



*The*  
**JERE BEASLEY REPORT**

*January 2018*

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LAW FIRM

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MONTGOMERY  
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# I. CAPITOL OBSERVATIONS

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## **BEASLEY ALLEN ANNOUNCES ANNUAL LAWYER AWARDS**

Our firm has announced the annual lawyer awards for 2017. Mike Andrews was selected as the firm's Litigator of the Year. This annual recognition is presented to the lawyer who demonstrates exceptional professional skill throughout the course of the year and best represents the firm's ideal of "helping those who need it most." Mike practices in the firm's Personal Injury & Products Liability Section. He handles complex product liability cases involving serious injury or death and has handled several cases against manufacturers of aircraft, light and heavy trucks, automobiles, and agricultural and construction equipment.

In addition to selecting the overall "top lawyer," Beasley Allen recognized excellence in our four sections, naming a Lawyer of the Year for each section. Honorees as Lawyers of the Year for 2017 are:

- LaBarron Boone, Personal Injury & Product Liability Section;
- Leslie Pescia, Consumer Fraud & Commercial Litigation Section;
- Leigh O'Dell and Ted Meadows, Mass Torts Section; and
- Rick Stratton, Toxic Torts Section Lawyer of the Year.

I am honored to work with a group of such outstanding lawyers who make it their personal responsibility to take good care of their clients. The lawyers receiving these awards know the value of exceptional work. As members of the Beasley Allen team, they do an excellent job of providing our clients with their very best. They work with colleagues and staff to seek justice for their clients. We are blessed to have each of them with the firm. These are recognitions that are well-deserved.

In addition to the professional awards given each year, the Board of Directors recognizes a lawyer each year to be honored in memory of Beasley Allen lawyer Chad Stewart, who passed away in 2014. The Chad Stewart Award was created to recognize a lawyer who best exemplifies Chad's spirit of service to

God, his family and the practice of law in the task of "helping those who need it most." The 2017 Chad Stewart Award was presented to Andy Birchfield, who is the head of the firm's Mass Torts Section. Andy is a lawyer dedicated to his clients and focused on helping others. He is a most deserving recipient of this award.

# II. MORE AUTOMOBILE NEWS OF NOTE

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## **BANKRUPTCY COURT UNCERTAIN OVER UNSIGNED GM SETTLEMENT**

A rather strange battle is going on in a New York bankruptcy court. It involves a legal dispute over the enforceability of a vehicle defect settlement between a General Motors (GM) bankruptcy trust and car purchasers and accident victims. The deciding factor appears to be whether the absence of signatures overpowers what appears to be the parties' stated agreement to the terms of a settlement.

At the end of a two-day trial on Dec. 19, U.S. Bankruptcy Judge Martin Glenn said that he's never seen a case like the one before him, putting millions of car purchasers and accident victims squarely against "New GM," the "operating incarnation" of the automaker, and a trust set up to distribute recovered funds to creditors of the defunct "Old GM." The parties are arguing over the enforceability of an unsigned settlement agreement.

The claimants say they reached a binding agreement with the bankruptcy trust, but things went south at the last minute when New GM pressured the trust to back out of the agreement in August and instead accept funding to fight the economic-loss and personal-injury claims. To say this turn of events is rather weird may be a gross understatement.

The abandoned settlement would have caused the carmaker to issue approximately \$1 billion worth of new stock. It's a "disputed issue of fact" whether the parties unambiguously agreed to be bound to the terms of the agreement, Judge Glenn said after the trial. It is now the judge's job to decide if the general unsecured creditors' trust had the freedom to back out simply because nothing had been signed by the parties.

Judge Glenn said he had "never seen a case like this," and he indicated that he was undecided on how to rule, but found it "incredible" that the trust backed out of the settlement altogether after meeting with New GM a day after finalizing material terms.

The claimholders at issue asked the bankruptcy court in December to allow late class claims against the GM trust, saying the company failed to tell vehicle owners about an ignition switch problem and other defects in time for them to file claims in the company's bankruptcy. Under the terms of the proposed settlement, the late claims would have been settled in exchange for a \$15 million payment and support for an order that

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would have obligated New GM to issue 30 million shares of common stock to creditors, pursuant to provisions of the 2009 bankruptcy sale of the company that call for New GM to put in additional consideration if claims allowed against the estate surpass certain thresholds. The share value of the proposed new equity would be approximately \$1 billion.

While the Plaintiffs say the settlement agreement should become binding under New York law, the trust believes it should instead be allowed to enter into a forbearance agreement with GM and accept funding to fight the creditors' claims. The basis for that position is that discussions "culminated in the preparation, but not the execution, of draft settlement documents."

The sides fought over whether language in the draft agreement—the final product of more than 20 back-and-forth revisions—indicating that the settlement had to be fully executed to "become effective and binding" was just a boilerplate contract provision or meant that signatures were absolute and binding. Judge Glenn said he is mindful of the injury claims at stake in the dispute and is taking the matter "very, very seriously."

The cases are *In re: Motors Liquidation Co., et al.*, (case number 1:09-bk-50026), in the U.S. Bankruptcy Court for the Southern District of New York, and *In re: General Motors LLC Ignition Switch Litigation*, (case number 1:14-md-02543), in the U.S. District Court for the Southern District of New York.

Source: Law360.com

#### **PRE-BANKRUPTCY GM IGNITION CLAIMS FROM EIGHT STATES CAN PROCEED**

U.S. District Judge Jesse Furman has ruled that claims from drivers in eight states can move forward. The opinion by Judge Furman marks a turning point for the so-called "successor liability" claims brought by drivers from 15 states and Washington, D.C., which seek to hold GM's current incarnation responsible for allegedly defective vehicles by the defunct Old GM. The successor liability claims are one subset of claims in the multidistrict litigation (MDL) case against GM. In this same ruling, Judge Furman dismissed a claim by Maryland.

Judge Furman had previously thrown out successor liability claims brought by car owners in seven other states, but this ruling on GM's motion for summary judgment means claims from the eight remain-

ing states could very likely head to trial. Judge Furman wrote:

*The court concludes that plaintiffs' successor liability claims fail as a matter of law under Maryland law, which applies a strict test to claims that a successor corporation is a 'mere continuation' of a predecessor corporation. By and large, the applicable law in the other eight jurisdictions, however, is more forgiving and less amenable to resolution on summary judgment, as it involves the application of fact-intensive multi-factor tests. Applying those tests, the court concludes that summary judgment cannot be granted as to plaintiffs' claims from the other eight jurisdictions still at issue.*

The remaining eight states are Alabama, Illinois, Michigan, Missouri, Oklahoma, Pennsylvania, Texas and Virginia. The claims from Texas and Virginia will be governed by New York state law, while claims from Illinois will be bound by Michigan law. Claims from the rest of the states will be governed by their own state's law.

The suits in the ignition switch MDL all allege that design defects in certain models of GM cars led keys to slip out of the run position, shutting off the car and preventing the airbags from deploying, among other things. More than 100 deaths have been attributed to the design flaw, and GM initiated an extensive recall of the affected cars in 2014.

Judge Furman's ruling will likely open the door for many of the cases in the remaining eight states to be sent back to state courts for trial. All states have laws that bar Plaintiffs from bringing claims against a company that has purchased assets from another company in a bankruptcy sale, if the claims arise from the pre-bankruptcy conduct of the seller. However, there are exceptions to that rule such as when a bankruptcy sale is a "de facto merger" of the two companies, or the purchaser is a "mere continuation" of the seller. The successor liability Plaintiffs relied on these two nearly identical legal theories in almost all of the nine states considered in Judge Furman's opinion.

Judge Furman said that Maryland state law sets an extremely high bar to prove mere continuation claims; so high that no Plaintiff has ever successfully cleared it. As a result, under Maryland state law the successor liability Plaintiffs met the same

fate as all the earlier Plaintiffs that had tried and failed on their claims.

In the remaining eight states, however, the tests used to determine whether those types of claims can go forward are less strict. Those tests include, among other things, the following:

- whether the purchaser basically continued the seller's business model,
- whether the seller corporation ceased business operations shortly after the sale, and
- whether the purchaser "held itself out to the world as the effective continuation of the seller operation."

Judge Furman said the successor liability Plaintiffs have a good chance of succeeding under the tests laid out in the state law that will govern claims from the eight remaining states. At the end of his 20-page opinion, Judge Furman asked both sides to "submit letters regarding the next steps for personal injury cases in the MDL, addressing the implications of this opinion and order" by early January.

Source: Law360.com

#### **JUDGE BARS CONSOLIDATED CLAIMS IN GM IGNITION SWITCH MDL**

U.S. District Judge Jesse M. Furman, the federal judge overseeing the General Motors (GM) multidistrict litigation (MDL), will no longer allow the filing of consolidated complaints on behalf of multiple people bringing personal injury or wrongful death claims in the MDL over General Motors LLC ignition switches that caused vehicles to abruptly lose power. Judge Furman said that until now he has allowed such filings—for efficiency's sake—even when joinder wouldn't be allowed under a strict application of the Federal Rules of Civil Procedure.

Judge Furman said that "upon reflection," he has decided to stop allowing the consolidated complaints because of the administrative problems created for the court clerk's office, along with depriving the court of filing fees. Judge Furman said:

*Requiring each plaintiff to pay a separate filing fee has an additional salutary effect: It helps ensure that plaintiff's counsel will adequately screen each plaintiff's claim to ensure that it is valid and belongs in these proceedings.*

Judge Furman explained that the problems the consolidated complaints create for the clerk's office will become even more pronounced if and when the individual cases are sent back to the courts from which they came.

As a result of Judge Furman's decision, which took effect immediately, lawyers won't be allowed to file consolidated complaints on behalf of multiple Plaintiffs involved in different crashes or incidents when joinder wouldn't be allowed under the Federal Rules of Civil Procedure. Instead, the judge wants individual complaints filed with separate filing fees for each such case. In the lawsuit, drivers claim that design defects in some GM vehicle models caused the ignition to slip out of the "on" position, shutting off the vehicle and preventing air bags from deploying. As we have reported, more than 100 deaths have been attributed to this defect. After hiding its knowledge of the defect for almost a decade, GM launched an extensive recall of affected vehicles in 2014.

The case is *In re: General Motors LLC Ignition Switch Litigation* (case number 1:14-md-02543) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

#### **NEW MEXICO, HAWAII, AND VIRGIN ISLANDS MOVE FORWARD WITH TAKATA SUITS**

Lawsuits brought by New Mexico, Hawaii and the U.S. Virgin Islands against bankrupt Takata over its dangerously defective airbags can proceed now that a Delaware bankruptcy court has agreed to lift a temporary stay it put in place in November. Both New Mexico and the Virgin Islands have two pending suits and Hawaii has one. On Dec. 19, U.S. Bankruptcy Judge Brendan L. Shannon allowed all five suits to continue pursuant to so-called "stipulated litigation plans," in which all of the parties have agreed to mostly limit themselves to working out discovery requests until Feb. 27.

Takata had previously asked Judge Shannon to completely stop all five suits until at least late February, in an attempt to stop what it described as "the awesome power of the state" from interfering with its restructuring efforts. Those efforts—if all goes well—will culminate in a \$1.6 billion sale to competitor Key Safety Systems Inc.

The stipulated litigation plans appear to be a compromise that will allow the suits to move forward without creating any

new problems for Takata over the next two months. Judge Shannon wrote:

*The necessary parties having met and conferred, and having agreed to the stipulated litigation plan, it is hereby ordered that the preliminary injunction shall be lifted as to the state actions based on the parties' agreement that litigation activity in the state actions will be limited to the stipulated litigation plan until Feb. 27, 2018.*

Both Hawaii and the Virgin Islands have two similar parallel suits pending. The first suit involves claims against Takata and "several Honda entities," while the second consists of claims against "Toyota, Nissan and Ford entities," as well as third-party claims brought by those automakers against Takata's Japanese corporate parent.

New Mexico's suit targets Takata and 15 automakers for their failure to properly protect consumers from the deadly defects in Takata's airbags that led to its bankruptcy in the first place. Judge Shannon's latest order directs New Mexico, Hawaii and the Virgin Islands to coordinate with Takata and the other Defendants "in good faith" to schedule depositions, work out other discovery requests and copy documents from the Florida MDL to be entered into the record in the five state actions.

Judge Shannon said that any party may request that discovery be coordinated among the five suits as well. The parties will also negotiate briefing schedules and protective orders, if necessary, but the actual filing of briefs will remain on hold until the stipulated litigation plans end on Feb. 27.

The Chapter 11 bankruptcy is *In re: TK Holdings Inc. et al.*, (case number 1:17-bk-11375); the Chapter 15 case is *In re: Takata Corp. et al.*, (case number 1:17-bk-11713); and the adversary case is *TK Holdings Inc. v. Hawaii et al.*, (case number 1:17-ap-50880), all in the U.S. Bankruptcy Court for the District of Delaware.

Source: Law360.com

#### **NHTSA LOOKING INTO REPORTS OF CHRYSLER PACIFICA ENGINE STALLING**

The National Highway Traffic Safety Administration (NHTSA) is looking into customer complaints about 2017 Chrysler Pacificas losing engine power. NHTSA says it has made no determination on whether there is a defect. The Center for

Auto Safety (an automobile public safety group) petitioned NHTSA in November after identifying 57 individual complaints. The agency opened the petition last month to evaluate the issue and to determine whether or not to take any action on it.

The Center says the complaints mention a stall or loss of power in Fiat Chrysler's Pacifica minivans rendering drivers unable to accelerate, decelerate or use power steering. Based on those reports, the group wants the agency to find that the vehicle, of which an estimated 140,000 may be affected, has a defect that affects its safety and to order a recall. According to the Center, FCA US LLC's dealership personnel haven't been able to identify or fix the problem. Jason Levine, the Center executive director, said in a statement:

*Stalling is a dangerous defect and has repeatedly led to tragedy. The danger goes beyond what happens to families in the stalled minivan during the loss of power, as drivers of disabled vehicles are often hit and killed by other cars after they have pulled over to the side of the road.*

Fiat Chrysler has said that it doesn't know of any injuries associated with the complaints and that there are no indications that the air bag or seatbelt pretensioner functions are, or may be, compromised. The company also said that in most of the complaints, drivers were able to restart their vehicles immediately and the issue did not happen again.

The Center said in its petition that the minivans have lost power at various speeds, ranging from sitting idle to 60 miles per hour while being driven in a tunnel. The group said that some owners have reported losing power as many as five times within the vehicle's first 205 miles, while others said that they didn't experience a loss of power until their Pacifica had logged several thousand miles. The group said that the lack of deaths or significant injuries reported as a result of a Pacifica's lost power is "in a word, miraculous," and urged NHTSA not to wait for injuries or deaths to occur before making a move toward fixing the problem.

Source: Law360.com

## **AUTO SAFETY GROUP WANTS RECORDS UNSEALED IN CASE OVER GOODYEAR TIRES**

The Center for Auto Safety has moved to unseal records in a fraud lawsuit that could reveal how Goodyear and its lawyers allegedly sought to cover up a major safety defect through the confidential settlements of claims. The Center, which made a similar move to unseal records involving Chrysler vehicles, was granted a motion to intervene in a lawsuit against Goodyear and its lawyers.

The lawsuit, filed in 2013 and since settled, alleged Goodyear and its lawyers failed to disclose test data that would have revealed how the automaker's G159 tires, used primarily in motorhomes, suffered tread separation at high temperatures. The suit says further that Goodyear and its lawyers secretly settled cases brought over the defect. Jennifer Bennett, a staff attorney at Public Justice representing the Center for Auto Safety, said:

*These tires are still on the road today. The documents would shed light on whether there's this defect. Second, they will shed light on how Goodyear handled the defect. Was Goodyear aware of it? The allegation is that Goodyear was aware of the defect and conspired with its lawyers.*

Ms. Bennett said that among the documents the Center for Auto Safety seeks to obtain are test data, internal communications, including with Goodyear's lawyers, and claims from customers about property damage, injuries and deaths.

The case, filed in Maricopa County Superior Court, is the second filed against Goodyear on behalf of four members of the Haeger family. They were severely injured when their 38-foot motorhome veered off a New Mexico highway after the right front tire's tread separated. Let's take a brief look at these two cases:

*In the first case, which settled in 2010, U.S. Chief Judge Roslyn Silver in Arizona imposed \$2.7 million in sanctions against Goodyear and its lawyers for failing to disclose test data to the Heagers' attorney—conduct that rose “to a truly egregious level.” That order went all the way up to the U.S. Supreme Court, which in April reversed to recalculate the sanctions, which it found must be causally linked to the underlying misconduct.*

*In the second case, brought in 2013, the Haegers sought punitive damages against The Goodyear Tire & Rubber Co. and its former associate general counsel, Deborah Okey. The suit also named Goodyear's outside law firms: Fennemore Craig and one of its lawyers; Graeme Hancock, and Ohio's Roetzel & Andress.*

This defect has been said to be “more than 20 times worse than Firestone tires.” So far 41 lawsuits have been brought over the defect. The original product liability suit, filed on behalf of the Heagers in 2003, settled for a confidential amount. But in 2012, Judge Silver found Goodyear and its lawyers had refused to produce information relevant to the case. The suit alleges:

*The little voice in every attorney's conscience that murmurs turn over all material information was ignored. The second suit sought damages relating to that conduct. By fraud and deception, Goodyear was able to secretly settle cases for a small fraction of the just compensation victims were entitled to and would have received if the truth were disclosed.*

After discovery commenced in 2016, new evidence about the deaths and injuries tied to the defect came out, showing this to be a very bad tire. It's said that Goodyear has used protective orders to shield lawyers from obtaining documents in other cases. These protective orders have prohibited disclosure to the National Highway Traffic Safety Administration (NHTSA), the Department of Justice, and to the public.

Hopefully, the Center for Auto Safety will be successful in this matter. If they are valuable safety-related information will be available to the public.

Source: Law360.com

## **III. PURELY POLITICAL NEWS & VIEWS**

### **THE NATIONAL SCENE**

The Trump Administration is the worst administration for small business owners and consumers in years and perhaps ever.

Ordinary folks are being badly mistreated on a daily basis by this Administration and it has been especially hard on senior citizens, children and minorities. Anything still around with President Obama's name on it has been a target of the Trump White House. Important safety programs are being scuttled and the American public is being put at extreme risk on our highways, in the workplace, and when they use prescription drugs.

The so-called tax reform bill—one that few members of the House and Senate have even read—is a payoff to the rich and powerful and it takes care of the huge campaign donors. There is no telling what all is in the bill. There is one thing for certain, however, and that is billionaires in the U.S. will be very happy with this so-called tax reform. I will have more to say on this subject in another section of this issue.

### **THE ALABAMA SENATE RACE**

Doug Jones pulled off a major upset on Dec. 12 and became the first Democratic Senator from Alabama in 25 years, the last being none other than Richard Shelby. Ironically it was a public statement by now powerful Republican Senator Shelby asking for write-in votes that actually won the race for Doug. The statement was made into an extremely effective ad by the Jones campaign.

I wish our new senator the very best as he joins a very exclusive club in Washington. Doug has been in the spotlight and once he is sworn in those lights will get even brighter. It will be interesting to see how Doug performs in Washington on the big stage. I believe that he will be good on issues that concern ordinary folks.

## **IV. CONSUMER FRAUD & COMMERCIAL LITIGATION SECTION**

### **YEAR-END REPORT ON OUR CONSUMER FRAUD & COMMERCIAL LITIGATION SECTION**

This month we are featuring the firm's Consumer Fraud & Commercial Litigation Section, which is managed by Section

Head Dee Miles. Lawyers and support staff have been very busy over the past year and we will mention some of the cases they have handled and some they are currently working on.

### **Class Actions**

Our firm's class action practice is continuing to grow. We have cases filed all over the country ranging from consumer fraud, antitrust, employment abuses, and ERISA (Employee Retirement Income Security Act), to defective product cases. The primary reason for this growth is due to the corporate abuses occurring in the business and consumer world.

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

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

### **Volkswagen/Audi/Porsche Emissions Defect**

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

\$15 billion 2.0 Volkswagen settlement announced in July 2016; the \$4 billion 3.0 settlement announced in February 2017; and the Bosch Volkswagen settlement of \$327.5 million also announced in February 2017. In addition, Volkswagen agreed to pay \$4.3 billion in civil/criminal penalties to the federal government as part of a plea bargain. To date the Volkswagen scandal has cost Volkswagen nearly \$24 billion.

There are still other Volkswagen cases that remain pending, including the cases our firm has filed on behalf of the Environmental Protection Commission of Hillsborough County, Florida, to recover statutory penalties for violations of a local clean air ordinance for these allegations. The illegal defeat devices installed in the Defendants' diesels affect more than 1,000 vehicles in the greater Tampa area.

If you own one of the affected vehicles, and need help with your class claim, please contact one of our class action lawyers for more details.

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

### **Life Insurance**

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

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

### **Takata Airbags**

Lawyers in the Section have filed a class action lawsuit for economic losses related to the potentially defective airbags manufactured by Takata Corporation. We were fortunate to have been selected by the multidistrict litigation (MDL) Leadership to conduct discovery in this case and we have been part of the \$1.48 billion settlement reached with Toyota, BMW, Mazda, Honda, Nissan and Subaru concerning the defective air bags in these vehicles. While vehicle owners and drivers could not have known about the potential danger posed by the airbags, the Defendants knew about the defect and failed to disclose it to consumers and actively concealed that defect from the public and federal regulators. It was not until December 2011, with the fifth recall related to the same defect, that Honda finally reported the injuries and deaths related to the Takata airbags to federal regulators. To date, more than 14 million vehicles with Takata-manufactured airbags have been recalled due to the defects.

The sole remaining auto manufacturer in this case is Ford. We will continue to update consumers on the progress of the settlements.

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

### **General Motors**

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

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

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

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

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

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

The complaint was filed in a California federal court on Dec. 12, 2016. The case name is *Monteville Sloan, Jr., Raul Siqueiros et al, vs General Motors* (3:16-cv-07244) and we are in the early pleading stages of this case.

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

### Talc Litigation

Lawyers in the Section are representing a class of consumers who were deceived into believing that Johnson and Johnson's talc-based products were safe and purchased those products for genital hygiene use. Studies have demonstrated a significantly increased risk of ovarian cancer for women who use talc-containing products on their genitals. Johnson and Johnson has been aware of the risk, or should have been, for years, yet the company continues to market its products as safe for daily use. These women would not have purchased the baby powder and other talc products had they known of the increased risk of ovarian cancer, but thanks to Johnson and Johnson's marketing, they believed they were purchasing and using a safe product. Lawyers represent these

women in an effort to recover the money they spent on these cancer-causing products that they would not have spent absent Johnson and Johnson's marketing.

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

### Home Depot Data Breach

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

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

### Silent Recalls

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

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

### ERISA Litigation

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

Lawyers in the Section recently filed an ERISA class against Wells Fargo for withholding information concerning the Wells Fargo stock within the ERISA plan, which caused losses to the plan. The information involved the fraudulent accounts scheme for which Wells Fargo has now paid more than \$100 million to the Federal Government in fines and restitution. This fraudulent scheme was ongoing while bank members with knowledge of the scheme continued to suppress it while managing the assets of the ERISA plan and authorizing more company stock purchases for the plan.

Lawyers: Dee Miles and Leslie Pescia  
 Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, and Tami Lee

### Qui Tam Litigation

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

*Qui tam* actions typically begin with an employee witnessing his/her employer defrauding the government. The employee may later consult with an attorney on

another matter, but convey their knowledge of false information being given to the government. Lawyers need to be on the lookout for such information and recognize potential claims.

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

Additionally, if a *qui tam* action is successful, the whistleblower receives between 10-30 percent of the Government’s recovery. Damages under the FCA include penalties and “3 times the amount of damages which the Government sustains” due to the fraud. 31 U.S.C. § 3729(a) (1)(G). In short, the law protects and rewards whistleblowers for their instrumental role in exposing and prosecuting fraud. Lawyers in our firm have waged war against corporate fraud for more than 30 years and would welcome the opportunity to assist with any *qui tam* actions that any of our readers may have.

Our firm has about 20 *qui tam* cases filed throughout the country, but because these cases are filed under seal, we cannot discuss the cases publicly until the seal is lifted. We will continue to report on these cases as they become public.

Lawyers: Dee Miles, Larry Golston, Archie Grubb, Andrew Brashier, Tyner Helms and Paul Evans  
Primary Staff Contact: Holly Busler

### **Antitrust Cases**

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

antitrust litigation against Blue Cross Blue Shield companies.

### **Blue Cross Blue Shield**

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

Our lawyers are serving on the leadership of the multidistrict litigation (MDL). They are on the trial team and will be assisting in preparing the case for trial.

Lawyers: Dee Miles, Archie Grubb, Leslie Pescia and Chris Baldwin  
Primary Staff Contacts: Michelle Fulmer, Ashley Pugh, Whitney Gagnon, and Tami Lee

### **German Auto Cartel Litigation**

Lawyers in the Section have recently filed an antitrust class action lawsuit against the five major German automakers for allegedly acting as a “cartel” by colluding for nearly two decades to limit the pace of technological advances in their vehicles for the purpose of stifling global competition and manipulating control of the automobile marketplace. Such things as “defeat devices,” convertible roofs, body design, brakes and other electronic systems were all part of the “technological innovations inhibited” plan made among the German “cartel.”

Auto supplier Robert Bosch GmbH, has also been named in the lawsuit as a supplier that allegedly participated in the scheme to impose a “German automobile” advantage in the market. The “circle of five” and Bosch allegedly were creating a “superior German engineering automotive premium” by secretly stunting incentives to innovate through the use of limiting the pace of technology introduced in the auto market through their automobile products.

Recently, the cases were sent to an MDL (multidistrict litigation) in San Francisco, California, and as of this writing are being organized in the court for coordinated proceedings. We will keep our readers posted on any new developments on this important antitrust case.

Lawyers: Dee Miles and Archie Grubb  
Primary Staff Contacts:  
Whitney Gagnon

### **Pharmaceutical Litigation**

Lawyers in the Section handle a wide array of cases dealing with the pharmaceutical industry. These cases include AWP, unapproved drugs, Actos, Granuflo and many others.

### **State Attorney General Representation**

#### **AWP**

Our firm has represented the States of Alabama, Alaska, Hawaii, Kansas, Louisiana, Mississippi, South Carolina and Utah in a series of cases against pharmaceutical companies, known as the Average Wholesale Price (AWP) litigation. These states allege that pharmaceutical companies falsified pricing information, causing state Medicaid agencies to grossly overpay for prescription drugs. The manufacturers’ false and inflated AWP’s caused pharmacies to shop for drugs that offered the highest reimbursement from the State. The inflated AWP’s in turn provided higher sales revenue, volume and market share for the drug companies, and created dramatically steeper costs for the States.

Juries have returned more than \$600 million in verdicts for the States of Alabama, Mississippi, Kentucky, Wisconsin, Missouri and Massachusetts. We recently won the appeal of a \$30 million verdict in Mississippi Supreme Court regarding Sandoz, Inc. Meanwhile, our firm has settled with many companies in all eight states for more than \$1 billion and completed the litigation in all states, with the exception of two trials remaining in Utah.

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

#### **Molina/Unisys**

At the conclusion of the AWP cases in Louisiana, the State discovered that its data-processing firm, Molina, appears to have utilized the wrong reimbursement rate in processing payments to pharmacies. Instead of the computer system auto-



matically calculating reimbursements with the state-approved formulary, Molina programmers apparently input the wrong data points, resulting in overpayments. Beasley Allen represents the State in seeking to recoup those overpayments from the party that caused them, which appears to be Molina.

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

### **Unapproved Drugs**

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

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

### **GranuFlo**

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

suffered because of the claims submitted to the states' Medicaid office for this substandard product and Fresenius' failure, through its marketing to physicians, clinics, and citizens, to inform its customers of the proper dosage requirements.

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

### **Actos**

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

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

### **Usual and Customary**

State Medicaid agencies reimburse pharmacies for the drugs they dispense to Medicaid beneficiaries within their States. The amount that a pharmacy receives is determined by a reimbursement formulary that is set by the State and approved by the Federal government. Most States will reimburse using a "lesser of" or "lower of" formula where four to five factors are considered, and the pharmacy is paid whichever amount is the lowest. These factors usually include: Wholesale Acquisition Cost (WAC), Average Wholesale Price (AWP), the Federal Upper Limit (FUL), a

State-set Maximum Allowable Cost (SMAC), or the pharmacies' Usual and Customary price (U&C) as reported by the pharmacy seeking reimbursement. U&C is generally understood to be the price charged to a cash-paying customer. Historically, the AWP, WAC, FUL, or SMAC were lower than a pharmacy's reported U&C, so U&C was very rarely utilized in reimbursement. However, around May of 2006, the historical U&C pricing model underwent a drastic change when Walmart and Kmart introduced their nationwide discount generic drug programs. Walmart's discount program offered hundreds of generic drugs at \$4 for a 30-day supply and \$9 for a 90-day supply. Similarly, Kmart's discount drug program offered hundreds of generic drugs at \$5 for a 30-day supply and \$10 to \$25 for a 90-day supply. Those low, flat-rate prices became the pharmacy's U&C price and should have been reported to State Medicaid agencies as the U&C. Lawyers in the Section uncovered evidence that many pharmacies with discount drug programs are not, however, reporting their flat-rate prices as their U&C, causing State Medicaid agencies to overpay large, chain pharmacies by millions of dollars. We have filed cases for the State of Mississippi to hold these pharmacies accountable and are working closely with other state attorneys general regarding their potential state claims.

Lawyers: Dee Miles and Ali Hawthorne  
Primary Staff Contacts: Michelle Fulmer, Ashely Pugh, and Jessica Stapp

### **FLSA Litigation**

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

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

### **Equal Pay/Race Discrimination/ Age Discrimination**

Several Lawyers in the Section also handle other employment cases involving discrimination due to gender, race, age, culture and other factors. We recently settled several cases involving these issues

and hopefully bettered the work environment for many others.

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

### Wills and Estates

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

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

### Hospital Lien Class Actions

Lawyers in the Section have recently filed several class actions against hospitals for improperly seeking a lien against an injured Plaintiff in a typical auto accident case. If an injured Plaintiff is represented by counsel and they are being billed for the full amount of charges for medical services provided by an emergency hospital, despite the fact that the injured Plaintiff has health insurance that would cover the claims, but at a discounted rate to the hospital, a class case may exist. Simply, the hospitals are attempting profit off of an injured patient that has coverage and has an attorney seeking recovery for them and attempting to collect the full amount of medical service charges from an injured party as opposed to accepting the discounted amount for medical services pursuant to the hospital's agreement with the health insurance companies. There has been a series of these class actions filed throughout the country; we are pursuing them as well.

Lawyers: Lance Gould and Leslie Pesca  
Primary Staff Contact: Kathi Butler,  
Holly Busler and Tami Lee

### CONCLUSION

Those areas mentioned above are just some of the highlights for the Consumer Fraud/Commercial Litigation Section's work. Our lawyers and support staff continue to be dedicated to all issues involving corporate misconduct. They all do an excellent job in this area of the law. Dee Miles heads up this section and Michelle Fulmer is the Section Coordinator. They do an excellent job for the firm and have an outstanding group of lawyers and support staff working on the matters mentioned above.

## V. WHISTLEBLOWER LITIGATION

### ACTIVITY IN CFTC WHISTLEBLOWER PROGRAM INCREASING

The Commodity Futures Trading Commission (CFTC) whistleblower program has seen a surge of activity in the past few months. The agency, according to reports, paid whistleblower awards of \$45.5 million last year. CFTC Whistleblower Office director Christopher Ehrman confirmed that 2017 was a record year. The whistleblower awards were the result of valid whistleblower claims. An independent auditor's report commissioned by the CFTC Office of Inspector General confirmed the payments.

The payouts of \$45.5 million were a record for the CFTC since its whistleblower program was created under the Dodd-Frank Act of 2010. The amount is more than four times the total amount the CFTC has paid to informants since its whistleblower program launched. According to Forbes, the CFTC's whistleblower program still lags behind the Securities and Exchange Commission (SEC) whistleblower program, which was also created by Dodd-Frank to combat the rampant Wall Street fraud that dragged the U.S. into an economic crisis in 2008.

Annual increases in reports submitted to the CFTC whistleblower program indicate that more and more people are

becoming familiar with the program and its potential benefits.

The CFTC's board has approved measures to make it less risky for "would-be whistleblowers" to call out fraud and other wrongdoing. These measures prohibit employers from retaliating against whistleblowers and allow employees to sue their employer for whistleblower-related retaliation.

The CFTC has been given authority to take enforcement action against any employer that retaliates against its employees for whistleblowing activity. Like the SEC's whistleblower program, the CFTC does not disclose any information about a case that could reveal a whistleblower's identity. As we have reported, the CFTC pays monetary awards to whistleblowers ranging from 10 to 30 percent of the total sanctions when those sanctions top \$1 million.

According to Forbes, some of the whistleblower reports the CFTC received last year related to "virtual currency trading, spoofing, market manipulation, false reporting, misrepresentations to customers regarding the handling of their accounts, fraud involving foreign currency exchanges, Ponzi schemes and other off-exchange investment scams involving futures." The CFTC whistleblower program is critically important to U.S. taxpayers and consumers generally. Hopefully, any attempt to weaken the program by the Trump Administration will be rejected by Congress.

Sources: CFTC and *Forbes*

### WHISTLEBLOWERS EXPOSE ILLEGAL DRUG RECYCLING AT PENN PHARMACY COMPANY

Two separate whistleblower lawsuits accusing pharmacy company Med-Fast of Aliquippa, Pennsylvania, Iserve Technologies, a Med-Fast subsidiary, and executives of the companies have led to a \$2,666,300 settlement of criminal and civil charges connected to a scheme of recycling unused drugs for re-use and re-sale to nursing homes.

The U.S. Attorney's Office for the Western District of Pennsylvania said that Iserve pleaded guilty to participating in a conspiracy to fill prescriptions for nursing homes with recycled unused drugs that were shuffled into drug stocks on hand at Med-Fast's Institutional Pharmacy. Iserve will pay \$400,000 in forfeiture, a \$44,600 criminal fine, and a \$400 special assessment.

Additionally, the court ordered Iserve to pay the U.S. \$1,555,000 as part of a civil settlement agreement to reimburse Medicare and the Pennsylvania Medicaid program for overbilling. Federal prosecutors alleged that Med-Fast drivers collected the unused medications from nursing homes and delivered them to an Iserve operation inside the Med-Fast facility in Aliquippa. Workers at the facility would remove the recycled unused drugs and put them back into stock. This practice caused drugs from different manufacturers and different expiration dates to be mixed in with other drugs in stock bottles. The employees were then ordered to produce fake labels and send the medications out for resale to other nursing homes. The criminal charges against Iserve follow earlier guilty pleas on related charges against Gino Cordisco, the former Med-Fast vice president of store operations, and Correna Pfeiffer, the former manager of a Med-Fast Institutional Pharmacy in Aliquippa. Med-Fast and its owner Douglas Kaleugher also agreed to pay the U.S. about \$666,000 to settle civil False Claims Act allegations, bringing the total amounts paid to \$2,666,300.

According to the U.S. Attorney's Office, the civil settlement resolves allegations in two separate whistleblower lawsuits filed in federal court in Pittsburgh, Pennsylvania. The whistleblower complaints alleged that Med-Fast violated the False Claims Act by distributing and submitting claims to Medicare for the drugs it had recycled from nursing facilities serviced by its institutional pharmacy and submitting claims for drugs that differed from the medications identified as part of the claims submitted to the federal health care programs.

The settlement arising from the whistleblower complaints also resolves claims that Med-Fast violated the False Claims Act by billing Medicare and Pennsylvania Medicaid for the retail-packaged version of diabetes testing strips when it had actually supplied patients with a cheaper mail-order-packaged version of the same strips.

The conspiracy charge against Cordisco carries a maximum total sentence of five years in prison, a fine of \$250,000, or both. The conspiracy charge against Iserve Technologies, Inc. carries a maximum total sentence of five years probation, a fine of \$500,000, or both.

Sources: U.S. Department of Justice and *Pittsburgh Post-Gazette*

## ***YOU CAN BE A WHISTLEBLOWER***

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, please contact an attorney at Beasley Allen for a free and confidential evaluation of your claim. There is a contact form on our firm's website ([Beasleyallen.com](http://Beasleyallen.com)) or you may email one of the lawyers on our whistleblower litigation team: Archie Grubb, [Larry.Golston@beasleyallen.com](mailto:Larry.Golston@beasleyallen.com), Lance Gould, [Andrew.Brashier@beasleyallen.com](mailto:Andrew.Brashier@beasleyallen.com), or Andrew Brashier, [Andrew.Brashier@beasleyallen.com](mailto:Andrew.Brashier@beasleyallen.com).

## **VI. THE MASSIVE OPIOID LITIGATION**

### ***AN UPDATE ON THE OPIOID LITIGATION***

Opioid abuse has reached epidemic proportions in the United States, and deaths from opioid overdoses are skyrocketing across the country. According to the Centers for Disease Control and Prevention (CDC), 91 Americans die every day from an opioid overdose. In 2015 alone, 12.5 million people misused prescription opioids, and 33,091 Americans died from opioid overdose. In 2012, 259 million prescriptions were written for opioids, which is more than enough to give every American adult their own bottle of pills.

According to the National Institute on Drug Abuse, opioids are a class of drugs that include the illegal drug heroin as well as the legal prescription pain relievers oxycodone, hydrocodone, codeine, morphine, fentanyl and others. Opioids are chemically related and interact with opioid receptors on nerve cells in the brain and nervous system to produce pleasurable effects and relieve pain.

While opioids may be necessary in managing certain types of pain, opioid manufacturers have been aggressively pushing these highly addictive, unsafe medications, turning patients into addicts for their own corporate profits. They have intentionally misled doctors and the public about the risks associated with

these dangerous drugs, which has resulted in a public health and safety crisis created by the pharmaceutical industry putting its bottom line ahead of patient safety.

In mid-December, lawyers at Beasley Allen filed two federal lawsuits on behalf of the City of Greenville, Alabama and Houston County, Alabama against a number of manufacturers and distributors of prescription opioid medications. The complaints allege the marketing of these drugs contributed to the creation of the opioid epidemic, a public health and safety crisis. Responding to the opioid crisis has required the City of Greenville and Houston County to sustain economic damages, which include:

- costs for providing medical care;
- therapeutic care and treatments for patients suffering from opioid-related addiction or disease, including overdoses and deaths;
- costs for providing counseling and rehabilitation services;
- costs for treating infants born with opioid-related medical conditions;
- public safety and law enforcement expenses; and
- care for children whose parents suffer from opioid-related disability or incapacitation.

Additionally, dozens of other municipalities and counties around the country have filed lawsuits against opioid makers and distributors for their contribution to the nationwide opioid epidemic. In September, New York Attorney General Eric T. Schneiderman announced that a bipartisan coalition of 41 attorneys general from across the country had demanded information and documents from the manufacturers and distributors of prescription opioid drugs, part of a multistate investigation into whether the companies engaged in any unlawful practices in the marketing and distribution of prescription opioids.

In November, three hospitals in Alabama and Mississippi filed a class action federal lawsuit, which includes a claim that drug manufacturers and distributors are guilty of racketeering as defined by the government's Racketeer Influenced and Corrupt Organizations (RICO) Act. Because it is a class action, it represents all U.S. hospitals that have provided patients with opioid-related treatment.

In addition to representing counties and municipalities, we are investigating cases involving opioid-related deaths and over-

dose, or symptoms of overdose requiring hospitalization. If you have any questions regarding the litigation, or if you would like for us to review a potential claim, contact Liz Eiland or Roger Smith, lawyers in our firm's Toxic Torts Section, at 800-898-2034 or by email at Liz.Eiland@beasleyallen.com or Roger.Smith@beasleyallen.com.

#### **ALABAMA GOVERNMENTAL ENTITIES SUE OPIOID MAKERS AND DISTRIBUTORS**

Houston County and the City of Greenville are suing several manufacturers and distributors of highly addictive prescription painkillers alleging their actions are contributing to the national opioid epidemic, a public health and safety crisis. The complaints were filed in the U.S. District Court for the Middle District of Alabama by Beasley Allen attorneys in the firm's Toxic Torts Section.

Many Cities and Counties in Alabama have disproportionately suffered from prescription opioid abuse. Alabama has the highest rate of prescription opioid use in the country with more prescriptions being written than people living in the state. Opioid overdoses in Alabama have increased in recent years with 282 deaths reported in 2015 alone, according to the Centers for Disease Control and Prevention (CDC).

Opioid makers and distributors named in the lawsuits include Purdue Pharma, Teva Pharmaceuticals, Cephalon Inc., Johnson & Johnson, Janssen Pharmaceuticals, Ortho-McNeil-Janssen Pharmaceuticals, Endo Health Solutions, Allergan, McKesson Corporation, Cardinal Health Inc., and AmerisourceBergen Drug Corporation.

As more states and local governments sue opioid manufacturers and distributors, law enforcement officials are continuing their investigation into these companies. As noted in a previous report, a coalition of 41 state attorneys general subpoenaed five major opioid manufacturers and three distributors seeking information about how these companies marketed and sold prescription opioids. This investigation now includes manufacturers Purdue Pharma, Allergan, Janssen Pharmaceuticals, Teva Pharmaceutical Industries, and Endo International and distributors Cardinal Health, McKesson, and AmerisourceBergen. According to the Drug Channels Institute, the three distributors generated more than \$400 billion in revenue last

year and manage about 90 percent of the country's national drug distribution.

If you need additional information relating to this litigation, contact Rhon Jones, head of our Toxic Torts Section, or Will Sutton, a lawyer in the Section, at 800-898-2034. You can email them at Rhon.Jones@beasleyallen.com or Will.Sutton@beasleyallen.com. Rhon and lawyers in the Section are handling this litigation for the firm.

#### **OPIOID CASES CONSOLIDATED IN OHIO**

Opioid lawsuits filed in federal courts nationwide are now consolidated before a federal judge in the Northern District of Ohio. Judge Dan A. Polster will oversee the newly formed multidistrict litigation (MDL) in Cleveland.

In September, Plaintiffs filed a motion requesting the formation of a multidistrict litigation docket for the pending 66 federal lawsuits, a majority of which were filed by state and local governments. Since that motion was filed, the number of lawsuits has ballooned to 155 across 25 federal districts. These lawsuits allege that opioid manufacturers and distributors misrepresented the benefits of these drugs while downplaying the addiction risks and failing to report suspicious orders.

As mentioned above, the consequences of opioid abuse are staggering. The Centers for Disease Control and Prevention (CDC) estimates that opioids killed more than 33,000 people in 2015—nearly half of these deaths involved a prescription opioid. This number has quadrupled since just 1999, a statistic that correlates closely with the increase in sales during that time.

The economic burden imposed on state and local governments is estimated to be \$75 billion. The White House's Council of Economic Advisers estimates the total opioid epidemic cost to the American economy, which includes the value of lost lives, was \$504 billion in 2015.

As the opioid epidemic continues to grow, state attorneys general have been investigating pharmaceutical companies in a similar manner to how the tobacco industry was targeted back in the 1990s. Society needs to hold these companies responsible for placing profits over the health of American consumers.

Lawyers at Beasley Allen, working with local lawyers, have filed lawsuits against opioid manufacturers and distributors on behalf of Houston County, Alabama and the City of Greenville, Alabama. Our Toxic

Torts Section is investigating other opioid cases on behalf of governmental entities. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, Will Sutton, or Ryan Kral at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, William.Sutton@beasleyallen.com or Ryan.Kral@beasleyallen.com.

Sources: HarrisMartin, Centers for Disease Control, The White House Council of Economic Advisers

## **VII. CONGRESSIONAL UPDATE**

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#### **THE GOP TAX PLAN BENEFITS HUGE CORPORATIONS AND THE RICH**

Just before this issue of the Report went to press in December, the Republicans in Washington got their Christmas wish and gave their "fat cat" donor base the best Christmas present ever. But for many Americans they may find "a lump of coal" in their stockings. The U.S. Senate and House of Representatives passed the tax overhaul bill in a huge rush. The bill includes about a trillion and a half of dollars in tax cuts, which primarily benefit large corporations and the most wealthy Americans. Unfortunately, this legislation will increase the federal debt by as much as a trillion and a half dollars. President Trump signed the bill into law on Dec. 22 and claimed it would help middle income Americans.

The bill lowers the corporate tax rate from 35 percent to 21 percent; repeals the corporate alternative minimum tax, nearly doubles the standard deduction for individuals and restructures the way pass-through businesses are taxed. While it does provide on average lower taxes in the short term for all income brackets, the individual tax cuts will expire after 2025. The unknown features of the bill will likely negate any potential benefit to most folks.

The Tax Policy Center notes that higher income households will receive larger average tax cuts, with the largest cuts going to taxpayers in the 95<sup>th</sup> to 99<sup>th</sup> percentiles. The center reports that compared to current law, 5 percent of taxpayers will pay more tax in 2018, 9 percent in 2025 and 53 percent in 2027, leaving the biggest benefits to the top income groups.

Lawmakers who opposed the bill also argued that it benefits some industries and individuals more than others. President Trump and his businesses will benefit from this legislation. For example, the *New York Times* reports the bill provides many more favorable tax preferences for commercial real estate than were offered to other industries.

The bill passed despite polls indicating 46 to 55 percent of voters nationwide opposed the plan. Reportedly, about 6,000 lobbyists worked behind closed doors to make the final bill work to the benefit of their clients. If I were a betting man, I would bet that less than 5 percent of the total membership of Congress has even read the so-called tax reform bill. In time, it's quite possible that this legislation for Republicans in Congress will be the political equivalent of what Obamacare has been for Democrats. The only difference, however, is that Obamacare actually helped ordinary people.

Sources: *New York Times*, Housingwire, *USAToday*, CNN

#### **ALABAMA'S NEW SENATOR WANTS CONGRESS TO RENEW CHIP FUNDING**

Sen.-elect Doug Jones, D-Ala., said on Dec. 17 that it was "unacceptable" for his future colleagues in the Senate not to renew the Children's Health Insurance Program, (CHIP), which provides health insurance for 150,000 children in Alabama. CHIP, a program for families who don't qualify for Medicaid but have difficulty buying health insurance, was last renewed in 2015. CHIP is set to run out of money in March. Congress passed legislation in late December that will keep the government operational. CHIP was funded in that bill for a short time. A temporary solution is not the answer.

The Alabama Department of Public Health said on its website that it would stop enrolling children in CHIP on Jan. 1 and that children will lose coverage at the end of February "if Congress does not act soon" to restore the program. As stated above, that was temporarily averted.

Doug made renewing CHIP a part of his campaign platform. He said in a statement:

*Funding for the Children's Health Insurance Program has reached a crisis level and my future colleagues must stop playing political football with the health care of our children and act now to ensure Alabama's most vulnerable do not begin losing*

*coverage. It is absolutely unacceptable for partisan fighting to delay renewing funding for CHIP. The State of Alabama announced yesterday that it would freeze enrollment beginning on January 1<sup>st</sup> and the funding that covers more than 150,000 Alabama children is set to expire not long after. As I have said throughout my campaign and again on election night, it's time for our leaders to do what's right and extend funding for the nine million children who receive coverage from CHIP.*

I totally agree that CHIP must be funded so that the 9 million children around the country who are under the program will keep their insurance coverage. It is unthinkable that Congress would kill this badly needed program.

Source: AL.com

## **VIII. PRODUCT LIABILITY UPDATE**

### **THE POLARIS FIRE RISK**

All-Terrain Vehicles (ATVs) and Utility Terrain Vehicles (UTVs) continue to be among some of the most dangerous products manufactured for consumer use. For some time, ATVs and UTVs have created risks of injuries involving rollovers, where occupants or riders are either injured inside the vehicle or thrown from the vehicle and seriously injured.

Now, a new and very serious issue has arisen involving fire risks among users and riders of Polaris ATVs and UTVs. In 2017, Polaris has been compelled to institute four separate recalls related to fire and burn risks among its users. Let's take a brief look at the recalls.

- In the first recall (in March 2017), the Consumer Product Safety Commission (CPSC) ordered Polaris to recall some of its ATVs and UTVs for fire risks, as a result of multiple reports to the CPSC regarding fires associated with these vehicles. The recall describes the issue thusly: "The vehicle engine can misfire and the temperatures of the exhaust and nearby components can get too hot and cause the components to melt, and/or a contaminated brake master cylin-

der may cause unintended brake drag, posing burn and fire hazards."

- An updated recall was issued on additional units in April 2017, warning of an additional risk wherein the "heat shield can fall off the vehicle, posing fire and burn hazards to riders."
- In July 2017, a third recall was issued, where the defect was noted to be: "The fuel tank neck can crack or the wiring harness can overheat or short-circuit, posing fuel leak and fire hazards."
- In October 2017, yet another fire/burn recall was required by the CPSC on certain Polaris models, with the following identified hazard: "The exhaust header can crack and release hot exhaust gases into the engine compartment, posing fire and burn hazards."

The original recall involved 2016 and 2017 RZR 900, 100, Turbo and GENERAL 1000 recreational off-road vehicles (ROVs). The second recall involved 2015 Polaris Ranger XP 900, XP 900 EPS, and CREW 900. The third recall involved Polaris RZR 170 ROVs, a vehicle marketed to directly to children. The fourth recall involved the 2014 through 2016 ACE 325 units. Polaris concedes that there have been multiple reported failures (more than 30 reported incidents) that create a serious fire or burn hazard. More than 90,000 Polaris units are involved in these recalls.

Polaris UTVs and ATVs are manufactured primarily in Mexico and the United States. To have four fire/burn recalls in one year on so many different models for so many different defects is unprecedented. Such repeated incidents raise questions about the company's manufacturing methods and quality assurance review system.

One writer reported that the 2017 recalls were a continuation of multiple recalls of Polaris vehicles in 2017, not only among the ROV class of vehicles, but also among the Polaris other lines, including its three-wheeled Slingshot motorcycle and some of its Indian motorcycle vehicles. According to this source, as of March 2017, Polaris had spent more than \$120 million in warranty and legal costs associated with its recalls. Other reports are that warranty and recall costs could top \$132 million, which is especially significant considering that sales of the once popular Polaris vehicles have fallen significantly. It is not clear whether there is a correlation between the multiple recalls, but one would certainly expect that the product defect issues would affect overall sales.

On Dec. 19, 2017, Polaris and the CPSC released a “Joint Statement” regarding certain fire issues and pending recalls with the Polaris ROVs. The Joint Statement, which can be found on the CPSC website, provides that fires related to certain ROVs “have caused death, serious injuries and property damage.” Furthermore, and perhaps most disturbing, Polaris concedes that despite recall efforts to remedy fire risks, some of its ROVs continue to catch fire. The purpose of the Joint Statement is noted to be: “The CPSC and Polaris continue to work together to ensure fire risks in these vehicles are addressed. However, at this time, the CPSC and Polaris want to make the public aware of the fires involving these vehicles.” Consumers who have experienced fires and overheating-related incidents are encouraged to file complaints at [www.SafeProducts.gov](http://www.SafeProducts.gov) or by calling 800-638-2772.

Our firm is currently investigating burn and fire risks associated with Polaris UTVS and ATVs. If you know someone who has suffered a personal injury or death as a result of being burned while operating one of these vehicles or you just need more information, contact Ben Locklar, a lawyer in our Personal Injury & Product Liability Section, at 800-898-2034 or by email at [Ben.Locklar@beasleyallen.com](mailto:Ben.Locklar@beasleyallen.com).

Sources: [cpsc.gov](http://cpsc.gov), [Polaris.com](http://Polaris.com), [startribune.com](http://startribune.com), [miamiherald.com](http://miamiherald.com) and [fool.com](http://fool.com)

#### **TRACTOR MANUFACTURERS MUST INSTALL MORE SAFETY DEVICES TO PROTECT OCCUPANTS FROM FORESEEABLE TRACTOR ROLLOVERS**

Tractor accidents account for an estimated 130 deaths each year, so it is no surprise that agricultural workplaces have the highest rate of death due to work-related injuries. What is surprising is that these deaths are, in many cases, preventable. Most deaths occur when the operator falls from the tractor after the tractor tips up or completely overturns. Injury and death caused by tractor falls could be minimized or eliminated if the tractor contained safety devices such as seatbelts, rollbars, deadman switches, and rotary mower guards. Yet, even after decades of research pointing to the necessity of these safety devices, manufacturers are still reluctant to incorporate and promote the use of these devices into their tractor designs.

Until 1985, seatbelts were not installed on tractors as standard equipment. In 1986, the National Safety Council found

that less than one-third of tractors were equipped with seatbelts. Even today—almost 30 years after seatbelts became standard—tractor manufacturers are not promoting the use of seatbelts. Many tractor advertisements feature operators who are not using their seatbelts. Despite warnings on tractors suggesting the use of seatbelts, operators primarily forego the use of seatbelts in favor of less restriction.

Due to minimal seatbelt usage, it is important that tractor manufacturers incorporate other safety devices, such as deadman switches and rotary mower guards to prevent injury in case of a fall. If an operator is not using a seatbelt, a deadman switch will cut off all power to the tractor once it senses that the operator has left the tractor seat. In addition, a rotary mower guard will minimize injuries from a tractor fall by protecting the occupant from being run over by the trailing mower. When a deadman switch is combined with a mower guard, the occupant is protected from being run over and from being dragged in front of the guard for an extended distance. This minimizes the chances of the occupant’s body coming into contact with the rotating mower blade.

Seatbelts alone are not sufficient in protecting tractor occupants from injury and death just as seatbelts alone are not sufficient in protecting car occupants from injury and death. The automobile industry recognizes that passive safety devices, such as airbags, are necessary to protect car occupants from foreseeable accidents because an active safety device, such as a seatbelt, is dependent on the occupant’s choice to utilize it. Tractor manufacturers must also recognize the need for passive safety devices, such as deadman switches and rotary mower guards, that protect the occupant even if the occupant chooses not to protect himself by wearing a seatbelt.

If you need more information on this subject, contact Stephanie Monplaisir, a lawyer in our firm, at 800-898-2034 or by email at [Stephanie.Monplaisir@beasleyallen.com](mailto:Stephanie.Monplaisir@beasleyallen.com).

Source: [www.tractorlaw.com](http://www.tractorlaw.com)

#### **E-CIGARETTE HEALTH CONCERNS**

Recently, in yet another e-cigarette explosion, a 25-year-old Hawaii man is considering a lawsuit after he lost four teeth and suffered facial lacerations and burns when his vaporizer exploded in his mouth. The incident left the young man

with 40 stitches in his mouth and the need for reconstructive surgery to replace the lost teeth with dental implants.

According to news reports, it was only his third time using the device. The device was a mechanical model, which seems to be the most common device in any e-cig explosion that happens while someone is vaping. A mechanical is basically a battery tube with a button and no safety features to regulate the high-powered lithium-ion batteries used in the vaporizer. This lack of safety features can lead to different factors that can cause the battery to explode, such as overheating and over discharging.

If you would like more information about these cases, you can contact Will Sutton, a lawyer in our Toxic Torts Section. Will can be reached at 800-898-2034 or by email at [William.Sutton@beasleyallen.com](mailto:William.Sutton@beasleyallen.com).

Source: Hawaii News Now

## **IX. MASS TORTS UPDATE**

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### ***\$27.8 MILLION VERDICT IN FIRST PHILADELPHIA XARELTO TRIAL***

On Dec. 5, 2017, a jury in the Philadelphia Court of Common Pleas returned a unanimous verdict against the makers of Xarelto (Bayer and Johnson & Johnson’s Janssen Pharmaceuticals) in the amount of \$27.8 million. The verdict for Plaintiff Lynn Hartman included \$1.8 million in compensatory damages and \$26 million in punitive damages.

After taking Xarelto for more than a year, Ms. Hartman, an Indiana resident, was hospitalized for severe gastrointestinal bleeding in 2014 that she attributed to Xarelto. The internal bleeding caused Ms. Hartman to lose nearly 40 percent of her blood volume and required her to undergo four blood transfusions. She spent several days in the hospital undergoing treatment for the internal bleeding.

At trial, in addition to proving that Xarelto caused her internal bleeding, Ms. Hartman’s lawyers presented evidence that Xarelto’s label failed to adequately warn about the risks of taking Xarelto with aspirin, which Defendants knew to increase the risk of bleeding by 93 percent. There was also evidence that Xarelto’s label failed to inform doctors

that Xarelto's clinical trials showed a 50 percent increased risk of bleeding for patients taking Xarelto in the U.S. compared to patients in other countries.

The Defendants relied on Xarelto's U.S. Food and Drug Administration (FDA) approval as their primary defense to liability, but Dr. David Kessler, former commissioner of the FDA, told the jury that FDA approval is not a "get out of jail free card" for pharmaceutical companies. Dr. Kessler testified that it is Bayer and Janssen's responsibility to include clinically significant data in Xarelto's label to warn doctors of the full extent of Xarelto's risks. He told the jury that Xarelto's label understated the drug's bleeding risks and failed to warn doctors that some patients have higher risks for bleeding on Xarelto.

After a month-long trial, the 12-person jury found that Bayer and Janssen were negligent with respect to Xarelto's warning label and that their negligence caused harm to Plaintiff Lynn Hartman, awarding \$1.8 million to compensate Ms. Hartman for her injuries. The jury also found by clear and convincing evidence that Bayer and Janssen engaged in willful and wanton misconduct, triggering the \$26 million punitive damage award.

Ms. Hartman's case was the first case tried in the Philadelphia Court of Common Pleas, where there are approximately 1,500 other Xarelto cases pending. Four additional cases are set for trial in March, April, May and June of 2018. The parallel multidistrict litigation (MDL) in the Eastern District of Louisiana now contains approximately 19,000 additional Xarelto cases. Andy Birchfield, the head of Beasley Allen's Mass Torts Section, continues to serve as Co-Lead Plaintiff Counsel for the Xarelto MDL.

Beasley Allen lawyers continue to work in both the MDL and the Philadelphia litigations on behalf of thousands of individuals injured by Xarelto. If you need more information on this litigation, please contact Joseph VanZandt or Sonny Wills, lawyers in our Mass Torts Section, at 800-898-2034 or by email at [Joseph.VanZandt@beasleyallen.com](mailto:Joseph.VanZandt@beasleyallen.com) or [Sonny.Wills@beasleyallen.com](mailto:Sonny.Wills@beasleyallen.com).

### **BOSTON SCIENTIFIC SETTLES NEARLY 350 PELVIC MESH SUITS**

Recently, nearly 350 suits against Boston Scientific in multidistrict litigation (MDL) were settled. The company was accused of making defective pelvic mesh implants. The Plaintiffs and Boston Scientific filed

two joint motions for dismissal with prejudice on Dec. 12, saying they had reached a settlement for hundreds of cases in the long-running five-year-old litigation. All of the cases in the West Virginia MDL were dismissed. The dismissals are part of a confidential settlement reached about a year ago and were "an expected part of the settlement process," according to Leigh O'Dell, a lawyer in our firm. She told Law360 on behalf of the Plaintiffs:

*The settlement offered an opportunity for all of our clients to settle their claims. Nearly all claims have been resolved at this point.*

The U.S. Judicial Panel on Multidistrict Litigation in 2012 centralized three MDLs featuring 150 cases in West Virginia. Since then, the litigation has grown to seven MDLs with some 28,000 cases against Boston Scientific and other makers of the mesh, according to a recent order.

The products at issue are intended to treat stress urinary incontinence, which is the involuntary loss of urine during movement that puts pressure on the bladder, such as laughing, coughing or sneezing, and pelvic organ prolapse, which is the movement of the bladder or other organs. The mesh can fix the problem, but can also lead to punctured organs, infections, bleeding, pain during sexual intercourse and urinary problems.

In November 2014, a Florida federal jury found Boston Scientific was negligent in manufacturing the Pinnacle Pelvic Floor Repair Kit and awarded some \$27 million to four women who said they experienced infection, organ perforation, nerve damage, blood loss and chronic pelvic pain. The jury did not award punitive damages in the bellwether trial. The Eleventh Circuit Court of Appeals upheld that decision in October.

The Plaintiffs are represented by Leigh O'Dell and Andy Birchfield from Beasley Allen. The MDL is *In re: Boston Scientific Corp. Pelvic Repair System Products Liability Litigation*, (case number 2:12-md-02326) in the U.S. District Court for the Southern District of West Virginia.

Source: Law360.com

### **THE TALC LITIGATION YEAR-END REVIEW AND WHAT'S AHEAD**

It's been another extremely busy year for our firm in the talcum powder litigation. You will recall that we tried three of these cases in 2016 with verdicts of \$72 million, \$55 million and \$70 million. In

2017, we tried three cases to verdict, which included one loss, and wins of \$110 million and \$417 million. Additionally, our lawyers got two weeks into an expected six-week, three-Plaintiff trial when St. Louis trial Judge Rex M. Burlison declared a mistrial because of a new jurisdictional ruling that came out of the U.S. Supreme Court that very June morning.

A few months later our lawyers returned to St. Louis to try one of those three cases, but lost that opportunity on the eve of trial when the Defendants secured a writ of prohibition from the Missouri Supreme Court requesting more briefing on a venue issue. Since then, Judge Burlison has reviewed the \$110 million verdict and found it to be appropriate. He also reviewed the jurisdictional question raised by the U.S. Supreme Court and found jurisdiction to be proper in Missouri. This contrasts with a prior finding by the Missouri Court of Appeals that the \$72 million dollar verdict should be vacated as a result of the new U.S. Supreme Court jurisdictional law decision. We believe that the Missouri Court of appeals is incorrect and we are appealing that decision. As Judge Burlison recently determined, the facts show that the Defendants have been conducting Johnson's Baby Powder business in the State of Missouri. Because of its importance to the talc litigation in Missouri, I will write more below on the effect of Judge Burlison's order on this litigation.

All of the trial activity over the last two years has now brought this litigation to the point where appellate courts have started to and will continue to weigh in on various issues that could impact the litigation going forward. In 2018, we expect a ruling out of the Missouri Supreme Court that will allow us to proceed with the trial that was twice stalled in 2017.

We also expect the New Jersey Court of Appeals will overturn the 2016 trial Judge finding that our experts did not provide adequate evidence of causation. A similar ruling by the same trial Judge in a different litigation has already been overturned by the New Jersey Court of Appeals and is now on appeal to the New Jersey Supreme Court. We also expect that California Appellate Courts will begin reviewing the \$417 million jury verdict that was overturned by the trial judge—we expect a reversal there as well.

In addition to all the appellate activity, trials should resume in St. Louis by summer of 2018 when Judge Burlison is expected to try at least two multi-Plaintiff trials. As our lawyers prepare for addi-

tional trials, they are also busy working with 37 new expert witnesses who were recently identified in the multidistrict litigation (MDL) as witnesses for the Plaintiffs. Part of those efforts will include taking dozens of depositions of executive, employees and scientists who worked for the Defendants over the years.

One of the biggest things to happen in this litigation, to date, was discovered on the eve of trial this summer when one of our clients informed us that she had just discovered a body powder product in a drug store that carried an ovarian cancer warning. Further investigation by our lawyers revealed that Walmart and Dollar Tree now sell body powders that carry these needed warnings. These are products that compete with Johnson's Baby Powder. The warning appears to have been started following the verdicts we got in 2016. This is further proof that our civil justice system can bring about change that makes all of us safer.

#### **RECENT COURT ORDER IS VERY IMPORTANT FOR CASES IN MISSOURI**

The recent order mentioned above that upheld the \$110 million verdict in favor of our client, Lois Slemple, who proved that that Johnson & Johnson talc products caused her ovarian cancer, was extremely important. This order means that Missouri will still be home to talc litigation brought by out-of-state patients. That is because J&J used a Missouri-based company, Pharma Tech, to "manufacture, mislabel and package" the talc products at issue. Judge Rex M. Burlison found that the May verdict for Lois Slemple fell within the jurisdictional standards laid out by the U.S. Supreme Court in its June decision in *Bristol-Myers Squibb Co. v. Superior Court of California*.

This finding means that non-Missouri Plaintiffs may continue to pursue their cases in Missouri. Max Kennerly, a well-respected lawyer who is with Kennerly Loutey LLC, made this observation:

*On a larger scale, this wasn't talc made just for this single plaintiff—the manufacturing in Missouri would be true obviously for a substantial number of the plaintiffs, and potentially a majority or all of them. I think this finding really establishes specific jurisdiction for everyone, or almost everyone, just simply how the product was made in Missouri.*

Under the Supreme Court's ruling, a nonresident Plaintiff must establish that there's an independent basis for a court to have specific personal jurisdiction over a Defendant in the state. That requires a specific link between the underlying controversy and the forum state. Here, the products at issue were manufactured either in Missouri or at a plant in Georgia that was under the Missouri company's control. Ms. Slemple developed ovarian cancer in August 2012 after 40 years of using J&J's baby powder and Shower to Shower products on her genital area daily. The jury in May found in favor of Ms. Slemple on all her claims, including conspiracy, breach of implied warranty and negligence.

#### **CALIFORNIA JURY RETURNS \$4.6 MILLION VERDICT AGAINST TALC MAKERS**

A California jury has awarded \$4.6 million in punitive damages to the family of a man who developed mesothelioma from asbestos. This brings to \$22.17 million the total verdict against Imerys Talc America Inc. and Vanderbilt Minerals LLC. The second Defendant has now settled with the family. The jury in Alameda County, California, Superior Court added the punitive damages to the compensatory-damages verdict on Nov. 27 that included a stipulated \$440,000 in economic damages for Richard Booker, who died in 2016, as well as other noneconomic damages for his surviving family members.

Those damages included \$500,000 in pre-death damages and \$7.63 million in post-death damages for Richard's widow, Cheryl Booker; \$3 million each for daughters Julie Mae Porter and Denise Rodriguez; and \$1 million each for grandchildren Kaylie Klitzing, Sienna Gavino and Capri Gavino, adding up to a total of \$17.57 million in compensatory damages. Forty percent of the blame was put on Imerys, and Vanderbilt was assessed with 60 percent.

Vanderbilt settled following the compensatory verdict phase of the trial. Mr. Booker died on June 3, 2016, at 72, after developing mesothelioma from working as a paintmaker and tinter at the Dexter-Midland Chemical Co. in Hayward, California, from 1972 to 1993. Talc was used to make the paint he worked with. He lived for less than a year after his August 2015 diagnosis.

As we have previously reported, asbestos was connected to health risks as early

as the 1890s, and it was understood to be carcinogenic in some industrial sectors by the 1940s. The Nationwide Occupational Safety and Health Administration safety guidelines for workers took effect in 1971.

The Plaintiffs are represented by Joseph Satterley, Denyse Clancy and Henry Steinberg of Kazan McClain Satterley & Greenwood. The case is *Booker v. Imerys et al.*, (case number RG15796166) in the Alameda County Superior Court.

Source: Law360.com

#### **LITIGATION INVOLVING MENTOR MESH PRODUCTS**

Since 2011, lawyers at Beasley Allen have represented thousands of women who sustained serious injuries after being implanted with transvaginal mesh (TVM). These cases have involved a number of different products and manufacturers, but the serious, life-altering injuries experienced by these women—including pelvic pain, pain during sexual intercourse, urinary retention, erosion requiring surgical intervention—shared many similarities. Of the many different TVM products that have been linked to these injuries, some products stand out as being uniquely bad, including Mentor's ObTape Transobturator Sling System.

Mentor manufactured a synthetic mesh suburethral sling, known as the "ObTape," that was surgically implanted in women to treat stress urinary incontinence. Stress urinary incontinence is the involuntary loss of urine that occurs during activities such as laughing, coughing or sneezing. The ObTape was intended to treat stress urinary incontinence by providing support under the urethra, which descends downward from the bladder.

The characteristics and properties of a given synthetic mesh determine how the mesh, which is a foreign body, will perform in the body and will affect incorporation of the mesh into human tissue. One of these properties is pore size, or the space between the fibers of the mesh material.

Sufficient pore size is required to allow the introduction of macrophages (white blood cells), which play a central role in wound healing and, thus, tissue integration. When pore size is insufficient or too small to allow the passage of macrophages, the risk of infection significantly increases due to the inability of macrophages to fight off bacteria present within the mesh.

In addition to the increased risk of infection, insufficient pore size also



increases the risk of mesh erosion (also referred to as exposure or extrusion). Mesh erosion occurs when mesh passes, or protrudes, through the vagina, urethra, bladder, or other pelvic structures. In the context of transvaginal mesh, mesh erosion most commonly involves the passage through a woman's vaginal wall. The pore size of the ObTape device was insufficient to promote tissue ingrowth and led to a higher rate of infections and erosions compared to mesh with larger pores.

Although Mentor was aware that the ObTape's pore size was insufficient, it continued to promote the ObTape as a safe and effective treatment for stress urinary incontinence to physicians and patients throughout the United States.

Lawyers in our firm's Mass Torts Section currently represent a number of women who have experienced serious injuries as a result of Mentor's ObTape device. Currently, there are trial dates set for three of these women:

- Jan. 16, 2018, in the U.S. District Court for the District of Massachusetts (Boston);
- March 5, 2018, in the U.S. District Court for the Eastern District of Arkansas (Little Rock); and
- May 1, 2018, in the U.S. District Court for the District of South Carolina (Anderson/Greenwood).

Though our lawyers continue to represent women in TVM cases, our firm is no longer investigating new TVM claims. For more information on the Mentor ObTape litigation, 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](mailto:Beau.Darley@beasleyallen.com) or [Melissa.Prickett@beasleyallen.com](mailto:Melissa.Prickett@beasleyallen.com).

#### **JUDGE AFFIRMS JURISDICTION ON OUT-OF-STATE MESH CASES**

A Pennsylvania state court judge has found that the court has jurisdiction over all but one of 71 cases involving out-of-state residents suing Johnson & Johnson subsidiary Ethicon Inc. in Philadelphia's Mass Tort Program over pelvic mesh injuries. Philadelphia Court of Common Pleas Judge Arnold New denied the company's renewed bid to dismiss the out-of-state cases. There was an exception made for one case in which an out-of-state Plaintiff

was implanted with Ethicon's Prolift+M pelvic mesh device.

Although, according to the Plaintiffs, the other implants in question were made using a mesh manufactured by Secant Medical Inc. in Pennsylvania, the mesh in Prolift-M was not manufactured by Secant. Shanin Specter, a lawyer with Kline & Specter, said:

*We are heartened by Judge New's ruling affirming Pennsylvania jurisdiction for all but one of Ethicon transvaginal mesh cases. Now our badly injured clients can continue to have us try their cases, which have been overwhelmingly successful both in Philadelphia and around the country. We will appeal the adverse ruling in the lone other case.*

Judge New said in August that he would reconsider a 2015 ruling that kept alive a number of cases brought by non-Pennsylvania litigants. That announcement came after Ethicon argued in a June motion that two recent U.S. Supreme Court decisions narrowed the scope of jurisdiction for Plaintiffs looking to pursue claims in venues outside either where they were injured or where a Defendant is headquartered. Ethicon said that 91 cases pending in the Philadelphia County Court of Common Pleas should be dismissed and refiled elsewhere.

The company previously sought to have claims from out-of-state Plaintiffs, whose cases are part of a mass tort program aimed at coordinating litigation over alleged pelvic mesh injuries, dismissed for a lack of jurisdiction, but Judge New rejected its bid in March 2015. Judge New is the coordinating judge of Philadelphia's Complex Litigation Center, which handles the court's mass torts.

Renewing its effort, Ethicon pointed to a ruling from the justices in June that found Bristol-Myers Squibb Co. did not have sufficient business contacts in California to confer courts there with jurisdiction over some 600 lawsuits brought by out-of-state Plaintiffs over injuries allegedly caused by the blood thinner Plavix. The 8-1 opinion came just weeks after another ruling from the Supreme Court that found two out-of-state employees couldn't sue BNSF Railway Co. in Montana given the company's lack of a bona fide business presence in the state.

Ethicon emphasized that its position as a New Jersey-based business meant that non-Pennsylvanians could not bring their claims in Philadelphia County. Documents

in the litigation show that the original 91 out-of-state cases identified by Ethicon have been cut down to 71 cases.

Six cases in the mass tort program have gone to trial so far in Philadelphia, resulting in five verdicts in favor of Plaintiffs against Ethicon and damages now totaling just more than \$105 million.

The Plaintiffs are represented by Thomas Kline, Shanin Specter, Lee Balesky and Chip Becker of Kline & Specter PC, and Clayton Clark of Clark Love & Houston. The case is *In Re: Pelvic Mesh Litigation* (case number 140200829) in the Philadelphia County Court of Common Pleas of Philadelphia.

Source: Law360.com

#### **MORE DATA LINKS PPIs TO KIDNEY DISEASE, FAILURE**

Data from a recent analysis of studies examining the link between kidney disease and patients using proton pump inhibitors (PPIs) shows a 33 percent increase in risk of developing chronic kidney disease or kidney failure compared to non-PPI users, Eurekalert reports. The outlet cites the American Society of Nephrology (ASN), which presented the findings at its latest ASN Kidney Week conference last month.

PPIs are heartburn drugs that have been on the market since the 1980s, as Beasley Allen has previously explained. They are used to treat acid-related disorders such as stomach ulcers, gastroesophageal reflux disease (GERD) and acid reflux. Studies dating to the 1990s link PPI use to kidney disease and failure. One study from 1992 linked the drugs to Acute Interstitial Nephritis (AIN), inflammation in the spaces between the kidney tubules. Additional studies later linked the drugs to an increased risk of Acute Kidney Injury (AKI or Acute Renal Failure) and Chronic Kidney Disease.

Dr. Charat Thongprayoon, who is with the Bassett Medical Center, led a team of researchers that analyzed five published studies reporting the risk of chronic kidney disease or kidney failure among PPI users compared with non-users. There were a combined 536,902 eligible participants included in the meta-analysis. He explained that the "study demonstrates a significant association between the use of PPIs and increased risks of chronic kidney disease and kidney failure." Dr. Thongprayoon also warned doctors to use caution when prescribing PPIs, especially for chronic use. The class of drugs is

among the most commonly prescribed worldwide and includes Prilosec, Prevacid and Nexium, as Beasley Allen has discussed.

There are 315 lawsuits now pending in a multidistrict litigation (MDL) in the U.S. District Court for the District of New Jersey, according to the U.S. Judicial Panel on Multidistrict Litigation. Plaintiffs are suing PPI manufacturers including 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 Plaintiffs argue that the drugmakers failed to warn consumers about the drugs' potential to cause kidney damage.

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

Sources: Eurekalert/ American Society of Nephrology and U.S. Judicial Panel on Multidistrict Litigation

#### **APPELLATE COURT VACATES DRUG LIABILITY MDL RULING FAVORING MERCK**

The Ninth Circuit Court of Appeals has vacated a lower court win for Merck Sharp & Dohme Corp. and other drugmakers in a suit claiming that they failed to warn consumers about pancreas problems from Type 2 diabetes drugs. The class action was sent back by the Ninth Circuit to the district court. The panel said that court erroneously interpreted a U.S. Supreme Court ruling in a previous case.

In the decision, the panel agreed with the consumers that the trial judge misread *Buckman Co. v. Plaintiffs' Legal Committee*—the Supreme Court decision that found that federal law bars private parties from pursuing state law tort claims that are predicated on alleged violations of the Food, Drug, and Cosmetic Act, or FDCA. The panel said:

*The district court relied on Buckman to impermissibly circumscribe discovery. And second, the district court relied on Buckman to deem the plaintiffs' newly discovered evidence 'irrelevant' to the court's preemption analysis at the*

*summary judgment stage. Either of these errors would independently warrant reversal.*

Drugmakers Merck, Eli Lilly & Co., Novo Nordisk Inc. and Amylin Pharmaceuticals LLC defeated state law claims in the multidistrict litigation (MDL) in November 2015 when U.S. District Judge Anthony J. Battaglia ruled that the U.S. Food and Drug Administration (FDA) would have rejected labels warning patients of a potential connection between several drugs used to treat diabetes and pancreatic cancer.

The MDL, combined in August 2013, targets a class of Type 2 diabetes drugs known as incretin mimetics that has been under regulatory scrutiny since academic researchers suggested in early 2013 that they may lead to an increased risk of pancreatitis and precancerous changes in the pancreas. But the FDA and the European Medicines Agency found no firm evidence the drugs are connected to pancreas problems, according to a study released in February 2014.

The Plaintiffs in the MDL had contended that the FDA was not properly evaluating the evidence of a connection between prescription drugs Januvia, Janumet, Byetta and Victoza and that the agency's failure to act should not mean the state law claims should be rejected. But the judge ruled that the FDA's active work on the subject and its decision that a new warning label isn't warranted were enough to close out the Plaintiffs' claims.

While the case is not exactly like *Buckman*, Judge Battaglia had said in November 2015 the consumers were relying on "fraud-on-the-FDA-type allegations" that were preempted by *Buckman*. The panel disagreed, however, saying that the discovery the consumers sought was relevant to whether any causal connection existed between incretin use and pancreatic cancer. The panel said:

*The plaintiffs did argue that it would not be unduly burdensome to produce the data they requested because the defendants were required to collect and submit it to the FDA, but the duty the plaintiffs claim the defendants breached was the parallel common law duty to warn, not a duty arising from the FDCA.*

The panel also disagreed with the trial judge's ruling that the consumers' request for source files for each pancreatic cancer

event known to the company was too burdensome. The panel said further:

*Such files have been produced in pharmaceutical litigation of this sort, it is undisputed that the defendants already maintained these databases, and here, the volume of the requested data was limited.*

Consumers are represented by David Frederick of Kellogg Hansen Todd Figel & Frederick PLLC. The case is *Adams v. Merck Sharp & Dohme Corp. et al.*, (case number 15-56997) in the U.S. Court of Appeals for the Ninth Circuit.

Source: Law360.com

#### **PAYMENTS OF \$200 MILLION SETTLEMENT FUND IN MDL NEAR END**

Three-quarters of a \$200 million settlement fund have been distributed in multidistrict litigation (MDL) that once numbered 733 cases against health care providers that administered, but did not concoct, contaminated epidural painkillers linked to a deadly meningitis outbreak. Only one claim remained unresolved. Lawyers told a Boston federal judge that about \$150 million has been paid to next of kin and patients who were injured or died after being injected with prescription steroids made at the New England Compounding Center (NECC) in 2012.

Separate federal juries this year convicted two former NECC pharmacists of racketeering, but acquitted them of second-degree murder, for their roles in manufacturing and distributing the tainted drugs. The settlement fund was approved by a bankruptcy court in 2015 to liquidate NECC assets after the shuttered facility was declared insolvent, and has largely been used to offset victims' claims against third-party hospitals and pain clinics that passed NECC products on to patients.

U.S. District Judge Rya W. Zobel scheduled an April 2018 trial for the final case in the docket, a wrongful death suit that Meghan Handy brought on behalf of her deceased mother, Brenda Rozek, against Box Hill Surgery Center LLC and Ameridose LLC. Most other cases in the multidistrict litigation have been settled, some have been dismissed and others were transferred or remanded to state courts.

Former U.S. Magistrate Judge Kenneth P. Neiman and a settlement administrator, Epiq, approved a total of 2,026 claims submitted in the multidistrict litigation, tort trustee Lynne Riley of Casner & Edwards wrote in a status report filed with the

court last month. They denied 327 claims. Judge Neiman retired in 2015. More than 1,850 of those claims have been paid in full. Others are missing paperwork or have failed to complete their submissions in other ways.

Judge Zobel said that she will give the remaining claimants until March 2018 to submit necessary documents, and indicated she will order them to show cause for prolonging claims beyond then. The tort trustee is Lynne F. Riley of Casner & Edwards. The Plaintiff Steering Committee is represented by Elizabeth J. Cabraser and Mark P. Chalos of Lief Cabraser Heimann & Bernstein LLP, and others.

The cases are *In re: New England Compounding Pharmacy Inc. Products Liability Litigation*, (case number 1:13-md-02419) and *Handy v. Ameridose LLC et al.*, (case number 1:14-cv-14019) both in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

#### **MORE THAN 3,000 LAWSUITS ARE PENDING AGAINST COOK MEDICAL IVC FILTERS**

The U.S. Judicial Panel on Multidistrict Litigation (JPML) reports that there are 3,081 lawsuits pending against Cook Medical, Inc. (Cook), in a multidistrict litigation (MDL) over the company's retrievable inferior vena cava (IVC) filters. Retrievable IVC filters are used as an alternative in trauma patients when they are unable to take blood thinners. The cage-like device is used to help prevent venous thromboembolism, such as deep vein thrombosis or pulmonary embolism. It is implanted in the inferior vena cava to catch blood clots that form in the legs and keep them from reaching the heart, lungs and other vital organs, as discussed previously by Beasley Allen.

Patients have filed lawsuits nationwide against Cook and other IVC filter manufacturers because the design is more fragile than that of their predecessors—permanent IVC filters. Fragmented pieces of retrievable IVC filters can travel through the body perforating or puncturing organs and causing other potentially life-threatening injuries. In one study, the *Journal of Vascular and Interventional Radiology* reports, Cook's Celect and Gunther Tulip IVC filters have 49 percent and 43 percent perforation rates, respectively.

The U.S. Food and Drug Administration (FDA) warned in August 2010 that retrievable IVC filters should be implanted only for short-term use because of the adverse

effects linked to the devices, as we have previously reported. Following the FDA safety warning, filter placements dropped by 29 percent. Yet, the rate of IVC filter placement remains significantly higher in the U.S. than in five large European countries. The Cook MDL is located in the U.S. District Court for the Southern District for Indiana. Another IVC filter MDL has consolidated 3,085 claims against C.R. Bard, Inc. That is pending in U.S. District Court in Arizona, according to the JPML, while cases involving Cordis IVC filters are consolidated in California state court.

If you would like more information about IVC filters, contact Melissa Prickett, a lawyer in our Mass Torts Section, at 800-898-2034 or by email at [Melissa.Prickett@beasleyallen.com](mailto:Melissa.Prickett@beasleyallen.com).

Sources: U.S. Judicial Panel on Multidistrict Litigation and *Journal of Vascular and Interventional Radiology*

#### **RISPERDAL PLAINTIFF GRANTED RETRIAL AGAINST J&J AND JANSSEN PHARMACEUTICALS**

The Superior Court of Pennsylvania has granted a young man's motion for retrial against Johnson & Johnson and its subsidiary Janssen Pharmaceuticals, the maker of the anti-psychotic drug Risperdal. By granting the retrial, the court reversed the only Risperdal jury verdict that had been handed down in favor of the Defendants. Like thousands of other Plaintiffs, the young man in this case (designated as W.C.) alleges the Defendants failed to adequately warn about the risk of gynecomastia (female-like breast development) in adolescent males taking Risperdal.

During the trial, a physician's assistant, Michelle Baker, testified about helping treat W.C. The appeals court said that Ms. Baker's testimony was erroneously allowed to cross the line from fact to expert by the Philadelphia Court of Common Pleas. The appellate court determined that Ms. Baker was testifying as an expert when she opined on what caused W.C.'s gynecomastia. Before she testified, her opinion had not received the level of scrutiny required of witnesses testifying as experts. That determination was the basis for granting a retrial.

W.C. was prescribed Risperdal to treat oppositional defiant disorder. As we have previously explained, the Food and Drug Administration (FDA) initially approved the drug in 1994 to treat schizophrenia in adult patients. It has since been approved to treat adolescent schizophrenia, bipolar mania in adults and children ages 10 to 17,

and symptoms of autism in children and adolescents ages 5 to 17.

Previously in the *Report*, we have described how Janssen aggressively marketed the drug for off-label uses in children and adolescents from 1998 to at least 2004. In 2013, Johnson & Johnson agreed to a \$2.2-billion settlement with the U.S. Department of Justice (DOJ) over these and other deceptive marketing practices involving Risperdal. At least five Risperdal Plaintiffs have won their cases, and verdicts have been awarded ranging from \$500,000 to \$77 million.

Approximately 5,500 claims have been filed against the Defendants in the Philadelphia County Court of Common Pleas and its Complex Litigation Center. Three thousand of those lawsuits were filed between January and March of this year. In addition to the Pennsylvania cases, approximately 16,900 lawsuits have been filed over the antipsychotic drug nationwide, according to [LawyersandSettlements.com](http://LawyersandSettlements.com).

If a member of your family has been diagnosed with gynecomastia as a result of taking Risperdal, contact James Lampkin, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at [James.Lampkin@beasleyallen.com](mailto:James.Lampkin@beasleyallen.com).

Sources: PennRecord, Drugwatch.com, and [LawyersandSettlements.com](http://LawyersandSettlements.com)

#### **MEDTRONIC TO PAY \$12 MILLION TO END DECEPTIVE ADVERTISING SUIT**

Medtronic Sofamor Danek Inc. has agreed to pay \$12 million to settle claims that the company misrepresented the safety of a spinal fusion device. According to Suffolk Superior Court Justice Mark A. Hallal, the amount will be divided among attorneys general representing California, Illinois, Massachusetts, Oregon and Washington. This settlement ends the investigation into Medtronic's allegedly deceptive marketing of its Infuse Bone Graft device. Massachusetts, which filed the suit, will receive \$2.4 million from the settlement. Massachusetts Attorney General Maura Healey said in a statement:

*Companies cannot use deceptive practices to increase their profits while compromising the safety and well-being of patients. With this settlement, we are bringing more than \$2 million back to Massachusetts after uncovering this unlawful conduct.*

The suit alleged Medtronic paid physicians to publish misleading and favorable reports in journals about its Infuse device. These articles failed to disclose adverse results from clinical studies, downplayed side effects of the device, inflated its effectiveness, and didn't mention any conflicts of interest.

The articles ran in numerous journals between 2002 and 2009 without Medtronic properly disclosing its editorial influence over them. Medtronic knowingly distributed the articles in Massachusetts, and used the misleading articles when training sales representatives, the complaint alleged. The company thus misrepresented the effectiveness and safety of Infuse to Massachusetts physicians and patients. The suit said:

*Medtronic knew or should have known that Infuse's efficacy was, at best, merely equivalent to other existing therapies, and that Infuse may pose additional safety risks, including inflammatory reactions, adverse back and leg pain events, radiculitis, retrograde ejaculation, urinary retention, bone resorption, implant displacement, sterility, and cancer.*

Infuse is a device approved by the U.S. Food and Drug Administration to serve as an alternative to traditional bone grafting, in which a portion of a patient's hip bone is transplanted into their spine to stimulate growth. The settlement requires Medtronic to publicly report the results of clinical trials of Infuse on the government-run website [clinicaltrials.gov](http://clinicaltrials.gov). The agreement also establishes standards for published medical articles about Infuse clinical trials.

Massachusetts is represented by Assistant AG Lisa Gaulin. The case is *Commonwealth of Massachusetts v. Medtronic Sofamor Danek Inc.*, (case number 1784CV04030) in the Suffolk Superior Court.

Source: Law360.com

### **\$150 MILLION ABBVIE ANDROGEL JURY VERDICT OVERTURNED**

An Illinois federal judge has negated the \$150 million verdict against AbbVie Inc. and ordered a new trial. The verdict involved the testosterone replacement drug AndroGel. The result of the first bellwether trial in multidistrict litigation (MDL) was overturned by U.S. District Judge Matthew Kennelly. The jury's

verdict appears "internally inconsistent" on its face, Judge Kennelly said in a 25-page order that faulted jurors for awarding punitive damages without a compensatory award. His order said that the jury could have awarded Jesse Mitchell punitive damages only if they found that he proved every element of his misrepresentation claim, including that he was damaged as a direct result of AbbVie's alleged misrepresentations.

Instead, the jury awarded no monetary award for compensatory damages. "Of course, it would violate the precepts of logic to assert simultaneously that a party has been damaged and not been damaged," Judge Kennelly said.

The verdict had come after a three-week trial over allegations that AbbVie ignored a connection between AndroGel and heart attacks while promoting it to treat a condition for which it wasn't approved. Neither party challenged the jury's verdict clearing AbbVie of strict liability and negligence over Mitchell's underlying heart attack, but both sides told Judge Kennelly in post-trial briefing that he should interpret its \$150 million punitive damages award in their favor. However, the judge said that both Mitchell's and AbbVie's attempts at avoiding a new trial were "unconvincing."

Judge Kennelly rejected Mitchell's contention that the zeroed-out compensatory damages were an "oversight" correctable by awarding him the undisputed amount in heart attack-related medical bills, finding "one could as readily say, as AbbVie does, that the award of zero damages requires a liability finding in AbbVie's favor." But he also said he can't easily side with AbbVie's argument that he should enter judgment against Mitchell on the grounds that the jury's verdict means it found that he suffered no compensable damage. He said AbbVie's theory that the jury thought it could agree with Mitchell's fraudulent misrepresentation claim without also finding that he had been damaged "is directly inconsistent with at least two express provisions" of the instructions jurors received at trial.

And while AbbVie's theory that the jury's understanding of the word "damages" could have led to a finding that Mitchell suffered a different kind of harm than the heart attack "appears plausible at first glance," Judge Kennelly said the company failed to provide any examples of such a harm, and that agreeing with that argument would be "directly at odds" with his instruction on causation. "The court concludes that it would be commit-

ting an error if did not order a new trial," Judge Kennelly wrote, noting the jury's punitive damages award "depends upon, at least, the viability of the jury's liability finding."

The Mitchell suit in 2014 was one of thousands filed against AbbVie and other manufacturers of testosterone replacement therapy gel products, and it was consolidated in an Illinois-based multidistrict litigation.

The case is *Mitchell v. AbbVie*, (case number 1:14-cv-09178), and the MDL is *In re: Testosterone Replacement Therapy Products Liability Litigation*, (case number 1:14-cv-01748) both in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

## **X. AN UPDATE ON SECURITIES INSURANCE AND FINANCE LITIGATION**

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### **SUNEDISON YIELDCO SETTLES INVESTOR MDL FOR \$57 MILLION**

A SunEdison yieldco has reached a \$57 million settlement of multidistrict investor litigation claiming the renewable energy giant tried to stave off its bankruptcy with its yieldcos' money. A yieldco is a public company that generates cash from a group of assets, which is then paid to investors as dividends. A yieldco is created by a parent company, in this case SunEdison, and uses its operating assets to develop predictable cash flow for investors.

In addition to the multidistrict litigation (MDL), SunEdison and TerraForm, Global Inc. have also been involved in cases filed by a pair of whistleblowers and SunEdison's unsecured creditors alleging improper asset transfers between the two companies. All three actions alleged that, faced with an imminent liquidity crunch, SunEdison improperly transferred assets between itself and its yieldcos, while telling shareholders there was nothing to worry about.

The MDL focused on allegations that SunEdison's board and executives violated the federal Securities Exchange Act by issuing misleading statements to shareholders throughout that period.

Carlos Domeneck Zornoza and former TerraForm COO Francisco J. Perez Gundin, as whistleblowers, alleged that SunEdison tried to stave off the liquidity crisis by dipping into the yieldcos' assets and wrongfully terminated them when they refused to go along with the alleged scheme.

The unsecured creditors alleged that, "once the writing was on the wall," the company transferred assets to the yieldcos at below-market rates to protect them from the unsecured creditors. In June, the unsecured creditors, who had brought their claim as an adversary action in SunEdison's bankruptcy case, settled for \$32 million.

The Plaintiffs also alleged that TerraForm's underwriters were in on the scheme. TerraForm settled with the consolidated group of individual and institutional investors, releasing the yieldco's underwriters, which included J.P. Morgan, Goldman Sachs and Morgan Stanley. The settlement ended one of the multiple suits involving the relationship between now-bankrupt SunEdison Inc. and TerraForm. The Plaintiffs, in support of the plan, told the court in a brief:

*Plaintiffs estimate that the proposed settlement returns between approximately 21.4 percent to 30.3 percent of estimated damages — well above the median settlement for similar securities class actions.*

The case is *In Re: SunEdison Inc. Securities Litigation*, (case number 1:16-md-2742) in the United States District Court for the Southern District of New York.

Source: Law360.com

## XI. PREMISES LIABILITY UPDATE

### **A LOOK AT ELEVATOR OR ESCALATOR INJURY LITIGATION**

What are the dangers associated with elevators or escalators?

The Consumer Product Safety Commission (CPSC) reports that more than 17,000 people are injured each year in the United States on elevators and escalators, and there are approximately 30 deaths. A majority of escalator injuries occur to children.

These injuries range in severity from abrasions and bruises to degloving and complete amputations of fingers and toes and sometimes hands and feet. The data from these injuries reveals that the most common types of injuries are entrapment injuries and falls.

Within the entrapment category, most common are injuries arising from entrapments between the front and rear of adjacent escalator steps, between the side of escalator steps and the escalator skirt (the interior sidewall of the escalator) and injuries occurring at the combplate (the piece with the menacing looking teeth on the floor at the top and bottom of escalators). However, manufacturers, maintenance providers and owners of escalators and elevators can take steps designed to prevent such tragic injuries.

What can be done to protect individuals from elevators or escalators?

One of the ways injuries can be prevented is through the consistent use of proper warnings. The American Society of Mechanical Engineers (ASME) and the American National Standards Institute (ANSI) Escalator Committee established a standard for escalators. The Consumer Product Safety Commission (CPSC) communicated that standard to the public in the mid 1990s, and the ASME/ANSI standard states that each escalator step should have "painted foot prints" or "brightly colored borders." However, look carefully at the next escalator you ride—most are not painted.

In addition to the lack of warning stripes painted on escalator steps, most experts contend that the purported "warning" signs provided on escalators are an inadequate and ineffective means of communicating the severity of potential entrapment injuries. As a result, intended users are simply not made aware of the potential for serious and severe injuries on the escalators.

Specifically, experts contend that current escalator "warning" signs are defective because they:

- use incorrect wording to properly communicate the danger of entrapment and the severity of injury if entrapment occurs,
- use an incorrect pictogram to properly communicate the danger of entrapment between adjacent steps, and
- use incorrect color to properly communicate the danger of entrapment and the severity of injury if entrapment occurs.

Additionally, some escalator steps are designed with a pattern of interlocking step treads on the leading edges. Specific interlocking designs vary among manufacturers, and some manufacturers have stopped producing some designs altogether because of allegations that certain patterns naturally create more hazardous pinch points than others.

The ASME A17 Safety Code for Elevators and Escalators requires that adjacent escalator steps be "in mesh" during operation, however most escalators violate this requirement and you will routinely see gaps between adjacent steps as well as gaps between escalator steps and the step skirt. Current codes allow the gaps along escalator step sides to be 3/16 of an inch on each side or 3/8 of an inch if the steps can be shifted from one side to the other, but many escalators are routinely operated with much larger gaps. In addition to correcting the problem with proper maintenance, escalators can also be retrofitted with safety plates that attach to the edges of steps and close dangerous gaps.

Most escalators are comprised of a series of individual steps that are not connected to each other, but rather are connected to large chains running along the sides of the escalator. Each step rides on roller-wheels and is pulled along by the chain, which is typically pulled around a large sprocket wheel in the bowels of the escalator. Naturally, such equipment requires regular and competent maintenance to both repair and prevent wear on the many moving parts.

The large chains can stretch or elongate after years of continual use, the roller wheels (which are typically made of a rubber-neoprene like substance) harden, crack and fall apart over time and we have all seen escalator combplates that are jagged and missing teeth. Current codes require that the combplate teeth mesh with the grooves on the tops of escalator steps, and that combplates with broken teeth should be immediately replaced. However, many escalators are not maintained properly and consequently are operated with broken and out-of-alignment combplates and teeth.

Escalators and elevators that carry inadequate warnings, are defectively designed, and/or are improperly maintained can cause serious life-altering injuries to intended yet unsuspecting users. Studies and statistics show that many of the victims are children who are simply the correct height to be more susceptible to injury or their fingers are the right size to slip into dangerous gaps in escalators.

Many escalators move along at an unrelenting 90 feet per minute and do not miss a beat when they mercilessly amputate a finger or toe, changing a child's life forever. But such injuries can largely be prevented by properly designed escalators, equipped with adequate warnings, which are consistently maintained by competent technicians.

Specific and detailed discovery, as in any products case, is key to developing the maintenance history on a given escalator as well as to reveal a likely history of previous injuries. It has been said many times before and it is especially applicable in an escalator injury case: when the cost of doing business the wrong or unsafe way becomes more expensive, as a result of claims and lawsuits, for a company than it is to operate in a safe and proper manner, then the simple economics of business will dictate that companies will change and adopt the safer approach.

Lawyers everywhere who care about children should constantly inform parents of the hazards of escalators and should vigorously pursue cases involving escalator injury.

### **What can you do?**

If you believe that you have a claim our lawyers will be glad to talk with you. You may be entitled to compensation. Contact us today for a free, no-obligation legal consultation. Beasley Allen lawyers are currently investigating cases involving serious injury or death resulting from an unsafe elevator or escalator. However, they would like to investigate any claims of serious injury or death that may be the result of negligence or wrongdoing. If you need to talk with one of our lawyers, contact Sloan Downes, the Section Head Administrator, at 800898-2034 or by email at Sloan.Downes@beasleyallen.com. Sloan will put you in touch with a lawyer.

Sources: CPSC, ASME and ANSI

### **ESTABLISHMENTS MUST DO THEIR PART TO PREVENT DEADLY SHOOTINGS**

Parker Miller, a lawyer in our firm's Personal Injury & Products Liability Section, is currently investigating a case that seems all too familiar to those of us who watch the evening news. A nightclub in Atlanta failed to check its patrons for weapons before allowing their entry into a crowded venue. Hundreds, if not thousands, of people were gathered at the club in close quarters. A deranged individual entered

the nightclub with a handgun that night. Upon the slightest dispute, the man pulled his handgun and shot into the crowd. In the process, he murdered two young people and severely injured others.

Shootings in public places have become an epidemic in this country. Rare is it that we turn on the television and are not reminded of another instance where an armed assailant has carried out a murderous rampage and taken the lives of innocent people. There are a host of factors that contribute to the shooting epidemic, but one thing is for certain—public venues must do more to ensure their patrons are safe. We now know that mass shootings can happen anywhere—at a conference in San Bernardino, a church in rural Texas, a concert in Las Vegas, a night club in Orlando, or during a concert in Atlanta.

Under Georgia law, establishments have a duty to exercise ordinary care to make their premises reasonably safe for their invitees or guests. This means making sure adequate security exists so dangerous, armed patrons are not allowed access and an opportunity to kill scores of people. While most establishments do a good job of protecting their patrons, some do not. The case our firm is investigating is an example of the horrific results that occur when a venue fails to do its job. The stakes are particularly high where large crowds exist in confined spaces, where alcohol is served, or when the venue exists in an area with a history of violent criminal activity.

Lawyers in our firm are investigating negligent security cases in Georgia where people are needlessly killed because establishments, such as apartment complexes, bars, parking garages, nightclubs, or businesses, failed to protect their guests. In these cases, merely instituting basic security measures would have meant the difference between life and death.

If you have any questions about these cases, contact Parker Miller at Parker.Miller@beasleyallen.com or by phone at 800.898.2034.

### **PARENTS OF TWO HOMELESS GIRLS SCALDED TO DEATH IN NEW YORK FILE SUIT**

The parents of Ibanez and Scylee Vayoh have filed suit for the wrongful deaths of Ibanez, 2, and Scylee, 1. The children were scalded to death on Dec. 7, 2016, by radiator steam in a city-funded apartment for the homeless located in the Bronx. A valve on the radiator in their bedroom had

come off. The authorities were never able to explain how the valve became separated from the radiator. The lawsuit says the city was negligent and failed to ensure safe conditions for families seeking shelter.

The lawsuit, filed in State Supreme Court in the Bronx, blames the city for poor oversight of the apartments that it used to house the homeless. The apartments, known as "cluster-site apartments," are part of a system of thousands of units that Mayor Bill de Blasio has criticized. He said the project was rife with problems and has vowed to shut them down. The lawsuit names the owner of the building, Moshe Pillar, and Bushwick Economic Development Corporation, the social services agency that administered homeless apartments in that building under contract with the city as Defendants.

The parents moved from Maine to New York City in 2016 and promptly applied for homeless housing. Eventually, they were placed in the Bronx apartment. It's alleged that other tenants in the Bronx building had complained about problems with the radiators and that the city ignored warning signs and complaints about dangerous conditions in the building and at other cluster sites.

Source: Law360.com

## **XII. WORKPLACE HAZARDS**

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### **TOP 10 WORKPLACE SAFETY TIPS EVERY EMPLOYEE SHOULD KNOW**

Workplace safety cannot exist on best practice guidelines and policies alone. A safe working environment is based on how well the people, in both management and on the factory floor, adhere to—and communicate about—safety standards. The foundation of any successful workplace safety effort is one that encourages employees to identify unsafe behaviors and opportunities for improvement while also making well-informed safety decisions during daily routine tasks.

The following are the Top 10 Workplace Safety Tips Every Employee Should Know to help you inform your own workers and create a workplace safety environment based on shared responsibility:

- **Be Aware Of Your Surroundings**

This step requires knowing the particular hazards of your job or workplace. Once you've learned these risks, you are able to keep clear of potential hazardous areas, and potential hazardous situations. Also, always be alert of machinery.

- **Keep Correct Posture To Protect Your Back**

If you work at a desk, keep your shoulders in line with your hips to avoid back problems. If you're picking things up, use correct form so your back doesn't get hurt. Avoid stooping and twisting. If possible, always use ergonomically designed furniture and safety equipment so everything you need is within easy reach.

- **Take Regular Breaks**

So many work-related injuries and illnesses occur because a worker is tired, burned out and not alert to their surroundings. Taking regular breaks helps you stay fresh on the job. One trick to staying alert is to schedule the most difficult tasks when your concentration is best, like first thing in the morning.

- **Use Tools And Machines Properly**

Take the proper precautions when using tools, and never take shortcuts. Taking shortcuts is one of the leading causes of workplace injury. It's a huge safety risk to use scaffolding as a ladder or one tool in place of another for a specific job. Using tools the right way greatly reduces the chance of workplace injury.

- **Keep Emergency Exits Easily Accessible**

In case of an emergency, you'll need quick, easy access to the exits. It's also recommended to keep clear access to equipment shutoffs in case you need to quickly stop equipment from functioning.

- **Report Unsafe Conditions To Your Supervisor**

Your supervisor needs to be informed about any workplace safety hazards or risks. They are legally obligated to ensure their employees have a safe working environment and will take

care of the unsafe conditions and make them safe for you and your coworkers.

- **Use Mechanical Aids Whenever Possible**

Instead of attempting to carry or lift something that's really heavy in an attempt to save a sliver of time during your workday, take the extra minute to use a wheelbarrow, conveyor belt, crank or forklift. Too many injury risks are involved with trying to lift something that weighs too much.

- **Stay Sober**

Around three percent of workplace fatalities occur due to alcohol and drugs. When a worker's ability to exercise judgment, coordination, motor control, concentration or alertness is compromised, this leads to any number of risks for workplace injury and fatalities.

- **Reduce Workplace Stress**

Stress can lead to depression and concentration problems. Common causes of workplace stress include long hours, heavy workload, job insecurity and conflicts with coworkers or managers. Take your concerns about workplace stress to your supervisor to see how they might help you address them.

- **Wear The Correct Safety Equipment**

If you're not wearing the correct safety equipment for a task, you may get injured. Depending on the job, equipment like earplugs, earmuffs, hard hats, safety goggles, gloves or a full-face mask greatly reduce the risk of workplace injury.

It's up to facility managers and business owners to get their employees onboard with workplace safety efforts, encouraging them to become active members in the process. Share with them the workplace injury statistics and the inherent risks their job presents to them on a daily basis. Provide incentives that reward them for exemplifying great workplace safety behavior. These simple initiatives really do make all of the difference.

If you need more information on workplace litigation contact Kendall Dunson, a lawyer in our Personal Injury & Products Liability Section, at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.

com. Kendall handles workplace litigation for the firm.

## **XIII. TRANSPORTATION**

### ***FIRM SETTLES TRACTOR TRAILER INJURY CASE AGAINST TRANS-CARRIERS, INC.***

In the early morning hours of Dec. 20, 2013, Margo Madden had just dropped off her infant daughter and was on her way to work as a high school English teacher. It was still dark outside. Mrs. Madden was on Hwy 45 between Tupelo and Prairie, Mississippi. At the same time, the driver of an 18-wheeler operated by Trans-Carriers, Inc., had stopped on the side of the highway to "relieve himself" and "check his equipment." For some unexplained reason, as Mrs. Madden got dangerously close, the Trans-Carriers' truck pulled out in front of her vehicle, blocking her path. Unable to avoid the collision, the Madden car struck the Trans-Carriers trailer totaling the vehicle and seriously injuring Mrs. Madden. She was rushed to the hospital where a team of doctors worked to save her life. She was left severely injured.

Mrs. Madden was not speeding, fatigued or using her cell phone at the time of the collision. She did try to avoid the crash, but was unable to do so. A scene witness, driving directly behind Mrs. Madden, saw the crash and testified that there was nothing Mrs. Madden could do to avoid the crash. That driver barely got stopped even though he had more warning and was a greater distance to the truck. The Trans-Carriers driver admitted that he never saw the Madden car prior to entering the car's lane of travel. The Defense experts were forced to admit that Mrs. Madden was in view and that the truck driver should have seen her in his mirrors prior to entering traffic. One Defense expert ultimately admitted that the truck driver "in hindsight" made a poor choice.

Mrs. Madden brought negligence and wantonness claims against TransCarriers and its driver. This case was particularly difficult because our client hit the back of the truck and the accident report had placed fault on Mrs. Madden. We were able to depose the state trooper who investigated the case. He admitted there was not enough information to place fault on anyone. It was revealed through pre-trial discovery that TransCarriers had a policy against truck drives stopping on

the side of the road absent an emergency. All witnesses in the case admitted there was no emergency and one Defense expert reluctantly agreed that the truck driver probably violated his company policy.

Several depositions were taken in the case, including those of experts hired by both sides in the areas of accident reconstruction, human factors, trucking industry standards, and injury causation. In addition, several hundred pages of internal documents were produced by TransCarries for our review.

The case settled on the eve of trial for a confidential amount. Chris Glover, who is in our Atlanta office handled the case for our firm. Chris says that he was honored to represent Mrs. Madden and was very glad to get a good settlement for her.

Chris is experienced in representing clients in truck accident cases. In fact, he recently wrote a book on the subject, *An Introduction to Truck Accident Claims: A Guide to Getting Started*, which serves as a primer for lawyers interested in this type of litigation. It is available free to lawyers at [www.chrisglover-law.com/book](http://www.chrisglover-law.com/book). You can contact Chris at 800-898-2034 or email [Chris.Glover@beasley-allen.com](mailto:Chris.Glover@beasley-allen.com).

#### ***RUNWAY INCURSIONS INCREASE IN U.S. FOR FOURTH CONSECUTIVE YEAR***

Without a doubt the holiday season is the busiest time of the year for air travel in the U.S. The trade group Airlines for America predicts 51 million passengers will fly globally on U.S. airlines between Dec. 15, 2017, through Jan. 4, 2018, which is a 3.5 percent increase in the number of passengers who flew during the same time last year.

The growing number of air travelers may be good for industry profits, but is not always good for passenger safety, according to the latest runway incursion report by the Federal Aviation Administration (FAA). Growing demand can translate into crowding and confusion on airport tarmacs.

The report provides data about the number of occurrences “involving the incorrect presence of an aircraft, vehicle or person on the protected area of a surface designated for the landing and take off of aircraft,” the FAA explains. The total number of incursions increased for the fourth consecutive year, climbing from 1,548 in fiscal year 2016 to 1,740 in fiscal year 2017. The consistent increase in

incidents comes despite federal efforts to reduce incursions.

There are four levels of incursion severity and the FAA’s latest report on the most severe incidents classified as A and B incursions shows a decrease. Yet, an increasing number of high-profile incidents continue raising questions about passenger safety while their aircraft is on the ground.

In February, Harrison Ford, the *Star Wars* and *Indiana Jones* star, landed his Aviat Husky plane on a taxiway that was parallel to the runway he was cleared to land on, USA Today reported. The star and aviation enthusiast alleged that he was distracted by turbulence from another aircraft when he erroneously flew his plane over a Boeing 737 with 116 people on board at the John Wayne Airport in Orange County, California.

A similar incident occurred with a commercial jet in July at the San Francisco (SFO) airport. An Air Canada plane flew hazardously low—59 feet off the ground—over four other aircraft awaiting takeoff with an estimated 1,000 passengers on board, according to *Mercury News*. The plane was attempting to land on a taxiway that was parallel to the runway where it was supposed to land. It even dropped off the air traffic controller’s ground surveillance system during the last 12 seconds of its approach. The plane finally aborted the landing when “a flight crew member from a jet on the taxiway” alerted the Air Canada crew and air traffic control about the imminent danger, *Mercury News* reported.

One pilot explained that if the Air Canada crew had waited only five seconds longer to abort, the plane would have hit a United Airlines 787 jet that was headed to Sydney, Australia, and filled with fuel and passengers. This incident could have caused one of the most devastating aviation disasters in the U.S., experts say.

Following Air Canada’s close call at SFO, the FAA began implementing a safety recommendation it rejected six years earlier, Bloomberg Technology explained. In 2011, The National Transportation Safety Board (NTSB) recommended upgrading the software used by ground radar systems after investigating a similar incident that occurred in 2009.

A Delta Air Lines plane landed on a taxiway at Atlanta’s Hartsfield-Jackson International Airport and the investigators determined that major airports could update existing radar systems to aid fatigued pilots landing planes at night. The systems were originally designed to

prevent incursions and collisions specifically on runways as opposed to taxiways. However, the upgraded systems will alert controllers if a plane is heading down a taxiway rather than a runway.

When the NTSB first issued the recommendation, the FAA refused to even study its feasibility. The agency believed the upgrade could potentially diminish the software’s performance, something that would not be offset by new capabilities. Revisiting a seemingly simple solution to protect passengers is a step in the right direction for the FAA, especially since other efforts have not proven effective in reducing runway incursions.

Mike Andrews, a lawyer in our Personal Injury & Products Liability Section, handles aviation litigation for the firm. For more information about this topic, you can contact Mike at 800-898-2034 or Mike.Andrews@beasleyallen.com. Mike also recently published a book, *Aviation Litigation & Accident Investigation*, which is free to lawyers. To obtain a copy, visit [www.mikeandrews-law.com/book](http://www.mikeandrews-law.com/book).

Sources: Airlines for America, Federal Aviation Administration, *USA Today*, *Mercury News*, and Bloomberg Technology

#### ***VICTIMS OF 2015 BUS CRASH IN JEFFERSON COUNTY AWARDED \$12 MILLION IN DAMAGES***

A Jefferson County, Alabama jury awarded \$12 million last month to a number of passengers who were injured in a 2015 MAX bus crash in Fairfield. The Birmingham-Jefferson County Transit Authority (BJCTA) operates the system. The evidence in this case revealed that a number of safety-related changes are badly needed.

During the trial it was proved that the driver started to slump over the steering wheel and fainted. The bus went out of control and ran over a curb, falling on its side into a ravine. The jury heard that the bus driver had been involved in 14 accidents while driving a MAX bus. The bus driver, who had worked for the BJCTA since 1988, had a medical condition that caused him to faint. The BJCTA was aware of that issue, but had no policies or procedure in place to remove him, or other drivers who were unsafe to be on the road.

The BJCTA’s existing process requires visually evaluating employees when they arrive to work, before giving them a key card that allows them to drive a bus. Those supervisors are not informed about the individual drivers’ medical history or



conditions. The supervisor in this case had no way of knowing the driver had a history of fainting, nor that he had not taken his medication that day.

Of the \$12 million verdict, \$6 million was for compensatory damages and \$6 million for punitive damages. The punitive damages will be divided equally between each Plaintiff. Sara Williams, Braden Bishop, Daniel Lehane, Ronald Jackson, Hiram Griffin and Antonio Spurling represented the Plaintiffs in the lawsuit. The claims involved severe personal injuries and one death. Sara Williams and Brandon Bishop were the lead lawyers in the trial.

#### **DOT RESCINDS EMERGENCY BRAKES MANDATE FOR CRUDE OIL TRAINS**

The U.S. Department of Transportation (DOT) is rescinding a 2015 final rule requiring trains carrying crude oil, ethanol and other flammable liquids to be outfitted with electronically controlled pneumatic brakes (ECP brakes), saying it's unclear whether the perceived safety benefits justified the costs to railroads. The DOT will rescind the ECP mandate finalized by the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Federal Railroad Administration (FRA) in 2015. The DOT determined there wasn't sufficient justification for mandating expensive ECP brakes on trains.

The DOT said it made the determination after the National Academy of Sciences' Transportation Research Board, the U.S. Government Accountability Office (GAO) and the FRA conducted studies—on orders from Congress—to more thoroughly examine whether the advanced braking systems truly provided meaningful safety benefits that would justify the amounts railroads would have to spend to install them.

The ECP mandate, which was part of the May 2015 enhanced tank car final rule issued by PHMSA and the FRA, required trains carrying crude oil and operating at speeds of more than 30 mph to be equipped with ECP brakes by 2021, while trains carrying ethanol and operating at more than 30 mph would have until 2023 to have ECP brakes installed.

ECP brakes provide an electronic brake signal instantaneously throughout the train, allowing train cars to brake faster than with conventional air brakes, which were first developed in the late 1800s and are still widely used in the industry today. But on Oct. 16, the DOT agencies published a revised regulatory impact analysis.

The revised analysis was mandated by Congress when it enacted the Fixing America's Surface Transportation (FAST) Act in late 2015. This came after complaints from the rail industry. The October 2016 study, as well as the separate review by the National Academies, raised doubts about the DOT's methodology for justifying the ECP mandate and gave the industry and its supporters ammunition in their fight to get the provision stricken from the broader tank car rule.

Safety advocates and labor unions have stood behind the ECP mandate and call the repeal a major setback for safety. John Risch, the national legislative policy director for the transportation division of SMART, had this to say:

*Clearly the railroad industry's overwhelming influence over the Trump administration is paying off in repealing the ECP brake rule. ECP brakes are the safest, most advanced braking systems in the world and without some government requirement we will continue to use our current, outdated 150-year-old braking technology for the foreseeable future.*

The DOT's public outreach efforts seeking information on other regulatory hurdles that should be eliminated could put even more freight rail proposals in jeopardy. Freight railroads recently gave the DOT its wish list for rules that should be significantly modified or dropped altogether. Safety should be a top priority for the "railroad bosses," but it appears profits top their list of priorities by a huge margin. The primary opposition to the requirement has come from these freight railroads, represented by the industry lobbying group Association of American Railroads (AAR). You shouldn't be surprised to learn that AAR also has been advocating for other DOT rules to be repealed.

The American people must be made aware of how the Trump Administration is doing everything possible to scuttle existing rules and regulations that are safety-related and, in the process, they are making our country much less safe and secure.

Source: Law360.com

#### **LAW REQUIRES LIFE-SAVING BRAKE DEVICE THAT MOST TRAINS DO NOT HAVE**

A recent train wreck in Washington where an Amtrak traveling 80 mph in a 30 mph speed zone resulted in deaths and

injuries has brought a serious safety problem back into focus. You may recall that we wrote about a train wreck in California that happened about a year ago. There a commuter train ran through a stop signal and ran head-on into an oncoming freight train, killing 25 people. After investigators determined that the crash could have been prevented by automatic-braking technology, Congress ordered all passenger railroads to install new systems by 2016. Since then, Congress has extended that deadline and trains are still speeding into preventable disasters.

The recent Amtrak derailment that killed three people in Western Washington State in November is a prime example of what can happen when safety rules are lacking or ignored. In Amtrak's case, this has become a recurring nightmare. The Washington crash was eerily reminiscent of one just two years ago in Philadelphia, where an Amtrak train raced into a sweeping curve at 106 miles an hour before jumping the tracks and rolling over. Eight people died in that crash, which also could have been prevented by the technology, known as "positive train control." But five months after it happened, Congress gave railroads at least three more years to install it. Almost 10 years have passed and trains are still crashing.

Railroads have cited the cost and complexity of adding the technology, which relies on satellites and radio signals to prevent trains from running out of control if an engineer has lost focus or fallen asleep while driving. Industry estimates of the total cost of installation exceed \$10 billion. But over the years since the mandate, railroads have continued to spend money on other priorities, including new trains and stations and passenger amenities.

The drawn-out campaign to adopt the needed technology reflects the conflicting forces at work on the nation's rails. Freight rail companies are the biggest users of tracks in most parts of the country, and those companies initially did not see enough benefits to investing in positive train control. It should be noted that passenger railroads often share tracks with the freight trains.

Installing the safety technology is only one challenge. The system requires operators of trains to be able to communicate instantly and continually with rail company back offices. Those must be connected with the track's owners so that real-time information about track conditions and switches—or curves requiring a

slowdown—can be fed into the system that automatically slows or stops a train as conditions change. And as in many other parts of the nation's train system, different entities own different pieces. If all three of the components are not harnessed together and working, then none of it works.

Senator Richard Blumenthal of Connecticut, a Democrat who sits on the Senate Committee on Commerce, Science and Transportation, called the delays in adopting the technology “scandalously irresponsible.” The senator added: “They have been directly the result of railroads using their political sway to achieve repeated postponements.”

The Senate committee plans to hold an oversight hearing on the status of positive train control this winter, in the wake of the Washington State crash. Joseph Boardman, a former chief executive of Amtrak, told the *New York Times* the company could have had the system in place throughout the corridor more than 15 years ago if Congress had not kept cutting the railroad's funding. “It's the same problem that you see everywhere with the infrastructure funding—not enough being available to do the job,” he said.

For Amtrak, the crash in Washington has reinforced the view that the railroad may be skimping on safety. In 2016, one of its trains slammed into a piece of maintenance equipment in Chester, Pennsylvania, killing two workers on the tracks. In a report on that accident, Robert L. Sumwalt, the chairman of the safety board, said “Amtrak's safety culture is failing, and is primed to fail again, until and unless Amtrak changes the way it practices safety management.”

Source: *New York Times*

## XIV. ENVIRONMENTAL CONCERNS

### **INTERNATIONAL AGENCY FOR RESEARCH ON CANCER FINALIZES BENZENE CARCINOGENICITY**

In October, 27 scientists from around the world met at the International Agency for Research on Cancer (IARC) as a working group to finalize their assessment of benzene's link to cancer, the Lancet Oncology reports. The earliest evidence of the toxic chemical's link to cancer dates back to the late 1920s, though the carcino-

genicity link was not conclusively proven until 1979 through the use of animal studies. The working group this year reviewed important new findings “from several large occupational cohort studies” offering more evidence of the link between occupational benzene exposure and cancer, specifically AML and acute non-lymphocytic leukemia.

We have previously reported that prolonged exposure to benzene, such as in the workplace, is a risk factor for the development of Acute Myeloid Leukemia (AML), which begins as Myelodysplastic Syndrome (MDS).

For those who are new to the Report, benzene is a solvent used in the rubber industry, oil refineries, chemical plants, shoe manufacturing, and gasoline-related industries, and is also found in cigarette smoke, gasoline and motor vehicle exhaust, and some glues, cleaning products, detergents, art supplies, and paints. Workers within these industries are at a higher risk of benzene exposure. The sweet-smelling toxic chemical can be inhaled or absorbed through the skin or eyes. Those who develop AML may not initially be aware they are displaying symptoms of the disease. This is because the symptoms, including fever, feeling tired, and easy bruising or bleeding present gradually and can be easily linked to other more common conditions. A combination of blood and bone marrow tests is used to diagnose AML.

If you would like more information about benzene exposure and benzene-related cancers such as AML, you can contact John Tomlinson, a lawyer in our Toxic Torts Section. John, who has handled these cases for the firm, can be reached at 800-898-2034 or by email John.Tomlinson@beasleyallen.com. You can also find more information at [www.benzene-exposure.com](http://www.benzene-exposure.com).

Source: The Lancet Oncology

### **CITY OF BOULDER OBTAINS \$3.6 MILLION SETTLEMENT FOR CLEANUP COSTS RELATED TO BENZENE CONTAMINATION AT FORMER COAL GASIFICATION PLANT**

Boulder and Xcel Energy have settled a lawsuit filed by the City of Boulder earlier this summer involving toxic chemical contamination at the 13<sup>th</sup> Street Plaza. From 1902 to 1952, the property surrounding what is now the 13<sup>th</sup> Street Plaza was owned by the Federal Gas Co., which operated a coal gasification plant that produced fuel for heaters and lanterns. That

plant was torn down in the early '60s as the country developed new sources of energy, and the land was mainly used for parking until Boulder started developing the property in 1995. Monitoring wells installed on the property in 2010 have since revealed elevated levels of benzene and naphthalene, both of which are common byproducts of coal gasification. Boulder alleged that Xcel knew of potential hazards on the site for decades but failed to disclose that information.

Benzene is a known carcinogen, which has the potential to damage the immune system and stop the production of red blood cells, leading to anemia. Naphthalene exposure can also cause anemia and damage to the liver, and can cause neurological damage in infants.

Boulder has estimated that the current and future costs related to the necessary cleanup will total approximately \$5 million. While the \$3.6 million settlement falls short of that total, the city estimated that litigation costs could have been as high as \$1 million were the case to proceed all the way to trial.

If you would like more information, you can contact Grant Cofer, a lawyer in our firm's Toxic Torts Section. Grant can be reached at 800-898-2034 or by email at [Grant.Cofer@beasleyallen.com](mailto:Grant.Cofer@beasleyallen.com).

Source: *Daily Camera*—Boulder News

### **WIFE AND ESTATE OF DECEASED MECHANIC FILES LAWSUIT OVER BENZENE EXPOSURE**

Our law firm recently filed a products liability lawsuit in The Superior Court of Fulton County, Georgia on behalf of the wife and Estate of a deceased fleet mechanic who died from Chronic Lymphocytic Leukemia (CLL), a type of cancer of the blood and bone marrow. The deceased had been a fleet mechanic for approximately 20 years and was constantly exposed to solvents and cleaners containing the chemical benzene.

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. It is also used in the manufacturing of some types of rubbers, lubricants, dyes, detergents, drugs and pesticides. Because benzene comes from petroleum, benzene is often found in oil-based paints, various degreasers, solvents, cleaners, and fuels—including diesel, gasoline and kerosene.

Persons working in close proximity to 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 CLL, acute myeloid leukemia (AML), myelodysplastic syndrome (MDS) and other forms of leukemia and lymphoma.

The recently filed lawsuit alleges that the Defendants know that the products the deceased was exposed to contained benzene and have known for years that benzene poses a health hazard and can kill humans working in close proximity to their products, yet they continued to manufacture and sell these products, while at the same time marketing the products as safe. We are very proud to be able to represent our client in her efforts to recover for the death of her husband.

John Tomlinson, the lawyer in our firm who filed the suit, is currently investigating other benzene exposure cases. If you need more information on this subject, contact John at 800-898-2034 or by email at [John.Tomlinson@beasleyallen.com](mailto:John.Tomlinson@beasleyallen.com).

#### **SCE&G FAILS TO CLEAN UP BENZENE-CONTAINING TOXIC SLUDGE**

River protection advocates in South Carolina are demanding that SCE&G clean up a slick of contaminated coal tar from the Congaree River or face a lawsuit over the utility's current plan to leave the toxic waste in the riverbed. The Congaree Riverkeeper organization has sent legal notices to SCE&G, the U.S. Army Corp of Engineers, and the Environmental Protection Agency (EPA), giving them three months to begin removing coal tar from the river. These letters are required before the organization can file a "citizen's suit" seeking to enforce federal clean water and hazardous waste laws.

The Congaree River coal tar is a byproduct of a manufactured gas plant that once operated in Columbia providing coal gas to homes in the early 20<sup>th</sup> century. However, the process of creating the gas created a sticky residue (coal tar) that was allowed to run into the ground and contaminate the Congaree. Coal tar is riddled with toxic pollutants, including the carcinogenic chemical benzene. This toxic sludge has been allowed to coat the river bottom for decades, with no effort ever having been made to clean the pollution.

SCE&G wants to cap the coal tar with stones and cloth, instead of going to the expense of dredging up the sludge and hauling it away. This plan, while opposed

by the Riverkeeper organization, has been approved by the U.S. Army Corp of Engineers. SCE&G argues that this plan will hold the coal tar in place, protect the river from contamination, and avoid the needless expense of dredging up the river bottom. The Riverkeepers, however, argue that while it would be more expensive and difficult to remove the sludge, the costs and challenges of such an undertaking do not outweigh the benefits of removal and disposal.

If you would like more information on this subject, you can contact Grant Cofer, a lawyer in our firm's Toxic Torts Section. Grant can be reached at 800-898-2034 or by email at [Grant.Cofer@beasleyallen.com](mailto:Grant.Cofer@beasleyallen.com).

Source: *The State*

#### **SPRAY FOAM INSULATION AND OTHER CONSTRUCTION WORKERS AT HIGH RISK OF DEVELOPING WORK-RELATED ASTHMA**

It is estimated that between 15 to 30 percent of asthma in adults is caused by occupational exposure. Isocyanates, a chemical component of conventional spray polyurethane foam insulation (SPF), have been reported as the leading chemical cause of work-related asthma—an illness that can limit a worker's ability to earn a living.

Spray application of SPF insulation generates isocyanate vapors and aerosols that can migrate throughout the building if it is not isolated and properly ventilated. Isocyanates are odorless and colorless and therefore do not present warning properties to alert those on the job site to possible exposure. Research data from the United States Environmental Protection Agency (EPA) indicate that inhalation exposures during SPF application will typically exceed Occupational Safety and Health Administration (OSHA) occupational exposure limits. Both inhalation and skin exposures to isocyanates can lead to the development of chemical sensitization and work-related asthma.

According to the National Institute for Occupational Safety and Health (NIOSH), some workers who become sensitized to isocyanates are subject to severe asthma attacks if they are exposed again. Death from severe asthma in some sensitized persons has been reported. Sensitization may result from either a single exposure to a relatively high concentration or repeated exposures to lower concentrations over time. If a worker is allergic or becomes sensitized to isocyanates, even exposure to low concentrations can

trigger a severe asthma attack or other lung effects, or cause a potentially fatal reaction. There is no recognized safe level of exposure to isocyanates for sensitized individuals.

In addition, once a worker is sensitized to isocyanates and has developed work-related asthma, it is possible for asthma symptoms to be triggered by exposures to everyday substances, including dust and hot or cold air. Because these conditions and substances are often found in abundance on most construction sites, developing work-related asthma could make working on most construction sites difficult. This could jeopardize or cut short a worker's career in the construction industry, thereby forcing the worker to seek less strenuous, and often lower-paying jobs.

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

#### **CHEMICAL SAFETY BOARD SUED OVER ACCIDENT REPORT RULES**

Environmentalists have sued the U.S. Chemical Safety and Hazard Investigation Board (CSB), alleging the agency has failed to publish regulations for accidental chemical-release reporting as required by the Clean Air Act (CAA). In a complaint filed last month in D.C. federal court, Air Alliance Houston, Public Employees for Environmental Responsibility (PEER) and other environmental groups say that the CAA requires the Chemical Safety Board to establish requirements for reporting accidents. While having acknowledged the mandate, the suit says, the CSB has not taken final action since the enactment of the 1990 Clean Air Act Amendments.

PEER said in a statement that the lawsuit seeks to force the CSB to establish guidelines for the disclosure of air pollutants accidentally emitted by any industry within the agency's jurisdiction. The CSB is charged with investigating chemical fires, explosions, leaks and other accidents. The group says the need for such a rule was highlighted this summer when Arkema Inc.'s liquid organic peroxide manufacturing plant caught fire in the

wake of historic flooding from Hurricane Harvey. PEER lawyer Adam Carlesco said in a statement:

*America's sole industrial safety monitor is currently flying blind and placing the health of the public at risk. Congress has clearly required, and the CSB has acknowledged, that a rule must be promulgated to inform the public as to what chemicals industries have spewed into the atmosphere following an accident. Our lawsuit would finally implement this unambiguous yet long-neglected mandate.*

According to the lawsuit, the CSB in 2009 published an advance notice of proposed rule-making for chemical release reporting but took no further action. In addition, the complaint says the Office of Inspector General of the U.S. Department of Homeland Security, the U.S. Government Accountability Office and the Office of Inspector General of the U.S. Environmental Protection Agency have separately noted the CSB's lack of air pollution reporting guidelines for accidents.

At least two lawsuits have been filed against Arkema over the releases from its facility. One was filed by first responders that alleged no one told them about the dangers associated with the chemicals released during the fires and explosions. A separate class action alleged that the company "could have prevented or avoided the accident with better precautionary measures."

The Plaintiffs are represented by Paula Dinerstein of Public Employees for Environmental Responsibility. The case is *Air Alliance Houston et al. v. U.S. Chemical Safety and Hazard Investigation Board*, (case number 1:17-cv-02608) in the U.S. District Court for the District of Columbia.

Source: Law360.com

#### **STUDY OF LONG-TERM PFC HEALTH PROBLEMS AUTHORIZED**

The National Defense Authorization Act signed by President Trump included a provision that authorized the Centers for Disease Control and Prevention (CDC) to undertake a five-year, \$7 million study of health effects posed by long-term exposure to the perfluorinated chemicals (PFCs) PFOA and PFOS. This funding is crucial to fully understanding the impact of these chemicals because scientific studies to date have been limited.

PFOA and PFOS persist in the environment for years and accumulate in the body. Exposure over one's lifetime can lead to a number of health problems including testicular cancer, kidney cancer, ulcerative colitis, thyroid disease, high cholesterol and pregnancy-induced hypertension. Consequently, the Environmental Protection Agency (EPA) set a lifetime health advisory of exposure to PFOA and PFOS at 70 parts per trillion.

The extent of the public's exposure to PFOA and PFOS was relatively unknown until the EPA tested certain water systems nationwide between 2013 and 2015. It discovered the drinking water for 5.2 million Americans had PFC levels higher than the EPA's lifetime health advisory. Since then, a number of water systems and individuals across the country have filed lawsuits seeking compensation for the installation of filtration systems capable of removing these chemicals.

Our firm, along with Roger H. Bedford of Roger Bedford & Associates, has filed lawsuits on behalf of the water systems in Gadsden and Centre, Alabama. These complaints allege that carpet and textile companies, manufacturers, and chemical suppliers located upstream in Dalton, Georgia 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 in our firm's Toxic Torts Section are investigating other PFC contamination cases. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, or Ryan Kral, lawyers in the Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, or Ryan.Kral@beasleyallen.com.

## **XV. UPDATE ON NURSING HOME LITIGATION**

### **NURSING HOME INDUSTRY CONTINUES TO FIGHT REGULATIONS THAT WOULD PROTECT THE SAFETY OF NURSING HOME RESIDENTS**

Recently, several disastrous events have occurred that spotlight the nursing home industry's inability or unwillingness to protect the safety and wellbeing of its resi-

dents. Following Hurricane Irma, 14 Florida residents died when the air conditioning failed at their nursing home, while many wheelchair-bound residents languished in floodwaters for hours at a nursing home in Texas. Also, in Puerto Rico, following Hurricane Maria, many nursing home residents went without power or supplies long after the storm passed. Despite these glaring deficiencies in the industry's emergency preparedness protocols, the nursing home industry continues to fight government regulations that seek to protect nursing home residents.

Within days of Hurricane Irma, Florida Governor Rick Scott used his emergency powers to issue a new rule requiring nursing homes to have backup generators that could provide enough power to keep facilities running for four days. However, rather than working to comply with the rule and protect their residents, the nursing home industry challenged Gov. Scott's rule in court. The industry's efforts to scuttle measures designed to protect nursing home residents were also on display during a public hearing held by Florida's Agency for Health Care Administration regarding a proposed rule like the one issued by Governor Scott. At the hearing, lobbyists for the nursing home industry opposed the rule and complained about the costs and time constraints nursing homes would suffer by complying with the life-saving rule.

In 2015, about 68 percent of U.S. nursing homes were owned by for-profit corporations. Medicare, funded by the American taxpayer, spends \$55 billion on nursing home care for approximately 870,000 residents. Despite regulations requiring nursing homes to provide "services to attain or maintain the highest practicable physical, mental and psychosocial well-being" of each resident, the industry's actions clearly demonstrate its commitment to put profits ahead of its obligation to protect and care for its elderly and infirm residents, even though American taxpayers pay the majority of America's nursing home bills.

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 had a family member who was catastrophically injured or died, or you have any questions about nursing home abuse and neglect, contact Chris Boutwell, who handles nursing home litigation for our

firm, at Chris.Boutwell@beasleyallen.com or by phone at 800-898-2034.

Sources: AARP Bulletin, Wall Street Journal

## XVI. CLASS ACTION LITIGATION

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### **MARVELL'S \$72.5 MILLION STOCK-DROP SETTLEMENT WITH INVESTORS IS APPROVED**

A California federal judge has given preliminary approval to Marvell Technology Group Ltd.'s agreement to pay \$72.5 million to end an investor class action alleging the company's stock dropped 16 percent after inflated revenue projections didn't pan out. The approval came two days after the company proposed the settlement and nearly two months after U.S. District Judge William Alsup certified a class of investors in their claims that the company used accounting tricks to make its financial performance look better than it actually was.

*The plan stated in a motion for preliminary approval:*

*Lead plaintiff believes that the claims asserted in the litigation have merit and that the evidence developed to date supports the claims. However, lead plaintiff and its counsel recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the litigation against defendants through trial and through appeals.*

Judge Alsup has scheduled a settlement hearing for final approval on April 17, 2018, and appointed Gilardi & Co. LLC as the claims administrator for the class. The judge wrote:

*The court approves, as to form and content, the notice of proposed settlement of class action ... the proof of claim and release form ... and the summary notice.*

Plumbers and Pipefitters National Pension Fund, the lead Plaintiff, said that a settlement would help the parties avoid a long fight over the veracity of the investors' claims. The shareholders alleged that the semiconductor company inflated its revenue figures by "cannibalizing" expected future sales and making them

look like current sales, an argument the investors said was bolstered by recently proffered internal documents from Marvell's forensic accountant, KPMG LLP.

The suit, filed in September 2015, claimed that Marvell borrowed from future sales to inflate its quarterly revenue numbers in U.S. Securities and Exchange Commission (SEC) filings, and that those "pull-in transactions" were the result of a numbers-obsessed culture at the company. The suit was filed soon after the company reported a loss of \$382.4 million for its fiscal second quarter, a period analysts had predicted would end in a \$11.9 million profit. When the news became public, Marvell stock took a 16 percent hit of \$1.71 per share.

PricewaterhouseCoopers LLP, Marvell's longtime auditor, resigned in 2015, spurring chatter about whether its management knew of its securities violations, according to the shareholders. In September, the shareholders won a bid to see some work papers from the company's forensic accountant, court records show. In October, Judge Alsup heard arguments on why the claims should be heard as a class, and then certified a narrower than requested group, limiting the class to investors who had bought in from February 2015 to December of that year.

The shareholders are represented by Ellen Gusikoff Stewart, Jonah H. Goldstein, Scott H. Saham, Matthew I. Alpert, Carissa J. Dolan, Shawn A. Williams and Jason C. Davis of Robbins Geller Rudman & Dowd LLP; and Louis P. Malone of O'Donoghue & O'Donoghue LLP. The case is *Luna et al. v. Marvell Technology Group Ltd. et al.*, (case number 3:15-cv-05447) in the U.S. District Court for the Northern District of California.

Source: Law360.com

## XVII. THE CONSUMER CORNER

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### **THE PERSONAL CARE PRODUCTS SAFETY ACT MAY FINALLY BRING COSMETICS INDUSTRY UNDER STRICTER FDA REGULATION**

With more than \$400 billion in sales, cosmetics and beauty products have created a lucrative industry. Most consumers would be shocked to learn that the cosmetics industry receives little oversight in manufacturing safe products. The lack

of oversight has led to almost 400 adverse events being reported each year associated with the use of unregulated cosmetics.

While the Food and Drug Administration (FDA) has regulatory authority of cosmetics under the Federal Food, Drug, and Cosmetic Act (FDCA), cosmetics receive far less oversight than other FDA-regulated products. For instance, the FDA does not have to approve the safety or efficacy of a beauty product before it can be placed on the market. Neither do cosmetics manufacturers have to disclose a product's ingredients.

The FDA does not require cosmetics manufacturers to register with FDA or report adverse events to FDA. Cosmetics manufacturers do not have to comply with FDA-mandated recalls. That is because the FDA does not have the authority to demand such recalls for cosmetics.

Hair care, skin care, and tattoos are the three most commonly reported product types in causing adverse effects in consumers. The WEN class-action lawsuit that settled last year for \$26.3 million illustrates the crisis consumers will face without further FDA oversight. WEN is a shampoo manufactured by Chaz Dean Cleansing Conditioner products. Chaz Dean is a celebrity stylist and the face of WEN. In 2016, the FDA received 1,386 adverse event reports from consumers about WEN. This is the largest number of reports ever associated with any cosmetic hair cleansing product. Consumers reported hair loss, hair breakage, balding, itching, and rash after using WEN products. In its investigation of WEN, the FDA learned that Chaz Dean had received more than 21,000 complaints directly from consumers but had failed to pass these complaints on to the FDA. Even worse, the manufacturer failed to remedy or recall its unsafe product.

On May 11, 2017, U.S. Senators Dianne Feinstein and Susan Collins introduced The Personal Care Products Safety Act (S. 1113) that seeks to increase the FDA's oversight of cosmetics companies in the following ways:

- Facilities that manufacture, process, pack or hold cosmetics would be required to register with FDA. This includes any factory, warehouse, or establishment, except for beauty shops, product retailers, health care facilities, public health agencies, hotels, trade shows, domestic manufacturers with less than \$100,000 in gross annual sales of cosmetic products, and research use of cosmetics not for sale.

- FDA would be required to evaluate a minimum of five ingredients per year to determine their safety and appropriate use. The bill specifies the first five ingredients for FDA review: diazolidinyl urea (preservative), lead acetate (color additive), methylene glycol/methanediol/formaldehyde (hair straighteners and preservatives), propylparaben (preservative), and quaternium-15 (formaldehyde-releasing preservative and surfactant). The legislation would require FDA to assess the safety of cosmetic ingredients by determining whether there is “adequate evidence to support a reasonable certainty among competent scientists that the ingredient is not harmful.”
- FDA may establish conditions for safe use of an ingredient, including a limit on the amount of the ingredient or a requirement for a warning label.
- FDA would have the authority to order recalls of cosmetic products that pose safety risks to consumers.
- Cosmetics companies would be required to submit ingredient statements on an annual basis and pay fees to FDA that would be used for “cosmetic safety activities.”
- Companies would be required to submit annual reports of all adverse events, and would be required to report serious adverse events, such as those resulting in death or disfigurement, within 15 business days after notification of the event.

The bill prohibits states from imposing different or additional regulations than those put on by the FDA. Senator Feinstein explained the need for this legislation as follows:

*From shampoo to lotion, everyone—women, men, children—uses personal-care products every day. Despite the universal use of these products, none of their ingredients have been independently evaluated for safety. This puts consumers’ health at risk and we urgently need to update the nearly 80-year-old safety rules.*

While FDA regulation will be costly for companies, it will also provide greater certainty for the cosmetics industry. Regulation would set expectations for safety that apply to all manufacturers. In addition, manufacturers would know the consequences for failing to provide safe prod-

ucts. Surprisingly, many large beauty companies support the legislation, including Estée Lauder, L’Oréal, Johnson & Johnson, the Honest Company, Juice Beauty, Revlon, Procter & Gamble, and Unilever. Hopefully, their support is more than “lip service.” Even with this support, however, it remains to be seen whether this proposed legislation will be passed. The folks here at Beasley Allen believe FDA regulation of cosmetics is certainly necessary for consumer protection. We will continue to fight to bring change to the cosmetics industry. If you need more information on this matter, contact Stephanie Monplaisir, a lawyer in our firm, at 800-898-2034 or by email at Stephanie.Monplaisir@beasleyallen.com.

Sources: fda.gov, jdsupra.com and thecut.com

### **OVER \$6.5 MILLION WILL BE RETURNED TO CUSTOMERS WHO WERE VICTIMS OF A GOLD AND SILVER INVESTMENT SCHEME**

On Oct. 23, 2017, U.S. District Court Judge Otis D. Wright II granted the Federal Trade Commission’s (FTC) request for summary judgment against a gold and silver marketing operation that allegedly cheated thousands of consumers out of their family trust and retirement savings.

In June of 2016, the FTC filed a complaint against the Defendants alleging that they marketed gold and silver as investments, but often failed to deliver the goods to the customer. The Defendants are Discount Gold Brokers and North American Discount Gold.com. The FTC alleged that the Defendants defrauded their customers by offering gold and silver at discounted prices, with zero commissions, fees, or expenses, and at zero percent above dealer cost, but the customers never actually received the gold and silver they purchased. The Defendants allegedly required up-front payment via check or wire and some consumers used their family trust or retirement savings to buy the precious metals, with individual orders ranging from \$1,000 to \$300,000. After paying thousands of dollars, hundreds of consumers reported that they never received their orders.

Through the filing of its complaint, the FTC sought to recoup the money the Defendants stole from the customers through their scheme. The FTC charged the Defendants with violating the FTC Act and the FTC’s Mail, Internet or Telephone Order Merchandise Rule, which requires sellers soliciting orders via mail, internet, or phone to have a reasonable basis to

expect that they can ship merchandise within any advertised time frame, or within 30 days if no specific time frame is promised. The Rule also requires that, when the promised shipping time cannot be met, the seller must obtain the buyer’s consent to a shipping delay or cancel the order and promptly refund payment for the unshipped merchandise.

On Oct. 23, 2017, Judge Wright issued a final judgment and order banning the Defendants from selling investment opportunities, misrepresenting any good or service, and violating the FTC’s Mail, Internet or Telephone Order Merchandise Rule. The order imposes a judgment of \$6,526,559 against the Defendants, which represents their unjust gains between 2012 and 2014.

Beasley Allen handles a variety of fraud cases. If you have any questions about this article or even potential fraud cases, please feel free to contact Ali Hawthorne, a lawyer in our firm’s Consumer Fraud & Commercial Litigation Section, at alison.hawthorne@beasleyallen.com.

Source: Federal Trade Commission

### **OCWEN NEAR SETTLEMENT IN TCPA CLASS ACTION**

In 2014, Plaintiffs in several states filed a class action complaint against Ocwen Loan Servicing, a national mortgage servicing firm. The complaint alleges that Ocwen’s system for contacting customers multiple times did not comply with the Telephone Consumer Protection Act’s (TCPA) requirements

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

Ocwen began contacting customers after purchasing those customers’ mortgage loans from other parties. They allege that between October 2010 and December 2014, Ocwen failed to obtain consent before calling borrowers’ cellphones using its automated telephone dialing system. As a result, Ocwen made more than 100,000,000 unauthorized calls during that time period.

The class settlement, which has not yet been approved, purports to cover calls made between Oct. 27, 2010, through Oct. 6, 2017. According to the Settlement

website, the average settlement will be \$60. The deadline to request to be excluded from this Settlement, or file a claim, is Feb. 19, 2018.

The TCPA imposes a statutory minimum penalty of \$500 per phone call if the creditor continues to call. In order to invoke this provision, however, the debtor must request that the debt collector cease its phone calls, as most consumer contracts authorize contact by telephone. Lawyers in our firm are currently investigating claims of harassment of consumers by creditors in violation of the TCPA.

If you would like to discuss a potential TCPA claim, contact Jeff Price, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at [Jeff.Price@beasleyallen.com](mailto:Jeff.Price@beasleyallen.com).

#### **LAWSUIT FILED AGAINST ENERGY DRINK COMPANIES OVER DEATH**

The family of a 25-year-old man found dead in the bathroom of his home has filed a wrongful death suit against energy drink companies. Anton Omelin regularly drank Red Bull, NOS and Monster beverages. He died on Oct. 30. His wife, Anna Omelin, alleges her husband drank at least four 16-ounce cans a day. She filed the lawsuit against Red Bull, Monster and the Hansen Beverage Co., which does business as Monster, and distributes Monster and NOS drinks.

The suit contends the companies should warn consumers not to use their products with alcohol, while exercising or in excess. Such warnings, the suit says, would have stopped Anton Omelin, a healthy man, from doing those things. In defense, the companies claim their products are safe.

The Center for Science in the Public Interest said in 2014 that 34 deaths had been linked to energy drinks since 2004. The industry has also faced other wrongful death lawsuits in recent years. This suit was filed in U.S. District Court in Tacoma, and seeks unspecified damages. The complaint gives this account of Omelin's death:

*When he learned he'd be taking over the family business—which distributes European food products through the United States—he brought home cognac, fruits and chocolate to celebrate. He had two or three shots of the alcohol between about 7 and 9 p.m. Oct. 29, along with two 16-ounce cans of Red Bull.*

*About 7 the next morning, his wife found him unresponsive on the bathroom floor, and saw vomit nearby. Emergency workers arrived, and he was pronounced dead. The Pierce County Medical Examiner's Office ruled the immediate cause of death was "aspiration of gastric contents," and noted alcohol intoxication was a factor.*

The lawsuit says Omelin drank in moderation, had no prior medical problems and didn't use illegal drugs. It also noted that studies show a caffeine overdose can cause heart problems, nausea, vomiting, insomnia, convulsions and death—and that combining energy drinks and exercise can cause heart trouble.

The suit alleges the large quantities of caffeine Omelin consumed gave him insomnia, and that as a result he regularly used an exercise machine in the garage and usually showered afterward in the bathroom where his body was found. It's alleged that energy drinks mask the effects of alcohol, and that mixing the two leads people to drink more. It's alleged further:

*Warnings or instructions were not provided with the products to warn against the use with alcohol, before/during/after physical exercises, and/or overconsumption.*

The complaint suggests warnings such as:

- Do not use with alcohol and while exercising;
- Do not exceed two drinks in a 24-hour period; and
- May cause cardiovascular problems, nausea, vomiting, insomnia and death.

Anna Omelin said she wants consumers to think carefully about advertisements for food and beverages. "It's not always what it shows," she said. "Learn more and discover for yourself what you are drinking and you are eating, before putting it in your body." She remembers her husband as a hard worker, who often did work for his job at home. In addition to his wife, he is survived by a teenage stepson and two young children.

Sources: *Idaho Statesman* and *thenewtribune.com*

#### **WHO IS LOOKING OUT FOR CONSUMERS WHILE THE CFPB IS CAUGHT UP IN LEADERSHIP SQUABBLE?**

In November, Richard Cordray resigned as director of the Consumer Financial Protection Bureau (CFPB). He appointed his deputy director, Leandra English, to replace him as the agency's head. However, President Donald Trump appointed his own pick to lead the CFPB, Mick Mulvaney, who is Director of the Office of Budget and Management.

This led to an unusual squabble, with English refusing to yield to Mulvaney, and both telling staff they were acting director. English filed a lawsuit seeking a temporary restraining order to block Mulvaney from taking over the agency. However, U.S. District Court Judge Timothy Kelly denied her request, and Mulvaney was recognized as acting director.

In his ruling, Judge Kelly cited the Federal Vacancies Reform Act (FVRA), which he said "on its face" would seem to allow the president to name a temporary successor to Cordray, according to the *National Law Journal*. However, a lawyer representing English says the Dodd-Frank Act, which created the CFPB, contains language about the succession order that dictates the deputy director should fill the position should the director leave.

Even more strange, it is now being reported that staffers within the agency are refusing to acknowledge Mulvaney's leadership. They are using encrypted devices to declare their support for English, who filed a motion for a preliminary injunction. The *NLJ* reports that in the amended complaint, English argues that:

*The president's attempt to appoint a still-serving White House staffer to displace the acting head of an independent agency is contrary to the overall statutory design and independence of the bureau, including its mandated independence from the Office of Management and Budget.*

If the preliminary injunction is denied, the case could be brought before the U.S. Court of Appeals for the D.C. Circuit. Judge Kelly ordered the Justice Department to respond to the request by Dec. 15 and set a hearing on the matter for Dec. 22. At press time, we had not heard from the hearing.

Meanwhile, who is watching out for consumers? It's not hard to believe the

Trump administration has its own best interests at heart in appointing Mulvaney. In October, the administration continued on its path of deregulating the financial industry by rolling back a rule that banned mandatory arbitration clauses. Usually buried in the fine print, arbitration clauses strip consumers of their constitutional right to a trial by jury, barring them from banding together in class action lawsuits.

A perfect example of the harm arbitration clauses can cause consumers is the Wells Fargo fake account scam, in which the bank defrauded millions of its customers when it opened checking, savings, and credit card accounts in their name and without their authorization, then charged them fees for those bogus accounts.

Not only did Wells Fargo use arbitration clauses to bar its customers from justice, it used the clauses to hide its activities from the public eye and perpetuate a number of other alleged schemes that defrauded homeowners, car buyers, veterans and taxpayers. It is also flagrantly deceitful of the financial industry.

Sources: *National Law Journal*, *TownHall.com*, and *The Hill*

## XVIII. RECALLS UPDATE

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

### **HONDA RECALLS 900,000 ODYSSEY MINIVANS FOR SECOND-ROW SEATS THAT COME LOOSE**

Honda said has recalled about 900,000 Odyssey minivans from the 2011 through 2017 model years in North America because second-row seats can come loose in “moderate to heavy braking.” Some 800,000 of those are in the United States. The issue relates to the second-row seating system’s ability to move from side to side. The system is designed to make seating comfortable for two adults or to fit up to three child seats in the second row, for example. The seats have the option of being latched in either a “standard” or

“wide” outboard position. But if they are improperly latched, the seats could come loose and jerk forward.

Honda said it has received 46 reports of “minor injuries” related to the issue. The company said it’s looking into the appropriate repair to ensure proper latching and will let Odyssey owners know when that fix is available. In the meantime, Honda has published detailed instructions on how to properly install and latch the second-row seats. It warns owners to be sure not to latch on to the center part of the floor strikers, where they could improperly latch on to a collar or a rib on the floor.

Honda said recall notifications will go out in the mail in late December. Owners can see if their Odysseys are affected at [www.recalls.honda.com](http://www.recalls.honda.com) or by calling 888-234-2138. Aside from the 800,000 in the United States, 69,000 of the recalled vehicles are in Canada, 28,000 are in Mexico, and about 2,000 were sold outside of North America, a company spokesman said. This latest recall is unrelated to one that began in February 2017, when Honda recalled 633,753 Odysseys from the 2011 through 2016 model years to fix a second-row release lever that could stay unlocked and cause the seats to move unexpectedly. A company spokesman said vehicles that have not yet been fixed under the earlier recall will require both repairs.

### **BMW RECALLS ALL I3 ELECTRIC CARS OVER CRASH-TEST RESULT**

BMW has recalled 2014 to 2018 model-year i3 electric cars sold in the U.S. because a crash test showed a higher risk of neck injury for a 5-foot-tall, 110-pound woman not wearing her seat belt. The automaker sent a notice to dealers to stop selling the i3 until the repairs have been completed. BMW says it has sold 29,383 of the cars in the U.S. and currently has 1,159 in dealer inventory. The test was one part of a recent certification conducted by the National Highway Traffic Safety Administration (NHTSA). BMW said its own testing did not show the issue, but more recent testing showed inconsistent results. The automaker says it’s working with NHTSA to understand the difference in test results. Owners will be notified in January, BMW says. Customers with questions may contact BMW Customer Relations at 800-525-7417 or email [CustomerRelations@bmwusa.com](mailto:CustomerRelations@bmwusa.com).

### **HYUNDAI AND KIA RECALL CARS TO FIX BRAKE LIGHT PROBLEM**

Hyundai and Kia have recalled more than a half-million compact cars in the U.S. because the brake lights may not go out when the pedal is released. The recall covers more than 390,000 Hyundai Elantra vehicles from the 2013 and 2014 year models. Also included are more than 134,000 Kia Forte cars from 2012 through 2014. The companies say in documents filed with the government that a polymer stopper pad between the pedal arm and the light switch can deteriorate, allowing the switch to stay on. That can keep the brake lights illuminated and also let a driver shift out of park without putting a foot on the brake. Neither company reported any crashes or injuries. Dealers will replace the brake stopper pad. Kia’s recall starts Jan. 30, while Hyundai’s begins Feb. 8.

### **FORD RECALLS 177,000 2016 F-150s AND EXPLORERS FOR LOOSE SEAT MOUNTING**

Ford has recalled 177,264 trucks and SUVs in the United States for loose seats. The automaker said the 2016 F-150 and Explorer have front power-seat sliding tracks that may have loose bolts, which could cause the seat to move excessively in a crash. Full details, including when Ford discovered the defect and how it attempted repairs, were not available from the National Highway Traffic Safety Administration (NHTSA). Dealers will check the torque applied to the “upper pivot link bolt,” take it out, clean it, coat it with adhesive, and bolt it back. That is if the bolt was tightened to factory specifications. If not, Ford will replace the link assembly with new fasteners and bushings.

Another 462 examples of the 2018 Expedition have second-row seats with potentially loose bolts that may cause the seatbacks to move in a crash. They may also have bad latches that can allow passengers to tilt too far forward. Dealers will install new seat frames and bolts or only one part “if required.” Ford says it knows of no injuries or accidents related to these bolt-tightening flaws.

### **MITSUBISHI RECALLS SMALL CARS BECAUSE AIR BAGS MAY NOT INFLATE**

Mitsubishi has recalled nearly 84,000 small cars in the U.S. because the air bags



may not inflate in a crash. The recall covers certain Mirage models from 2014 through 2018. The company says the safety restraint computer can interpret road vibrations or a flat tire as a sensor error and disable the car's seven air bags. If this happens, drivers would see a warning light on the dashboard. Mitsubishi says that dealers will reprogram the computer at no cost to owners. The documents posted by the National Highway Traffic Safety Administration (NHTSA) do not say if there have been any crashes or injuries.

#### **FORD AND MAZDA AGAIN RECALL PICKUPS WITH TAKATA AIR BAGS**

Ford Motor Co. and Mazda are increasing a recall to include more than 380,000 pickup trucks made in the mid-2000s equipped with potentially fatal Takata air bags that can explode and have killed at least 20 people around the world. This is the second time that a recall has been issued for 2004 to 2006 Ford Ranger and Ford-made Mazda B-Series trucks originally recalled in 2015 and 2016. The original recall involved a temporary repair and the superseding recall will require customers who received an air bag to take in their cars to a dealer to have an alternate inflator installed that doesn't have ammonium nitrate, an inexpensive but volatile compound that causes the air bags to explode, according to National Highway Traffic Safety Administration (NHTSA) documents dated Dec. 14.

The air bags have prompted the largest recall in U.S. history, with more than 40 million vehicles recalled. 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.

#### **FIAT CHRYSLER TO RECALL 1.8 MILLION RAM TRUCKS OVER ROLLAWAYS**

Fiat Chrysler Automobiles is recalling about 1.8 million Ram pickup trucks that could be shifted out of park without the driver's foot on the brake. The company initiated the action after gathering reports of seven people suffering minor injuries and a "small number" of crashes that might be linked to the problem.

Fiat Chrysler said that based on those reports—from owners, dealers and other sources—it had traced the issue to a part

known as a brake transmission shift interlock, a device that normally prevents a vehicle from shifting out of park until the brake pedal is depressed. The company said it had found that heat could build up around the gearshift under particular circumstances—when the truck is idling in park and the driver keeps his foot on the brake. After prolonged exposure to heat, the shift interlock can fail to work properly, the company said. In a statement, Tom McCarthy, Fiat Chrysler's head of safety compliance and product analysis, said the automaker was developing a fix. "We urge customers to use their parking brakes, as recommended, and to ensure that child occupants are not left unattended" until the remedy is available and installed, he said.

The trucks covered include several variations of Ram 1500, 2500, 3500, 4500 and 5500 pickups from the 2010 to 2017 model years. All 2017 Ram trucks built after Dec. 31, 2016, are excluded from the recall. The action covers 1.48 million trucks sold in the United States. Fiat Chrysler is also recalling 290,000 trucks sold in Canada and Mexico, and a small number sold in other markets.

#### **ROCKY MOUNTAIN BICYCLES RECALLS MOUNTAIN BICYCLES DUE TO CRASH HAZARD**

About 1,300 Mountain bicycles have been recalled by Rocky Mountain Bicycles, of Canada. The brake cable housing was not secured properly during manufacturing, which can cause brake failure, posing a crash hazard to the rider. This recall involves all model year 2018 Altitude, Instinct and Pipeline mountain bicycles. The carbon fiber and aluminum bicycles were sold in different colors. The model name is printed on a sticker on the top tube of the bicycles. Rocky Mountain is printed on the down tube. The Rocky Mountain logo is also printed on the headbadge on the headtube. The specified platform family is also printed on the rear triangle of the bicycle at the seatstay.

The bikes were sold at Rocky Mountain bicycle dealers nationwide from June 2017 through November 2017 for between \$2,600 and \$7,300. Consumers should stop using the recalled bicycles immediately and contact an authorized Rocky Mountain dealer for free inspection and free repair. Contact Rocky Mountain at 866-522-2803 from 9 a.m. to 5 p.m. ET Monday through Friday, via email at [info@bikes.comor](mailto:info@bikes.comor) online at [www.bikes.com](http://www.bikes.com) and click on Safety/Recall at the bottom of the

page. Pictures available here: <https://www.cpssc.gov/Recalls/2018/Rocky-Mountain-Bicycles-Recall-Mountain-Bicycles-Due-to-Crash-Hazard>.

#### **WEST ELM RECALLS TABLE LAMPS DUE TO SHOCK HAZARD**

About 43,000 table lamps have been recalled by West Elm, a division of Williams-Sonoma, Inc., of San Francisco, California. The electrical wire that runs through the lamps can be cut or frayed by the lamp's adjustable joint, posing a risk of electric shock to consumers. This recall involves West Elm's Industrial Task table lamps. The metal lamps have an on/off switch and an adjustable arm that locks at two angles. The head of the lamp has a tension that allows it to swivel to direct light. Some models have a USB port in the base. The lamps were sold in various colors and are about 33 inches tall and measure about 7 inches in diameter at the base. West Elm, the SKU# and the date of manufacture in Letter/YYYY format are printed on a sticker on the underside of the base. Dates of manufacture for the non-USB models are C/2014 and later. All lamps with a USB port in the base are included in this recall. The company has received 24 reports of the lamps shorting, sparking or getting hot. There have been no reports of injuries.

The lamps were sold at West Elm stores nationwide, West Elm's catalog and online at [www.westelm.com](http://www.westelm.com) from June 2014 through October 2017 for about \$130 for the lamp with a USB and for between \$80 and \$100 for the lamp without a USB. Consumers should immediately stop using the recalled lamps and return them to West Elm for a full refund, including return shipping. Contact West Elm toll-free at 866-577-9276 from 7 a.m. to midnight ET every day, or online at [www.westelm.com](http://www.westelm.com) and click on Safety Recalls at the bottom of the page for more information. Pictures available here: <https://www.cpssc.gov/Recalls/2018/West-Elm-Recalls-Table-Lamps-Due-to-Shock-Hazard>

#### **HUNTER FAN RECALLS CEILING FANS DUE TO IMPACT INJURY HAZARD**

Hunter Fan Company, of Memphis, Tennessee, has recalled about 168,000 Hunter Contempo ceiling fans. The owner's manual instructs consumers to install the light globe incorrectly and the light globe can fall, posing an impact injury hazard.

This recall involves Hunter Contempo ceiling fan models 59176 and 59174. The model number can be found on a label on top of the motor housing. The fan comes with five reversible blades and has a 54-inch blade span. Model 59176 comes with cherry and dark walnut blades. Model 59174 comes with light gray oak and gray walnut blades. Hunter has received 38 reports of the light globe falling due to the incorrect instructions in the U.S. and two in Canada. No injuries have been reported.

The fans were sold at Costco stores nationwide and online at Costco.com from January 2016 through August 2017 for about \$130; refurbished fans were sold online during the same period on eBay, Amazon, and Groupon. Consumers with a recalled Contempo model ceiling fan should check to ensure that the light globe was installed correctly by turning it clockwise until it stops and is resting firmly in place. Costco and Hunter Fan Company are contacting all known purchasers and providing new instructions for installing the light globe. Contact Hunter toll-free at 866-326-2003 from 8 a.m. to 4 p.m. CT Monday through Friday, or online at [www.hunterfan.com](http://www.hunterfan.com) and click on "Recall" located at the bottom of the page for more information or visit [www.hunterfan.com/recall](http://www.hunterfan.com/recall). Pictures available here: <https://www.cpsc.gov/Recalls/2018/Hunter-Fan-Recalls-Ceiling-Fans-Due-to-Impact-Injury-Hazard-New-Instructions-Provided>

#### **MONTE CARLO RECALLS CEILING FANS DUE TO INJURY HAZARD**

Monte Carlo Fan Company, of Skokie, Illinois, has recalled about 3,400 Cyclone ceiling fans. The brackets connected to the fan blades can break, causing the blades to fall, posing an injury hazard. This recall involves two models of the Monte Carlo "Cyclone" ceiling fans with five blades. The fans are 60 inches wide, weigh about 32 pounds and have either a Roman Bronze or White finish. The model numbers are 5CY60RB for the Roman Bronze and 5CY60WH for the White finish and can be found on top of the motor housing. The Manufacturer Purchase Order numbers (MPO#) can also be found on top of the motor housing. For the Cyclone model ceiling fan in Roman Bronze finish, they are: 30082259, 30100285, 30103624, 30115763, 30126474, 30128431, 30139761, 30143432 and for the White finish, they are: 2020018,

30082259, 30139815, and 30139829. Monte Carlo Ceiling Fan Company has received 10 reports of a bracket breaking, causing a fan blade to fall. The firm has received one report of minor property damage. No injuries have been reported.

The fans were sold at: Del Mar Fans & Lighting, Pacific Ceiling Fans, Wilson Lighting and other lighting stores nationwide and online from January 2016 through September 2017 for between \$500 and \$550. Consumer should immediately stop using the recalled ceiling fans and contact Monte Carlo to receive a free bracket replacement kit with instructions. Consumers can hire an electrician to perform the repair and Monte Carlo will reimburse them for the repair. Contact Monte Carlo toll-free at 888-475-1136 from 8 a.m. to 5 p.m. ET Monday through Friday, email at [montecarlofans@generation-brands.com](mailto:montecarlofans@generation-brands.com) or online at [www.montecarlofans.com](http://www.montecarlofans.com) and click on "Voluntary Recall" for more information.

#### **RAVIN CROSSBOWS RECALLS ARROW NOCKS DUE TO INJURY HAZARD**

About 220,000 Ravin arrow nocks have been recalled by Venatics Inc. and Ravin Crossbows LLC., of Superior, Wisconsin. If the nock is not fully engaged with the bowstring, the crossbow can fail to discharge when the trigger is pulled and can result in the bow discharging while re-nocking of the arrow, posing an injury hazard to users. This recall involves all white plastic molded clip-on nocks used in arrows for Ravin brand crossbows. The white arrow nocks were sold separately in a package of 12 and as original equipment with Ravin crossbows and Ravin arrows. The white nocks measure about 0.9 inches long. The company has received 44 reports of the arrow nocks malfunctioning. There were 23 reports of finger injuries, including six serious injuries.

The nocks were sold at Bass Pro Shops, Cabela's, Dicks Sporting Goods stores and other stores nationwide from October 2016 through November 2017 for between \$8 and \$15 when sold separately from other equipment. The arrow nocks were also included as original equipment with Ravin crossbows sold for between \$1,500 and \$2,000 and Ravin arrows sold for between \$75 and \$110. Consumers should immediately stop using the recalled arrow nocks and contact Ravin® Crossbows for free replacement nocks. Contact Ravin Crossbows toll-free at 888-298-6335 from 9 a.m. to 5 p.m. CT, email at [\[ravincrossbows.com\]\(http://ravincrossbows.com\) or online at \[www.ravincrossbows.com\]\(http://www.ravincrossbows.com\) and click on Safety and Instructions for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/Ravin-Crossbows-Recalls-Arrow-Nocks-Due-to-Injury-Hazard>](mailto:nockupdate@</a></p></div><div data-bbox=)

#### **PIER 1 IMPORTS RECALLS DECORATIVE GLASS PUMPKINS DUE TO LACERATION HAZARD**

Pier 1 Imports of Fort Worth, Texas, has recalled about 16,600 glass pumpkins with wooden stems. The wooden stem on the top of the decorative pumpkin can detach when picked up, causing the glass pumpkin base to fall and break, posing a laceration hazard. This recall involves Pier 1 Imports' decorative clear glass pumpkins with wooden stem. The glass pumpkins have a hollow glass base with a wooden stem attached to the top and were sold in two sizes, small and medium. The small pumpkins weigh 1.65 pounds, and measures 8 high by 8.5 inches wide. The medium pumpkins weigh about two pounds, and measures 10 inches high by about 7 inches wide. The recalled pumpkins have the following SKU numbers: 3202753 for the small pumpkin and 3202766 for the medium pumpkin. The SKU numbers can be found on the price sticker located on the bottom of the product. Pier 1 Imports has received seven reports of the wooden stems detaching from the glass pumpkin base when picked up by the stem, causing the glass pumpkin base to fall and break, resulting in lacerations, including one incident which required stitches.

The glass pumpkins were sold exclusively at Pier 1 Imports stores nationwide and online at [www.Pier1.com](http://www.Pier1.com) from June 2017 through November 2017 for about \$25 for the small glass pumpkin and about \$30 for the medium glass pumpkin. Consumers should immediately stop using the recalled decorative pumpkins and return them to their nearest Pier 1 Imports store for a full refund or merchandise credit. Contact Pier 1 Imports toll-free at 855-513-5140 from 10 a.m. to 5 p.m. CT seven days a week or online at [www.pier1.com](http://www.pier1.com) and click on "Product Notes & Recalls" at the bottom of the page for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/Pier-1-Imports-Recalls-Decorative-Glass-Pumpkins-Due-to-Laceration-Hazard>

### **DREAM ON ME RECALLS CRIB & TODDLER BED MATTRESSES**

About 23,400 crib and toddler bed mattresses have been recalled by Dream On Me, of Piscataway, New Jersey. The mattresses fail to meet the mandatory federal flammability standard for mattresses, posing a fire hazard. This recall involves Dream On Me spring and foam mattresses for cribs and toddler beds. The recalled mattresses were sold in a variety of colors and prints. The model number and date of manufacture are printed on a tag on the top center of the mattress.

The mattresses were sold at Amazon.com, Kohls.com, ToyRUs.com, Walmart.com and Wayfair.com from January 2016 through December 2016 for between \$40 and \$90. Consumers should immediately stop using the recalled mattresses and contact Dream On Me to receive a free mattress cover to bring the mattress into compliance with the federal flammability standard. Contact Dream On Me toll-free at 877-201-4317 from 9:30 a.m. to 4 p.m. ET Monday through Friday or online at [www.dreamonme.com](http://www.dreamonme.com) and click on "Customer Care" for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/Dream-On-Me-Recalls-Crib-Toddler-Bed-Mattresses-Due-to-Violation-of-Federal-Mattress-Flammability-Standard>

### **ONE STOP SHOP RECALLS CHILDREN'S PAJAMAS**

Karmin Industries, of Canada, has recalled about 350 Children's pajama sets. The children's pajamas fail to meet the federal flammability standards for children's sleepwear, posing a risk of burn injuries to children. This recall involves children's 100 percent cotton knit, two-piece, long-sleeve top and pant pajama sets. They were sold in three different styles: Santa Claus print with a white button and black and gold belt screenprint; Elf screenprint with a white Peter Pan collar, three red buttons and a black and gold belt; and reindeer screenprint on the top with a Faire Isle pattern on the pant and a reindeer on the top. "Mad Engine" "RN 129993" and the size are on the neck label. The pajama sets were sold in children's sizes XXS, XS, S, M, L and XL. Mad Engine claims these recalled pajama sets are counterfeit.

The sets were sold at Foreman Mills stores nationwide from September 2016 through November 2017 for about \$6. Consumers should immediately take the

recalled pajamas away from children and contact One Stop Shop for a full refund. Contact One Stop Shop toll-free at 888-884-7202 from 8 a.m. to 3 p.m. ET Monday through Friday or email [onestopshop-lcc1001@outlook.com](mailto:onestopshop-lcc1001@outlook.com).

### **TODD SNYDER RECALLS SWEATSHIRTS**

About 2,100 Todd Snyder + Champion brand sweatshirts have been recalled by WS and Co., of Canada. The sweatshirts fail to meet federal flammability standards for clothing textiles, posing a burn risk to users. This recall involves Todd Snyder + Champion brand men's 100 percent cotton brushed fleece knit, long-sleeve, reverse weave sweatshirts. They have ribbed side gussets and a Champion applique logo on the left wrist. "Champion Processed Sportswear + Todd Snyder New York" is printed on a label at the neck. The SoulCycle sweatshirts have a SoulCycle logo on the front.

The sweatshirts were sold at Bloomingdale's, Hush Life Boutique, SoulCycle and Todd Snyder stores nationwide and online at [www.amazon.com](http://www.amazon.com), [www.net-a-porter.com](http://www.net-a-porter.com), [www.soulcycle.com](http://www.soulcycle.com) and [www.toddsnyder.com](http://www.toddsnyder.com) from August 2014 through October 2017 for between \$140 and \$150. Consumers should immediately stop using the recalled sweatshirts and contact Todd Snyder to return them for a full refund plus a \$50 gift card. Consumers who purchased the sweatshirts online will be contacted directly by the firm. Contact Todd Snyder toll-free at 866-897-0333 from 9 a.m. to 7 p.m. ET Monday through Friday and 9 a.m. to 5 p.m. ET on Saturday and Sunday, email at [recall@toddsnyder.com](mailto:recall@toddsnyder.com) or online at [www.toddsnyder.com](http://www.toddsnyder.com) and click on Product Recall for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/Todd-Snyder-Recalls-Sweatshirts-Due-to-Violation-of-Federal-Flammability-Standards>

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

contact Shanna Malone at [Shanna.Malone@beasleyallen.com](mailto:Shanna.Malone@beasleyallen.com) for more recall information or to supply us with information on recalls.

## **XIX. FIRM ACTIVITIES**

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### **EMPLOYEE SPOTLIGHTS**

#### **ASHLEY JAMES BURGIN**

Ashley Burgin, a Legal Secretary in our Consumer Fraud & Commercial Litigation Section, has been employed by Beasley Allen for more than two years now. She holds a Bachelor's Degree in Criminal Justice from Troy University. Since Ashley was hired, she has worked for Andrew Brashier handling a myriad of tasks from filing pleadings and organizing internal documents to maintaining Andrew's schedule and communicating updates with his clients through letters, phone calls and emails.

Ashley and her husband reside in Millbrook, Alabama, with the rest of her family. They have three daughters—MacKenzie, Lynzie and Carlie. The two oldest daughters are highly involved with travel softball, which requires the family to spend a lot of time at ball parks and traveling on the weekends. Having played at the collegiate level, Ashley helps coach her children in softball. In addition to the family's love of softball, they also enjoy vacationing in the mountains and at the beach when they get the opportunity.

Ashley is a very good, dedicated employee who enjoys her work, knowing she is helping people. We are fortunate to have her with us.

#### **CAROLYN ELIZABETH LITTELL COURSON**

Lisa Courson joined our firm in October 2014 as a lawyer in the Mass Torts Section. Currently, she is working on cases involving metal-on-metal hip implant litigation, which affects thousands of victims who have defective hip implants. The defective implants cause severe pain and metal poisoning, and in some cases require revision surgery. These defective hip devices are manufactured by a variety of companies, including a Johnson & Johnson subsidiary, DePuy Orthopaedics.

Lisa earned her undergraduate degree from the University of Tennessee Knoxville, receiving her B.A. in political science

in 1999. She attended Cumberland School of Law at Samford University, earning her J.D. in 2002. She is admitted to practice law in Alabama, in the Northern and Middle Districts of Alabama, and in Tennessee.

Before coming to the firm, Lisa had a great deal of experience as a lawyer. Lisa worked as a clerk for the Honorable Steven Bevil, Hamilton County, Chattanooga, Tennessee, in 2001. She has practiced in the state of Alabama since her admission in 2002, and is experienced and specially trained in mediation. From 2002-2006, Lisa was a senior associate at the Fields Law Firm in Birmingham. She worked as an associate at Slaten & O'Connor from 2007-2009. Later Lisa was in her own firm in private practice for three years. She then worked with Stewart Littell Courson & Tompkins from 2012 to 2015. Lisa has also been an adjunct professor at Columbia Southern University since 2006.

Lisa is a member of the American Association for Justice and a member of the AAJ Women's Caucus. She also serves as vice president of the Alabama Field Trial Association. Lisa is a good, hard-working lawyer who is a definite asset to our firm. She is dedicated to her work and enjoys helping people. We are fortunate to have her with us.

#### **JENNIFER KATHRYN EMMEL**

Jennifer joined Beasley Allen as a lawyer in 2013 and, at present, she primarily focuses on cases consolidated in multidistrict litigation (MDL) in a New Jersey federal court involving the link between talcum powder and ovarian cancer. Jennifer is in our Mass Torts Section.

Jennifer's previous work in the firm dealt with transvaginal mesh, which is used to treat conditions such as pelvic organ prolapse (POP) and stress urinary incontinence (SUI). These defective products cause conditions such as organ perforation, pain, infection, painful intercourse and urinary and fecal incontinence.

Jennifer is currently active in the American Association for Justice. She also volunteers for the Alabama State Bar, as well as with the Montgomery County Volunteer Lawyers Program. Jennifer became a member of the Alabama State Bar in 2012.

Jennifer earned her undergraduate degree in biology, with a double minor in physics and chemistry, from the University of Wisconsin—Eau Claire. She went on to earn a Ph.D. from the University of South Carolina School of Medicine in biomedical science with a focus on molecular oncology. In graduate school, Jennifer

won graduate research awards for oral presentation of research, first in neuroscience and later in molecular oncology. Her work earned her travel fellowships, and she was invited to present her research at international conferences in Paris and Mexico City. Subsequently, Jennifer spent two years in Boston with a consulting company specializing in mergers and acquisitions.

Jennifer earned her J.D. from Gonzaga University School of Law in 2009, and is a member of the Washington State Bar. While in law school, Jennifer interned at the Spokane County Prosecutor's Office in the property, major crimes and domestic violence divisions and gained courtroom experience including serving as lead counsel on a multiple-felony trial. Jennifer then moved to North Alabama and associated with a law firm, working in the areas of criminal and family law.

Jennifer is a college-level educator, and has taught courses as an adjunct in biology, chemistry, medical terminology and anatomy. She is another hard-working, dedicated lawyer who enjoys her work. We are fortunate to have Jennifer with the firm.

#### **ASHLEY GRIZZELL**

After starting as a temporary worker in February 2016, Ashley Grizzell was hired on later that year in October in a full-time capacity as a Legal Secretary and Intake Specialist. She is responsible for handling new client calls and various other projects in our firm's Mass Torts section.

Ashley is a mother who is blessed with three children—8-year-old Kelsey, 3-year-old Kendall and 2-year-old Judson. Ashley says the family also has an adorable kitten named Roxy.

When she is not working, you will find Ashley at the Little League fields during the fall and anywhere in the sun during the summer. She is always spending time with her children, while also trying to squeeze a book in whenever she gets the chance. We are fortunate to have Ashley with the firm. She is a very good employee who is dedicated to her work and an asset to the firm.

#### **TARA ELIZABETH OLIVER**

Tara Oliver is a Legal Assistant in our Personal Injury & Product Liability Section. She has been working with Beasley Allen lawyer Evan Allen since March of 2016. Prior to joining our firm, Tara assisted with civil defense litigation.

As a native of Montgomery, Tara attended Saint James School and Jeff Davis High School. She then went on to graduate

from Troy University with a Bachelor of Science Degree in Business Management. Tara has one 11-year-old daughter Dylan Elizabeth, who is currently a 6<sup>th</sup>-grader at Saint James School. Tara enjoys traveling in her spare time, as well as spending time with her friends and family. Tara is another hard-working, dedicated employee who enjoys helping people. We are blessed to have Tara with us.

## **XX. SPECIAL RECOGNITIONS**

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#### ***JULIE BEASLEY IS MOVING FROM THE COURTROOM TO CUTTING COMPETITIONS***

Many of the regular readers of the Report and fans of our law firm know my daughter, Julie Beasley, has been a lawyer at Beasley Allen since 1992. Julie is an accomplished lawyer in our Personal Injury & Products Liability Section, having represented hundreds of folks who were injured or who lost a loved one as the result of the negligence or wrongdoing of others. She has done a tremendous job for her clients.

While I have really enjoyed the opportunity to work and practice with Julie, this past summer, after much thought and prayer, she decided to announce she was retiring from full time law practice. She plans to devote more time to the other passion in her life—raising and showing her cutting horses. Julie is part owner with me of Double B Ranch.

Julie has already been competing on the local and national level in cutting horse competitions. In November and December, she held her own in the National Cutting Horse Association (NCHA) 2017 World Championship Futurity in Fort Worth, Texas, competing against folks who are pretty much full-timers. Julie and her horse, Countin Blessings (nicknamed Val because she was born on Valentine's Day), finished in the top 20, at No. 18, in the finals of the Limited Non-Pro, out of 139 in the class. She also made it to the Unlimited Amateur Class semi-finals. Val is a 3-year-old and the Futurity was her first competition.

This year's futurity in Fort Worth was extra special, not only because of the successful competition, but because this was the first time Julie showed a "home grown" horse—one for which she was the

breeder, owner and rider. "It's cool to have a horse that's already competitive and to look on the scoreboard at Will Rogers Coliseum and see your name as breeder, owner and rider. It's very special," Julie said.

Julie's goal is to improve as a Non-Pro / Amateur, spending time improving skills like herd work, which is very important for showing but hard to master when you can't spend a lot of time in practice. She explained that the more you can show and enter the herd, the more you learn. Her trainer is Austin Shepherd from Summerdale, Alabama, who is considered to be one of the leading cutting horse trainers in the world. In my opinion, Austin is the very best.

"The people you travel with and show with and see on a regular basis really become like another family. It's competitive but it's really a family sport," Julie says.

While Julie says she will miss her daily law practice, Julie plans to remain with the firm as Of Counsel for a while and continue to help clients. She says, "It has been an honor to work at Beasley Allen and especially to work with my father—that has been the most special blessing of all. I will miss everyone at the firm. At Beasley Allen, we are a big family. I plan to keep my office for a while and will continue to keep my law license active. I'm so thankful for having great place to work all these years. We have the best staff, excellent employees and outstanding lawyers."

Julie earned her J.D. from Samford University Cumberland School of Law. She is a Martindale-Hubbell AV Rated lawyer, and has been selected for inclusion on the Best Lawyers in America list since 2012 and to the prestigious 2017 Super Lawyers list.

Julie says, "It has been a privilege to represent so many wonderful clients over the years. I will always cherish the notes that many sent me. To this day, I keep a copy of Frankie Bell's x-rays in my Bible as a reminder of her inspiration and that God's truth prevails. I hope I have made a difference during my time with the firm and I am forever grateful for the opportunity to help so many people who are hurting and have suffered so much."

As a father, and hopefully a mentor, I am very proud of all that Julie has accomplished. She has been totally dedicated to her clients and truly cared for them. God blessed Julie with tremendous talent and the intense desire to help folks. I predict she will be a real champion in the cutting competition now that she will actually have time to practice.

### **LANCE COOPER IS DEDICATED TO ADVOCATING FOR HIS CLIENTS**

Lance Cooper is the founding partner of The Cooper Firm and he represents clients in catastrophic injury and wrongful death cases. Lance specializes in product liability cases involving automobile design and manufacturing defects. He has been lead counsel for Plaintiffs in a large number of jury trials, including trials against General Motors, Ford, Toyota, Kia, Chrysler, Honda, as well as other motor vehicle manufacturers. Lance has successfully handled hundreds of cases, has received numerous multi-million-dollar jury verdicts and settlements. Lance is also a Principal with Beasley Allen, and has been actively involved with the opening our firm's Atlanta office last year.

Lance may be best known for his work on the 2014 wrongful death case against General Motors (*Melton v. GM*, 14A 1197-4), which exposed the cover-up of faulty ignition switches, resulting in millions of recalled vehicles. The case involved Brooke Melton, who had taken her 2005 Chevrolet Cobalt to a local dealership after experiencing serious problems with the vehicle, including the engine shutting off while she was driving. A day after she got the car back, it lost power while she was driving and Brooke was killed in an accident.

When he initially filed *Melton v. General Motors*, Lance believed the accident was caused by a defect related to a power-steering recall issued by GM one week before the accident. But Lance retained experts who determined that the real culprit in the fatal accident was a defective ignition switch that caused the car to turn off suddenly while Brooke was driving. He then showed that GM had known about the deadly ignition defect before the accident, exposing a corporate cover-up and federal regulatory lapse that led to GM recalling over 2.5 million vehicles, and likely saving millions of lives. Lawyers at Beasley Allen were privileged to work with Lance and his firm, The Cooper Firm, on the *Melton* case and resulting GM ignition switch litigation.

Lance says that though the work he does as a personal injury lawyer is difficult, the opportunity to advocate on behalf of clients facing devastating circumstances is why he became a lawyer. "Every day when I wake up I have a different story to tell on behalf of our clients," he said. "There's nothing more important to me than telling their story and ultimately obtaining justice on their behalf."

Lance is a member of the American Association for Justice, Georgia Trial Lawyers Association and Cobb County Trial Lawyers Association. Lance served as the president of the Georgia Trial Lawyers Association from 2002 to 2003 and is a past president of the Cobb County Trial Lawyers Association.

In addition to his law practice, Lance is actively engaged in numerous community and charitable activities. He and his wife, Sonja, are the proud parents of five children: Rachel, Rebekah, Michelle, Asa and Aaron. Lance Cooper is a great American—a credit to the legal profession—and a good man in every respect. We are blessed to be associated with Lance and look forward to a long relationship with him and his firm.

## **XXI. FAVORITE BIBLE VERSES**

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Mike Andrews, a lawyer in our Personal Injury & Products Liability Section, sent in a verse. Mike was just selected as Litigator of the Year for the firm. He says that after all his trial prep work is done, each night during trial he reads Joshua chapter 1:6-9. Mike says: "I am strengthened and at peace when I have made all the preparations for the coming day and then specifically instructed to be strong and courageous as I lead my clients who depend on me. We are told to not be afraid or discouraged but instead to be strong in the face of adversity and obstacles because we are on the right path."

*Be strong and of good courage, for to this people you shall divide as an inheritance the land which I swore to their fathers to give them. 7 Only be strong and very courageous, that you may observe to do according to all the law which Moses My servant commanded you; do not turn from it to the right hand or to the left, that you may prosper wherever you go. 8 This Book of the Law shall not depart from your mouth, but you shall meditate in it day and night, that you may observe to do according to all that is written in it. For then you will make your way prosperous, and then you will have good success. 9 Have I not commanded you? Be strong and of good courage; do not be afraid, nor be dismayed,*

*for the Lord your God is with you wherever you go.” Joshua chapter 1:6-9*

Brenda Newton, who works at Pickwick Antiques, furnished three timely verses for this issue. She says even our suffering can be utilized for God’s plan if we persevere and trust Him through it.

*Not only so, but we also glory in our sufferings, because we know that suffering produces perseverance; preservice, character; and character, hope. Romans 5:3*

*Not only that I have already obtained all this, or have already arrived at my goal, but I press on to take hold of that for which Christ Jesus took hold of me. Philippians 3:12*

Brenda says that even Paul considered himself a work in progress, but we should not let our shortcomings keep us from pressing forward. In 2018, let us advance closer to the dreams that God has put in our hearts.

*And who knows but that you have come to your royal position for such a time as this? Ester 4:14*

Brenda says; “Maybe we are not royalty, but when we take the positions God has placed us in we have the opportunity to change our families and communities for the better. May we use these positions of authority for God’s glory.”

Sonny Wills, another lawyer in our firm, supplied two timely verses for us this month.

*For I know the plans I have for you,” declares the Lord, “plans to prosper you and not to harm you, plans to give you hope and a future. Jeremiah 29:11*

*Blessed is the man who trusts in the Lord and whose trust is the Lord. For he will be like a tree planted by the water, that extends its roots by a stream and will not fear when the heat comes; But its leaves will be green, and it will not be anxious in a year of drought nor cease to yield fruit. Jeremiah 17:7-8*

Sonny reminds us that God loves us and wants what’s best for us. In the midst of life’s trials and tribulations, Sonny also reminds us that it’s imperative for us to be confident and trust in the fact that with God all things are possible. He says God is

our great sustainer and will never abandon us and that is absolutely correct.

Soo Seok Yang, also a lawyer in our firm, has been a real inspiration to all of us at Beasley Allen. He furnished a verse and had this to say:

*Each year, my wife and I prayerfully think about and ask God for a “keyword” for that specific new year which works as a vision, goal or motivation that we hold on to throughout the year. We have experienced God’s blessings the way the keyword would represent. Sometimes the word is given through the Scriptures we read or a sermon we hear, or sometimes through the experiences and incidents of an important nature. Sometimes the word is a noun, just like this past year’s “Upgrade,” and other times it is a verb, “Go & Conquer” or an adjective “New.” I remember, in the year with “New,” we had asked God to renew ourselves.*

*We witnessed to His faithfully making new every aspect of our lives spiritually and physically throughout the year, which included NEW babies as well—one born in that year and the other conceived that year! Even the new house that my family ended up moving into was in as newly created neighborhood whose name is “New Park.”*

*For this new year 2018, my wife and I agreed on the word “Deep.” We want our relationship with God, and our family and friends to grow deeper and our faith and knowledge in trusting Him and knowing Him much deeper than what has been. Thinking of this, the very first Bible verse that comes to mind is this:*

*Ob, the depth of the riches of the wisdom and knowledge of God! How unsearchable His judgments, and His paths beyond tracing out! Romans 11:33*

## XXII. CLOSING OBSERVATIONS

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### **CHILDREN’S HEALTH PROGRAM MUST BE PROTECTED BY CONGRESS**

More and more states are running out of money for the Children’s Health Insurance Program (CHIP) and Congress is to blame. It’s critically important for Congress to provide money before children lose health care and coverage. But the program, known as CHIP, which insures nearly 9 million children, took a back seat last month as lawmakers raced to pass a \$1.5 trillion tax cut. CHIP’s fate then got caught up in a messy fight over an end-of-the-year deal on spending with government facing a shutdown on Dec. 22. Linda Nablo, the Chief Deputy Director of the Virginia Department of Medical Assistance Services, made this observation:

*CHIP is being used as a pawn in larger debates and negotiations. It has fallen victim to the dysfunction and partisanship in Congress. And we are getting very close to the point where some children will also be victims.*

Congress did pass needed legislation to keep the government operating. Congress has known since April 2015 that funds for the popular children’s insurance program—created and sustained for two decades with bipartisan support—would expire this year at the end of September. The Senate Finance Committee approved a five-year extension of funding for the program in early October, but did not specify how to pay for it.

Interestingly, Republicans insist that it must be paid for. I wonder what they were thinking when they added more than a trillion dollars to our national debt last month. The House passed a bill to provide five years of funds in early November, but those funds would come from public health programs set up under the Affordable Care Act and an increase in premiums for affluent Medicare beneficiaries, provisions that should be unacceptable.

Members of Congress should act promptly, do the right thing and invest in our nation’s true future, invest in the children, and save children’s lives. Funding for the program should be made available and not just for a short term.

A survey by the Kaiser Family Foundation found that 16 states expect to exhaust their federal CHIP funds by the end of January, with 21 additional states saying they would run out by the end of March. The Trump administration has reshuffled money to help states with the most urgent needs. But in so doing, it exacerbates the financial problems that other states will soon face because Congress has not provided any new funds. Republican governors, including Greg Abbott of Texas and Scott Walker of Wisconsin, have joined Democrats in urgent appeals to Congress with little success.

#### 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

## XXIII. PARTING WORDS

As I approach a new year, I have always found it helpful to first reflect on the past year and then look ahead to the new year. So I will do it for 2018. All of us at Beasley Allen have been truly blessed. During the past year we helped lots of folks who badly needed our help. In addition to helping our clients, we also were able to once again play a major role in bringing about some badly needed changes in the way a number of large companies in corporate America operate.

Those changes would never have happened without an open, accessible and independent court system and without trial lawyers being able and willing to represent victims, utilizing that system. Numerous cases were handled by lawyers in our firm where the outcomes were directly responsible for bringing about badly needed changes involving public safety and consumer-related concerns.

Making a difference in the lives of our clients is what makes having the privilege of being a trial lawyer, and helping folks who need help, worth every bit of the effort we put forth. I can think of nothing else that I would rather be doing at this juncture in my life. I thank God for the opportunities given to me to help folks who badly need help in their lives.

Our lawyers and support staff have worked extremely hard this year and we are blessed to have good folks in our firm who do things not only in the right way, but also for the right reason. I thank God every day for the lawyers and support staff in our firm and for what they do for others. They have been a blessing to thousands of folks over the years and that makes what we all do worthwhile.

The New Year will present lots of opportunities and challenges for all of us at Beasley Allen. I really look forward to 2018. God has blessed me with the desire to help others and has surrounded me with folks who share that desire. I have mentioned before the message I give to all new lawyers who come to work at our firm. It is so important that I will mention the message again. It is very simple, but absolutely necessary.

*We all need to set priorities in our lives. Putting God first in all things, with our families next in line, is absolutely necessary. Our work will follow in order. When God is truly first, the other two priorities fall in place with no difficulty.*

However, those priorities are not just for lawyers, but apply to everybody regardless of their profession, occupation, or work. When we let our priorities get out of kilter, we will go astray and problems will always follow. The problems may not show up right away, but rest assured in time they will surely come. Because we all need to be reminded of the need to set and keep the proper priorities in our lives, I will wind up this year with the following prayer for 2018.

My prayer is for all of you to have a good, healthy, prosperous and blessed New Year. May God bless each of you and your family during 2018.

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

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Jere Beasley has been an advocate for victims of wrongdoing since 1962, practicing law in his hometown of Clayton, Alabama, until he was elected Lieutenant Governor of the state of Alabama in 1970, beginning his term in January 1971. 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.

On January 15, 1979, Jere established a one-lawyer firm in Montgomery, Alabama, now known as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.. He filed his first case on behalf of the practice on January 17, 1979. It has been nearly 40 years since he began the firm with the intent of "helping those who need it most." Beasley Allen is still located in Montgomery with an office in Atlanta, Georgia. The firm is one of the country's leading firms involved in civil litigation on behalf of claimants, having represented hundreds of thousands of people.

Beasley Allen employs more than 250 people in Montgomery, including more than 70 attorneys.



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