The JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

Beasley Allen Legal Conference Set For Nov. 16 & 17 In Montgomery

For the past 11 years our firm has hosted the Beasley Allen Legal Conference & Expo. It is hard to believe that we have grown from a 300-person event to more than 1,500 being in attendance last year. This year we will hold the event on Nov. 16 & 17 at the Montgomery Performing Arts Center at the Renaissance Montgomery Hotel & Conference Center in Montgomery, Alabama. The two-day event is the largest gathering of its kind in the state, and one of the largest legal conferences in the nation.

We have a variety of speakers, including lawyers from Beasley Allen and special guest speakers who are political and community leaders. Alabama lawyers will learn about emerging areas of litigation, and how to examine potential claims and evaluate their potential.

Lawyers who attend the conference can earn a full 12 hours of Continuing Legal Education (CLE) credit, certified by the Alabama State Bar. The event also provides a legal services expo where conference attendees can visit with a limited number of the nation's top legal service providers. This is a great place to learn about the leading products and services that will help enhance and support your litigation efforts.

Another valuable benefit of attending the conference is the chance to network with other lawyers from all over the state. Lawyers who have attended the previous conferences tell us they learn lots from talking to their colleagues. It's a great opportunity to build relationships that will help lawyers grow their practice.

The best part is that all of this is completely free and open to all Alabama lawyers in private practice. The event includes breakfast, lunch and a dinner reception on Thursday. A special prayer breakfast will be held on Friday morning and it always features an inspirational speaker. We appreciate our sponsors, who help make this conference possible. This year's platinum sponsors are Jackson Thornton Valuation and Litigation Consulting Group and Freedom Reporting, Inc.

All Alabama lawyers are invited. Those who are on our email list should already have received some information about the conference. You can visit our conference registration website at expo.beasleyallen.com to get more information. We really look forward to this year's event!

II. MORE AUTOMOBILE NEWS OF NOTE

Honda Settles Takata Airbag MDL For $605 Million

Honda Motor Co. Ltd. has agreed to pay $605 million to settle claims pending in multidistrict litigation (MDL) surrounding exploding Takata airbags. Beasley Allen lawyers Dee Miles, Archie Grubb and Clay Barnett were part of the MDL discovery team in this litigation. Dee, who is head of the firm's Consumer Fraud & Commercial Litigation Section, had this to say about the settlement:

> *We are happy to see this latest settlement, which means progress for our clients. We will continue fighting for the other victims who have suffered from this winding saga of corporate behavior at its worst.*

Honda is the latest automaker to settle in order to exit the MDL. It joins Toyota, Subaru, Mazda and BMW—automakers that settled earlier this year for a combined $553.6 million.

As we have previously reported, Honda was alerted to the safety issues as early as 2004, when an Accord airbag in Alabama exploded and shot shrapnel throughout the vehicle interior. The company settled four lawsuits before issuing a small recall in late 2008. By the following year, four injuries and a death were linked to ruptured airbag inflators in Honda vehicles. The settlement will cover 11.4 million Honda vehicles currently under recall and 5.1 million more vehicles that may be subject to a later recall, Reuters reports.

The U.S. Department of Transportation initiated a recall of Takata airbags in 2015 after determining they were prone to instability. Although other airbag manufacturers refused to do so because of safety concerns, Takata opted to use ammonium nitrate in its airbag inflators. The compound can destabilize over time, particularly if exposed to high temperatures and humidity. This may cause the airbag inflator to explode with excessive force when the airbag is deployed—spewing shrapnel at drivers and passengers.

As we have previously reported, now linked to 17 deaths and more than 180 injuries worldwide, the safety recall is the largest in U.S. history. The recall encompasses about 70 million individual airbag units in 42 million vehicles made by 19 different auto manufacturers.

The settlement covers monetary losses for Plaintiffs in class action litigation resulting from the massive recall. The settlement covers claims "that vehicles were inaccurately represented to be safe, and that buyers had overpaid for cars with defective or substandard air bags" and

IN THIS ISSUE

covers out-of-pocket costs Honda owners may incur while working to get their airbag replaced or repaired. Additionally, settlement proceeds will be used to establish a customer support program for affected vehicle owners, and to provide them an extended warranty.

In February, Takata executives pleaded guilty to criminal charges. The company agreed to a $1 billion settlement including agreeing to pay $850 million in restitution to automakers, $125 million for victims and families and $25 million in a criminal fine. Last month, Delaware bankruptcy judge Brendan L. Shannon, who is overseeing Takata's bankruptcy proceedings in the U.S., granted the company a 90-day freeze on hundreds of lawsuits and government enforcement actions related to its defective airbags so it can focus on its restructuring under Chapter 11 bankruptcy. However, Judge Shannon exempted the lawsuits consolidated for MDL in the Southern District of Florida from the freeze because the court sees those lawsuits essentially as one.

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. For more information about the Takata airbag recall, visit Beasley Allen's YouTube page.

Sources: Law360.com and Reuters

GM Gas Tank Defect Suit Revived By Bankruptcy Judge

A New York bankruptcy judge is allowing a woman burned by a defectively designed gas tank to move forward with her second attempt to hold General Motors LLC (New GM) responsible. U.S. Bankruptcy Judge Martin Glenn said the revised version of Kaitlyn Reichwaldt's complaint adequately states a claim for punitive damages against New GM independent of Old GM's conduct. The court had previously determined that Ms. Reichwaldt, who sustained burns after her non-GM car collided with a 1984 GM pickup bearing what she says was a dangerously placed gas tank, could not pursue punitive damages against New GM following Old GM's 2009 bankruptcy. That was because her claim didn't target New GM specifically. Judge Glenn said in his order:

The court has reviewed the revised [first amended complaint], and finds that it does not conflict with this court's prior rulings with respect to impermissible allegations concerning independent claims..

The court had directed the parties to meet and revise the proposed complaint with regard to allegations against New GM in particular. In the August order, the court cited a previous ruling that found "a Plaintiff who was injured post-petition by a vehicle manufactured prepetition, who had no contact with the debtor prior to the accident, and who received no notice of the bankruptcy, did not hold a 'claim' that could be barred at the time of a sale." Ms. Reichwaldt's revised complaint states a claim for punitive damages against New GM specifically for failing to warn of the potential danger from the gas tank's placement in Old GM's pickup trucks. The new complaint states:

That GM LLC was on notice of the danger and therefore had its own independent duty to warn of a danger for which it admits it had assumed responsibility cannot be denied.

The court said that the revised complaint "gets through the gate" to the Georgia federal court that will determine whether the allegations meet the pleading standards of nonbankruptcy law.

Kaitlyn Reichwaldt is represented by Jim Butler, Robert Snyder, David Rohwedder and Joseph M. Colwell of Butler Wooten & Peak LLP. The bankruptcy is *In re: Motors Liquidation Co.*, (case number 1:09-bk-50026) in the U.S. Bankruptcy Court for the Southern District of New York.

Source: Law360.com

12,500 Ford Owners Opt Out Of Settlement And Will Sue Ford

Nearly 12,500 Ford Fiesta and Focus owners with allegedly defective transmissions have opted out of a proposed settlement and plan to sue the automaker this month. The proposed settlement was announced in March and would provide "substantial cash payments" and other benefits to the owners of about 1.5 million vehicles, resolving a class action over vehicles with PowerShift transmissions. Sept. 5 was the last day owners of 2011-2016 Fiestas and 2012-2016 Focuses could opt out of the settlement, and many did. Reportedly, 4,500 did so between July 5 and the final day.

A mass action is being planned to be filed against Ford seeking a buyback and damages for depreciation, repair costs, inconvenience and lost wages. The main criticism of the settlement relates to its compensation structure. Those who did not opt out would be forced into arbitration to pursue their claims for damages. The two-month opt out period was said to be too short, which could limit the number of people who could opt out.

An approval hearing was scheduled for Oct. 2, but since this issue was already on the way to the printer on that date, we don't have anything to report. The class is represented by Jordan L. Lurie, Tarek H. Zohdy, Cody R. Padgett and Karen L. Wallace of Capstone Law APC, Russell D. Paul of Berger & Montague and Thomas A. Zimmerman Jr. of Zimmerman Law. The case is *Omar Vargas et al. v. Ford Motor Co.*, (case number 2:12-cv-08388) in the U.S. District Court for the Central District of California.

Source: Law360.com

DOT Unveils Voluntary Guidance For Self-Driving Cars Rollout

The U.S. Department of Transportation (DOT) has unveiled a new federal policy that purports to ease the process for manufacturing, testing and deploying self-driving or autonomous cars in the U.S. The DOT established guidelines prioritizing safety and discouraging states from drafting potentially conflicting self-driving car rules of their own. The policy, which is called the Automated Driving Systems: A Vision for Safety 2.0, lays out voluntary guidelines for automakers and technology companies to consider and design best practices to more quickly develop highly automated vehicles and get them ready for highways in the United States.

You will recall that recently the U.S. House of Representatives passed first-of-its-kind legislation intending to make it easier for automakers to manufacture and test autonomous or self-driving cars on U.S. highways. The obvious purpose of this legislation was to assure industry stakeholders that the federal government would be in complete control on automated car safety standards.

According to Transportation Secretary Elaine L. Chao, the policy is meant to serve as a guidance document that is purposefully flexible and is not intended to serve as a regulatory document or provide mechanisms for enforcement. Secretary Chao says the document preserves NHTSA's broad enforcement authority over traditional cars, as well as automated driving systems (or ADS).

Specifically, NHTSA's enforcement authority concerning safety-related defects

in motor vehicles and motor vehicle equipment extends and applies equally to current and emerging ADS, according to the DOT. Let's take a look at the two sections:

- The first section of the document focuses on giving car makers voluntary guidance on what to include when developing or testing their automated driving systems, especially for those that have what's defined as SAE Automation Levels 3 through 5, which are conditional automation, high automation and full automation. These are the levels in which drivers can take more of a back seat to the operating and driving functions that the car itself can take over.
- Section 2 of the document clarifies the federal and state roles when it comes to regulating automated driving systems. It makes clear that NHTSA will still be responsible for regulating the safety design and performance aspects of motor vehicles and motor vehicle equipment, while states will continue to be responsible for regulating the human driver and vehicle operations, the DOT said. The section also provides best practices for state legislatures to consider when coming up with their own potential rules and regulations for how to safely operate highly automated vehicles on public roadways. The section addresses such things as applications and permissions to test, registration and titling, working with public safety officials, and liability and insurance.

It appears that the automobile industry is highly pleased with the steps the federal government has taken. The Auto Alliance, also known as the Alliance of Automobile Manufacturers, the leading advocacy group for 12 of the largest car manufacturers, said in a statement that automakers have been developing self-driving technologies for years, recognizing the tremendous potential for enhanced safety and greater self-sufficiency for certain populations. The Auto Alliance said:

> *This federal guidance is helpful in advancing road safety and safe testing, while also providing more clarity on the role of states. The guidance provides the right balance, allowing emerging innovations to thrive while government still keeps a watchful eye over new developments.*

I believe there will be some major safety issues that come along with these self-driving vehicles. A recent incident is a case in point. Companies developing semi-autonomous vehicles should find better ways to identify when a driver is not actively paying attention to the car's surroundings. The National Transportation Safety Board (NTSB) made that observation, finding that a Tesla driver's over-reliance on his car's automation contributed to a fatal Florida crash.

NHTSA's guidance is entirely voluntary, and it doesn't carve out any compliance requirement or enforcement mechanism. It should be noted that the new guidelines are just that—nonbinding guidelines. Hopefully, safety will be the top priority for all that the government is doing in this arena.

Source: Law360.com

III. PURELY POLITICAL NEWS & VIEWS

Kay Ivey Officially Announces Bid For Full Term as Alabama Governor

On Sept. 7, Gov. Kay Ivey made it official, and announced she will run for a full term as Alabama's governor. Ivey was sworn in as the 54th Governor of Alabama April 10, after Gov. Robert Bentley resigned in the midst of an ethics investigation. Gov. Ivey called the events leading up to her taking over the governor's office "one of the darkest time's in our state's memory," but said she felt successful in having "steadied the ship" of state.

Nearly a month before officially announcing her plans, Gov. Ivey filed the necessary paperwork with the Secretary of State's office, on Aug. 18, to form a principal campaign committee. Within a few weeks, AL.com reports, she had collected $1 million in campaign contributions.

Shortly after taking office, Gov. Ivey embarked on a "listening tour" of the state, visiting various communities to find out their concerns. After the drama and secrecy that marked Bentley's last days in office, it's likely voters are relieved to feel that someone is now listening to them.

In her first campaign video, Gov. Ivey talks about growing up in the Black Belt and visiting her family's cattle farm on the weekend with her dad. While the ad has folksy appeal likely to connect with voters on a personal level, keep in mind Gov. Ivey is no naïve farm girl. She has an impressive record of public service and experience.

Gov. Ivey is the state's second female governor. She served as Alabama's Lieutenant Governor from 2011 to 2017, and was the first Republican woman to serve in that role. She also served as Alabama State Treasurer from 2003-2011.

Other Republicans vying for the nomination are Huntsville Mayor Tommy Battle, Birmingham evangelist Scott Dawson, state corrections officer Stacy George, state Sen. Bill Hightower of Mobile, Birmingham businessman Joshua Jones and Agriculture Commissioner John McMillan. On the Democratic ticket, Sue Bell Cob has announced her candidacy. Tuscaloosa Mayor Walt Maddox, who is considering a run, definitely has a future in Alabama politics. However, it might be best for this rising star to sit this one out.

Gov. Ivey will be extremely difficult to beat. Thus far she has done everything right. In fact, I will go on record at this juncture and predict that she will win a full term as governor of our state.

Source: AL.com

Judge Roy Moore Wins Runoff In Alabama Senate Race

The outcome of the runoff in the Senate race in Alabama was another ending to an epic David vs. Goliath battle. Judge Roy Moore overcame $30 million being spent by the Washington crowd, personal visits in opposition by the President and Vice-President, some really bad negative television and radio ads, and most all of the special interests opposing him. Against these odds, Judge Moore won by getting 55 percent of the vote.

Judge Moore will face the Democratic nominee Doug Jones in the general election which will be held on Dec. 12. I predict that Doug will run a more civil campaign than what Judge Moore faced in his primary. I fully expect the Moore campaign to continue running a positive campaign, which has worked well so far. I don't believe the Moore campaign will take Doug for granted. But unless something major occurs to derail him, I predict that Roy Moore wins on Dec. 12.

IV. COURT WATCH

Lawsuit Challenging Racial Makeup Of Alabama Courts Moves Forward

The Alabama Supreme Court met during a special session last month at Samford University in Birmingham to hear arguments in two cases: *Exxon Corp. v. Department of Conservation and Natural Resourses et al.*, and *Ex Parte Alabama*. While both cases were important, the second is especially noteworthy for obvious reasons.

Despite accounting for more than one-quarter of the state's population, African-Americans rarely get elected to the state's highest courts—a situation advocacy groups want to change by ending statewide judicial elections. Their argument got a boost recently when a federal judge rejected motions to dismiss a lawsuit brought last fall by the NAACP of Alabama and The Lawyer's Committee for Civil Rights Under Law. The organizations had filed suit against the state of Alabama and Secretary of State John Merrill.

The lawsuit alleges that the practice of holding statewide elections for Alabama's 19 appellate judges disenfranchises black voters. Instead, civil rights groups propose creating districts for elections, increasing the odds for black candidates in majority-black districts. Ezra Rosenberg of the Lawyer's Committee for Civil Rights under Law, in a statement, said:

> *We will now continue to aggressively litigate this case to achieve a remedy that gives African American voters a real opportunity to elect members to these courts which play such important parts in their lives.*

Alabama has three appellate courts—the state Supreme Court, Court of Criminal Appeals and Court of Civil Appeals. All 19 members of those courts are white. Three black judges have served on those courts and two have won statewide elections for seats. The courts have been all-white for the last 16 years, according to the Lawyer's Committee.

Chief U.S. District Judge Keith Watkins rejected the argument that the state's interest in maintaining the current system outweighed concerns about weakening the minority vote. Judge Watkins wrote:

> *Defendants appear to argue that the degree to which Alabama's electoral system may have diluted the black vote is irrelevant because, no matter how extreme the vote dilution, the interest of minority citizens to participate in the democratic process can never outweigh the state's interest in maintaining the status quo. Defendants' argument is untenable.*

Alabama is one of just five states that hold partisan, statewide elections for appellate courts. Candidates run as Democrats or Republicans, and all the judges currently on the bench ran as Republicans.

Federal courts can step in if voting power is diluted among minority groups, which is the allegation made in the lawsuit. However, the 11th Circuit Court of Appeals has ruled that states are not required to create districts in judicial races, according to the motion filed by attorneys for Alabama and Merrill. Justices rule on cases from all over the state and should therefore be elected in statewide elections, according to attorneys for the Defendants. Benard Simelton, president of the Alabama NAACP, said in a statement:

> *The Alabama NAACP is elated that the court has ruled in favor of the people to deny Alabama's motion to dismiss this case. We will continue to fight to ensure that African Americans are treated equally under the law and have the ability to elect judges of their choosing.*

It will be most interesting to see how the case turns out. I believe this effort may well be successful. If so, Alabama will be better as a result.

Source: AL.com

V. THE NATIONAL SCENE

Alabama Attorney General To Target Opioid Makers And Distributors In National Investigation

A major national investigation was launched last month that will seek to discover if U.S. drug manufacturers and distributors acted unlawfully in the marketing, sale, and distribution of opioids, according to a press release by the Alabama Attorney General's office on Sept. 19. Steve Marshall and 40 other state attorneys general are combining resources to tackle an opioid crisis that has been described as "national emergency" by President Donald Trump. Attorney General Marshall said in the release:

> *Earlier this year I joined with fellow attorneys general in investigating what role opioid manufacturers may have had in creating or prolonging the opioid abuse epidemic, and to establish the appropriate course of action to help solve this crisis. Our investigation continues as we seek information from drug manufacturers and distributors to help determine whether they engaged in unlawful practices in the marketing, sale, and distribution of opioids.*

The various AG offices around the country have already served investigative subpoenas for documents and information on companies such as Endo, Janssen, Teva/Cephalon, Allergan, and their related entities, as well as a supplemental Civil Investigative Demand on Purdue Pharma, according to the Alabama Attorney General's office. The attorneys general also sent information demand letters to opioid distributors AmerisourceBergen, Cardinal Health, and McKesson requesting documents about their opioid distribution business. Opioids were involved in 33,091 deaths in 2015 including 736 in Alabama, and opioid overdoses have quadrupled since 1999, according to the Centers for Disease Control and Prevention.

Source: AL.com

VI. WHISTLEBLOWER LITIGATION

The Whistleblower Litigation Team At Beasley Allen

As we have previously reported, our firm's Board of Directors felt it was necessary to create a special whistleblower litigation team to handle the expanding litigation under the False Claims Act (FCA). We did so and now believe this approach has allowed us to do a better job of handling this most important litigation.

Are you aware of fraud being committed against the federal government, or a state government? If so, you may be protected and rewarded for doing the right thing by reporting the fraud. If you have any questions about whether you qualify

as a whistleblower, you can contact one of the lawyers on the Whistleblower Litigation Team for a free and confidential evaluation of your claim.

There is a contact form on the firm's website. You can also email one of the lawyers on the team: Archie Grubb, Larry Golston, Lance Gould or Andrew Brashier at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

AmerisourceBergen To Pay $260 Million After Mislabeling Drugs

AmerisourceBergen Specialty Group (ABSG), a subsidiary of pharmaceutical giant AmerisourceBergen Corp., has pled guilty in a Brooklyn federal court to violating federal rules on the packaging and distribution of drugs. The company agreed to pay $260 million in fines and forfeiture. The guilty plea was entered before U.S. District Judge Nina Gershon. ABSG will pay $208 million criminal fine and criminal forfeiture of $52 million. The company pled guilty to a single count of introducing misbranded drugs into interstate commerce.

Medical Initiatives Inc. (MII), an Alabama subsidiary of ABSG, opened sterile vials of oncology drugs, pooled the medicine and transferred the drugs into single-dose prefilled syringes. The syringes were often shipped out without a prescription signed by a physician, sometimes in doses far exceeding plausible or safe usage for an individual. Occasionally they were for dead people. Neither did ABSG register MII with the U.S. Food and Drug Administration (FDA) as required by the Federal Food, Drug and Cosmetic Act (FDCA). It was admitted to the court that ABSG and its parent company were aware of the misconduct and supported it.

The company also agreed to a three-year agreement "to maintain a compliance and ethics program designed to increase accountability of individuals and corporate board members, to increase transparency, and to strengthen ABSG's compliance with the FDCA," officials said. It was revealed that MII not only opened the sterile vials but stored the open vials in nonsterile conditions. So whatever overfill was in the vial could be harvested to make additional prefilled syringes at essentially no cost.

AmerisourceBergen Corp. said in a recent filing to the U.S. Securities and Exchange Commission that it may face a civil lawsuit from Brooklyn federal prosecutors for alleged violations of the False Claims Act.

The government is represented by Assistant U.S. Attorneys Alixandra E. Smith and Ameet B. Kabrawala. The case is *U.S. v. AmerisourceBergen Specialty Group, LLC*, (case number 1:17-cr-00507) in the U.S. District Court for the Eastern District of New York.

Source: Law360.com

J&J Unit Must Face Whistleblower's Retaliation Case

A Massachusetts magistrate judge has kept alive a former sales representative's claim that Acclarent Inc. fired her for questioning the company's purported submission of false claims to the government. However, U.S. Magistrate Judge Donald L. Cabell dismissed claims against parent companies Ethicon Inc. and Johnson & Johnson. The judge said Melayna Lokosky sufficiently alleged that Acclarent retaliated against her for questioning the sale of its Relieva Stratus MicroFlow Spacer for an off-label use. But the court determined that Johnson & Johnson and its unit Ethicon, which acquired Acclarent in 2009, were not involved with Lokosky's termination and therefore not liable for Acclarent's alleged misconduct.

Lokosky claimed that Acclarent, in an effort to receive approval from the U.S. Food and Drug Administration (FDA), falsely told the agency that its spacer device would be used to deliver salt water to the sinus to aid healing. After receiving FDA clearance, Acclarent allegedly marketed the device to physicians for the delivery of the steroid Kenalog-40, and had never intended for it be used with salt water. Lokosky, who Acclarent hired as a sales representative in 2007, asked at a 2010 conference how to deal with physicians' questions about the spacer. She was then placed on an "unrealistic performance plan" and fired the following January, the court noted.

Acclarent sought to dismiss Lokosky's retaliation suit in April, arguing that she had complained of off-label promotion without linking that promotion to the submission of false claims to the government. But the court agreed with the Plaintiff's contention that any sale of the product would result in the submission of a false claim because the spacer was promoted and sold only for off-label use. Her internal complaints of off-label promotion were therefore protected conduct under the False Claims Act. The court said: "The law does not require a Plaintiff to connect all of the dots between alleged off-label promotions and fraud on the government."

Acclarent should have known of that protected conduct because Lokosky told supervisors about her concerns about selling the spacer for off-label use and asked questions in front of in-house regulatory personnel about the product at the 2010 conference, the court said. Lokosky adequately proved a link between her questioning and her termination as well, the court said. But the court dismissed Ethicon and Johnson & Johnson from the suit, saying that Lokosky can't bring claims against the companies just because Ethicon acquired Acclarent.

The Plaintiff is represented by Royston H. Delaney, Ilyas J. Rona and Charles Kester of Delaney Kester LLP. The case is *United States et al v. Acclarent Inc. et al,* (case number 1:11-cv-11217-DLC) in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

PHH And Realogy Settle Title Referral Award Kickback Suit For $17 Million

PHH Corporation and Realogy have agreed to pay $17 million to end a putative class action accusing them of arranging kickbacks for unlawful referrals of title services. PHH, Realogy Group LLC and various affiliates were accused of violating the Real Estate Settlement Procedures Act (RESPA) with a scheme to illegally funnel business to Title Resource Group, which is a Realogy subsidiary. The Plaintiffs accused the Defendants of creating an affiliated business arrangement, dubbed PHH Home Loans, to facilitate the exchange of unlawful referral fees and kickbacks. A motion for preliminary approval of the settlement was filed.

The proposed settlement class consists of borrowers who closed on any mortgage loan originated by PHH between Nov. 25, 2014, and Nov. 25, 2015, and paid any title, escrow or closing charges to Title Resource Group. More than 32,000 transactions fall within the settlement class definition, according to the motion for preliminary approval. The suit, filed in November 2015, alleged that PHH entered a strategic relationship agreement with Cendant Corporation, a former parent of both PHH and Realogy, requiring certain business exchanges that violated RESPA.

The Plaintiffs claimed that PHH was bound to refer all title insurance and set-

tlement services to Title Resource Group in exchange for referral fees and kickbacks funneled through PHH Home Loans. The agreement also made PHH Home Loans the exclusively recommended mortgage lender for Realogy's real estate brokerage network, according to court documents.

The Plaintiffs also claimed that PHH unlawfully directed various banking institutions to refer title insurance and other settlement services to Title Resource Group and its affiliates without telling consumers that PHH had an affiliation with the title company. Nor, according to the Plaintiffs, did consumers know that PHH was required to make banks refer the business to Title Resource Group.

The RESPA bans the payment or acceptance of "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."

In their motion for preliminary approval, the Plaintiffs said continuing with litigation risked the Defendants' moving for summary judgment or challenging class certification. Conversely, other RESPA settlements support a finding that this settlement is fair, adequate and reasonable, the motion said, citing six other settlements that ranged between $4 million and $34 million. "The settlement thus confers an excellent recovery for Plaintiffs and the putative class," the motion said.

It should be noted that PHH had agreed to pay almost $75 million in a settlement with the U.S. Department of Justice over claims that it originated mortgages backed by different federal agencies that didn't meet requirements for federal guarantees.

The Plaintiffs are represented by Daniel S. Robinson and Wesley K. Polischuk of Robinson Calcagnie Inc. and Wayne R. Gross and Evan C. Borges of Greenberg Gross LLP. The case is *Timothy L. Strader Sr. v. PHH Corporation et al.*, (case number 8:15-cv-01973) in the U.S. District Court for the Central District of California.

Source: Law360.com

Novo Nordisk Pays $60 Million To End Drug Marketing Investigation

Novo Nordisk Inc. has agreed to pay at least $60 million to end a federal investigation into its marketing practices and resolve seven whistleblower suits alleging the pharmaceutical company misled physicians and insurers about its top-selling Type 2 diabetes drug Victoza, according to the U.S. Department of Justice (DOJ).

Under the settlement, Novo Nordisk will pay out more than $43 million to the federal government and approximately $3.3 million to state Medicaid programs to settle claims under the False Claims Act (FCA). Novo Nordisk, which is a unit of Denmark's Novo Nordisk A/S, also agreed to disgorge $12.15 million in profits to resolve claims it violated the federal Food, Drug and Cosmetic Act from 2010 to 2012.

The settlement brings to an end an investigation the federal government launched into the drugmaker's marketing practices and resolves seven suits filed by 11 whistleblowers between 2010 and 2016 who asserted claims under the whistleblower provision of the FCA.

Novo Nordisk agreed to pay $1.1 million to the state of California and $350,000 to the state of Illinois to settle at least one whistleblower suit brought by Peter Dastous, a Novo Nordisk sales representative who was responsible for selling Victoza to endocrinologists in South Carolina and northern Georgia. The suit alleged fraud against private commercial health insurers, and the settlement brings the aggregate settlement amount the company will pay to $60 million. The claims go back to 2010, when the U.S. Food and Drug Administration (FDA) originally approved the drug.

The FDA had required Novo Nordisk to modify its FDA-mandated risk evaluation and mitigation strategies, or REMS, after a 2011 survey revealed that half of primary care doctors polled were unaware of the potential cancer risks associated with the drug, according to the DOJ. The drug has been linked to a rare cancer called medullary thyroid carcinoma, the DOJ said. But rather than appropriately implementing the modification, the government claims Novo Nordisk instructed its sales force to provide statements to doctors that obscured the cancer risk information, allegedly misbranding the drug.

Meanwhile, Dastous, the whistleblower, alleged Novo Nordisk launched an extensive campaign to promote Victoza for off-label uses, including weight loss treatment in patients with all types of diabetes. It also allegedly marketed the drug to patients who were prediabetic, or pediatric patients with Type 2 diabetes, even though the FDA hadn't approved the use of Victoza for the treatment of pediatric patients due to the lack of pediatric studies, or adults without Type 2 diabetes. When at least one of the complaints was filed, Victoza cost roughly $300 to $400 per month, depending on the dose.

The suits claimed that those prices unnecessarily increased the costs for government health care programs while allegedly endangering patients. U.S. Attorney Channing D. Phillips said that Novo Nordisk's actions unnecessarily put vulnerable patients at risk, and the litigation sends a "strong signal" to the drug industry that the government is committed to holding companies accountable for violating the integrity of the FDA's efforts.

Special Agent Nick DiGiulio for the U.S. Department of Health and Human Services' Office of the Inspector General also emphasized that the government needs to trust that pharmaceutical companies truthfully represent their products' potential risks. DiGiulio said in a statement:

> *We will continue to work with our partners to ensure federal health care dollars are spent only on drugs that are marketed honestly.*

The federal government is represented by U.S. Attorney Channing D. Phillips, Assistant U.S. Attorney Darrell C. Valdez, acting Assistant Attorney General Chad A. Readler, acting Director Joshua I. Wilkenfeld, Deputy Director Jill Furman and trial attorney Matthew J. Lash. The federal suit is *United States et al. v. Novo Nordisk Inc.*, (case number 1:17-cv-01820) in the U.S. District Court for the District of Columbia. The whistleblower suit filed by Dastous is *United States et al. ex rel. Dastous v. Novo Nordisk Inc.,* (case number 1:11-cv-01662) in the U.S. District Court for the District of Columbia.

Source: Law360.com

Pharmacy Company Settles Exjade Kickback Claims

US Bioservices Corp. has agreed to pay $13.4 million to settle claims that it engaged in a kickback scheme with Novartis to boost sales of Exjade, a blood iron treatment, in exchange for patient referrals and other benefits. According to the U.S. Attorney's Office in Manhattan, the settlement requires US Bioservices to pay approximately $10.6 million to the United States and nearly $3 million to settle state law and civil fraud claims related to the impact of the illegal kickback scheme on state Medicaid programs.

Acting U.S. Attorney Joon Kim alleged in a False Claims Act (FCA) lawsuit that federal and state health care programs were illegally billed for Exjade, and that

US Bioservices had its nurses call patients to recommend they order prescription refills. Exjade can have serious adverse effects on a patient's health, including kidney and liver failure and gastrointestinal bleeding. In previous lawsuits, the U.S. government sued Novartis and the two other specialty pharmacies that participated in the same Exjade kickback scheme. The government settled those lawsuits when Novartis agreed to pay $390 million and the other pharmacies involved collectively paid $75 million.

According to the U.S. Department of Justice (DOJ), Novartis launched its Exjade kickback scheme in 2005 when it became concerned that many patients were discontinuing their use of the drug because they were worried about its serious, life-threatening side effects. When Novartis gained U.S. Food and Drug Administration (FDA) approval for Exjade, it created a closed distribution network that included US Bioservices and two other pharmaceutical providers, BioScrip and Accredo, which together dispensed most of the Exjade prescriptions in the U.S. Novartis was able to easily monitor and manipulate Exjade prescriptions sold through this small, limited network. The scheme also gave Novartis more control over Exjade prescriptions by rewarding the distributor company that sold the most units of the drug with rebates, discounts and other illegal kickbacks.

Source: U.S. Department of Justice

Whistleblower Action Recovers $1.4 Million From National Dental Chain

National dentistry chain Dental Dreams has agreed to pay the U.S. nearly $1.4 million to settle a whistleblower's claims that it improperly billed the Massachusetts Medicaid program, MassHealth, for "unnecessary and unjustifiable dental procedures." The $1.375 million settlement resolves claims brought by a former Dental Dreams employee under the whistleblower provisions of the False Claims Act (FCA). Dental Dreams is a full-service chain of dentistry clinics that operates in 10 states and the District of Columbia.

According to the U.S. Department of Justice (DOJ) the whistleblower lawsuit alleged that Dental Dreams overbilled the Massachusetts Medicaid program for surgical extractions of teeth and for a certain type of oral examination that was not specified.

Source: U.S. Department of Justice

U.S. Intervenes In Los Angeles Accessible Housing Fraud Lawsuit

The Department of Justice (DOJ) has filed a complaint in intervention against the City of Los Angeles and the former Community Redevelopment Agency of the City of Los Angeles (CRA/LA). The claim is that acting together, the CRA/LA and the City of Los Angeles fraudulently obtained millions in housing grants from the U.S. Department of Housing and Urban Development (HUD). These funds were obtained under the false certification they would be spent in compliance with federal accessibility laws. The complaint in intervention replaces a complaint previously filed on behalf of the United States by a whistleblower under the False Claims Act (FCA).

HUD, a Cabinet department of the Executive branch of the federal government, has as one of its primary goals to establish and maintain a suitable living environment for all Americans. Generally, HUD works to improve and develop communities and additionally enforces fair housing laws. In this case, HUD granted federal funds to the City of Los Angeles for creation of housing for people with disabilities in compliance with federal accessibility laws. CRA/LA and the city are required by law to comply with federal accessibility laws. However, the City of LA authorized the design and construction of inaccessible buildings.

The complaint includes violations of Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Fair Housing Act. Section 504 of the Rehabilitation Act prohibits discrimination of disabled persons under any program or activity receiving federal funds or conducted by any Executive agency. The Americans with Disabilities Act prohibits discrimination against individuals in all areas of public life. The Fair Housing Act protects individuals from discrimination in renting, buying, or securing financing for a home.

In the repeated certification of compliance with federal accessibility laws, the U.S. alleges that the former CRA/LA and the City of LA defrauded the government in direct violation of the FCA. Acting U.S. Attorney Sandra R. Brown for the Central District of California stated:

> *Despite the federal government investing hundreds of millions of dollars in Los Angeles to create housing for everyone, the City of Los Angeles instead created housing only for some. For 17 years, the city falsely certified that it had complied with federal law and covered up its repeated disregard of historic and important civil rights laws.*

The complaint in intervention is indicative of HUD's mission to ensure equal access to federally funded public housing. The initial lawsuit was filed in U.S. District court by whistleblowers Mei Ling, a Los Angeles inhabitant who uses a wheelchair, and the Fair Housing Council of San Fernando Valley, a nonprofit civil rights advocacy group. The U.S. Government elected to intervene in the lawsuit and take over the case, unsealing the whistleblowers' complaint. This case is still pending in District Court.

Sources: U.S. Department of Justice, U.S. Department of Housing and Urban Development, 29 U.S.C. § 701 and 42 U.S.C. § 3604

VII. PRODUCT LIABILITY UPDATE

Lawn Mower Accidents Involving Children

Lawn mower accidents involving children occur at an "alarming rate" according to a recent study published by the American Academy of Orthopedic Surgeons. Despite advances in technology and safety within the power equipment industry, lawn mower accidents are on the rise. In 2010 there were 253,000 reported lawn mower accidents. This number more than triples the approximately 77,000 injuries reported annually in the early 1980s. In 2013, the number rose to more than 300,000 injuries. Approximately 17,000 children younger than 19 suffer severe injuries due to lawn mower accidents. Of those injuries, approximately 600-800 result in limbs being amputated. In fact, for children younger than 10, major limb loss is most commonly caused by lawn mower accidents.

Passengers and bystanders of lawn mowers are four times more likely to be injured than operators. According to results presented by the American Academy of Orthopedic Surgeons, injuries were caused most often when children ran behind a mower, slipped under the mower while riding as a passenger, contacted mower blades when the machine was steered in reverse, were struck by a mower that rolled over, or struck by objects thrown from the mower. The most common types of lawn mower injuries to

children are cuts and burns. The hands and fingers of the children are the most commonly injured body parts, followed by feet and legs.

There are other trends of note. Children younger than 5 are more likely to either be injured due to touching a hot surface on a lawn mower, or being backed over. Children between the ages of 5-19 are more likely than younger children to by struck by an object thrown by the mower.

These hazards are not new. What is alarming is that despite advances in safety technology, the rate of accidents and injuries is on the rise. Safety features that have become standard on lawn mowers often malfunction, are bypassed, or completely removed. These features such as operator presence sensors, dead-man switches, discharge shields, and No Mow in Reverse, or NMR, features are great in theory, but they must be functioning and used. Often, the most severe injuries occur when young children are inadvertently backed over. The NMR safety feature has likely decreased these injuries. However, these switches are some of the most easily and consequently commonly bypassed safety features on lawn mowers. As a result, these accidents are still all too common.

Some experts criticize the power equipment industry for a lack of new innovation in safety features. Many of the safety features presently on mowers are essentially the same as those emplaced decades ago, yet power equipment has become more powerful, responsive and efficient. One example of this is the common "Zero turn" category of riding mowers. These mowers are extremely nimble, fast and powerful, yet they have the same safety features as their slower, traditional riding mowers. The statistical data available establishes that more safety features are necessary to remedy the alarming trend in increased injuries and deaths caused by lawn mowers. Injury prevention experts recommend the following:

- Teach and supervise teens. Children younger than 12 should not operate a push mower. Children younger than 16 should not operate a riding mower.
- Children should never be passengers on riding mowers, and children younger than 6 years old should never be outside while mowing.
- Before mowing, pick up any rocks, sticks or debris that could be thrown by the mower.
- Ensure all guards, shields, and safety features such as presence sensors and mow and reverse features are operational.
- While mowing, wear shoes, eye and ear protection.
- Only refuel once the engine has cooled.
- Do not try and unclog the discharge or any part of the mower until the mower is shut off and the blade has stopped spinning.

If you need more information on this subject, contact Ethan Allen, a lawyer in our Personal Injury & Products Liability Section, at 800-898-2034 or by email at Ethan.Allen@beasleyallen.com.

CPSC Adopts New Federal Standard For Infant Bouncer Seats

On Sept. 1, 2017, the Consumer Product Safety Commission (CPSC) voted 3-2 in favor of a new federal mandatory standard to improve the safety of infant bouncer seats. The new standard is designed to reduce the risk of fatalities and serious head injuries associated with the improper use of bouncer seats. During the last 10 years, infant bouncer seats have caused 12 fatalities and 54 injuries in babies. Suffocation led to most of the infant deaths, either when an unrestrained baby flipped over in the seat or when the seat turned over onto a soft surface. An additional 874 incidents were reported where infant fell while in the bouncer from hazardous locations, such as countertops. Some of these falls resulted in skull fractures and concussions.

The new mandatory standard will make fall hazard warnings more visible to caregivers by requiring the label to be placed on the front of the bouncer seat near the baby's head and shoulders. CPSC recommends the following tips to parents and caregivers when using an infant bouncer seat:

- Always use the bouncer on the floor, never on a countertop, table or other elevated surface.
- Never place the bouncer on a bed, sofa, or other soft surface because babies have suffocated when bouncers tipped over onto soft surfaces.
- Always use restraints and adjust restraints to fit snugly, even if baby falls asleep.
- Stay near and watch the baby during use.
- Stop using the bouncer when a child is able to sit up on his/her own or the baby reaches 20 lbs. or the manufacturer's recommended maximum weight.

The Commission is required by The Danny Keysar Child Product Safety Notification Act, Section 104(b) of the Consumer Product Safety Improvement Act of 2008 (CPSIA), to issue consumer product safety standards for durable infant and toddler products. In the past seven years, the Commission has approved new federal safety standards for durable infant or toddler products, including full-size cribs, non-full-size cribs, play yards, baby walkers, baby bath seats, children's portable bed rails, strollers, toddler beds, infant swings, handheld infant carriers, soft infant carriers, framed infant carriers, bassinets, cradles, portable hook-on chairs and infant slings.

The CPSC has proposed that the rule become effective six months after the publication of a final rule in the Federal Register. Lawyers in our Personal Injury & Products Liability Section have handled several cases involving infant products. For more information on this subject, contact Cole Portis or Stephanie Monplaisir, lawyers in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at Cole.Portis@BeasleyAllen.com or Stephanie.Monplaisir@beasleyallen.com.

Source: www.cpsc.gov

Manufacturer Must Face Claims Of Defective Guardrail Design

A Georgia man who claims a defective Trinity Industries Inc. guardrail pierced the length of his car and severely injured him during a car crash is being allowed to proceed with his lawsuit against the company. In rejecting a motion to dismiss filed by Trinity and its Trinity Highway Products LLC subsidiary, U.S. District Judge William S. Duffey Jr. kept most of Plaintiff Bobby J. Chapman's complaint alive. The only claim eliminated was a breach of warranty claim that Chapman voluntarily agreed to be dropped from his complaint.

Judge Duffey also refused to remand the case back to state court, finding that Trinity's motion to remove the case to federal court was filed in time. The dispute arises from a May 2013 crash that occurred while Chapman was traveling north on

Interstate 85 in Georgia. Chapman says he lost consciousness and his vehicle gradually veered off the road and into a guardrail. He claims the guard rail was defectively designed by Trinity in that it speared his vehicle through the front and exited through the back, seriously injuring him in the process.

Chapman first filed a suit in a Georgia state court in Fulton County two years after the crash. Trinity didn't remove that case to federal court. Chapman dropped that action himself in July 2016. In January, with new representation, Chapman filed a new, but similar lawsuit, in the same court. Trinity removed that case to federal court based on diversity jurisdiction the following month. Trinity then moved to dismiss the case in early March.

About two weeks later, Chapman moved to remand the case back to state court, arguing that Trinity was required to seek removal within 30 days of his original lawsuit, not 30 days after his second one. Meanwhile, he said the second Trinity is a new action and that the clock for removal started in January.

Judge Duffey agreed, finding that Chapman's original Trinity was voluntarily dismissed and was thus "terminated completely," so the second one constituted a new action and restarted the clock. As for Trinity's dismissal motion, Judge Duffey ruled that the company had minimum contacts with Georgia as it was registered to do business in the state from 1987 to 2011 and that it hasn't presented evidence contradicting Chapman's argument that it dealt in guardrails, including the one at issue in the instant suit.

Judge Duffey said Trinity also failed to establish a "compelling case" that the court's decision to exercise personal jurisdiction over it would be unfair. He added that Chapman lives in Georgia, the crash happened within the state's borders and Trinity was registered to do business in the state for more than 20 years, including during the time when the guardrail was likely installed.

Chapman is represented by David N. Krugler of Cash Krugler & Fredericks LLC. The case is *Chapman v. Trinity Highway Products LLC et al.*, case number 1:17-cv-00575, in the U.S. District Court for the Northern District of Georgia.

Source: Law360.com

E-cigarette Explosion Causes Major Security Alert

British police recently evacuated London's Euston Station, one of London's busiest train stations, and locked down the train system due an e-cigarette explosion inside a passenger's bag. Dozens of people in the crowded terminal abandoned their bags and fled when the bag started smoking. Euston Station was quickly evacuated and bomb-sniffing dogs were brought in to search the area. Reports from the British Transport Police (BTP) said, "an electrical item is believed to have caused a small contained explosion." The police later said that a malfunctioning e-cigarette was the culprit. Fortunately, no one was injured by the explosion.

E-cigarettes and the lithium batteries that power them continue to be the cause of explosions, public scares, and personal injuries around the world. Batteries may overheat if overcharged or charged with an incompatible device. Lithium batteries may also malfunction because of manufacturing flaws or damage. Loose lithium batteries can short circuit if stored in bags or pockets with other metal objects.

If you would like more information, 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: *The Independent*

VIII. MASS TORTS UPDATE

4th Bellwether Over J&J Metal Hip Implants Is Underway

The fourth bellwether trial involving J&J's metal-on-metal hip implants started last month in a Texas federal court. Six Plaintiffs told the federal jury that a money-driven Johnson & Johnson pushed a dangerous metal-on-metal hip implant into the world that it knew wouldn't work well and that was defectively manufactured, in the fourth bellwether trial in multidistrict litigation (MDL) over the devices.

In the fourth matchup between Plaintiffs' lawyer Mark Lanier of The Lanier Law Firm and J&J and its subsidiary DePuy Orthopaedics Inc. over the Pinnacle Ultamet line of metal-on-metal hip implants, six New York Plaintiffs and four of their spouses allege that the devices were designed based on problematic research, made with "shoddy equipment," and that DePuy and J&J failed to provide adequate warnings about problems with the safety of the devices and made highly misleading marketing claims about the success of the product.

The two most recent trials ended in massive verdicts for California and Texas Plaintiffs, and J&J and DePuy defeated claims of wrongdoing in the first bellwether. The Plaintiffs claim that J&J and DePuy are liable for negligence, strict liability, fraud, negligent misrepresentation, fraudulent business acts and practices and breach of express and implied warranty, and are seeking punitive damages in the trial.

The Plaintiffs allege that J&J didn't warn surgeons or patients about the risks of metal rubbing against metal and causing microscopic metal particles to be shed into their bodies, leading to serious complications and necessitating follow-up surgeries.

This is the fourth bellwether trial involving the Pinnacle line of metal-on-metal hip implants. The first involved a single Plaintiff from Montana and ended in a Defense win. The second, involving five Plaintiffs from Texas, ended in a $502 million verdict that was reduced to about $150 million. And the third, involving six Plaintiffs from California, ended in December with a more than $1 billion verdict, later reduced to about $543 million.

Although Judge Kinkeade initially told the parties to prepare 10 cases involving Plaintiffs from New York and New Jersey for the fourth bellwether, only six Plaintiffs remain, all from New York, after several Plaintiffs withdrew from the case and one case was dismissed on summary judgment. More than 9,100 cases remain in the MDL.

The Plaintiffs are represented by Mark Lanier of The Lanier Law Firm, Richard Arsenault of Neblett Beard & Arsenault, Wayne Fisher of Fisher Boyd Johnson & Huguenard LLP, and Jayne Conroy of Simmons Hanly Conroy. The consolidated cases are: *Alicea et al. v. DePuy Orthopaedics Inc. et al.*, (case number 3:15-cv-03489), *Barzel v. DePuy et al.* (case number 3:16-cv-01245), *Kirschner v. DePuy et al.*, (case number3:16-cv-01526), *Miura v. DePuy et al.*, (case number 3:13-cv-04119), *Stevens v. DePuy et al.*, (case number 3:14-cv-01776), and *Stevens v. DePuy et al.*, (case number 3:14-cv-02341),

in the U.S. District Court for the Northern District of Texas.

Source: Law360.com

Special Master To Oversee Discovery In J&J Talc MDL

A New Jersey federal court has detailed the responsibilities of the special master who will oversee discovery in multidistrict litigation (MDL) involving Johnson & Johnson's talc-based products. As special master, retired U.S. District Judge Joel A. Pisano will resolve all disputes related to discovery in the MDL accusing Johnson & Johnson of personal injury or wrongful death over the side effects of its talcum powder products, according to an order by U.S. District Judge Freda L. Wolfson, who is overseeing the litigation. The cases involve claims that the talc products cause ovarian cancer.

Judge Wolfson had appointed Judge Pisano special master in August. The order outlining the responsivities of the special master stated:

> *The special master shall proceed with all reasonable diligence to resolve all discovery disputes in any case in the above-captioned MDL proceeding that are referred to the special master by the court.*

The suits were centralized by the Judicial Panel on Multidistrict Litigation (JPML) in October. The common questions among the cases are whether the talc-based powders cause ovarian or uterine cancer, whether the company knew or should have known about that correlation, and whether it did enough to warn users.

Judge Pisano retired from the judiciary in 2015 after more than two decades on the federal bench. Pisano was appointed a U.S. Magistrate Judge for the District of New Jersey in 1991, and appointed U.S. District Judge in 2000 by former President Bill Clinton. He has since returned to private practice and currently works as counsel with Walsh Pizzi O'Reilly Falanga LLP. During his judicial career, Judge Pisano oversaw a range of civil and criminal cases including multidistrict litigation over Merck's osteoporosis drug Fosamax and a real estate investment Ponzi scheme. The court, when appointing Judge Pisano in August, said:

> *The court commented that Judge Pisano is well-qualified because he has, in the past, sat as an MDL judge, that he has a background as a magistrate judge, and that he served numerous years as a district judge.*

The Plaintiffs are represented by co-lead counsel P. Leigh O'Dell of Beasley Allen Crow Methvin Portis & Miles PC and Michelle A. Parfitt of Ashcraft & Gerel LLP, among others. The MDL is In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices And Products Liability Litigation, (case number 3:16-md-02738) in the U.S. District Court for the District of New Jersey.

Source: Law360.com

$57 Million Jury Verdict Against J&J In Philadelphia Mesh Case

A Philadelphia jury has awarded $57.1 million in damages to a woman who accused a Johnson & Johnson unit of manufacturing a defective pelvic mesh implant that scarred her urethra and left her incontinent. The award, which included $50 million in punitive damages, easily eclipses verdicts won by Plaintiffs in four prior cases tried in the Philadelphia County Court of Common Pleas as part of a mass tort program over the defective pelvic mesh implants sold by Ethicon Inc. The jury found that a pair of negligently and defectively designed mesh devices had "mutilated" Ella Ebaugh's urethra and left her with little control over her urinary flow.

The trial focused on two Ethicon mesh products—the TVT-Secur, which is no longer on the market, and the company's "standard" TVT product, which is still being sold. Ms. Ebaugh was implanted with a so-called TVT-Secur mesh device in May 2007 to treat symptoms of stress urinary incontinence and ultimately received a second TVT implant in the summer after her condition did not improve.

After reporting to her doctor three years later that she was having sudden urges to urinate and significant pelvic pain, it was discovered that the mesh had eroded into her urethra. A series of surgical interventions followed including one operation in which Ms. Ebaugh was cut open from "hip to hip" in an effort to remove as much of the mesh as possible. Despite the operations, scarring from the mesh implants had essentially propped open her urethra and left her all but incontinent. Ethicon came into the Ebaugh case with a losing record after four out of five juries in prior trials in Philadelphia County sided with Plaintiffs to the tune of nearly $50 million in total damages.

A jury in the fifth case decided in June that while the TVT-Secur had been defectively designed, it was not the cause of an Ohio woman's injuries. A judge, however, agreed a month later that the verdict was inconsistent and ordered a new trial on damages. Until this one, the largest verdict the company had faced in a mesh case in Philadelphia had been a $20 million award handed down in April. That award included $17.5 million in punitive damages.

Ms. Ebaugh is represented by Kila Baldwin of Kline & Specter PC. The case is *Ella Ebaugh et al. v. Ethicon Inc. et al.,* (case number 130700866), in the Court of Common Pleas of Philadelphia County, Pennsylvania.

Source: Law360.com

Navan Ward Appointed To Plaintiffs Executive Committee For PPI Litigation

Navan Ward, Jr., a lawyer in our Atlanta office, has been appointed to the Plaintiffs Executive Committee (PEC) for the multidistrict litigation (MDL) involving proton pump inhibitor (PPI) drugs linked to kidney damage. Ward is one of five attorneys appointed to the PEC. The U.S. Judicial Panel on Multidistrict Litigation (JPML) granted the Plaintiffs' motion to consolidate 161 PPI cases in the U.S. District Court in the District of New Jersey under Judge Claire C. Cecchi. Navan says:

> *I'm honored to be selected to work with this incredibly talented group of attorneys to lead this nationwide litigation. The evidence of these products' defect is very apparent in the early stages of this litigation, so I look forward to continuing our efforts to provide a successful resolution to these claims for all of our clients.*

Plaintiffs are suing PPI manufacturers after developing kidney damage linked to the use of PPIs. Plaintiffs claim the companies should be held accountable for their failure to warn consumers about the drugs' potential to cause kidney damage. Studies dating back to the 1990s have linked PPIs to kidney problems, including Acute Interstitial Nephritis (AIN), which is inflammation in the spaces between the kidney tubules. PPI use has also been linked to an increased risk of Acute Kidney Injury (AKI or Acute Renal Failure) and Chronic Kidney Disease.

The litigation centers on suits against the manufacturers of a variety of products including five prescription products Prilosec, Prevaid, Nexium, Protonix and Dexilant; and three over-the-counter products: Prilosec OTC, Prevacid 24-Hour and Nexium 24 Hour. Pharmaceutical companies named as Defendants in the MDL include: Takeda Pharmaceutical Co., AstraZeneca; Pfizer Inc., (and its subsidiaries Wyeth Pharmaceuticals, Inc., Wyeth, LLC, and Wyeth-Ayerst Laboratories); Procter & Gamble Company; and Novartis Consumer Health, Inc. (and its subsidiaries Novartis Vaccines and Diagnostics, Inc. and Novartis Institute for Biomedical Research, Inc). The litigation is *In Re: Proton-Pump Inhibitor Products Liability Litigation*, MDL No. 2789.

Lawyers in our firm's Mass Torts Section are currently investigating cases involving PPI use and AIN, AKI or Acute Renal Failure, and Chronic Kidney Disease. If you would like more information, contact Navan Ward or Tiffany Roberts at 800-898-2034 or by email at Navan.Ward@beasleyallen.com or Tiffany.Roberts@beasleyallen.com.

More Than 800 Physiomesh Incidents Filed With FDA Report Pain And Suffering

As we previously reported, the U.S. Judicial Panel on Multidistrict Litigation (JPML) created a multidistrict litigation (MDL) for Physiomesh Plaintiffs earlier this year. The JPML reports the number of pending lawsuits has increased to 92 since the MDL was created. And, given the information collected by the U.S. Food and Drug Administration's (FDA) MAUDE reporting system about adverse events involving the product, there is no doubt the number of claims will continue to rise.

Physiomesh is manufactured by Ethicon, a subsidiary of Johnson & Johnson. According to Righting Injustice, more than 800 negative incidents involving the mesh have been reported to the FDA's MAUDE. This reporting system allows doctors and hospitals to provide details about adverse events related to medical devices. Since Physiomesh was first approved by the FDA in 2010, medical professionals have reported 839 such events, including injuries and at least nine deaths, naming the mesh device as the culprit.

Physiomesh, considered a medical device, is made of a flexible plastic called polypropylene and is used to repair weak abdominal muscles, called hernias. It is intended to reinforce the weakened area and prevent the hernia from reopening. Yet, once implanted, Physiomesh begins to erode.

Physiomesh has a higher rate of hernia recurrence and re-opening in patients using the device as compared to patients using other similar devices. Two of the more recent lawsuits, consistent with previous lawsuit claims, provide a glaring backdrop of the pain and suffering patients report is associated with the mesh. The following is a brief account of these cases:

- Righting Injustice describes Kathy Edwards' plight as she watched her husband suffer numerous surgeries and countless hours of pain after surgeons used Physiomesh to repair a hernia. The device failed to incorporate into William Edwards' tissue, which resulted in an infection and required a wound vac to prevent the infection from growing worse. The wound never healed and William died from septic shock, respiratory failure and acute renal failure on Jan. 31, 2017—19 months after the initial surgery.

- An Alabama man's lawsuit recounts his own torture from the device and explains how it left him with permanent scarring and other injuries. Bill Tedford had a hernia repaired in December 2013 with a Physiomesh patch implant. The device was marketed as a hernia repair device that would prevent or minimize the risk of inflammation and adhesions. The device's design was also purported to incorporate better into the body's tissues. However, the Tedford lawsuit explains that it "caused or contributed to an intense inflammatory and chronic foreign body response." Like many others, Tedford endured a number of surgeries in order to repair the damage caused by the failed Physiomesh patch.

The embattled mesh maker has settled approximately 3,000 lawsuits due to similar problems with a related product—the company's Proceed polypropylene transvaginal mesh. The settlement came in January 2016 as part of an MDL. It occurred just months before Ethicon issued a Field Safety Notice and quietly withdrew Physiomesh from markets in the U.S., Europe and Australia because of the product's high failure rate.

If you need more information on the Physiomesh litigation, contact Melissa Prickett or Matt Munson, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com or Matt.Munson@beasleyallen.com.

Sources: U.S. Judicial Panel on Multidistrict Litigation, Righting Injustice and the Daily Hornet

An Abilify Litigation Update

In October 2016, the multidistrict litigation (MDL) for Abilify was established in the Northern District of Florida. The central question involved in this MDL is whether Abilify causes compulsive behavior in people prescribed the medication. United States District Court Judge Casey Rodgers scheduled a general causation Daubert hearing soon after the MDL was formed in order to expedite a global general causation determination by the end of the summer. This general causation hearing addressed whether Abilify could cause users to develop compulsive behaviors. Five cases have been identified to be fully worked up under a fast-tracked schedule with the intention to hold at least one trial by the end of 2017.

In addition to the federal litigation, there is a separate group of cases pending in the Superior Court of New Jersey. Judge James DeLuca has consolidated pretrial proceedings for Abilify in Bergen County Superior Court, and is coordinating these proceedings with the matters pending in the Northern District of Florida. Recently a total of 11 cases have been designated to be prepared for trial. The first trial is scheduled to begin by the end of 2018.

Both litigations include Plaintiffs that allege they developed uncontrollable urges to gamble, shop or eat after being prescribed the antipsychotic medication and have now sustained substantial financial debt. Abilify (aripiprazole) is an atypical antipsychotic drug that was approved by the U.S. Food and Drug Administration (FDA) to treat bipolar disorder and schizophrenia. In May 2016, the FDA added new warnings to the drug label to encompass all of the compulsive behaviors Abilify could cause.

In December 2016, Bristol-Myers Squibb agreed to pay a total of $19.5 million to 43 states and the District of Columbia in order to resolve allegations that the drug manufacturer had promoted Abilify by using false and misleading representations. A multi-state investigation found that the Bristol-Myers improperly promoted Abilify for uses that were not approved by the FDA. The multi-state settlement bans the drug manufacturer from promoting Abilify for uses not approved by the FDA for a term of five years.

Lawyers in the section are currently investigating cases involving Abilify and compulsive gambling. If you have any questions regarding the litigation, or if you would like us to review a potential claim, contact Melissa Prickett, a lawyer in the Mass Torts Section. She can be reached at 800-898-2034 or by email Melissa.Prickett@beasleyallen.com.

Abbott Must Pay $38 Million Depakote Verdict

The Supreme Court of Missouri has upheld a jury's award of $38 million to a girl born with spina bifida after her mother took Abbott's epilepsy drug Depakote. The court ruled there was evidence Abbott knew the birth defect risk surpassed what it listed on the drug's warning label. The seven-member court voted unanimously to affirm a St. Louis jury's award—including $23 million in punitive damages—to 14-year-old Maddison Schmidt on her claims that Illinois-based Abbott Laboratories Inc. failed to warn about the risk of birth defects posed by Depakote. The court, however, did split 4-3 on the reasons for doing so. In the opinion, Judge W. Brent Powell, writing for the majority, rejected Abbott's argument that the Depakote label provided an adequate warning as a matter of law, stating that even if the warning was in the proper form and contained the right type of information, it failed its most fundamental test: to be complete and accurate, so as not to mislead consumers.

Judge Powell noted that while Depakote's label stated that use of antiepileptic drugs could increase the risk of birth defects, and that the Centers for Disease Control and Prevention (CDC) had estimated the risk of spina bifida was 1 or 2 percent—but that the Plaintiff presented evidence that Abbott was aware of multiple studies showing the risk of birth defects was 10 percent or greater, and that the risk of spina bifida was even higher. The judge wrote:

> *As Depakote's label did not reflect this relevant information, a reasonable inference could be drawn from this evidence that Abbott's warning was not complete and accurate and, therefore, did not adequately warn.*

The high court also backed up the jury's award of punitive damages, with Judge Powell writing that there was sufficient evidence for a jury to reasonably infer that Abbott was "motivated by profits" and had "deliberately disregarded the safety of Depakote users."

Abbott and its spinoff pharmaceutical company AbbVie Inc., which has held the rights to Depakote since 2013, are facing thousands of Plaintiffs who say they didn't do enough to warn would-be mothers about the risk of severe birth defects in their children. The Schmidt child was born in 2003 with spina bifida and other birth defects including microcephaly and brain malformations, is paralyzed and lacks bowel and bladder control, and is severely cognitively impaired. She filed suit in Missouri state court, joined with similar claims brought by 24 other people, in May 2012. It was alleged in the Schmidt case that Abbott specifically misled consumers and heavily marketed Depakote despite being aware of its propensity to cause birth defects since the 1980s.

After the Schmidt case was removed to federal court and then remanded back to state court, she was chosen to be the first case to go to trial. After a jury awarded her $38 million, a Missouri appellate court affirmed that verdict in November 2016. Now, the state's highest appellate court upheld that ruling, finding there was sufficient evidence to support the jury's findings.

The high court also rejected Abbott's arguments that the trial court erred in not granting its requests to transfer Minnesota-resident Schmidt and several other non-Missouri Plaintiffs' cases to St. Louis County court, from St. Louis city, and also to sever Schmidt's claims before the trial.

Schmidt is represented by Edward D. Robertson Jr., Mary D. Winter and Anthony L. DeWitt of Bartimus Frickleton and Robertson PC, John T. Boundas, Sejal K. Brahmbhatt and Margot G. Trevino of Williams Kherkher Hart Boundas LLP, and Douglas Dowd, William T. Dowd, John Driscoll and Christopher J. Quinn. The case is *Maddison Schmidt et al. v. Abbott Laboratories Inc.*, (case number SC96151) in the Supreme Court of Missouri.

Source: Law360.com

No New Trial For Janssen Pharmaceutical In $2.5 Million Risperdal Case

Philadelphia Court of Common Pleas Judge Ramy Djerassi has refused to grant Johnson & Johnson subsidiary Janssen Pharmaceuticals a new trial in one of the first of thousands of lawsuits against the company's antipsychotic drug Risperdal. The company was seeking a new trial as part of an effort to overturn a $2.5 million jury verdict that was awarded in 2015 to Austin Pledger, an Alabama man. The jury determined that Janssen concealed data about Risperdal's negative side effects, including the risk of a condition called gynecomastia, or the abnormal growth of breast tissue in young boys.

Beginning in 2002, when he was 7 years old, the Plaintiff was prescribed Risperdal to treat behavior disorders associated with autism, and continued taking the drug for five years. Like thousands of other male Plaintiffs who took the drug when they were children, the Plaintiff believes Risperdal caused him to develop gynecomastia, a physically and emotionally painful condition.

Righting Injustice explains that some Plaintiffs, including Austin Pledger, developed breasts as large as DD and that the breasts may even lactate because Risperdal generates the production of prolactin—a hormone produced by women during and just after childbirth to trigger lactation. Surgery, including liposuction and mastectomy, is often required to remove the breast tissue. We have previously reported that more than 5,800 Risperdal lawsuits are pending in the Philadelphia state court.

The Food and Drug Administration (FDA) approved Risperdal in 1993 to treat adult schizophrenia, but it was not approved for pediatric use until 2006. However, as we have previously reported, Janssen aggressively marketed the drug for a number of off-label uses in children and adolescents prior to the FDA's 2006 approval. For example, a Janssen sales representative visited Austin Pledger's doctor more than 20 times while the doctor was treating the boy. Such actions served as a basis for Janssen's $2.2 billion settlement with the U.S. Department of Justice in 2013 for deceptive marketing practices.

If you need more information on the Risperdal litigation, contact James Lampkin, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at James.Lampkin@beasleyallen.com.

Sources: Law360 and Righting Injustice

A Look At The Regulatory Path Of The Depuy Synthes Attune Knee

Knee replacement surgery is considered highly effective for the treatment of degenerative joint disease or arthritis and is considered one the most successful surgical procedures in medicine. Implant survival rates are reported at more than 90 percent at 10-19 years of follow-up. With

more than 600,000 knee implants per year in the United States, these numbers underscore the substantial public health impact of total knee replacements.

The number of knee replacements performed each year is only expected to grow. Therefore, medical device manufacturers are constantly developing new technologies to try to improve on this procedure. DePuy Synthes, a Johnson & Johnson company, developed the ATTUNE® Knee System—a novel design total knee arthroplasty (TKA) system. The ATTUNE System features unique designs and lighter innovative patient-specific instruments for implant of the prosthesis. In 2013, DePuy Synthes launched the ATTUNE System into the marketplace. DePuy boasts that ATTUNE gives patients increased range of motion and a shorter hospital stay.

Despite its novel features, DePuy Synthes bypassed the usual approval path, which requires an independent demonstration of safety and effectiveness. Instead, DePuy Synthes obtained market approval from the FDA based on the representation that the ATTUNE® Knee System was substantially equivalent to prior proven models. As a result, arthroplasty patients are being implanted with a product that was launched without any clinical testing.

Initially, as a result of a successful marketing campaign, the ATTUNE® Knee System was embraced by the medical community. However, within two years surgeons began encountering large failure rates. In addition, researchers found numerous adverse reports with the FDA of tibial component failure in the ATTUNE® Knee System. In a June 2017 study, the researchers identified similarities in the failures.

All revisions in the study had the failure of cement-to-implant. Several design features were identified as possible reasons for increased failure of this implant, including increased constraint of tibial polyethylene, reduced cement pockets in tibia, reduced rotational stabilizers on keel (*i.e.*, all smooth surfaces on tibial fixation surface), and the roughness factor on fixed bearing (60 versus 220 on the previous generation system).

The 2017 study pointed out that failure is likely underreported as competing companies cannot provide data on the revision components that they replace. The authors recommended that patients who present with unexplained pain undergo a thorough workup for a painful joint, including blood work and imaging, and that doctors should consider the diagnosis of debonding at implant-cement interface.

Lawyers in Beasley Allen's Mass Torts Section are currently investigating cases involving early knee implant failure with the ATTUNE® Knee System associated with debonding at implant-cement interface. If you or a loved one has experienced complications from knee replacement surgery with the ATTUNE® Knee System, including loosening or debonding of the tibial component, 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: Bonutti, Peter M., MD, et al., Unusually High Rate of Early Failure of Tibial Component in ATTUNE Total Knee Arthroplasty System at Implant-Cement Interface, J. Knee Surg. 30:435-39 (2017). And https://www.depuysynthes.com/patients/knee/attune-knee

New Trial For Testosterone Litigation Starts In Chicago

In June, the first bellwether trial for the Testosterone Replacement Therapy (TRT) multidistrict litigation (MDL) ended in a mistrial when the lead Plaintiff's lawyer suffered from heart problems. The new trial started on Sept. 18 in the U.S. District Court for Northern Illinois in Chicago. Jury selection was completed, opening statements done, and the Plaintiff began to call witnesses. The trial was still in progress when this issue went to the printer.

Plaintiff Jeffrey Konrad contends that his heart attack seven years ago was linked to the TRT drug AndroGel he started to use 65 days earlier. His is one of more than 7,000 claims pending against TRT manufacturers, including AndroGel maker AbbVie, Besins, Eli Lily and GlaxoSmithKline, as we previously reported. The claims are seeking to hold the manufacturers accountable for failing to warn users of potential cardiovascular side effects.

The Food and Drug Administration (FDA) approved TRT to treat hypogonadism, which occurs when the body does not produce enough of the male hormone. Plaintiffs maintain that despite not being designed to treat symptoms of age-related testosterone decline, manufacturers marketed the products as "fountain of youth" drugs to lure men who did not need the treatment to ask for it by name. They claim TRT manufacturers concocted a fictitious condition called "Low T," which includes symptoms such as low libido, weight gain and muscle loss—all age-related symptoms.

The off-label use is ineffective and even puts men at increased risk of life-threatening events such as heart attacks, strokes and blood clots, the litigation alleges. A jury in July agreed and awarded another Plaintiff in the MDL $150 million in punitive damages. It found that AbbVie's aggressive marketing scheme targeting aging men was fraudulent. Jeffrey Konrad's case is one of seven cases in the class action selected as bellwethers—six of the claims are against AbbVie. The remaining bellwethers are scheduled through next April.

We will keep you updated on the trial. In the meanwhile, if you or a loved one has suffered a heart attack or stroke while taking testosterone supplements, or if someone you love has died, you can contact Matt Teague, a lawyer in the firm's Personal Injury and Product Liability Section at 800-898-2034 or by email at Matt.Teague@beasleyallen.com. More information about testosterone replacement drugs or replacement therapy can be found at http://www.lowt-lawyer.com/.

Source: Law.com

Another Low-T Trial Update

After more than two weeks of trial, the jury in *Couch v. AbbVie*, the first state court trial against the manufacturer's of AndroGel, returned a verdict for the Defendants on all claims. The Couch case was one of about 150 cases filed in Illinois state court, as opposed to being consolidated in a multidistrict litigation (MDL), consisting of thousands of cases, in federal court. This verdict came shortly after a highly unusual verdict in the federal bellwether trial, *Mitchell v. AbbVie*, where the jury awarded no compensatory damages, but awarded a large punitive award to the Plaintiff.

In the state court trial, Mr. Couch sued AbbVie, claiming that his AndroGel use caused a severe heart attack at the end of 2013. Like the arguments made in the July bellwether trial in federal court, the Plaintiffs in state court argued that existing studies showed that testosterone replacement therapy caused an increased risk of adverse cardiovascular events. Mr. Couch argued that AbbVie knew about these studies and risks, but failed to conduct further studies regarding AndroGel's safety before engaging in a mass marketing scheme aimed at significantly growing the patient population for their drug.

Instead of focusing on patient safety, AbbVie focused on advertising AndroGel

to treat age-related testosterone decline rather than the very specific and rare conditions for which the drug was FDA-approved to treat. Mr. Couch was one of the many men who fell prey to AbbVie's targeted off-label marketing, and ultimately sought testosterone replacement therapy from his doctor to treat symptoms like depression and lethargy, neither of which are FDA-approved indications for AndroGel.

AbbVie argued that Mr. Couch did not use AndroGel consistently during the time leading up to his heart attack, noting that he only filled his prescription for AndroGel twice between February 2013 and his heart attack on Dec. 13, 2013. AbbVie further argued that Mr. Couch only actually used AndroGel for a combined total of about three months throughout the one-year period prior to his heart attack and that he stopped using it two months prior to suffering his heart attack. Defendants also focused heavily on Mr. Couch's pre-existing cardiac risk factors, arguing that those risk factors, not AndroGel, caused his heart attack. While the Plaintiffs' arguments were very compelling, ultimately, the jury found for the Defendants on all claims.

Lawyers and staff from Beasley Allen as well as several other law firms on the MDL Plaintiff Steering Committee and Executive Committee are already back in the courtroom, working on the new trial for Jeffrey Konrad, discussed above. Mr. Konrad's case is distinguishable from the previous two cases in several ways, and we are excited about presenting his case to the jury.

Source: Law360.com

Taxotere MDL Trial Dates Set

According to the U.S. Judicial Panel on Multidistrict Litigation there are 1,624 lawsuits in the Taxotere multidistrict litigation (MDL) pending against the drug's manufacturer and French drugmaker Sanofi Aventis (Sanofi). The cases are consolidated in the U.S. District Court of the Eastern District for Louisiana with Judge Kurt D. Engelhardt presiding.

In August, Judge Engelhardt issued an order establishing the dates of four bellwether trials for the MDL, beginning in January 2019. The initial dates for the other three trials are set for April 8, July 15, and Nov. 4, 2019. The MDL is moving ahead despite Sanofi's continued attempts, Reuters reports, to get the claims tossed out of court.

Taxotere is a chemotherapy drug approved by the Food and Drug Administration (FDA) to treat breast cancer and other forms of cancer. As we have previously reported, it is two times as potent as its safer and just as effective alternative, Taxol. Many patients who took the drug are now experiencing permanent hair loss, but were never warned of the risk. Unlike Taxol, Taxotere can destroy hair follicles, preventing hair from growing back after treatment.

Although Sanofi knew about the risk and warned patients outside of the U.S. as early as 2005, it refused to warn U.S. patients until 2013 when the FDA demanded the drugmaker change its label and warn patients of the risk of permanent hair loss. Patients suffering from the unnecessary side effect have a permanent physical reminder of their cancer and its impact on their lives.

Lawyers at Beasley Allen are currently investigating potential cases involving individuals who have suffered permanent hair loss following chemotherapy with Taxotere. For more information on this subject, contact Beau Darley or Melissa Prickett, lawyers in our firm's Mass Torts Section, at 800-898-2034 or by email at Beau.Darley@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

Sources: U.S. Judicial Panel on Multidistrict Litigation; U.S. District Court Eastern District of Louisiana and Reuters

Doctors Abandoning Invokana Over Increased Risk Of amputations

Invokana was approved by the Food and Drug Administration (FDA) in 2013 as the first SGLT2 inhibitor to help lower blood sugar in adults with Type 2 diabetes. However, the drug, manufactured by Johnson and Johnson's Janssen Pharmaceuticals, has been plagued with a number of reported adverse side effects. Among these, Invokana has been linked to diabetic ketoacidosis (DKA), or kidney damage caused from the buildup of too much acid in the blood, as well as the risk of serious urinary tract infections (UTIs). These UTIs can lead to a serious blood infection called urosepsis or kidney infection called pyelonephritis, according to Righting Injustice. But the latest reported adverse side effect connected to the medication—an increased risk of amputation—has led some doctors to stop prescribing Invokana.

Doctors across the country "are scurrying to take patients off of the diabetes drug canagliflozin (Invokana)," according to Medpage Today. The proactive measures come after the results of a FDA-mandated clinical trial showed the drug doubled the risk of leg and foot amputations compared with outcomes of patients taking a placebo. The dangers are even present in patients without risk factors for amputation.

The U.S. Judicial Panel on Multidistrict Litigation reports that more than 740 lawsuits have been filed in the multidistrict litigation (MDL) against Janssen Pharmaceuticals—more than 13 times the number of lawsuits originally consolidated in the U.S. District Court for New Jersey with Judge Brian R. Martinotti presiding. The claims allege the drugmaker failed to properly test Invokana and warn of the risks and consequences of using the Type 2 diabetes drug.

Lawyers in our firm's Mass Torts Section are investigating claims on behalf of individuals and families injured by Invokana and Invokamet, specifically cases involving DKA, acute kidney injury, heart attack and stroke. If you would like more information, contact Danielle Ward Mason, a lawyer in our Mass Torts Section. She can be reached at 800-898-2034 or by email at Danielle.Mason@beasleyallen.com.

Sources: Righting Injustice, Medpage Today, and U.S. Judicial Panel on Multidistrict Litigation

New FDA Study Shows Consumers May Benefit From Simpler Warnings

In a study released in July, U.S. Food and Drug Administration (FDA)-sponsored research investigated an "alternative approach" to presentation of warnings in direct-to-consumer (DTC) advertising for pharmaceutical products. DTC advertisements are required to provide the consumer with major risks associated with the product and frequently include a laundry list of associated effects. The recent study compared consumer retention of information between the traditional risk statement and a revised statement, which included only serious and actionable risks.

The study, which included 1,500 participants, showed that consumers were significantly more likely to recall risks and benefits, as well as their perceived magnitude, with the revised information statement. Researchers concluded that limiting the information provided to the consumer increased the effectiveness of the warning and caused better understanding of product risks.

Effective conveyance of risk information is extremely important in DTC advertising. These advertisements are designed to provide consumers with information about pharmaceutical products and encourage them to contact their physicians about prescribing the product. Accurate understanding of risks associated with the product allow the consumer to weigh the benefits of the product before they discuss with their physician. Although this study demonstrates that limiting the information in the warning statement may increase the consumer's potential recall of serious risks, it also eliminates their opportunity to evaluate less-serious risks.

Additionally, revising DTC warning statements allows the pharmaceutical company to determine which risk information should be provided to the consumer. Additional research is needed to help determine the best way to provide the valuable information to the consumer, while making sure the consumer understands and retains the information.

IX. BUSINESS LITIGATION

Bosch Agrees To $33.4 Million Settlement In Auto Parts Price-Fixing MDL

Robert Bosch GmbH and Robert Bosch LLC have agreed to pay $33.4 million to settle antitrust lawsuits involving four different types of auto parts. Consumers are seeking preliminary approval of the settlement. The settlement would resolve the end-payor Plaintiffs' claims against Bosch in the massive automotive parts antitrust litigation alleging a conspiracy to fix prices and rig bids for parts, thus improperly inflating their prices.

The parts specifically involved in the Bosch settlement are windshield wiper systems, starters, fuel injection systems and spark plugs. Bosch agreed to keep its offending sales in the case to aid in calculating treble damages against any nonsettling Defendants. The company has also agreed to cooperate with the consumers as they continue to prosecute claims against the remaining Defendants.

The consumers also asked the court to certify four separate settlement classes: one for each of the four auto parts. In each class, the end payors seek to represent anyone who, between Jan. 1, 2000, and the execution of the settlement, bought or leased a new vehicle that had the relevant part, or bought one or more of the parts as a replacement.

Most of the $33.4 million would be allocated to members of the spark plug class, who would receive $29 million. About $2.9 million would go to members of the fuel injector class, $1 million would go to the members of the starters class and about $508,000 would go to members of the windshield wiper class. Those amounts do not include interest. In August, U.S. District Judge Marianne O. Battani, who is overseeing the case, approved a $61.2 million settlement between car dealers and Japanese parts maker Denso Corp.

With the settlement's final approval, Judge Battani ended a total of 23 actions brought by the dealerships against Denso in the multidistrict litigation (MDL). That settlement involved classes for wire harnesses, instrument panel clusters, fuel senders, heater control panels, alternators, windshield wiper systems, radiators, starters, ignition coils, motor generators, inverters, air flow meters, fan motors, fuel injection systems, power window motors, automatic transmission fluid warmers, air conditioning systems, windshield washer systems and spark plugs.

The Plaintiffs are represented by Cotchett Pitre & McCarthy LLP, Robins Kaplan LLP, Susman Godfrey LLP and The Miller Law Firm PC. The cases are *In re: Windshield Wiper Systems*, (case number 2:13-cv-00903); *In re: Starters*, (case number 2:13-cv-01103); *In re: Fuel Injection Systems*, (case number 2:13-cv-02203); and *In re: Spark Plugs*, (case number 2:15-cv-03003), while the MDL is *In re: Automotive Parts Antitrust Litigation,* (case number 2:12-md-02311), all in the U.S. District Court for the Eastern District of Michigan.

Source: Law360.com

X. AN UPDATE ON SECURITIES LITIGATION

ComScore Retools $120 Million In Settlements In Industry Lawsuits

ComScore Inc., a media and audience measurement company, has announced a company shakeup and a $120 million package of stockholder suit settlements. The company also announced new financial reporting delays and moves that could affect claims in a hedge fund investor's Delaware Chancery Court lawsuit. In its announcement, comScore reported settlements in four investor lawsuits, with $110 million of the total paid in cash or stock to resolve a consolidated Securities Act complaint filed in the Southern District of New York (SDNY) in March 2016.

The complaint in that case cited a range of company financial accounting and reporting failures. ComScore said it would pay $27.2 million in cash and $82.2 million in common stock into a settlement fund to resolve all claims against the company.

Another $10 million will be paid to settle shareholder derivative actions—filed by stockholders for damages on behalf of the company—in a different SDNY federal case and two cases filed in Fairfax County Circuit Court in Virginia. ComScore also has agreed as part of the proposed settlement to adopt certain corporate governance and compliance terms.

Earlier this year, comScore announced a $19 million settlement with former shareholders of audience measurement company Rentrak Corp. in Oregon state court over its merger with comScore. A fairness hearing on that settlement has been scheduled. ComScore is a "cross-platform measurement company" that measures audiences, brands and consumer behavior. The company operates in about 75 markets in 30 countries, with around 3,200 clients and more than 1,800 employees in operations that capture data on 1.9 trillion interactions monthly.

Starboard is represented by A. Thompson Bayliss, Adam K. Schulman and Daniel J. McBride of Abrams & Bayliss and Jaclyn H. Grodin of Olshan Frome Wolosky LLP. The Delaware case is *Starboard Value and Opportunity Master Fund Ltd. v. comScore Inc.,* (case number 2017-0533), in the Court of Chancery of the State of Delaware. The consolidated case settled for $110 million is *Fresno County Employees' Retirement Association et al. v comScore, Inc. et al.*, (case number 1:16-cv-09855) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

$30 Million Settlement In Investors' Suit Against Lender Gets Approval

A Pennsylvania federal judge has approved a $30 million settlement

between payday lender DFC Global and a class of institutional investors who alleged that the company violated securities laws by misrepresenting its financial health and quality of lending practices. U.S. District Judge Berle Schiller agreed that the settlement between DFC Global Corp.—once the largest payday lender in the U.K.—and the investors was fair, reasonable and adequate. The decision came after a hearing before Judge Schiller who said:

Securities litigation is tough stuff. This alleged securities fraud matter is no different, and would have required significant resources to further delve into the payday loan industry.

The investors alleged in a November 2013 complaint that executives at DFC Global falsely portrayed the company as "conservative" in its approach to underwriting payday loans, such that by the time the U.K. began strengthening its regulatory controls over lending practices in 2012, the company was forced to start recognizing its credit losses, affecting its reported earnings.

The Arkansas Teacher Retirement System, Macomb County Employees Retirement System, Laborers' District Council and Contractors' Pension Fund of Ohio said the company, which also went by names like The Money Shop, Dollar Financial, Month End Money and Payday Express Ltd., made risky loans with little or no oversight or attention to borrowers' ability to repay the loans.

DFC Global generated most of its payday lending revenue from rolled-over loans, encouraged borrowers to roll over loans rather than pay them off, and imposed rollover quotas on employees, while excluding such rollover loans from its loan loss reserves and failing to comply with certain lending regulations, the investors allege. The company was acquired by Lone Star Funds in June 2014.

In August 2016, Judge Schiller granted the investors class certification. The beneficiaries of the settlement are investors who bought shares of DFC Global between Jan. 28, 2011, and Feb. 3, 2014, the day DFC Global President and Chief Operating Officer Norm Miller resigned, and a day before the price of DFC's stock fell from $7.09 to $6.76.

The Arkansas Teacher Retirement System is represented by Angus F. Ni, Hannah Ross, Jai Chandrasekhar, Katherine Sinderson and John Rizio-Hamilton of Bernstein Litowitz Berger & Grossmann LLP and Jeffrey W. Golan, Jeffrey A. Barrack and Lisa M. Port of Barrack Rodos & Bacine. The case is *West Palm Beach Police Pension Fund et al. v. DFC Global Corp. et al.*, (case number 2:13-cv-06731) in the U.S. District Court for the Eastern District of Pennsylvania.

Source: Law360.com

XI. INSURANCE AND FINANCE UPDATE

Blue Cross Blue Shield Hit With $8 Million Penalty By Insurance Department

State regulators have hit Blue Cross Blue Shield of Alabama (Blue Cross) with an $8 million penalty for charging rates that differed from those approved by the Alabama Department of Insurance from 2005 to 2013. The charges investigated by the department occurred in about 1,400 plans issued to small group employers—those with two to 50 employees—and some COBRA plans for former employees. Company officials have said the rate variations were tied to a policy that was intended to reduce the shock of large rate increases and resulted in savings for most customers.

Lawyers suing the company for alleged anti-trust violations said the practice violated state laws that require rates to be filed and approved by insurance regulators. Blue Cross Blue Shield of Alabama claims "the goal was to smooth rate adjustments over time and provide small employers more predictability in their business planning." Interestingly, the company says it "believed these practices were beneficial overall to our small business customers."

The rate variances resulted in undercharges of almost $107 million and overcharges of almost $33 million, according to the order issued on Aug. 16 by the Alabama Department of Insurance. The department has been investigating Blue Cross' small group and COBRA charges since February. The $8 million assessment, as it was described in the order, was levied because the company failed to inform the department of insurance about its methods for raising or reducing rates. The order read:

Within 60 days of the date of this Order, Blue Cross shall pay the amount of $8,000,000 to the Commissioner of Insurance as an assessment for Blue Cross' oversight in not filing its renewal rating methodology with the Department pursuant to [Alabama law]. This assessment is a result of Blue Cross' inability to reasonably conduct variance analysis outside of the study period due to incomplete data.

In its statement, Blue Cross officials said its rate-stabilization practices were common in the health insurance industry and ended in 2014 and that they had made a mistake. Blue Cross said:

Although premium rate stabilization efforts are common insurance practices, we mistakenly did not document these practices in our Small Group rate filings. We also did not adjust the rating category for some small business customers when their annual employee health insurance enrollment fluctuated from the previous year.

The company must also pay $100,000 to the department for costs related to the investigation. The Blue Cross Blue Shield statement reported that refunds have been made to more than 1,400 small business customers and 2,200 COBRA customers. The company said it will not seek reimbursement from customers who were undercharged. Customers who believe they were overcharged by the company can make a claim to the Alabama Department of Insurance within the next two years.

XII. PREMISES LIABILITY UPDATE

Jury Awards $130 Million To Landowners For Fiber Optic Cable Use

A Missouri federal jury recently found that Sho-Me Power Electric Cooperative owes about $130 million in damages to landowners in a long-running suit over a fiber optic cable used for telecommunications purposes that saw a previous $79-million jury verdict vacated at the Eighth Circuit. The lawsuit was initially filed in November 2011 by south-central Missouri homeowners suing for trespass and unjust enrichment. The line, which was installed in the late 1990s and cuts through more than 3,500 privately owned parcels, has been partly used for commercial telecom-

munications purposes since January 2005. However, the landowners said Sho-Me wasn't allowed to use the line for that particular purpose under their electric utility easements.

Earlier parts of the litigation determined that the easements for the cable did not give Sho-Me authority to use the line for telecommunications purposes, and that such a use constituted trespass. U.S. District Judge Nanette Laughrey left it up to a jury to decide how much in damages the power company owed to landowners as a result of the trespass. About $129.2 million in damages was awarded to the Plaintiffs over the fair market rental value they could have obtained from third parties for a commercial telecommunications easement on their property. In order to determine the value of the easement, the jury was told to use comparable rentals, the value of the property and other appraisal practices. An additional $1.3 million was awarded by the jury as punitive damages.

Ron Waicukauski, lead counsel for the Plaintiffs from Price Waicukauski & Riley LLC said in a news release the litigation has been a hard-fought battle to defend the landowners' rights. The damages award winds up equaling $2.44 per foot per year for the 796 miles of trespass for 12.6 years, the news release said. That was the exact amount the Plaintiffs requested. Waicukauski added:

> *The jury verdict's precise calculation of the damages demonstrates the jury's careful understanding of the facts, and is a victory for Missouri landowners.*

Kathleen Kauffman of Ackerson Kauffman Fex PC, who also represented the Plaintiffs, stated that the verdict affirms the rule of law and is a victory for the judicial system. She said:

> *No one can take private property without consent or legal right, regardless of commercial benefit.*

It was alleged in the initial complaint alleged that Sho-Me Electric Cooperative, Sho-Me Technologies LLC, Kamo Electric Cooperative Inc. and a Kamo subsidiary should have known that the easements on the affected land only covered electric transmission purposes. The companies had no right to operate fiber optic cable for commercial communications purposes, the suit said. After the court certified a class of landowners, it granted summary judgment on the trespass and unjust enrichment claims.

An initial jury trial on damages for the unjust enrichment claim awarded landowners $79 million for the fair market rental value of their properties, but Sho-Me appealed the liability determination, damages instructions and class certification to the Eighth Circuit. The appellate panel in March affirmed the summary judgment and class certification rulings, but vacated the unjust enrichment finding and the jury's verdict. The decision said the landowners could choose to pursue damages on their trespass claim.

The time of trespass was said to begin on Jan. 21, 2005, and extended through the date of the trial. The Kamo parties were dismissed from the case in June 2015, after Judge Laughrey approved a class settlement to give landowners cash compensation per linear foot of covered rights of way. The Kamo settlement was said to be worth $6.5 million, netting payments for 4,070 rural Missouri landowners.

The Plaintiffs are represented by Henry J. Price, Ronald J. Waicukauski and Brad A. Catlin of Price Waicukauski Joven & Catlin LLC; Kathleen C. Kauffman and Cecilia Fex Ackerson Kauffman Fex PC; Dale C. Doerhoff and Heidi Doerhoff Vollet of Cook Vetter Doerhoff & Landwehr PC; and Fred O'Neill serving of counsel.

The case is *Barfield et al. v. Sho-Me Power Electric Cooperative et al.*, (case number 2:11-cv-04321-NKL) in the U.S. District Court for the Western District of Missouri.

Source: Law360.com

Judge Approves $151 Million Elk River Spill Class Settlement

A West Virginia federal judge has granted preliminary approval to a class settlement worth up to $151 million with American Water Works Co. and Eastman Chemical Co. This will end claims from a 2014 coal-processing spill in the Elk River. U.S. District Judge John T. Copenhaver Jr. had rejected the settlement in July, citing issues with tiered compensation structure that was proposed for businesses that were closed or partially closed by health officials after the spill and other concerns. The parties submitted an amended class settlement on Aug. 25 addressing the judge's concerns.

For the tiered business compensation structure, which the judge previously said "generates unfairness" to businesses with higher annual revenues, the parties split businesses into two categories: those with an annual revenue of $1 million or less, and those making more than that. The parties said:

> *Businesses with annual revenue up to and including $1,000,000 receive an estimated base payment of $1,875 plus 4 percent of an amount equal to their 2013 gross revenue—so that the formula for computing the payment is the same for all eligible businesses. Businesses with annual revenue in excess of $1,000,000 receive an estimated uniform payment of $41,8755—which is the amount that the above formula yields for a business with an annual revenue of $1 million.*

The judge had also objected to the proposed deal's review and appeals process for claims disputes, which the parties addressed by creating a "more robust" appeals process that allows claimants to appeal to an independent reviewer if they're dissatisfied with a decision from the settlement administrator, according to the Aug. 25 filing.

The judge's third concern was a system of fixed base payments for certain medical claims. The proposed payments ranged from $50,000 to $500,000, which the judge said failed to account for differences between claims. The parties changed the formula for medical claims from a fixed base payment to a payment equal to four times past medical costs, plus an additional $5,000 for each night spent in a hospital related to the diagnosis or treatment of an injury or illness.

Judge Copenhaver had expressed concern that some of the proposed agreement's provisions would cause delays of claims payments until all appeals have been resolved or appeals periods expired. The parties added new provisions for the appeals process and an early funding into escrow accounts in the event that there are any appeals.

The class action had been prompted by a January 2014 incident in which a Freedom Industries coal-cleaning mixture containing primarily 4-methylcyclohexane methanol, also known as MCHM, leaked from one of its storage tanks on the banks of the Elk River in West Virginia, just upstream from a municipal drinking water intake. The spill left residents and businesses in a nine-county area in the state without a potable water source from which to drink, bathe, or wash dishes for at least five days.

The Plaintiffs are represented by Van Bunch of Bonnett Fairbourn Friedman &

Balint PC, Kevin W. Thompson of Thompson Barney Law Firm, Stuart Calwell, Alex McLaughlin and D. Christopher Hedges of The Calwell Practice LC, Anthony J. Majestro of Powell & Majestro PLLC, Benjamin L. Bailey of Bailey & Glasser LLP, and Marvin W. Masters of The Masters Law Firm LC.

The case is *Good et al. v. American Water Works Co. Inc. et al.*, (case number 2:14-cv-01374) in the U.S. District Court for the Southern District of West Virginia.

Source: Law360.com

XIII. TRANSPORTATION

Electronic Logging Device Rule Compliance Date Approaching

The Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety and Accountability (CSA) initiative monitors seven safety improvement categories called BASICs and one of those categories is Hours of Service (HOS). The federal regulation sets the maximum number of hours commercial motor vehicle (CMV) drivers—including drivers transporting property and people—can legally drive each day and within a week. The updated rule was announced in December 2011 and took full effect in July 2013, according to the U.S. Department of Transportation (DOT). The goal of the rule is to reduce fatigue-related crashes and ultimately save lives.

However, truck drivers passing through the metro Atlanta area (and many other places across the country) are faced with limited options when it comes to pulling over and resting when they reach their maximum driving hours. The *Atlanta Journal Constitution* reports that eight counties surrounding the metro Atlanta area have no private parking spaces for CMV drivers and five other counties have 50 or less. While Fulton County, home to Atlanta, has more than 500 spaces, "there's a scarcity in some areas."

CMV drivers should not rely on public parking in the metro area either because public parking for truck drivers is limited to a single weigh station in Douglas County. A survey by the Atlanta Regional Commission (ARC) shows available CMV parking statewide is not much better. Available spaces includes: 265 private truck stops with 12,017 spaces; 47 public facilities with 1,701 spaces and private-to-public areas with 7.1 spaces.

The metro Atlanta problem with scarce parking seems to be on par with the national trend. The FMCSA says there are approximately 11.2 million heavy trucks registered in the U.S. contributing to nine percent (279.8 billion) of the vehicle miles traveled annually in the country. However, the Federal Highway Administration reports there are only 308,000 truck parking spaces available, nationwide. The limited amount of parking will grow even more deficient in the next decade without changes to infrastructure and updating local parking policies.

In the Atlanta Regional Freight Mobility Plan, ARC explains that by 2030 trucks will make up 91 percent of all freight traffic. Therefore, the demand for parking will continue to grow as well. Like other cities, towns and metro areas across the country, Atlanta will also face a more immediate test of parking infrastructure this December when another FMCSA regulation enters its second of three implementation phases.

The Electronic Logging Device (ELD) rule, which was first announced in 2016, will require CMV carriers and drivers to use an automatic on-board recording device or an ELD to track their HOS in order to strengthen compliance with the regulations. The ELD automatically records driving time and other aspects of the HOS records. It allows for easier and more accurate record keeping, but intensifies the pressure on a driver to find a parking space and still maintain a delivery schedule.

Recognizing the scarcity of parking for truck drivers affects everyone, ARC is working toward a plan to address the problem, in addition to the current Regional Freight Mobility Plan. ARC expects to release its recommendations early next year. The Atlanta Journal Constitution noted that some of those options may include:

- Encouraging companies to provide parking spaces for CMVs on their property if the trucks are picking up or delivering to the company.
- Increasing the number of private truck stops.
- Working with communities to develop policies that allow for peaceful coexistence.

Beasley Allen lawyer Chris Glover, who is in our Atlanta office, handles personal injury and death cases 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 or by phone at 800-898-2034. To get your free copy of *An Introduction to Truck Accident Claims: A Guide to Getting Started*, visit Chris Glover's website at www.ChrisGlover-Law.com.

Sources: U.S. Department of Transportation, Atlanta Regional Commission, *Atlanta Journal Constitution, Safety and Health Magazine*

Two Fatal Helicopter Crashes Coincide With Release Of New Safety Enhancements

Two high-profile, fatal helicopter crashes occurred within hours of each other on Sept. 8, and highlight the significant risks that accompany the mode of transportation. Helicopters are more versatile than airplanes and are often used in circumstances with significant uncertainties. Slate notes that they have more moving parts than airplanes, must fly at lower altitudes and are trickier to handle, especially for beginners.

A Duke Life Flight helicopter crashed, killing all four people on board, as it was transporting 70-year-old Mary Bartlett to Duke University Hospital in Durham, North Carolina from Sentara Albemarle Medical Center in Elizabeth City, WRAL reported. Mary was experiencing internal bleeding after recent pancreatic cancer surgery. The other three crash victims included pilot Jeff Burke and flight nurses Kris Harrison and Crystal Sollinger.

Righting Injustice explained that the Eurocopter EC 145s crashed in a rural area of Perquimans County and was the second fatal medical helicopter crash in the U.S. this year. Jarvis Miller told local NBC affiliate WGRZ that he saw "[b]lack smoke pouring out of the engine" before the helicopter crashed to the ground and exploded.

We described the dangers of medical ambulance helicopters in a previous *Report* and specifically the dangers of post-crash fires and the need to require crash-resistant fuel tanks on all helicopters in another *Report*. While the Duke Life Flight crash remains under investigation by the National Transportation Safety Board (NTSB), witnesses and aerial photos show evidence of a post-crash fire.

Between 1994 and 2016 there were 202 helicopter crashes and nearly 40 percent resulted in post-crash fire deaths—victims survived the initial impact but died due to the post-crash fire. It is past time for

federal regulators to require all helicopters incorporate crash-resistant fuel tanks—something the NTSB recommends to increase the chance of survival for victims in helicopter crashes.

The other crash involved country singer Troy Gentry of the duo Montgomery Gentry, according to Righting Injustice. According to the NTSB's preliminary report, the singer was taking a sight-seeing flight in Medford, New Jersey on a Schweizer 269C-1 helicopter. Engine problems forced pilot James Evan Robinson to attempt an emergency landing. The pilot opted to stop the engine and perform an autorotation—something he had performed numerous times. However, the failed emergency landing claimed the pilot's life on impact. Mr. Gentry was cut from the wreckage, transported to a local hospital, but later died from his injuries. This crash also remains under investigation.

Three days following the crashes, the U.S. Helicopter Safety Team (USHST) published 22 safety enhancements based on its comprehensive analysis of fatal accidents like the two that occurred Sept. 8. The group's parent organization, the International Helicopter Safety Team (IHST), released the analysis showing that out of 104 fatal accidents that took place between 2009 and 2013, 50 percent resulted from three "occurrence" categories including: loss of control while inflight; unintended flight into Instrument Meteorological Conditions (IMC); and low altitude operations. The 22 safety enhancements focus on addressing the three occurrence categories including: loss of control; safety management; competency; and IMC and visibility.

The USHST will initially focus on applying the enhancements within personal/private, air ambulance, commercial and aerial application segments of the industry as part of an industry-government partnership. The goal is to reduce the number of helicopter accidents and save lives.

If you need assistance on any claim involving aircraft issues, contact Mike Andrews, who handles aviation litigation for our firm. You can reach Mike at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com.

Sources: International Helicopter Safety Team, U.S. Helicopter Safety Team

XIV. HEALTHCARE ISSUES

A Report On Traumatic Brain Injury Research

We are now past Labor Day, Summer is ending and Fall will have come by the time you receive this issue. That means children have returned to school and to their sports activities. All of this also means the nation is heavily involved in one of our favorite pastimes—football. While the excitement is all about winning and losing, there is another aspect of the sport. Recent studies regarding traumatic brain injuries (TBIs) paint a different picture of football and other contact or impact sports—one that should give all of us pause, especially parents and other caregivers of children and youth.

This summer the Journal of the American Medical Association released findings from a study of Chronic Traumatic Encephalopathy (CTE) and its prevalence among American football players. One of the key findings revealed that 99 percent—110 out of 111—former NFL players who donated their brains for research were diagnosed with CTE. The study examined samples from a total of 202 deceased football players across all levels of play. Researchers found that overall 87 percent, or 177 players, exhibited signs of CTE.

Although more research is needed to demonstrate the full extent of the problem, this study confirms a problem exists with football and the problem is more than just anecdotal. The Mayo Clinic explains that CTE is a degenerative brain condition, which is likely caused by repeated head traumas or TBIs, and currently has no cure. Diagnosis can only be made by conducting an autopsy and studying sections of the brain. Symptoms of CTE are thought to include physical problems as well as difficulties with thinking, emotions and other behaviors such as aggression, memory loss, depression, and an increased risk of suicide, *Sports Illustrated* reported.

The most common TBI is a concussion, which is caused by a bump, blow or jolt to the head that can alter how the person's brain normally works. Earlier this year, we previously reported, NFL data for 2016 recorded 244 concussions that occurred in practices and games during preseason and regular season. Although the number is down from the five-year high in 2015, even NFL insiders admit more steps can be taken to better protect players. Additional new research confirms the need for more proactive measures and ones that should be taken early in an athlete's life.

The Radiological Society of North America measured head impact data for 25 male football players between the ages of 8 and 13. After analyzing the data, researchers warn that players with repeated head impact, even if the impact doesn't result in a concussion, exhibited changes to their brains comparable to people who suffer TBIs.

Science Daily reports that researchers at St. Michael's Hospital discovered similar results in a study that compared 65 varsity athletes—both male and female—involved in sports with varying levels of physical contact. The researchers "found progressive differences between the brains of athletes in non-contact, contact and collision sports." Researchers also noticed that athletes involved in sports with higher levels of contact "showed signs of reduced communication between brain areas and decreased activity, particularly within areas involved in vision and motor function" compared to other athletes in the study.

These findings are important for the approximately 30 million children and adolescents Stanford's Children's Health estimates are involved in football and other contact sports each year in the U.S. Although information is evolving, parents and caregivers should heed the latest scientific findings regarding TBIs and the implications for children's developing brains when they are exposed to repetitive head impacts, especially potentially long-term effects. It is also critical to recognize that, while important, protective equipment, such as helmets, is designed to reduce the risk of damage—not completely prevent injury.

For more information on how sports, and especially football, are linked to traumatic brain injury visit http://www.helmetinjuries.com/. Mike Andrews, a lawyer in our firm's Personal Injury & Products Liability Section, handles cases involving traumatic brain injuries for the firm. You can contact Mike by phone at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com.

Sources: *Journal of the American Medical Association*, Mayo Clinic, *Sports Illustrated*, NFL, Radiological Society of North America and Stanford's Children's Health

Important Lawsuit Filed Against NFL And The Patriots

A most significant lawsuit has been filed suit against the NFL and the Patriots organization for loss of parental consortium. In the suit, Avielle Hernandez, the 4-year-old daughter of Aaron Hernandez, the former Patriots and University of Florida tight end, is claiming that the NFL's and the Patriot's conduct cost her father his life. The claims stem from the player's post-mortem diagnosis of Chronic Traumatic Encephalopathy, more commonly known as CTE.

Aaron Hernandez committed suicide on April 19, 2017, at the Souza-Baranowski Correctional Facility in Lancaster, Massachusetts. He was being held at that facility after a jury found him guilty of murder in the first degree on April 15, 2017. Four days later, correction officers found him in his cell, where he had hanged himself. At the request of his family, his brain was sent to Boston University to be studied for signs of CTE. Boston University, which is home to the highly-regarded CTE center, released a statement that disclosed its findings, and diagnosing Hernandez with Stage 3 CTE. There are four stages.

CTE has been linked with several symptoms, including ADHD, confusion, disorientation, memory loss, social instability, impulsive behavior, poor judgment, and in the third and fourth stages, dementia, movement disorders, depression, and suicidality. Hernandez had a history of violence, as he was linked with a double homicide in Boston in 2012 (he was acquitted) and a shooting in Miami.

Hernandez's diagnosis is notable, because it was the most severe case of CTE ever recorded for a person of his age. The trauma to his brain, and diagnosis of Stage 3 CTE, are typically seen in players with a median age of 67. Hernandez was 27 when he committed suicide.

CTE is found in people who have suffered repeated brain trauma, including concussions. Typically, the disease is found in athletes who play contact sports, like football. While symptoms can obviously be viewed in a living person, it can only be conclusively diagnosed *post mortem*. In 2015, the NFL entered into an uncapped settlement with a class of thousands of players that could end up paying out $1 billion.

The case is *Hernandez v. National Football League et al.*, (case number 1:17-cv-11812) in the U.S. District Court for the District of Massachusetts.

Source: Law360

XV. ENVIRONMENTAL CONCERNS

Federal Scientists Say Dispersants From BP Spill Make People Sick

The dispersants used to break up oil during the BP oil spill can make people sick, according to a new study from the National Institutes of Health (NIH). The study included 31,609 response workers who handled and applied dispersants during the spill, or were in close proximity to the chemicals. The research team included scientists from the National Institutes of Health, the National Institute of Environmental Health Sciences, and the Centers for Disease Control and Prevention (CDC).

The new study is the largest ever conducted that examined the health effects of Corexit products. During the spill, 1.8 million gallons of Corexit EC9500A or Corexit EC9527A were applied in the Gulf. More than 700,000 gallons of that was pumped deep under the surface of the Gulf and applied directly to the stream of oil spewing from the broken well. The product had never been applied in this fashion before. But the lion's share, more than a million gallons, was applied to oil floating on the sea surface.

The study concluded that response workers experienced a suite of symptoms as a result of exposure to dispersant chemicals. From the report, "The research team found that workers exposed to dispersants were more likely to experience certain symptoms—cough, wheeze, tightness in the chest, and burning in the eyes, nose, throat, or lungs—than those who were not exposed to dispersants." In some cases, those symptoms disappeared in time after the spill. But some of the study participants believe their symptoms persist years later.

Dale Sandler, Ph.D., the lead GuLF STUDY researcher at the National Institute of Environmental Health Sciences (NIEHS), part of NIH, said the findings only apply to workers involved in the cleanup effort and not the general public. Dr. Sandler said:

> *The health effects that we see in the workers don't necessarily apply to the community at large, although many of the workers live in affected areas.*

During the BP spill, there was widespread concern among the public that limited exposure to the chemicals, even when applied 50 to 100 miles away, might present a risk. A number of people who billed themselves as toxicology experts traveled the Gulf Coast during the spill giving public presentations about the supposed risks, further increasing anxiety among residents.

Corexit and other dispersant products are designed to break oil down into tiny particles. The hope with applying dispersants was two-fold.

- First, by essentially sinking the oil below the surface, responders hoped to limit the amount of floating oil that ended up coming ashore in coastal marshes.
- Second, by breaking the oil down into small particles, it was made more available to the naturally occurring bacteria in the Gulf that specialize in eating oil.

Most scientists interviewed by Ben Raines believe the use of dispersants was successful in limiting the ecological impact of the spill. It also helped protect the marshes, as hoped. There is a saying among scientists, the dose is the poison. It means that toxicity associated with chemicals really boils down to how large an amount a person is exposed to. It falls to reason that workers who handled and applied the chemical would have a greater exposure than coastal residents who may have been dozens of miles away from the application sites. However, this study does not address what effects a more limited exposure might cause.

Source: AL.com

Hurricane Recovery Includes Threat Of Asbestos Exposure

Due to the devastating impacts of Hurricanes Harvey and Irma, many areas along the Gulf Coast are focusing on recovering, on trying to rebuild homes, businesses and lives as much as possible. Though most recognize the process will be a long one, what many may not realize is the danger of a natural disaster can extend well into recovery efforts. In the process of rebuilding or demolishing or sanitizing after these hurricanes, residents will likely face clean-up threats through exposure to toxic chemicals and building materials, including asbestos.

Asbestos is a group of silicate minerals that is now a known carcinogen. However,

it was once used in a variety of construction materials, including insulation and pipe wrappings, due to its heat resistance and flexibility. If asbestos fibers become airborne when material containing it is damaged or moved, it creates a serious hazard that can lead to a variety of health issues, including lung cancer and mesothelioma, which is usually deadly within two years of diagnosis. Though strict rules regulate the use of asbestos and its abatement in certain situations, homes damaged in the wake of a hurricane may not fall under those protections. The Environmental Protection Agency (EPA) states on its website:

> *Federal law does not require persons who inspect, repair or remove asbestos-containing materials in detached single-family homes to be trained and accredited; however, some states and localities do require this. For safety, homeowners should ensure that workers they hire to handle asbestos are trained and accredited.*

The EPA warns that buildings built before 1975 are most likely to contain asbestos. "In particular, large structures built before 1975 typically contain asbestos pipe wrap, siding, ceiling tiles, and other building materials high in asbestos content," the organization stated in its response to Hurricane Katrina in 2005. At that time, the agency recommended requiring all workers to use equipment specifically designed to protect them from asbestos and have at least one person be trained in asbestos National Emission Standards for Hazardous Air Pollutants regulations. Wetting down materials as often as possible is also a way to help reduce the amount of dust emitted during removal.

If any asbestos-containing material is damaged during a storm, it can add to the devastation of a natural disaster—just likely decades down the road due to asbestos-related diseases' long latency periods. This is especially important to keep in mind as the threat of additional hurricanes continues to loom over us.

Sources: EPA and MyMeso

EPA's Less Stringent Chemical Rules Likely To Increase Litigation

Until as recently as 2015, a loophole in Environmental Protection Agency (EPA) regulations allowed petroleum refineries and power plants to release virtually unlimited pollution when starting up and/or shutting down their industrial facilities. This exemption allowed refineries and power plants to release thousands of pounds of cancer-causing chemicals into the air, meaning that communities near these facilities can be subjected to emissions easily 10 times the level typically allowed under EPA regulations. Benzene and other carcinogens are released at disproportionate levels during these startup and showdown periods, creating an increased danger for at-risk communities.

However, in 2015, the Obama Administration's EPA issued a rule "to ensure that states have plans in place that require industrial facilities across the country to follow air pollution rules during times when the facility is starting up or shutting down, or when a malfunction occurs." This rule was called the "Startup, Shutdown and Malfunction Rule" (SSM). While the SSM rule is currently in place, immediately after its finalization Scott Pruitt (then Oklahoma's attorney general) sued to block its implementation. Because the rule has been blocked from going into effect, most refinery owners have not implemented measures to limit emissions from their facilities.

Scott Pruitt is now the EPA administrator, and is currently considering whether to rescind the SSM rule. Earlier this year Pruitt asked a federal court to delay oral arguments in the legal case challenging the rule, leading the court to issue an order indefinitely delaying oral arguments and placing the litigation on hold. Because the Obama administration finalized the SSM rule, any attempt to repeal it will need to go through a rulemaking process that could take more than a year, though it is likely the EPA will not enforce the rule during that time.

If you would like more information, 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@beasleyallen.com.

Source: ThinkProgress.org

Benzene And Other Pollutants Released Into Environment Following Hurricane Harvey

While Hurricane Harvey's winds caused catastrophic damage to Houston and the surrounding areas, it's becoming increasingly apparent that the storm has also led to a significant amount of air pollution being released from refineries and petrochemical plants in the storm's path. Plumes of benzene and other carcinogenic chemicals are being tracked in east Houston neighborhoods located near the refineries and plants along the Houston Ship Channel.

The Houston Health Department and the Environmental Defense Fund have set up air quality monitors in East Houston neighborhoods and have been collecting data since the storm. So far, these air monitors have measured approximately 15,000 parts per billion of smog-forming volatile organic chemicals in the air. While the Environmental Protection Agency (EPA) and the Texas Commission on Environmental Quality (TCEQ) have both reassured residents that they have no reason to be concerned about air quality issues related to the effects of Harvey, these warnings stand in stark contrast to the levels of pollution detected by the air monitors in the region. Interestingly, the TCEQ opted to turn off its air quality monitors as Harvey approached the Texas coast two weeks ago.

Representatives from the Environmental Defense Fund warn that the shutdowns and startups from the various chemical plants and refiners due to Harvey have already released about four million pounds of pollutants in concentrations nearly 10 times what health officials have deemed safe. As facilities reboot over the next month, air pollution is expected to worsen due to a regulatory loophole that allows greater pollution to be discharged when facilities start up, shut down or experience a malfunction. While the Obama administration's EPA finalized a rule that eliminated the loophole, this rule has not yet been implemented due to an ongoing lawsuit.

If you would like more information, 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@beasleyallen.com.

Source: *Houston Press*

Piano Refurbisher Files Suit Over Benzene Exposure

A former piano refurbisher has filed a benzene complaint in a Chicago Illinois federal court, contending that he used benzene-containing products in the process of tuning and refurbishing pianos. Plaintiffs Joseph and Carole Kupiszewski filed the suit on Sept. 5 in the U.S. District Court for the Northern District of Illinois.

It's alleged in the suit that the Defendant's benzene-containing products caused Mr. Kupiszewski to develop chronic lymphocytic leukemia (CLL). CLL

is a type of cancer of the blood and bone marrow—the spongy tissue inside bones where blood cells are made. It occurs when some factor causes a genetic mutation in the DNA of blood-producing cells. This mutation causes the blood cells to produce abnormal, ineffective lymphocytes—one type of white blood cell that helps your body fight infection.

In the complaint, the Plaintiffs claim that Joseph Kupiszewski was self-employed, working at tuning and refurbishing pianos. During his work, he used benzene, strippers, lacquers and other products that they allege caused Mr. Kupiszewski's illness.

As we have stated previously, benzene is a clear, highly flammable liquid with a sweet, gassy smell. It occurs naturally in petroleum, and it is used as an organic solvent to make a variety of other chemicals and various plastics. Benzene is also used in the manufacturing of some types of rubbers, varnishes, lacquers, lubricants, dyes, detergents, drugs and pesticides. Because benzene comes from petroleum, benzene is often found in oil-based paints, various degreasers, thinners, solvents, and fuels—including diesel, gasoline and kerosene.

Persons working closely with benzene or benzene-containing products can be put at serious risk because their exposure can occur at much higher levels and for longer periods of time. The medical literature indicates that benzene causes multiple myeloma, acute myeloid leukemia (AML), myelodysplastic syndrome (MDS) and other forms of leukemia and lymphoma.

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

Source: *Harris Martin Publishing* – September 14, 2017

Air Force Refuses To Reimburse Towns' Water Contamination Costs

The Air Force is refusing to reimburse three Colorado communities for expenses incurred to remediate water contaminated by its use of toxic firefighting foam at its base. The Air Force reasoned that it does not have the authority to reimburse communities for the costs they incurred to address environmental contamination. This could potentially leave the towns responsible for an $11 million tab.

Aqueous film-forming foam (AFFF) was developed by 3M and used at Peterson Air Force Base for decades to battle jet-fuel fed fires. Over the years, the foam eventually seeped into the Widefield Aquifer, which serves several nearby Colorado Springs communities, rendering its well water unsafe to drink. AFFF contains perfluorinated chemicals (PFCs), such as PFOA and PFOS, which persist in the environment for years and accumulate in the body. The Environmental Protection Agency (EPA) has warned that exposure to elevated levels of PFCs can lead to a number of health problems including testicular cancer, kidney cancer, ulcerative colitis, thyroid disease, high cholesterol and pregnancy-induced hypertensions.

Investigators discovered PFC concentrations from the Widefield Aquifer were more than 1,250 times the EPA's lifetime health advisory warning of 70 parts per trillion. Shortly thereafter, the Security, Widefield and Fountain water districts spent $6 million to address the contamination. These costs could reach $12.7 million by the end of 2018.

The Air Force pledged $4.3 million in aid, yet only $1.7 million of that amount will go to the water districts while the majority of the funds will purchase bottled water and carbon filters. After releasing its own report, the Air Force determined that other sources likely contributed to the aquifer's contamination, though none has been identified. The military will continue studying PFCs' effect on residents' health until 2019 and does not expect to undertake a remediation plan for contaminated wells until next decade.

Water districts and residents are justifiably upset they could be left paying for a problem they didn't cause. Fountain officials have budgeted $4.2 million in fixes through 2018 after they decided to increase water rates by 5.3 percent. Widefield plans to install a new treatment plant for 10 affected water wells, which could amount to $12 million in costs. Security is also planning to build a treatment plant and, in the interim, has been purchasing uncontaminated water from Colorado Springs Utilities at a rate of $1 million per year.

Although these chemicals are not regulated, public awareness of their presence in our nation's drinking water has grown since the EPA tested for PFOA and PFOS over the last few years. Data shows that 194 water systems nationwide serving 15 million people have found traces of these chemicals in their water; 64 of those systems contained PFC levels over the EPA's lifetime health advisory. Lawsuits have been filed by many systems seeking reimbursement of costs to temporarily deliver clean water while a permanent solution is implemented.

Our firm, along with Roger H. Bedford of Roger Bedford & Associates, has filed lawsuits on behalf of the water systems in Gadsden and Centre, Alabama. These complaints allege that carpet and textile companies, manufacturers, and chemical suppliers located upstream in Dalton, Georgia are responsible for contaminating the Coosa River and Weiss Lake. The lawsuits were filed to ensure that these entities, not ratepayers in Gadsden and Centre, would pay to decontaminate their drinking water.

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

Source: Coloradoan.com

XVI. UPDATE ON NURSING HOME LITIGATION

U.S. Nursing Home Industry Fails To Protect Residents As Aging Population Demand Grows

A new study from the RAND Center for the Study on Aging shows that more than half the U.S. population will require nursing home care at some point during their lives. The number is much higher than the 35 percent previously estimated by the U.S. Department of Health and Human Services (HHS). The needs can range from weeks of temporary care for rehabilitation to longer term care. These findings come on the heels of a recently released report by the Office of Inspector General (OIG) at HHS. When combined, the information from the two reports is very troubling for our country's aging population and their loved ones regarding the abuse and neglect running rampant in nursing homes across the country.

Auditors for the OIG found that skilled nursing facilities or nursing homes failed

or refused to report more than one-quarter of severe incidents of abuse as required by law.

In an ongoing review of potential abuse and neglect of Medicare beneficiaries, auditors uncovered 134 such incidents and learned that 28 percent of the cases showed no evidence they were reported to local law enforcement "despite State mandatory reporting laws requiring the hospitals' medical staff to do so," the report noted. While the audit continues, OIG officials believed it was critical to issue an "early alert" insisting the Centers for Medicare and Medicaid Services (CMS), which oversees nursing homes, immediately address the significant underreporting problem.

The auditors discovered the grave problem while sifting through and comparing reports for services paid to beneficiaries who obtained emergency room treatment in addition to the treatment and care they were already receiving at their nursing home. Auditors learned that CMS does not conduct the same type of comparison of beneficiaries' records. This finding was key to alerting auditors that CMS procedures to identify and report abuse and neglect incidents were deficient.

As federal regulators and consumer advocates work to combat nursing home abuse and neglect and make nursing homes safer for residents, others are working to block these efforts, including the nursing home industry. In the coming weeks, we will highlight the shortfalls within the industry and the challenges facing nursing home residents and their families and caregivers in this Nursing Home Series of stories.

If you need more information on nursing home litigation contact Chris Boutwell at 800-898-2034 or by email at Chris.Boutwell@beasleyallen.com. Chris handles nursing home litigation for our firm, and he will be glad to talk with you.

Sources: RAND Center for the Study on Aging and U.S. Department of Health and Human Services/ Office of Inspector General

Investigation Begins After 10 Die At Florida Nursing Home Following Hurricane Irma

Furious officials launched investigations of a blazing hot Hollywood, Florida nursing home where 10 people died after the Sept. 13 Hurricane Irma left the building without air conditioning. The deaths occurred at the Rehabilitation Center at Hollywood Hills, in the town of Hollywood, about 20 miles north of Miami. Although no official cause of death has been given, authorities described the deaths as heat-related.

Democratic U.S. Sen. Bill Nelson called the disaster "an emerging scandal of gargantuan proportions." The Senator said it was "inexcusable" that no one appeared to have called 911 as residents in their 70s, 80s and 90s sweltered without air conditioning in the summer Florida heat overnight.

Raelin Storey, a spokeswoman for the city government, said fire crews were first called to the Hollywood Hills facility at 3 a.m. ET for a report of a cardiac arrest. More fire and emergency response crews were sent when a second call came in at 4 a.m. for a patient having breathing issues and three people were found dead on the second floor. By 6:15 a.m., a full-scale evacuation of the facility was underway.

"This was a terrible incident. The scene was chaotic when I arrived," said Dr. Randy Katz, medical director for emergency services at Memorial Healthcare System, where about a dozen of the 158 people who were evacuated from the facility were admitted for respiratory distress, dehydration and heat-related issues. Dr. Katz said so many patients needed assistance that his hospital, which is just down the street, called in more than 50 doctors, nurses and other staffers under a mass casualty protocol. Dr. Katz stated:

> *I've definitely seen mass casualties and things to that extent, but this is something unique, something extremely sad and unfortunate for these patients and their families.*

It was reported that fire rescue crews have responded to the facility 127 times over the last 12 months, a rate which was said to be "far above average for what we would expect for this kind of facility."

Hollywood police launched a criminal investigation, and agents from the state attorney general's office and the state Agency for Health Care Administration were on the scene. State officials closed the facility and barred it from admitting new patients.

Medicare records show that the nursing home, owned by Larkin Health Systems Inc., was fined $5,500 in February 2016 for unspecified violations. In its most recent review, the federal Centers for Medicare and Medicaid Services, which regulates nursing homes, gave the facility a "below-average" overall rating of two stars out of five; the health inspection was rated one star, or "much below average."

Lawyers in our firm are currently representing nursing home residents or their families in cases where the resident was severely injured or died because of nursing home abuse or neglect. If you have suffered serious injury, your loved one had been catastrophically injured or died, or you have any questions about nursing home abuse and neglect, contact Chris Boutwell in our office at Chris.Boutwell@beasleyallen.com or by phone at 800-898-2034.

Source: NBC News

Kentucky Family Awarded $42.75 Million In Nursing Home Neglect Case

Following a three-week trial, a Hopkins County, Kentucky jury awarded $42.75 million to a man's family that sued a Madisonville, Kentucky nursing home. The lawsuit, filed by the family of 92-year-old Joseph Clint Offutt, claimed that negligence committed by Offutt's nursing facility, Harborside of Madisonville, led to his death. Harborside, now called Hillside Villa Care and Rehabilitation Center, is owned by Sunbridge Healthcare Corporation.

According to Lexington, Kentucky lawyer Lisa Circeo of the Wilkes & McHugh law firm, Mr. Offutt served in World War II and was still planting crops at the age of 88. A stroke weakened him in 2007, and his wife of 58 years, Pearline, cared for him at home for eight months before the family realized he needed professional care. Mr. Offutt was admitted to the Harborside nursing facility on March 25, 2008 and died nine days later of severe dehydration. According to Ms. Circeo, "Offutt became lethally dehydrated despite having a feeding tube. The facility simply failed to ensure he got enough water to live."

In their lawsuit, Mr. Offutt's family alleged that nursing home staff members neglected Offutt, causing him to suffer severe dehydration, malnutrition, bedsores, infections and, ultimately, death. When his grave condition was discovered, Mr. Offutt was transferred to a regional medical center, where he died on April 5, 2008. Adult Protective Services officials of the Kentucky Cabinet for Health and Family Services substantiated the allegations of neglect against the Harborside nursing facility.

Unfortunately, tragic stories such as Mr. Offutt's have become increasingly more common over the last few years. Our firm is fighting to protect the safety and rights

of elderly and infirmed Americans who reside in nursing homes across the country. Our nursing home lawyers represent the victims or families of those who have suffered death or serious injury because of nursing home abuse and neglect. If you have suffered serious injury, your loved one had been catastrophically injured or died, or you have any questions about nursing home abuse and neglect, please contact Chris Boutwell in our office at Chris.Boutwell@beasleyallen.com or by phone at 800-898-2034.

Source: *Lexington Herald-Leader*

XVII. An Update On Class Action Litigation

Deutsche Bank To Pay $190 Million In Forex Rigging Deal

Deutsche Bank AG has agreed to pay $190 million to settle claims that it rigged foreign exchange rates. This is the latest in a line of global banks that have settled class action claims totaling $2.3 billion to date. Under the settlement, which was filed in federal district court in Manhattan, Deutsche Bank agreed to cooperate with the Plaintiffs in their pursuit of the last holdout bank. Deutsche Bank is the 15th of 16 banks that were sued over claims they were part of a scheme to manipulate foreign exchange markets over an approximate six-year period.

Only Credit Suisse AG remains a holdout among the banks that were included in the multidistrict litigation (MDL), which just covers U.S.-related claims.

The action, first filed in 2013 amid regulatory probes, accused major financial institutions of engaging in a scheme to rig the $6 trillion foreign exchange market from at least 2007 to 2013. Previously, U.S. District Judge Lorna D. Schofield gave preliminary approval to a $111.2 million settlement with Bank of Tokyo-Mitsubishi UFJ Ltd., Morgan Stanley, RBC Capital Markets LLC, Societe Generale and Standard Chartered PLC.

Judge Schofield gave preliminary approval to a $2 billion settlement the Plaintiffs reached with JPMorgan Chase & Co., Barclays PLC, HSBC Holdings PLC, The Royal Bank of Scotland PLC, Goldman Sachs Group Inc., BNP Paribas SA, UBS AG and Bank of America Corp. in December 2015. The case is *In re: Foreign Exchange Benchmark Rates Antitrust Litigation*, (case number 1:13-cv-07789) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

$146 Million Settlement In Aggrenox Pay-For-Delay MDL Gets Initial Approval

A Connecticut federal judge has preliminarily approved a $146 million settlement between direct purchasers and pharmaceutical companies over the drugmakers' role in a scheme to block generic alternatives to the stroke-prevention drug Aggrenox from coming on the market. U.S. District Judge Stefan R. Underhill found that the settlement, under which each direct buyer will receive a pro rata share of the settlement, is fair, reasonable and adequate for the purposes of preliminary approval.

If granted final approval, the settlement would resolve claims brought by direct buyers against Barr Pharmaceuticals Inc., which was acquired by Teva Pharmaceutical Industries Ltd. in 2008; Boehringer Ingelheim Pharmaceuticals Inc.; and the drugmakers' affiliates. The direct buyers' allegations, which were initially launched in December 2013, are only a part of a sprawling multidistrict litigation (MDL) accusing Barr Pharmaceuticals of agreeing to delay marketing its generic version of Aggrenox in exchange for a portion of Boehringer's profits from the hit drug.

The MDL combined 11 proposed antitrust class actions and accuses Boehringer of orchestrating a $120 million pay-for-delay deal to keep generic versions of its stroke-prevention medication off the market. Boehringer received U.S. Food and Drug Administration (FDA) approval for Aggrenox in 1998, and it went on to become a success, netting $366 million in U.S. sales alone by 2008. But when Barr Pharmaceuticals allegedly sought regulatory approval in 2007 to introduce a generic version of the drug, it was promptly hit with a patent infringement suit by Boehringer.

To settle the patent infringement suit, Boehringer allegedly agreed to pay Barr Pharmaceuticals $120 million over a period of seven years and delay the introduction of a generic version of Aggrenox until 2015, according to court documents. Meanwhile, Boehringer granted Barr Pharmaceuticals a license to sell an authorized generic version of Aggrenox immediately, allegedly further suppressing the market for the generic drug.

The direct buyers—led by drug wholesalers American Sales Company LLC, Cesar Castillo Inc., Miami-Luken Inc. and Rochester Drug Co-Operative Inc.—asked the court to preliminarily approve the settlement. The direct buyers argued that certification for the purposes of settlement is warranted considering the proposed class includes at least 35 members, who are spread across 14 states and Puerto Rico. They also noted that other courts have certified similar classes in 23 other generic prescription-drug-delay cases, and certified seven for purposes of settlement.

Judge Underhill has set a final fairness hearing for Dec. 18. Class members who want to object to the proposed settlement and appear at the hearing must notify the court in advance and send a written objection summarizing their arguments.

The direct purchasers are represented by Bruce E. Gerstein, Joseph Opper, Noah Silverman and Ephraim R. Gerstein of Garwin Gerstein & Fisher LLP.

The MDL is *In re: Aggrenox Antitrust Litigation*, (case number 3:14-md-02516) in the U.S. District Court for the District of Connecticut.

Source: Law360.com

New TCPA Rulings And Settlements

In the years following the Great Recession, many people are finding themselves behind on their bills; and with the near ubiquity of cell phones, it is 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 a debt. 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 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.

All the call recipient needs to do in order to stop these calls, according to the Federal Communication Commission (FCC), is tell the caller, on the phone, to stop calling. A recent court case in the 11th Circuit, Schweitzer v. Comenity Bank, confirms this. In that case, the Plaintiff told Comenity Bank to stop calling her in the morning or during the work day. The 11th Circuit found that that was enough to put Comenity Bank on notice not to call her during those times. This is a rather novel case, in that revoking consent had previously been thought to be an all or nothing deal; but it's more important in that it confirms revoking consent over the phone is sufficient to require telemarketers and creditors to stop calling, per FCC regulations.

Lawyers in our firm are currently investigating claims of harassment of consumers by creditors in violation of the TCPA. If you would like to discuss a possible TCPA violation, call Jeff Price, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email Jeff.Price@beasleyallen.com.

TCPA Case Results

3 Million Robocalls Warrant $32 Million Damages

A ruling by a Missouri federal judge has resulted in what is being described as a small victory for marketing company ccAdvertising. The judge found the company made millions of illegal robocalls involving former presidential candidate Mike Huckabee, as their spokesman, awarding $32.4 million in damages, rather than the $1.6 billion prescribed by the Telephone Consumer Protection Act (TCPA). In an eight-page memorandum and order, U.S. District Judge E. Richard Webber granted a post-trial motion for reduction of excessive damages filed by FreeEats.com and AIC Communications LLC, which do business as ccAdvertising, which illegally made 3.2 million recorded robocalls promoting a conservative-leaning independent film "Last Ounce of Courage," according to the class action brought by Plaintiffs Ron and Dorit Golan.

Judge Webber, who in August cut short a jury trial and awarded judgment to the plaintiffs, finding that ccAdvertising had violated the TCPA, now has declined to impose the statutory damages—$500 per violation—required by that law, which would total more than $1.6 billion. The judge wrote that although the TCPA's statutory damages clause is constitutional, the 2012 Eighth Circuit ruling *Capital Records Inc. v. Thomas-Rasset* reveals that any particular damages award might be unconstitutional if they are so severe that they are obviously out of proportion with the offense.

As a $1.6 billion damages award would be "obviously unreasonable and wholly disproportionate to the offense," Judge Webber instead awarded $32 million to the Plaintiffs. Judge Webber wrote:

> *This reflects the severity of the offense, a six-day telemarketing campaign which placed 3.2 million telephone calls, as well as respecting the purposes of the TCPA to have a deterrent effect and to account for unquantifiable losses including the invasions of privacy, unwanted interruptions and disruptions at home, and the wasted time spent answering unwanted solicitation calls or unwanted voice messages.*

The Golans filed suit in Missouri state court in 2013 before the case was removed to federal court, where the Golans' amended complaint alleged that they had received two unsolicited prerecorded phone messages on their home phone line, despite being on the Missouri Do Not Call list, according to appellate filings. The messages said, "Liberty. This is a survey call. We may call back later."

Roughly 3 million phone lines received that recorded message, about 1 million calls got live responses and heard the majority of former Arkansas Republican Gov. Huckabee's recorded script, which purported to be a 45-second survey on "American freedom and liberty," but exhorted the listener to see "Last Ounce of Courage," calling it a film "about faith, freedom and taking a stand for American values." The Golans saw their case dismissed by a district court because the messages they received—as opposed to the speech recorded by Gov. Huckabee that would have played had they answered the phone—did not explicitly mention the movie.

In June 2015, the Eighth Circuit revived the case, ruling that the robocalls promoting a conservative independent movie were telemarketing even if they didn't explicitly contain an advertisement. In August, the case went to a jury trial, and after the Plaintiffs rested their case, Judge Webber granted their motion for judgment as a matter of law, but did not determine damages. Last month, Judge Webber awarded the Plaintiffs the $32 million, stating that this amount accounts for the expense and time needed to notify the class and distribute the award.

The Plaintiffs are represented by John G. Simon and Kevin M. Carnie Jr. of The Simon Law Firm PC. The case is *Ron Golan et al. v. Veritas Entertainment LLC et al.*, (case number 4:14-cv-00069) in the U.S. District Court for the Eastern District of Missouri.

Source: Law360.com

Monitronics To Pay $28 Million To Settle TCPA Robocall MDL

Monitronics International Inc. has agreed to pay $28 million to settle multidistrict litigation accusing the company of violating the Telephone Consumer Protection Act (TCPA). The company was accused of autodialing consumers to peddle home security devices. Monitronics, a security alarm monitoring company, along with several alarm manufacturers, were accused of violating the TCPA by using automated telephone dialing systems and calling numbers listed on the Do Not Call Registry to market products from Monitronics and Honeywell. Consumers said that the company was vicariously liable for calls placed by its authorized dealers and their subdealers and vendors.

If approved by the court, the settlement would release Monitronics from all claims related to telemarketing calls, though not to those related to debt collection calls. The settlement does not apply to the other Defendants in the litigation, including Alliance Security Inc., UTC Fire & Security Inc., Honeywell or Alarm.com. The proposed settlement, which was factored on the basis that Monitronics' insurer disputed whether its policy covered TCPA claims, includes a $13.18 million fund to pay cash

awards to the settlement class, $9.33 million for attorneys' fees and $4.77 million in costs associated with administering the agreement. The remainder includes payouts to the lead Plaintiffs and other fees.

Lawyers for the consumers estimate they have contact information for about half of the 7.8 million individuals who received calls. The class members are expected to receive between $12 and $25 each, according to the terms of the settlement. While that amount appears low, Monitronics argued that the amount was reasonable when weighed against the costs and fees associated with any individual class member trying to pursue an individual claim on their own. Diana Mey sued Monitronics and Honeywell in West Virginia state court in 2011, and the suit was removed to federal court later that year and eventually transferred into multidistrict litigation (MDL) along with several others in 2013. The MDL has since grown to include more than 30 lawsuits.

The proposed settlement class consists of consumers who, starting in May 2007 and going to the date when the settlement is approved, received a telemarketing call from Monitronics or an affiliate on a number registered on the national do not call list. As the court had dismissed claims against two of the companies in the suit, Monitronics said the settlement was fair given the risks consumers faced taking the case any further.

The consumers are represented by Jonathan R. Marshall and John W. Barrett of Bailey & Glasser LLP, and Beth E. Terrell and Mary B. Reiten of Terrell Marshall Law Group PLLC. The case is *Monitronics International Inc., Telephone Consumer Protection Act Litigation*, (case number 1:13-md-02493) in the U.S. District Court for the Northern District of West Virginia.

Source: Law360.com

Ocwen Reaches $17.5 Million Settlement In TCPA Action

Ocwen Loan Servicing LLC has agreed to pay a $17.5 million to resolve putative class action claims on behalf of more than 1.6 million consumers. It was alleged that the mortgage loan servicer autodialed their cellphones without their consent, in violation of the Telephone Consumer Protection Act (TCPA). Under the settlement, eligible consumers are each expected to receive between $55 and $90, according to a motion for preliminary settlement approval.

The West Palm Beach, Florida-based mortgage firm has also agreed to alter its consent-gathering practices, and it has agreed to pay enhanced damages to consumers who may receive automated calls in the future due to gaps in Ocwen's consent record keeping practices. For those future violations, Ocwen has agreed to pay a minimum of $1,000 for the first 10 illegal calls, $1,250 for the next 11-50 calls and $1,500 for any calls over 50, according to the motion. The motion says:

> *Persons who seek higher amounts—for example $1,500 per call for all calls—are free to do so; these amounts represent guaranteed minimums.*

Once divided, any funds remaining would be distributed evenly to the National Consumer Law Center and Public Justice Foundation, and no amount of the settlement would revert to Ocwen. If approved, the settlement would mark an end to a suit that named Plaintiff Keith Snyder initially filed against Ocwen in October 2014. A year later, in January 2015, consumers Tracee Beecroft and Susan Mansanarez filed a separate proposed class action. The two lawsuits were consolidated in late 2016. The consumers claim that between October 2010 and December 2014, Ocwen didn't have a policy in place for obtaining consent before calling borrowers' cellphones using its "Aspect" automated telephone dialing system. As a result, Ocwen placed 105,831,658 unauthorized calls to nearly 1.2 million unique cellphone numbers belonging to borrowers during that time period.

In May, the pair asked the court to certify two nationwide classes that received unwanted calls, arguing that phone records obtained from Ocwen during discovery supported their allegations. Beecroft also sought to represent a subclass of more than 60,000 borrowers. For that group, Ocwen allegedly obtained their numbers through third-party sources, using a method known as "skip-tracing," and then called to determine whether they were in fact their numbers. The TCPA prohibits companies from obtaining numbers in such an indirect way.

In June, the court held that the consumers had established the basis for certification of a limited class and those members were likely entitled to preliminary injunctive relief. But the judge deferred ruling on the issue, asking the parties to submit additional documents. Before the judge issued a final order on the matter, the parties reached the settlement.

The consumers are represented by Beth E. Terrell and Adrienne D. McEntee of Terrell Marshall Law Group PLLC, Mark Ankcorn of Ankcorn Law Firm PLLC, Guillermo Cabrera and Jared Quient of the Cabrera Firm APC, Alexander H. Burke and Daniel J. Marovitch of Burke Law Offices LLC, and Mark L. Heaney of Heaney Law Firm LLC.

The consolidated case is *Snyder et al. v. Ocwen Loan Servicing LLC*, (case number 1:14-cv-08461), in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

Imperva Pays $19 Million To Settle Investors' Stock-Drop Row

Shareholders of Imperva Inc., a data security company, asked a California federal judge last month to preliminarily approve a $19 million settlement that would resolve putative class claims that the company misled investors and cost them nearly half the value of their investment while letting executives sell off their shares for millions. Imperva has agreed to pay the $19 million in settlement.

The shareholders argued that the deal is fair and reasonable, considering the risks involved with litigation. The shareholders also noted that $19 million is 8.3 percent of the total $228 million in damages that the investors sought. The memo in support of the settlement said: "[8.3 percent] is well above the median percentage of 2.5 percent for securities class action settlements in 2016."

The parties stated they don't know exactly how many class members are qualified to receive the relief, but they estimate there are hundreds, if not thousands, who purchased or acquired Imperva's 24

million shares during the applicable class period. If approved, the settlement would resolve claims that the Redwood City, California-based data security company deceptively hyped the company's competitiveness against rival International Business Machines, while executives sold off millions of their shares. The shareholders claimed the company overestimated Imperva's competitive success, superior technology and revenue predictions for 2014.

Imperva provides data security solutions to companies through its flagship product SecureSphere. The shareholders had sued the company in April 2014 after that month's earnings announcement came in $5 million below the lowest estimate, sending the stock falling 44 percent the next day. Before the earnings announcement, the company's top officers and directors sold stock while shares were flying high in March, dumping nearly $26 million before the stock price dropped, the shareholders allege. Meanwhile, Imperva's CEO Shlomo Kramer and its chief financial officer Terrence J. Schmid, who are also named Defendants, sold a portion of their holdings for nearly $12 million.

The settlement outlines how the recovery class members can receive relief based on the number of claims the investor submits, when the investor acquired and sold Imperva securities, and the number of the shares that the investor purchased or acquired and sold. A hearing on the proposed settlement is set for Oct. 11.

The shareholders are represented by Theodore J. Pintar, Douglas R. Britton and Ashley Price of Robbins Geller Rudman & Dowd LLP. The case is *Shankar v. Imperva Inc. et al.,* (case number 4:14-cv-01680) in the U.S. District Court for the Northern District of California.

Source: Law360.com

$86.5 Million ExamWorks Settlement Fund Gets Chancery Court Approval

An $86.5 million settlement has received approval in Delaware state court, resolving the class litigation pending between shareholders of medical examination provider ExamWorks Group Inc. and the company's officers, directors, financial advisors and legal counsel over its $2.2 billion acquisition by private equity firm Leonard Green & Partners. During a hearing in Wilmington, Delaware, class attorney Michael Hanrahan of Prickett Jones & Elliott PA told the court that the settlement was achieved after mediation with a retired federal judge just before the case was set to go to trial in Delaware's Chancery Court.

The settlement is actually comprised of two separate agreements, with Defendants tied to ExamWorks, purchaser Leonard Green & Partners and financial advisers Goldman Sachs & Co. and Evercore Groups LLC contributing $40 million in exchange for a release of claims by the class. ExamWorks' legal advisers, law firm Paul Hastings LLP, will provide $46.5 million.

Stockholder City of Daytona Beach Police and Fire Pension Fund filed a lawsuit in June 2016 alleging the acquisition was "irreparably tainted" by what it says was ExamWorks executive chairman Richard E. Perlman's control of the process. A class of shareholders of the company who held ExamWorks stock between April and July 2016 was certified by the court in February.

Vice Chancellor J. Travis Laster approved the settlement fund, saying it fell within an acceptable range of reasonableness considering the work put in by counsel to litigate to the pretrial stage and the merits of their claims. Vice Chancellor Laster said:

> *That's real cash and a meaningful improvement over what the deal price was. It's significantly higher than what the special committee was able to negotiate.*

The settlement represented a $2.17 per share recovery for shareholders on the original $35.05 deal price. The court also approved the $575,479.21 in expenses requested by counsel as well as a 25 percent share of the settlement fund, amounting to $21,481,130, which Vice Chancellor Laster said was right in line with what the court is usually comfortable with awarding in cases litigated to the point of trial.

The merger was a take-private deal that was allegedly led by ExamWorks management and resulted in the company becoming a wholly owned subsidiary of a Leonard Green & Partners unit. The suing shareholders claimed the company's board didn't appoint a special committee to vet the deal until its consummation was a foregone conclusion, resulting in a lower-than-fair deal price for investors.

The City of Daytona Beach Police and Fire Pension Fund is represented by Michael Hanrahan, Bruce E. Jameson, Paul A. Fioravanti Jr. and Samuel L. Closic of Prickett Jones & Elliott PA, and Lee D. Rudy, Michael C. Wagner, J. Daniel Albert and Stacey A. Greenspan of Kessler Topaz Meltzer & Check LLP.

The case is *The City of Daytona Beach Police and Fire Pension Fund v. ExamWorks Inc., et al.*, (case number 12481) in the Delaware Court of Chancery.

Source: Law360.com

XVIII. THE CONSUMER CORNER

Equifax Discloses Massive Data Breach

Equifax, Inc., an Atlanta-based credit reporting agency, recently revealed that a data breach potentially impacted as many as 143 million consumers throughout the United States—nearly half of all Americans. Hackers obtained sensitive information, such as names, addresses, and social security numbers, from as many as 143 million consumers, as well as credit card numbers for hundreds of thousands of consumers who purchased credit monitoring services from Equifax. The vast scope of this breach makes it one of the worst in history.

According to Equifax, the breach began in mid-May of this year and was discovered on July 29. Despite discovery of the breach, however, Equifax failed to inform the public until Sept. 7. Between discovery of the breach and informing the public of the breach, at least three Equifax executives sold nearly $1.8 million worth of company stock. Unsurprisingly, this massive stock dump is drawing severe criticism. Equifax stock prices plunged 32 percent within a week of the breach becoming public. A bipartisan group of senators have asked the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) to investigate these stock sales.

Equifax faced further criticism of its attempt to strip consumers of their rights and its attempt to make a profit off its massive security failure. Freezing credit is the best way for victims to protect themselves; however, Equifax charges for a credit freeze. After facing substantial criticism, Equifax agreed to waive fees for security freezes for 30 days and refund those customers who paid for a credit freeze in response to the breach. Additionally, regardless of whether a consumer was affected or not, they can opt to enroll in a free credit monitoring service.

If a consumer opted to enroll in the credit monitoring, the fine print contained a mandatory arbitration clause, which limits a consumers' rights to seek relief in court. Equifax later included an "opt-out" provision allowing a consumer to opt-out of arbitration by notifying the company in writing within 30 days. Finally, Equifax clarified that the arbitration and class-action waiver clauses do not apply to this breach. Still, opting to enroll in Equifax's free credit monitoring is only a preliminary step because consumers must then return to sign up for the service at a future enrollment date provided by the company.

The breach has drawn criticism from numerous authorities and has led to multiple lawsuits seeking to hold Equifax accountable for its misconduct. New York Attorney General Eric Schneiderman launched a formal investigation into the hack the day after the breach became public. More than 30 additional attorneys general have launched investigations into the breach and some already plan to file suit against the company. Multiple class-action lawsuits have been filed on behalf of consumers against Equifax, and the company's officers and directors are facing securities actions from stockholders. The Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC) are looking into the breach as well.

In Congress, the leading members of the House's Energy and Commerce, Financial Services and Judiciary committees have all called for hearings on the matter. At least two congressional hearings on the Equifax breach have been announced. The first scheduled panel will take place Oct. 3, when Equifax chief executive Richard Smith is expected to testify. Senator Elizabeth Warren launched a broad investigation into the causes of the cybersecurity breach and introduced the Freedom from Equifax Exploitation (FREE) Act. Four other Democratic senators introduced additional legislation to require accountability and transparency for data brokers.

Although investigation of the breach is ongoing, Equifax explained that the breach occurred because of a flaw in a tool designed to build web applications known as Apache Struts. Equifax admitted its security department was aware of the flaw a full two months before hackers first gained accessed to its data. One week after disclosure of the breach, Equifax announced that its Chief Information Officer, David Webb, and its Chief Security Officer, Susan Mauldin, were "retiring" immediately.

There are multiple steps you can take to protect your information if you are concerned about the breach. You can check Equifax's website to see if you have been affected by the data breach at www.equifaxsecurity2017.com. Regardless of whether you were exposed, enroll for a year of free credit monitoring, but be sure to also personally monitor your accounts for any unusual activity. You can contact the nationwide credit reporting agencies to review your credit reports.

It should be noted that you are entitled to a free copy of your reports every 12 months. You can also consider contacting the credit reporting agencies to place a credit freeze on your reports, which makes it more difficult for someone to open a new account in your name, or consider setting a fraud alert, which requires lenders to take additional steps to verify your identity before opening a new account or increasing a credit limit.

Lawyers at Beasley Allen are involved in litigation on behalf of consumers affected by the Equifax breach. For more information about the Equifax data breach litigation, contact Beasley Allen lawyers Dee Miles, head of the firm's Consumer Fraud & Commerical Litigation Section, Archie Grubb, Andrew Brashier, and Leslie Pescia at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Archie.Grubb@beasleyallen.com, Andrew.Brashier@beasleyallen.com, and Leslie.Pescia@beasleyallen.com.

Sources: Law360.com, CNN, and Equifax

Wells Fargo Discovers Another 1.4 Million Fake Accounts

Wells Fargo & Co. recently announced it has found another 1.4 million accounts that were created without customers' knowledge. This announcement comes nearly one year after the company's fraudulent account scandal first broke. The total, which came about through an independent review, raises the number of fraudulent accounts to 3.5 million—significantly more than Wells Fargo originally announced. In fact, this is nearly a 70 percent increase over Wells Fargo's initial estimate.

The additional review examined more than 165 million retail banking accounts created between January 2009 and September 2016. Wells Fargo admitted approximately 190,000 of these accounts incurred fees and charges, which is again significantly more than had been previously announced. The San Francisco-based bank initially reviewed 93.5 million current and former customer accounts opened from May 2011 through mid-2015 and identified roughly 2.1 million potentially unauthorized accounts.

The fraudulent accounts stem from Wells Fargo employees covertly opening unauthorized accounts and funding them by transferring money from customers' authorized accounts without the owners' knowledge or permission. The secret practice stemmed from Wells Fargo incentive programs that linked bank employees' income to the number and volume of new accounts opened. This additional review, however, uncovered another problem: unauthorized enrollment of customers in the bank's online bill payment service. Wells Fargo said that it had found 528,000 cases in which customers may have been signed up without their knowledge or consent, and will refund $910,000 to customers who incurred fees or charges. Although the service is now free, it once carried fees for some accounts.

Wells Fargo announced it would provide another $2.8 million in refunds and credits. The company has already paid out $3.3 million after its first review. On Sept. 8, 2016, Wells Fargo admitted to the fake-accounts fiasco and agreed to pay $185 million in fines and penalties to regulators, including the Los Angeles City Attorney's office. The bank also faces class-action litigation from consumers over these fraudulent accounts, which reached a settlement agreement of $142 million recently. Although the judge preliminarily approved the settlement, it is unclear if or how this new disclosure will affect the settlement. If you need more information on the Wells Fargo litigation contact Dee Miles or Leslie Pescia at 800-898-2034 or by email at Dee.Miles@beasleyallen.com or Leslie.Pescia@beasleyallen.com.

Sources: *The New York Times*; *Bloomberg*

Home Depot To Pay $5.7 Million For Selling Recalled Products

The U.S. Consumer Product Safety Commission (CPSC) announced recently that it would likely accept a $5.7 million settlement with Home Depot USA Inc., resolving charges the hardware store knowingly sold recalled consumer products. The commission voted four-to-one to provisionally accept the settlement. Commissioner Ann Marie Buerkle, who was named acting chairman of the commission by President Donald Trump in February, voted to reduce the fine to $1 million. The

settlement would end charges that between August 2012 and November 2016, Home Depot sold 2,816 units of recalled consumer products in violation of the Consumer Product Safety Act.

The 33 recalled products include various light fixtures, space heaters, smoke alarms, rugs and appliances that pose a range of hazards from fire to electrocution to laceration. It was alleged that Home Depot ignored notifications from manufacturers and the commission. The settlement agreement said:

> *Home Depot sold and distributed recalled products because Home Depot's procedures failed to accurately identify, quarantine and prevent the sale, offer for sale and distribution of the recalled products. Home Depot sold and distributed recalled products through the firm's traditional register lanes, special services desks, sales for salvage from its reverse logistic centers, internet sales and donations through the Framing Hope program.*

In May 2015, Home Depot told the commission it had potentially sold 595 units of seven recalled products. The admission triggered an investigation, which revealed thousands of recalled items had been sold. Even after the CPSC and Home Depot issued a joint press release about the finding in November 2015, Home Depot continued selling defective products, according to the settlement agreement. About 40 units of products mentioned in the press release were bought by customers over the next year, and other items subject to recalls were also sold, because they'd been either recalled or discovered after the release was issued.

The settlement agreement said Home Depot knew or should have known about the recalls, but it also found the company "took reasonable measures" to keep from selling recalled products, discovered the error itself with an internal review and voluntarily notified the commission. The settlement includes provisions set up by Home Depot to avoid future mistakes.

Home Depot spokesman Stephen Holmes said no customers were injured as a result of the sales, which made up a small fraction of the 5 billion transactions the company made over the four-year period. It appears that Home Depot alerted the CPSC to the problem. The spokesman said the company "fixed a process glitch that allowed a relatively small number of recalled products to be sold through various channels." The case is *In the Matter of Home Depot USA Inc.,* CPSC docket number 17-C0005.

Source: Law360.com

Flood Insurance And Debt Collection Scams

On the heels of two of the worst natural disasters in recent memory, scammers are attempting to capitalize on tragedy by playing on homeowners' fears. These scammers are placing robocalls to victims of Hurricanes Harvey and Irma, informing the homeowners that their flood insurance premiums are past due and asked to bring payments up to date. The Federal Trade Commission (FTC) advises anyone who is concerned whether their premiums are up to date to contact their insurance agent. Do not respond to the robocall. Instead, report the robocall to the FTC.

Another scam reported by the Federal Trade Commission reports that several businesses in North Carolina have been accused of masquerading as law firms in order to collect outstanding payday loans that either don't exist or that the business had no right to collect. Operating under names that might sound like a law firm, such as Lombardo, Daniels & Moss; and Barron, Gibson & Phillips; these businesses have collected in excess of $2 million over the course of four years.

In order to avoid these types of scams, consumers need to know that a legitimate debt collector must identify, in writing, the amount of the debt and the name of the creditor. This is called a "validation notice." If you have not received a notice, the FTC says, it is a likely indication that the caller is a scammer. If you did not receive such a notice, request one from the caller. Do not agree to pay the debt over the phone, and don't believe the caller is legitimate because they have some of your personal information.

Recommendations To Protect Women From Talc-Related Ovarian Cancer

Approximately 21,000 women are diagnosed with ovarian cancer each year, making it the fifth-leading cause of cancer-related deaths among women. Still, it is a largely silent epidemic, one where women too often dismiss the symptoms, allowing the disease to go undetected until it is too late.

While many ovarian cancer cases are related to genetics, four decades of prospective and retrospective scientific studies involving thousands of women have shown a link between genital talcum powder use and ovarian cancer. In addition, laboratory-based human cellular studies show that the introduction of talcum powder to ovarian tissue produces inflammatory responses associated with cancer.

Following nearly $720 million in court verdicts, Dr. Roberta Ness, a recognized expert in women's health research and former Dean of The University of Texas School of Public Health, advocates that "It is time for doctors and women to realize that more than 40 years of scientific research doesn't lie: there is a link between genital talc use and ovarian cancer. This cause is 100 percent preventable."

Dr. Ness is sharing the following recommendations to help protect women from contracting ovarian cancer as a result of genital talc use:

- **Look at Labels:** It is important to look at the ingredient labels for all body powder products you use on your body. While some body powder products are beginning to include ovarian cancer warning labels on talc products, not all do. If you see talc listed as an ingredient, find an alternative that uses cornstarch.
- **Product Use:** Despite decades of both broad-based and demographically targeted marketing campaigns by large companies, talc-based products should never be used for feminine hygiene purposes. If this talc use is part of your daily routine, stop using it immediately.
- **Consult Your Doctor:** Annual Pap tests do not check for ovarian cancer. If you have ever used talc for feminine hygiene, it is important to consult with your gynecologist about proper monitoring and testing.
- **Observe Ovarian Cancer Awareness Month:** September is Ovarian Cancer Awareness Month, and women should take time to learn more about this disease. Being aware of the symptoms such as bloating, pelvic pain, and feeling full quickly when eating can help raise red flags in early stages, and increase chances for survival with proper medical treatment.

If you or a loved one currently suffer from or have been diagnosed with ovarian cancer, Dr. Ness recommends connecting with trusted resource and support groups such as the National Ovarian Cancer Coali-

tion. Dr. Ness says that "If you have to battle ovarian cancer, it is best to go through that battle with a community of other strong women."

XIX. RECALLS UPDATE

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

GM To Recall 2.5 Million Cars In China For Takata Air Bags

General Motors and its Chinese joint venture, Shanghai GM, are recalling more than 2.5 million cars with faulty Takata air bags, shortly after Volkswagen also announced a recall of 4.86 million vehicles for the same issue, according to media reports. Starting Oct. 29, General Motors will recall about 13,500 imported Saab and Opel cars with Takata Corp. air bags, and then on Dec. 29, the company will start another recall of more than 2.51 million Chevrolet and Buick vehicles, according to reports. The recall was announced by the Chinese government's General Administration of Quality Supervision, Inspection and Quarantine, according to reports.

At least 12 deaths in the U.S. have been linked to the faulty air bags, which allegedly have 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. The air bags have prompted the largest recall in U.S. history. In June, Takata filed for bankruptcy in Delaware and Japan, having reached a deal to sell most of its assets to Sterling Heights, Michigan-based auto parts supplier Key Safety Systems Inc. for $1.6 billion.

Volkswagen Recalls Millions Of Cars

Volkswagen Group China announced its recall of about 4.86 million imported cars on Sept. 14. The recall will start in 2018 and be carried out step by step, according to a statement from the German automaker. The decision to recall the cars was made on the advice of the Chinese safety authority, VW said. "As of now, Volkswagen Group has not received any report on our products worldwide regarding ruptured Takata front airbags," VW said. "A comprehensive parts analysis program conducted so far, showed that the analyzed inflators on Volkswagen Group products worldwide are under normal condition."

John Deere Recalls Tractors For Risk Of Transmission Failure

John Deere has recalled certain tractors due to a crash hazard. The transmission in the John Deere D105 lawn tractors sold between February 2016 and July 2017 can fail. While no injuries have been reported, it does pose a crash hazard. The tractors sold for about $1,500 at John Deer Dealers, Home Depot and Lowe's stores nationwide. The service transmissions were sold by John Deere authorized dealers from March 2016 through August 2017 for about $300. If you bought an affected tractor, you should stop using it immediately and contact a John Deere dealer for a free repair. If your lawn tractor's serial number begins with 1GXD105, which would be printed on the tractor's rear frame above the left rear tire, your tractor is affected. About 25,000 tractors and 500 transmissions were sold nationwide. Contact Deere & Company at 800-537-8233 from 8 a.m. to 6 p.m. ET Monday through Friday and Saturday from 9 a.m. to 3 p.m. ET or online at www.deere.com and click on Recalls under the Parts & Service drop-down menu for more information.

Renthal Recalls Motorcycle Clip-on Handlebars Due To Crash Hazard

Tucker Rocky Corporation, Inc., of Ft. Worth, Texas and LeMans Corporation, of Janesville, Wisconsin, have recalled about 3,000 Gen1 and Gen 2 motorcycle clip-on handlebars. The handlebar clamp can crack and fail, posing a crash hazard. This recall involves all Gen 1 and Gen 2 motorcycle clip-on aluminum handlebars for motorcycles distributed or sold for use on non-public roads. Gen 1 handlebars have a golden 40 mm tube with a black clamp and texturized gray end cover. Renthal and adjustability markings are etched on the tube and on the clamp. Gen 2 handlebars have a silver 20 mm tube with a black tip on one end and a two-screw clamp on the other end. Renthal is printed on the clamp. Renthal has received 22 reports of handlebars cracking. No injuries have been reported.

The clips were sold at Renthal motorcycle dealers nationwide from April 2009 through July 2017 for about $215. Consumers should immediately stop using the recalled handlebars and contact Renthal for free replacement handlebars. Contact Renthal toll-free at 877-736-8425 from 8 a.m. to 5 p.m. MT Monday through Friday or online at www.renthalroad.com and click "Clip-on Recall" in the middle of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Renthal-Recalls-Motorcycle-Clip-on-Handlebars

Ameriwood Home Recalls Chest Of Drawers For Tip-Over Hazard

Ameriwood Home, of Tiffin, Ohio, has recalled their Mainstays chests of drawers. The recalled chests of drawers are unstable if they are not anchored to the wall, posing serious tip-over and entrapment hazards that can result in death or injuries to children. The chests do not comply with the performance requirements of the U.S. voluntary industry standard (ASTM F2057-14). This recall involves Mainstays four-drawer chests of drawers with plastic drawer glides and a single decorative pull on each drawer. The composite wood chests were sold in six colors: alder, black forest, white, weathered oak, walnut and ruby red. The chests measure 40 5/16 inches high by 27 11/16 inches wide by 14 11/16 inches deep. Model numbers included in the recall are 5412012WP, 5412301WP, 5412328WP, 5412015WY, 5412301WY, 5412012PCOM, 5412015PCOM, 5412026PCOM, 5412213PCOM, 5412214PCOM, 5412301PCOM, 5412317PCOM, and 5412328PCOM. The model number is printed on the instruction manual.

CPSC has received one report of an injury after a chest of drawers tipped over onto a 4-year-old. The chests were sold at Walmart stores and other retailers nationwide and online at Walmart.com from April 2009 through May 2016 for about $60. Consumers should immediately stop using any recalled chest that is not properly anchored to the wall and place it into an area that children cannot access. Contact Ameriwood for a free repair kit

that includes a wall anchoring device and feet for the unit. Consumers who require additional installation guidance should contact Ameriwood for further assistance.

Target Recalls Room Essentials 4-Drawer Dressers Due To Tip-Over And Entrapment Hazards

Target Corp., of Minneapolis, Minn., has recalled about 175,000 Room Essentials 4-drawer dressers. The recalled dressers are unstable if they are not anchored to the wall, posing serious tip-over and entrapment hazards that can result in death or injuries to children. This recall involves Room Essentials 4-drawer dressers sold in three colors. The dressers measure 41 7/8 inches tall by 31 ½ inches wide by 15 11/16 inches deep. Model number 249-05-0103 (black), 249-05-0106 (espresso), or 249-05-0109 (maple) is printed on the product's packaging. The company has received 12 reports of dressers tipping or collapsing, including tipping over on two three-year-old children. No injuries have been reported.

The dressers were sold at Target stores nationwide and online at Target.com from January 2013 through April 2016 for about $118. Consumers should immediately stop using the recalled dresser that is not properly anchored to the wall and place it into an area that children cannot access. Consumers should return the recalled dresser to any Target store for a full refund. Contact Target at 800-440-0680 from 7 a.m. to 8 p.m. CT daily or online at www.Target.com and click on "Recalls" at the bottom of the page, then "Furniture" for more information, or the "Product Recalls" tab on www.Facebook.com/Target. Pictures available here: https://www.cpsc.gov/Recalls/2017/Target-Recalls-Room-Essentials-4-Drawer-Dressers

Saber Grills Recalls Grills And LP Regulators Due To Fire And Burn Hazards

Saber Grills LLC, of Columbus, Georgia, has recalled gas grills and liquid propane (LP) regulators. The grills' LP regulator can allow gas to flow at a higher pressure than intended, which can result in a gas leak and flame burst from the burner knobs, posing fire and burn hazards to consumers. This recall involves Model RA329 LP regulators with a date code in the range of 1120 to 1344, which were: sold with certain SABER LP grills, warranty part kits, and natural gas to LP conversion kits; installed as warranty or service parts in certain other SABER LP grills; or installed in SABER natural gas grills and burners if they have been converted to use LP instead of natural gas. The model number of the grill is located on a rating label located on the underside of the grease tray. The regulator date code is stamped on the regulator adjacent to the gas tank connection, and the regulator model number is on the center of the regulator. Saber Grills has received 35 reports of regulators malfunctioning, including three reports of singed arms and two reports of burned or singed hair.

The grills were sold at specialty outdoor living stores nationwide, including Family Leisure, Fortunoff Backyard Store, and Watson's, and through authorized websites and catalogs including Bed, Bath & Beyond and Frontgate, from September 2011 to May 2017 for between $800 and $2,000. The price of the LP conversion kit ranges from $90 to $105. The warranty parts were also sold as service parts for between $50 and $110. Consumers should immediately stop using the recalled grills and regulators and contact Saber for a free repair kit with installation instructions. A video on how to install the replacement components is available at: www.sabergrills.com/Support/SafetyBulletins.aspx. Contact Saber Grills toll-free at 866-671-7988 from 8 a.m. to 6 p.m. ET Monday through Friday and 10 a.m. to 3 p.m. ET Saturday, or online at recall.sabergrills.com for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Saber-Grills-Recalls-Grills-and-LP-Regulators

Skip Hop Recalls Nightlight Soothers Due To Shock Hazard

Skip Hop, of New York, New York, has recalled about 130,000 Moonlight & Melodies nightlight soothers. The soother's USB wall power adapter can break, posing an electrical shock hazard. This recall involves Skip Hop's Moonlight & Melodies owl and elephant nightlight soothers that play melodies or nature sounds and project images. They have a USB wall power adapter and cord. The white and gray owl soothers measure about 5.5 by 4.5 by 6 inches. The white elephant soother measures about 7 x 4.2 x 5.7 inches. The soothers have a sound speaker on each side and operation buttons at the top or the back. The Skip Hop logo is on the underside of the soother. Skip Hop is aware of incidents of the power adapter breaking, including one that resulted in an electrical shock.

The soothers were sold at Babies R Us, Buy Buy Baby, Target and other retailers nationwide and online at Skiphop.com and Amazon.com from July 2016 through August 2017 for approximately $40. Consumers should immediately stop using the recalled nightlight soothers and contact Skip Hop for instructions on returning the USB wall power adapter with a prepaid shipping label and receive a free repair kit which includes a free USB wall adapter. Contact Skip Hop toll-free at 888-282-4674 from 9 a.m. to 5 p.m. ET Monday through Friday, email at recall@skiphop.com or online at www.skiphop.com and click on Product Recalls at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Skip-Hop-Recalls-Nightlight-Soothers

Fireworks Over America Recalls Fireworks Due to Burn, Fire And Impact Hazards

Fireworks Over America has recalled fireworks after receiving one incident report of the device tipping over while firing. No injury was reported. This recall involves all Fireworks Over America Serious Spinout multi-effect fireworks sold both individually and by the case. Recalled fireworks have product code FOA 2773 printed on the back panel in the lower right hand corner. The fireworks consist of eight tubes wrapped in colorful paper. The tubes are bundled together to form a "cake" that measures 6 inches tall by about 4 inches wide. "Serious Spinout," "Warning" and an image of two yellow cars are printed on the front panel.

The fireworks were sold at Fireworks Over America wholesale distribution centers and retail fireworks stores, tents, and stands nationwide from October 2016 through July 2017 for about $10. Consumers should immediately stop using the recalled fireworks and contact Fireworks Over America for a full refund. Contact Fireworks Over America at 800-345-3957 Monday through Friday from 9 a.m. to 5 p.m. CST, or email at melissa@fireworksoveramerica.com, or online at www.fireworksoveramerica.com and click on the "Latest News" tab on the bottom left of the page for more information.

Southwire Recalls Globe And Snow Globe Stake Lights Due To Fire Hazard

Southwire Company LLC, of Carrollton, Georgia, and Southwire Canada Company of Mississauga, Ontario, Canada, have recalled about 8,700 Moonrays mystic globe and snow globe stake lights. Light refraction through the stake lights can singe or melt items in contact with or in the immediate proximity, posing a fire hazard. This recall involves Moonrays brand large mystic globe and winter-themed snow globe stake lights. The lawn and garden decorations are plastic globes mounted on a metal stake that can be inserted into the ground. Water and anti-freeze allows glitter inside the globe to float. The winter-themed light stake is framed by a snowman, Christmas Tree, Santa Claus or reindeer. The solar powered lights also contain LED bulbs that run on AA NI-cd or AA-NI-Mh rechargeable batteries. Southwire has received nine reports of incidents including heat-related damage to nearby property such as grass, deck posts and house siding. No injuries have been reported.

The globes were sold at Moonrays and home improvement and hardware stores nationwide and online from August 2016 through March 2017 for about $20. Consumers should immediately stop using the recalled stake lights and contact Southwire to return the product for a refund. Contact Southwire toll-free at 888-847-8709 Monday through Friday from 9 a.m. to 5 p.m. ET, online at www.southwire.com, www.southwire.ca or www.moonrays.com and click on "Product Recall" for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Southwire-Recalls-Globe-and-Snow-Globe-Stake-Lights

Delta Recalls Strollers Due To Fall Hazard

About 28,000 J is for Jeep brand cross-country all-terrain jogging strollers have been recalled by Delta Enterprise Corp., of New York, N.Y. The stroller leg bracket can break, posing a fall hazard to infants in the stroller. This recall involves J is for Jeep brand cross-country all-terrain jogging strollers, models and lot numbers listed below, manufactured by Delta. The strollers have two wheels in the back and one smaller wheel in the front. "J is for Jeep" is printed on the side of the stroller sun canopy and a star with a circle around it logo is printed on the front bottom of the seat and on the side of the stroller. The model number and lot number are printed on a Delta Children label with a blue heart at the left bottom frame support. The company has received four reports of the stroller leg bracket breaking, including one report of a child falling from a stroller and receiving cuts and bruises.

The strollers were sold at Target, Walmart and other stores nationwide and Shopko stores in Wisconsin from August 2015 through August 2016 for between $130 and $160. Consumers should immediately stop using the recalled strollers and can contact Delta for a free repair. Contact Delta at 800-377-3777 from 9 a.m. to 6 p.m. ET Monday through Friday, email at recall@deltachildren.comor online at www.deltachildren.com and click on Help Center and then Recall Center for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Delta-Recalls-Strollers

Pro-Tec Recalls Multisport Helmets Due To Risk Of Head Injury

Pro-Tec, a division of Bravo Sports, of Santa Fe Springs, California, has recalled about 4,600 Multisport helmets. The buckle on the helmet fails to meet current federal safety standards, posing a risk of head injury. This recall involves Pro-Tec City Lite and Pro-Tec Street Lite adult multisport helmets. The helmets have chin straps secured by plastic buckles and were sold in sizes S, M, L, and XL. The same buckle was used on all sizes of both helmets. The buckle bears the markings "ERGO-LOK" and the "UTX D-FLEX" logo. A label on the inside of the helmet reads "Pro-Tec City Lite" or "Pro-Tec Street Lite." The recalled helmets have a date code inside on the EPS liner in the format MM/DD/YYYY-090EO. There are two vent holes in the back of the helmet. The left vent hole has either an LED light or a plastic insert. The City Lite helmet was sold in rubber black and gloss white, and the Street Lite helmet was sold in rubber black, rubber red and gloss white.

The helmets were sold at McCully Bicycle & Sporting Goods, Quality Bicycle Products, Uncle Funky's Boards, and other sports specialty stores nationwide and online at Amazon.com and ProtecB2C.com from February 2016 through January 2017 for about $80 for the City Lite helmet, and about $60 for the Street Lite helmet. Consumers should immediately stop using the recalled helmets and return them to Pro-Tec for a full refund. Contact Pro-Tec toll-free at 844-368-3695 from 7:30 a.m. to 4 p.m. PT Monday through Friday, or online at www.protecbrand.com and click on CPSC Safety Recall for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Pro-Tec-Recalls-Multisport-Helmets

DICK'S Sporting Goods Recalls Resistance Tubes Due To Injury Hazard

DICK'S Sporting Goods, of Coraopolis, Pennsylvania, has recalled about 207,500 Fitness Gear resistance tubes. The resistance tubes can break while in use and strike the user, posing an injury hazard. This recall involves Fitness Gear resistance tubes used as upper and lower body workout equipment. The latex tubes were sold in blue, gray, green, orange, purple and red with grey handles. The tubes range in resistance from five pounds to 30 pounds and were sold individually and in kits of three, four or five resistance tubes. The resistance level is marked on the black strap between the handle and the tube. The recalled model numbers are: STA00560, STA00561, STA00562, STA00563, STA00564, STA00565, STA00566, STA00567, and STA00568. The company has received 12 reports of tubes breaking, resulting in two reports of consumers who were struck by a broken tube and a consumer who fell when a tube broke.

The tubes were sold at DICK'S Sporting Goods stores nationwide and online at DicksSportingGoods.com from September 2015 through August 2017 for between $15 and $80. Consumers should immediately stop using the recalled products and return them to the nearest DICK's Sporting Goods store. Consumers with a receipt will receive a full refund and consumers without a receipt will receive a store credit. Contact: DICK'S Sporting Goods toll-free at 877-846-9997 from 8 a.m. to midnight ET Monday through Friday, or online at www.DicksSportingGoods.com and click on "Recalls" at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Dicks-Sporting-Goods-Recalls-Resistance-Tubes

Hallmark Recalls Plush Baby Stacking Toys Due To Choking Hazard

Hallmark Marketing Company LLC, of Kansas City, Missouri, has recalled about 5,800 itty bittys® baby plush stacking toys. The toys have fabric hats and bows that can detach, posing a choking hazard. This

recall involves the itty bittys baby Disney-licensed plush animal stacking toys with rattling rings. The toys measure 10 inches by 7.5 inches by 9.5 inches. They have a yellow base stand with a post and four rattling rings that slide on and off the post. The red, blue, pink and purple rings have Mickey Mouse and Minnie Mouse, and Donald Duck and Daisy Duck characters attached to them. Three of the four Disney-licensed characters are wearing a small plush, fabric hat or bow. The Hallmark logo and "itty bittys" are printed on a sewn-on tag attached to the toy's base. Hallmark has received one report of the toy's fabric bow detaching. No injuries have been reported.

They were sold at Hallmark Gold Crown stores nationwide and online at Hallmark.com and Amazon.com from June 2016 through July 2017 for about $30. Consumers should immediately stop using the recalled toys and take them away from children. Contact Hallmark to receive a prepaid shipping label for returning the recalled toy and for a $40 Hallmark Gold Crown gift card. Contact Hallmark at 800-425-5627 from 9 a.m. to 8 p.m. ET Monday through Friday or online at www.hallmark.com and click on Product Recalls at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Hallmark-Recalls-Plush-Baby-Stacking-Toys

DEMDACO Recalls Infant Bib and Bootie Sets Due To Choking Hazard

DEMDACO has recalled its infant bib and bootie sets. Rattles sewn into the booties can detach, posing a choking hazard. None reported. This recall involves Story Time bib and bootie sets for infants, ages 3 through 6 months. The multi-colored pastel sets were sold in six different child themes and have serial numbers ranging from 5004700491 to 5004700496. The serial number can be found on the side of the bib. The sets were sold under the brand name Nat & Jules. Rattle attachments sewn into the booties coordinate with the theme. 5004700491 Dragon Bib & Bootie Set 5004700492 Sea Creatures Bib & Bootie Set 5004700493 Unicorn Bib & Bootie Set 5004700494 Princess Bib & Bootie Set 5004700495 Pirate Bib & Bootie Set 5004700496 Rocketship Bib & Bootie Set

The booties were sold at Christus Health Retail Systems, Joseph-Beth Booksellers, More Than Words, The Mole Hole of Peddlers Village & Eash Sales from June 2017 through August 2017 for about $25. Consumers should immediately stop using the recalled bib sets, take them away from children and return them to any store that sells DEMDACO's products for a full refund. Contact DEMDACO toll-free at 888-336-3226 between 8 a.m. and 5 p.m. CT Monday through Friday or online at www.demdaco.com and click on Product Recall for more information.

Dr. Brown's Natural Bottle & Dish Soaps Recalled By Handi-Craft Company Due To Risk Of Bacteria Exposure

Handi-Craft Company, of St. Louis, Missouri, has recalled about 23,000 Dr. Brown's Natural bottle and dish soap. The bottle and dish soap can contain harmful bacteria. Exposure to bacteria poses a risk of respiratory and other infections in immunocompromised individuals. This recall involves Dr. Brown's Natural Bottle & Dish Soap sold separately and with Dr. Brown's bottle brush as a bottle cleaning kit. The soap bottles were sold in two sizes: a clear plastic 16-ounce bottle with a pump and a 4-ounce clear squeeze bottle. A label affixed to the front of the bottles read "Dr. Brown's natural bottle & dish soap" and "100% plant-based ingredients."

The bottle and dish soap were sold at 4 Our Little Ones, Babies R' Us, Bebeang, Buy Buy Baby, Drugland Pharmacy, Family First Pharmacy, Global Nutrition Trading, Macro and Turquoise stores nationwide and online at Amazon.com from September 2016 to June 2017 for between $3 and $7. Consumers should immediately stop using the recalled bottle and dish soap and contact the company for instructions on receiving a replacement bottle of reformulated dish soap or comparable merchandise of equal or lesser value. Bottles and dishes cleaned with the recalled soap should be boiled or sanitized in the dishwasher. Contact Handi-Craft toll-free at 877-962-2525 from 8 a.m. to 4 p.m. CT Monday through Friday, or online at www.drbrownbaby.com and click on "Recall Information" for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Dr-Browns-Natural-Bottle-Dish-Soaps-Recalled-by-Handi-Craft-Company

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 we felt to be of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm's web site at www.BeasleyAllen.com or our blog at www.RightingInjustice.com. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

XX. FIRM ACTIVITIES

Eighth Annual Seat Check Saturday Event Set For Oct. 7

On Oct. 7 Beasley Allen will host the eighth annual "Seat Check Saturday" event. It is extremely gratifying to provide this event for families in the River Region. I am proud to say that we have installed and inspected hundreds of child safety seats! That makes me believe we have most likely saved lives in the process.

Every year, thousands of children are killed in automobile accidents, the leading cause of death for children ages 3-6 and 8-14. The importance of safety seats is undisputed. Unfortunately, they simply cannot work if they are not installed correctly. Three out of four child restraints are not used properly, resulting in these deaths and injuries.

The annual Seat Check Saturday check point will be located in the Dillard's parking lot at the Shoppes at Eastchase from 9 a.m. to noon on Oct. 7. Certified technicians will be on hand to install, inspect and instruct caregivers. There is no charge and no appointment necessary. For questions, contact Helen Taylor by email, Helen.Taylor@beasleyallen.com.

New Lawyers Join The Firm

Leon Hampton Jr. Joins The Firm In The Fraud Section

This past month we welcomed a new lawyer in our Consumer Fraud & Commercial Litigation Section. Leon Hampton Jr. joined the section and will be handling class action, employment and whistleblower claims.

In 2010, Leon graduated *magna cum laude* from Alabama A&M University with a bachelor's degree in secondary education. Leon earned his Juris Doctor from Samford University's Cumberland School of Law in 2013. While in law school, Leon

clerked at Beasley Allen and at the Attorney General's Office. He also served as a judicial extern for the Honorable Clyde Jones of the 10th Judicial Circuit. Before joining the firm full time, Leon worked for four years as a prosecutor in the Montgomery County District Attorney's Office, where he advanced to the Violent Crimes Unit. There he served as a lead counsel on homicide cases.

Though he was initially set on becoming a high school principal, Leon said he was convinced about becoming a trial lawyer after reading Kevin Boyles' *Arc of Justice* in college, which is an account of a young African-American doctor who was put on trial for murder and acquitted, and after listening to former U.S. Attorney Doug Jones speak about his involvement in the 16th Street Baptist Church bombing prosecution. It was through those experiences he saw "how lawyers had the power to stand up and speak for people who cannot otherwise speak effectively for themselves."

Leon is a member of the Alabama State Bar, Montgomery County Bar Association, Hugh Maddox's Inn of Court and a board member of the Alabama Lawyer's Association. He currently serves on the Alabama State Bar's 2017-2018 Election Procedures Review Task Force. In 2017, Leon was awarded the board member of the year for the Alabama Lawyer's Association. He is also a member of the Alpha Phi Alpha Fraternity, Inc. Montgomery Alumni Chapter, where he serves as the chapter's parliamentarian and constitution committee chairperson.

Leon is married to Dr. Tonquita Hampton, a physical therapist at Jackson Hospital, and they have one daughter, Kori Skye. They attend True Divine Baptist Church, where they serve together as young adult directors. We are blessed to have Leon with the firm.

Paul May Joins Beasley Allen's Mass Torts Section

Recently we welcomed Paul May to the firm. Paul is assigned to the Mass Torts Section, where he will be handling Invokana litigation. A native of Union Springs, Alabama, Paul earned his undergraduate degree in history from Auburn University Montgomery, graduating *cum laude*. He then graduated from Faulkner University's Thomas Goode Jones School of Law and was admitted to the Alabama State Bar in 1996.

Paul said he pursued law because growing up in a small town, he viewed it as a noble profession that helped everyday folks solve their problems, and says that Beasley Allen carries out that ideal. He added:

> *This firm can be the last best hope for someone who is in a dire situation and needs help, and this attitude of service makes Beasley Allen an honor to be a part of.*

Prior to working at Beasley Allen, Paul worked in private practice as a solo practitioner for the past 17 years. His work history also includes regulatory control manager for Colonial Mortgage.

Paul is a member of the Bullock/Barbour County Bar Association and serves as an adjunct professor in the College of Business and Executive Education at Faulkner University. He is also a certified Guardian Ad Litem for the state of Alabama and serves on the Bullock County Children's Policy Council.

Paul and his wife, Theresa, have three children and reside in Prattville, Alabama. They attend Hunter Hills Church in Prattville, where they have been active in the children's ministry. Paul is an avid fan of the Alabama Crimson Tide and the Boston Red Sox. We are blessed to have Paul with us at Beasley Allen.

Employee Spotlights

JENNIFER DAY FULK

Jennifer "Jenna" Day Fulk joined Beasley Allen in 2012. Jenna works in the firm's Mass Torts Section, investigating claims involving dangerous drugs and medical devices, after previously being a member of the Toxic Torts section.

Prior to becoming a lawyer, Jenna had the opportunity to work for a very successful female Plaintiff's lawyer in Kansas City. That law firm predominately handled products liability cases. She was able to get hands-on experience by attending client meetings and depositions, reviewing written discovery, documents and pleading, and observing this lawyer in her day-to-day practice. While Jenna already had an interest in pursuing law as a career, she says this amazing experience solidified her decision to become a lawyer.

Jenna says her favorite part of practicing law is the challenge of knowing each day will never be the same. She adds that new issues and arguments are always being presented and the landscape of ongoing litigation can change very quickly. However, Jenna says the reward of successfully litigating cases that you personally believe in, as well as changing clients' lives for the better, cannot be matched.

Jenna believes Beasley Allen is structured in such a way that no case is too big to undertake. She has found that this firm has unmistakable leadership in numerous multidistrict litigations (MDLs) where teamwork is highly valued in every person involved. Jenna says she appreciates how our firm has a real Christian value focus, which continually sets the firm apart in how it approaches the law and our clients' lives.

Jenna is a very good lawyer who is totally dedicated to helping her clients receive justice. We are blessed to have her with us.

MAKESHA NICOLE NOWELL

Makesha "Kesha" Nowell joined Beasley Allen's Mass Torts Section in June of 2013 working on cases involving defective and dangerous medical devices and drugs. Kesha's current focus is handling metal-on-metal hip implant cases, in particular cases included in the Biomet Multidistrict Litigation.

Kesha's journey to becoming lawyer began on Career Day in the third grade when she remembers meeting a female criminal defense lawyer. Upon asking the lawyer a question regarding how to determine whether a client is guilty, she was impressed with the answer. Her curiosity of the law and the legal system continued to grow as she got older. Despite being the first person in her family to graduate for college with a four-year degree, the prospect of going to law school seemed insurmountable. However, with the support and encouragement of her husband and many prayers for strength, Kesha was able to persevere and realize her dream of becoming a lawyer in 2008.

Because her exposure to the law growing up was primarily through television and movies, Kesha never thought about the civil law side of being a lawyer. She now understands the power and importance of helping clients by means of holding an individual or corporation accountable for its actions. Kesha says she believes Beasley Allen is tremendously helpful in accomplishing this, considering the firm is more flexible and accommodating to its lawyers. Kesha is very proud of being both a lawyer and a mother, however, balancing the two can be overwhelming. Kesha says she is thankful for Beasley Allen's ability to create such a great, family-like environment.

Kesha is a very good lawyer who is dedicated to helping her clients receive justice. We are blessed to have her with the firm.

BRANDY JEAN LUCIO

Brandy Lucio, a Staff Assistant in our Mass Torts department, will have been with Beasley Allen six years as of this November. She began her tenure doing questionnaires in the hip replacement litigation, then went on to become a Staff Assistant for Navan Ward. However, starting in 2013, Brandy was assigned to work for James Lampkin and she continues to work for him, as well as for Chad Cook and Allison Hunnicutt. She has only worked in the firm's Mass Torts Section.

Brandy says she is very blessed with her daughter Jay, who will be 5 years old this October. Her father is now 88 years old and Brandy is thankful every day that she gets to spend time with him. She also has her very cute niece Maddie, who will be 2 in November. When she has free time, Brandy says enjoys gardening with her "papa," cooking, going to concerts and traveling with her family. Brandy is a very good, hard-working employee and we are pleased to have her with the firm.

TAMMIE L. THORNTON

Tammie Thornton, who is the Medical Advisor for Beasley Allen, has been working for the firm since July 2012. As a certified nurse, Tammie has been responsible for assisting the Mass Torts department with hip and knee replacement cases. She takes pride in being able to use her knowledge of medicine to help our clients as much as possible.

Tammie is married with five boys ranging in age from 5 to 22. She loves to spend her free time with her family, just being goofy and having a good time together. She also enjoys reading, walking, hiking and swimming.

CHINET L. MURRAY

Chinet Murray started at Beasley Allen in May of 2012 as a temporary worker, but was later hired on full-time as a Staff Assistant in December of that same year. Working for Chris Boutwell, Chinet's experience has been focused in the firm's Toxic Torts Section handling the Coastal Property Claims for the BP oil spill litigation. Her responsibilities include getting permission to accept settlement amounts on claims and getting the release paperwork to the client on all claims, as well as any other documentation that is needed to finalize the claim. She is also involved in assisting with nursing home cases.

Chinet has two children, Cody and Mya, of whom she is very proud. Her son Cody is 23 years old, a member of the Army National Guard and currently finishing up his degree at Auburn University at Montgomery (AUM). He was forced to put school on hold after being deployed to Kuwait a little over a year ago, but he has since returned and continues to drill with the National Guard and works at Wells Fargo. Chinet's daughter Mya is 19 years old and graduated from high school in May of this year. She will be leaving for Miles University in Birmingham, Alabama, in January of next year.

Chinet is currently taking online courses to finish her Bachelors Degree in Legal Studies and she definitely plans on graduating. In her spare time, Chinet enjoys working out about three days a week, though she normally doesn't have much free time since studying for school takes up a large portion of her time. Chinet is a most valuable employee who does good work and we are blessed to have her with us.

XXI. SPECIAL RECOGNITIONS

Andrew Brashier Received A Significant Honor

Andrew E. Brashier, a lawyer in our firm, was recognized as a 2017 Young Alumni Rising Star for the University of Alabama at Birmingham (UAB). The award recognizes alumni who have demonstrated an ability to excel personally and professionally while committing time and energy to serve the university and local community.

This is the university's inaugural award, established by the UAB National Alumni Society's (NAS) Junior Board. The board selected five young alumni who are 35 or younger and are working within their careers and communities to blaze a path for future generations of young alumni for the honor.

We congratulate Andrew and are proud of the strides he has made and continues to make in his career. His dedication and work ethic demonstrate his passion to help clients navigate the civil justice system and his volunteer commitments equally reveal his compassion for people.

In January, Beasley Allen named Andrew a principal at the firm, primarily for his leadership within the firm's Whistleblower Litigation Team. The team represents clients involved in class action lawsuits and qui tam litigation under the False Claims Act. He has represented multiple whistleblowers retaliated against for reporting corruption and fraud, including one whistleblower who assisted in recovering $39 million for the federal government. Andrew gives voice to whistleblowers who report fraud to the IRS, SEC and Department of Transportation/NHTSA and frequently writes about the topic.

Andrew is currently handling cases against insurance companies for unjustly increasing policyholders' cost of insurance. He also handles auto defect class actions such as General Motors' defective ignition switch and Takata's shrapnel-shooting air bag inflator. Additionally, he represented consumers and financial institutions harmed by the Target, Home Depot and Community Health Systems data breaches and has spoken nationally on the topic. He has fought for consumers in multidistrict litigation class actions such as Toyota's sudden unintended acceleration and Ford Navistar's engine defect.

Earlier this summer, Andrew was selected as a 2017 recipient of the American Association for Justice (AAJ) Wiedemann & Wysocki Award. The award recognizes lawyers who demonstrate a deep commitment to the profession's highest standards and who are passionately committed to the principles of the civil justice system and the mission of AAJ. The National Trial Lawyers also named him to the Alabama Top 40 Under 40 list. Andrew had this to say:

> *It is truly an honor to be recognized by my alma matter for the work I am privileged to be a part of every day. I am thankful for the opportunities to represent those who have suffered due to corporate wrongdoing and to assist our clients who have the courage to speak up against fraud. I would not be where I am today without my education at UAB and participation with UAB's Mock Trial Team.*

Andrew graduated from UAB with a Bachelor's degree in Political Science and History and from Samford University's Cumberland School of Law. He is a member of Taxpayers Against Fraud, a non-profit advocacy organization for whistleblowers, and regularly volunteers and does pro bono work through the Middle District of Alabama Pro Se Assistance

Program. Andrew is also a member of the Montgomery County Bar Association Foundation's Volunteer Lawyer Service Program.

Among his community involvements Andrew serves as a member of the Advisory Board of Directors for Catholic Social Services of Montgomery and formerly as vice-president for the Autauga Interfaith Care Center. He also volunteers as the Chancellor for the Anglican Church in North America's Jurisdiction of the Armed Forces and Chaplaincy and is a Governance Task Force member with the Anglican Church in North America.

XXII. MYTHBUSTER SERIES

Myth: The FDA Conducts Tests On Pharmaceutical Drugs

This is another in our series on mythbusters. When our firm first started handling pharmaceutical product liability litigation in 2001, our lawyers quickly learned that many consumers who could potentially serve as jurors on our cases believed that the U.S. Food and Drug Administration (FDA) actually conducted clinical trials on the products they approve to be put on the market. Of course, contrary to public belief, that is not true. The truth is the FDA approves drugs based upon information provided to them by the manufacturer of the drug. I have asked the question when speaking to civic clubs about testing and so far all members believe the FDA does testing. That myth is a common misconception we must educate potential jurors on, typically in voir dire. It appears the public in general needs to be educated on this subject.

The FDA can only base its approval or denial on the information a drug manufacturer provides to them. We quite often see that the manufacturers cherry-pick the information provided to the FDA and/or characterize the information in such a way to portray the results of the trials as positively as possible to the FDA medical review officer in charge of developing a recommendation to approve, not approve or request additional studies or data. We have seen in litigation where pharmaceutical companies hire teams of writers and statisticians to package the results of cherry-picked trials favorable to the drug's approval.

The average patient goes into a doctor's office believing the drug prescribed to them has undergone rigorous testing by the manufacturer and the FDA. The FDA does no testing and many studies indicate the agency is shorthanded already in even trying to adequately review the new drug applications it receives while also tracking the safety record of drugs on the market.

If you need more information on the FDA and how it operates, contact Frank Woodson, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at Frank.Woodson@beasleyallen.com. Frank is the President of the Alabama Association for Justice. Over the past weeks, he has been traveling around the state visiting with lawyers who share our goal of keeping the courts open and independent.

XXIII. FAVORITE BIBLE VERSES

Sandra Miles, wife of Dee Miles who heads up our Consumer Fraud & Commercial Litigation Section, sent in two verses for this issue.

Make no friendship with an angry man, and with a furious man do not go, lest you learn his ways and set a snare for your soul. Proverbs 22:24-25

Sandra, a Godly woman, a tremendous wife and mother, who is heavily involved in her church, tells us:

Dee and I are at the point in our lives where our children have become independent and have left to set up their own homes or are living away from home at college. And like most parents I feel it necessary to pray for them to be surrounded by Godly friends and not be led down a path where their lives become difficult, or make decisions that they wouldn't have made if they were at home with us. Psalm 90:17 gives me comfort that I am praying as a parent for them to be wise and be surrounded by friends who can become role models as well.

Let the beauty of the Lord our God be upon us, and establish the work of our hands for us; yes, establish the work of our hands. Psalm 90:17

Then Sandra had this to say:

We all wonder what special gift God has given us to share with others while we are on this Earth. For my husband it is the gift of finding justice for others through the legal system. For me it is service to those in need. I like to think that we both live to help the poor and those who have been shown injustice and prejudices because of the color of their skin, lack of education or their rank on the social ladder. This verse affirms my belief that I was given a "gift" and my hope is that when others look upon me that they see the face of God when I give them my service.

My longtime friend, Dr. Terry Stallings, sent in three Bible verses that he says have special meaning to him. Terry, a strong Christian, is a tremendously talented medical doctor.

Bless those who persecute you; bless and do not curse. Rejoice with those who rejoice, and weep with those who weep. Be of the same mind toward one another. Do not set your mind on high things, but associate with the humble. Do not be wise in your own opinion. Romans 12:14-16 NKJV

But hope that is seen is not hope at all. Who hopes for what he already has? But if we hope for what we do not yet have, we wait for it patiently. In the same way, the Spirit helps us in our weakness. We do not know what we ought to pray for, but the Spirit himself intercedes for us with groans that words cannot express. And he who searches our hearts knows the mind of the Spirit, because the Spirit intercedes for the saints in accordance with God's will. And we know that in all things God works for the good of those who love him, who have been called according to his purpose. Romans 8:26-28 NIV

That if you confess with your mouth, "Jesus is Lord," and believe in your heart that God raised him from the dead, you will be saved. For it is with your heart that you believe and are justified, and it is with your mouth that you confess and are saved. Romans 10:9-10 NIV

Melinda Henderson, who is a legal secretary in our firm, sent in a verse for this issue. She says 2 Corinthians 12:9 means a lot to her and has helped her through trying times.

But he said to me, my grace is sufficient for you, for my power is made perfect in weakness. Therefore I will boast all the more gladly about my weaknesses, so that Christ's power may rest on me. 2 Corinthians 12:9

Melinda says this verse reminds us that no matter what we are dealing with and no matter how difficult the season of life we are in, God is right there with us, and as long as we have our minds on Him, we will be strong.

Dr. John Kline, a Professor at Troy University, and another longtime friend of mine, who is a dedicated Christian, sent in some verses this month. John says that he is "blessed to teach and minister to young people at Troy where they focus on "Servant Leadership;" that is, leading to serve the needs of others and the organization." Every summer at the freshman orientation sessions, John meets all incoming freshmen students and he also addresses all of the parents. John tells them, "We take as our model the Greatest Servant Leader who ever lived—and He is much more—the one who came not to be served but to serve." The following are two of John's favorite verses about the Great Servant Leader.

For even the Son of Man did not come to be served, but to serve, and to give His life a ransom for many. Mark 10:45 (also found in Matthew 20:28)

If I then, the Lord and the Teacher, washed your feet, you also ought to wash one another's feet. For I gave you an example that you also should do as I did to you. . . . If you know these things, you are blessed if you do them. John 13:14-17

Lisa Temple sent in her favorite Bible verses for this issue. She says growing up, she was taught by word and deed the importance of friendship - how to make friends and how to keep them. Lisa says she was also taught that our best friend is Jesus Christ who sacrificed his life so that we may live eternally. For this reason, Lisa always loved John 15:13.

Greater love has no one than this: to lay down one's life for one's friends. John 15:13

It was also Lisa's late husband Dana's favorite verse and it seemed to suit him because those who knew Dana well knew he believed in standing up for the underdog and defending those who could not defend themselves. Lisa says:

The past few years have been difficult ones in my life. I lost my father (Ted Cheek) in 2013 and my husband Dana in November of last year. I have often felt completely lost and overcome with fear. A precious friend who herself is no stranger to loss and fear told me that Isaiah 41:10 helped her so much as she imagined Jesus lifting her up with his righteous right hand!

So do not fear, for I am with you; do not be dismayed, for I am your God; I will strengthen you and I will uphold you with my righteous right hand. Isaiah 41:10.

XXIV. CLOSING OBSERVATIONS

Talc-Cancer Juries Speak Loud And Clear, But Is J&J Listening?

News organizations are besieged with invented holidays—think National Donut Day—dreamed up by marketing geniuses trying to market a corporation's products. But September was National Ovarian Cancer Awareness month and, by definition, that's a topic far more important than any food item. For pharmaceutical giant Johnson & Johnson, this special designation for a month couldn't come at a worse time.

That's because reporters looking to write about ovarian cancer need venture no further than Los Angeles, where a jury's recent $417 million verdict against Johnson & Johnson is the largest yet in a series of lawsuits by women claiming the company failed to warn them about cancer risks associated with J&J's iconic Johnson's Baby Powder and Shower to Shower products.

As we have reported, this was not the first multimillion-dollar award against J&J for women who have developed ovarian cancer after using the company's talc-based products for feminine hygiene. But this case is different than the rest so far, and not solely because jurors made a point of harshly punishing J&J for its corporate behavior. This verdict is different because it's now much harder for J&J to continue its "kill-the-messenger" approach to the thousands of talc-cancer lawsuits the company faces.

For more than a year, jurors in four trials in Missouri courts have told Johnson & Johnson what they think about the evidence that clearly shows women who use talc products have an increased risk of ovarian cancer. The multimillion-dollar verdicts there have been adding up. But until now, those trials had been concentrated in St. Louis where J&J responded with an aggressive public relations strategy to discredit the science linking talc and cancer while disparaging the citizens serving on these juries.

In tandem with the U.S. Chamber of Commerce "PR machine," J&J has suggested that these dying women were engaged in "forum shopping" and had filed their lawsuits in St. Louis solely because its juries are somehow overly friendly toward Plaintiffs. Earlier this year, the company trumpeted a U.S. Supreme Court opinion, known as *Bristol-Myers Squibb*, that drastically limits where injured individuals can bring lawsuits against businesses such as J&J.

Meanwhile, J&J disparaged the reputations of some of the world's leading scientists for their decades of research that has established how talc particles can cause ovarian cancer. Internal J&J documents show that the company ignored studies that linked talc products such as Johnson's Baby Powder and Shower to Shower to ovarian cancer and actively sought to hide their knowledge from the public by using corporate influence to prevent governmental regulation of these products

So all eyes were on Los Angeles where 63-year-old Eva Echeverria brought her case before a jury 1,800 miles from St. Louis, and the verdict shows that J&J's legal problems cannot be blamed on a single so called Plaintiff-friendly venue. Any lawyer who has tried cases in St. Louis knows that St. Louis jurors are highly educated, sophisticated individuals in large part and are far from being friendly to Plaintiffs.

In Ms. Echeverria's case, jurors heard how she had used J&J's talc products for feminine hygiene since she was 11 years old because she thought doing so was harmless. In dramatic testimony, Ms. Echeverria described how she would have stopped using the product had the company placed a simple warning label on the bottles.

Perhaps most damaging of all, jurors heard how other talc products sold at retailers including Walmart and Dollar Tree have recently placed straightforward warning language regarding the talc-ovarian cancer link on their products, all while J&J continues refusing to provide such warnings on their products.

The testimony clearly resonated, and the jury moved to punish Johnson & Johnson in the only way that will make a difference to a publicly traded company—in the pocketbook. As part of the $417 million verdict, jurors imposed a record $347 million in punitive damages for the company's failure to warn women such as Ms. Echeverria.

There is a reason why the courtroom losses keep piling up for Johnson & Johnson, and it has nothing to do with rogue juries or greedy trial lawyers. It's because of Johnson & Johnson's own conduct and disregard for all of the evidence linking talcum powder to ovarian cancer. J&J has been guilty of a massive cover-up of what they knew about the cancer risk and when they knew it.

As we observed national Ovarian Cancer Awareness month in September, it was highly important to have considered how corporations like Johnson & Johnson are relentless in their efforts to strip away our constitutional right to justice through jury trials, while wielding deep influence of the regulatory oversight of products in our marketplace. Thank goodness for our civil justice system and its ability to hold corporations accountable for unsafe products. Our firm, along with the others involved in the talc litigation, are honored to have been a part of the massive efforts to obtain justice for thousands of women who have been victimized by J&J. Eventually J&J will have to listen!

Our Monthly Reminders

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732 - 1802)

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

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

Vincent Lombardi

XXV. PARTING WORDS

Building Bridges Together

St. James United Methodist church joined last month with Greater Peace Missionary Baptist Church from Opelika, Alabama, to host a meeting of the two churches. St. James, which is my church, was the host church for the event. The title of the meeting was "Building Bridges Together," and it was promoted as an "Alabama evening for greater civility." The stated purpose of the meeting was that "we come together to celebrate our humanity and our love of God as one of many cultures and races."

Our foreign enemies must be extremely happy with what they now see happening in the United States of America. We are more divided today than I can recall at any time during my lifetime. There is clearly a need for greater civility and respect for one another. We are constantly being fed a message of hate and division from Washington and it makes absolutely no sense. It's a message that, if not stopped, can only hurt and eventually destroy our nation from within.

The meeting at St. James is the sort of thing that churches across the land should be promoting. The churches have an obligation to work toward building bridges. It's time for the American people to wake up and work to become unified and truly become a nation under God with liberty and justice for all.

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Jere Beasley, the founding member of Beasley Allen Law Firm, has practiced law as an advocate for victims of wrongdoing since 1962. During his career, he has tried hundreds of cases. Jere's numerous courtroom victories include landmark cases that have made a positive impact upon our society. His areas of practice include litigation in products liability, insurance fraud, business, nursing home and personal injury.

Jere established a one-lawyer firm that officially opened on Jan. 15, 1979, and he filed his first case on behalf of the practice on Jan. 17, 1979. Now, it has been 30 years since he began with the intent of "helping those who need it most." Today, the firm is known as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., still located in Montgomery, Alabama. Beasley Allen is one of the country's leading firms involved in civil litigation on behalf of claimants, having represented hundreds of thousands of people. The firm employs more than 250 people in Montgomery, including more than 70 attorneys.

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