

# *The* JERE BEASLEY REPORT

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ATLANTA | MONTGOMERY



# I. CAPITOL OBSERVATIONS

## **BRYAN STEVENSON TO RECEIVE 2018 AMERICAN BAR ASSOCIATION MEDAL**

The American Bar Association (ABA) will honor Bryan Stevenson, lawyer, social justice activist, founder and executive director of the Equal Justice Initiative in Montgomery, Alabama, with its highest honor — the ABA Medal. Bryan will receive the award this month at the ABA Annual Meeting in Chicago. The ABA Medal recognizes exceptionally distinguished service by a lawyer to the cause of American jurisprudence. ABA President Hilarie Bass had this to say:

*We are proud to add Bryan Stevenson to the distinguished list of ABA Medal winners for his outstanding leadership and tireless efforts in protecting basic human rights for the most vulnerable in American society. Bryan has spent his career in service of others and is a widely acclaimed public interest lawyer dedicated to helping the poor, the incarcerated and the condemned. His work fighting poverty and challenging racial discrimination in the criminal justice system is nationally recognized and laudable.*

I have known Bryan for a number of years and it is good to see this man being honored by our profession for a lifetime of service to others. Bryan created the Equal Justice Initiative (EJI) in 1994 to provide legal representation to those who may have been denied a fair trial. EJI has won major legal challenges eliminating excessive and unfair sentencing, exonerating innocent death row prisoners, confronting abuse of the incarcerated and the mentally ill and aiding children prosecuted as adults. EJI has won reversals, relief or release for more than 125 wrongly condemned prisoners on death row.

Bryan culminated an eight-year project in April with the opening of the National Memorial for Peace and Justice in Montgomery and a related museum, From Enslavement to Mass Incarceration. The National Memorial for Peace and Justice honors the names of each of the more than 4,000 African-Americans

lynched in the United States from 1877 to 1950. Bryan had this to say concerning his award:

*I am very honored to receive the ABA Medal. I've spent my career in jails and prisons, frequently in rural courts with the poor, marginalized and some of our nation's most vulnerable populations. It is deeply meaningful to me that the ABA would honor work that helps the indigent. I hope it reflects our commitment to the rule of law even on behalf of the 'least of these.' As someone who never met a lawyer until I got to law school, I've come to appreciate more and more the power of the law to protect the rights of the disadvantaged and lawyers to be agents of justice and understanding.*

The ABA Medal recognizes exceptionally distinguished service by a lawyer to the cause of American jurisprudence and is given only in years when the ABA Board of Governors determines a nominee has provided exceptional and distinguished service to the law and the legal profession. Bryan Stevenson certainly meets that lofty criteria.

## II. THE OPIOID LITIGATION

### **ALABAMA PLAYS KEY ROLE IN OPIOID MDL**

Significant progress continues to be made in the opioid multidistrict litigation (MDL) consolidated before U.S. District Judge Dan Aaron Polster in Cleveland, Ohio. Judge Polster recognizes the extreme urgency of the opioid crisis and has set an aggressive schedule of settlement negotiations while simultaneously putting certain cases on litigation tracks.

The State of Alabama, the counties of Summit (Ohio), Cabell (West Virginia), Monroe, Michigan, and Broward (all Florida), and the City of Chicago were all selected as bellwether cases for motion to dismiss practice to determine the viability of threshold legal issues that may assist in the settlement negotiations and to prepare the test cases for trial in the event that a settlement does not occur.

Judge Polster selected cases that represent a variety of jurisdictions, Plaintiffs, Defendants and issues. Summit and Cuyahoga counties and the City of Cleveland were selected to conduct discovery and prepare their cases for trial, which has tentatively been set for March 2019. The State of Alabama is gearing up in expectation that it will be appointed as a bellwether case in the second round of bellwether trials. Alabama is the only state currently litigating its case in the MDL.

Alabama has been particularly hard hit by the crisis. The state has one of the highest prescription rates for opioids in the nation, with 1.2 prescriptions per person, nearly twice the national

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average of 0.72 prescriptions per person. According to the National Institute on Drug Abuse, there were 343 opioid-related overdose deaths in Alabama in 2016, and at least 282 deaths were attributed to opioid overdoses in Alabama the previous year.

On a national level, the effects of the opioid epidemic are startling. A study published in the journal *JAMA Network Open* suggests opioid abuse in the U.S. is now responsible for 20 percent of deaths among young adults—up from just 4 percent in 2001—a far greater pace than any other age group. Comparatively, one in every 65 adults in the U.S. suffered deaths associated with opioids in 2016—a 292 percent increase since 2001. Due to the continued deterioration of the addiction crisis nationwide, the researchers concluded the U.S. lost a total of 1,681,359 years of life in 2016 alone.

But loss of life isn't the only toll the opioid crisis takes on communities. According to the Centers for Disease Control and Prevention (CDC), the opioid epidemic costs the U.S. about \$78.5 billion a year in health care, lost productivity, addiction treatment, and criminal justice involvement.

To better assist local governments in the opioid MDL, Judge Polster also ordered the Drug Enforcement Administration (DEA) to release detailed data regarding opioid sales activity in these six critical states from its Automation of Reports and Consolidated Orders Systems (ARCOS) database.

The ARCOS database lists individual opioid transactions and tracks quantities of specific opioids from manufacturer to distributor to pharmacy. Local governments in the MDL requested records dating back to at least 1995, to provide a baseline for opioid sales activity. This request was granted by special master David Cohen, who concluded that this “baseline evidence” regarding opioid sales must be provided in order to contextualize the issue that allegedly broke laws and created the opioid epidemic. The timeline coincides with the launch of Purdue Pharma LP's OxyContin, which was approved for marketing in the U.S. in 1995.

The ARCOS data is pivotal to local governments suing opioid manufacturers, distributors and pharmacies because it gives insight into the marketing and sales practices of drug makers accused of fueling the opioid crisis by overstating the benefits of the drugs while downplaying their highly addictive qualities,

and will be extremely helpful in holding these companies accountable for their role in the destruction opioids have had on local governments across the nation. Shortly after releasing the ARCOS data to the six potential bellwether states, Judge Polster agreed to release the data to all 50 states.

More than 700 cases are currently pending in the opioid MDL filed by cities, counties, states and even Indian tribes accusing manufacturers and distributors of the powerful painkillers, and pharmacies of inflating the effectiveness of the medications and downplaying their addictive properties, creating conditions ripe for abuse and misuse. As a result, the lawsuits claim, tens of thousands of citizens have died or required medical care, creating a crippling financial burden to communities across the country.

In 2017, President Trump declared the opioid epidemic a national public health emergency. Earlier this year, Attorney General Jeff Sessions announced a new Prescription Interdiction & Litigation (PIL) Task Force established by the U.S. Department of Justice to aggressively coordinate all available criminal and civil law enforcement tools to reverse “the tide of opioid overdoses in the United States.” The task force will focus on the activities of opioid manufacturers and distributors. Attorney General Sessions also assigned 12 assistant U.S. attorneys to spend three years focusing exclusively on investigating and prosecuting health care and fraud related to prescription opioids.

Sources: Reuters, Beasley Allen, U.S. District Court of Ohio and Law360.com

#### **BEASLEY ALLEN OPIOID LITIGATION TEAM**

As previously reported, because of the enormity of the opioid litigation, our firm has put together an “Opioid Litigation Team.” We represent the State of Alabama and numerous local governments and other entities in opioid litigation. Our firm is also handling individual claims for victims. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, Ryan Kral, Parker Miller, Jeff Price and Will Sutton, lawyers in our firm's Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, Ryan.Kral@beasleyallen.com, Parker.Miller@beasleyallen.com, Jeff.Price@beasleyallen.com or William.Sutton@beasleyallen.com.

### **III. AUTOMOBILE NEWS OF NOTE**

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#### **VW's \$10 BILLION DIESEL VEHICLE SETTLEMENT WITH OWNERS IS APPROVED**

In one of the most important consumer cases our firm has had the privilege of being involved in, the Ninth Circuit Court of Appeals has approved Volkswagen AG's \$10 billion settlement with owners of more than 475,000 diesel vehicles. The multidistrict litigation (MDL) involves the German automaker's emissions scandal. A three-judge panel of the federal appeals court upheld a California federal judge's 2016 approval of Volkswagen's \$10.03 billion settlement with a class of owners and former owners of certain 2009-2015 model year 2.0-liter diesel vehicles outfitted with “defeat devices” to cheat U.S. regulators' emissions tests. Circuit Judge Marsha S. Berzon, writing for the panel, stated:

*We do note that the settlement delivered tangible, substantial benefits to class members, seemingly the equivalent of—or superior to—those obtainable after successful litigation, and was arrived at after a momentous effort by the parties, the settlement master and the district court. The district court more than discharged its duty in ensuring that the settlement was fair and adequate to the class.*

Under the settlement, Volkswagen set up the \$10 billion pot to pay consumers and is required to invest \$2 billion over the next 10 years in projects that support the increased use of zero emission vehicles and pay \$2.7 billion to mitigate the effects of pollution from the cars that hit the road equipped with the defeat devices.

Elizabeth Cabraser of Lief Cabraser Heimann & Bernstein LLP, served as lead counsel for the consumers, along with our firm as Class Counsel. She said:

*We are pleased with the court's decision, which acknowledges the widespread support this historic settlement has received from affected Volkswagen owners and lessees and the substantial benefits available to class members.*

Dee Miles from our firm was one of 20 lawyers appointed as Class Counsel.

Archie Grubb from the firm assisted Dee in his role in the litigation. The consolidated appeal is *In re: Jason Hill et al. v. Volkswagen Group of America I et al.*, (case numbers 16-17157, 16-17158, 16-17166, 16-17168, 16-17183 and 16-17185), in the U.S. Court of Appeals for the Ninth Circuit. The MDL is *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation* (case number 3:15-md-02672) in the U.S. District Court for the Northern District of California.

Source: Law360.com

#### **FORD AGREES TO \$300 MILLION SETTLEMENT IN TAKATA AIR BAG MDL**

Ford Motor Co. has agreed to a \$299.1 million settlement that will take the automaker out of the multidistrict litigation (MDL) over defective Takata Corp. air bags. This will accelerate the removal of dangerous air bag inflators from 6 million affected vehicles. Under the terms of the settlement, Ford will inform affected consumers about the recall of cars with the defective air bags using a state-of-the-art outreach program that regularly contacts class members through direct mail, phone calls, email, internet ads, social media and in-person canvassing.

The settlement will also provide compensation to consumers for their losses resulting from the recall, including the reimbursement of reasonable out-of-pocket expenses or up to a \$500 payment for those who did not document their out-of-pocket expenses. Ford will also provide rental cars for class members while they wait for their recall repairs. The settlement is still subject to court approval.

Ford is the seventh automaker to reach a settlement in the MDL, after Honda agreed last September to a \$605 million deal, Nissan settled for \$98 million in August and Toyota, Subaru, Mazda and BMW agreed to pay a combined \$553 million in May 2017. Plaintiffs' lead counsel Peter Prieto of Podhurst Orseck PA said:

*These settlements are proving to be vital in protecting consumers from dangerous Takata air bags and this latest agreement with Ford is an important expansion of this effort. All consumers deserve to drive without fear of injury, and the outreach, support and compensation programs in this settlement*

*will undoubtedly make Ford drivers and passengers safer.*

Ford spokeswoman Elizabeth Weigandt, saying safety is the company's top priority, stated that the company is working with customers to get their vehicles repaired. She said "parts are available for all of the Ford vehicles in priority groups one through three, and we urge customers to contact their dealer immediately for free repairs."

Four additional automakers—General Motors LLC, Fiat Chrysler, Volkswagen Group of America and Mercedes-Benz USA LLC—that were brought into the MDL with new suits filed in March are still defending the claims against them.

Consumers first filed suit in 2014, alleging the cheap but volatile ammonium nitrate that inflates the bags can misfire, especially in humid conditions, blasting chemicals and metal fragments at passengers and drivers. Takata's air bag inflators have been linked to at least 11 deaths in the U.S. and the company has faced massive global recalls.

Takata has pled guilty to wire fraud, agreed to pay \$1 billion in fines and restitution and acknowledged that it ran a scheme to use false reports and other misrepresentations to convince automakers to buy air bag systems that contained faulty, inferior or otherwise defective inflators. In June, the company filed for bankruptcy in Delaware and Japan.

The class is represented by chair lead counsel Peter Prieto, Aaron S. Podhurst, Stephen F. Rosenthal, John Gravante, Matthew P. Weinshall and Alissa Del Riego of Podhurst Orseck PA, with parts of the suit being handled by Boies Schiller Flexner LLP, Colson Hicks Eidson, Power Rogers & Smith LLP, Lief Cabraser Heimann & Bernstein LLP, Carella Byrne Cecchi Olstein Brody & Agnello PC, and Baron & Budd PC. Dee Miles, Clay Barnett and Archie Grubb from Beasley Allen served on the Discovery Committee in the case and provided a valuable service to the outcome.

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

Source: Law360.com

#### **NHTSA PROBES STALLING AND OVERHEATING OF FORD ESCAPES**

The National Highway Traffic Safety Administration (NHTSA) has opened an investigation into complaints that some 2013 model Ford Escapes are overheating and suddenly losing power at highway speeds. The Office of Defects Investigation has received 40 complaints of 2013 Ford Escapes with 1.6-liter turbocharged EcoBoost engines stalling unexpectedly while driving. The complaints allege that the stalling is caused by an overheating of the engine; two of the 40 complainants claim that their vehicle's engine caught fire.

"A preliminary evaluation has been opened to determine the scope, frequency and potential safety-related consequences of the alleged defect," NHTSA said. Ford Motor Corp. said in a statement that it will cooperate with the investigation, which will cover an estimated 127,000 vehicles. The following are examples of the complaints:

One complaint from a customer in Yonkers, New York, referenced in the investigation notice alleged that while driving in August 2016, the Escape's dashboard displayed a "vehicle overheating" message before the engine suddenly stalled. The customer said smoke was coming from under the hood due to oil leaking onto the engine and that the cause of the failure was neither diagnosed nor repaired.

Another customer who complained about an engine fire said that while driving on June 6 of this year in Dozier, Alabama, the Escape's engine stalled and the vehicle was coasted to a fuel station where its engine caught fire. No injuries resulting from the alleged defect were reported in any of the complaints.

NHTSA's investigation comes one year after Ford issued a recall of 230,000 vehicles that were at risk of under-hood fires from overheating engines that were running low on coolant. Ford said at the time that it had received 29 reports of under-hood fires in the U.S. and Canada and that it would notify affected car owners that dealers would install a coolant-level sensor free of charge.

That recall affected 2014 Escape models, as well as 2014-2015 Fiesta STs, 2013-2014 Fusions and 2013-2015 Transit Connect models, all equipped with the

same 1.6-liter engines contained in the 2013 Escapes at issue in the latest investigation.

The investigation also comes two days after Ford issued safety recalls in North America to replace shifter cable bushings for approximately 550,000 2013-2014 Escapes and 2013-2016 Fusions. The bushings that attach the shifter cable to the transmission could degrade and detach and cause unintended vehicle movement, Ford said in its recall announcement.

Source: Law360.com

#### **FORD EXPLORER FACES MORE PITFALLS**

Ford's Explorer model SUV has had a troubled history, and has been the subject of several high-profile recalls in years past. One such recall centered on the Explorer's engine being prone to catching fire; so great was the risk, Ford advised its customers that it was too dangerous to even drive their SUVs to the dealership. Ford had to send tow trucks.

Ford has now had to face two new and equally terrifying issues in their Explorer models; the 2013 Explorers with the 1.6-liter engines are subject to overheating, which can cause the engine to shut down at highway speeds. The National Highway Traffic Safety Administration (NHTSA) has opened an investigation into the more than 40 complaints it has received. Ford also faces a lawsuit brought by two New York Police Department (NYPD) officers claiming that the Explorers modified and sold by Ford to the New York Police force had design flaws in the HVAC and exhaust systems that allowed lethal levels of carbon monoxide to enter the vehicle's cab.

"A preliminary evaluation has been opened to determine the scope, frequency, and potential safety-related consequences of the alleged defect," NHTSA said. The investigation, which was opened July 16, will cover an estimated 127,000 2013 Ford Explorers. Drivers have complained that while driving the "vehicle overheating" light comes on, and then the engine suddenly stalls. At least two drivers have said that their engines have caught on fire. At least one other driver says his engine started smoking.

This investigation comes only one year after Ford issued a recall of 230,000 vehicles that were at risk of engine fires. In those cases, the fires stemmed from overheating engines running low on

coolant. Those engines were also 1.6-liter engines, though they were used in a variety of models.

While they are awaiting the results of the NHTSA investigation into the Explorer's engines, Ford will have to deal with a lawsuit alleging that the Explorers sold to the police force in Nassau County, New York, were defectively modified or designed and that, as a result, dangerous and potentially lethal amounts of carbon monoxide are allowed to enter the vehicles' cabins. The lawsuit alleges that Ford kept the defect secret, and failed to notify any of the officers who might be affected by the hazard.

This lawsuit is a proposed class action, with the two police officers proposing a class of nearly 2,500 other New York officers. Both of the officers were involved in wrecks. In each case, abnormally high levels of carbon monoxide were detected in the officers' blood. NHTSA opened an investigation to look into the more than 150 complaints concerning Ford Explorer exhaust systems, and Ford agreed last year to pay for repairs once the investigation was expanded. Ford issued technical service bulletins to dealers, but never notified the end users of the problem.

#### **FORD FACES CLASS CLAIMS OVER DEFECTIVE ENGINES IN TEXAS AMBULANCES**

A lawsuit was filed last month against Ford Motor Company by a Texas ambulance company, TacMed Holdings Inc. In the proposed class action, it is claimed that Ford was aware of serious engine defects in its Transit Vans for years prior to issuing a safety recall.

TacMed alleges in the complaint that as early as 2015, Ford became aware of a serious defect in the flex disc of the company's popular Transit Vans. The flex disc is described in the complaint as a type of "universal joint" positioned between the engine, specifically the transmission, and the driveshaft. The flex disc is used to transmit the rotational torque generated by the engine to the driveshaft, which then passes it to the axles and the wheels to set the vehicle in motion.

The failure of the flex disc can lead to serious issues with the rest of the vehicle, including damage to brake and fuel lines, transmission, rear end differential, torque converter and the evaporation container. The complaint against Ford states:

- Despite being aware of the serious safety risks associated with the defect, Ford continued to sell Transit Vans to the public, marketing the vehicle as "tough," "safe," "durable" and "designed to do its job all day, every day, and for many years to come."

- It was not until June 28, 2017, that the Defendant issued a safety recall. The recall advised drivers to replace the flex disc every 30,000 miles until Ford can devise a permanent remedy for the dangerous defect.

The suit states causes of action for breach of express warranty, breach of the Magnuson-Moss Warranty Act, breach of implied warranty of merchantability, fraud by concealment, unjust enrichment and violation of the Texas Deceptive Trade Practices Act. The proposed class is seeking to include anyone who purchased or leased a Ford Transit Van with a defective flex disk, for non-personal use, between 2015 and 2017.

The case is: *TacMed Holdings Inc. et al. v. Ford Motor Company*, Case No.: 7:18-cv-00212, in the U.S. District Court for the Southern District of Texas.

Source: Counselfinancial.com

#### **DRIVERS WIN PARTIAL CLASS CERTIFICATION IN FIAT CHRYSLER CAR-HACKING CASE**

Chief U.S. District Judge Michael J. Reagan has partially certified a slightly reduced inscope class action lawsuit claiming Fiat Chrysler vehicles were outfitted with infotainment systems that were vulnerable to hacking. Judge Reagan found there to be enough facts and evidence backing the consumers' fraud and warranty claims to allow the case to move forward. The judge certified three state-based classes of drivers in Illinois, Michigan and Missouri, led by named Plaintiffs Brian Flynn, Michael Keith and George and Kelly Brown.

Armstrong Teasdale LLP, the Law Office of Christopher Cueto Ltd., the Law Office of Lloyd M. Cueto PC and the Law Office of Stephen R. Wigginton were selected as class counsel by the judge.

FCA US LLC is accused of designing and installing defective "Uconnect" infotainment systems in Jeep Grand Cherokees and other vehicles that could be hacked and remotely controlled. However, Judge Reagan refused to certify a nationwide class of drivers, saying "it would be unwieldy and

require highly individualized inquiries” to sort through the underlying state laws governing the implied warranty, fraud and products-liability claims at issue.

The Jeep vehicle owners filed suit in August 2015 after researchers in a controlled experiment were able to hack a Jeep Cherokee and gain control of certain functions. The experiment, conducted and written about by Wired magazine, received extensive press coverage. The car owners argued that Fiat Chrysler’s voluntary recall and software fix, released before news of the experiment broke, still left exploitable, unguarded pathways into the car’s computer system.

The drivers are represented by Christopher D. Baucom, Lucas Pendry and IJay Palansky of Armstrong Teasdale LLP; Michael Gras and Christopher Cueto of the Law Office of Christopher Cueto Ltd.; and Stephen R. Wigginton of the Law Office of Stephen R. Wigginton. The case is *Flynn et al. v. FCA US LLC et al.*, (case number 3:15-cv-00855) in the U.S. District Court for the Southern District of Illinois.

Source: Law360.com

## IV. COURT WATCH

### **SUPREME COURT RULING IS BLOW TO PUBLIC-SECTOR UNIONS**

The U.S. Supreme Court’s recent ruling that public-sector unions cannot force nonmembers to pay fees to cover collective bargaining costs will most likely undermine the power of unions. Public unions, which represent workers such as police officers, teachers and firefighters, rely on these fees as a source of revenue. The high court’s ruling in *Janus v. AFSCME*, issued on the last day of the term, overturned precedent set in 1977 that said unions could collect fees from nonmembers for the purpose of collective bargaining.

The high court said these fees violate First Amendment speech rights and said that essentially collective bargaining is a political act. The Bureau of Labor Statistics estimates that 10.7 percent of U.S. workers were union members in 2017, down from 20.1 percent in 1983. Nearly a third of U.S. government employees are members of a public-sector union.

This ruling is definitely a major blow to unions nationwide.

There have been lots of early take-aways and predictions on the impact of the court’s ruling by lawyers who handle employment litigation. Most of them see hard times for unions—and especially public-sector workers—in the future. The following are some of the observations:

- There will be reduced revenue streams, which most likely means less lobbying. Public sector unions will have reduced revenue streams, which will change the way these groups conduct their business.
- Unions will have to become more creative if they are to remain a political force and benefit the members.
- There likely will be lots of activity in state legislature bodies.
- Dues are the lifeblood of all labor unions and the decision will continue a developing trend in the private sector.

As a result of this ruling, unions will have to regroup if they are going to be able to adequately support and fight for workers’ rights. Hopefully, they will do so and be successful.

Source: Law.com

### **SUPREME COURT VACATES \$32 MILLION UNION FEES DECISION POST-JANUS**

The U.S. Supreme Court has asked the Seventh Circuit to re-evaluate its opinion in a suit looking to recoup \$32 million in fees the Service Employees International Union Healthcare Illinois & Indiana collected from a group of nonmember home health care workers. The court said its ruling regarding unauthorized union-fee collection warrants further consideration in the case.

The high court’s order, issued one day after its opinion in the *Janus* case, declared collection of those so-called fair-share fees to cover union bargaining costs to be a First Amendment violation, and granted the petition for a *writ of certiorari*. Theresa Riffe had filed the petition after a unanimous three-judge panel upheld a lower court ruling that the Illinois health care workers could receive individual, but not class-wide relief over the fees. The high court’s order brings Ms. Riffe and Illinois Gov. Bruce Rauner back to the federal appel-

late court for another round of briefing. William Messenger, who is one of Ms. Riffe’s lawyers, told Law360:

*Janus resolved the opt-in/opt-out issue upon which the Seventh Circuit’s [Riffe] opinion was based, so we think there’s no reason for the court to deny class certification.*

Messenger, who is with the National Right to Work Legal Defense Foundation, also represented Janus in that case. The Riffe lawsuit is the latest incarnation of *Harris v. Quinn*, a suit over state laws requiring the fees that U.S. District Judge Manish Shah and the Seventh Circuit dismissed before the Supreme Court reversed their rulings in 2014.

At the heart of the suit are executive orders signed by then-Gov. Rod Blagojevich in 2003 requiring workers who provided in-home care to disabled individuals and were reimbursed by state Medicare programs to be classified as public employees for union organizing purposes. Current Gov. Bruce Rauner, a proponent of so-called right-to-work laws, which are totally anti-union, is now a Defendant in the suit.

The Seventh Circuit’s October opinion told Ms. Riffe that Judge Shah correctly found her bid for class certification over the unilaterally collected fees was fatally wounded by potential conflicts among class members who oppose the union on principle, class members who just don’t want to pay the fees and class members who have come to support both the union and the fees. It appears that the Supreme Court’s *Janus* opinion may well have put that concern to rest. Justice Samuel Alito’s majority opinion in *Janus* held outright that “the state’s extraction of agency fees from nonconsenting public-sector employees violates the First Amendment.”

The case is *Riffe et al. v. Rauner et al.* (case number 17-981) in the Supreme Court of the United States.

Source: Law360.com

## V. WHISTLEBLOWER LITIGATION

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### **SEC PROPOSAL TO LIMIT WHISTLEBLOWER REWARDS**

Over the past eight years, whistleblowers have played an integral part in the ability of the Securities and Exchange Commission (SEC) to effectively enforce federal security laws. In 2010, the SEC established a program under the Dodd-Frank Reform Act to reward and incentivize these good-doers to come forward, whether internally or externally, with helpful tips and reports of illegal activity that may otherwise go unseen. Since the program's creation, the SEC has returned the majority of \$1.4 billion to harmed investors.

### **Current Operations And Regulations Of The Whistleblower Program**

Historically, the Whistleblower Program rewarded individuals whose reports led to actions that yielded more than a million dollars. The SEC would then determine the whistleblower's compensation based on the usefulness and significance of the information the individual provided. The program was intended to ensure that whistleblowers provided the SEC with new information that did not stem from investigations already done by the SEC. Further, knowing a possibility of a significant monetary reward existed, the SEC believed that this new program would encourage individuals to bring crucial information forward. The program has proven to increase efficiency in investigations over the last eight years and more than \$266 million has been rewarded to upwards of 50 whistleblowers.

The program requires the SEC to compensate whistleblowers whose reports led to successful actions against the violating organization with anywhere from 10-30 percent of the total sanctions. The Whistleblower Program pays these awards out of a separate fund, set up by Congress, within the Treasury Department. This account, known as the Investor Protection Fund, is

not funded by taxpayers' dollars, but rather by sanctions against the wrongdoers.

### **Proposed Amendment To Current Rules**

Within the last week, the SEC has voted to propose several amendments to the current operations of the Whistleblower Program. The most controversial amendment follows a record-breaking payout of \$83 million to three individuals. The whistleblowers provided the SEC with tips that led to a \$415 million settlement against Merrill Lynch. Prior to this payout, the largest payout in history was \$30 million.

Proponents of the amendment argue that payouts are getting too large and a cap would ensure whistleblowers are compensated quickly and correctly. The limit would remain subject to the statutory 10 percent minimum. The proposed amendment qualifies this cap by ensuring that when a tip aids in an action resulting in \$100 million or more in sanctions, the award cannot be below \$30 million. However, the Amendment does not only propose a cap on payments, it would also allow the SEC to increase awards under \$2 million that it deems "too small" (while still subject to the 30 percent maximum).

The SEC voted to propose this amendment by a narrow 3-2 vote. The commissioners who opposed the proposal expressed their concerns that this amendment would decrease individuals' willingness to come forward with tips if a payout is not certain. They reminded the Commission of the critical role whistleblowers play in successfully punishing wrongdoers for their illegal actions and of the fact that this type of limit is not found in other type of regulatory payout.

The proposed amendment is currently open for public comment. Comments on the proposal can be made at [sec.gov](https://www.sec.gov) under the *Proposed Rules* section of the *Regulation* tab and will remain open for 60 days: <https://www.sec.gov/rules/proposed.shtml>. Following this feedback, the amendment will await further action by the Commission.

If you need additional information on this matter, contact Andrew Brashier, a lawyer in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at [Andrew.Brashier@beasleyallen.com](mailto:Andrew.Brashier@beasleyallen.com).

Sources: Francine Mckenna, *SEC Proposes to Limit Whistleblower Awards*, MarketWatch (June 28, 2018, 1:51 PM), <https://www.marketwatch.com/story/sec-proposes-to-limit-whistleblower-awards-2018-06-28>, Caryn Trombino, *SEC May Limit "Game Changing" Whistleblower Bounties*, White Collar Briefly (June 29, 2018), <https://www.whitecollarbriefly.com/2018/06/29/sec-may-limit-game-changing-whistleblower-bounties/>, and *SEC Proposes Whistleblower Rule Amendments*, U.S. Sec. and Exch. Comm'n (June 28, 2018), <https://www.sec.gov/news/press-release/2018-120>.

### **HEALTH CARE WHISTLEBLOWER SUIT RESULTS IN \$10 MILLION SETTLEMENT**

A whistleblower complaint that has been ongoing for five years involving health care fraud at a south Alabama rehabilitation clinic has resulted in a \$10 million settlement. The complaint involved a number of facilities in Florida and one in Alabama.

Long-sealed court documents, now revealed, lay out a narrative alleging that two health care companies systematically overbilled for rehab services. The Department of Justice (DOJ) says the case shows its vigilance in defending the Medicare system from false claims. Acting Assistant Attorney General Chad A. Readler of the Justice Department's Civil Division stated:

*Today's settlement demonstrates our continuing commitment to ensure that Medicare providers do not place their own financial gain over patients' clinical needs. Such conduct is especially unacceptable when it seeks to take advantage of older Americans, who are some of the most vulnerable members of our community.*

Richard W. Moore, U.S. Attorney for the Southern District of Alabama, had this to say about the case:

*The United States Attorney's Office for the Southern District of Alabama is committed to holding accountable those who place profit over the medical needs of patients. The provision of excessive and medically unnecessary therapy services will not be tolerated.*

All the allegedly improper conduct in the case occurred in a period ending in mid-2013. The origin of the case goes back to November 2011, when faith-based hospice care company Mercy Medical sold its Daphne campus to SE Healthcare Inc., managed by Florida-based Southern SNF Management. The facility was soon renamed Eastern Shore Rehabilitation & Health Center.

In July 2013, a little more than a year and a half later, three whistleblowers filed a False Claims Act complaint. La Wanda M. Davis, a speech pathologist, said she had been fired that February after “voicing concerns about unlawful practices taking place at Eastern Shore.” She was joined in the complaint by occupational therapy assistant Tramecier J. Donald and occupational therapist Megan Dinkins.

The three whistleblowers said collectively that Southern SNF Management systematically inflated billing for therapy services, billing Medicare and Tricare for top-tier “Ultra High” skilled rehab therapy whether patients needed it or not. This was being done in conjunction with Rehab Services in Motion, doing business as Dynamic Rehab, a company providing rehab services at Southern SNF properties. The two companies were said to have carried out the scheme throughout a chain of properties owned by Southern SNF. The complaint alleged:

*The groundwork for Defendants’ Ultra High policy was laid on the first day that Southern SNF assumed control of Eastern Shore, on or about December 11, 2011. Soon operations were restructured so that Ultra High skilled care was heavily emphasized. This usually meant that each new Medicare Part A patient was assigned all three types of therapy, or else extremely long sessions of physical and occupational therapies, on a daily basis upon admission, regardless of whether this regimen was medically indicated or not. Tellingly, treating therapists were not permitted to attend the meetings with patients’ families during which the care plan was discussed. Sometimes, one of the physical therapists would rewrite goals within the care plan in order to render them unattainable, thus helping to ensure that continuing the program of therapy would appear warranted.*

The complaint was filed at the end of July 2013 and was promptly sealed. This gave federal prosecutors a chance to investigate and to decide whether to step in. In June 2018, the U.S. attorney’s office weighed in, announcing that it had decided to intervene in part. It wasn’t including all the facilities where Southern SNF allegedly had cheated the system for high-cost service reimbursements. But it was pursuing the case against Southern SNF, Rehab Service in Motion and nine other facilities.

Eastern Shore Rehabilitation & Health Center, where the conduct giving rise to the suit began, was the lone Alabama site on the DOJ’s list. Since the time of the misconduct that facility has been sold to new owners. The other sites were all in Florida. A list of those sites is available on request.

The case settled quickly once the DOJ intervened. The government had been given until late August to file its own criminal complaint, but the settlement was agreed to before it ever did so. On July 13 the government asked Chief District Court Judge William Steele to unseal documents related to the case because a settlement agreement had been reached. The settlement agreement was filed on July 18.

According to the settlement agreement, half the \$10 million settlement is to be considered restitution to the government. State records indicate that in 2016, Eastern Shore Rehabilitation & Health was purchased by Birmingham-based Noland Health Services. It should be noted that Noland wasn’t involved in the litigation.

Source: Al.com

#### **CONNECTICUT REACHES SETTLEMENT IN FALSE CLAIMS ACT LAWSUIT**

The State of Connecticut has reached a \$200,000 settlement with Elijah Caldwell, a behavioral health clinician, and his company, A Prospering Vision, LLC. According to a lawsuit filed last year by Connecticut’s Department of Social Services (DSS), A Prospering Vision was enrolled in the Connecticut Medical Assistance Program (CMAP)—Connecticut’s Medicaid Program—as a licensed behavioral health clinician group provider as well as for advanced practiced registered nurse (APRN) group providers.

The lawsuit alleged that between March 2013 and December 2016, Caldwell billed the Medicaid program

for Connecticut millions of dollars in the form of claims reimbursement. However, the lawsuit alleged that many of the services were either never provided to patients, were provided but were provided by unlicensed individuals, or were “upcoded.” Upcoding involves performing a service for a patient, but then knowingly using a higher-paying code on the claim form for a Medicaid patient to indicate that a different and more expensive service was provided.

To resolve the litigation, Caldwell, A Prospering Vision and a third company agreed to pay \$200,000 in settlement. The settlement also required that all three be excluded from participation in the CMAP/Medicaid program for 10 years.

Source: Press Release, The Office of Attorney General George Jepsen

#### **NEW AND FUTURE DECISIONS INVOLVING FALSE CLAIMS ACT LIABILITY FOR MEDICAL JUDGMENTS**

Two recent decisions by separate federal appeals courts have ruled that physicians’ medical judgments could be false or fraudulent. The Department of Justice (DOJ) has since touted the two decisions in a pending Eleventh Circuit Court of Appeals case. The issue before the court is whether medical judgments can be “false” so that health care providers can be liable under the False Claims Act (FCA) when performing and billing for procedures that are “medically unnecessary.”

The following is a brief summary of the two decided cases referred to above:

A Tenth Circuit Court of Appeals case involved a doctor who blew the whistle on a fellow doctor who billed Medicare for medically unnecessary heart surgeries and who falsely certified that the surgeries were necessary. *United States ex rel. Polukoff v. St. Mark’s Hosp.*, No. 17-4014 (10<sup>th</sup> Cir. July 9, 2018). The district court granted a motion to dismiss, holding that a doctor’s medical judgment regarding the necessity of treatment could not be false or fraudulent under the FCA. The Tenth Circuit reversed the district court’s ruling and remanded the case for further proceedings, finding that a doctor’s certification to the government that a procedure is medically necessary is “false” for



purposes of the FCA if the procedure is not in fact necessary.

Similarly, a Sixth Circuit Court of Appeals case involved a cardiologist who was criminally charged with health care fraud for defrauding Medicare and Medicaid by inflating arteries when interpreting angiograms and by performing medically unnecessary procedures, such as implanting stents into unblocked arteries. *United States v. Paulus*, No. 17-5410 (6<sup>th</sup> Cir. June 25, 2018). A jury found the cardiologist guilty on the health care fraud count, but the district court set aside the guilty verdict by concluding the angiogram interpretations could not be false or fraudulent. However, the Sixth Circuit reversed, holding that medical judgments could be false or fraudulent.

The Eleventh Circuit is now considering the question of whether medical judgments can be “false” for purposes of the False Claims Act. The case is *United States v. GGNCS Admin. Servs* No. 16-13004 (11<sup>th</sup> Cir. July 10, 2018). The case is referred to as the “AseraCare” case.

In two separate filings of supplement authorities in AseraCare, the DOJ encouraged the Eleventh Circuit to follow the Tenth Circuit’s *Polukoff* decision and that in the Sixth Circuit’s *Paulus* case. The DOJ wrote that the Tenth Circuit’s approach in *Polukoff* reflected the “proper understanding of falsity” in medical-judgment cases under the FCA. Further, the DOJ cited the *Paulus* decision as rejecting the defense that conflicting expert testimony as to medical necessity shields a Defendant from FCA liability for false medical judgments.

Ultimately, the Eleventh Circuit’s decision in AseraCare will be important to whistleblower cases alleging violations of the FCA where doctors perform and bill Medicare and Medicaid for medically unnecessary procedures.

Beasley Allen lawyers continue to monitor the developments in cases interpreting the False Claims Act. Further, our lawyers vigorously investigate fraud by health care providers billing federal and state governments for medically unnecessary procedures. Anyone who knows of fraudulent activities is encouraged to step forward. Any person considering blowing the whistle is strongly

urged to seek legal advice before doing so.

Sources: <https://www.jdsupra.com/legalnews/fca-alert-medical-judgment-can-be-false-97977/> and <https://www.bna.com/medical-judgment-not-n73014477299/>

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

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

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

## **VI. PRODUCT LIABILITY UPDATE**

#### **DISASTER IN MISSOURI RAISES NEW SAFETY CONCERNS ABOUT DUCK BOATS**

As has been widely reported, 17 people were killed when an amphibious boat carrying sightseers on a lake in Missouri sank after encountering high winds and choppy waters. The disaster began on July 19 at Table Rock Lake, when a tour company vessel known as a duck boat—which has wheels and can also drive on land—sank with 31 sightseers and crew members on board. Seventeen people died in the horrific disaster. Ride the Ducks, a tour company, owned the boat involved in the tragic incident.

One of the survivors said that before the boat capsized, the captain said, “don’t worry about grabbing the life

jackets—you won’t need them.” It appears that the life jackets were never used by any of the passengers. The life jackets were seen hanging in photographs taken of the boat.

Duck boats—so named because of the boats’ military origins in World War II, when the amphibious DUKW craft were created to ferry U.S. Army troops and supplies—have wheels and can drive on land as well float through the water. After the war ended, many of the boats were sold as surplus for civilian use and became a popular novelty for water tours across the U.S.

The ill-fated duck boat entered the water at night as a storm was arriving in the area. The National Weather Service issued a severe thunderstorm warning at 6:32 p.m., warning of possible winds exceeding 60 mph. The first 911 calls about the sinking came just before 7:10 p.m.

This disaster was not the first of its kind for duck boats. Jim Hall, a former top federal safety official, has questioned why the duck boats are still in service across the U.S. Hall, the former chairman of the National Transportation Safety Board (NTSB) from 1982 to 2001, had this to say:

*It’s clear to me that this is not a vehicle that should be licensed for commercial purposes to carry that number of people.*

Hall was the chairman when the NTSB investigated a similar duck boat disaster on Lake Hamilton in Arkansas in 1999 that left 13 passengers dead when the boat suddenly sank. DUKWs were not originally designed for passenger service and do not have adequate reserve buoyancy to remain afloat in the event of a breach of watertight integrity. The boats are equipped with canopies that can be lowered with passengers still able to see outside. Unfortunately, when closed, the canopies keep passengers from escaping when a disaster happens. This Missouri incident is a prime example of how that hazardous condition can trap passengers inside the boat and keep them from escaping before the boat sinks.

The NTSB has recommended adding extra buoyancy to duck boats and recommended “the removal of canopies during water operations or installation of a Coast Guard approved canopy” to give passengers a better chance to escape in case of a disaster. The NTSB report from the Arkansas disaster also found that the U.S. Coast Guard had no

uniform nationwide inspection policy for duck boats.

There have been several lawsuits arising from duck boats sinking, resulting in deaths and injuries. One such case involving two deaths occurred in 2012 and it settled for \$17 million. These boats should be banned for use as tour boats because of their design problems and the history of numerous serious safety problems. We have reported about the duck boat problems in past issues of this Report. It is time for government regulators to get involved and either ban the duck boats or at least regulate their use. If additional authority is needed, Congress should act.

#### **COURT RULES ON HANKOOK'S REQUEST FOR A NEW TRIAL IN \$37 MILLION DEFECT SUIT**

It doesn't appear that there will be a new trial in the Benedict case that was tried in Virginia against Hankook Tire Co. Ltd. The jury awarded \$38 million to the Plaintiff who became a quadriplegic in a 2014 motor vehicle accident. However, there is a condition in the order by the trial judge that would give the Defendant company a very slight chance for a new trial. If the Plaintiff objects to taking an amount slightly smaller than the actual verdict the court would order a new trial. Common sense says there is no chance of that happening.

While U.S. District Judge Robert Payne rejected the tire company's motion for a new trial, he found that the jury had made a small calculation error when it came back with the \$37.83 million requested by Plaintiff Robert Benedict. The jury had based the amount of the verdict on various past and future medical expenses and lost wages, but used the wrong number for the Plaintiff's lost future wages.

Judge Payne said the jury should have used a number that was about \$67,000 lower and therefore the jurors should have come back with a \$37.77 million verdict. Since the jury awarded the Plaintiff exactly the amount requested during closing arguments, the judge said it is clear all the jury intended to award was the amount he sought, and not some other number.

The Plaintiff now has the choice to either agree to a new trial on the whole case, a new trial limited to the issue of damages, or to accept the slightly smaller \$37.77 million award. The jury unanimously found in favor of the Plain-

tiff in his suit alleging Hankook was negligent in its manufacture of the right front tire of the cement mixer truck he was driving in his work in November 2014. The incident, according to trial testimony and documents in evidence, occurred as follows:

*The Plaintiff was on his way to the first delivery of the day when he heard a loud boom; the tread on the right front tire had separated, resulting in a sudden loss of all air pressure, according to court documents. Soon after the boom, Benedict's truck veered to the right and hit an embankment on the side of the road, rolling once before coming to rest upright.*

*The Plaintiff estimated that there was, at most, two to three seconds in between the boom and the collision. He was driving normally and at legal speed before the accident. The Plaintiff suffered a spinal cord injury that left him a quadriplegic.*

The tire at issue was a Hankook Aurora TH08 radial made overseas by Seoul-based Hankook Tire and sold to its subsidiary in the U.S., Hankook Tire America Corp. The Plaintiff's expert witness, tire engineer David Southwell, testified that there were two defects in the tire: one being that the components didn't adequately adhere to each other and the other that the tire's inner liner was too thin and allowed oxygen to permeate into the tire and degrade the rubber.

Judge Payne rejected Hankook's contention that the evidence, taken as a whole, did not support the verdict, thus warranting a new trial. The tire company's expert claimed that the accident was caused by the truck hitting something in the road. Judge Payne said:

*This is a classic 'battle of the experts' situation, and the court cannot find that the jury's decision to believe one expert over another was against the clear weight of the evidence.*

The Plaintiff is represented by Jonathan E. Halperin, Isaac McBeth and Andrew Lucchetti of Halperin Law Center LLC and Jay Halpern and Ernesto L. Santos Jr. of Halpern Santos & Pinkert PA. The case is *Benedict v. Hankook Tire Co. Ltd. et al.*, (case number 3:17-cv-

00109) in the U.S. District Court for the Eastern District of Virginia.

Source: Law360.com

#### **RIDING LAWNMOWERS KILL AN AVERAGE OF 70 PEOPLE EACH YEAR AND INJURE 80,000 MORE**

Many Americans own and use riding lawnmowers. However, many do not realize that these products can present the risk of serious injuries and even death. The recent deaths of two Alabama men highlight the dangers that come with operating a riding lawnmower.

Lawnmower injuries sent more than 80,000 people—including 5,000 children—to U.S. emergency rooms in 2015, according to the Consumer Product Safety Commission (CPSC). Lawnmowers are especially dangerous for children and are cited by the Amputee Coalition as the No. 1 reason for pediatric amputations nationwide. According to the commission, 800 children are run over by riding mowers or small tractors each year, and more than 600 of those incidents resulted in amputation.

Incidents involving lawnmowers have been blamed for an average of 70 deaths annually, according to the CPSC. The injuries range from people falling or slipping in front of or off a mower; burns; amputations from the blades; damage from projectiles thrown from the lawnmower; or, as in several recent Alabama cases, rollovers. Nearly all deaths were caused by mowing on hillsides or near water where the operator lost control and the mower rolled over onto the operator, or into the water trapping and drowning the operator.

One type of mower that can be particularly problematic is what is known as a zero-turn mower (ZTM). These mowers do not have a steering wheel and therefore are not controlled by turning steer wheels. Instead, a ZTM is hydrostatically controlled by the handles, which operate larger drive wheels on either side of the operator. The front wheels are basically casters that are free turning and over which the operator has no control.

Because ZTMs handle much differently than conventional mowers, learning to operate a new machine can be a potential hazard. With machine weights from 500 to almost 1,800 pounds, and larger drive tires, the machines are very susceptible to slipping sideways on wet slopes. In addition, when pointed downhill the mowers tend to roll down slopes

and hills at a high rate. This is further complicated by the weight shift of the mower from the drive tires to the uncontrollable front caster wheels. This can result in an uncontrollable downhill free-fall. Pulling on the handles and going into reverse has proven an ineffective way to stop a zero-turn mower when it begins a downhill free-fall.

However, there are some after-market products that have proven effective at preventing this hazardous phenomenon. The simplest, and what appears to be the most effective are front brakes. Surprisingly, none of our lawyers are aware of any major zero-turn mower manufacturer that offers this option.

In addition to the zero-turn mower hazards, all mowers for many years have been especially hazardous where children are involved. Jeffrey Janis, MD., president of the American Society of Plastic Surgeons, said:

*Lawn mowing can unexpectedly become a dangerous activity, especially when children are near. It's imperative that operators take proper precautions and eliminate all risks to reduce these traumatic injuries.*

The Alabama Department of Public Health offers a number of safety recommendations. While the list is long, each of the recommendations is important and should be followed:

- Children should be at least 12 years old before they operate any lawn mower, and at least 16 years old for a ride-on mower.
- Children should never be passengers on ride-on mowers.
- Always wear sturdy shoes while mowing—not sandals.
- Young children should be at a safe distance from the area you are mowing.
- Before mowing, pick up stones, toys and debris from the lawn to prevent injuries from flying objects.
- Always wear eye and hearing protection.
- Use a mower with a control that stops it from moving forward if the handle is released.
- Never pull backward or mow in reverse unless absolutely necessary – carefully look for others behind you when you do.

- Start and refuel mowers outdoors—not in a garage. Refuel with the motor turned off and cool.
- Blade settings should be set by an adult only.
- Wait for blades to stop completely before removing the grass catcher, unclogging the discharge chute, or crossing gravel roads.
- Avoid driving backward unless absolutely required and exercise extreme caution when necessary.
- When purchasing a lawn mower, look for machines that have a forward control mechanism that stops the machine from moving if the handle is released.
- Never use a riding lawnmower on slopes greater than 15 degrees or a 27 percent slope. This is almost the same as a drop of 3 feet over a distance of 10 feet.
- When mowing a slope with a riding lawnmower, mow up and down and only turn around on level ground at the top or bottom of a hill.

Needless to say, all of these safety precautions must be followed. If you need more information, contact Graham Esdale, a lawyer in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at [Graham.Esdale@beasleyallen.com](mailto:Graham.Esdale@beasleyallen.com).

#### **TODDLER'S BURN INJURIES SAID TO HAVE BEEN CAUSED BY LIGHT-UP SHOES**

A mother whose toddler suffered second-degree burns on his feet says that the injuries were caused by the batteries that power the lights in the child's Skechers Light Up training shoes. Sherry Foster described her son Peyton's burn injuries in a public Facebook post on June 26. She said in the post:

*Peyton has 2<sup>nd</sup> degree chemical burns from his sketcher lightable shoes. Apparently when they get wet the batteries release a chemical causing children's feet to burn.*

Ms. Foster thanked her son's doctor for treating his injuries on a busy day. The post quickly went viral, with more than half a million Facebook users, many of whom are concerned parents, sharing the public post.

At least one parent said that they had several pairs of light-up children's shoes but never had any issues with them, even after putting them through the washing machine. In a statement about the Facebook post, Skechers said that it immediately contacted Ms. Foster after learning of the post. The manufacturer requested that she send the shoes so that the company could investigate and determine if the shoe batteries had malfunctioned and caused her son's burn injuries. Skechers said in a statement:

*Ms. Foster has agreed to send us the shoes, and we will continue our investigation. Despite the lack of any other similar reported incidents, we are taking this complaint very seriously and giving it the highest priority.*

The incident is very much like a previous case reported by KHOU of Houston, Texas, in 2016, involving parents who said their child's light-up shoes caused a fire in their SUV. The child was not wearing the "Jake and the Neverland Pirates" sneakers from Disney at the time and there were no injuries, but the extent of the damage and the potential for serious injury were said to concern the Virag family. The fire in the backseat burned a hole through the floor of the vehicle and melted the passenger seat.

The Virags reported the incident to the Harris County Fire Marshal's Office, which investigated. It was stated: "There just wasn't anything in there to start a fire. Only shoes and clothes." Based on reports, half of one of the shoes was burned away, leaving only a burned shoe with a charred battery and wiring exposed.

Lithium-ion batteries are used to power a multitude of consumer products, including children's light-up shoes. Though highly effective, the batteries can release a tremendous amount of heat if damaged or somehow flawed in the manufacturing process, potentially causing fires and burns. Although cases of fires and burns involving children's light-up shoes appear to be rare, parents may nevertheless want to keep a close eye on the shoes and check them periodically for signs of heat or melting.

Source: Righting Justice

## VII. TALC LITIGATION UPDATE

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### **JURY AWARDS \$4.69 BILLION TO PLAINTIFFS IN TALC OVARIAN CANCER TRIAL**

A St. Louis jury has awarded \$550 million in actual damages and an additional \$4.14 billion in punitive damages to the 22 women who proved that Johnson & Johnson talcum powder products caused them to develop ovarian cancer. The trial was held in the Circuit Court of the City of St. Louis, Missouri. The Plaintiffs proved that J&J and its talc supplier, Imerys Talc America, concealed the fact that their talc was contaminated with asbestos.

Johnson & Johnson has known for years that its talc products cause cancer. It can no longer hide its very bad and sinister conduct from the American people. Mark Lanier of the Lanier Law Firm was the lead lawyer representing the Plaintiffs in the case. Mark and his trial team did an outstanding job for the Plaintiffs in this very important case.

Prior to the start of the trial, Imerys reached a settlement with the Plaintiffs. The terms of the settlement haven't been revealed. Pursuant of the settlement, Imerys was released from the case, leaving J&J and its subsidiary solely responsible for the verdict.

The jury held J&J and its subsidiary Johnson & Johnson Consumer Inc. liable based on strict liability and negligence. They awarded an average of \$25 million to each woman suing individually and \$12.5 million to each woman who sued together with her husband. Punitive damages include \$3.15 billion against J&J and \$990 million against J&J Consumer.

The companies, particularly Johnson & Johnson, have faced similar lawsuits alleging their talc contained asbestos and that using products like Johnson's Baby Powder and Shower to Shower on the genitals for feminine hygiene can cause ovarian cancer. The companies have also been named in lawsuits alleging the asbestos-contaminated talc also causes mesothelioma, a rare and deadly form of cancer caused by asbestos exposure.

The consolidated case is *Ingham v. Johnson & Johnson*, in the Circuit Court

of the City of St. Louis, Missouri; (Cause No. 1522-CC10417-01) Division Ten.

Source: Law360.com

### **\$117 MILLION VERDICTS IN NEW JERSEY UPHELD AGAINST J&J AND ITS TALC SUPPLIER**

As stated above, a New Jersey state judge has upheld verdicts totaling \$117 million in damages against Johnson & Johnson and its talc supplier over claims that a man's decades-long exposure to the pharmaceutical giant's alleged asbestos-containing talcum powder contributed to his mesothelioma. Superior Court Judge Ana C. Viscomi denied motions from J&J and Imerys Talc America Inc. to set aside a \$37 million verdict in compensatory damages and a combined \$80 million verdict in punitive damages awarded to Stephen Lanzo III and his wife earlier this year. Based on the evidence in the case and the consideration of the evidence during both phases of the trial, Judge Viscomi said those verdicts "do not shock the judicial conscience."

Among other evidence, jurors learned that an Imerys employee announced that it was "time to create confusion with regard to defining asbestos and testing protocols." A doctor with Johnson & Johnson Consumer Inc. also advised the J&J unit about "health concerns because of asbestos in the talcum powder."

The trial included evidence about "countless negative tests" and studies deeming JJCI's products to be safe, but jurors ultimately rejected those materials, the judge said. "This was a jury who collectively paid very close attention to the evidence," Judge Viscomi said in denying the Defendants' motions challenging the amounts of the damages awards. Lanzo Moshe Maimon of Levy Konigsberg LLP, one of the Plaintiffs' lawyers, told Law360:

*The evidence clearly showed that Johnson's Baby Powder contained asbestos and caused Steve Lanzo's mesothelioma. Moreover, both Johnson & Johnson and Imerys knew of the asbestos in the talc and designed and implemented testing programs intended not to detect it. Both Defendants were warned of the dangers of asbestos—but chose not to warn the innocent users of their products. All the while a perfectly safe alternative—corn starch—was available. The denials by the company*

*spokespeople is belied by the secret and confidential internal documents that the jury saw, assessed and based its verdict upon.*

The jury found that JJCI's talc products, including its baby powder, contained asbestos. The jury found that Lanzo's exposure to the toxic mineral in the products between 1972 and 2003 played a substantial role in his contracting mesothelioma. Jurors awarded compensatory damages of \$30 million to Lanzo and \$7 million to his wife, Kendra, who was also a Plaintiff in the case. JJCI was ascribed 70 percent of the blame with Imerys being given 30 percent.

The jury awarded \$55 million in punitive damages against JJCI and \$25 million against Imerys in the punitive phase, finding that the companies acted in wanton and willful disregard of the Lanzos' rights. Judge Viscomi explained that the verdicts should stand by citing various pieces of evidence presented to the jury, including evidence supporting the Plaintiffs' position that J&J's baby powder was contaminated with asbestos during the time period when the product was used on and by Stephen Lanzo.

The jury also heard evidence that the Defendants knew their methodology for testing talc and talc products was deficient. Nevertheless, the Defendants advanced those protocols as the proper methodology to be utilized.

The Lanzos are represented by Szaferman Lakind Blumstein & Blader PC, Moshe Maimon of Levy Konigsberg LLP, and Joseph Satterley and Denyse F. Clancy of Kazan McClain Satterley & Greenwood. The case is *Lanzo et al. v. Cyprus Amax Minerals Co. et al.*, (case number L-7385-16) in the Superior Court of the State of New Jersey, County of Middlesex.

Source: Law360.com

### **THE RISTESUND CASE IS ON APPEAL**

Recently, the Missouri Court of Appeals reversed and vacated a \$55 million verdict against Johnson & Johnson in the baby powder talc litigation. You may recall that South Dakota resident Gloria Ristesund was the second woman to receive a favorable jury verdict in St. Louis. In April 2016, the jury in her case found decades of baby powder usage caused her ovarian cancer and awarded \$5 million in com-

pensatory damages and \$50 million in punitive damages. Shortly thereafter, the trial court denied J&J's post-trial motions to set aside the verdict and the case then went up on appeal.

A year later, while the case was still on appeal, the U.S. Supreme Court issued an opinion in an unrelated case that changed the law with respect to what women like Ms. Ristesund must prove in order to establish jurisdiction when they hail from a foreign state. Ms. Ristesund then requested that her case be remanded to the trial court for further proceedings in order to show that J&J had, for the last 13 years, been contracted with a Missouri Corporation to process, bottle and label the baby powder and thereby prove she complies with the new Supreme Court jurisdictional law. Unfortunately, that request was denied. The case is now on appeal to the Missouri Supreme Court and is awaiting a decision.

Johnson & Johnson used a jurisdictional technicality to escape liability for its reprehensible corporate conduct in the Ristesund case. However, neither the facts nor the science behind these verdicts are going away. Like many trial verdicts before it, a Missouri jury saw the internal documents from Johnson & Johnson, they also saw the science, studied the science and found that talc caused Ms. Ristesund's ovarian cancer.

The juries also found that Johnson & Johnson used its corporate influence to prevent government regulation and warnings from being placed on its talc-based powder products. Our litigation team will continue to fight for Ms. Ristesund and other victims, and will do so in courtrooms throughout the country, including Missouri.

#### **COLGATE SETTLES BABY POWDER CANCER CLAIM ON EVE OF TRIAL**

Colgate-Palmolive Co. reached a settlement the day before jury selection in a trial that would have involved the company's talc-based baby powder. The consumer products company would have faced claims that it sold a man talc-based baby powder that contained asbestos and that it contributed to him contracting mesothelioma. Paul Garcia, the Plaintiff, had claimed that decades of exposure to Colgate-Palmolive products like Cashmere Bouquet and Mennen Baby Powder caused him to develop the deadly lung cancer linked to asbestos exposure.

Consumer products giant Colgate-Palmolive once again is paying for the link that is being claimed to exist between the company's Cashmere Bouquet talcum powder and deadly asbestos exposure. There have been several other settlements in cases against Colgate-Palmolive. Garcia's complaint, filed in May 2017, alleged that the baby powder he used contained asbestos, that Colgate-Palmolive knew about it, and that the company failed to warn him.

Colgate-Palmolive currently faces numerous cases claiming the company sold asbestos-laced talcum powder. The company settled 43 asbestos-in-talc cases last year, according to Bloomberg. Colgate-Palmolive manufactured Cashmere Bouquet from 1871 to 1985 and continued to market it until 1995. At last count there were still more than 170 cases pending in courts.

A California jury awarded Judith Winkel \$13 million in 2015 over her mesothelioma claim tied to Cashmere Bouquet. The verdict was the first against Colgate-Palmolive for asbestos exposure from commercial talcum powder. The company and Winkel later agreed to a confidential settlement

Cashmere Bouquet contained talc mined by Imerys Talc North America, the world's leading talc producer. Imerys' Yellowstone open-cast mine in Montana remains the nation's largest talc mining operation.

Source: Law360

#### **BEASLEY ALLEN TALC LITIGATION TEAM**

Our firm has been heavily involved in the Talc litigation for several years. We learned quickly that our lawyers and support staff had to be totally dedicated to the task in order to take on powerful companies like Johnson & Johnson. For that reason we formed The Talc Litigation Team. Currently the following lawyers are on the team: Ted Meadows, Rhon Jones, Leigh O'Dell, David Dearing, Danielle Mason, Sharon Zinns and Ryan Beattie.

Ted Meadows leads the firm's effort involving the Ovarian Cancer aspect of the litigation. Rhon Jones and Sharon Zinns handle the mesothelioma-related talc litigation for the firm. We expect both areas will continue to be very active over the next two years.

Leigh O'Dell is co-lead counsel for the Plaintiffs in the Talc Litigation MDL in New Jersey. She can be reached at 800-

898-2034 or by email at Leigh.Odell@beasleyallen.com.

If you need more information on either aspect of the Talc litigation mentioned above, other than the MDL, contact Ted or Rhon at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com or Rhon.Jones@beasleyallen.com. You can also contact Katie Tucker, the Legal Assistant who has been working with the team from the very beginning, at 800-898-2034 or by email at Katie.Tucker@beasleyallen.com. Katie will put you in touch with a lawyer.

## **VIII. A FURTHER UPDATE ON MASS TORTS LITIGATION**

#### **STRYKER LFIT ANATOMIC V40 FEMORAL HEAD- EXPANDED: PRODUCT SAFETY NOTIFICATION**

Beasley Allen lawyers continue to investigate and file cases involving the Stryker/Howmedica LFIT Anatomic v40 Cobalt Chromium Femoral Head. On May 22, 2018, Stryker/Howmedica released an expanded Product Safety Notification to include additional catalog numbers for the LFIT v40 femoral heads manufactured before March 4, 2011. The litigation continues to expand to include the ever-growing number of affected Plaintiffs.

As previously reported, the micromotion between the V40 femoral head, when combined with any of Stryker's titanium femoral stems, causes corrosion and wear, and the devices are failing prematurely, sometimes catastrophically. In addition to the dissimilar metals issue, the taper design for the devices is also in question.

These devices can cause tissue damage and related complications, and the micromotion within the construct can also cause the head and stem to wear on each other so severely that the stem can be filed down to a sharp point, and the head loses support and can become loose or dissociate completely.

Corrosion and dissociation injuries present an urgent need for revision surgery, which is a painful and risky operation and poses risks of infection, decrease in integrity of the bone, DVT, foot drop, nerve damage and death.

The damage caused by the corrosion alone, without the added complications of dissociation, can lead to serious and permanent complications, such as the destruction of muscle systems, decreased stability, increased risk of dislocation, infection, revision, fractures and amputations.

In addition to the Stryker LFIT v40 femoral head, Beasley Allen lawyers also continue to investigate and file lawsuits related to Stryker Rejuvenate and ABG II Modular femoral stem failures. These devices were voluntarily recalled by Stryker/Howmedica Osteonics Corporation in 2012 and, thus far, there have been two rounds of settlements. A third settlement has not been announced and cannot be guaranteed.

To discuss a potential Stryker hip claim, or if you need additional information, contact Lisa Littell Courson, a lawyer in our firm's Mass Tort Section, at 800-898-2034 or by email at Lisa.Courson@beasleyallen.com.

#### **SUPREME COURT AGREES TO REVIEW FOSAMAX MDL REVIVAL**

The U.S. Supreme Court has agreed to review a Third Circuit Court of Appeals decision that revived multidistrict litigation (MDL) over Merck's failure to warn Sharp & Dohme Corp. about a risk of femoral fractures from its osteoporosis drug Fosamax. The parties are battling over the U.S. Food and Drug Administration (FDA) rejection of Merck's proposed fracture warning sought to be added to its label in 2008. The Third Circuit revived the patients' claims last year, saying the drug maker must prove to a jury by "clear evidence" that federal regulators would have rejected even a properly worded warning.

The panel found that there was a valid argument that Merck could have received approval for its proposed femur fracture warning had it described the fractures differently; that is, more consistently with the types of fractures actually being reported. Instead, Merck warned of nondescript stress fractures, and implied causes other than Fosamax.

More than 500 patients who took Fosamax before the eventual addition of the warning about atypical femoral fractures in 2011 contend that the FDA rejected the proposed "stress fracture" warning because it didn't represent the type of injury the patients sustained—not because of insufficient data or evidence of causation.

In May the acting U.S. Solicitor General weighed in on the issue, urging the high court to take up the company's appeal. In an amicus brief, acting Solicitor General Jeffrey Wall argued that the appeals panel wrongly focused on how the FDA would have responded to a differently worded proposed warning, rather than on the legal effect of the agency's decision. The Solicitor General wants to leave such decisions in the hands of judges.

Merck has asked the high court to affirm the district court's decision dismissing the cases, taking the position that because the FDA rejected Merck's proposed femur fracture warning, the Plaintiffs are preempted by federal law from pursuing failure to warn claims. Under the Supreme Court's *Wyeth v. Levine* decision, pharmaceutical companies cannot be sued for a failure to warn where there is "clear evidence" the FDA considered a proposed warning but rejected it for inadequate data. The Fosamax femur fracture claims were dismissed in 2014 by U.S. District Judge Joel A. Pisano, finding that Merck's proposed and rejected warning was adequate. It is quite clear that the "clear evidence" standard from *Wyeth* requires the court to rule for the Plaintiffs.

Plaintiffs are represented by David C. Frederick, Brendan J. Crimmins and Jeremy S.B. Newman of Kellogg Hansen Todd Figel & Frederick PLLC. The case is *Merck Sharp & Dohme Corp. v. Doris Albrecht et al.*, (case number 17-290) before the Supreme Court of the United States.

Source: Law360.com

#### **DAVITA HIT WITH \$375 MILLION PUNITIVE DAMAGES IN COLORADO CASE**

A Denver federal court jury has awarded \$384 million in a case against DaVita Healthcare Partners, Inc., with \$375 million of the verdict being punitive damages. Three dialysis patients died after being treated by the national dialysis chain DaVita with solutions that were said to have known dangers. The suit was filed by family members of the patients. The jury found that DaVita was negligent and also had committed fraud by concealment in the treatment of Irma Menchaca, Gary Saldana and Deborah Hardin with the solutions GranuFlo and NaturaLyte.

The solutions are not made by DaVita, but they had been recalled by the U.S.

Food and Drug Administration (FDA) for possible contribution to cardiac arrests. The treatments, manufactured by Fresenius Medical Care North America, were subject to a Class I FDA recall in March 2012 over risk of heart attacks, cardiac arrhythmias, hypotension, stroke and death. Each of the three patients suffered from severe health problems such as end-stage kidney disease, morbid obesity and diabetes mellitus.

The allegedly dangerous solutions are used in hemodialysis, an aggressive kidney disease treatment. Kidney disease inhibits the body's ability to produce essential electrolytes like calcium and magnesium. Hemodialysis restores these in acid concentrates like NaturaLyte and GranuFlo, which prevent the electrolytes from engaging in a chemical reaction with other substances used in the treatment. However, as a result, the treatments can result in dangerously high levels of bicarbonates in the body, leading to potentially fatal complications.

The suits stated that DaVita should have protected patients by inspecting and reviewing the composition of the concentrate, detecting "significant upswing" in patients' bicarbonate blood levels and noting the various death and complication reports associated with the treatments. DaVita could have done this, but failed to do so. The manufacturer, Fresenius, has also been targeted over the treatments in multiple lawsuits accusing it of hiding their cardiac risks. After FDA approval in the early 1980s, Fresenius learned in 2004 that its revised formulation of GranuFlo resulted in an increased likelihood of metabolic alkalosis, yet kept those findings to itself.

In November 2011, the company sent an internal memo to its medical directors warning of severe health risks, but that information was not shared with the medical community or regulatory agencies. However, in March 2012 the internal memo was anonymously submitted to the FDA, prompting the agency to launch an investigation and issue a Class I recall of GranuFlo and NaturaLyte. The FDA said the use of either product could increase the risk of heart attacks. In June 2012, the agency said it was investigating the matter.

The Plaintiffs are represented by Molly Booker and Robert Carey of Hagens Berman Sobol Shapiro LLP and Stuart Paynter and Sara Willingham of Paynter Law Firm PLLC. The lead case is *White v. DaVita Healthcare Partners Inc.*, (case

number 1:15-cv-02106) in the U.S. District Court for the District of Colorado.

Source: Law360.com

#### **AN UPDATE ON THE IVC FILTER LITIGATION**

Retrievable IVC filters are small, spider-like wire devices developed to prevent blood clots from reaching the lungs and to be retrievable after the risk has passed. Since the retrievable IVC filters hit the market, hundreds of complications have been reported, including migration, fracture and perforation leading to embolism, organ damage and death. As a result, lawsuits are being filed against the manufacturers. More than 3,500 cases are currently pending against C.R. Bard in federal multidistrict litigation (MDL) in Arizona alleging that Bard defectively designed several of its retrievable IVC filters.

Earlier this year, Bard lost its first bellwether trial, a test case intended to try a widely contested issue. The jury found the company was liable for negligently failing to warn the doctor who implanted the IVC filter about its risks and ordered Bard to pay \$3.6 million to the Plaintiff in that case. In post-trial motions, Bard argued the evidence underpinning the award was lacking and called the verdict “irreconcilably inconsistent” and asked for a new trial or judgment as a matter of law. District Judge David Campbell recently upheld this verdict, and said “the court continues to conclude that there is sufficient evidence to support a finding in favor of Plaintiff.” Additional trials have been scheduled in the MDL later this year and early next year.

If you or a loved one have had complications related to a Bard IVC filter, 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)

Source: Law360.com and Beasleyallen.com

#### **PROBLEMS WITH THE DEPUY SYNTHES ATTUNE KNEE SYSTEM**

Knee replacement surgery is considered one of the most successful surgical procedures. Typically, this is a very effective treatment of degenerative joint disease or arthritis. Knee implant survival rates are estimated at more than 90 percent at 10-19 years post-surgery. It's reported that more than 600,000 knee

implants occur each year in the United States. This number is expected to increase. As a result, DePuy Synthes, a Johnson & Johnson company, developed the ATTUNE® Knee System, a novel design total knee arthroplasty (TKA) system. ATTUNE features new designs and lighter innovative patient-specific instruments for implant of the prosthesis. DePuy Synthes launched ATTUNE on the market in 2013.

Despite ATTUNE's new features, DePuy Synthes bypassed the usual U.S. Food and Drug Administration (FDA) approval path, which requires an independent demonstration of safety and effectiveness. Instead, DePuy Synthes obtained market approval from the FDA based on the representation that the ATTUNE System was substantially equivalent to prior proven models, which did not require DePuy Synthes to establish that its knee system was safe and effective. As a result, the public is experiencing the harm caused by no clinical testing for a product with new features. The representation that the product was “substantially equivalent” to prior proven models was accepted by the FDA.

Initially, due to a successful marketing campaign, the medical community embraced ATTUNE. DePuy Synthes claims that ATTUNE gives patients increased range of motion and a shorter hospital stay. However, within two years, surgeons encountered significant failure rates. Additionally, researchers found numerous adverse reports with the FDA of tibial component failure in the ATTUNE® Knee System. In a June 2017 study, researchers identified similarities in the failures.

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

The 2017 study explains that the failure rate of the ATTUNE is most likely underreported to the FDA as competing companies cannot provide data on the revision components replaced. The researchers recommend that patients with unexplained pain undergo a thorough workup for a painful joint, including blood work and imaging, and that doctors consider the diagnosis of debonding at implant-cement interface.

The first lawsuit was filed against DePuy Synthes for injuries associated with the failure of its ATTUNE System in September 2017. Lawyers in our firm filed the third ATTUNE lawsuit in the country in the Eastern District of Kentucky in February 2018.

Lawyers in our firm's Mass Torts Section are investigating cases involving early knee implant failure with the ATTUNE® Knee System associated with debonding at implant-cement interface. For more information, contact Roger Smith or Ryan Duplechin, lawyers in the Section, at 800-898-2034 or by email at [Roger.Smith@beasleyallen.com](mailto:Roger.Smith@beasleyallen.com) or [Ryan.Duplechin@beasleyallen.com](mailto:Ryan.Duplechin@beasleyallen.com).

Sources: Bonutti, Peter M., MD, et al., Unusually High Rate of Early Failure of Tibial Component in ATTUNE Total Knee Arthroplasty System at Implant-Cement Interface, *J. Knee Surg.* 30:435-39 (2017). And <https://www.depuyorth.com/patients/knee/attune-knee>

#### **BOSTON SCIENTIFIC CANNOT AVOID 800 PELVIC MESH SUITS**

A settlement has been reached in the pelvic mesh implant litigation against Boston Scientific. However, a West Virginia federal judge denied joint attempts to dismiss more than 800 of the suits against Boston Scientific. U.S. District Judge Joseph R. Goodwin denied joint motions from the Plaintiffs and Boston Scientific to dismiss hundreds of cases from the present litigation, but granted their request to dismiss nearly 300 suits against the medical device maker. The parties said in their motion that they had reached a settlement on the cases and asked for the claims against Boston Scientific to be dismissed.

In 2012, the U.S. Judicial Panel on Multidistrict Litigation centralized three multidistrict litigations (MDLs) featuring 150 cases in West Virginia. The litigation has since grown to seven MDLs with some 28,000 cases against Boston Scientific and other makers of the mesh. 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. While the mesh can fix the problem, it can also lead to punctured organs, infections, bleeding, pain during

sexual intercourse and urinary problems.

In November 2014, a Florida federal court 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. In October, the Eleventh Circuit upheld the verdict.

Source: Law360.com

#### **PENNSYLVANIA COURT TO REVIEW RISPERDAL BREAST-GROWTH TIME LIMIT**

A pair of cases with implications for thousands of lawsuits pending Philadelphia against Janssen Pharmaceuticals Inc., a Johnson & Johnson unit, are on appeal to the Pennsylvania Supreme Court. The Court has agreed to weigh when the clock began to run on claims of abnormal breast growth in adolescent boys prescribed the antipsychotic drug Risperdal.

The appeal follows a November ruling by an intermediate appeals court finding that two Plaintiffs in a mass tort program in Philadelphia County, which currently includes some 6,700 cases, should have known about the potential link between their abnormal breast growth and the powerful drug when a label for the medication was updated in October 2006 to reflect heightened incidences of the side effect.

The Risperdal litigation in Philadelphia has resulted in several substantial verdicts in favor of Plaintiffs, including a \$70 million verdict returned in July 2016. The Plaintiffs in the two cases involved in this appeal are represented by Stephen Sheller of Sheller PC, and Thomas Kline, Charles Becker, Christopher Gomez and Ruxandra Laidacker of Kline & Specter PC. The cases are *In: Re Risperdal Litigation* (case numbers 22 EAP 2018 and 23 EAP 2018) before the Pennsylvania Supreme Court.

Source: Law360.com

#### **GSK PLANNED OFF-LABEL MARKETING AIMED AT EVERY OB-GYN IN THE COUNTRY**

Lawyers for hundreds of families suing GlaxoSmithKline (GSK) told a Massachusetts federal judge recently that depositions have allegedly revealed

GlaxoSmithKline employed—but later fired—a small team of specialists to secure hedge fund money and deploy pharmaceutical sales representatives to ask every OB-GYN in the country to prescribe an anti-nausea drug off-label.

The families were allowed to extend a discovery deadline to pursue more information on what two former product managers allegedly described as a plan in the mid-2000s to get 33,000 doctors to consider prescribing the antiemetic Zofran to pregnant women who did not need the drug originally intended for cancer patients.

The families' lead counsel, Tobias Millrood of Pogust Braslow & Millrood LLC, explained the depositions, but did not specify whether the former employees saw the company fulfill the plan.

One of the former managers, Alyson Henley, said she was tasked with devising, funding and implementing a program that ultimately saw 250 GSK representatives sent to OB-GYNs, according to Millrood. Ms. Henley later testified before a grand jury. However, GSK spokeswoman Sarah Spencer said in an email to Law360 that the statements by Millrood about an off-label plan were simply untrue. Ms. Spencer said:

*GSK engaged in lawful, on-label promotion of Zofran and the notion of hedge fund involvement is irresponsible and false. However, off-label prescriptions written by health care providers are legal and appropriate when done in the best medical judgment of the physician when taking into account an individual patient's needs.*

More than 600 women and their families have claimed GSK lied to their doctors about Zofran's safety for pregnant women and their unborn children, suing over cleft palates, structural heart defects and other birth defects. The company has denied the allegations.

It appears the families found out in Ms. Henley's deposition that several product managers were terminated for violating company policy relating to their work on Zofran. Ms. Henley started working on the project in 2001. The company fired Ms. Henley along with three of her co-workers in what she called a "midnight massacre of sorts" in 2007. Years later hundreds of women sued the company over birth defects allegedly linked to Zofran.

GSK agreed to pay \$3 billion in 2012 and pled guilty to illegally promoting three prescription drugs, but those did not include Zofran. The company did not admit wrongdoing relating to Zofran, but agreed to pay \$1 billion to end False Claims Act allegations.

The U.S. Department of Justice called the overarching agreement the largest health care fraud settlement in U.S. history and the largest payment ever by a drug company at the time. Between 33,000 and 39,000 OB-GYNs were employed in the U.S. in the mid-2000s, according to the American Congress of Obstetricians and Gynecologists. As of June 15, a total of 465 cases remained in the Zofran multidistrict litigation, according to the most recent data provided by the Judicial Panel on Multidistrict Litigation.

The families are represented by Tobias L. Millrood of Pogust Braslow & Millrood LLC, Kimberly D. Barone Baden of Motley Rice LLC, M. Elizabeth Graham of Grant & Eisenhofer PA, Robert K. Jenner of Janet Jenner & Suggs LLC, and James D. Gotz of Hausfeld LLP. The case is *In re: Zofran (Ondansetron) Products Liability Litigation* (case number 1:15-md-02657) in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

## **IX. BUSINESS LITIGATION**

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#### **ABBVIE AND BESINS ORDERED TO PAY \$448 MILLION IN FTC ANDROGEL ANTITRUST CASE**

AbbVie Inc. and its affiliate, Besins Healthcare Inc., must pay \$448 million in the Federal Trade Commission's (FTC) suit alleging they netted more than \$1 billion after bringing sham patent lawsuits to stave off generic competition to AbbVie's AndroGel testosterone replacement drug.

The decision by U.S. District Judge Harvey Bartle III ordering the payment calls for AbbVie and Besins to disgorge \$448 million in profits from June 2013, when competitor Perrigo Co. would have entered the market if not for the AndroGel makers' intervention, through August 2017.

The FTC had alleged that the companies used "sham lawsuits" against Teva Pharmaceuticals USA Inc. and Perrigo to



gain more than \$1 billion in monopoly profits for the brand-name drug, and the judge found in an earlier decision that the lawsuits were baseless. In the recent ruling, Judge Bartle concluded that the companies knew those lawsuits were based on trumped-up claims, but that they filed them anyway. The judge wrote:

*The patent attorneys also clearly recognized that the entry of generic versions of AndroGel with their much lower prices would quickly and significantly erode this ideal financial picture. Their reason and motivation for the filing of these objectively baseless actions against potential competitors was to staunch, at least for a time, this looming reversal of fortune.*

The FTC had sought disgorgement of the companies' profits on AndroGel and an injunction barring AbbVie from filing more infringement suits over the patent that protects its brand-name product, U.S. Patent No. 6,503,894. Judge Bartle refused to grant the injunction finding there was no evidence that AbbVie was continuing its bad behavior. He also found that the injunction would be overbroad.

The FTC's expert estimated that AbbVie saw a \$1.35 billion gain from its scheme to hold off competition from generics. But Judge Bartle reduced that number in assessing disgorgement, saying that the sham lawsuits had not been the only obstacle faced by the generics-makers.

After reaching his decision on disgorgement, Judge Bartle determined that Besins was liable together with AbbVie even though Besins didn't make any profits off of AndroGel. He found that Besins' corporate affiliate did collect royalties on the patent's use, and that the company had gone forward with the sham litigation.

The case is *Federal Trade Commission v. AbbVie Inc. et al.* (case number 2:14-cv-05151) in the U.S. District Court for the Eastern District of Pennsylvania.

Source: Law360.com

## X. AN UPDATE ON INSURANCE LITIGATION

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### **JURY SAYS GEICO ACTED IN BAD FAITH AND AWARDS \$2.7 MILLION**

A federal court jury in Columbus, Georgia, has awarded Terry Guthrie \$2.763 million in an insurance bad faith case against Geico. The jury found that the insurance company acted in bad faith in the handling of Guthrie's claim. Guthrie suffered injuries in June of 2012 when he was struck by a vehicle while riding his bicycle in Columbus. Geico, which insured the motorist who hit Guthrie, refused to settle the claim for the policy limits after the crash. The jury found the company acted in bad faith throughout the handling of the claim. Charles Gower, the Guthries' lawyer, says:

*They (Geico) could have settled this for \$30,000 back in 2012. He (Guthrie) suffered back and neck injuries. Instead, they offered less than \$12,500, which was not much more than his \$10,000 in medical bills.*

Guthrie was hit by an SUV driven by Bonnie Winslett, who was at fault and solely responsible for the crash. Guthrie was knocked off his bike and into a utility pole, which was not disputed at trial. After the crash, Geico informed its insured Winslett that it would handle the matter with Guthrie's lawyer. Guthrie did not have medical insurance and was unable to obtain additional medical care needed after the crash. Three months later, Gower on behalf of Guthrie sent Geico a letter offering to settle the case for the policy limits. Geico refused and countered with a low-ball offer of only \$12,409. It was contended that by not settling the case for the policy limits, Geico exposed its insured, Ms. Winslett, to financial risk.

Guthrie sued Ms. Winslett in Muscogee County Superior Court. The complaint was not answered by Ms. Winslett or by Geico. Judge Gill McBride issued a default judgment in the Plaintiff's favor for \$2.916 million. A bad faith complaint was subsequently filed in federal court, alleging:

*Recognizing its obvious bad faith in exposing its insured to a more than \$2.9 million judgment when it had the opportunity to settle Terry Guthrie's claim for \$30,000, Geico moved quickly to appoint outside fee counsel to represent Bonnie in an effort to have the default judgment set aside. However, rather than mitigating the bad faith that Geico had already committed by failing to settle the case for the policy limits, Geico's subsequent actions only served to compound its bad faith.*

When Geico failed to get the default judgment set aside, Columbus lawyer Fife Whiteside, a trustee for the U.S. Bankruptcy Court, Middle District of Georgia, filed an involuntary bankruptcy claim against Ms. Winslett, attempting to collect the nearly \$3 million. Geico hired an outside lawyer to defend the involuntary bankruptcy petition. Guthrie said in a pleading:

*Clearly, Geico's decision to fight the involuntary bankruptcy was not motivated by any interest to protect Bonnie, who only stood to benefit from the bankruptcy, but was driven entirely by Geico's desire to protect itself from the bad faith lawsuit it knew would be forthcoming from the bankruptcy trustee if the involuntary bankruptcy proceeded.*

The judgment, when paid, will be awarded to the bankruptcy trustee. Guthrie is the only creditor in the bankruptcy case. Geico is expected to appeal the decision. The case was tried in U.S. District Court, Middle District of Georgia with Judge Clay Land presiding. In addition to Charles Gower, Miranda Brash and Shaun O'Hara from his firm assisted at trial, and they all did a very good job in a most interesting case.

Source: Ledger-Enquirer.com

## XI. WORKPLACE HAZARDS

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### **ON-THE-JOB INJURIES AND THIRD-PARTY CLAIMS**

We have previously published several articles in this *Report* discussing the rights of workers who are injured on the

job. Because of the inadequate benefits offered by Alabama, and most states, it is important to look beyond workers' compensation statutes to adequately compensate workers for their injuries. When the injuries are minor, workers' compensation remedies are usually adequate. But when a worker is killed or suffers a severe injury that affects his or her ability to earn income in the future, workers' compensation benefits are often lacking.

Lawyers investigating these types of claims must investigate whether third-party claims exist. Third-party claims are not governed by Workers' Compensation statutes; thus, the injured employee and their families are able to recover for damages otherwise unavailable to them in the Workers Compensation Statutes like pain, suffering, mental anguish, lost enjoyment of life and punitive damages.

Previous articles in this *Report* have focused on product manufacturers, product installers, co-employees and employers who terminate the employee for pursuing their rights under Workers' Compensation statutes. In addition to these claims, investigating lawyers should also consider claims against parties that have contracted to maintain and service equipment on behalf of the employer. In 90 percent of the cases I've investigated, the employer has in-house maintenance staff that perform all repairs, maintenance and upkeep.

In situations where improper maintenance is the cause of an injury, Workers' Compensation statutes do not allow claims against the in-house maintenance staff or the employer. If, however, a third-party contractor was responsible for the improper maintenance, repairs or upkeep, a suit is allowed against that entity. There are some companies that specialize in maintaining industrial equipment. These companies could be liable to an injured employee if their conduct is the cause of an injury. The following are two examples of successful cases:

Kendall Dunson, a lawyer in our firm, recently handled such a case involving the death of a worker. The industrial equipment to be maintained was equipped with an emergency brake. The emergency brake was not properly maintained, which resulted in the death of our client. Because the claim was not prohibited by the Workers' Compensation statute, Kendall was able to obtain a settlement subsequently above the

limited recovery available for a death under the Workers' Compensation Act.

Kendall also handled a case in Kentucky involving a worker injured while using a crane. Through our investigation of the incident, our lawyers found that the maintenance company had ignored evidence that a damaged component was cutting into a metal cable supporting a crane cab. The metal cable broke causing our client to sustain severe injuries preventing him from gainful employment for the remainder of his life. If his only remedy had been Workers' Compensation benefits, it would have been difficult for him to support his family. The ability to pursue a claim against the third-party maintenance provider was instrumental in allowing him to maintain his standard of living despite his serious life-altering injuries.

Anytime an employee suffers a catastrophic injury, it is imperative that all third-party claims be thoroughly investigated, including third-party maintenance providers. The identification of this third-party claim could very well be the factor that allows your client to obtain full, not partial, compensation for their injuries. If you need more information on work-related injury or death, contact Kendall Dunson, who handles work-related litigation involving serious injury or death for the firm, at 800-898-2034 or by email at [Kendall.Dunson@beasleyallen.com](mailto:Kendall.Dunson@beasleyallen.com).

## **XII.** **TRANSPORTATION**

### **FIRST PASSENGER FATALITY ON A U.S. AIR CARRIER IN NEARLY A DECADE**

An incident aboard a Southwest Airlines flight in April led to the first passenger fatality on a U.S. carrier in almost a decade, the *Washington Post* reported. It was also the first passenger death in the airline's 51-year history.

On April 17, Southwest Airlines Flight 1380 left New York's LaGuardia Airport and was bound for Love Field in Dallas, Texas, when one of its engines failed about 20 minutes into the flight. The Boeing 737's failed engine broke apart,

throwing shrapnel in the air, which fractured one of the aircraft's windows and caused a loss of cabin pressure. Jennifer Riordan, a passenger and 43-year-old bank executive from Albuquerque, New Mexico, was partially pulled out of the plane and subsequently died.

The plane was diverted to Philadelphia International Airport where it landed and remained until April 30, according to *Fortune*. A company spokesperson confirmed that that aircraft was flown across the country to Victorville, California, where it will be stored until Southwest determines if it will be returned to "revenue service."

National Transportation Safety Board (NTSB) investigators found evidence of metal fatigue on one of the engine's broken fan blades, prompting the Federal Aviation Administration (FAA) to order airlines to inspect fan blades on aircraft with similar engines. *Popular Mechanics* noted that the NTSB's preliminary report "revealed that traditional engine-checking protocols didn't go far enough to prevent a catastrophe." One potential cause for the faulty engine is the frequent takeoffs and landings performed by discount air carriers like Southwest. The extra cycles create more wear and tear on the engines. Because the powerful engines have a vacuum effect, more takeoffs and landings also increase the amount of debris taken in off the tarmac by the engines.

The engine, a popular CFM56-7B model, has been routinely checked over the years but the last rigorous inspection was six years ago. At that time, the inspection met the FAA's requirements; however, since then the FAA and the engine maker CFM International, a joint venture between General Electric and France's Safran Aircraft Engines, have emphasized the need for more thorough inspections that will help reveal sub-surface flaws similar to the one that caused Flight 1380's accident.

For example, following an August 2016 accident in Pensacola, Florida, in which similar damage occurred to a fan blade, the industry began incorporating eddy current inspections or testing (ECT). The ECT process uses electromagnetic induction to detect flaws in conductive material, according to *Quality Magazine*. The flaws detected through ECT are not likely visible or easily detected through other inspection approaches.

Similarly, the NTSB preliminary report noted that within days following Flight 1380's emergency landing, CFM Interna-

tional, the FAA and the European Aviation Safety Agency (EASA) called for additional inspections, specifically ultrasonic engine inspections. The FAA's Airworthiness Directive (AD), which was based on CFM International's Service Bulletin 72-1033, required ultrasonic inspections on all CFM 56-7B-series engines with 20,000 or greater cycles and future inspections should be conducted at intervals not to exceed 3,000 engine cycles.

Eight passengers from Flight 1380 filed a lawsuit in June against Southwest, the Boeing Company, GE Aviation Systems LLC, Safran USA Inc. and CFM International Inc. The lawsuit is filed in the Supreme Court of the State of New York. The Plaintiffs claim the air carrier did not protect its passengers because it failed to maintain and repair the aircraft and engine.

A month after the Flight 1380 accident another Southwest flight was forced into an unscheduled landing after one of the aircraft's passenger windows cracked, Bloomberg reported. The aircraft, Flight 957 from Chicago-Midway to Newark, New Jersey, did not lose cabin pressure and did not declare an emergency. The cause of the window breakage is under investigation by the NTSB and FAA but an industry expert said it was likely a rare occurrence and that the window's backup function worked, preventing a serious emergency. Consumers have criticized Southwest on social media and are pressuring the air carrier to improve its maintenance reviews and practices, especially for older aircraft.

If you need more information on this subject, contact Mike Andrews, a lawyer in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at [Mike.Andrews@beasleyallen.com](mailto:Mike.Andrews@beasleyallen.com). Mike handles aviation litigation for the firm.

Sources: *Washington Post*, *Fortune*, *Popular Mechanics*, National Transportation Safety Board, *Quality Magazine*, *Bloomberg*

#### **FAA SAYS SOME BOMBARDIER PLANES NEED SAFETY INSPECTIONS**

The Federal Aviation Administration (FAA) has announced two proposed rules targeting Bombardier Inc. planes that would require certain models to be inspected and tested in response to incidents that may compromise safety. A notice was published recently in the Federal Register.

The Bombardier planes targeted by the airworthiness directive are the DHC-8-102, -103, and -106 models, the DHC-8-200 series, and the DHC-8-300 series. The FAA was responding to reports of smoke coming from the planes' windshields. DHC-8-300s were also the focus due to an emergency exit door failing to open. The FAA said that the proposed airworthiness directive for the DHC series planes was "prompted by reports of arcing and smoke emanating from the windshield, caused by loose or damaged windshield heater terminal lugs."

According to the FAA, cracking in the windshield could lead to a drop in cabin pressure that would result in an emergency descent. The agency said Canada's aviation authority, Transport Canada Civil Aviation, had issued its own version of the same airworthiness directives in 2017. The Canadian agency informed the FAA of the issues with the Bombardier planes, and this information prompted the American agency to undertake its own assessment. The FAA said:

*We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.*

The proposed rule would require the planes at issue to have their windshield moisture seal inspected. Additionally, windshield heater terminal lugs would have to be re-torqued, windshield heater screw heads would need to be re-coated, and the windshield heating system would need to be tested, the FAA said.

Certain models of the DHC-8-300 series of airplanes have a separate issue. Inspections of those planes are needed as a certain emergency exit door failed to open during maintenance. On that plane, the handle was jammed due to corroded ball bearings, and now the FAA says that "within 5,000 flight hours or 36 months, whichever occurs first," all planes must undergo detailed inspections of their emergency exits. The inspections must look for corrosion, seal damage and loss of lubricant, while bearings must be replaced if necessary, the agency said.

Source: [Law360.com](http://Law360.com)

## XIII. HEALTHCARE ISSUES

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#### **DRUG COMPANIES USE LIMITED FDA REVIEW PROCESS TO RUSH RISKY DRUGS TO MARKET**

President Trump has encouraged Dr. Scott Gottlieb, Commissioner of the U.S. Food and Drug Administration (FDA), to give patients faster access to drugs. Based on recent activity at the FDA, it appears that the commissioner has definitely delivered for the drug industry. The FDA has provided faster routes for drug approvals and cleared 46 first-of-a-kind medications in 2017, which was more than the agency had done in at least the past 15 years. While this may sound very good, it comes with serious risks.

Faster and more lenient review processes mean that the FDA is often approving medications based on limited and inadequate information. In some expedited reviews, the agency allows just one clinical trial to determine safety and efficacy. That would be instead of the typical two clinical trials. More and more, drug makers are allowed to claim success in studies based on proxy measurements, like shrunken tumors, rather than survival rates or cures because those measurements require more time.

The trade-off for faster approvals is that drug companies agree to continue to research their treatments after they have reached the market with a drug. These studies can take a decade or longer, making consumers guinea pigs for the drug industry, and that is not a good thing. The required studies and testing should be done, and completed and reported to the FDA before a new drug is approved and sent to market.

This process does allow patients to receive these new treatments faster, which can be beneficial and even lifesaving. But there are sizeable risks to this gamble. Consider these two examples:

In two of three clinical trials testing the gout drug Uloric, patients taking the drug suffered more heart attacks, strokes and heart failure than those not taking gout meds or treated with standard treatment. Despite these concerns, the FDA still approved Uloric. Last November, makers of Uloric announced that patients taking the gout drug were 34 percent more likely to die

from heart disease than patients taking another gout drug.

The FDA also fast-tracked the approval of Nuplazid, a drug to treat hallucinations and delusions in patients with Parkinson's disease. The drug failed to show benefit in two clinical trials. The third trial showed minimal benefit. Overall, patients taking Nuplazid died or had more serious side effects compared to patients who received no treatment. The FDA approved Nuplazid in 2016 despite the tepid data. Since its approval through March 31, the FDA has received 6,800 reports of adverse events in patients taking the drug, including 887 deaths.

"Clearly, accelerated approval has greater uncertainty," Dr. Janet Woodcock, head of the FDA's Center for Drug Evaluation and Research, told ProPublica, adding that speeding up its review process can be attributed to more drug makers developing treatments for rare diseases where there is an unmet need and where patient populations are eager to accept more uncertainty. Perhaps there is another and perhaps more compelling motivating factor to be considered.

It appears that money has helped to pave the way for the upward trend in expedited reviews by the FDA. The drug industry contributes to the salaries of agency drug reviewers for faster evaluations. In 2017 the industry paid as much as 75 percent, or \$905 million, of their salaries. The drug industry also applies pressure to the agency in a subtler way, by giving physicians, caregivers and others consulting fees, expense payments or other remuneration to testify before FDA advisory panels.

I will concede that making novel new drugs available to patients faster in some cases can be beneficial. However, patient safety must always remain a top priority with the FDA. Without question, safety of drugs on the market is critically important to the American people. I am afraid that the FDA has not always completely shared that view.

Sources: ProPublica, PBS News Hour, ProPublica

#### **NEW CMS RULE WOULD STOP PUBLIC REPORTING OF HOSPITAL INFECTIONS AND ACCIDENTS**

More than 600,000 patients contract an infection while being treated in the

hospital each year, according to reports, and about 270,000 of them die from sepsis, a complication of infection. But a new Trump administration rule could end the public reporting of these preventable infections, which, critics fear, could give hospitals the incentive to just stop reporting the data they get penalized for.

The proposed rule by the Centers for Medicare and Medicaid Services (CMS) would stop hospitals from reporting infections like MRSA and post-operative sepsis, as well as accidents like falls and bedsores—so-called "never events" because they are preventable and never should have happened. Currently, hospitals that don't report this kind of safety data are penalized by losing up to a quarter of the financial incentives they receive from the federal government.

The Inpatient Quality Reporting Program was established in 2005 during the George W. Bush administration. CMS' Hospital Compare website began disclosing some hospital safety measures after requests from health care providers, policymakers and advocacy groups for hospitals to be more transparent.

But the proposed rule, if finalized, would mean Hospital Compare would not show the infections or safety measures because the data would be in a program to which the Trump administration says hospitals no longer have to report those issues.

Based on reports, it doesn't appear that hospitals have been lobbying for the rule change. However, the American Hospital Association says the amount of information required by various federal programs was overwhelming. By not having to report infections and safety issues, hospitals could instead spend more time focusing on patient safety, the association says. But those fighting the new rule aren't buying that argument. Larry Muscarella, an infection control expert with LFM Healthcare Solutions, LLC, in Philadelphia, told USA Today:

*The public should be concerned whenever there is a national effort in health care to withhold information, to not provide us with accurate information about hospital infections and other harms, or to otherwise adversely impact transparency. In my opinion, such efforts are suspect unless independently documented to improve patient care and reduce spiraling costs.*

Adopting the proposed rule would not be good for the American people. I believe that when hospitals know that infection information will be released, as required under the current rule, it is probable that more will be done in the hospitals to control infections. If that requirement is changed, it most likely would cause some to be less vigilant.

Source: USA Today

## **XIV. TOXIC TORTS**

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### **ASBESTOS USE IN THE NAVY HAS CAUSED SEVERE HEALTH PROBLEMS**

Many Navy veterans find themselves diagnosed with asbestos-related diseases every year. Although they may have served in the Navy as long ago as the Korean War, mesothelioma and lung cancer may take up to 50 years to develop from the time of exposure to asbestos.

Asbestos exposure in the Navy usually occurs when a serviceman is assigned to the boiler room or engine room of a ship. In either engineering compartment of a naval ship, steam system equipment such as boilers, engines, turbines, generators, pumps, valves, and compressors are insulated. Without that insulation, the engineering spaces would be too hot for anyone to work in. Through the 1970s, that insulation was asbestos-containing. That insulation frequently needed to be removed and replaced to access the equipment for repairs.

During those repairs, machinist mates or boiler tenders or others would have to scrape asbestos-containing gaskets and packing from the hot surfaces of the equipment, exposing them to even more asbestos. Cutting new gaskets from rolls and new packing rings from spools caused even more asbestos exposure. Even servicemen who stood fire watch in these engineering spaces without doing hands-on work could have been exposed to enough asbestos to cause mesothelioma.

Once released into the air, asbestos can remain airborne for some time. Sweeping up asbestos dust from repair operations can cause it to be re-released into the air and remain there again. Other shipboard navy men were exposed to asbestos standing watch on or off ship during overhauls.

Many shipyards practiced unsafe work practices when civilian workers boarded ships to assist with overhaul work. Civilian workers at those shipyards usually have claims for exposure to asbestos from the same unsafe working conditions.

Mechanics in all branches of the military were exposed to asbestos through their work on the internal components of airplanes and servicing vehicles. Brakes, clutches, engine gaskets, clamps, and engine compartment cowling all contained asbestos that mechanics would have had to disturb in their jobs keeping military airplanes and cars running.

The mesothelioma lawyers at Beasley Allen, led by Sharon Zinns, have represented many veterans in their claims against the manufacturers of the asbestos-containing products to which they were exposed. None of those manufacturers warned our clients or anyone else of the hazards of asbestos so that they could take proper precautions to prevent being exposed.

For more information about asbestos exposure in the Navy, at Naval shipyards, or in other branches of the military, contact Sharon J. Zinns at 800-898-2034 or by email at Sharon.Zinns@beasleyallen.com. Sharon has been actively involved in this litigation for years and will be glad to discuss any potential claim.

#### **JURY AWARDS \$25 MILLION IN HOG FARM NUISANCE SUIT**

A federal court jury in North Carolina awarded a couple \$25.13 million on their nuisance claims against a pork company over the feces, urine and associated odors and flies at a hog farm near their property. The jury awarded Elvis and Vonnie Williams of Beulaville, North Carolina, each \$12.5 million in punitive damages and \$65,000 in compensatory damages, finding that Murphy-Brown LLC had “substantially and unreasonably” interfered with their property.

Murphy-Brown is a subsidiary of Smithfield Foods Inc., which bills itself as the world’s largest pork processor and hog producer. Smithfield Foods is a subsidiary of Hong Kong-based WH Group Ltd. Murphy-Brown contracts with Joey Carter Farms, which raises up to 4,740 hogs for it on two sites near the Williams property.

The complaint claims that the hog farm generates “many times more

sewage than the entire town of Beulaville,” but Murphy-Brown, which owns the hogs, does not do enough to control the “millions of gallons of feces and urine that come from the hogs, and the odor, flies and other nuisance that they cause.”

The complaint alleges other issues such as swarms of gnats and buzzards, dead hogs rotting in dumpsters left in plain view, and big trucks loudly coming and going on narrow and unpaved country lanes to pick up and drop off the hogs. Joey Carter Farms was named as a Defendant.

Senior U.S. District Judge W. Earl Britt, who is overseeing the litigation, recently ordered the parties and their lawyers to refrain from making any statements about the case to the media. The judge noted that there had been a “significant increase in trial publicity,” and that there are 26 total similar cases against Murphy-Brown, with several more jury trials slated to take place this year.

In one of the other cases, a North Carolina federal jury in April awarded 10 neighbors of another farm Murphy-Brown contracts with \$75,000 each in compensatory damages and \$5 million in punitive damages. Judge Britt reduced the punitive damages awarded to the 10 Plaintiffs, finding that a state law limits the amount of punitive damages to \$250,000 each.

Elvis and Vonnie Williams are represented by Mona Lisa Wallace and John Hughes of Wallace & Graham PA and Michael Kaeske, Lynn Bradshaw and Eric Manchin of Kaeske Law Firm. The case is *McGowan et al. v. Murphy-Brown LLC* (case number 7:14-cv-00182) in the U.S. District Court for the Eastern District of North Carolina.

Source: Law360.com

#### **MDL JUDGE RULES THAT EXPERTS CAN TESTIFY ROUNDUP LINKED TO CANCER**

U.S. District Judge Vince Chhabria in California ruled on July 10 that the experts for Plaintiffs who have sued Monsanto Co. in multidistrict litigation (MDL) involving the herbicide Roundup should be allowed to testify. The judge said the Plaintiffs presented evidence from which a reasonable jury could conclude that glyphosate, the active ingredient in Roundup, can cause non-Hodgkin lymphoma (NHL) at “human-relevant doses” (*In re: Roundup Products Liability Litigation*, MDL No. 2741, N.D. Calif.).

The decision by Judge Chhabria allows hundreds of lawsuits against Roundup’s manufacturer, Monsanto, to move forward. The lawsuits by cancer victims and their families say the agrochemical giant long knew about Roundup’s cancer risk but failed to warn them.

Many government regulators have rejected a link between cancer and glyphosate, the active ingredient in Roundup. Monsanto has denied such a connection, claiming that hundreds of studies have established that glyphosate is safe. Judge Chhabria was tasked with determining whether the science behind the claim that Roundup can cause non-Hodgkin’s lymphoma had been properly tested and met other requirements to be considered valid.

Before issuing his ruling, Judge Chhabria spent a week in March hearing “dueling testimony” from epidemiologists. The Judge asked a number of pertinent questions about potential strengths and weaknesses of research on the cancer risk of glyphosate. She heard and considered testimony from:

- Dr. Beate Ritz, an epidemiologist at the University of California, Los Angeles, testified for the Plaintiffs that her review of scientific literature led her to conclude that glyphosate and glyphosate-based compounds such as Roundup can cause non-Hodgkin’s lymphoma. Dr. Ritz said a 2017 National Institute of Health study that found no association between glyphosate and non-Hodgkin’s lymphoma had major flaws. Monsanto brought in its own expert,
- Dr. Lorelei Mucci, a cancer epidemiologist at the Harvard T.H. Chan School of Public Health, who praised the 2017 study and reached the opposite conclusion from Ritz.

Monsanto developed glyphosate in the 1970s, and the weed killer is now sold in more than 160 countries. Farmers in California, the most agriculturally productive state in the U.S., use it on more than 200 types of crops. Homeowners use it on their lawns and gardens. St. Louis-based Monsanto also sells seeds that can tolerate being sprayed with glyphosate as the surrounding weeds die. This has given the company another stream of business, helping it to dominate the market for genetically modified crops.

The herbicide came under increasing scrutiny after the France-based International Agency for Research on Cancer, which is part of the World Health Orga-

nization, classified it as a “probable human carcinogen” in 2015. A number of lawsuits against Monsanto in federal and state courts followed. California added glyphosate to its list of chemicals known to cause cancer. Monsanto has attacked the international research agency’s opinion as an outlier.

It will be most interesting to see how the MDL litigation develops now that Judge Chhabria has ruled on the Plaintiffs’ experts. If you need more information, contact John Tomlinson at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

Sources: *Associated Press*, and *Mealey’s*

#### **DOJ AND WISCONSIN DEFEND SUPERFUND SETTLEMENT**

The federal government and the State of Wisconsin have urged the Seventh Circuit to uphold a settlement with NCR Corp. and Appvion Inc. to finish cleaning up a Wisconsin Superfund site contaminated with polychlorinated biphenyls by the paper industry activity. Paper manufacturer P.H. Glatfelter Co. has objected. The federal and state governments pressed the Seventh Circuit to affirm a lower court’s approval of their settlement with NCR and Appvion, which resolved the two companies’ Comprehensive Environmental Response, Compensation and Liability Act liabilities over contamination of the Lower Fox River and Green Bay Superfund site.

Glatfelter, which is a party to the underlying lawsuit concerning the contamination liability, has contended that the lower court abused its discretion by signing off on the governments’ consent decree with NCR and Appvion. The allocation scheme used to apportion responsibility among parties liable for the site’s contamination was said to be unfair. The governments argued in their brief that Glatfelter “fails to meet the heavy burden it must overcome to reverse the approval of the challenged consent decree,” that their allocation scheme was reasonable and that the estimated costs to each party was “favorable” to Glatfelter. The brief said:

*Glatfelter asserts that the allocation model used by the governments makes erroneous assumptions and does not adequately explain the basis of its calculations. Glatfelter cannot point to a single case that reversed*

*approval of a CERCLA consent decree for these kinds of alleged errors.*

The Superfund site comprises nearly a 40-mile stretch of the Lower Fox River and thousands of square miles of Green Bay in Wisconsin. The PCB contamination has been traced not only to NCR and Appvion, but also to Glatfelter and Georgia-Pacific Consumer Products LP. All of the companies, or their corporate predecessors, operated along the river. In 2010, the federal government and Wisconsin filed an enforcement action over the site against NCR, Appvion, Glatfelter, Georgia-Pacific and other potentially responsible parties.

Eventually, the governments proposed a consent decree with NCR and Appvion. Last year, the judge overseeing the dispute approved the settlement, despite objections by Glatfelter. Under the consent decree, NCR took sole responsibility for all remaining dredging work at the site, for an estimated \$200 million over two to three years. This is in addition to the more than \$650 million NCR and Appvion had already spent on cleanup. To determine whether the settlement was fair and reasonable, the governments calculated the allocation of responsibility for each of the Defendants.

Ultimately, the governments settled on allocating 65 percent of the total \$1.35 billion in costs to NCR and Appvion, 12 percent each to Glatfelter and Georgia-Pacific, and 11 percent to prior settlers. However, on appeal to the Seventh Circuit, Glatfelter argued that the allocation scheme was unfair. The company said:

*The governments provided no expert opinion on the fairness of the ‘allocation scheme.’ Glatfelter, on the other hand, offered expert opinion that the ‘allocation scheme’ did not conform to any conventional, peer-reviewed allocation approach, and that, as a matter of arithmetic, the district court’s prior rulings required NCR to absorb hundreds of millions of dollars of cost in addition to what it will under this consent decree.*

The federal government is represented by Jennifer Scheller Neumann, Brian Toth, Randall M. Stone and Robert H. Oakley of the U.S. Department of Justice (DOJ). Wisconsin is represented by the State’s attorney general’s office. The case is *USA et al. v. P.H. Glatfelter Co. et al.*,

(case number 17-3175) in the U.S. Court of Appeals for the Seventh Circuit.

Source: Law360.com

#### **\$4 MILLION SETTLEMENT REACHED IN TENNESSEE RIVER POLLUTION CASE**

Daikin America has agreed, for a second time, to a multi-million-dollar settlement in a lawsuit involving chemical pollution of the Tennessee River. The West Morgan East Lawrence Water and Sewer Authority has reached a \$4 million settlement with Daikin over PFOA and PFOS contamination in the Tennessee River. The \$4 million will go to repay money the water authority borrowed to install a temporary filter that removes PFOA and PFOS from drinking water before it is pumped out to the utility’s 57,000 customers in north Alabama.

As we previously have reported on numerous occasions, PFOA and PFOS are man-made chemicals used to create non-stick, waterproof, or stain-resistant coatings on commercial products like cookware, clothing, carpets or food packaging. The substances are extremely resistant to breaking down and persist in the environment for decades. They also build up in the tissues of humans and animals over time, leading to health concerns.

Daikin had previously agreed to pay \$5 million to resolve its liability to the water authority and the customers of the authority as a class. That settlement was rejected by an appeals court after about 300 customers of the water authority challenged the settlement. Their lawyer said the case presented a conflict of interest because the same lawyers were representing both the authority and the customers as a class. The appeals court agreed. This new settlement involves only claims by the water authority. Claims for individual customers are not involved.

The water authority sued Daikin America and 3M after a health advisory from the U.S. Environmental Protection Agency (EPA) was released in 2016, warning that exposure to these chemicals could cause health problems, including cancer, at lower concentrations than previously thought.

The water authority responded by issuing a “do not drink” order because their drinking water contained levels of those chemicals above the new health advisory limits.

Daikin and 3M both manufactured or used PFOA or PFOS at facilities along the Tennessee River in Decatur, about 16 miles upstream of the water authority's drinking water intake.

The granular activated carbon (GAC) filtration is said to be working, keeping the chemicals below the new threshold limits for the time being. However, it is seen as a temporary solution. The permanent fix is expected to be a more expensive, permanent reverse osmosis-style filtration system. Water Authority general manager Don Sims said in a news release:

*The GAC system is working well, but everyone understands that it is temporary. It was built quickly in response to the EPA advisory and the carbon wears out and has to be replaced. Long term, the permanent solution is a state of the art filtration system. That's our goal and if litigation is unsuccessful, we will have to consider public funding.*

The claims against 3M as well as claims by individuals are still pending and proceeding in court. Carl A. Cole, III, a lawyer with The Cole Law Firm, located in Decatur, Alabama, represented the Water Authority in the settlement referenced above.

Source: Al.com

#### **SHELL TO PAY MORE THAN \$3.9 MILLION 2016 GULF OIL SPILL**

Shell Offshore Inc. has agreed to pay nearly \$3.9 million in connection with a May 2016 spill of more than 80,000 gallons of oil in the Gulf of Mexico that occurred about 100 miles from the Louisiana coast. A consent decree relating to the settlement was filed in federal court. The bulk of the total payment, about \$3.6 million, will go to the U.S. Department of the Interior's (DOI) Natural Resource Damage Assessment and Restoration Fund to pay for "natural resource restoration projects," the consent decree said. It was stated in the complaint:

*Shell's oil discharge polluted portions of the Gulf of Mexico from the seafloor to the water surface. Oil, including oil sheen, was observed over a large area around the spill site. The surface oil generally traveled west-northwest sweep-*

*ing through an area of over 1,270 square miles over five days.*

In addition to the payment to the restoration fund, the consent decree calls for about \$26,000 to go toward the DOI's unpaid natural resource damage assessment costs. Another \$182,196 will be allocated for unpaid assessment costs to the National Oceanic and Atmospheric Administration. Louisiana state entities will receive nearly \$38,000, according to the agreement.

The oil was released from a piping system used "to transport oil from a production well on the seafloor," according to the consent decree. It was noted that "numerous types of sea birds and aquatic life are known to inhabit the oiled areas." The 2016 spill occurred on May 11 and response efforts finished the following May 16. The consent decree said:

*The trustees and Shell worked collaboratively for over 1.5 years to, among other things, identify the data and modeling procedures that were most applicable to this incident, evaluate the potential impacts to natural resources, and identify actions to restore affected natural resources.*

Shell no longer owns the Glider Field where the spill occurred, according to court documents. In a release the day after the spill occurred, Shell said in a statement, "No release is acceptable, and safety remains our priority as we respond to this incident."

The federal government is represented by Karen Dworkin and Jason T. Barbeau of the U.S. Department of Justice and U.S. Attorney Duane A. Evans, Assistant U.S. Attorney Brock D. Dupre, Ericka M. Hailstocke-Johnson of the National Oceanic and Atmospheric Administration and John D. Rudolph of the U.S. Department of the Interior. Louisiana is represented by Stephanie C. Morris of the Louisiana Oil Spill Coordinator's Office. The case is *United States of America et al. v. Shell Offshore Inc.* (case number 2:18-cv-06495) in the U.S. District Court for the Eastern District of Louisiana.

Source: Law360.com

#### **EPA SUPPRESSES STUDY ON THE DANGERS OF FORMALDEHYDE**

The Environmental Protection Agency (EPA) under President Donald Trump is

taking actions that are not good for people from a health and safety perspective. In a move that should concern every American, the agency is preventing the release of an EPA report that reveals alarming evidence that most Americans inhale enough formaldehyde on a daily basis to put them at risk of developing leukemia, nose and throat cancer. This is a typical decision by the EPA since Trump took office that is indefensible.

Formaldehyde is one of the most prevalent industrial chemicals in the U.S. A chemical mostly known as a component of embalming fluid, formaldehyde, a known carcinogen, also is widely used in a number of industries. Research into how much exposure to formaldehyde can lead to cancer is still ongoing. The link between leukemia and formaldehyde is new.

Formaldehyde is also known to cause other negative health effects. The U.S. Agency for Toxic Substances and Disease Registry states that "chronic exposure to formaldehyde may also cause general damage to the central nervous system, such as increased prevalence of headache, depression, mood changes, insomnia, irritability, attention deficit, and impairment of dexterity, memory and equilibrium."

The warnings about the link between formaldehyde and leukemia are contained in a health assessment EPA scientists drafted before Trump became president. Top advisers to Scott Pruitt, the outgoing and disgraced EPA Administrator, have stonewalled the release as part of a larger campaign to undermine the agency's independent research into the health risks of toxic chemicals.

In a clear sign of regulatory capture, the stonewalling is meant to prevent stricter regulations of chemicals refineries and wood products and forestall lawsuits from cancer patients harmed by the exposure.

The American Chemistry Council, a manufacturer trade group, has been pressuring the EPA keep the study under wraps or to change its findings. Obviously, they are concerned over the impact the study would have on the continued use of formaldehyde in consumer products. The Council spent more than \$7 million last year lobbying EPA and Congress on formaldehyde and other issues.

Included in the council's efforts was a push to implement a policy to restrict the EPA's use of human health research. That policy, which requires that the EPA

only use studies where the underlying data is public, would severely restrict the agency's ability to regulate. Much of the underlying data in health research is not public because of personal and medical data and proprietary information. Nevertheless, that information is needed in research efforts.

The American people are being betrayed by an Administration that claims to be protecting their welfare. The public must be made aware of the efforts by the EPA to take actions that are clearly averse to the regulatory role and mission of the agency. If you agree, let your members of Congress know that the EPA must be allowed to do its job and that the health and safety of the American people is important.

Sources: Politico.com

#### **GOVERNMENT RELEASES HIGHLY ANTICIPATED PFC STUDY**

The U.S. Agency for Toxic Substances and Disease Registry has released a long-awaited report on the extent of the contamination of our country's drinking water from perfluorinated chemicals (PFC). This release came amid an uproar over claims that other federal agencies were suppressing its release. However, the federal government's delay in releasing the report is not surprising given the report's contents.

The report listed the toxicological profile of 14 PFCs, including the most-studied PFOA and PFOS, as well as PFHxS and PFNA. According to the Environmental Working Group, which has been studying PFC contamination for years, the new drinking water advisories are 7 parts per trillion (ppt) for PFOS; 11 ppt for PFOA and PFNA, and 74 ppt for PFHxS. These are approximate figures centered on a body-weight basis intended to serve as estimates of daily human exposure unlikely to cause an appreciable risk of adverse non-cancer health effects.

These figures are much lower than the 70 ppt lifetime health advisory limits the U.S. Environmental Protection Agency (EPA) set for PFOA and PFOS in 2016—seven to 10 times higher than that now recommended by the report. Previous lifetime health advisories for PFOA (400 ppt) and PFOS (200 ppt) were established in 2009. This constant downward trend in minimum risk levels means that the EPA was underestimating the risks these chemicals pose to human health.

Seven states proactively set PFC limits lower than those set by the EPA. New Jersey promulgated the nation's lowest levels, 14 ppt for PFOA and 13 for PFOS.

The report also studied the health effects of shorter-chain PFCs, which were created after longer-chain PFCs, such as PFOA and PFOS, were determined to be toxic to humans. However, many of these short-chain PFCs are likely to break through water filtration systems designed to remove these chemicals quicker than the longer-chain chemicals. As a result, the extent of the contamination nationwide could be much worse than originally thought. This is presumably why one White House staffer described the previously suppressed report a "public relations nightmare."

The government's release of this report is a welcome sign that some in Washington may be waking up to the danger PFCs pose to the public health. We must fully understand the extent of the problem and work to ensure that the American people have clean drinking water. It should be noted that water systems nationwide have filed lawsuits against the government, chemical manufacturers, and other companies that have used products containing PFCs that have contaminated sources of drinking water.

Our firm, along with Roger H. Bedford of Roger Bedford & Associates, has filed lawsuits on behalf of two Alabama water systems, one in Gadsden and one in Centre. These suits 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 the citizens' drinking water.

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

Source: Environmental Working Group and ChemicalWatch

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

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#### **BEASLEY ALLEN LAWYERS REPRESENT VICTIMS OF NURSING HOME NEGLIGENCE AND ABUSE**

It is universally recognized that nursing homes exist to provide skilled nursing care to elderly and disabled residents. Quality care at the facilities should be their basic product and mission. However, according to many studies, the quality of care in the nursing home industry has markedly declined over the past decade.

One of the main causes of this decline is because in an effort to maximize profits, many nursing homes cut costs by failing to employ enough nurses and other qualified care givers to provide quality care for all of the residents in their facilities.

Lawyers on our firm's Nursing Home Litigation team have learned that low pay scale for nurses and other staff causes high turnover rates. Understaffing and overburdening existing nurses and care givers often leads to patient neglect or poor-quality care for residents. This can result in avoidable illnesses or injury to residents, many of which are serious and can lead to death.

If a nursing home does not or cannot adequately care for all its residents, the facility is failing in its legal responsibilities and is putting highly vulnerable people at risk. Lawyers in our firm are fighting to protect the safety and rights of elderly and infirmed Americans by representing the injured in litigation—in both lawsuits and in arbitration—to hold nursing home facilities accountable for their acts of abuse and neglect. Cases handled by our lawyers include many of the common injury types typically found in nursing home cases. We are currently handling cases involving the death of nursing home residents due to decubitus ulcers (bed sores), malnutrition, failure to treat known medical conditions, choking, and falls. We are also handling cases involving catastrophic injuries caused by severe bed sores, infections, and amputations resulting from delayed or poor nursing care. These are some of our cases:

- One of our cases, filed in Tuscaloosa County, involves claims that the



nursing home failed to adequately treat and care for our client's bed sore, causing her extreme pain and other injuries.

- We also represent a family of a deceased woman in Jefferson County Circuit Court, in a lawsuit alleging that the nursing home failed to take the necessary precautions to prevent her from choking, including providing adequate supervision and monitoring while she was eating.
- Another of our cases involves a Georgia woman who because of the nursing home's failure to prevent, properly treat, and seek additional medical care allowed her to develop a bed sore that became septic causing her to suffer tremendous pain and suffering for more than two years and ultimately caused her death.
- We recently filed a lawsuit on behalf of the family of a Wilcox County man who died as a result of a nursing home's failure to properly care for and seek appropriate medical treatment for a life-threatening illness. The complaint, filed in Wilcox County, Alabama, Circuit Court, alleges that Camden Nursing Home failed to adequately identify, monitor, document, and communicate the resident's true condition to physicians, and to provide adequate care or transfer him to another medical facility where he could get the necessary medical treatment necessary to save his life. It is further alleged that Camden Nursing Facility failed to follow the resident's Advanced Directive, allowing him to be intubated and placed on a respirator against his wishes. Ray J. Hawthorne, Jr., of The Cleveland Law Firm in Montgomery is our co-counsel in this case.

Many recent studies indicate that in recent years residents in nursing homes suffer abuse and neglect more and more frequently. The owners of nursing homes have a moral and legal duty to correct and resolve this trend.

#### ***NURSING HOME FALLS: A COMMON PROBLEM IN U.S. NURSING HOMES***

Falls among residents of skilled nursing facilities are the leading cause of injury and hospital admissions for residents and a leading cause of lawsuits for nursing home operators. According to

the Centers for Disease Control and Prevention (CDC), as many as 75 percent of elderly nursing home residents suffer at least one fall each year—this rate is twice as high as the rate of falls among elderly people living within the community (not in a nursing home). Falling is not a normal part of aging. The risk of falling can be minimized and there are proven ways to reduce falls.

The CDC has compiled some alarming statistics relating to nursing home falls. According to the CDC, 100 to 200 falls happen each year per 100 beds in a facility and as many as 27 percent of nursing home falls are a result on environmental hazards in the nursing facility, which are conditions the facility can control and prevent. CDC data also reveals that approximately 20 percent of nursing home falls result in a serious injury and that approximately 1,800 nursing home residents die from fall-related injuries each year.

Nursing home falls occur for a variety of reasons, some of which relate to individual resident factors while others relate to environmental factors found in the facility. Some individual resident factors include medications the resident may be taking and a residents' existing health conditions. Many nursing home residents are taking a variety of medications. Some are given antipsychotics, tranquilizers and other drugs to keep them calm. Unfortunately, these substances also cause confusion, unsteady gait, and loss of balance. Minimizing the use of such drugs will reduce one of the biggest causes of patient falls.

A resident's existing health conditions, such as Parkinson's, Alzheimer's, and other such diseases, often result in unsteady gaits that can lead to falls. Other health problems, like orthostatic hypotension, can cause residents to become weak or faint if they try to stand up suddenly. The facility should maintain a close watch on residents affected by these and similar conditions to reduce the risk for falls.

One major fall factor within the control of the nursing facility includes having adequate staff in the facility to care for all the residents. Inadequate staffing is a longstanding concern in nursing homes and other long-term care facilities. The Centers for Medicare and Medicaid Services (CMS) documented in a study that more than 97 percent of nursing facilities failed to have sufficient staff to meet one or more federal staffing requirements and to prevent avoidable harm to residents. This is especially true

at night and this situation can cause many problems when residents need to get up but no one is immediately available to help them. The following are some ways that falls can be prevented by a nursing home:

- Providing proper equipment for each resident.
- Adding bed rails and safety bumpers and keeping the bed at a position low to the ground can greatly reduce accidental falls.
- Providing fall mats, bed and chair alarms, safety equipment in bathrooms, and anti-slip mats in showers.
- The facility should also have a comprehensive fall prevention plan that includes measures like improved lighting, emphasis on keeping rooms and hallways free of clutter, re-assessment of medications, use of sitters, and increased overall staffing.

Nursing homes can be liable for fall-related injuries sustained by residents under specific situations such as: failure to evaluate and assess new patients for falling risks; failure to institute modifications to enable safer mobility of patients who are at high risk for falling; failure to provide and maintain clean and safe premises for residents; failure to develop and educate staff in the implementation of a fall prevention program; and failure to maintain adequate staff levels.

#### ***THE BEASLEY ALLEN NURSING HOME LITIGATION TEAM***

Lawyers in our firm are fighting to protect the safety and well-being of nursing home residents in facilities across the country. Our nursing home lawyers represent the victims or families of those who have suffered death or serious injury because of nursing home abuse and neglect. We have a team of lawyers in our firm who handle nursing home litigation on a regular basis. Members of the Nursing Home Litigation Team are Chris Boutwell, Susan Anderson and Leah Robbins. The firm's Board of Directors recognized that handling nursing home litigation required lawyers and support staff to have specific experience and expertise in this type case.

If you have suffered serious injury, a loved one has been catastrophically injured or died, or you have any questions about nursing home abuse and

neglect, contact one of the team members at 800-898-2034 or by email at Chris.Boutwell@beasleyallen.com, Susan.Anderson@beasleyallen.com or Leah.Robbins@beasleyallen.com.

## XVI. AN UPDATE ON CLASS ACTION LITIGATION

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### **JOHN HANCOCK AGREES TO \$91 MILLION SETTLEMENT TO END LIFE INSURANCE LITIGATION**

John Hancock Life Insurance Co. has agreed to pay more than \$91 million to settle and end a proposed class action alleging the company was “jacking up” life insurance policy rates by using the wrong mortality rate calculations. The insurance company agreed to end the two-and-a-half-year suit by agreeing to pay out a cash payment that will be distributed to the Plaintiffs without any person having to make a claim. This is an element of the agreement that the policyholders said would benefit the older customers that make up the proposed class. In their motion for preliminary approval, the policyholders said:

*The \$91.25 million settlement fund will be used to compensate tens of thousands of elderly insureds, and is a remarkable result for an alleged breach of a contractual promise that this Court had preliminary concerns about being ‘awfully vague’ and ‘almost sounds illusory.’*

The suit was initially filed in New York federal court in December 2015 by 37 Besen Parkway LLC, a policy owner that took issue with what it said were excessive costs for its insurance, and with allegedly excessive premiums for a rider applied to insured people who reach age 100.

It was alleged that the cost of insurance charges John Hancock was issuing to its policyholders were spiked because the company wasn’t lowering those charges even as nationwide mortality rates improved. Because the insured people were living longer than originally anticipated by John Hancock when the company first priced policies for the proposed class members, those rates should

have gone down. But the company didn’t lower its prices.

The company charges additional premiums for customers once they hit 100 years of age under a so-called “Age 100 Rider” that permitted the company to charge the policyholder more while they are younger than 32, and less once they cross the century line. However, the company charged those steeper premiums to customers even after they had turned 33.

The policyholders are represented by Glenn C. Bridgman, Steven G. Sklaver, Seth Ard and Rohit Nath of Susman Godfrey LLP. The case is *37 Besen Parkway LLC v. John Hancock Life Insurance Co.* (case number 1:15-cv-09924) in the U.S. District Court for the Southern District of New York.

Source: Law360.com

### **JUDGE APPROVES \$54 MILLION AGGRENEX SETTLEMENT IN PAY-FOR DELAY SUIT**

A Connecticut federal judge has approved a \$54 million settlement between indirect purchasers of stroke prevention medicine Aggrenox and drugmakers Teva Pharmaceutical and Boehringer Ingelheim. This will end claims the companies blocked generic alternatives to the drug from coming to the market.

U.S. District Judge Stefan R. Underhill has approved a settlement, which brings an end to the indirect buyers’ claims in the multidistrict litigation (MDL) accusing Teva Pharmaceutical Industries Ltd. and Boehringer Ingelheim Pharmaceuticals Inc. of orchestrating a \$120 million pay-for-delay deal to keep generic versions of Aggrenox off the market.

The settlement doesn’t cover a number insurance companies, including Aetna Inc., Cigna Health and Life Insurance Co., and four CareFirst BlueCross BlueShield plans, among others, that were able to opt out of the settlement class in June.

Lawsuits in the MDL contend that Boehringer made \$388 million in U.S. sales of the drug between 1998 and 2008. But when Barr Pharmaceuticals, which was later purchased by Teva, sought regulatory approval in 2007 for a generic version of Aggrenox, the company was promptly hit with a patent infringement suit by Boehringer.

To settle the infringement suit, Boehringer agreed to pay Barr Pharmaceuticals \$120 million over a period of seven

years to delay the introduction of a generic version of Aggrenox until 2015. Meanwhile, Boehringer granted Barr Pharmaceuticals a license to sell an authorized generic version of Aggrenox immediately, further suppressing the market for the generic drug, according to allegations in the complaint.

The U.S. Judicial Panel on Multidistrict Litigation combined a number of Aggrenox suits in Connecticut in 2014. In December, Judge Underhill granted final approval for a \$146 million deal between the drugmakers and a group of direct purchasers led by drug wholesalers American Sales Company LLC, Cesar Castillo Inc., Miami-Luken Inc. and Rochester Drug Co-Operative Inc. Indirect buyers announced an agreement to settle their claims in January, prompting a number of insurance companies and California-resident purchasers of Aggrenox to try to opt out of the settlement class.

The end-payors are represented by Renae D. Steiner of Heins Mills & Olson PLC, Steve D. Shadowen and D. Sean Nation of Hilliard & Shadowen LLP, Marvin A. Miller of Miller Law LLC, and Donald A. Migliori and Michael M. Buchman of Motley Rice LLC. The MDL is *In re: Aggrenox Antitrust Litigation* (case number 3:14-md-02516) in the U.S. District Court for the District of Connecticut.

Source: Law360.com

### **WELLS FARGO AND BORROWERS AGREE TO \$30 MILLION SETTLEMENT IN POST-LOAN INTEREST LITIGATION**

A proposed class of nationwide borrowers has asked a California federal judge to preliminarily approve a \$30 million settlement that would resolve contentions that Wells Fargo NA charged the borrowers interest after they paid off their Federal Housing Administration (FHA)-insured loans. In a motion for preliminary settlement approval, lawyers for the borrowers said that the settlement is fair and should be resolved on a classwide basis, since there are more than 1.1 million members in the proposed class. The motion says:

*This case presents no realistic alternative to a class action because it is a “negative value suit” with more than 1.1 million class members; i.e., a case where an individual suit will cost a class*

*member more than he or she could recover.*

The settlement, if approved, would resolve a lawsuit that lead Plaintiff Vana Fowler filed in March 2017 claiming the San Francisco-based bank has a systematic practice of collecting “post-payment” interest on loans insured by the FHA without complying with the provisions of the promissory notes and U.S. Department of Housing and Urban Development (HUD) regulations governing the loans. Post-payment interest is interest charged after the loan has been paid in full.

In May 2017, Wells Fargo sought to have the suit dismissed, but a district judge denied the motion in part in September and the parties entered into settlement negotiations. In March, they reached the \$30 million settlement under which every class member who does not opt out will automatically receive a check in the mail with their pro rata share of the fund. In exchange, class members agree to release any and all claims that “were or could have been asserted” in the class action complaint. Each class member would receive an average of \$27 before costs and fees.

The motion asks the court to preliminarily approve the settlement and conditionally certify a nationwide class of borrowers who had an FHA-insured loan that originated between June 1, 1996, and Jan. 20, 2015, that was serviced by Wells Fargo or its predecessor. The motion also notes that this is the second major litigation between consumers and Wells Fargo seeking recovery of post-payment interest.

The lead Plaintiffs in the first case, *Miller v. Wells Fargo Bank NA*, settled their claims after a Florida district judge refused to certify the class. Lawyers for the borrowers in the instant case were also appointed class counsel in two other post-payment interest cases against Bank of America NA and SunTrust Bank NA that resulted in multimillion-dollar settlements. Bank of America paid \$29 million in November 2016 to settle the suit, while SunTrust paid \$3.5 million. A hearing on the proposed settlement in the instant case is set for Aug. 9.

The Plaintiffs Fowler and Peters are represented by Michael F. Ram and Susan S. Brown of Robins Kaplan LLP, Kevin E. Epps and Adam L. Hoipkemier of Epps Holloway Deloach & Hoipkemier LLC, and Samuel Strauss of Turke & Strauss LLP. The case is *Fowler v. Wells*

*Fargo Bank NA*, (case number 4:17-cv-02092) in the U.S. District Court for the District of Northern California.

Source: Law360.com

#### **INITIAL APPROVAL GIVEN TO \$11.2 MILLION SETTLEMENT IN JP MORGAN CHASE BANK INTEREST SUIT**

JPMorgan Chase Bank NA will pay more than \$11.2 million to settle a proposed class action accusing the bank of improperly charging interest on already paid-off Federal Housing Administration (FHA)-insured mortgages. The settlement was preliminarily approved by an Iowa federal judge last month.

U.S. District Judge Stephanie M. Rose gave tentative approval to the settlement, saying it is “fair, reasonable and adequate.” The judge conditionally certified a settlement class comprising the borrowers on more than 376,000 FHA-backed loans on which Chase charged so-called post-payment interest. Judge Rose wrote in her order:

*The court finds on a preliminary basis that the settlement as set forth in the agreement falls within the range of reasonableness and was the product of informed, good-faith, arm's-length negotiations between the parties and their counsel, and therefore meets the requirements for preliminary approval.*

If a borrower completely pays off a loan before the next monthly payment is due, lenders may sometimes charge interest for that full month, even though no more principal remains on the loan. Such interest is known as post-payment interest. The FHA rules allow lenders such as Chase to charge the interest under certain circumstances on FHA-insured loans originated before the practice was prohibited in 2015.

The Plaintiffs in the case—an Iowa couple and a California man—alleged that Chase had not followed FHA regulations and instead had charged them post-payment interest without providing proper disclosure. The suit, which dates to 2016, survived a dismissal bid from Chase in 2017 before both sides agreed to mediation that yielded a tentative deal earlier this year.

According to the Plaintiffs’ request for preliminary approval, the settlement breaks down on a per loan basis to a mean recovery of about 13 percent, not

including attorneys’ fees and other costs, of the nearly \$230 in post-payment interest that was collected on average.

Judge Rose said in her order that she would determine how much to award in fees and expenses at the final approval hearing for the settlement, scheduled for November. In the meantime, she appointed Paul LLP, Rouse Law PC and Gibbs Law Group LLP as class counsel.

The Plaintiffs are represented by Ward A. Rouse of Rouse Law PC, Richard M. Paul III and Ashlea G. Schwarz of Paul LLP, and Eric H. Gibbs, Michael Schrag and Aaron Blumenthal of Gibbs Law Group LLP. The case is *Audino et al. v. JPMorgan Chase Bank NA* (case number 4:16-cv-00631) in the U.S. District Court for the Southern District of Iowa.

Source: Law360.com

## **XVII. THE CONSUMER CORNER**

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### **AN AGENCY DESIGNED TO PROTECT CONSUMERS CHANGES COURSE**

We are writing at great length this month about the apparent demise of a very important consumer protection agency in Washington, D.C. This is an agency created to protect consumers and certainly was not intended to harm them. As of June 11 the Consumer Financial Protection Bureau (CFPB), an Obama-Era watchdog agency, sports a new sign outside of the agency’s office, reflecting the agency’s official name as the Bureau of Consumer Financial Protection as proposed by Title X of the Dodd-Frank law. The change has widely been viewed by many as an act of petteiness by acting director Mick Mulvaney. However, this small, seemingly insignificant change exemplifies how the Trump administration obfuscates reality and is making consumer protection efforts by the federal government much weaker.

That the Trump administration has effectively removed the presumption of concern for the consumer from the CFPB, and replaced it with the intent to help huge corporations to profit to the detriment of the consuming public, seems much less remarkable when performed by an agency that has largely ignored the need to protect consumers. Worse, the media attention paid to these changes, which started in November of

2017 when Mulvaney assumed the position of acting director, has been minimal, but the ramifications significantly impact every consumer market.

The goal of the agency was to protect consumers from deceptive or misleading practices in the financial industry<sup>1</sup>; practically, the CFPB works with laws including but not limited to governing credit cards, bank accounts, mortgages, student loans, car loans, debt collection, consumer leases, payday loans, credit reports, and lending discrimination. Many Republicans have criticized the agency since its inception as an example of government overreach and unnecessary bureaucracy. While in Congress, Mulvaney called the agency “a joke,”<sup>2</sup> saying it needed to be reined in. Naturally, Mulvaney interpreted his temporary appointment as acting director of the agency as an opportunity to hastily undermine and gut the CFPB.

Since his temporary appointment, Mulvaney has announced a review of all agency policies, priorities, and procedures. In doing so, he asked the financial services industry, *the entities the bureau is supposed to be policing*, for input on how they would like to be policed, such as how the agency should change its use of civil investigative demands, a form of subpoena that lets the CFPB get information from suspected wrongdoers.<sup>3</sup>

Mulvaney has even rewritten the agency’s mission statement to highlight how he intends to serve banks and other financial companies instead of consumers. In the Spring version of its regulatory agenda, the CFPB estimated that it

will issue new proposed rules in February 2019.<sup>4</sup>

Such changes have been fiscally conservative as evidenced by the financial demands Mulvaney expects in order to operate the agency. Mulvaney requested no funding for the first three months of the year, saying the bureau was able to operate with leftover funds from enforcement actions and unspent money.<sup>5</sup>

Mulvaney is among those who are pushing for Congress, not the Fed, to control the agency’s budget and has said lawmakers should have oversight of the bureau’s budget and function. Mulvaney has also significantly cut the agency’s budget, requesting about \$65 million to fund itself during the fourth quarter,<sup>6</sup> bringing its budget for the year to \$318.6 million.<sup>7</sup> That is down significantly from the agency’s original budget of \$575 million for the year and \$602 million last year.<sup>8</sup> The agency’s budget for 2019 is expected to include another 20 percent cut.<sup>9</sup>

Changes made to the CFPB under the Trump administration are not limited to future direction. On April 11, 2018, Mulvaney claimed career lawyers were proceeding with about 25 existing cases. Nevertheless, enforcement lawyers said they have been asked to draft extensive memos for the bureau’s new political

leadership to justify their work.<sup>10</sup> More candidly, during his congressional testimony, Mulvaney told members of the House Financial Services Committee, “The bureau practice of regulation by enforcement has ceased.”<sup>11</sup>

Investigations performed by CFPB staff including investigations into Equifax’s data breach<sup>12</sup> and Zillow Group’s violations of the Real Estate Settlement Procedures Act<sup>13</sup> over potential kickbacks in its co-marketing program have ended without action. Explanations for why action has not been pursued were not provided in the announcements.

The CFPB has dropped lawsuits against payday lenders<sup>14</sup>, and it is joining forces with payday and auto title lenders to challenge its own rule to bring minimum standards to that broken market.<sup>15</sup> It has undermined fair lending and efforts to help students struggling with unprecedented debt burdens by taking power away from bureau offices that effectively fought for students and underserved communities. The agency has not explained why the cases were dropped<sup>16</sup>.

The bureau dropped its sanctions against the online payday lender NDG Financial Corp., which was accused of

1 Kolhatkar, Sheelah. “Elizabeth Warren makes a case for Democrats to be the anti-corruption party”. June 7th, 2018. <https://www.newyorker.com/news/news-desk/elizabeth-warren-makes-a-case-for-democrats-to-be-the-anti-corruption-party>. Accessed July 23, 2018

2 “It’s a wonderful example of how bureaucracy will function if it has no accountability to anybody,” Mulvaney said in a 2014 interview with the Credit Union Times. “It turns up being a joke, and that’s the CFPB really has been, in a sick, sad kind of way, because you’ve got an institution that has tremendous authority over what you all do for a living.” <https://youtu.be/RaVeNafdyVA>

3 Sylvan, lane. “Mulvaney to bankers: Your input will help limit consumer bureau’s power” April 24, 2018. <http://thehill.com/homenews/administration/384742-mulvaney-to-bankers-campaign-donations-will-help-limit-consumer>. Acces July 23, 2018.

4 Thrush, Gleen and Rappeport, Alan. “Like a mosquito in a Nudist Colony’: How Mick Mulvaney Found Plenty to Target at Consumer Bureau” May 7, 2018. <https://www.nytimes.com/2018/05/07/us/mick-mulvaney-budget-director-consumer-bureau.html>. July 23, 2018.

5 Letter to Honorable Janet L. Yellen from Director Mic Mulvaney, January 17, 2018. [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_fy2018\\_q2\\_funding-request-letter-to-frb.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf)

6 Letter to Honorable Janet L. Yellen from Director Mic Mulvaney, June 15, 2018. [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_fy2018\\_q2\\_funding-request-letter-to-frb.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf)

7 “CFO update for the second quarter of fiscal year 2018.” <https://www.consumerfinance.gov/about-us/budget-strategy/financial-reports/>

8 “CFO update for the fourth quarter of fiscal year 2017” Page 3/11. <https://www.consumerfinance.gov/about-us/budget-strategy/financial-reports/>; see also Merle, Renae, “The Clock is running out on Mick Mulvaney” June 12, 2018. [https://www.washingtonpost.com/news/business/wp/2018/06/12/the-clock-is-running-out-on-mick-mulvaney/?utm\\_term=.4a900d3cb423](https://www.washingtonpost.com/news/business/wp/2018/06/12/the-clock-is-running-out-on-mick-mulvaney/?utm_term=.4a900d3cb423). Accessed July 23, 2018.

9 Merle, Renae. “The clock is running out on Mick Mulvaney” June 12, 2018. [https://www.washingtonpost.com/news/business/wp/2018/06/12/the-clock-is-running-out-on-mick-mulvaney/?utm\\_term=.4710276335b7](https://www.washingtonpost.com/news/business/wp/2018/06/12/the-clock-is-running-out-on-mick-mulvaney/?utm_term=.4710276335b7). Accessed July 23, 2018.

10 Thrush, Gleen and Rappeport, Alan. “Like a mosquito in a Nudist Colony’: How Mick Mulvaney Found Plenty to Target at Consumer Bureau” May 7, 2018. <https://www.nytimes.com/2018/05/07/us/mick-mulvaney-budget-director-consumer-bureau.html>. July 23, 2018.

11 Mulvaney, Mick. “Written Testimony of Mick Mulvaney, Acting Director, Bureau of Consumer Financial Protection, Before the House Committee on Financial Services” April 10, 2018. <https://www.consumerfinance.gov/about-us/newsroom/written-testimony-mick-mulvaney-acting-director-before-house-committee-financial-services/>. Access July 23, 2018.

12 Rucker, Patrick. “Exclusive: U.S. consumer protection official puts Equifax probe on ice- Sources” February 5, 2018. <https://www.reuters.com/article/us-usa-equifax-cfpb/exclusive-u-s-consumer-protection-official-puts-equifax-probe-on-ice-sources-idUSKBN1FP0IZ>. Access July 23, 2018.

13 Seal, Dan. “CFPB Ends Investigation into Zillow’s Co-Marketing Program” June 25, 2018. <https://www.law360.com/articles/1056869/cfpb-ends-investigation-into-zillow-s-co-marketing-program>. Accessed July 23, 2018.

14 Faux, Zeke. “CFPB Signals Shift by Dropping Payday Lender Lawsuits” January 18, 2018. <https://www.bloomberg.com/news/articles/2018-01-18/trump-led-cfpb-signals-shift-by-dropping-payday-lender-lawsuit>. Access July 23, 2018.; Lane, Sylan. “Mulvaney ends Consumer protection probe of payday loan collector: report” Marsh 23, 2018. <http://thehill.com/policy/finance/379919-mulvaney-ends-consumer-bureau-probe-of-payday-loan-collector-report>. Access July 23, 2018.

15 Id.

16 “A payday lender is accused of stealing million from customers. Trump’s CFPB is now letting them off the hook.” April 20, 2018. <https://www.vox.com/2018/4/20/17225564/mick-mulvaney-cfpb-payday-loan-cases>. Accessed July 23, 2018.

running a “cross-border online payday lending scheme.”<sup>17</sup> A federal judge had sanctioned the uncooperative Defendants in March by entering a default judgment against them, which held them liable for the charges of unfair and deceptive trade practices<sup>18,19</sup> Then, the CFPB “terminated sanctions” against the remaining Defendants according to the CFPB’s report to Congress. The reason for the dismissal of charges against six Defendants in the case was not explained in the court motion<sup>20</sup>.

As of July, Mulvaney has brought two cases from CFPB complaints and dropped most cases against payday lenders. Former director Richard Cordray filed nearly one case per week from 2015-2016 against offending entities, returning nearly US \$12 billion to about 30 million consumers who had been taken advantage of by financial institutions<sup>21</sup>. And, when the bureau began publishing consumer complaints on its website, financial institutions responded more than 700,000 times with a 97 percent response rate, often by providing remedies<sup>22</sup>.

Further changes relate to the structure and organization of the CFPB. The Dodd-Frank Wall Street Reform and Consumer Protection Act directed the creation of a Consumer Advisory Board, to meet at least twice per year. The Bureau also formed two additional advisory groups, the Community Bank Advisory Council and the Credit Union Advisory Council.

Under former Director Richard Cordray, the 25-member group (comprising academics, consumer advocates and industry representatives from financial companies such as PNC Bank and Citigroup) typically met with the CFPB at least three times a year. Mulvaney has repeatedly canceled these meetings, citing his busy schedule.

When some members began to complain that Mulvaney was ignoring them and making unwise decisions about the agency’s future, Mulvaney fired the 25-member unpaid Consumer Advisory Board members in a phone call hosted

by CFPB’s policy associate director for external affairs. This came days after some of its members criticized Mulvaney’s leadership of the watchdog agency<sup>23</sup>.

In a blog post titled “Transforming the way we engage,” the CFPB announced that all three of the advisory groups for the Bureau have been disbanded.<sup>24</sup> The CFPB stated it will continue to fulfill its statutory obligations to convene the Consumer Advisory Board and plans to “provide forums” for the councils, using the current 2018 application and selection process to reconstitute the groups “with new, smaller memberships,” according to the blog post. “By both right-sizing its advisory councils and ramping up outreach to external groups, the Bureau will enhance its ability to hear from consumer, civil rights and industry groups on a more regular basis.”

Despite criticism that the move demonstrates Mulvaney’s efforts to stock the board with his own selections, the CFPB characterized the situation as a transition “from former modes of outreach to a new strategy to increase high-quality feedback.”<sup>25</sup>

Mulvaney has stated the bureau should be guided by the number of complaints it receives, while also proposing to conceal CFPB complaints and its database from the public.<sup>26</sup> While speaking with bankers and lending industry professionals at the American Bankers Association conference, Mulvaney said he wants to make the complaints private, meaning nobody would know what harm companies might be causing customers and how the CFPB is responding. “I don’t see anything in here that says I have to run a Yelp for financial services sponsored by the federal government,” he said, holding up a copy of the Dodd-

Frank financial reform law, according to the Wall Street Journal.<sup>27</sup>

Mulvaney’s actions will lower the complaint databases’ profile, and will most likely reduce the number of complaints it receives. The proposal also increases the difficulty that consumers will have in obtaining redress from misbehaving companies.

The Trump administration and Mulvaney stripped enforcement powers from the Office of Fair Lending and Equal Opportunity in January by moving the powerful division of the bureau under Mulvaney’s direct oversight<sup>28</sup>. The Office of Fair Lending and Equal Opportunity is responsible for some of CFPB’s most high-profile cases, including a 2015 settlement recovering \$25 million in loan subsidies against Hudson City Savings Bank from charges involving racially discriminating against minority mortgage borrowers.<sup>29</sup>

The administration and Mulvaney deemed the CFPB unit’s efforts as acting too aggressively<sup>30</sup>. By reorganizing the unit to the office of the director, Mulvaney effectively negated the regulation of discriminatory lending. Mulvaney explains in an email post move that staffers of the office of Fair Lending and Equal Opportunity will be focused on “advocacy, coordination and education.”<sup>31</sup>

Perhaps the most dangerous changes relating to the CFPB has been the expanding use by the Trump Administration and Congress of the Congressional Review Act (CRA), applying the Act

17 <https://www.courtlistener.com/docket/4577063/consumer-financial-protection-bureau-v-ndg-financial-corp/>

18 Id.

19 <https://financialservices.house.gov/uploaded-files/hhrg-115-ba00-wstate-mmulvaney-20180411-sd001.pdf>

20 Id.

21 <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-ohio-land-bank-conference/>

22 <https://www.consumerfinance.gov/data-research/consumer-complaints/>

23 “Mick Mulvaney fires all 25 members of consumer watchdog’s advisory board”. June 6, 2018. [https://www.washingtonpost.com/news/business/wp/2018/06/06/mick-mulvaney-fires-members-of-cfpb-advisory-board/?utm\\_term=.22321b71f163](https://www.washingtonpost.com/news/business/wp/2018/06/06/mick-mulvaney-fires-members-of-cfpb-advisory-board/?utm_term=.22321b71f163). Accessed July 23, 2018.

24 <https://www.consumerfinance.gov/about-us/blog/transforming-way-we-engage/>, see also <https://www.jdsupra.com/legalnews/cfpb-news-mulvaney-replacement-bcfc-81956/>

25 Id.

26 Arnold, Chris. “The Consumer Complaints Database that Could Dissappear from View” April 25, 2018. <https://www.npr.org/2018/04/25/605835307/the-consumer-complaints-database-that-could-disappear-from-view>. July 23, 2018.

27 “The CFPB considers ending Public Access to complaints about Banks” <https://www.wsj.com/articles/cfpb-considers-ending-public-access-to-complaints-about-banks-152460177>. Accessed July 2018.

28 Merle, Renae “Trump administration strips consumer watchdog office of enforcement powers in lending discrimination cases” February 1, 2018. [https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm\\_term=.182134f4ed34](https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm_term=.182134f4ed34). July 23, 2018

29 Id.

30 Merle, Renae “Trump administration strips consumer watchdog office of enforcement powers in lending discrimination cases” February 1, 2018. [https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm\\_term=.182134f4ed34](https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm_term=.182134f4ed34). July 23, 2018

31 Merle, Renae “Trump administration strips consumer watchdog office of enforcement powers in lending discrimination cases” February 1, 2018. [https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm\\_term=.182134f4ed34](https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm_term=.182134f4ed34). July 23, 2018

to CFPB agency decisions dating back years.<sup>32</sup>

Previously, the CRA was used successfully only once before the Trump administration and that was by President George W. Bush in 2001<sup>33</sup>. The CFA allows Congress to review federal regulations and, by joint resolution, overrule those regulations within 60 legislative days of their enactment. Importantly, once rules are discontinued using the CRA, agencies are prohibited from ever enacting “substantially similar” rules, unless it obtains Congressional authorizations.<sup>34</sup>

Using the CRA, a resolution was signed into law to remove a consumer protection measure in the form of an auto-lending guidance the CFPB released in March of 2013. The guidance provided that indirect auto lenders could be held liable under the Equal Credit Opportunity Act; Congress and the President have now signaled this guidance and its implementation to be an overreach of the CFPB’s jurisdiction, and Regulation. Once the guidance repeal was signed into law, Mick Mulvaney said the CFPB would “continue to fight unlawful discrimination at every turn” but was glad the anti-discrimination guidance was gone<sup>35</sup>.

While the disregard for anti-discrimination guidance is highly disturbing on its face, there is also a more significant issue in play where the use of the CRA could allow Congress to strike down or roll back decades of hard work, designed to protect consumers. The resolution is a strong indicator that Congress will continue to view any agency “guidance” as rules subject to the Congressional

Review Act. Given proven inability of this Congress to successfully publish bipartisan legislation beyond banking deregulation, it’s extremely likely Republicans will continue to capitalize on an expanded CRA in order to generate headway into the fall mid-term elections.

Mulvaney’s appointment should have ended June 22, 2018, under federal regulations governing temporary appointments. President Trump tapped current deputy director Kathy Kraninger to be the official Director of the Bureau<sup>36</sup>.

But the nomination of Ms. Kraninger allows Mulvaney to remain in place until either the end of the year or the Senate votes on her nomination, whichever event comes first. Ms. Kraninger is best described as a career mid-level bureaucrat currently employed in the Office of management and Budget. Her Senate hearing was held on July 19 before the Senate Banking Committee<sup>37</sup>. The hearing testimony focused largely on the Trump Administration’s policy of separating children at the border and was largely received negatively by Democrats on the committee<sup>38</sup>.

If the Senate declines to confirm Kraninger, Mulvaney can then continue to manage at the CFPB for another 210 days<sup>39</sup>. Some political commentators have speculated this is the real plan considering Kraninger has no known appreciation of the breadth of laws the CFPB should utilize nor experience in protecting consumers<sup>40</sup>.

But, there is some hope. The move by the Trump Administration and Mulvaney to weaken the bureau’s consumer pro-

tection efforts has prompted state attorneys general to fill the void. “As it became clear that they were not going to be pursuing these cases and working with us, we picked up the slack,” said Josh Shapiro, Pennsylvania’s Attorney General. State consumer protection efforts are expected to escalate considerably in this administration’s wake.<sup>41</sup>

Lauren Miles, a lawyer in our firm’s Consumer Fraud & Commercial Litigation Section, wrote this piece. She did an excellent job. Hopefully, it will cause many of our readers to get involved and cause them to contact the politicians in Washington to let them know that consumers deserve and badly need protection from wrongdoers in Corporate America. While many in the corporate sector do things right, a huge number simply don’t play by the rules and hurt consumers in the process. The demise of the CFPB must be stopped before it’s too late.

#### **LAWSUIT TARGETS “HIDDEN FEES” IN WELLS FARGO FINANCE PROGRAMS**

A lawsuit has been filed against Wells Fargo & Co. by a Texas jewelry company accusing it of encouraging thousands of retailers nationwide to charge hidden fees to customers using financing programs created by the bank. The lawsuit, filed in San Francisco federal court, said retailers were told to build financing fees into the price of goods and advertise that purchases could be financed interest-free. In reality, the lawsuit said, the higher purchase price amounted to a hidden, double-digit interest charge.

The lawsuit alleges violations of the U.S. Truth in Lending Act, which requires lenders to clearly disclose financing charges. The complaint was filed by El Paso, Texas-based J Edwards Jewelry Distributing and its president, John Silverman, as a proposed class action on behalf of more than 5,000 retailers nationwide. The finance programs went by such names as Wells Fargo Jewelry Advantage or Wells Fargo Home Projects.

The fourth-biggest U.S. bank, Wells Fargo has also been grappling with a sales scandal involving unauthorized

32 Scott, Dylan. “The new Republican plan to deregulate America, explained” April 25, 2018. <https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut>. July 23, 2018.

33 Id.  
34 Scott, Dylan. “The new Republican plan to deregulate America, explained” April 25, 2018. <https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut>. July 23, 2018.

35 “Trump just scrapped safeguards that stop auto lenders from discriminating based on race.” May 21, 2018. <https://www.vox.com/policy-and-politics/2018/4/17/17248340/congressional-review-act-auto-loan-discrimination-cfpb>. July 23, 2018; see also “The new Republican plan to deregulate America, explained” April 25, 2018. <https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut>. July 23, 2018.

“Trump just scrapped safeguards that stop auto lenders from discriminating based on race.” May 21, 2018. <https://www.vox.com/policy-and-politics/2018/4/17/17248340/congressional-review-act-auto-loan-discrimination-cfpb>.

36 “Democrats gear up for a fight over the next head of the CFPB” July 19, 2018. <https://www.vox.com/2018/7/19/17587346/kathy-kraninger-elizabeth-warren-cfpb-hearing>. Accessed July 23, 2018.

37 <https://www.banking.senate.gov/imo/media/doc/Kraninger%20Testimony%207-19-183.pdf>

38 Mishkin, Barabra S. “Senate Banking Committee holds hearing on Kraninger nomination” July 19, 2018. <https://www.natlawreview.com/article/senate-banking-committee-holds-hearing-kraninger-nomination>. Accessed July 23, 2018.

39 Olen, Helaine. “Trump wins, consumers lose again at the CFPB” [https://www.washingtonpost.com/blogs/post-partisan/wp/2018/06/21/trump-wins-consumers-lose-again-at-the-cfpb/?utm\\_term=.8a0d5a3c800e](https://www.washingtonpost.com/blogs/post-partisan/wp/2018/06/21/trump-wins-consumers-lose-again-at-the-cfpb/?utm_term=.8a0d5a3c800e). July 23, 2018.

40 Puzanghera, Jim. “Trump picks a nominee for CFPB chief—which really lets Mick Mulvaney stay in charge longer” June 16, 2018 <http://www.latimes.com/business/la-fi-cfpb-nominee-kathy-kraninger-20180616-story.html>. Accessed July 23, 2018; Hill, Jon “CFPB Nominee Could Open Door to Lengthier Mulvaney Stay” June 18, 2018. <https://www.law360.com/banking/articles/1054587>. Accessed July 23, 2018.; Finkle, Victoria “Trump’s CFPB pick clears up what, exactly?” June 19m 2018. <https://www.americanbanker.com/opinion/trumps-cfpb-pick-clears-up-what-exactly>. July 23, 2018.

41 Thrush, Gleen and Rappeport, Alan. “‘Like a mosquito in a Nudist Colony’: How Mick Mulvaney Found Plenty to Target at Consumer Bureau” May 7, 2018. <https://www.nytimes.com/2018/05/07/us/mick-mulvaney-budget-director-consumer-bureau.html>. July 23, 2018.

accounts. In April, it agreed to pay \$1 billion to settle regulators' allegations that it forced unneeded auto insurance on consumers and charged homebuyers excessive fees.

The latest lawsuit said the financing programs were advertised at retailers' stores and on their websites, but Wells Fargo controlled how merchants could describe them. Retailers were told they could not charge a fee for customers using Wells Fargo financing but could inflate a purchase price to cover the fees, the lawsuit said.

In a typical purchase, the complaint said a customer might pay \$3,000 for a ring and zero interest if the full amount was paid within 60 months. The retailer forfeited 22.5 percent of the cost to Wells Fargo in exchange for the zero percent financing. Customers could buy the same ring for just \$2,325 if they paid in cash, saving \$675. Customers using Wells Fargo financing were thus paying \$675 in undisclosed finance charges.

Wells Fargo likely collects as much as \$800 million a year in hidden finance charges through the programs. Because finance charges were built into a purchase price, retailers also had to remit more sales taxes to local governments than they otherwise would have.

The case is *Silverman et al v Wells Fargo & Co.*, U.S. District Court, California Northern District, No 18-3886

Source: Reuters

#### **FORMER EXECUTIVES OF DEFUNCT FOR-PROFIT COLLEGE FIRM SETTLE FRAUD CHARGES WITH SEC**

Former top executives at ITT Educational Services, the parent company of defunct ITT Technical Institute, have settled fraud cases with the Securities and Exchange Commission (SEC). A trial had been slated to begin on July 9. The settlement resolves civil fraud charges filed in 2015 against ITT chief executive Kevin Modany and former chief financial officer Daniel Fitzpatrick for deceiving investors about high rates of late payments and defaults on student loans backed by the company.

While neither Modany nor Fitzpatrick, in typical fashion, admitted or denied

wrongdoing, they agreed to pay penalties of \$200,000 and \$100,000, respectively. They are both barred from serving as officers and directors of public companies for five years. Even though the company had settled its fraud case with the SEC, the former executives had continued to fight the claims against them. Stephanie Avakian, co-director of the SEC's division of enforcement, in a statement, said:

*Holding individuals accountable—particularly senior executives—is a critical focus of our enforcement program. These settlements, entered into on the eve of trial after years of litigation, reflect our commitment to this accountability.*

The SEC definitely needed to go after the ITT executives based on their obvious direct involvement in the wrongdoing. However, it appears the executives got off pretty light. Take a look at the following brief summary of the activities at ITT and see if you agree.

In 2015, the SEC accused ITT's top brass of making secret payments on delinquent accounts to delay defaults instead of disclosing the tens of millions of dollars in impending losses to investors. Executives assured investors in conference calls that the programs were performing well, while ITT's obligations to pay out on soured loans began to balloon, according to the complaint.

ITT created two in-house student-loan programs as private lenders retreated from the market at the height of the 2008 financial crisis. Banks stopped extending credit to students at for-profit colleges because of their historically high default rates.

To get investors to finance the in-house loans, ITT offered a guarantee to limit the risk of students not repaying the debt. If a certain percentage of loans soured, the company agreed to cover the principal, interest and fees.

Because ITT kept the loan programs off its balance sheet, investors did not have direct information about the performance of the debt. And when students began defaulting en masse around 2011, all investors could rely on was the company's

word, according to the SEC complaint.

The following fall, ITT paid \$8 million as guarantee obligations came due, but executives allegedly failed to inform investors that the company was facing an additional \$30 million in payments at the end of that year. The SEC claims the company used accounting tricks to hide the impending financial trouble. It wasn't until 2014 that ITT reported more than \$60 million in charges related to its loan programs, a revelation that sent its stock plummeting.

ITT ceased operations at all of its Technical Institutes in 2016 after the Education Department curtailed the company's access to federal loans and grants. An accrediting body had threatened to pull the school's accreditation amid mounting lawsuits and investigations.

Days after shutting down 137 campuses and leaving 35,000 students and 8,000 employees in the lurch, the company filed for bankruptcy protection to liquidate its business. That bankruptcy case continues as creditors, federal regulators, state attorneys general, cheated employees and students lay claim to the remaining assets.

Earlier this year, a federal judge recognized a \$1.5 billion claim that ITT Tech students, who attended the school between 2006 and 2016, asserted against the company for breach of contract and consumer protection violations. That means that if there is money in the estate to pay unsecured claims—debts that are not assured payment—at the end of the bankruptcy, students would receive a share. Toby Merrill, director of the Project on Predatory Student Lending at Harvard Law School and a lawyer representing the students in the bankruptcy case, said:

*It is outrageous that the executives get to walk away with a sweetheart deal from the SEC while ITT students will be lucky to get a sliver of justice in ITT's bankruptcy and the Department of Education refuses to cancel students' fraudulent debt.*

I believe that the government should get much tougher on companies that take advantage of the government and the public, especially students, and

make them pay for their wrongful conduct.

Source: *Washington Post*

#### **JUDGE RULES UBER CANNOT FORCE PRIVATE ARBITRATION ON CUSTOMERS**

A federal judge in New York has ruled that Uber cannot force its customers to accept private arbitration in their claims against the company. Kings County Judge Francois Rivera allowed a disabled woman to move forward with a lawsuit against Uber. Judge Rivera wrote that the company's arbitration clause is buried so deep in reams of legal language that it is unfair to expect users of the app to dig that deeply through the fine print. The judge wrote:

*A registrant may complete the process without seeing or even being aware that there are other clickable buttons leading to a screenshot containing Uber's terms and conditions.*

Pursuant to the ruling, Elizabeth Ramos, a Brooklyn resident, can take her claim against Uber to a court for failing to pick her up on several occasions when she tried to order a wheelchair-accessible ride through the app in the summer of 2016. Ms. Ramos said: "I'm not going to stop until we can go to the app and get a ride as quickly as everyone else." Ms. Ramos has been using a wheelchair since she was a preteen.

While the ruling only applies to New York, it could be used as a precedent to force Uber to go to court in cases in other states, said Ian Poulos, the lawyer representing Ramos. He stated:

*Uber has been pushing cases to arbitration all across the country so they don't have to go to court and create a precedent. This case isn't binding outside of New York, but it is very persuasive and other courts could follow this standard. This is a big deal.*

The app company has traditionally forced any rider who sued over sexual assault or harassment to go to arbitration instead of the courts. To its credit, the company announced in May that it would change that policy.

Disability advocates say the ruling could lead to easier transportation for wheelchair-bound riders. Joe Rappaport, Executive Director for the Brooklyn

Center for Independence of the Disabled, stated:

*Companies hide behind arbitration clauses that make it difficult to go the court to win basic rights, including the right to accessible transportation. This is a first step toward getting people with disabilities a ride on a system that other New Yorkers ride every day.*

Uber will have to respond to the original lawsuit that Ms. Ramos filed in 2016. This ruling is very important in the ongoing battle with corporate America over forced arbitration.

Source: *New York Post*

## **XVIII. RECALLS UPDATE**

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

#### **AUTO RECALLS**

**Mazda North America Operations** is recalling certain 2003-2008 Mazda6, 2006-2007 Mazdaspeed6 and 2004 MPV vehicles nationwide. Mazda is also recalling 2005-2006 MPV vehicles in Alabama, Arizona, Arkansas, California, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands (Saipan), and the U.S. Virgin Islands. These vehicles are equipped with certain air bag inflators assembled as part of the passenger frontal air bag modules, and used as original equipment or replacement equipment. In the event of a crash necessitating deployment of the passenger frontal air bag, these passenger air bag inflators may explode due

to propellant degradation occurring after long-term exposure to absolute humidity and temperature cycling. An inflator explosion may result in sharp metal fragments striking the driver or other occupants resulting in serious injury or death.

**Ford Motor Company** is recalling certain 2013-2014 Ford Escape, and 2013-2016 Ford Fusion vehicles, equipped with six-speed automatic transmissions. The bushing that attaches the transmission shifter cable to the transmission may degrade over time and cause the bushing to detach from the transmission. The condition could allow the driver to move the shift lever to Park and remove the ignition key, while the transmission may not be in Park, with no warning message or audible chime. If the vehicle is exited without the transmission being in Park and without the parking brake being applied, the vehicle may unexpectedly move, increasing the risk of a crash.

**Ford Motor Company** is recalling certain 2018 Ford Expedition, F-150, and Lincoln Navigator vehicles equipped with 3.5L GTDI V6 engines. These vehicles have high pressure fuel pump assemblies with welds that can fracture, which may cause an oil or fuel leak. A fuel leak in the presence of an ignition source may increase the risk of a fire.

**Ford Motor Company** is recalling certain 2017-2018 Ford Edge and 2017 Lincoln MKZ vehicles. On vehicles with 2.0L gas engines and six-speed automatic transmissions, the torque converter weld studs may have been inadequately welded. If the torque converter weld studs fail, the torque converter will not be connected to the engine flexplate and the vehicle will lose the ability to move, increasing the risk of a crash.

**Ford Motor Company** is recalling certain 2018 Ford F-650 and F-750 trucks. The brake circuit hose assemblies located between the master cylinder and the hydraulic control unit, may have been manufactured without anti-corrosion plating on the coupling fittings, or "ferrules," of the hoses. This can lead to premature corrosion, and result in a brake fluid leak. A brake fluid leak can reduce brake effectiveness, increasing the risk of a crash.

**Automobili Lamborghini** is recalling certain 2015-2016 Lamborghini Aventador SV Coupe and Aventador SV Road-



ster vehicles. The bolts centering and supporting the brake discs to the wheel's hub may loosen over time. Continued driving with loose centering bolts may result in the wheel detaching. A wheel detachment can increase the risk of a crash.

**Toyota Motor Engineering & Manufacturing** is recalling certain 2007-2011 Lexus GS350 and GS450h, 2006-2013 Lexus IS350 and 2010-2014 Lexus IS350C vehicles, equipped with 3.5L V6 2GR-FSE gasoline engines. The diaphragms in the fuel pulsation dampers may harden over time and develop cracks, possibly causing a fuel leak. A fuel leak in the presence of an ignition source can increase the risk of a fire.

**Volkswagen Group of America, Inc.** is recalling certain 2013-2015 Audi S8 and A8 vehicles. The fuel supply line for the high-pressure fuel pump may become porous over time, resulting in a fuel leak. A fuel leak in the presence of an ignition source can increase the risk of a fire.

**Spartan Motors USA** is recalling certain 2009-2018 Gladiator and Metro-Star emergency vehicles. The fire water pump solenoid may corrode internally, causing a loss of power to the pump control module. A loss of power to the pump control module can cause a loss of water pressure for fighting fires, thereby increasing the risk of injury.

**E-One Incorporated** is recalling certain 2016-2017 E-One Cyclone II SP-10 emergency vehicles equipped with a 100-foot steel rear mount platform aerial device. Over time, movement of the bucket on the aerial ladder may cause stress fractures in the ladder tubing, compromising the integrity of the aerial device. Stress fractures in the aerial device may result in the ladder failing, increasing the risk of injury of the bucket occupant.

**Honda** is recalling certain 2018 Honda Civic vehicles. The manufacturing date area of the certification labels may have random characters, which can affect the owner's ability to determine if a safety recall includes their vehicle. If the owner is not able to verify if their vehicle is involved in safety recall, it can increase the risk of injury or crash.

**Bugatti** is recalling certain 2018 Chiron vehicles. The heat shield for the gas generator for the side air bags may have been incorrectly installed during the air

bag manufacturing process, potentially reducing the performance of the air bag. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 214, "Side Impact Protection." If the air bag deployment performance is reduced, it can increase the risk of injury.

**Gillig LLC** is recalling certain 2001-2018 Gillig Low Floor transit buses. The turn signals may flash slowly, reducing their visibility to other drivers. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 108, "Lamps, Reflective Devices, and Associated Equipment." The reduced visibility of the turn signals can increase the risk of a crash.

**Navistar, Inc.** is recalling certain 2018-2019 International HX and LT trucks equipped with a Cummins ISX engine and a Wabco 37.4 air compressor. The air compressor discharge line may contact the fuel filter inlet and outlet lines (fuel lines) and the heat generated from the air compressor discharge line may cause heat damage to the fuel lines. Continued heat damage to the fuel lines could cause the fuel lines to rupture, resulting in a fuel leak and increasing the risk of a fire.

**Daimler Trucks North America LLC** is recalling certain 2018-2019 Freightliner Cascadia vehicles. The brake caliper mounting bolts on these vehicles may not be properly tightened, potentially resulting in the caliper detaching. If the calipers detach, there would be reduced braking performance, increasing the risk of a crash.

**Daimler Trucks North America LLC** is recalling certain 2017-2018 Thomas Built Buses Saf-T-Liner EFX transit buses. The check valve for the air brake system may not be plumbed correctly, which can cause the primary air system to not be isolated from the secondary air system. In the event of a rapid loss of air pressure in the secondary system, the incorrectly plumbed check valve can cause rapid air loss in both secondary and primary system, causing the parking brakes to activate suddenly. This will increase the risk of a crash.

**Daimler Trucks North America LLC** is recalling certain 2017-2018 Thomas Built Buses Saf-T-Liner EFX school buses. The check valve for the air brake system may not be plumbed correctly which

can cause the primary air system to not be isolated from the secondary air system. In the event of a rapid loss of air pressure in the secondary system, the incorrectly plumbed check valve can cause rapid air loss in both secondary and primary system, causing the parking brakes to activate suddenly. This will increase the risk of a crash.

**BMW of North America, LLC** is recalling certain 2017-2018 BMW G310R and 2018 BMW G310GS motorcycles. Over time, repeated use and loading of the side stand could cause damage to the side stand and the motorcycle's frame. Damage to the side stand and/or frame may result in the motorcycle unexpectedly falling over while it is stationary, increasing the risk of injury.

**Mercedes-Benz USA, LLC** is recalling certain 2018 Mercedes-Maybach S560 and S560 4Matic and Mercedes S450 4Matic, S450, S560, S560 4Matic, and S560 Coupe 4Matic vehicles. The electrical power bars inside the pre-fuse box in the trunk may not have been secured properly. If the power bars are not properly secured, it can cause higher electrical resistance increasing the risk of a fire. Additionally, an intermittent contact between the power bars could lead to a loss of vehicle functions. The engine operation, the seat belt functions and the instrument cluster could be impaired, increasing the risk of a crash and injuries.

**Mercedes-Benz USA, LLC** is recalling certain 2018 Mercedes-Benz GLA250 and GLA250 4Matic vehicles. The child seat top tether anchorage point on the center position of the rear seat may not have been installed. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 225, "Child Restraint Anchorage Systems." If the top tether anchorage point is missing, a child seat will not be able to be properly installed in the center rear seat position, increasing the risk of injury.

**Mazda North America Operations** is recalling certain 2005-2006 Mazda MPV vehicles sold, or ever registered, in the states of Alaska, Colorado, Connecticut, Idaho, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New York, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. These vehicles are equipped with certain air bag inflators

assembled as part of the passenger frontal air bag modules used as original equipment or replacement equipment. In the event of a crash necessitating deployment of the passenger frontal air bag, these inflators may explode due to propellant degradation occurring after long-term exposure to absolute humidity and temperature cycling. An inflator explosion may result in metal fragments striking the vehicle occupants resulting in serious injury or death.

**Nissan North America, Inc.** is recalling certain 2011 Nissan Versa sedan vehicles and 2011-2012 Nissan Versa hatchback vehicles ever registered in the states of Arizona, Arkansas, Delaware, the District of Columbia, Illinois, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Virginia, and West Virginia. Nissan is also recalling 2010-2011 Nissan Versa sedan vehicles and 2010-2012 Nissan Versa hatchback vehicles ever registered in the states of Alaska, Colorado, Connecticut, Idaho, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New York, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. In the event of a crash necessitating deployment of the passenger frontal air bag, these passenger air bag inflators may explode due to propellant degradation occurring after long-term exposure to absolute humidity and temperature cycling. An inflator explosion may result in sharp metal fragments striking the driver or other occupants resulting in serious injury or death.

**General Motors LLC** is recalling certain 2016-2018 Chevrolet Malibu vehicles. During servicing, a Passenger Presence System (PPS) may have been installed that was not correctly calibrated to the vehicle's seat type. As a result, the PPS may not properly identify an adult passenger from a child passenger in the front passenger seat, potentially causing the air bag to not deploy when it should, or causing the air bag to deploy when it shouldn't. In the event of a crash, improper air bag deployment can increase the risk of injury.

**Chrysler** is recalling certain 2018 Dodge Journey and RAM 1500, 2500, and 3500 vehicles. The backup camera may experience a loss of image display while backing up. As such, these vehi-

cles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 111, "Rearview Mirrors." A loss of image in the rearview camera while backing up can increase the risk of a crash.

**Chrysler** is recalling certain 2018 Dodge Journey vehicles. When reverse gear has been selected, the rear camera view may not be fully visible within two seconds. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 111, "Rearview Mirrors." If the full camera view is delayed and the driver does not check their surroundings before backing up, there may be an increased risk of a crash.

**Porsche Cars North America, Inc.** is recalling certain 2017-2018 Panamera 4S, Panamera Turbo and Panamera Turbo Executive and 2018 Panamera Turbo S E-Hybrid, Panamera Turbo S E-Hybrid Executive, Panamera 4S Sport Turismo, Panamera Turbo Sport Turismo, Panamera Turbo S E-Hybrid Sport Turismo, and Panamera 4S Executive vehicles. The connecting links may detach from the rear-axle anti-roll bar potentially damaging the surrounding suspension parts and affecting the vehicle's handling. An unexpected change to the vehicle's handling can increase the risk of a crash.

**New Flyer of America, Inc.** is recalling certain 2014-2016 New Flyer XT60, 2014-2017 New Flyer XN60 and XD60, and 2015-2017 New Flyer XDE60 urban transit buses equipped with ZF Axles that have radial air disk brakes. Surface roughness of a guide pin in the radial brake calipers may cause the brake carriage guide pin support bolt to break. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 121, "Air Brake Systems." Breakage of the guide pin can cause a reduction of braking ability and an increase in stopping distances, or a loss of tire pressure, increasing the risk of a crash.

**Kovatch Mobile Equipment Corp.** is recalling certain 2015-2017 KME Predator SS Aerial, and 2015-2018 KME Predator Aerial emergency vehicles equipped with an aerial platform and optional modular platform tether control. If the tether control gets unplugged while it is operating the aerial, the last command will be continued to be carried out. If the aerial continues moving when the

tether is unplugged, it can increase the risk of an injury.

**Automobili Lamborghini** is recalling certain 2012-2018 Lamborghini Aventador Coupe and Roadster vehicles. The engine may stall unexpectedly during certain driving conditions such as when the accelerator pedal is released below 2000 rpms while the transmission is automatically down shifting to a lower gear. An engine stall can increase the risk of a crash.

**Indian Motorcycle Company** is recalling certain 2017-2018 Indian Scout, Scout Sixty, and Scout Bobber motorcycles. The Anti-Lock Brake System (ABS) may have air left in the system after the assembly process. Air in the brake system can reduce brake effectiveness, increasing the risk of a crash.

**Robert Bosch LLC** has submitted a Defect Information Report based upon decisions made by Ford Motor Company and General Motors to conduct recalls (numbers 18V392 and 18V358 respectively) to inspect and replace certain Robert Bosch HDP5 High Pressure Fuel Pump Assemblies, part numbers 0261520518 and 0261520515. Welds between the pump housing and the mounting flange may fracture, possibly causing a fuel leak. A fuel leak in the presence of an ignition source can increase the risk of a fire. Bosch is working with the affected vehicle manufacturers. Ford and GM will notify owners and dealers will replace the high-pressure fuel pump assembly, free of charge. Owners may contact Ford customer service at 866-436-7332, Buick customer service 800-521-7300, Cadillac customer service 800-458-8006, Chevrolet customer service 800-222-1020, and GMC customer service at 800-462-8782.

**Darsan Trading Co.** is recalling certain HCI Gloss Black Open Face helmets, model number 15, in size large. These helmets may not adequately protect the wearer in the event of a head impact during a motorcycle crash. As such, these vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard (FMVSS) number 218, "Motorcycle Helmets." A helmet that does not adequately protect the wearer from an impact can increase the risk of injury in the event of a crash.

## Other Recalls

### **HUISH OUTDOORS RECALLS SCUBA DIVING REGULATORS DUE TO DROWNING HAZARD**

Huish Outdoors LLC, dba Oceanic and Hollis, of Salt Lake City, Utah, has recalled about 4,500 Oceanic and Hollis scuba diving regulators. An additional 330 were recalled in Canada. The scuba diving regulators can restrict airflow at low tank pressures (below 500 psi), posing a drowning hazard to divers. This recall involves Oceanic and Hollis regulators for scuba diving. The metal regulator attaches to the scuba tank valve and controls the pressure of the air a diver breathes. The serial number is laser etched on the first stage body. Part numbers and UPC numbers are printed on the packaging only.

The regulators were sold at scuba dive equipment stores nationwide from October 2017 through June 2018 for between \$240 and \$350 for the first stage regulator only and between \$400 and \$650 when sold as part of a complete first- and second-stage regulator. Consumers should immediately stop using the recalled scuba diving regulators and contact a local Oceanic or Hollis dealer for a free repair. Contact Huish Outdoors toll-free at 888-270-8595 (extension 4) from 8 a.m. to 5 p.m. MT Monday through Friday or online at [www.Hollis.com](http://www.Hollis.com) and [www.Oceanic-Worldwide.com](http://www.Oceanic-Worldwide.com) and click on recall at top of page, or <https://recall.hollis.com> and <https://recall.oceanicworldwide.com> for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/Huish-Outdoors-Recalls-Scuba-Diving-Regulators-Due-to-Drowning-Hazard>

### **BACCUS RECALLS STANLEY WORKBENCH LED LIGHT AND POWER STATIONS**

Baccus Global has recalled about 20,000 units of its Stanley workbench LED light and power stations, according to the Consumer Product Safety Commission (CPSC). The workbench and power stations are incorrectly wired, which can result in reverse polarity, posing electrocution and shock hazards, according to the recall notice. Baccus has received three reports of the units being wired incorrectly, but no injuries have been reported.

The recall involves Stanley LED workbench and power stations with the model number WLB40PS. The model

number can be found on a sticker on the back of the lighting panel. The recalled units are black/yellow, with “Stanley” printed in yellow by the outlets, and measure about 19.75 inches long by 3.75 inches wide and 5 inches tall. They have a 40-chip LED shop light with adjustable angles, four power outlets, and an on/off switch mounted on the unit. Consumers should stop using the recalled workbench and power station, unplug it, and contact Baccus Global for a free replacement or a full refund. Baccus is contacting all known purchasers. They were sold at Sam’s Club stores nationwide and online at Amazon from March 2017 through August 2017.

### **WATER PIK TOOTHBRUSHES RECALLED FOR OVERHEATING RISK**

The U.S. Food and Drug Association (FDA) has announced that Water Pik is recalling 3,800 of its Sonic-Fusion flossing toothbrushes due to an overheating problem, after receiving consumer reports of the product malfunctioning in the U.S. The base might overheat, possibly leading to fire, shock or burns. The recall is applicable only to Sonic-Fusion products. All other Waterpik brand flossers and toothbrushes are not affected. The toothbrushes were distributed between June 2017 and June 2018 in all U.S. states and in Canada and limited to professional educators, key opinion leaders, trade show customers and limited direct online sales. Consumers who have the affected units should stop using them, immediately unplug the unit, and return them to Water Pik, Inc. To receive a product return kit, or for additional information, consumers should call 800-674-7718 or email at [SonicFusion-Return@Waterpik.com](mailto:SonicFusion-Return@Waterpik.com).

### **BLOOD PRESSURE MEDICINE RECALL**

A common drug used to treat blood pressure has been recalled after the U.S. Food and Drug Administration (FDA) found one of its ingredients poses a potential cancer risk. Valsartan, prescribed for high blood pressure and heart failure, contains an impurity called N-nitrosodimethylamine (NDMA), the FDA said. NDMA, which is found in liquid rocket fuels, softeners and lubricants, is classified as a probable human carcinogen - a substance that could cause cancer.

Major Pharmaceuticals, Solco Healthcare and Teva Pharmaceuticals Industries Ltd. are participating in the recall. The presence of NDMA was “unexpected” and it thought to be related to changes in the manufacturing process, the FDA said.

The FDA said because valsartan is used to treat serious medical conditions, patients currently taking the recalled medicines are advised to continue taking it until a replacement product is found. Patients are also advised to follow recall instructions provided by the specific company that manufactured their medication.

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 [BeasleyAllen.com](http://BeasleyAllen.com) or our consumer blog at [RightingInjustice.com](http://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**

#### **RACHEL BRASHIER**

Rachel Brashier, a data entry specialist in the firm’s marketing department, celebrated her first anniversary with Beasley Allen in May. Rachel maintains the firm’s database of more than 112,000 records, which is important to maintaining contact with those receiving this *Report*, as well as with lawyer contacts from all over the country.

Rachel grew up in Helena, Alabama, the daughter of Mike and Kim Brashier. Her older brother, Andrew Brashier, is a lawyer in the firm’s Consumer Fraud & Commercial Litigation Section. Rachel said Andrew has always looked after her and she greatly appreciated his support because she was not only the youngest in the family, she was the only girl. Rachel graduated from Pelham High School and attended Jefferson State

Community College prior to joining the firm.

Rachel now lives in Prattville, Alabama, and is happy to live closer to Andrew and his family so that she can spend more time with them. She also loves to read, a passion that was sparked when she read *The Lord of the Rings* Trilogy in middle school. J.R.R. Tolkien remains her favorite author and will always have a special place in her heart.

Rachel is a very good, hard-working employee who has an important job in the firm. We are fortunate to have her with us.

### **HOLLY BUSLER**

Holly Busler has been with the firm 18 years this month and is currently legal secretary to Lance Gould in the firm's Consumer Fraud & Commercial Litigation Section. She has worked with Lance for the last 13 years, handling calendaring, correspondence, pleadings, travel, organizing files, document review, research, communicating with clients and lawyers, and investigating cases, among other responsibilities. Previously, Holly worked in the Information Technology department and the Mass Torts Section before becoming Lance's secretary.

The mother of four is married to Trenton Busler and they live in Wetumpka. Her daughter Taylor is 19 and a rising sophomore on the Dean's list at the University of Alabama. Holly's two sons, Drew (17) and Pruitt (7), attend school in Wetumpka. Drew is a junior and member of Wetumpka High School's Varsity baseball team. Pruitt will be in third grade this fall. He is a straight-A student who loves baseball, football, hiking, camping and anything outdoors. Holly says her youngest, 1-year-old daughter Georgia, has the prettiest blue eyes and is a "sassy little girl" who also loves anything outdoors.

Holly and Trenton are very close with their siblings so family time is very important and a big part of Holly's time outside of work. In the spring, the family is usually at the ballfield with their sons. They also enjoy taking trips, grilling out or just spending weekend days by the pool in the summer. During football season, you can find the Alabama fans cheering "Roll Tide!" If Holly has any additional free time, she enjoys filling that time with sewing or reading.

Holly is another dedicated and hard-working employee who is an asset to the firm. We are fortunate to have her with us.

### **CHAD COOK**

Chad Cook, a lawyer in the firm's Mass Torts Section, focuses his practice on pharmaceutical litigation, investigating claims and representing victims of defective prescription drugs and medical devices. In October, Chad will mark his 18<sup>th</sup> year with the firm.

Chad was chosen as one of 11 lawyers from around the country to oversee the consolidated litigation as part of the Plaintiffs Steering Committee (PSC) for *In re: Fosamax Products Liability Litigation* (No. II), MDL 2243. This litigation, which encompasses hundreds of cases against Merck Sharp & Dohme, Corp., involves femur fracture injuries and is consolidated in federal court in New Jersey.

Chad is also on the Plaintiff's Discovery Committee for *In re: Fosamax Products Liability Litigation*, MDL-1789, located in the Southern District of New York Federal Court. Additionally, he serves on the Fosamax Science and Administrative Committees for the litigation. Chad also handles a number of cases including Transvaginal Mesh and Xarelto litigations.

Chad obtained a bachelor of science degree in criminal justice from Auburn University Montgomery. He obtained his law degree at Faulkner University's Thomas Goode Jones School of Law. While attending law school, Chad worked as a staff assistant in the firm's Mass Torts Section.

Chad has served as an instructor and mentor to law students, allowing him the opportunity to influence other future lawyers. He has served as an instructor in Civil Procedure and Evidence at Faulkner University, as a member of the school's Legal Studies Advisory Committee, and as a mentor for the Thomas Goode Jones Professional Development Program, which gives law school students an opportunity to connect with practicing lawyers, discuss the practice of law and promote professionalism.

As a passionate advocate, Chad says that regardless of how long a person practices law, new challenges, circumstances and emerging issues are constantly arising. Providing assistance to those in need of solutions is one of the parts of the legal profession that drives him the most. He says:

*The number-one job at our firm is to help our clients. When you talk with a client who is desperately seeking help and can provide assis-*

*tance and a favorable outcome in a difficult time, that is extraordinarily rewarding.*

Chad was selected to the National Trial Lawyers Association (NTLA) Top 100 Trial Lawyers list, an invitation-only organization composed of the premier trial lawyers from each state or region who meet stringent qualifications as civil Plaintiff and/or criminal Defense trial lawyers. He is also Past President of the Montgomery County Association for Justice and is a member of the Montgomery County Bar Association, Alabama Association for Justice, District of Columbia Bar, American Association for Justice, Christian Trial Lawyers Association, and the Public Justice Foundation.

Chad says that Beasley Allen is a unique law firm in everything it pursues. From the employees' weekly devotions to the annual Legal Strategies Conference & Expo the firm hosts, to the Jere Beasley Report, Chad says the firm is exceptional. However, he believes one aspect of the firm stands out most—its leadership. Chad says "What truly makes our firm special is the leadership in place, starting at the top with Mr. Beasley."

Chad is a very good lawyer who cares deeply about his clients. He works very hard in their quest for justice. We are blessed to have Chad with us.

### **GRAHAM ESDALE**

Graham Esdale is a lawyer in the Firm's Personal Injury & Product Liability Section where he focuses his practice on products liability and workplace injuries. Graham joined the firm in 1996 after handling more than 150 trials for the Jefferson County, Alabama, District Attorney's Office and practicing civil law in Birmingham, Alabama.

After joining the firm, Graham continued his trial work, which he explained is what drew him to the legal profession. Graham has been involved in a number of high profile cases. He was one of the first lawyers in the country to file a lawsuit against Toyota in what would become the nationwide and high-profile Sudden Unintended Acceleration (SUA) litigation. He was a member of the trial team that secured a \$3 million verdict against Toyota in 2013 in *Bookout, et al v. Toyota*. The case was the first in the nation tried on the theory that Toyota's throttle control software was defective and could cause unintended acceleration.

The Toyota case also landed Graham and the trial team as a finalist for Public Justice's 2014 Trial Lawyer of the Year, which recognizes the lawyer or trial team making the most outstanding contribution to the public through precedent-setting litigation in the preceding year. He also was named Beasley Allen's 2014 Products Liability Section Lawyer of the Year as a result of his work on the *Bookout* case. Among his additional noteworthy cases, Graham obtained a \$114.5 million verdict against a bucket truck manufacturer and a \$3 million verdict against Alabama Power Company involving an electrical accident.

Graham says the clients he represents are his favorite part of practicing law. The 7<sup>th</sup> Amendment advocate is glad to be part of a judicial system that affords people their day in court. Graham says:

*If someone has come to see me wanting representation, then they have likely experienced the worst day of their life. My clients come in wanting answers and desperately needing help. There is no better feeling than resolving a lawsuit favorable to the client. You know it has made a major difference in their life going forward and their appreciation and thanks is heartfelt.*

Graham is National Board Member of the Alabama Chapter of the American Board of Trial Advocates (ABOTA), which is a national organization comprised of both Plaintiff and Defense trial attorneys committed to preserving trial by jury. Members must have tried at least 20 civil jury trials to verdict as lead counsel. Graham also serves as Life Fellow in National ABOTA. He has been named one of America's "Best Lawyers" and "Super Lawyers" and was selected as one of the 2014-2015 Lawdragon 500 Leading Lawyers in America. Graham was also named one of America's Top 100 High Stakes Litigators and received a lifetime achievement award from America's Top 100 Attorneys.

The University of Alabama School of Law graduate earned his undergraduate degree in marketing from Auburn University. If you know Graham, you already know where his sports-related allegiance is. Graham is married to the former Leigh Ann Hibbett of Florence, Alabama, and they have two children, Whitney and Robert. Whitney is a now physician assistant in cardiovascular surgery at Huntsville Hospital. Robert, a 16-year-old

music lover, appears to have the goal of obtaining every musical instrument known to man. Robert's latest requests are for a harp and a cowbell.

Graham says he really enjoys working at Beasley Allen because of the employees. Although he says he doesn't know the secret, Graham says the firm has made the best hires he has ever seen at any organization. He adds:

*From the runners to the most experienced trial lawyers, we are blessed to have genuinely good people working here who understand the importance of what we do and work very hard toward that goal. It makes walking through the front door in the mornings a truly enjoyable experience.*

Graham is a very good lawyer who works very hard to see that his clients obtain justice. He has made a huge difference in the lives of his clients. We are blessed to have Graham at Beasley Allen.

## XX. SPECIAL RECOGNITIONS

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### **DR. QUINTON ROSS IS APPROACHING HIS FIRST ANNIVERSARY AS ALABAMA STATE UNIVERSITY PRESIDENT**

Dr. Quinton T. Ross, Jr. was named as President of Alabama State University last year. He obtained a Bachelor of Science degree in political science at ASU. Quinton and I have been friends for a very long time and I have tremendous admiration and respect for him. Quinton served as Co-Chair of the State Advisory Committee for President Barak Obama's first presidential election campaign. He also served with distinction in the Alabama Senate for four terms.

Now, some 26 years after graduating from ASU, Quinton is approaching the end of his first year as President of his alma mater. Last September, the ASU Board of Trustees named the four-term state senator to the University's top leadership position. I am totally convinced the Board made an excellent choice.

ASU is among the historically black colleges and universities (HBCUs) in the country and was founded in 1867 in Marion, Alabama, by nine freed slaves now known as "The Marion Nine." The

school is now located in Montgomery, Alabama, and welcomes students of all races.

As ASU's president, Quinton continues his personal mission of advocating for public education and helping young people "grasp the light of knowledge through embracing technology." During his tenure in the Alabama State Senate, Quinton was one of seven African Americans serving in the body and was the first African American male elected Senate Minority Leader in 2015. During his time in the Senate, Quinton was also the first Minority Leader elected to a four-year term. He was an unwavering advocate for public education, child safety and the general welfare of all Alabamians.

Quinton is a member of Hutchinson Missionary Baptist Church where he sings in its male chorus. He says his most notable accomplishment is being a loving husband and father of two sons. I am convinced that ASU is now in good hands and that Quinton will be an outstanding president. May God bless him in his quest to take ASU to a new and higher level. I am confident that under Quinton's leadership, ASU will reach the lofty goals set by him.

Source: Montgomery Advertiser

## XXI. FAVORITE BIBLE VERSES

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**LEIGH O'DELL, A LAWYER IN OUR FIRM'S MASS TORTS SECTION, PROVIDED THESE VERSES FOR THIS ISSUE.**

*For it is by grace you have been saved, through faith—and this is not from yourselves, it is the gift of God—not by works, so that no one can boast. For we are God's handiwork, created in Christ Jesus to do good works, which God prepared in advance for us to do. Ephesians 2:8-10*

*Yours, Lord, is the greatness and the power and the glory and the majesty and the splendor, for everything in heaven and earth is yours. Yours, Lord, is the kingdom; you are exalted as head over all. Wealth and honor come from you; you are the ruler of all things. In your hands are strength and*

*power to exalt and give strength to all. Now, our God, we give you thanks, and praise your glorious name. 1 Chronicles 29:11-13*

*Now may the God of peace, who through the blood of the eternal covenant brought back from the dead our Lord Jesus, that great Shepherd of the sheep, equip you with everything good for doing his will, and may he work in us what is pleasing to him, through Jesus Christ, to whom be glory for ever and ever. Amen. Hebrews 13:20-21*

Temp Temple, a staff assistant in our Mass Torts Section, sent in 1 Corinthians 3:7 as his verse. Temp had this to say:

*How often in life do we find ourselves working day after day on goals that we truly believe in only to wind up dissatisfied and disheartened by the lack of visible progression? Instead of falling into the trap of self-doubt and condemnation, I've let this verse into my heart to help take the burden off of me. If we place our faith in an all-knowing God, we can accept that we are never in control of an outcome—even if we believe our dedication is deserving of the outcome we desire. We can only do as we feel we must and let God take care of the rest.*

*So neither the one who plants nor the one who waters is anything, but only God, who makes things grow. 1 Corinthians 3:7 New International Version (NIV)*

## XXII. CLOSING OBSERVATIONS

### **INTERNET SALES TAX RULING BY THE U.S. SUPREME COURT SHOULD GREATLY BENEFIT THE STATES**

In a closely watched tax case with broad implications for commerce in the digital age, the U.S. Supreme Court has allowed states to collect sales taxes from online retailers that do not have a physical presence within their borders. By a 5-4 vote in the case, *South Dakota v. Wayfair*, the majority, led by Justice Anthony Kennedy, overturned the

court's 1992 decision in *Quill v. North Dakota*, which had affirmed the "physical presence" test for state sales-and-use tax collections. Justice Kennedy wrote:

*Each year the physical presence test becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the commerce clause.*

Justice Kennedy said the test was estimated to cost the states between \$8 billion and \$33 billion annually. In South Dakota alone, he said, the estimated revenue loss was \$48 million to \$58 million annually. Chief Justice John Roberts Jr., joined by justices Stephen Breyer, Sonia Sotomayor and Elena Kagan, dissented. Chief Justice Roberts wrote:

*E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress.*

South Dakota and more than 40 states told the court the continuing force of the *Quill* decision was depriving states of billions in sales tax revenue while also giving unfair advantage to internet retailers over brick-and-mortar stores that must pay sales taxes. It has been quite obvious that the states were losing massive sales tax revenues.

This ruling should help small businesses nationwide that are being harmed because of the unlevel playing field created by *Quill*, where out-of-state remote sellers are given a price advantage. I believe that local business owners around the country deserve as much protection as legally permissible.

Deborah White, general counsel to the Retail Industry Leaders Association and president of the Retail Litigation Center, had this to say about the ruling:

*Today's decision culminates years of tireless work by the retail community to reverse a pre-internet era rule that distorts free markets and puts local brick and mortar stores at a competitive disadvan-*

*tage with their online-only counterparts. This was the right case and the right time for the Court to act, and we couldn't be more pleased with the outcome.*

Some justices noted during oral argument that computer software could ease the process of paying out-of-state sales taxes. It was noted that Amazon and other retailers are already collecting sales taxes from some or all states. Justices also discussed whether the taxation issue should be something for Congress, not the courts, to resolve. However Congress has been weighing possible legislation—but not acting—for more than 25 years. On Oct. 1, 2018, the State of Alabama will start collecting taxes on online sales and that is very good news for the people of my state.

Source: Law.com

### **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

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### **STUDENTS PREVAIL AS CHANNEL ONE NEWS SIGNS OFF FOR GOOD IN OUR SCHOOLS**

A major victory for children in our nation's schools was achieved recently when Channel One News finally pulled out of the schools. Most child advocates are bidding them "a less-than-fond farewell." Channel One for 28 years has compelled students to watch a 12-minute newscast that included two minutes of commercials. Each year due to the commercials, schools with Channel One lost the equivalent of a full week of school to the broadcasts, as well as a full day of instructional time. Josh Golin, Executive Director of Campaign for a Commercial-Free Childhood (CCFC), had this to say:

*This is a landmark day for children, and a testament to the tireless advocacy of those who believe classrooms should be free of corporate marketing. Parents and educators have become increasingly wary of corporations targeting a captive audience of schoolchildren, and Channel One has been losing subscribers in droves with each passing year. We're glad Houghton Mifflin Harcourt has*

*finally pulled the plug on what was a terrible idea from the start.*

CCFC had organized parents to keep Channel One out of school districts and urged advertisers to avoid the controversial network. Launched in 1989 by marketing executive Chris Whittle, Channel One lured schools with the promise of free classroom television sets. However, the cost of this "free" equipment came at a high price. Schools with Channel One were required to show the broadcast, including two minutes of student-targeted commercials, on 90 percent of school days. Former Channel One President Joel Babbit once boasted:

*The advertiser gets kids who cannot go to the bathroom, cannot change the station, who cannot listen to their mother yell in the background, who cannot be playing Nintendo.*

Channel One's business model was controversial from the start because it exploited a captive student audience and cost taxpayers dearly. Research showed that the "news" on Channel One was often no more than "fluff pieces about pop culture." The research also revealed that Channel One cost American taxpayers nearly \$2 billion per year. Children in low-income school districts, according to the research, were more likely to be forced to watch the commercialized broadcasts.

My friend Jim Metrock, President of the watchdog organization Obligation, Inc., has been actively involved on the front lines of this lengthy battle. Jim had this to say:

*During a childhood obesity crisis, Channel One News advertised Twinkies, Snickers, and Pepsi to schoolchildren. They shamelessly advertised movies that glamorized drug and alcohol use. Ad revenue became more important than the welfare of students. It was telling that every Channel One president was an advertising or marketing executive, never an educator or*

*journalist. Few will mourn the loss of this kiddie-marketing firm.*

Obligation, Inc., based in Birmingham, Alabama, was instrumental in raising awareness of the impacts of Channel One News on children, and how it was operated in secrecy despite being shown in taxpayer-funded schools. Houghton Mifflin Harcourt, which purchased Channel One in 2014, refused to disclose the schools Channel One News operated in and refused requests to identify the companies purchasing ad time on the network.

Alex Molnar, Co-Director of the Commercialism in Education Research Unit at the National Education Policy Center, said:

*Good riddance! Channel One was always about corporate money, not education. From the start, it was a failure for students, teachers, and the public. Now it's failed as a corporate profit center. RIP.*

Faith Boninger, also Co-Director at the Commercialism in Education Research Unit at the National Education Policy Center, added:

*Children won't miss Channel One in their schools. For too many years they were taken advantage of as a captive audience, forced to watch what Channel One was selling. This is an important step in the right direction.*

I believe getting Channel One out of our schools is long overdue. I commend all of those who led the fight to get them out. The winners clearly are the students. I have to wonder how many of our readers were aware of the involvement of Channel One in our schools before reading the above account. The only reason I became involved was because Jim Metrock came down to my office and told me what was going on in our schools. Once I realized what was happening in the schools I joined with Jim in the fight. I am glad that I did!

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

Jere has been an advocate for victims of wrongdoing since 1962, when he began his law practice in Tuscaloosa and then his hometown of Clayton, Alabama. He took a brief hiatus from the practice of law to enter the political arena, serving as Lieutenant Governor of the State of Alabama from 1970 through 1978. He was the youngest Lieutenant Governor in the United States at that time. During his tenure he also briefly served as Governor, while Gov. George Wallace recovered from an assassination attempt.

Since returning to his law career, Jere has tried hundreds of cases. His numerous courtroom victories include landmark cases that have made a positive impact on our society. His areas of practice include litigation in products liability, insurance fraud, business, nursing home and personal injury.

It has been nearly 40 years since he began the firm with the intent of “helping those who need it most.” Today, Beasley Allen has offices in Atlanta and Montgomery, and employs more than 250 people, including more than 75 attorneys. Beasley Allen is one of the country’s leading firms involved in civil litigation on behalf of claimants, having represented hundreds of thousands of people.

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



ATLANTA | MONTGOMERY

