Johnson Consumer Inc., General Mills Inc., The Dannon Co. Inc. and Reckitt Benckiser LLC.

The settlement amounted to “an outstanding result,” Judge Pauley wrote in October when he approved the settlement, compared to the class’ two estimates of the single damages the consumer goods giants had suffered because of the alleged monopolization. The “core” damages theory focusing purely on overcharges estimated the companies paid \$355 million more than they would have if News Corp. had not kept rivals out of the market. The “adjusted” damages theory puts the figure at \$674 million by factoring in the millions of dollars the Plaintiffs say News Corp. gave retailers to lock out other in-store advertising providers.

The class is represented by James T. Southwick, Ryan V. Caughey and Richard W. Hess of Susman Godfrey LLP, Steven F. Benz of Kellogg Huber Hansen Todd Evans & Figel PLLC, Daniel B. Goldman of Kramer Levin Naftalis & Frankel LLP, R. Stephen Berry of Berry Law PLLC and Lewis T. LeClair, John C. Briody and James H. Smith of McKool Smith PC. The case is *Dial Corp. et al. v. News Corp. et al.* (case number 1:13-cv-06802) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

GOOGLE AGREES TO \$22 MILLION SETTLEMENT TO END ADWORDS “DEAD SITES” ACTION

Google Inc. has agreed to a \$22.5 million settlement with a proposed class of advertisers who contended the tech giant placed their purchased ads on unused or inactive websites. The settlement brings an end to a nearly nine-years-long litigation in a California federal court. It was claimed that Google violated California’s unfair competition law and false advertising law by failing to disclose to millions of advertisers participating in Google’s AdWords program that it placed their ads on so-called parked domains. Basically, these are websites without developed content, or error pages. This occurred between July 11, 2004, and March 13, 2008, causing the advertisers to overpay.

The advertisers are represented by Schubert Jonckheer & Kolbe LLP, Foote Meyers Mielke & Flowers LLC, Chavez Law Firm PC, The Law Office of Peter A. Lagorio, Gross Belsky Alonso LLP, The Kralowec Law Group, Kabateck Brown Kellner LLP, Saveri & Saveri Inc. and The Law Firm of Peter L. Currie PC. The case is *In re: Google AdWords Litigation* (case number 5:08-cv-03369) in the U.S. District Court for the Northern District of California.

Source: Law360.com

\$76 MILLION CRUISE ROBOCALL CLASS SETTLEMENT GETS FINAL APPROVAL

U.S. District Judge Matthew Kennelly, a federal judge in Illinois, has given final approval to a \$76 million settlement agreement resolving a class action accusing several cruise marketing companies of robocalling potentially millions of Americans. There is a stipulation that the court must give prior approval to any gifting of unclaimed settlement funds. Judge Kennelly granted the class members’ motion for final approval of the proposed settlement agreement with Caribbean Cruise Lines Inc., the Berkley Group Inc. and Vacation Ownership Marketing Tours Inc. The judge had preliminarily approved the agreement in September, but said a phrase must be added that stipulates judicial approval of the unclaimed “cy pres” funds that would be awarded to charitable causes. Judge Kennelly said:

The court grants plaintiffs’ motion for final approval of the proposed settlement agreement, subject to the following modification to section 2.2(f) of the agreement: a sentence shall be added to the end of section 2.2(f) stating, ‘No funds shall be distributed to a cy pres recipient without prior approval of the court.’

Class members in the suit have called the agreement one of the most favorable Telephone Consumer Protection Act (TCPA) settlements on record, saying it will create a \$76 million common fund providing most class members with more than \$400 in cash.

The settlement brings to an end a suit filed in 2012 that accused the cruise marketing companies of operating a massive telemarketing scheme to offer free cruises actually designed to sell timeshares. The calls went out to at least 900,000 numbers contained in a class list put together from company records, according to the agreement. Judge Kennelly in 2014 certified two

classes of people who received the calls between August 2011 and 2012, one for cellphones and one for landlines.

Judge Kennelly had said that the size of the individual awards is likely to bring out more claimants than normally would come forward in a TCPA class. That’s exactly what happened because in total, more than 63,500 class members filed provisionally approved claims for nearly 365,650 calls, far more than expected. Among those claimants, were several Fortune 500 companies and Oakland County, Michigan.

The class is represented by Jay Edelson, Rafe S. Balabanian and Eve-Lynn J. Rapp of Edelson PC and Jonathan I. Loevy, Scott R. Rauscher and Michael I. Kanovitz of Loevy & Loevy. The case is *Birchmeier et al. v. Caribbean Cruise Line Inc. et al.* (case number 1:12-cv-04069) in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

L3 TECHNOLOGIES INVESTOR SUIT SETTLEMENT GETS PRELIMINARY APPROVAL

A Manhattan federal judge granted preliminary approval last month of a \$34.5 million settlement between L3 Technologies Inc. and a class of shareholders that accused the company of securities fraud. U.S. District Judge Valerie E. Caproni granted preliminary approval of the settlement between L3, formerly L-3 Communications Holdings Inc., and shareholders in a suit related to the company’s 2014 disclosure of an \$84 million accounting error in its aerospace segment that sent its stock falling by roughly 12 percent on the day of the announcement. Under the terms of the settlement, L3 will deposit the cash into settlement fund, pending notification of class members.

A fairness hearing for final approval will be held on August 10 to determine whether the plan for award and dispersal of the settlement is fair to class members. Class members have until July 21 to submit objections to the agreement. The company described the alleged misconduct at the time as wrongly deferred contract cost overruns and exaggerated net sales related to a fixed-price contract for maintenance and logistics support. The involved people in the logistics solutions sector of the company’s aerospace systems segment concealed the bad accounting from other corporate staff and external auditors, officials said at the time. The aerospace systems segment accounts for roughly a third of the company’s sales, including contracts with NASA and the U.S. Army exceeding \$100 million.

The investors are represented by Samuel Rudman, David Rosenfeld, Alan Ellman and Ellen Gusikoff Stewart of Robbins Geller Rudman & Dowd LLP, Thomas Michaud of VanOverbeke Michaud & Timmony PC and Cynthia J. Billings of Sullivan Ward Asher & Patton PC. The consolidated case is Patel et al. v. L-3 Communications Holdings Inc. et al. (case number 1:14-cv-06038) in the U.S. District Court for the Southern District of New York.

MASSMUTUAL TO PAY \$37.5 MILLION TO END POLICYHOLDER DIVIDENDS SUIT

A MassMutual Life Insurance policyholder has asked a Massachusetts federal court for preliminary approval of a \$37.5 million settlement of her putative proposed class action. The Plaintiff, Karen Bacchi, alleged that the insurance company shorted policyholders on dividends. The settlement was reached after the Plaintiff and the company entered mediation last year while awaiting the outcome of a statute of limitations-based dismissal motion. The motion stated:

Through that intensely adversarial process, the parties reached an agreement to settle the action on a class-wide basis through a non-reversionary common fund payment by MassMutual of \$37.5 million, to be distributed to current and former participating MassMutual policyholders through a plan of allocation to be approved by the court

The class potentially includes 2.9 million policyholders nationwide. Ms. Bacchi sued MassMutual in July 2012, alleging it had retained profits that it should have distributed to participating policyholders as dividends. The suit includes claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Ms. Bacchi's policy was issued in 1975 by Connecticut Mutual Life Insurance Co. After Connecticut Mutual merged with MassMutual in 1996, it became a MassMutual policy. Under Massachusetts law, a mutual insurer's safety fund consists of:

an amount not in excess of [12] percent of [the company's] reserve for such business ... and, in addition thereto, any surplus that may have been contributed by the holders of the guaranty stock of the company, or which has been accumulated for the retirement of said guaranty stock

and the margin of the market value of its securities over their book value.

Ms. Bacchi alleges at least five different accounting errors she believes MassMutual made in calculating its safety fund. Among other things, she says, the insurer shouldn't have included the margin of market value over book value in its calculations because statutorily mandated accounting practices no longer consider that margin "surplus."

Ms. Bacchi is represented by Jason B. Adkins and John Peter Zavez of Adkins Kelston & Zavez PC, Andrew S. Friedman and Francis J. Balint of Bonnett Fairbourn Friedman & Balint PC, and Mark A. Chavez of Chavez & Gertler LLP. The case is *Karen L. Bacchi v. Massachusetts Mutual Life Insurance Co.* (case number 1:12-cv-11280) in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

DOLE AND EXECUTIVES REACH \$74 MILLION SETTLEMENT IN FEDERAL SHAREHOLDER LAWSUIT

Dole Food Co., its CEO and general counsel have agreed to a \$74 million settlement with a class of investors. This comes about in a Delaware case that had accused the Defendants of driving down Dole's price before a 2013 take-private deal. This is the second settlement for the company and its executives over the transaction.

A December 2015 settlement was reached by Dole, CEO David Murdock, and General Counsel C. Michael Carter with shareholders in Delaware Chancery Court. The Plaintiffs were the San Antonio Fire and Police Pension Fund and Fire & Police Health Care Fund San Antonio. It appears that CEO Murdock made a series of moves to reduce the company's value before taking the company private. It was contended by the Plaintiffs that the fraud not only harmed shareholders, but also prevented sellers of the stock from getting a fair value.

On March 16, U.S. District Judge Sue L. Robinson granted preliminary approval to a \$74 million cash settlement for the investment funds in the federal suit, certifying for settlement purposes a class of shareholders who sold Dole common stock from Jan. 2, 2013, to Oct. 31, 2013.

The investment funds' complaint in federal court had relied on Vice Chancellor J. Travis Laster's August 2015 ruling in the separate, consolidated shareholder class action as evidence of wrongdoing. In that decision, Vice Chancellor Laster wrote that although the Dole board's merger committee made a herculean effort to overcome

Murdock and Carter's efforts to keep investors in the dark, it was deprived of information about the company's ability to cut costs and improve income and was unable to negotiate on a fully informed basis to reject the merger offer. The Vice-Chancellor found Murdock and Carter to be liable to investors to the tune of \$148 million. In December, the state court parties announced settlement terms that matched Vice Chancellor Laster's findings.

The February 2016 decision, approving the core of that settlement, awarded nearly \$101 million to shareholders before adding about \$13.5 million in accrued interest and subtracting legal fees. A related award was carved out from the overall total for shareholders whose lawsuit sought a corrected appraisal, with Vice Chancellor Laster's decision mooting that case. The approval order by the Vice Chancellor included a 30 percent fee award, totaling nearly \$33.9 million, to lawyers leading the larger of two consolidated suits filed after the November 2013 merger. Meanwhile, in December 2015, the San Antonio funds filed suit in the Delaware federal court with claims that focused on the lost value of those who sold shares while the company's stock value was depressed.

The investors are represented by Katherine M. Sinderson and Gerard H. Silk of Bernstein Litowitz Berger & Grossmann LLP; Joel Friedlander, Jeffrey M. Gorris and Christopher Foulds of Friedlander & Gorris PA; and Vincent R. Cappucci, Andrew J. Entwistle and Arthur V. Nealon of Entwistle & Cappucci LLP. The case is *San Antonio Fire and Police Pension Fund et al. v. Dole Food Company Inc. et al.*, (case number 1:15-cv-01140) in the U.S. District Court for the District of Delaware.

Source: Law360.com

XIX. AN UPDATE ON OUR CONSUMER FRAUD & COMMERCIAL LITIGATION SECTION

AN UPDATE ON OUR CONSUMER FRAUD & COMMERCIAL LITIGATION SECTION

This month, we feature the Consumer Fraud & Commercial Litigation Section of the firm, is managed by Dee Miles. Dee is

the Section Head and is also a member of the firm's Board of Directors. Dee's Section has been very busy during 2017. Lawyers in the Section are currently investigating and/or litigating the following cases:

Class Actions

Our firm's class action practice is continuing to grow. We have cases filed all over the country ranging from consumer fraud, antitrust, employment abuses, and ERISA (Employee Retirement Income Security Act) to product liability cases. This area of our practice continues to grow due to the corporate abuses occurring in the business world.

While arbitration clauses have had some impact on class action filings, it has not proved to be the effective deterrent corporate America intended. This is mainly due to the courts finally recognizing that arbitration was never intended to be utilized in consumer transactions. Arbitration was designed for complex business transactions involving sophisticated parties in specialized areas of business. However, corporations have manipulated the use of arbitration clauses to frustrate consumer resistance to their fraudulent practices.

Just because a consumer contract has an arbitration clause, that doesn't mean a class action on the abusive corporate conduct is barred. There may be ways around the arbitration clause, and a lawyer familiar with the ever-changing law on this issue can make that determination. Our lawyers in the consumer fraud/commercial litigation section are well versed in the area of the law surrounding both class actions and arbitration clauses. We review many potential class actions daily and welcome the opportunity to review more.

Volkswagen/Audi/ Porsche Emissions Defect

It is no secret that our firm joined with other firms to file a nationwide class action lawsuit on behalf of consumers that own Volkswagen, Audi and Porsche who were deceived by the automaker's deliberate "end-run" around Environmental Protection Agency (EPA) pollution controls. We were most fortunate to have been selected by Judge Charles R. Breyer, United States District Judge in California, located in San Francisco, California, to serve on the Plaintiff's Steering Committee of this most important case. Dee Miles was selected by the court and has been quite busy on this case over the last year and a half, but we are pleased to be part of the three part Volkswagen settlement of the "cheat device" class: the \$15 billion 2.0 Volkswa-

gen settlement announced in July 2016; the \$4 billion 3.0 settlement announced in February 2017; and the Bosch Volkswagen settlement of \$327.5 million also announced in February 2017. In addition, Volkswagen agreed to pay \$4.3 billion in civil/criminal penalties to the federal government as part of a plea bargain. To date, the Volkswagen scandal has cost Volkswagen nearly \$24 billion. However, there are still other Volkswagen cases that remain pending, including the cases our firm has filed on behalf of the Environmental Protection Commission of Hillsborough County, Florida, to recover statutory penalties for violations of a local clean air ordinance for these allegations. The illegal defeat devices installed in the Defendants' diesels affect more than 1,000 vehicles in the greater Tampa area. If you own one of the affected vehicles, and need help with your class claim, please contact one of our class action attorneys for more details.

Lawyers: Dee Miles, Archie Grubb,
and Clay Barnett
Primary Staff Contacts: Michelle
Fulmer, Ashley Pugh and
Whitney Gagnon

Life Insurance

Our firm has recently filed two class action lawsuits against separate companies, Banner Life and Voya/Lincoln Life Insurance Company, alleging that the cost of insurance increases these companies have implemented on certain policies are unfounded. Policyholders are seeing increases of more than 500 percent in some cases, and the cash value of their policies are being stripped down to zero dollars in a matter of months. It appears that these increases have been executed ultimately to benefit shareholders and rid the company of near-term liabilities it has accrued due to its wrongful use of captive reinsurance companies. We have also filed some individual cases against Transamerica Life Insurance Company for the same reasons. We are attempting to recover the excess insurance costs paid out-of-pocket or stripped from the value of these policies. Additionally, we are looking into many other life insurance companies with similar unfair practices and welcome the opportunity to review additional policies that have seen sudden increases in costs or premiums.

Lawyers: Dee Miles, Andrew Brashier,
and Rachel Boyd
Primary Staff Contacts: Michelle
Fulmer, Ashley Pugh, and
Ashley Burgin

Takata Airbags

Beasley Allen has filed a class action lawsuit for economic losses related to the potentially defective airbags manufactured by Takata Corporation. We were fortunate to have been selected by the multidistrict litigation (MDL) Leadership to conduct discovery in this case and are working furiously to move this case along to trial and class certifications. While vehicle owners and drivers could not have known about the potential danger posed by the airbags, the Defendants knew about the defect and failed to disclose it to consumers and actively concealed that defect from the public and federal regulators. It was not until December 2011, when the fifth recall was issued related to the same defect, that Honda finally reported the injuries and deaths related to the Takata airbags to federal regulators. To date, more than 14 million vehicles with Takata-manufactured airbags have been recalled due to the defects.

Lawyers: Dee Miles, Archie Grubb,
Clay Barnett, and Andrew Brashier
Primary Staff Contact: Michelle
Fulmer, Ashley Pugh, and
Whitney Gagnon

General Motors

The Section is also involved in the class action lawsuits against general motors concerning GM model vehicles (listed below). The Generation IV 5.3 Liter V8 Vortec 5300 engine rapidly consumes oil at a rate that greatly exceeds industry standards. This excessive oil consumption results in low oil levels and internal engine damage.

The oil consumption defect is caused by low-tension oil control rings that GM installed within its Generation IV 5.3-Liter V8 Vortec 5300 passenger engines. The low-tension oil rings are incompatible with these engines as they allow an excessive amount of engine oil to enter the engine's combustion chambers—where it is consumed or accumulates—resulting in oil loss.

GM offered the defective 5.3-liter engines in the following vehicles (the "Class Vehicles"):

- 2010-2013 Chevrolet Avalanche
- 2010-2012 Chevrolet Colorado
- 2010-2013 Chevrolet Express 1500
- 2010-2013 Chevrolet Silverado 1500
- 2010-2013 Chevrolet Suburban
- 2010-2013 Chevrolet Tahoe

- 2010-2013 GMC Canyon
- 2010-2013 GMC Savana 1500
- 2010-2013 GMC Sierra 1500
- 2010-2013 GMC Yukon
- 2010-2013 GMC Yukon XL

GM's "Oil Life Monitoring System," which is supposed to alert drivers when it is time for an oil change, makes the problem worse because it does not properly monitor the engine oil level. As the oil ring defect rapidly depletes the engine's oil reserves, the Oil Life Monitoring System dangerously encourages drivers to travel farther than the engine can safely handle due to inadequate oil levels.

Beginning with its 2014 models, GM began installing a materially redesigned Generation V 5.3 Liter V8 Vortec 5300 engine, which was designed to remedy the excessive oil consumption problem. The redesigned engine abandoned the low-tension oil control ring engineering failure and returned to the use of standard tension oil rings. However, despite knowing that vehicles equipped with faulty 5.3-liter engines remained on the road, GM has done nothing to alert owners and lessees that their vehicles may be unreliable and unsafe.

We have filed the complaint in the Northern District of California federal court. Filed on Dec. 12, 2016, the case name is *Monteville Sloan, Jr., Raul Siqueiros et al, vs General Motors* 3:16-cv-07244.

Lawyers: Dee Miles, Clay Barnett, Archie Grubb and Andrew Brashier
 Primary Staff Contacts: Michelle Fulmer, Ashley Pugh and Whitney Gagnon

Talc Litigation

The firm is representing a class of California citizens who were deceived into believing that Johnson and Johnson's talc-based products were safe and purchased those products for genital hygiene use. Some recent studies have demonstrated a significantly increased risk of ovarian cancer for women who use talc-containing products on their genitals. Johnson and Johnson has been aware of the risk, or should have been, for years, yet the company continues to market its products as safe for daily use. These citizens would not have purchased the baby powder and other talc products had they known of the increased risk of ovarian cancer, but thanks to Johnson and Johnson's marketing,

believed they were purchasing and using a safe product. Beasley Allen represents these citizens in an effort to recover the money they spent on these cancer-causing products that they would not have spent absent Johnson and Johnson's marketing.

Lawyers: Dee Miles, Lance Gould, and Ali Hawthorne
 Primary Staff Contacts: Holly Busler and Jessica Stapp

Oil and Gas

The firm has also filed a class-action complaint against oil and gas companies involving royalties owed to landowners for the sale of natural gas. The landowners signed leases with the oil and gas companies granting them the right to drill and produce natural gas and constituents. In exchange, the companies were to pay the landowners royalties as a share of the production income. Instead of selling the gas in arms-length transactions on the open market, the companies sell to affiliates at grossly inadequate prices. Landowners' royalty payments are calculated off that first sale. The company affiliate or related entity that first purchased the gas then sells the products at market price. The company keeps the difference between what it would have paid in royalties to the landowners had those first sales been made at market price and the fraudulently low royalties it actually did pay the landowners. Beasley Allen is representing the class of landowners and is seeking to recover the money those landowners would have received had XTO properly sold the natural gas on the market. We are pursuing a similar case in Monroe, Louisiana.

Lawyers: Lance Gould, Larry Golston and Leslie Pesca
 Primary Staff Contacts: Holly Busler and Whitney Gagnon

Home Depot Data Breach

Dee Miles was appointed to the Plaintiffs Steering Committee (PSC) representing financial institutions in the Multidistrict litigation (MDL) over a massive Home Depot data breach. The litigation involves consumer and financial institution Plaintiffs who were affected by the incident, which compromised up to 56 million credit and debit card numbers. The cyberattack is believed to have occurred at Home Depot stores between April and September of 2014. The MDL Court recently and preliminarily approved a settlement valued at \$27 million for the financial institutions and we

will be moving forward to finalize this important settlement.

Lawyers: Dee Miles, Larry Golston, Andrew Brashier, and Leslie Pesca
 Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, and Ashley Burgin

Silent Recalls

Lawyers in the Consumer Fraud section are investigating numerous safety defects involving multiple auto manufacturers and varying models. Although there are more active recalls now than ever before, every potential defect has not necessarily been placed under a mandatory recall. Auto manufacturers commonly conduct "silent recalls"—where the dealer only repairs a defect once a consumer complains about the specific defect even though the manufacturer is aware of the defect. This practice leaves thousands of American motorists unaware of the defective components in their vehicles. Alternatively, auto manufacturers are able to conduct regional recalls that are only disseminated to a particular region, leaving consumers outside the specified region unaware of the recall. Under this process, the same make and model under recall in one state may not be under recall just over the state line. If you have a vehicle with a safety defect and the manufacturer has refused to repair your vehicle under the warranty, then you may have a case. Please contact one of our class action attorneys for more details.

Lawyers: Dee Miles, Archie Grubb, Clay Barnett, and Andrew Brashier
 Primary Staff Contacts: Whitney Gagnon and Ashley Burgin

ERISA litigation

The Employee Retirement Income Security Act of 1974 (ERISA) dictates certain minimum standards for voluntarily established health and benefit plans. Employers sometimes violate the requirements of ERISA, to the detriment of their employees. If these violations are plan-wide, or affect a large number of employees, it is possible to form a class to seek recompense and/or to force compliance. Please contact us with information regarding any instances where ERISA's requirements have been violated; we are particularly interested in self-funded employee health benefit plans.

The section recently filed an ERISA class against Wells Fargo for withholding information concerning the Wells Fargo stock within the ERISA plan, which caused losses

to the plan. The information involved the fraudulent accounts scheme for which Wells Fargo has now paid more than \$100 million to the Federal Government in fines and restitution. But this fraudulent scheme was ongoing while bank members with knowledge of the scheme continued to suppress the information while managing the assets of the ERISA plan and were authorizing more company stock purchases for the plan. This caused harm to the ERISA plan.

Lawyers: Dee Miles and
Rebecca Gilliland
Primary Staff Contacts: Michelle
Fulmer, Ashley Pugh, and
Amanda Richards

Qui Tam Cases

A *qui tam* action involves a private party, called a relator, who asserts claims on behalf of the government. Although the government is considered the real (named) Plaintiff, if the action is successful, the relator receives a share of the award. Most *qui tam* actions are brought under the federal False Claims Act (FCA), 31 U.S.C. § 3729, et seq., although many states have adopted their own false claims acts. The successful results speak for themselves—more than \$34 billion in recoveries since 1986—and that tells us a powerful story. Our firm is currently involved in a number of these *qui tam* cases throughout the country.

Qui tam actions typically begin with an employee witnessing his/her employer defrauding the government. The employee may later consult with an attorney on another matter, but convey their knowledge of false information being given to the government. Attorneys need to be on the lookout for such information and recognize potential claims.

It takes vigilance and courage for these private individuals, commonly referred to as “whistleblowers,” to report fraudulent activity; but without them, the vast majority of fraud against our government would go undetected. Recognizing the perils faced by whistleblowers, legislators have passed laws protecting individuals who take a stand against fraud. 31 U.S.C. § 3730 prohibits discrimination and retaliation against whistleblowers and imposes strict penalties, including double back pay with interest, on violators.

Additionally, if a *qui tam* action is successful, the whistleblower receives between 10-30 percent of the Government’s recovery. Damages under the FCA include penalties and “3 times the amount of damages which the Government sus-

tains” due to the fraud. 31 U.S.C. § 3729(a)(1)(G). In short, the law protects and rewards whistleblowers for their instrumental role in exposing and prosecuting fraud. Lawyers in our firm have waged war against corporate fraud for more than 30 years and would welcome the opportunity to assist with any *qui tam* actions that any of our readers may have.

Lawyers: Dee Miles, Larry Golston,
Archie Grubb, Clay Barnett, Andrew
Brashier, and Rebecca Gilliland
Primary Staff Contact: Holly Busler

Antitrust Cases

Lawyers in the Section continue to investigate and litigate antitrust cases. Antitrust law is the law of competition. Society is better off if buyers and sellers act independently, not in concert. Antitrust law focuses on the promotion of competition through restraints on monopoly and cartel behavior. Typical cases involve attempts to monopolize, price fixing, exclusive distributorships, refusals to deal, tying arrangements, and mergers and acquisitions. We believe that antitrust is a growing area, as corporations increasingly tend to “cross the line” as they seek to gain advantage in this tough economy. The firm is currently heavily involved in antitrust litigation against Blue Cross Blue Shield companies.

Blue Cross Blue Shield

Beasley Allen is currently involved in an antitrust cases dealing with Blue Cross Blue Shield’s illegal actions. The BCBS case involves the Blues’ agreements not to compete with each other. BCBS has separate companies that cover different geographical regions of the country. Those individual companies agreed amongst themselves to stay out of other geographic regions. For example, BCBS of Alabama and BCBS of Mississippi agreed to not compete with each other for providers (hospitals and physicians) or subscribers (individual and group policyholders). Normally, competition in a certain area drives costs down with each company trying to be the lowest available. Absent competition, the companies were able to set prices for both reimbursement and premiums at any price they chose.

We are honored to be serving on the leadership of this multidistrict litigation (MDL) case. Our lawyers are diligently pursuing discovery in the case as the Alabama portion of this MDL is headed for trial this year.

Lawyers: Dee Miles, Archie Grubb, and
Rebecca Gilliland

Primary Staff Contacts: Michelle Fulmer,
Ashley Pugh, Whitney Gagnon, and
Amanda Richards

Capacitors

The capacitor litigation involves a price-fixing scheme. Capacitors are, generally, tiny but are in nearly every electronic device on the market. The manufacturers agreed amongst themselves to only sell their products at a certain price, one that is above what normal market conditions would dictate. Their actions caught the attention of several United States and foreign agencies, including the Department of Justice, who are investigating the illegal agreements. Beasley Allen, and other national firms we are working with, moved quickly to recover damages for those directly injured by the price fixing scheme.

Lawyers: Archie Grubb, Ali Hawthorne,
Andrew Brashier, and
Rebecca Gilliland
Primary Staff Contacts: Jessica Stapp,
Holly Busler, Whitney Gagnon, Brenda
Russell, and Amanda Richards

Pharmaceutical Litigation

The firm handles a wide array of cases involving the pharmaceutical industry referred to as “Big Pharma.” These cases include AWP, unapproved drugs, Actos, Granuflo and many others.

STATE ATTORNEY GENERAL REPRESENTATION

AWP Litigation

Our firm has represented the States of Alabama, Alaska, Hawaii, Kansas, Louisiana, Mississippi, South Carolina and Utah in a series of cases against pharmaceutical companies, known as the Average Wholesale Price (AWP) litigation. These States allege that pharmaceutical companies falsified pricing information, causing state Medicaid agencies to grossly overpay for prescription drugs. The manufacturers’ false and inflated AWP (average wholesale prices) caused pharmacies to shop for drugs that offered the highest reimbursement from the State. The inflated AWP in turn provided higher sales revenue, volume and market share for the drug companies, and created dramatically steeper costs for the States. Juries have returned more than \$600 million in verdicts for the States of Alabama, Mississippi, Kentucky, Wisconsin, Missouri and Massachusetts. We recently won the appeal of a \$30 million verdict in Mississippi Supreme Court

regarding Sandoz, Inc. Meanwhile, our firm has settled with many companies in all eight states for more than \$1 billion and completed the litigation in all states, with the exception of two trials remaining in Utah.

Lawyers: Dee Miles and Ali Hawthorne
Primary Staff Contacts: Jessica Stapp and Brenda Russell

Molina/Unisys

At the conclusion of the AWP cases in Louisiana, the State discovered that its data-processing firm, Molina, appears to not have been utilizing the correct reimbursement rate in processing payments to pharmacies. Instead of the computer system automatically calculating reimbursements with the state-approved formulary, Molina programmers apparently input the wrong data points, resulting in overpayments. Beasley Allen represents the State in seeking to recoup those overpayments from the party that caused them, which appears to be Molina.

Lawyers: Dee Miles and Ali Hawthorne
Primary Staff Contacts: Jessica Stapp and Brenda Russell

Unapproved Drugs

In order for a state to reimburse pharmacies for dispensing drugs to state Medicaid beneficiaries, those drugs must be U.S. Food and Drug Administration (FDA) approved. By manipulating the system, some pharmaceutical manufacturers have been able to sneak certain drugs that have not been FDA approved onto the state Medicaid reimbursement without alerting anyone. States have reimbursed pharmacies for dispensing these drugs, unaware that they were not FDA approved and, therefore, ineligible for reimbursement. Beasley Allen represents the States of Louisiana and Mississippi in seeking to recover Medicaid reimbursements for these ineligible drugs and we are consulting with other State Attorneys General.

Lawyers: Dee Miles, Lance Gould, and Ali Hawthorne
Primary Staff Contacts: Holly Busler and Jessica Stapp

GranuFlo

GranuFlo is a dialysate product used in the hemodialysis process. Several years ago

Fresenius, the manufacturer of GranuFlo, realized that through a natural biological process, its product created a significantly increased risk of cardiac distress and death when not administered in a different dosage than every other dialysate product on the market. It appears that instead of warning clinics, physicians, consumers, and the states, Fresenius remained silent about the risk. Once the risk came to attention of the FDA, Fresenius notified its own clinics to adjust their dosage, but it appears it did not notify those owned and operated by non-Fresenius companies. Eventually, the true risk information became public. There are several cases filed against Fresenius alleging that the Defendants actions caused injuries to individual users. Beasley Allen represents the States of Louisiana and Kentucky in seeking to recover for the reimbursements it made and damages it suffered because of the claims submitted to the states' Medicaid office for this substandard product and Fresenius' failure, through its marketing to physicians, clinics, and citizens, to inform its customers of the proper dosage requirements.

Lawyers: Dee Miles, Lance Gould, Ali Hawthorne, and Rebecca Gilliland
Primary Staff Contacts: Holly Busler and Jessica Stapp

Actos

Actos is a commonly prescribed drug used in treating Type 2 Diabetes Mellitus. Diabetes affects more than 26 million people nationwide. Approximately 90 to 95 percent of those 26 million Americans with diabetes suffer from Type 2 Diabetes. Actos received FDA approval in 1999, but prior to that, an unreported clinical study was conducted, whereby the Defendants discovered an association between Actos and an increased risk of bladder cancer. Subsequent studies over the years have demonstrated that there is in fact a statistically significant increase in the risk of bladder cancer for individuals that have been prescribed and consumed Actos. The Defendants, manufacturers of Actos, were aware of the increased risk of bladder cancer, but downplayed and tried to discredit the numerous studies that demonstrated that risk. Beasley Allen represents the State of Louisiana in seeking to recover for the reimbursements it made and damages it suffered because of the claims submitted to the state's Medicaid office for this substandard product and the manufacturers' failure, through their marketing to physi-

cians and citizens, to inform its customers of the proper dosage requirements.

Lawyers: Dee Miles, Lance Gould, and Ali Hawthorne
Primary Staff Contact: Jessica Stapp

Usual and Customary

State Medicaid agencies reimburse pharmacies for the drugs they dispense to Medicaid beneficiaries within their States. The amount that a pharmacy receives is determined by a reimbursement formulary that is set by the State and approved by the Federal government. Most States will reimburse using a "lesser of" or "lower of" formula where four to five factors are considered and the pharmacy is paid whichever amount is the lowest. These factors usually include: Wholesale Acquisition Cost (WAC), Average Wholesale Price (AWP), the Federal Upper Limit (FUL), a State-set Maximum Allowable Cost (SMAC), or the pharmacies' Usual and Customary price (U&C) as reported by the pharmacy seeking reimbursement. U&C is generally understood to be the price charged to a cash-paying customer. Historically, the AWP, WAC, FUL, or SMAC were lower than a pharmacy's reported U&C, so U&C was very rarely utilized in reimbursement.

However, around May of 2006, the historical U&C pricing model underwent a drastic change when Walmart and Kmart introduced their nationwide discount generic drug programs. Walmart's discount program offered hundreds of generic drugs at \$4 for a 30-day supply and \$9 for a 90-day supply. Similarly, Kmart's discount drug program offered hundreds of generic drugs at \$5 for a 30-day supply and \$10 to \$25 for a 90-day supply. Those low, flat-rate prices became the pharmacy's U&C price and should have been reported to State Medicaid agencies as the U&C. Attorneys in our Consumer Fraud section uncovered evidence that many pharmacies with discount drug programs are not, however, reporting their flat-rate prices as their U&C, causing State Medicaid agencies to overpay large, chain pharmacies by millions of dollars. We have filed cases for the State of Mississippi to hold these pharmacies accountable and are working closely with other state Attorneys General regarding their potential state claims.

Lawyers: Dee Miles, Ali Hawthorne, Rebecca Gilliland, and Clay Barnett
Primary Staff Contacts: Michelle Fulmer, Ashely Pugh, Jessica Stapp, Brenda Russell, and Amanda Richards

FLSA Litigation

Lawyers in the Section have been handling FLSA (Fair Labor Standards Act) cases for many years. FLSA cases range from mischaracterizing an employee as a “manager” to avoid having to pay overtime wages, to employers having employees “work off the clock” to save on labor cost, but both are violations of the law under the FLSA.

Lawyer: Lance Gould
Primary Staff Contacts: Holly Busler and Brenda Russell

Equal Pay And Race Discrimination/ Age Discrimination

Several lawyers in the Section handle other employment cases involving discrimination due to gender, race, age, culture and other factors. We recently settled several cases involving these issues and hopefully bettered the work environment for many others.

Lawyers: Larry Golston and Lance Gould
Primary Staff Contact: Holly Busler

Wills and Estates

Creating a will to plan for what happens to your estate after you pass is critical. Without a will, all of a person’s possessions pass through their state’s intestate succession laws—meaning that heirloom you want your cousin to have probably will not get into your cousin’s hands without a will; it will pass to whomever the law dictates receives your estate. For some people, those with a lot of assets, even a trust is necessary to protect the estate assets for years to come. This is particularly important for people who own their own business. A trust can dictate who controls the business, what happens to business assets, and how the company profits are handled. Though the decedent would hope it does not create a dispute, sometimes the heirs of an estate dispute the validity of the will/trust or dispute the meaning of the language in the will/trust. Beasley Allen lawyers are looking into these disputed wills and trusts involving large estates.

The Kessler Case

Beasley Allen has teamed up with The CBC Law Group in Nashville to litigate an estate dispute involving the estate of the late Gerald A. Kessler. Mr. Kessler passed away in March 2016 at the age of 80, leaving an estate believed to be

valued at more than \$800 million. In dispute is an Amendment created in 2013 to the Gerald A. Kessler Revocable Trust that gives Melanie Kay Williams (an actress also known by the stage name Meadow Williams) control over almost all of his assets as Trustee. It further established her as, essentially, the sole and exclusive beneficiary of the estate. The Petition filed on behalf of the Kessler family alleges Ms. Williams, who is 31 years younger than Mr. Kessler, manipulated and unduly influenced him to execute new estate planning documents through actions including bigamy, undue influence and elder abuse.

Lawyers: Dee Miles, Lance Gould, and Leslie Pesca
Primary Staff Contact: Holly Busler

CONCLUSION

These are just some of the highlights for the work currently being done in the Consumer Fraud & Commercial Litigation Section. Our lawyers continue to dedicate their time and efforts on the multitude of issues involving corporate misconduct. They do an excellent job in this area of the law. Michelle Fulmer, Section Administrator, can be reached at 800-898-2034 or Michelle.Fulmer@beasleyallen.com. She can assist you in getting in touch with lawyers in the section.

XX. THE CONSUMER CORNER

TELEPHONE CONSUMER PROTECTION ACT

In the years following the Great Recession, many people are finding themselves behind on their bills. With the near ubiquity of cell phones, it is getting easier and easier for bill collectors to contact their customers in an attempt to collect those debts. Many of these creditors, or third party debt collectors, go well beyond what is reasonable in attempting to collect the debts. Some go so far as to call multiple times every day of the week.

There is something you can do about it. The Telephone Consumer Protection Act (TCPA) is a federal statute that provides a remedy for consumers who are being harassed by telephone by their creditors. If you have told the caller to stop contacting

you over the phone, and the calls continue, it is highly likely that you have a remedy under this statute.

The TCPA prohibits creditors from contacting consumers without their consent if the creditor is using an “automatic telephone dialing system.” An automatic telephone dialing system is usually used to connect the caller to the consumer. Despite the existence of this statute, some creditors will continue to call after they have been told to stop—often every day.

The TCPA imposes a statutory minimum penalty of \$500 per phone call if the creditor continues to call. In order to invoke this provision, however, the debtor must request that the debt collector cease its phone calls, as most consumer contracts authorize contact by telephone. Lawyers in our firm’s Consumer Fraud & Commercial Litigation Section are currently investigating claims of harassment of consumers by creditors in violation of the TCPA. If you need additional information, contact Jeff Price, a lawyer in the Section, at 800-898-2034 or by email at Jeff.Price@beasleyallen.com.

ROCHE AND PHARMACIES REACH \$17 MILLION SETTLEMENT OVER UNWANTED FAXES

Medical testing supplier Roche Diagnostics Corp. has agreed to pay \$17 million to potentially tens of thousands of pharmacies to settle Telephone Consumer Protection Act (TCPA) claims. Those claims are in a putative class action over unwanted faxes sent to pharmacies. The settlement proposal was filed in an Indiana federal court on March 16. The putative class action from family-owned, Arkansas-based Econo-Med Pharmacy Inc. alleged Indianapolis-based Roche violated the TCPA with “junk faxes.” The parties reached the \$17 million agreement to end the suit earlier this year at a mediation.

The proposed settlement class includes all pharmacies that received a fax from Roche from April 11, 2012, through the date of the settlement’s preliminary approval. Based on Roche’s internal records the class could be tens of thousands of members. Each member is expected to receive at least \$500. The complaint, filed in April 2016, says Roche sent Econo-Med multiple “junk faxes,” including an unsolicited advertisement for Accu-Chek test strips in January 2016 in violation of the Indiana Deceptive Consumer Sales Act and TCPA. It was alleged in the complaint that the faxes did not contain opt-out notices as required by the TCPA.

The court stayed the action while Roche waited on a response to a waiver application in front of the Federal Communications Commission (FCC). In November 2016, the FCC said Roche's request was granted through April 30, 2015, meaning any noncompliant faxes without opt-out information sent after that date are subject to TCPA liability. After the FCC's decision, the parties agreed to mediate the suit.

Econo-Med and the proposed settlement class are represented by Irwin B. Levin and Vess A. Miller of Cohen & Malad LLP and Randall K. Pulliam and Tiffany Wyatt Oldham of Carney Bates & Pulliam PLLC. The case is *Econo-Med Pharmacy Inc. v. Roche Diagnostics Corp.* (case number 1:16-cv-00789) in the U.S. District Court for the Southern District of Indiana.

Source: Law360.com

JUDGE APPROVES SUBWAY'S RECORD \$31 MILLION FACTA SETTLEMENT

A Florida federal judge has approved the largest settlement in the history of the Fair and Accurate Credit Transactions Act (FACTA), a nearly \$31 million settlement between Subway and a class of consumers. It was alleged that the sandwich chain unlawfully printed full credit card expiration dates on receipts. U.S. District Judge Cecilia M. Altonaga gave preliminary approval to the \$30.9 million settlement with Doctor's Associates Inc., which does business as Subway. It was submitted for approval on March 21 by named Plaintiff Shane Flaum on behalf of about 2.6 million people whose credit and debit card information was potentially compromised by the printed receipts showing the full expiration dates of their cards.

Judge Altonaga also granted Flaum's request for leave to amend his complaint to include as an additional representative Jason Alan, the Plaintiff in a parallel class action pending in Florida, and approved Scott Owens PA, Bret Lusskin PA and Keogh Law Ltd. as class counsel. The judge also agreed to conditionally certify a class that includes all Subway patrons who received receipts upon purchase that showed their credit and debit cards' full expiration dates between Jan. 1, 2016, and the date of preliminary approval. Judge Altonaga also approved a class notice proposal that included a settlement website, publication notice and press release. The judge also set out the rules for properly submitting a claim form.

Mr. Flaum filed his complaint in June 2016, alleging that Subway violated FACTA through its practice of printing customers'

cards' full expiration dates even after it had been sued in the past for similar violations—twice in 2007, and again in 2008 and 2009. FACTA regulations require retailers to omit card expiration dates on receipts, as emphasized in the Credit and Debit Card Clarification Act. Mr. Flaum sought to recover FACTA statutory damages of \$100 to \$1,000 per receipt for him and the proposed class members. It appears that only about half of U.S. Subway restaurants printed receipts that showed entire expiration dates, and they only did so during a "very limited window of time."

The \$30.9 million settlement appears to have set a new record for FACTA class actions. It is believed to be the "largest FACTA settlement in the history of FACTA." Plaintiff Flaum is represented by Scott D. Owens of Scott D. Owens PA, Bret Leon Lusskin Jr. of Bret Lusskin PA, and Michael Hilicki of Keogh Law Ltd. The suit is *Flaum v. Doctor's Associates Inc.* (case number 0:16-cv-61198) in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

XXI. RECALLS UPDATE

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

MERCEDES-BENZ RECALLS 354,000 U.S. VEHICLES OVER FIRE RISK

Mercedes-Benz USA LLC has recalled more than 354,000 vehicles in the U.S. after discovering that the starter current limiter can overheat and cause fires, according to the National Highway Traffic Safety Administration (NHTSA). Daimler AG, the company's owner, said worldwide it will be recalling a million vehicles, after 51 fires were reported, according to published reports. There have been no injuries or deaths, the reports state. Those cars include "certain 2015-2017 C300 4Matic, C300, CLA250, CLA250 4Matic and CLA45 AMG vehicles, 2017 C300 4Matic Cabrio, C300 4Matic Coupe, C300 Cabrio, C300 Coupe, E300, E300 4Matic, E400 4Matic

Wagon, E43 AMG 4Matic, GLA250, GLA250 4Matic and GLC300 4Matic Coupe vehicles and 2016 C350e and GLC300 vehicles and 2016-2017 C450 4Matic AMG Sport and GLC300 4Matic vehicles," NHTSA said on Feb. 23. The government said there could be 354,434 vehicles recalled in the U.S., but reports said Daimler placed that number at 307,629.

The U.S. company was to make car owners aware of the recall in late March. Dealers to install an additional fuse in the electrical line to the starter for free, NHTSA said. When parts become available to fix the problem, Mercedes-Benz will alert owners. That's expected to happen around July. This isn't the company's first time dealing with possible overheating problems. The company is currently engaged in a potential class action over seat heaters that are allegedly prone to fail, spark or catch fire.

HYUNDAI RECALLS 978,000 CARS FOR SEAT BELT PROBLEM

Hyundai is recalling nearly 978,000 cars in the U.S. because the front seat belts could detach in a crash and fail to hold people. The recall covers Sonata midsize sedans from the 2011 through 2014 model years, and the Sonata hybrid from 2011 through 2015. Hyundai says in government documents that a fastener for a seat belt anchor may not have been fully latched during assembly. If that happens the belts can detach. The company says it knows of one minor injury caused by the problem. The trouble was discovered in September when an owner reported that the front passenger belt in a 2013 Sonata came loose in a collision. Owners will be notified starting April 7. Dealers will inspect the seat belt anchor system and repair it if needed.

NISSAN RECALLS VERSA AND INFINITI QX30 VEHICLES OVER AIRBAG PROBLEMS

Nissan is recalling older Versa sedans and the all-new Infiniti QX30 hatchback-turned-crossover. The National Highway Traffic Safety Administration (NHTSA) agreed with Nissan that the 2012 Versa has to be recalled to be fixed. There are just about 54,751 units potentially affected by an electrical issue. Nissan refers to Versa sedans manufactured between June 9, 2011, and April 2, 2012.

In the subject bargain-basement sedans, Nissan notes, dissimilar metals were employed for the side airbag sensor connector harness. In time, this combo may

lead to the fretting and oxidation on the harness connection pins of the Satellite Sensor-to-Airbag Control Unit (ACU). This condition increases the likelihood of a signal loss from the satellite sensor to the ACU, which may cause the curtain and seat-mounted airbags to deploy if the door is slammed. The QX30, then. Infiniti brought this thing to market for the 2017 MY, yet 79 units have to go back to the dealership for fixing. The problem with these particular QX30 vehicles is the driver-side curtain airbag inflator initiator. "Manufactured out of specification" by Autoliv, the "initiators may have been assembled using an incorrect generant mix ratio." That's the reason why the airbags may not deploy in a crash, thus increasing the risk of injury.

Those 79 QX30s affected by this problem were manufactured from Oct. 10, 2016, to Oct. 26, 2016. The dealers were instructed to replace the entire driver-side curtain airbag assembly with a new one. Nissan has promised to notify all owners of potentially affected vehicles within 60 days. If you own a Versa or a QX30 and you need more info, Nissan's customer service is 800-647-7261 and Infiniti is reachable at 800-662-6200.

POLARIS RECALLS MORE OFF-ROAD VEHICLES FOR FIRE AND BURN HAZARDS

Polaris is recalling several recreational off-road vehicles (ROVs) because they pose burn and fire hazards to users. The recall includes 2016-17 RZR 900, 1000, Turbo and GENERAL 1000 models, which were sold in various colors and produced in Mexico and the U.S. "The vehicle engine can misfire and the temperatures of the exhaust and nearby components can get too hot and cause the components to melt, and/or a contaminated brake master cylinder may cause unintended brake drag, posing burn and fire hazards," reads a statement from the U.S. Consumer Product Safety Commission (CPSC). The Minnesota company says it is aware of 14 reports of vehicles catching fire due to the brake master cylinder, and one report of fire and two reports of melting vehicle components related to an engine misfire. No injuries have been reported. The items were sold for \$12,800 to \$24,000 nationwide from August 2015 until February 2017. Customers should immediately stop using the ROVs and contact their Polaris dealer for a free repair. This is the 11th Polaris vehicle recall since 2015. It is unclear if the most recent recall involves the company's new Huntsville-annexed plant, which handles

assembly, metal fabrication, welding, chassis and body painting and injection molding for the Polaris Ranger off-road vehicles and Slingshot Moto-Roadster.

POLARIS RECALLS SPORTSMAN 850 AND 1000 ALL-TERRAIN VEHICLES DUE TO BURN AND FIRE HAZARDS

About 19,200 Sportsman 850 and 1000 all-terrain vehicles (ATVs) have been recalled by Polaris Industries Inc., of Medina, Minnesota. The right side panel heat shield can melt, posing burn and fire hazards to riders. In addition, in 2015 Sportsman 1000 ATVs, the exhaust springs can stretch and damage the exhaust seal, which can result in exhaust leaks and pose burn and fire hazards. This recall involves all model year 2015 and 2016 Polaris Sportsman 850 and 1000 model all-terrain vehicles (ATVs). "Polaris" is printed on the front grill and "Sportsman 850" or "Sportsman 1000" is printed on the side of the steering column. The ATVs were sold in several colors. The model number is located on the fuel tank cover.

Polaris has received at least 793 incidents, including reports of warped, melted or burned side panels, 47 fires and four minor burn injuries. The ATVs were sold at Polaris dealers nationwide from May 2014 through March 2017 for between \$8,500 and \$15,000. Consumers should immediately stop using the recalled ATVs and contact Polaris to schedule a free repair. Polaris is contacting all known purchasers directly. Contact Polaris at 800-765-2747 from 7 a.m. to 7 p.m. CT Monday through Friday or online at www.polaris.com and click on "Off-Road Safety Recalls" for more information. In addition, check your vehicle identification number (VIN) on the "Product Safety Recalls" page to see if your vehicle is included in any recalls. Pictures available here: <https://cpsc.gov/Recalls/2017/Polaris-Recalls-Sportsman-850-and-1000-All-Terrain-Vehicles>

PHILIPS LIGHTING EXPANDS RECALL OF METAL HALIDE LAMPS DUE TO FIRE AND LACERATION HAZARDS

Philips Lighting North America Corp., of Somerset, New Jersey, has recalled about 256,000 Metal Halide Lamps. This expanded recall involves Philips Energy Advantage Ceramic Metal Halide Lamps model CDM330 manufactured from May 2011 through March 2014. They are designed as energy efficient replacements for traditional 400W quartz metal halide

lamps installed in magnetic ballasts and intended for use in high-ceiling industrial, retail and commercial applications. The lamps were sold in both clear and coated versions. Each lamp includes an etching, located either on the base of the lamp or the glass bulb that displays the date code in the format of a number followed by a letter representing the year and month, "Philips," wattage (330W) and the model number (CDM330).

The company has received 12 new reports of lamps shattering including one incident involving a fire. No injuries have been reported. Electrical supply distributors, including Grainger, Rexel and Voss from May 2011 through August 2014 for about \$40. The outer bulbs can shatter, resulting in hot internal pieces of glass falling from the lamps, posing fire and laceration hazards. Consumers should immediately stop using the recalled lamps and contact Philips for a free replacement by email at ceramicmh@philips.com or online at www.philips.com and click on "For Professionals" and then "Recalls" for more information.

BATTERY CHARGERS FOR XBOX ONE VIDEO GAME CONTROLLERS RECALLED BY PERFORMANCE DESIGNED PRODUCTS DUE TO BURN HAZARD

About 121,000 Energizer® XBOX ONE 2X Smart Chargers have been recalled by Performance Designed Products LLC, of Burbank, California. The battery chargers can overheat and damage the XBOX ONE video game controller, posing a burn hazard to consumers. This recall involves Energizer® XBOX ONE 2X Smart Chargers used to charge XBOX ONE video game controllers. The chargers are black plastic and measure about 3.5 inches long, 5 inches wide and 11 inches tall. "Energizer®" is printed on the charger's label. Item number 048-052-NA is printed on the bottom of the chargers. The chargers hold up to two XBOX controllers. The company has received 24 reports of the chargers overheating and deforming the charger's plastic cover, including six reports of chargers emitting a burning odor. No injuries have been reported.

The chargers were sold at Best Buy, GameStop and other stores nationwide and online at Amazon.com and other online retailers from February 2016 through February 2017 for about \$40. Consumers should immediately stop using the recalled battery chargers and contact Performance Designed Products to return the chargers for a full refund. Contact Performance

Designed Products at 800-263-1156 from 10 a.m. to 4 p.m. PT Monday through Friday, or online at www.pdp.com and click on Safety Recall for more information. Photos available here: <https://cpsc.gov/Recalls/2017/Battery-Chargers-for-XBOX-ONE-Video-Game-Controllers-Recalled-by-Performance-Designed-Products>

R.W. BECKETT RECALLS FUEL OIL VALVES DUE TO FIRE HAZARD

R.W. Beckett Corp., of North Ridgeville, Ohio, has recalled about 18,000 Firomatic® fusible safety valves. The safety valve stem does not properly seal and shut off the flow of fuel, allowing fuel to leak and posing a fire hazard. This recall involves Firomatic ½ inch FPT Fusible Safety Valves series 200 Fusible Inline valve, 1/2F X 1/2F Out. The valves are located on the fuel lines that lead to oil-burning appliances. The valves have a UL metal ring on top of the body of the valve stamped with “FIROMATIC SERIES 200.” “Firomatic” is cast into the body of the recalled valves.

The valves were sold at HVAC wholesale distributors including Ferguson Enterprises, FW Webb, Johnstone Supply, RE Michel Co and Sid Harvey Industries nationwide and from September 2011 through September 2016 for about \$40. Consumers should immediately contact R.W. Beckett for a free repair kit or a replacement valve and free installation at 800-645-2876 from 8 a.m. to 5 p.m. ET, Monday through Friday or online at www.beckettcorp.com and click on Support/Technical Bulletins for more information.

LIVLY RECALLS CHILDREN'S SLEEPWEAR DUE TO VIOLATION OF FEDERAL FLAMMABILITY STANDARD

About 1,200 children's robes and two-piece pajama sets have been recalled by LCK Design LLC d/b/a Livly Clothing, Sunny Isles, Florida. The children's robes and pajama sets fail to meet federal flammability standards for children's sleepwear, posing a risk of burn injuries to children. This recall involves children's robes and two-piece pajama sets. The recalled two-piece sets are a long-sleeve top and pants and have a sewn-in side fabric label that has “LIVLY,” “www.livlyclothing.com” and RN number 146214 printed on it. The two-piece sets also have a printed label with “LIVLY” on the back of the neck and at the back of the pants. The recalled robes have a chest pocket on the left side with the word “Mini” embroidered on it, two pockets at the bottom and one snap-closure

on the right side above the abdomen for closure. A belt is attached to the center back of the robe and an outline of a sleeping face is embroidered on the back of the robe. A fabric label with “LIVLY” and the size is sewn on the inside of the neck of the robe. More information here: <https://cpsc.gov/Recalls/2017/LIVLY-Recalls-Childrens-Sleepwear>

The pajamas were sold at Baby Elaine, Bluebelle, Le Bambini, The Hosiery Boutique, LIVLY and other specialty stores and online at Gilt.com, LivlyClothing.com and other websites from February 2016 through January 2017 for about \$55 for the children's two-piece pajama sets and \$78 for the children's robes. Consumers should immediately take the recalled children's clothing away from children and contact LIVLY for a full refund. Contact LIVLY toll-free at 844-350-7728 from 9 a.m. to 5 p.m. Monday through Friday or online at www.livlyclothing.com and click on “Product Recall” at the bottom of the page for more information. Photos available here: <https://cpsc.gov/Recalls/2017/LIVLY-Recalls-Childrens-Sleepwear>

S.R. SMITH RECALLS HELIX POOL SLIDES DUE TO FALL HAZARD

About 800 Helix pool slides have been recalled by S.R. Smith LLC, of Canby, Oregon. A child can fall off the side of the slide before reaching the pool entry point, posing a fall hazard that can result in serious injury. This recall involves Helix residential pool slides with serial numbers from SR-HX13-01001 to SR-HX13-01488 and SR-HX14-01001 to SR-HX14-01602. “S.R. Smith,” “Helix” and the serial number can be found on the product label located on the top right side of the slide near the staircase rail. The recalled slides are 7-feet, 4 inches-tall at the highest point and have a helix (corkscrew) shape to its slide or flume. The firm has received 16 reports of users falling from the slide, resulting in 15 reports of injuries including a 4-year-old girl who sustained a concussion. Other reports included damaged/loosened teeth, cuts to the chin that required stitches, bruising and scrapes.

The slides were sold at In The Swim, Leslie's Swimming Pool Supply, SCP Distributors and other pool product distributors nationwide and online at Amazon.com and Intheswim.com between May 2013 and March 2015 for about \$3,000. Consumers should immediately stop using the recalled slides and contact S.R. Smith for a free slide rail extension kit that will increase the height of the rail sides. Consumers can

install the extension kit or contact S.R. Smith for a one-time, free installation of the kit. Contact S.R. Smith at 800-611-4750 from 6:30 a.m. to 5 p.m. PT Monday through Friday, or online at www.srsmith.com and click on “Helix Slide Info” for more information. Consumers can also email the firm at helixslideinfo@srsmith.com.

DILLARD'S RECALLS BABY JACKET OVER CHOKING FEARS

Dillard's is recalling faux-fur hooded bear coats for babies over fears that the metal snaps can detach, posing a choking hazard. The recall includes Starting Out Baby Girls 3-24 Months Faux-Fur Hooded Bear Coat with style numbers F64CI801I and F64CI801N. The “Starting Out” logo and style number can be found on the tag sewn into the garment. Dillard's has received one report of snaps detaching. The company is telling consumers to immediately stop using the jackets, and to return them to the store for a full refund. You can also contact the company to receive a prepaid envelope for return by mail. You can reach out to the company at 800-345-5273 from 8 a.m. to 1 a.m. Monday through Saturday and 10 a.m. to 8 p.m. on Sunday. You can also contact the company by email at bearcoat.recall@dillards.com or online at dillards.com. Additional information is available on the CPSC's website.

ADVANCED SPORTS INTERNATIONAL RECALLS FUJI BICYCLES DUE TO FALL HAZARD

About 650 Fuji bicycles have been recalled by Advanced Sports International, of Philadelphia, Pennsylvania. The rear wheel freehub can slip while pedaling, posing a fall hazard. This recall involves Advanced Sports International's 2017 Fuji bicycles with Oval Concepts Rear Wheels. The aluminum or carbon fiber bicycles come in a variety of colors. The bicycle model name is printed on the frame of the bicycle. The wheel model number is printed on the rim of the wheel. The hub model number is printed on the drive-side hub flange.

Advanced Sports International has received four reports of freehub slipping while pedaling. No crashes or injuries have been reported. The bicycles were sold at Fuji Bicycle and Authorized Oval Concept dealers from April 2016 through October 2016 for \$2,000 to \$8,000. Consumers should immediately stop riding the recalled bicycles and contact Advanced Sports Inter-

national to receive a free replacement freehub body. Advanced Sports International can be contacted toll-free at 888-286-6263 from 9 a.m. to 5 p.m. ET Monday through Friday or online at fujibikes.com or ovalconcepts.com and click on “Recall Notice” at the bottom of the page for more information.

37 TONS OF BEEF RECALLED FOR RARE TYPE OF E. COLI

Nearly 37 tons of beef produced by a Texas-based company have been recalled. This came after state inspectors found that a sample tested positive for a rare strain of E. coli. H&B Packing Co. Inc. is recalling about 74,000 pounds of boneless beef products that might be contaminated with E. coli O103. According to the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS), the issue was uncovered when Texas meat safety regulators told FSIS that a sample of the beef products tested positive for a non-O157 Shiga toxin-producing E. coli sample. Many laboratories don't test for non-O157 Shiga toxin-producing E. coli, such as E. coli O103, since it's harder to detect than the O157 strain, the USDA said in the recall notice. People can become ill from E. coli two to eight days after eating a contaminated food, the USDA said. The USDA said:

Most people infected with Shiga toxin-producing E. coli O103 develop diarrhea (often bloody), and vomiting. Some illnesses last longer and can be more severe.

So far, no illnesses have been reported in connection with the beef, according to the USDA. While most people recover within a week, in rare cases some may develop a more serious infection, the agency said. According to the recall notice, the beef products were made on March 6 and bear the establishment number “EST. M13054” inside the USDA mark of inspection. They were shipped to food manufacturers in Texas, the USDA said. The agency is urging consumers to throw away the beef products or return them to where they bought them. “FSIS and the company are concerned that some product may be frozen and in customers' freezers,” the agency said. The company didn't immediately return a request for comment on Monday.

MYLAN RECALLS 80,000 EpiPENS MANUFACTURED BY PFIZER

Just as the furor over pricing had died down, the EpiPen is back in the spotlight with Mylan recalling more than 80,000 of the injectors outside the U.S. because they may not work. The injectors were manufactured for Mylan by Pfizer's Meridian Medical Technologies, a unit that has been at the center of unwanted attention for its injectors before. Mylan this week issued a recall of four batches of its EpiPen 300 microgram injectors shipped to Europe, Japan, Australia and New Zealand. The recall followed two confirmed reports that the devices may contain a defective part that could result in the pen either not activating or requiring extra force to activate, the company said. That, as Mylan pointed out, could be a problem for someone being injected for anaphylaxis or anaphylactic reactions. It said that “at this time” its EpiPen Jr pens, its 150 pens and all of the EpiPen 300 injectors outside of the identified batches were okay to use. The pens were manufactured for Mylan by Pfizer's Meridian unit in St. Louis, Missouri. The Pfizer operation ran into trouble with a Congressman in 2013 when it had to replace injectors sold to the military that were to be used in case of a sarin gas attack. Pfizer had discovered that about 7 out of 1,000 of its DuoDote auto-injectors containing atropine and pralidoxime didn't contain enough of one or both of the drugs.

At the time, there had been a confirmed report that Syria had used sarin in a rocket attack in its civil war that killed hundreds. The current recall comes as attention on EpiPen pricing has subsided somewhat. Mylan CEO Heather Bresch spent the second half of last year dealing with public and political outrage after reports showed Mylan had raised the price repeatedly for the pens as its lock on the market tightened. It also struck a \$465 million settlement with the Justice Department to resolve allegations that it overcharged Medicaid for EpiPen.

Once again there have been a fairly large number of recalls since the last issue. While we weren't able to include all of them in this issue, we included those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm's websites at www.BeasleyAllen.com or www.RightingInjustice.com. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more

recall information or to supply us with information on recalls.

XXII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

KENDALL DUNSON

Kendall Dunson, a lawyer in our firm's Personal Injury/Products Liability Section, grew up in LaGrange, Georgia. He earned his degree in Corporate Finance from the University of Georgia and his J.D. from the University of Alabama School of Law.

As a young man, Kendall says his decision to pursue a law degree came after being exposed to the “Eyes on the Prize” Civil Rights documentary. He was struck by one consistent fact throughout his studies—any serious progress for Civil Rights originated from our court system. Kendall says he was also motivated by watching LA Law on television when he was young, finding the show to be instrumental in his path to becoming a lawyer.

Kendall has worked on numerous cases involving defective machinery and safety equipment with goals of compensating clients for their losses, as well as influencing corporations to design and manufacture safer products. Kendall says he is most pleased after achieving a result that not only vindicates a client, but also pushes for stronger safety regulations. In one of Kendall's cases, his client's husband was killed when a Goldkist truck backed up and killed him. The truck was not equipped with a back-up alarm despite needing one. As a result of the verdict, Goldkist has since outfitted its entire fleet of trucks with back-up alarms.

Kendall says he is grateful that Beasley Allen provides a work environment where people truly care about their clients, each other and society in general. He believes the firm has a unique opportunity to become involved in major litigations due to its past success, therefore ensuring there is never a boring day in the office.

Kendall is married to Samarria Munnerlyn Dunson. Samarria, who is also a lawyer, is the Director of the Office of Compliance and Ethics for the Alabama Department of Public Health. Kendall and Samarria have three children—two daughters and one son. Kendall is a tremendously talented and hard-working lawyer and we are blessed to have him with us.

ARCHIE GRUBB

Archie Grubb joined Beasley Allen in 2009 and works as a Principal in our firm's Consumer Fraud & Commercial Litigation Section focusing on consumer class actions and whistleblower litigation. Archie grew up around lawyers since his own father opened a practice in Eufaula, Alabama. As a result, Archie says he became exposed to many great lawyers through his father's practice, many of whom would later become role models for how lawyers can make a difference in the lives of their clients.

Archie says he found his favorite part of being a lawyer to be problem solving. Many times, Archie must meet with clients and work with them to figure out how to overcome the difficulties they are facing. Archie says that Beasley Allen provides the perfect environment to do just that. He also believes that the firm exemplifies the importance of teamwork in that everyone—paralegals, investigators, technology specialists, law clerks and many others—contribute to the firm's foundation for success.

Archie and his wife Mary Lynn have two boys and one girl—Win, who is 12 years old, Sam, who is 10 years old, and Kate, who is 6 years old. Mary Lynn's father, Houser Pugh, is also a lawyer. Houser, who has been practicing in Columbus, Georgia, for 50 years, has served as a strong mentor to Archie throughout his career as a lawyer.

In his spare time, Archie serves as vice-president of the Board of Directors at Brantwood Children's Home, a non-profit home for neglected and at-risk children. He is also a co-founder of the Unity Group, a partnership between predominantly black and white Methodist churches in the Montgomery area. As a hobby, Archie has coached youth basketball since 2011. Archie is a very good lawyer who believes strongly in what he does. He puts his clients' interests first at all times. We are most fortunate to have Archie with the firm.

DEBBIE CUNNINGHAM

Debbie Cunningham began her tenure at Beasley Allen in March of 2008 as a temporary worker in the Mass Torts section. Since then, she has worked with the Toxic Torts section on the BP oil spill litigation, then went back to the Mass Torts section to help with the talcum powder litigation.

Currently, Debbie works as the legal secretary for Gibson Vance. Some of her responsibilities include routine clerical and administrative functions, as well as several other reports. One of her favorite things about this position is that she works directly with referring attorneys and their

staff. Debbie says it is critical to the firm's success to help cultivate and maintain those working relationships.

Debbie and her husband Jeff have been married for nearly 31 years and are the proud parents of two grown children—Erin, 29, and Nicholas, 26. She considers raising her children to be her greatest accomplishment, although she and Jeff are now “empty nesters,” with the exception of their pit bull mix “fur baby” Max.

In her spare time, Debbie and Jeff enjoy traveling out of state at least once every few months, as well as grilling outdoors with the whole family. Debbie is also taking on a new hobby—organic gardening. Debbie is a very good, hard-working employee. She is a definite asset to the firm and we are fortunate to have her with us.

JASON KING

Jason King started work at Beasley Allen in October of 2010 as a Web Developer in the firm's Marketing department. His responsibilities include managing numerous digital marketing efforts, such as search engine marketing, social media marketing, web design, graphic design and creative direction.

Jason attended both John Patterson Technical School and Auburn University Montgomery, now holding several certifications in Advanced Search Engine Optimization and Digital Marketing.

Jason enjoys spending most of his downtime with his family, either playing games, watching movies, cooking together, or hiking and traveling around to explore more of God's magnificent creation with one another. He is also musically inclined, having played the drums for a few local churches. He endeavors to continue expanding his creative side by practicing an art technique known as palette knife painting. Jason is a very good employee and his work is invaluable to the firm. We are fortunate to have him with us.

LORETTA WILLIAMS

Loretta Williams has been employed by Beasley Allen since 2001, which is a little over 15 years now. As an Accounting Clerk II, Loretta processes invoices and check requests by staff members. She is also responsible for reconciling departmental credit card statements and several other miscellaneous tasks for the firm's Accounting department. Prior to starting in Accounting, Loretta worked both in Records Retention and the Personal Injury & Product Liability Section.

A native of Mississippi, Loretta moved to Montgomery in order to further her education after high school. Upon earning her Bachelor's degree in Secondary Education

from Alabama State University, Loretta decided to take more classes at Troy Montgomery. She plans to finish working toward another degree in the near future.

Loretta and her husband Paul have been married eight years and together have one 6-year-old son. Loretta enjoys writing and journaling in her spare time, as well as obtaining knowledge from books, videos and whatever else can offer her new information. Loretta says she has always wanted to proceed through life as a student, meeting people and sharing life experiences with others. She also enjoys traveling with her family whenever she gets the chance. Loretta is a very good, hard-working employee and we are fortunate to have her with the firm.

XXIII. SPECIAL RECOGNITIONS

U.S. ATTORNEY GEORGE BECK WILL BE MISSED

U.S. Attorney George Beck of the Middle District of Alabama announced his resignation effective March 10. George joined nearly 50 other federal prosecutors around the U.S. who on the same day all resigned in a rather strange manner. The resignation is part of a Department of Justice (DOJ) mandate under the Trump administration, and came at the request of U.S. Attorney General Jeff Sessions. While it is not uncommon for U.S. Attorney positions to change with a new presidential administration, this one was different. The men and women serving as U.S. Attorneys around the country were called on March 10 and they were instructed to “clear their desk” by 3 p.m. Apparently, the request to resign and “get out of dodge” came without warning.

George was nominated for the position of U.S. Attorney by President Barack Obama and was sworn in in July 2011. Without any doubt, he has done a tremendous job. George made it his mission to get tough on violent crime, and he was extremely active in addressing issues including drugs and gun violence. George and his office prosecuted a number of high-profile cases involving dog fighting and child pornography that drew national attention.

The Middle District of Alabama covers 23 counties, and includes the cities of Alexander City, Andalusia, Auburn, Clanton, Dothan, Enterprise, Eufaula, Greenville,

Montgomery, Opelika, Ozark, Phenix City, Prattville, Troy and Wetumpka. The United States Attorney's Office is responsible for conducting all criminal and civil litigation in the district involving the United States government. George Beck—a good man—will be missed!

Sources: AL.com, WSFA, and *Montgomery Advertiser*

XXIV. FAVORITE BIBLE VERSES

Helen Taylor, our firm's Public Relations Coordinator, furnished a verse this month that she says is especially comforting to her in times of worry and stress. Helen points out that all too often we forget how easily our anxiety can be set aside, with the right word or gentle touch of a friend or loved one.

*Heaviness in the heart of man
maketh it stoop: but a good word
maketh it glad.*

Proverbs 12:25 KJV

Liz Eiland, a lawyer with our firm, also furnished a verse for this issue. She pointed out that in the sixth chapter of Micah, the Israelites, because of their sin, are separated from God. Liz had this to say: "The people offer great sacrifices, both in quantity (thousands of rams and 10,000 rivers of olive oil) and quality (their firstborn children), all in effort to atone for their sins. However, there is only one sacrifice that the Lord desires from us—a complete change of heart, lifestyle, and disposition toward God and neighbor." Liz says, like the Israelites, we often try to make up for our shortcomings with good deeds and charitable contributions, "but those are only worthwhile if they come from a place of transformation."

*What can we bring to the Lord?
Should we bring him burnt offerings?
Should we bow before God Most High
with offerings of yearling calves?
Should we offer him thousands of rams
and ten thousand rivers of olive oil?
Should we sacrifice our firstborn children
to pay for our sins? No, O people,
the Lord has told you what is good,
and this is what he requires of you:
to do what is right, to love mercy,
and to walk humbly with your God.
Micah 6:6-8*

Aigner Kolom, a staff assistant in the Mass Torts Section, sent in a verse for this issue. She says that we never know how much time we have left on earth. Therefore, Aigner says "we have no time to be complacent with our love for God," adding:

*Now is the time to stand up for God
and not worry about money or materialistic possessions.
We shouldn't think we can wait to show our Love
for God tomorrow or on another day
because we do not know if there will
be a tomorrow on this Earth.
Today could be our last day.
The time to start is now.
There is nothing of this human world
that is worth losing your soul
or the kingdom of heaven over.*

*What good will it be for someone to
gain the whole world, yet forfeit their soul?
Or what can anyone give in exchange
for their soul?
Matthew 16:26*

XXV. CLOSING OBSERVATIONS

BEASLEY ALLEN WORKS TO BREAK INDUSTRY STANDARD WITH MORE FEMALE LAWYERS IN LEADERSHIP ROLES IN NATIONAL LITIGATION

Temple University's Beasley School of Law released a study earlier this month analyzing the gender breakdown of leadership in multidistrict litigation (MDL). Law360 cites the study, noting that 98 percent of all MDLs between 2011 and 2016 had at least one man in the highest leadership position and nearly half the cases "had no women at all in the upper levels of case leadership." The study notes that gender equity is more likely as lawyers begin their careers, yet the gap between male and female lawyers with regard to leadership opportunities widens as they move further into their careers.

I can say without reservation that we at Beasley Allen are pleased to break with this antiquated industry standard. The firm is committed to providing a workplace where all of our lawyers and staff can grow and reach their full potential. That is something we are proud of.

In March, Beasley Allen was recognized for its efforts to provide an inclusive environment that fosters female lawyers' leadership and success. The Girl Scouts of Southern Alabama (GSSA) selected the firm

as the Leading Workplace for Women. Promoting a positive and inclusive environment allows the firm to attract tremendously talented female lawyers like Danielle Mason, who was awarded the GSSA's inaugural "Leading Lady" award in March, and Leigh O'Dell, who has exhibited superb leadership throughout her career. Both Danielle and Leigh currently serve in leadership roles in MDLs.

In January, Danielle was appointed to the Plaintiffs' Steering Committee (PSC) that will help lead the consolidated MDL pending in New Jersey federal court concerning diabetes drug Invokana's link to kidney damage and diabetic ketoacidosis. She is a member of the trial team that has secured nearly \$200 million in verdicts against Johnson & Johnson in litigation alleging the company's talcum powder products significantly increase a woman's risk of developing ovarian cancer when the products are used in the perineal area. In 2016, Danielle was named Beasley Allen's Mass Torts Lawyer of the Year.

Last fall, Leigh was appointed as co-lead counsel in an MDL pending in New Jersey federal court on behalf of Plaintiffs suing Johnson & Johnson for the development of ovarian cancer after using its talcum products. Leigh also handles litigation involving complications from transvaginal mesh. The U.S. Judicial Panel on Multidistrict Litigation (JPML) granted motions to create consolidated MDLs against seven transvaginal mesh manufacturers and Leigh was selected to serve on the Plaintiff's Steering Committee for each of these MDLs. Leigh also was part of the trial team for five of the 17 bellwether trials against Vioxx maker, Merck & Co. In 2014, Leigh was named Beasley Allen's Litigator of the Year.

Danielle, Leigh, as well as all of our other female lawyers, distinguish themselves daily by demonstrating leadership, striving for excellence and maintaining compassion for their clients. The Beasley Allen law firm celebrates the diverse perspectives of our lawyers who come from different backgrounds with varied experiences.

We plan to highlight the contributions of the firm's female lawyers with a series of stories about our "Leading Ladies." These stories will highlight the unique ways women are contributing in the legal profession. We will discuss the opportunities that exist for young women interested in law as a career.

OUR MONTHLY REMINDERS

*If my people, who are called by my name,
will humble themselves and*

pray and seek my face and turn from their wicked ways, then will I bear from heaven and will forgive their sin and will heal their land.

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732 - 1802)

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

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

Vincent Lombardi

XXVI. PARTING WORDS

Easter Sunday falls this year on April 16. It is a special day for families, but it takes on different meanings for lots of folks in this country. Some folks still like to “dress up” and attend church, and for some Easter Sunday might be one of the few times they attend during the year. Older family members who live away from home may visit their parents on this day. Easter egg hunts are still popular for small children. All of these things are good, but Easter Sunday has a much more profound meaning and significance for those who call themselves Christians.

Fortunately, there are many in the U.S. who recognize and honor the real significance of Easter Sunday. Sadly, there will be others who will totally miss the significance of Easter and the real reason for us to celebrate this very special day.

Rev. Jay Wolf, Pastor at the First Baptist Church in Montgomery, wrote a piece on Easter for us, titled “Preparing for Easter.” It is a timely message for all of us and it clearly puts Easter in the proper perspective. Let’s take a look at what Jay had to say.

PREPARING FOR EASTER!

On three occasions, I have stood in the empty tomb of Jesus Christ. Christ's vacant grave stands adjacent to an outcropping of rocks that resembles a skull near to the Jerusalem bus station. The tomb is open and empty. Written on the side of the ancient grave is the proclamation of the angels: "He is not here. He has risen!" The resurrection validates all of the claims of Jesus of Nazareth. Because His tomb is empty our lives can be full of His resurrection presence, purpose and power. Easter

crowns our calendar. The validity of the resurrection split time into BC and AD. Every time you write the date, you proclaim the reality of His resurrection. Can you imagine facing the fears of death and the daily grind of life without the reassuring reality of Christ's resurrection? So let us proclaim along with the angels the ultimate good news that He has risen out of the tomb and now resides in our hearts! Sam Shoemaker was the great preacher at Calvary Episcopal Church of New York City in the early 20th century. He was famous for his booming voice. Unfortunately, muscular atrophy diminished his mighty vocal mechanism to a whisper. On one of his last Easter Sundays on planet Earth, Sam instructed, "It is a terrible thing to wake up on Easter morning and not have a voice to shout that He is risen. However, it is even more terrible to wake up with a voice and not want to shout it." The tomb is empty and our lives are full of His presence, promise, purpose, perspective, power and peace. Share that good news with everyone this Easter season and EVERY DAY by joining the angels in announcing, "Jesus has risen from the dead, just as He said. Come and see then go and tell!" (Matthew 28:6)

I totally agree with Jay in all that he wrote and I am more than glad to pass his words on today. If you find yourself among those who don't understand how important Easter is to humanity, there is still time to learn before the dawning light of April 16. Indeed, Jesus has risen!

My prayer is for each of us to make Easter Day a day of true celebration. Those of us who are Christians have an obligation to help spread the word about what Easter is all about.

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Jere L. Beasley, Principal & Founder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley's law firm, established in 1979 with the mission of "helping those who need it most," now employs over 75 lawyers and more than 175 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 35 years.



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

Beasley Allen

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