I. CAPITOL OBSERVATIONS

Unity Is Getting Complicated – Can We Get There Together?

America needs to move forward together. It is time for our nation to unite and heal. But finding the path looks more complicated than ever. Let’s take a look at where we are now and how we got there.

The country was divided before the Trump presidency – his election revealed some of the conflict running just under the surface. The last four years began and ended with protests – with issues like women’s rights, equal justice for Black people in America and the resulting conflict over just what our country is founded on – and for whom – compelling crowds into the streets despite a global pandemic.

A tumultuous election cycle culminated in a violent insurrection on the nation’s Capitol as legislators worked inside the halls of Congress to ratify the electoral college votes, a formality, to certify Joe Biden as the 46th President of the United States. Washington, D.C., took on the appearance of a war zone behind barbed wire and barricades as national guard troops were put in place to protect the inauguration.

For decades, our country has demonstrated the peaceful transition of power from one leader to the next. That image has been shattered. How do we regain our vision of a United States?

Almost immediately after being declared the winner of the presidential election, Biden called for Americans to be calm and to embrace the goal of unity. Even as events afterward leading to his final certification spiraled from worrying and concern to unbelievable, the president has pleaded with the country to look away from the political divide and to rediscover our common ground.

President Biden takes the helm of a nation shocked by how far we have fallen from our ideal. Nobody said democracy was going to be easy.

In the popular musical Hamilton, when America wins her independence King George sings, “What comes next? You’ve been freed. Do you know how hard it is to lead?” When the fictionalized King learns George Washington is stepping down as president to pass the torch to a new leader, he muses, “I’m perplexed. Are they going to keep replacing whoever’s in charge?” He notes, “They will tear each other into pieces,” as he envisions the winner of the presidential election, Biden muses, “I’m shocked by how far we have fallen from our ideal. Nobody said democracy was going to be easy.

The musical reminds us that the concept of willingly relinquishing power and agreeing to pass the torch to a new leader agreed upon by the people was practically unheard of when America fought for its freedom, and is still radical in much of the world today. Where our ideals of democracy stumble are when an individual’s desire for control and craving for position eclipse, as President Biden said in his inaugural address, “our better angels.”

Until we can find a way to see again why a strong America depends on our reliance on each other, our pursuit of unity will be futile. I believe we truly need divine intervention at this troublesome time to stay on the path. I take comfort in the ideal that we are “one nation, under God,” and pray that we can open our eyes and work together before we kill this “great experiment.”

Source: The Wall Street Journal

II. THE ROLE OF TRIAL LAWYERS TODAY

Trial lawyers play a highly significant role in the actual regulation of corporate America, a role that is critically important to the safety of products, health issues and consumer protection. We know from experience that the courts and juries have played a major role in bringing about needed changes that would never have happened if left to Corporate America. Over the past 42 years Beasley Allen lawyers have successfully handled a huge number of important cases that have brought about many of these changes. I will mention some of the cases below that involved defective products. In the March issue additional cases that made the needed changes and it did so.

- Most school buses now have detection devices – sensors – that protect children getting on and off buses. In a tragic case, a child was killed in front of a bus because his bus had no sensors and had blind spot in front of the bus. The bus driver ran over the child when he bent down to pick up his backpack. Discovery in our case showed how the industry knew of the defect and failed to remedy it. That has now changed on many buses.

Beasley Allen Cases That Have Made A Difference

- Rollover Protection (ROPs) for tractors became more prevalent because of a case we handled in 1993. Roll bars and seat belts became standard equipment and Kubota claimed to lead the industry in requiring ROPs. But the case of Spivey v. Kubota brought this about. Dixie Merle Spivey refused after four days of trial to allow the settlement and the bad conduct we discovered to be placed under seal and confidential. Kubota then realized it had to make the needed changes and it did so.

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• We discovered in the case of Johnson v. GM that “silent recalls” were being used by General Motors. The automaker was notifying dealers that vehicles had a defective computer chip that was causing stalling problems. Vehicle owners were not notified of the defect. The result in our case brought about a change in how recalls were handled by GM.

• The “$2500 Program,” a mandated reduction in production costs by General Motors created defects causing safety hazards. General Motors knowingly withheld on certain cars information from the program that required $2,500 per vehicle in cost reduction, which resulted in the weight of steel being reduced in critical parts of the cars. Jernigan v. GM brought this program to the attention of the public.

• A serious ignition switch defect and cover up by General Motors was discovered and exposed in the case of Melton v. General Motors. This brought about a massive amount of litigation including the creation of an MDL and the settlement of hundreds of cases. Delphi – a supplier – gave us documents needed to prove a 10-year cover-up by GM. Lance Cooper, a tremendously talented Atlanta lawyer, brought Beasley Allen into the Melton case. He deserves all the credit for taking what many lawyers would have turned down.

• Our lawyers discovered information relating to a sudden acceleration defect in the case of Bookout v. Toyota. A cover-up by the automaker was exposed and there were massive settlements in the MDL. The 10-year cover-up by Toyota of a known defect was discovered in the case.

• In the case of Nelom v. Toyota, a defective Toyota SUV suspension system was discovered involving the Toyota 4-Runner. Recalls of the vehicles subsequently took place. Unfortunately, a beautiful young lady died because of the defect.

• Several cases impacted the safety of Cab Guards for Heavy Trucks. Taylor v. Fontaine (Road Gear) – 2002 – First cab guard case in the nation to address design/manufacturing defects in cab guards. This case made the defects known to industry. Blair v. Pro Tech – 2003 – first cab guard trial and verdict in the country – $12 million. Plaintiffs’ expert wrote the National Transporta-

• tion Safety Board (NTSB) and explained that federal regulation for cab guards, FMCSR 393.106, was inadequate to protect occupants. Beasley v. Merritt – 2004 – The firm’s second cab guard trial. As a result, Merritt added new warnings to its cab guards – “Do not use on Pole or Log trucks.” Harkness v. Road Gear also involved a cab guard on a log truck. This trial judge ruled as a matter of law that the cab guard was a defective product. The manufacturer made significant safety changes to its warnings including telling the industry the cab guard would not protect drivers from shifting cargo. Dement v. Road Gear also involved a cab guard on a log truck. The trial judge ruled that the cab guard was defective as a matter of law. The cab guard was produced prior to Road Gear’s change in its warnings following the Harkness case. Since the filing of the Dement case, Road Gear has ceased doing business.

• Bad Boy Buggies were recalled with doors and seat belts required as a result of the case of Pike v. Textron, Inc. We learned in discovery that no testing had ever been done prior to production. Many Bad Boy Buggies were defective causing sudden acceleration problems. A large number of crashes had occurred.

• Melquan Robinson died after being electrocuted at a park in Georgia. A significant legal obstacle in the Robinson case was the county’s sovereign immunity under Georgia law. Our firm negotiated an agreement with Augusta-Richmond County wherein the county agreed to inspect all of its parks and replace any faulty wiring; settled with the Robinsons for $1.5 million – more than twice the largest amount ever paid for any claim in the history of the county; re-named a street after Melquan Robinson, Jr. and placed a permanent memorial at Fleming Park.

• A case Beasley Allen filed for two people injured in an incident involving the Poarch Creek Indians resulted in an Alabama Supreme Court ruling limiting protections available under Tribal Sovereign Immunity. The ruling held Tribal Sovereign Immunity does not apply to tort victims or injured persons when the wrongful conduct occurs off the premises of the tribe.

• Takata was primarily a seatbelt manufacturer that got into the airbag business. To compete on price, Takata started making airbag inflators with ammonium nitrate propellant. Unfortunately this propellant becomes deadly when it degrades over time and leads to airbags that rupture shooting metal shrapnel throughout the interior of the vehicle. These dangerous airbags are subject to the largest recall in the history of the automotive industry. Takata’s massive recall placed a huge financial burden on the company and they were forced to bankruptcy. This bankruptcy and other legal issues made it incumbent that we secure financial resources for clients who had been injured and those we knew would be injured after the bankruptcy concluded. Our firm participated in the negotiations with Takata and Honda that led to claims fund that is now present to compensate victims of this dangerous defect. In addition, to compensating the victims. This fund allows victims to proceed without worry of the defendants raising defense like the statute of repose, statute of limitations, contributory negligence, and comparative negligence. This is a huge victory for consumers and we’re proud to have participated.

There were many other Beasley Allen cases involving defective products that made a difference. Because of space limitations we can’t include all of them in this issue. There are also a number of cases that are still in litigation. They are candidates for inclusion in future issues.

III. THE TALC LITIGATION

February Talc Update

Beasley Allen’s Talc Litigation Team has continued to advance the talc litigation in both the multidistrict litigation (MDL) and state courts with trials to start 2021. The MDL team has been taking a huge number depositions of Plaintiffs, fact witnesses, and experts for those cases selected for the discovery pool. The discovery pool cases are a mix of Plaintiff picks, Defense picks, and random selections from the court. The goal was for the case-specific depositions to be completed by the end of January of 2021. The MDL team is also working on discovery issues with Defense counsel and will be conducting additional corporate liability discovery depositions starting in this new year. Numerous Johnson & Johnson witnesses have been identi-
fied and researched with their depositions slated to be taken and completed in the first half of 2021.

In state courts across the country, Beasley Allen lawyers have numerous cases set for trial in 2021. Many of the talc trials scheduled for 2020 were rescheduled for this year. Our firm also has a slate of additional cases that hopefully will be set for trial in 2021.

The first trial of 2021 was scheduled for Jan. 4 in St. Clair County, Illinois, but that trial has been rescheduled for April after the recent surge in new COVID-19 cases throughout the area. The multi-Plaintiff trial in St. Louis, Missouri, involving three Plaintiffs has been rescheduled for April. There has also been an additional case set for trial in St. Louis in May with additional potential trial dates to be scheduled throughout the second half of 2021.

In Philadelphia, coronavirus continues to affect trial settings, and the Kleiner trial was moved into 2021. The Beasley Allen team has several trial-ready cases in Philadelphia and will be trying the Kleiner case as soon as possible. In addition to Kleiner, the Wilson case is set for trial in Philadelphia for May 5 and it currently remains on schedule.

The Brower retrial will be reset in Georgia, and we hope to retry this case as soon as it can be scheduled this year. While working on getting the Brower retrial set, additional discovery efforts have continued against Johnson & Johnson's long-time talc package manufacturer PTI, which has a large presence in Georgia and Missouri.

Along with multiple trials already set in Missouri, Illinois and Pennsylvania for 2021, the team is continuing to look at Atlantic City and South Florida as potential venues for additional trials in 2021. For additional information on these cases, contact Ted Meadows, Leigh O'Dell or Brittany Scott at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com, Leigh.Odelle@beasleyallen.com or Brittany.Scott@beasleyallen.com.

Judge Agrees To Approve Imerys' Additional Chapter 11 Disclosures

The Imerys Talc America, Inc. bankruptcy proceeding is ongoing in the U.S. Bankruptcy Court for the District of Delaware. Imerys Talc America (“Imerys”) was the talc supplier for Johnson & Johnson for Johnson’s Baby Powder from approximately 2011 to 2019. In 2020, a settlement was reached between Imerys and the Tort Claimant Committee and Future Claims Representative. The settlement proceeds include $75 million, proceeds from the sale of the U.S. operations, and various insurance proceeds. Imerys has proposed and filed with the Court disclosure documents, including Trust Distribution Procedures, which lay the groundwork for the creation of a bankruptcy trust. The Imerys bankruptcy also includes a second settlement in the amount of $340 million between claimants and Rio Tinto, another talc producer who supplied Johnson & Johnson from 1992 through 2011.

Last month, Imerys reached a third settlement with Cyprus Mines Corporation, Johnson & Johnson's talc supplier from 1989-1992. Cyprus agreed to pay $130 million plus assign proceeds from its respective insurance policies. In exchange for these proceeds, the Imerys trust will handle the claims made in relation to Cyprus-talc exposure by ovarian cancer and mesothelioma victims. Imerys argued that the prosecution of 955 claims against Cyprus in the tort system should be stayed because they would “effectively liquidate claims against the debtors outside of the Chapter 11 process” and exhaust insurance funds.

Following a Jan. 15, 2021, hearing, Imerys Talc America agreed to add additional disclosures to its Chapter 11 bankruptcy plan documents prior to being sent to creditors for a solicitation of votes on the plan. The new documents will include information regarding the $130 million-dollar settlement for legacy asbestos liability with former parent company Cyprus Mines Corporation, along with other information regarding estate assets and the criteria for future compensable claims.

On Jan. 25, 2021, U.S. Bankruptcy Judge Laurie Selber Silverstein approved Imerys’ Chapter 11 plan disclosure statement, including the information regarding the talc supplier settlements. The Chapter 11 filing of Imerys is a result of the thousands of personal injury and wrongful death claims alleging the talc supplied to Johnson & Johnson by Imerys, Rio Tinto, and Cyprus contained multiple carcinogens, including platy talc, fibrous talc, and asbestos. Imerys filed for Chapter 11 protection in February of 2019 with plans to establish a trust to handle the talc litigation claims. The solicitation process will begin in February with a confirmation hearing scheduled to take place in early summer.

If you need further information or have questions, contact Melissa Prickett at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com and she will put you in touch with one of the lawyers handling the talc-related litigation.

Source: Law360.com

Beasley Allen Talc Litigation Team

Beasley Allen lawyers Ted Meadows and Leigh O’Dell head up the Beasley Allen Talc Litigation Team. The team handles claims of ovarian cancer linked to talcum powder use for feminine hygiene. Lawyers Will Sutton and Charlie Stern also are on the team and they are exclusively handling mesothelioma claims. Will and Charlie are looking at cases of industrial, occupational and secondary asbestos exposure resulting in lung cancer or mesothelioma as well as claims of asbestos-related talc products linked to mesothelioma.

Members of the Talc Litigation Team, in alphabetical order, include: Kelli Alfreds (Kelli.Alfreds@beasleyallen.com), Ryan Beattie (Ryan.Beattie@beasleyallen.com), Beau Darley (Beau.Darley@beasleyallen.com), David Dearing (David.Dearing@beasleyallen.com), Liz Eiland (Liz.Eiland@beasleyallen.com), Jennifer Emmel (Jennifer.Emmel@beasleyallen.com), Jenna Fulk (Jenna.Fulk@beasleyallen.com), Lauren James (Lauren.James@beasleyallen.com), James Lampkin (James.Lampkin@beasleyallen.com), Caty O’Quinn (Caty.OQuinn@beasleyallen.com), Cristina Rodriguez (Cristina.Rodriguez@beasleyallen.com), Brittany Scott (Brittany.Scott@beasleyallen.com), Charlie Stern (Charlie.Stern@beasleyallen.com), Will Sutton (William.Sutton@beasleyallen.com), Matt Teague (Matt.Teague@beasleyallen.com) and Margaret Thompson (Margaret.Thompson@beasleyallen.com).

IV. OPIOID LITIGATION

There has been a great deal of activity in the Opioid Litigation. Even with all of the delays caused by the pandemic, cases are now being set for trial. Our lawyers have been very busy with case preparation. U.S. District Judge Dan Aaron Polster, who is overseeing the Opioid multidistrict litigation (MDL), is taking senior status, but will keep the
MDL. He says that he plans “to see it through” to the end. Judge Polster since its inception has pushed hard to keep the important litigation moving forward.

On Jan. 6, U.S. District Judge David Faber set a May trial date involving the three major drug distributors over claims they fueled the opioid crisis. Judge Faber, agreeing with Judge Polster, acknowledged that the coronavirus vaccine rollout has been troublingly slow, and said it is time to “get some closure.”

The suit brought by West Virginia’s Cabell County and its county seat, Huntington, is expected to be a dramatic test of allegations that the nation’s three major distributors – AmerisourceBergen Drug Corp., Cardinal Health Inc. and McKesson Corp. – wantonly sent out narcotics and unleashed a devastating plague of addiction. The trial had been delayed because of the pandemic.

Judge Faber said that he will set the expected 12-week trial for May 3. With six weeks for the Plaintiffs’ case, the judge said that would have the Defense case starting around June 28 and the trial finished by roughly Aug. 9.

Another opioid bellwether, set to take place in Ohio against major pharmacy chains, has been delayed as well. When reset, that trial will be held before Judge Polster.

Cabell County is represented by Paul Farrell Jr. of Farrell Law, Anthony Majestro of Powell & Majestro PLLC and Michael Woelfel of Woelfel & Woelfel LLP. Huntington is represented by Anne Kearse, Joseph Rice, Linda Singer and David Ackerman of Motley Rice LLC and Charles Webb of Webb Law Centre PLLC.

The cases are City of Huntington v. AmerisourceBergen Drug Corp. et al., (case number 3:17-cv-01362) and Cabell County Commission v. AmerisourceBergen Drug Corp. et al., (case number 3:17-cv-01665) in the U.S. District Court for the Southern District of West Virginia. The MDL is In re: National Prescription Opiate Litigation (case number 1:17-md-02804) in the U.S. District Court for the Northern District of Ohio.

Source: Law360.com

DOJ Opioid Lawyer Targets Pharmacies

Daniel Feith, a Deputy Assistant Attorney General overseeing the Department of Justice (DOJ) Consumer Protection Branch, came down very hard recently on some of the huge pharmacies involved in the opioid crisis. He made it quite clear that many pharmacies have ignored their legal duty to prevent the diversion of narcotic painkillers for illicit uses and that they would be held responsible for their conduct. Feith, one of the U.S. Department of Justice’s top lawyers, said related enforcement actions are likely this year.

The observations were made by Feith during a keynote address at the Food and Drug Law Institute’s annual enforcement conference for the pharmaceutical industry. The remarks signaled that the federal government will continue to broaden its opioid enforcement beyond drug manufacturers and distributors. The branch of the DOJ that Feith heads helps to lead an agency task force on opioid enforcement. Feith observed:

The Consumer Protection Branch is also going after unlawful actions by others in the opioid supply chain, including pharmacies. Pharmacies are the last line of defense against prescription opioid diversion. But too many pharmacies [for] too long abdicated that responsibility.

In response to those failings, DOJ lawyers in Washington, D.C. – in cooperation with U.S. attorney offices and the U.S. Drug Enforcement Administration – are pursuing “aggressive enforcement under the Controlled Substances Act to secure injunctions and penalties against pharmacies that have helped flood communities with opioids,” the deputy assistant attorney general said.

No specific pharmacy corporations were identified by Feith in his remarks. But it’s apparent that the focus of a nationwide wave of opioid lawsuits increasingly is shifting toward pharmacies. In general, pharmacies are accused of profiting immensely by dispensing vast amounts of addictive painkillers that clearly weren’t for legitimate medical needs. Unlike manufacturers and distributors, the pharmacies have shown little interest publicly in settling cases.

Most of the lawsuits against pharmacies have been brought by local governments in opioid multidistrict litigation (MDL) but there have been signs of a greater federal involvement. Perhaps most notably, retail giant Walmart Inc. – which operates roughly 5,000 in-store pharmacies in the U.S. – recently launched a preemptive lawsuit seeking to sharply limit any legal liability for opioid sales.

Walmart and other pharmacy chains – including CVS Health Corp., Walgreen Co. and Rite Aid Corp. – are facing hundreds of lawsuits in the MDL. While the pharmacies have publicly vowed to fight the cases, they have lost key legal disputes. It’s now obvious that the huge pharmacies will be the MDL’s top remaining targets as drug manufacturers and distributors work toward finalizing global settlements.

Feith emphasized that decisions to bring cases depend heavily on whether anyone was harmed by unlawful business practices, saying that “consumer harm is the lodestar for our exercise of prosecutorial discretion.”

It’s very clear that the unlawful actions by manufacturers, distributors, pharmacy dispensers or physician prescribers have all contributed to the massive problems caused in the opioid debacle. It’s good to see the DOJ taking the actions needed to hold all of the wrongdoers responsible.

Source: Law360.com

The Beasley Allen Opioid Litigation Team

Beasley Allen’s Opioid Litigation Team continues to be hard at work and have overcome the roadblocks caused by the pandemic. The team includes Rhon Jones, Parker Miller, Ken Wilson, David Diab, Rick Stratton, Will Sutton, Jeff Price, Gavin King and Tucker Osborne. This team of lawyers represents the State of Alabama, the State of Georgia, and numerous local governments and other entities, as well as individual claims on behalf of victims. If you need more information on the opioid litigation contact one of these lawyers at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Parker.Miller@beasleyallen.com, Ken.Wilson@beasleyallen.com, David.Diab@beasleyallen.com, Rick.Stratton@beasleyallen.com, William.Sutton@beasleyallen.com, Jeff.Price@beasleyallen.com, Gavin.King@beasleyallen.com or Tucker.Osborne@beasleyallen.com.

JereBeasleyReport.com
V. CONGRESSIONAL UPDATE

Democrats Control Congress As Senate Flips In A Wave Of ‘Firsts’

As January draws to a close, the word of the day is “first.” For the first time in a decade, the Democrats have full control of Washington with the majority in the House and Senate, and the swearing in of President Joe Biden and Vice President Kamala Harris.

Democrats secured the Senate for the first time in six years with the swearing in of Sens. John Ossoff and Raphael Warnock from Georgia, and Alex Padilla of California. Then President Trump, because of his bizarre involvement, was largely responsible for this being the first time Georgia has sent a Democrat to the Senate in 20 years. Sens. Ossoff and Warnock are also the first Jewish and the first Black senators, respectively, to represent Georgia. Sen. Padilla is the first Latino to represent California in the Senate. Sen. Chuck Schumer became majority leader and is the first Jewish majority leader.

Sens. Ossoff, Warnock and Padilla were sworn in by Vice President Kamala Harris, who became the first woman, first Black person and first South Asian person to hold the nation’s second-highest office.

The Senate actually is split 50-50 with Republican and Democratic lawmakers, but Democratic Vice President Harris would cast any tie-breaking votes, giving the Dems majority.

Another “first” drawing the attention of lawmakers is the second impeachment of former President Donald Trump, the first president to be impeached twice. On Jan. 13, the House of Representatives voted to impeach Trump for inciting violence in connection to the insurrection at the Capitol on Jan. 6. Senators were sworn in as jurors on Jan. 26 for the trial, which is set to ramp up the week of Feb. 8.

While all these high-profile issues are grabbing the headlines, Congress also faces a full slate of legislation that needs attention, including escalating health care costs and the future of the Affordable Care Act; the economy and budget deficits related to the pandemic as well as trade agreements and military spending; and the need to analyze and invest in critical infrastructure including roads, air travel and clean energy. Climate change legislation will also be a top priority. It’s quite obvious that passage of another stimulus bill relating to the pandemic is an absolute necessity and is a top priority.

Congress definitely has its work cut out for it. While there is hope that some of the partisan bickering will recede, it’s going to take a real commitment to putting people over politics to accomplish things the American people need.


VI. LEGISLATIVE HAPPENINGS

The Legislative Session In Alabama – What’s On The Agenda In 2021?

The Alabama Legislature convened on Feb. 2 for the regular session, with some notable procedural and technological changes designed to protect the public and legislators from COVID-19. Among them are face mask and social distancing requirements for the public as well as regular temperature checks for the public, members and legislative staff, and livestreaming of sessions from the chamber and committee meetings.

Some of the top priorities for the session have also been influenced by the pandemic. At press time, it’s become apparent that the session will be affected significantly by the pandemic. That could mean a change in meeting dates or an actual delay in the session. In any event, the following is a look at key issues the Alabama Legislature will likely face in 2021:

Economic recovery from COVID-19

Alabama entered 2020 with the strongest economy it had ever seen. That came to a staggering halt when the coronavirus pandemic hit the United States in March and businesses were shuttered by state and local governments to stop the spread of the virus. Many businesses closed or were pushed to the brink of bankruptcy, and it is likely there will be a number of bills designed to stimulate the state’s economy. This may include proposals for issuing economic incentives, establishing tax protection for federal stimulus checks, and limiting liability for businesses.

Rural broadband

One issue expected to be embraced by both sides of the aisle is rural broadband, especially after rural communities had limited access to e-learning and telehealth during COVID-19. Expanding high-speed broadband in rural Alabama will help increase access to education, telemedicine, economic development and agriculture, as well as help communities attract and keep companies.

COVID-19 vaccine distribution

Now that vaccines are beginning to roll out, focus must shift to distributing the vaccine across Alabama. Another issue is convincing Alabamians to actually get the shot when many people are hesitant to trust that it is safe.

Legalization of medical marijuana

Despite legislation passed by the Senate in 2019 and 2020 to legalize medical marijuana in Alabama, it never got out of the Health Committee and to the Alabama House of Representatives. The Alabama Cannabis Industry Association said it will continue its efforts to push for legalizing medical marijuana. So far 32 states and the District of Columbia have passed legislation legalizing medical cannabis.

Prison reform

Reforming Alabama’s prison system remains a contentious issue, especially after the U.S. Department of Justice (DOJ) in December 2020 hit the Alabama Department of Corrections with a lawsuit for failing to protect prisoners from violence and sexual abuse, and failing to provide safe confinement conditions, following up on allegations first made by the DOJ in April 2019. Gov.Kay Ivey is pushing a plan to replace aging prison buildings with expensive new ones, a move not everyone supports. But it doesn’t address staffing concerns and the inadequate care of inmates.

Justice reform

A number of recommendations were introduced during the 2020 Legislative session to improve the state’s justice system so that fewer people go to prison and that those who have served are better able to transition back into
society without relapsing. COVID-19 sidetracked discussions on the issue, but it is expected to be brought up this session with renewed interest.

Gambling

Lawmakers are also expected to debate the issue of gambling following the recently released 850-page report from the Governor's Study Group on Gambling, which projected the state could reap $600 million to $700 million by legalizing casinos and sports gaming, and passing a lottery.

COVID-19 Liability Protection

During the last legislative session, a COVID immunity bill was introduced in the legislature but the legislature did not have time in the limited session to get it passed. It is expected that this bill will be reintroduced. In the form it was filed during the last session, the COVID bill provided businesses and health care providers with protection from lawsuits that were related to COVID exposure that may occur in businesses or while receiving health care.

The bill provided a higher burden of proof for those making claims and limited the damages available to claimants except to those seriously injured or who lost their lives. However, for businesses and health care providers to receive the immunity protections, they would have to be following governmental safety guidelines.

It is also very important for employees and consumers to be protected. Hopefully, any bill that passes would have the needed balance between the competing interests.

The members of the House and Senate, all staff personal and other employees, lobbyists and members of the public who are allowed to visit the sessions must be protected from the risks associated with the coronavirus.

Source: Alabama Political Reporter and AL.com

VII. THE COURT SYSTEM

High Court Won't Decide Arbitration Carveout Question

The U.S. Supreme Court on Jan. 25 dismissed as "improvidently granted" a petition asking the justices to consider whether a "carveout" in an arbitration agreement negates a provision allowing arbitrators to rule on their own jurisdiction.

The ruling in the case, which was before the high court for the second time, means that the justices have opted not to take a closer look at a Fifth Circuit decision refusing to send the dispute between two dental equipment distributors to arbitration due to a carveout in the underlying arbitration clause. As is customary, the justices did not provide any reasoning for their decision.

Henry Schein Inc. was looking to arbitrate Archer and White Sales Inc.'s accusations that it conspired with other large dental distributors to maintain supracompetitive margins by threatening to stop buying from manufacturers that sold to low-margin distributors such as Archer and White.

Schein asked the justices to conclude that the Fifth Circuit erred in 2019 when the appeals court found that the parties hadn't clearly delegated the "who decides" question to an arbitrator due to a carveout in the arbitration agreement for actions seeking injunctive relief. Archer and White's complaint, which seeks huge damages over the alleged conspiracy, includes a claim for unspecified injunctive relief.

Schein told the high court in its petition last year that the Fifth Circuit's decision "defies common sense," and that it deepens a divide among the nation's appeals courts on the effect of a carveout exempting certain claims from arbitration when the parties clearly wanted an arbitrator to decide whether the matter belongs in arbitration or litigation.

With this recent decision by the high court, the Fifth Circuit's decision is now final. The case will now go back to the Texas district court where it was originally filed back in 2012. Preparations for a trial there had been ongoing until the Supreme Court stayed the case last January.

This is the second time that the Schein case has landed before the Supreme Court. In January 2019, the justices concluded that courts may not override a contract delegating to arbitrators the question of whether a claim must be arbitrated or litigated, even if the arbitration bid was "wholly groundless," unanimously vacating a Fifth Circuit decision. The decision struck down the "wholly groundless" exception, under which courts were able to decide whether a claim belongs in arbitration, for being inconsistent with the Federal Arbitration Act.

On remand, the Fifth Circuit concluded in its decision that the parties had intended for an arbitrator to decide the venue question for at least some category of cases. But the panel then went on to find that the carveout provision negated that "clear and unmistakable" delegation of the arbitrability question to an arbitrator, and that the court therefore had authority to rule on that issue. The circuit court then denied Schein's arbitration bid, saying the claim belonged in court since Archer and White is seeking injunctive relief, which is included in the carveout.

The case is Henry Schein Inc. v. Archer and White Sales Inc. (case number 19-963) in the Supreme Court of the United States.

Source: Law360.com

VIII. THE NATIONAL SCENE

The Russian Cyberattack On The U.S. Remains A Severe Threat

News of a massive cyberattack broke on Dec. 13, with Reuters news service reporting that a sophisticated hacking group backed by a foreign government might have stolen information from U.S. government agencies. The attack was eventually linked back primarily to Russia.

The cyberattacks were totally ignored by the Trump Administration even though the attacks compromised thousands of government and private networks. As a result, the public really hasn't comprehended how dangerous these attacks have been and continue to be. The hacks are likely ongoing and could even be irreparable according to some of the nation's top cybersecurity and intelligence officials.

This was a massive intelligence coup by Russia’s Foreign Intelligence Service (SVR). Unfortunately, a massive security failure on the part of the United States is also to blame. Our insecure internet infrastructure has become a critical national security risk – one that the Biden Administration will need to take seriously and work very hard to reduce.

Theresa Payton, a leading internet security authority and former Bush administration security official, told FOX News the highly sophisticated hacks gave operatives what the industry refers to as “God access”
SolarWinds discovered the intrusion, the company's computers since 2017. Malicious code, spread inadvertently through updates provided by software service provider SolarWinds, have been likened to the COVID-19 pandemic: a virus that is difficult to contain, has the ability to spread to all points of contact, and may never be fully eradicated.

So far, U.S. intelligence officials have found no evidence that the Russian government has planned to do anything but steal information. But that should come as no assurance. The cyber attackers have created multiple backdoor access points on all the compromised networks. That means they have prepared the battlefield, according to Richard Clarke, a cybersecurity expert who worked for the Clinton and Bush administrations. He told CBS News:

That means they are in the position ... to walk right into lots of important American networks, both government and private sector, and then to wipe out the software on them, to shut the network down.

In typical fashion, while still president, Trump took to Twitter to downplay the cyberattack and defend Russia. He tweeted that the breach was “far greater in the Fake News Media than in actuality.” Trump, in his expected defense of Russia, added:

I have been fully briefed and every-thing is well under control. Russia, Russia, Russia is the priority chant when anything happens because Lamestream is, for mostly financial reasons, petrified of ... discussing the possibility that it may be China (it may!)

Some cybersecurity experts say SolarWinds’ culture of sloppiness and lax standards may have helped Russian operatives gain access to its computer systems. Problems within the company allegedly include upgrade servers loosely protected by a weak password and hackers hawking access to the company’s computers since 2017.

One expert told Reuters that days after SolarWinds discovered the intrusion, the company still had the corrupted updates available for download.

David Sanger, a New York Times national security correspondent, said the cyberattack means the U.S. is “now in a moment of history where there is a constant, escalating, short-of-war cyber-conflict underway every single day.”

The United States, the most networked nation in the world, is also the most vulnerable. This is unacceptable. If the nation’s federal agencies and top corporations are to rely on private-sector software to manage their networks, the manufacturer of that software must be vetted and held to the strictest possible security standards. Anything short of that is inviting catastrophe.

SolarWinds is now also feeling the heat from investors who say the company and its executives overlooked and ignored serious vulnerabilities and made “materially false and misleading statements” about vulnerabilities in its software and the security measures it took to address the risks in regulatory filings.

In a proposed class action lawsuit filed Jan. 4 in a Texas federal court, SolarWinds investor Timothy Bremer alleges that the company and its executives violated federal securities law by lying about and/or misrepresenting the measures it took to protect its software and customers from cyberattacks.

The lawsuit’s allegations include a report from Reuters in which a cybersecurity expert warned SolarWinds that anyone could hack into the company’s secure update server using the password “solarwinds123.” There is no evidence the weak password was the source of the Russian intrusions, but it does underscore the risks to which the company exposed its 300,000 customers.

Reports of the Russian cyberattack and its severity have caused SolarWinds to suffer significant reputational harm,” the lawsuit alleges. The value of the company’s shares has also plummeted by about 17% in recent weeks, causing investors to suffer “significant losses and damages.”

The proposed class action asks that a jury consider whether the company’s stock was artificially inflated from Feb. 24 to Dec. 15 of 2019. The lawsuit alleges that false and misleading statements about the company’s financial results and prospects caused company shares to be overvalued. The lawsuit also alleges that SolarWinds’ CEO and COO sold their own shares of company stock at the inflated prices, making them nearly $7 million richer.


IX. THE WHISTLEBLOWER LITIGATION

FCA Whistleblowers Are More Important Today Than Ever Before

The U.S. Department of Health and Human Services (HHS) has enhanced the cooperation with the U.S. Department of Justice (DOJ) and the Office of the Inspector General (OIG) with the creation of a “Working Group” under the False Claims Act (FCA). At press time, members of the “Working Group” remain unidentified, but HHS said it will be comprised of former DOJ False Claims Act and health care fraud prosecutors, former private counsel for health care and life sciences companies, and current HHS lawyers.

The HHS Office of General Counsel created the Working Group as a result of the unprecedented disbursement of taxpayer funds to private organizations and individuals through the CARES Act. The responsibility of HHS to administer significant funds for various programs to private parties uniquely positions HHS to work with DOJ to identify and assess potentially fraudulent activities, frivolous waste and abuse of COVID-19 relief funds.

The DOJ’s involvement with the Working Group substantiates an elemental change portended by comments from DOJ officials throughout summer 2020 on how the DOJ prioritizes FCA enforcement actions regarding False Claims Act /qui tam litigation.

Comparing this initiative to 2018 when the DOJ moved to dismiss approximately 50 qui tam actions, as compared to the approximately 45 qui tam actions the department moved to dismiss in the entire 30 years preceding its release, the COVID-19 crisis being ripe for fraudulent exploitation shouldn’t be underestimated.

Since its amendment in 1986, the FCA has been notoriously efficient in recovering lost funds through litigation. The amendment to the Act enhances the government’s defense against fraud without increasing resources or cost by incentivizing private citizens to sue companies and individuals defrauding the government (and ultimately taxpayers) on the government’s behalf.

Prior to 1986, the U.S. Department of Justice recovered less than $50 million a year under the False Claims Act. Amending provisions to empower whistleblowers with either inside information or expertise in an industry to point out fraud expiates deficient government resources to investigate and
The FCA’s dual incentives — lucrative financial rewards and antiretaliatory protections — efficiently compel whistleblowers to align their interests in a public/private partnership that facilitate access to private enterprise, heretofore sheltered by erudite intricacy.

Since 1986, the DOJ has been able to recover more than $62 billion with the DOJ most recently reporting its enforcement recovery in the 2019 fiscal year to have exceeded $3 billion. Approximately $2.6 billion of the $3 billion recovery came from qui tam suits related to the health care industry, meaning for each dollar the federal government spent enforcing the FCA, it recovered $20 in the health care industry alone, not including billions more dollars recovered as related criminal fines and as Medicaid money returned to the states.

In the last six months alone, successful FCA qui tam cases have recovered more than $1 billion for taxpayers stemming from pharmaceutical, medical device, hospital, federal mortgage insurance, customs and import duties, kickback, bribery, energy contractor, cost data, pricing data and research grant fraud.

The main purpose of the newly created “Working Group” is currently described as a resource providing vulnerable HHS programs enhanced and targeted training to better detect and refer potential false claims and FCA violations to the DOJ and OIG, while also overseeing the composite legal framework of HHS funding programs as well as regulatory changes to its reimbursement policies for delivery of care during the public health emergency.

While HHS aspires the “Working Group” to provide consultation regarding compliance with legal requirements and recommendations about alleged health care fraud violations, the group has no prescribed authority, nor a defined official capacity to act as a resource or even a coordinator between the departments.

Likewise, there does not appear to be any coordination between the Group and the DOJ’s Criminal Division, in particular the Fraud Section’s recently created National Rapid Response Strike Force. Hopefully, there will be coordination and efficiency.

The “Working Group” has its detractors. Most FCA Defendants are large companies that participate in large government-funded programs or compete for big government contracts, and a handful are repeat offenders. Counsel for FCA Defendants typically exaggerate the potential for unintended consequences of the FCA, exploiting the rare example of inadvertent noncompliance and exploiting the rare potential for a Defense verdict or an investigation that devastates a small business as a pretext to undermine the FCA precisely because huge corporations with deep pockets are the predominant Defendant in FCA actions.

Moreover, litigation history demonstrates that large corporations habitually violate federal law in favor of more lucrative business practices, which repeatedly results in the companies paying restitution to the government for repeated fraudulent harmful schemes. But that hasn’t kept these companies from getting new contracts with the same violated government agency.

The FCA already contains a provision that allows corporations to reduce their liability by one-third if they self-report a fraud within 30 days of becoming aware of it. Big corporations routinely enter into settlement negotiations with the Department of Justice for FCA violations confident the government would never demand a settlement so punitive as to truly affect their business and knowing the consequences for their fraud will not preclude opportunities to enter into a different contract with the same department they admit to defrauding.

As a matter of fact, the Department of Justice’s statement released on Jan. 9, 2020, seemingly rationalizes the escalation in the DOJ’s recovery for FCA violations in 2019 compared to the previous year by explaining all settlements from 2019 were negotiated based on the corporate Defendants’ ability to pay.

Significant monetary recovery from FCA enforcement in the health care industry reflects the False Claims Act’s success in the only measure that these Defendants consider consequential, but FCA enforcement also champions each citizen against the private contractor Defendant who willfully gambles patients’ health to fraudulently collect more money that the peoples’ taxes provide.

Some of Beasley Allen’s most important and gratifying cases involve working with state attorneys general across the country revealing illegal kickbacks and bribes to doctors and government officials and expelling adulterated prescription drugs and faulty medical devices being sold to an unsuspecting public that began with a faulty medical devices being sold to an unsuspecting public that began with a defendant calculatedly jeopardizes the health of innumerable community members so long as the practice proves lucrative.

Corporate interests advocating for lenient enforcement won’t curry favor with life science and health care companies partnered with HHS to respond to the COVID-19 crisis more than current enforcement precluded it. Thus, the “Working Group” concept is not only needed, but is a welcomed positive development in protecting the government from false claims.

The FCA is arguably the most effective reformer of corrupt industries while also providing more safeguards and oversight to protect against frivolous or ill-advised lawsuits than any other civil enforcement statute in the Federal code. Not only does the FCA specifically provide for penalties for frivolous and vexatious litigation, but enforcement is rare because there are so many filters against pursuing a weak case motivated by petty grievances. Likewise, arguing qui tam cases create inefficiencies and distractions for government and industry alike at a time when both are playing critical roles in the battle against the COVID-19 pandemic is meritless and ignores the well-documented history of how significantly the FCA safeguards individual interests.

Again, private citizen-whistleblowers have proven to be a vital resource for the government by bringing to light evidence of fraud that would otherwise have gone undetected. The ever-increasing recoveries have exceeded all expectations. The provision allowing relations to pursue cases declined by the government has resulted in billions of dollars of recoveries that would otherwise have been lost and has led to reforms in critical industries.

During a global pandemic and a volatile transition between administrations, civil servants and intelligence contractors and grantees are the first line of defense to prevent, mitigate or address abuses that violate the public trust. Lawyers who represent whistleblowers offer badly needed resources to government officials in the fight against fraud, waste and abuse of COVID-19 disaster relief funds. Our firm is proud to have held numerous corporations accountable for committing fraudulent acts for decades, and encourage qui tam litigation for its ability to confront corporate impunity on behalf of those injured by their greed.

Beasley Allen lawyers welcome any opportunity to pursue False Claims Act /qui tam litigation, and encourage those who witness potential fraud involving government funds to contact one of our lawyers on the Whis-
The Beasley Allen Whistleblower Litigation Team continue to be very busy handling cases under the False Claims Act (FCA). Fraud against the federal government by all too many industries in this country, especially in health care, remains a huge problem. Because of the pandemic, we expect the amount of fraud against the federal government to increase greatly during the coming months. The combination of the national mishandling of the coronavirus pandemic by the Trump Administration and corporate greed will be a major factor for the increase.

A Look At The FCA Circuit Split That Is Before Supreme Court

Plaintiffs in a current whistleblower case have told the U.S. Supreme Court that a prominent circuit split over whether the False Claims Act (FCA) requires objectively bogus billing is actually “irrelevant.” They said a hospice chain is engaging in “scaremongering” in an attempt to mislead the high court.

The whistleblowers – four ex-employees of New Jersey-based Care Alternatives – made the assertions in a brief that urged the Supreme Court to deny the hospice chain’s requested review of a Third Circuit decision that said the FCA doesn’t merely cover “objectively false” billing of the federal government.

As an initial matter, the whistleblowers argued that the decision is correct, saying that the Third Circuit properly concluded that the FCA covers not only objective falsity, such as blatantly dishonest billing, but also “legal falsity,” including noncompliance with regulatory requirements for billing. The whistleblowers wrote:

In general, that is the right way to understand false claims. If a defendant presents a claim that the government would not pay, that claim is false, regardless of the reason.

The brief acknowledged that the Third Circuit’s March decision created a split with the Eleventh Circuit, which ruled in a similar case in 2019 involving hospice chain AseraCare Inc. that FCA suits must prove objective falsity. But the brief downplayed the significance of the split, saying that disputed certifications of terminal illness by Care Alternatives would ultimately be evaluated the same way in either circuit. The whistleblowers said: “The purported split has no bearing on the outcome of this case.”

Care Alternatives is asking the justices to decide whether honest physician judgments can be deemed false “based solely on a reasonable difference of opinion among physicians.” But the whistleblowers in their brief rejected that framing. “Nobody is bringing fraud cases predicated solely on a difference of opinion between physicians.”

Care Alternatives, which does business as Ascend Hospice, argues that the Third Circuit’s decision will expose hospices to “crushing financial liability” for faulty diagnoses of terminal illness even though “determinations about life expectancy are notoriously difficult and inexact.” But the whistleblowers questioned that prediction, contending that Plaintiffs’ lawyers won’t waste time on flimsy cases and that well-meaning hospices are sophisticated enough to avoid frequently misdiagnosing patients as terminally ill, or likely to die within six months, when billing Medicare and Medicaid.

The whistleblowers also observed that FCA liability is only in play when improper billing is intentional. As a result, even if FCA Plaintiffs only have to show that billing was legally false because it flouted regulatory requirements, they still must show that it happened on purpose. The whistleblowers told the high court:

In sum, scaremongering about widespread meritless litigation, second-guessing of good-faith medical judgments, or chilling of beneficial behavior is unwarranted.

The Care Alternatives case has attracted attention from outside the health care industry. In an amicus brief last year, the U.S. Chamber of Commerce and trade group Pharmaceutical Research and Manufacturers of America told the Supreme Court that the Third Circuit’s decision “potentially affects any entity, public or private, that receives federal funds in myriad contexts.” The justices also recently received a separate petition presenting essentially the same question in an FCA case out of the Ninth Circuit. The petition, filed by a health care management company’s owner called Rollins-Nelson LTC Corp., echoed Care Alternatives in contending that circuit courts are badly divided on whether objective falsity is required.

The whistleblowers are represented by Ross Begelman and Marc M. Orlow of Begelman & Orlow PC. The case is Care Alternatives v. U.S. et al. ex rel. Druding et al. (case number 20-371) in the Supreme Court of the United States.

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Source: Law360.com

The Beasley Allen Whistleblower Litigation Team

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Supreme Court Justices Decline To Review Duplicative False Claims Act Cases

Recently, the U.S. Supreme Court declined to review a qui tam decision that allows the State of New Mexico to bring a False Claims Act (FCA) lawsuit against international drug makers Bristol Myers Squibb Co. and Sanofi-Aventis US LLC, after a whistleblower lost a case with similar facts. The government alleges that the Defendants engaged in illegal drug marketing tactics that ultimately defrauded the state of New Mexico. The denial came after New Mexico Court of Appeals ruled that the government was not precluded from bringing a qui tam action after a whistleblower lost a case with similar facts.

In its decision, the New Mexico Court of Appeals stated that preventing the government from bringing such a suit could “operate adverse to the public interest.” The Defendants argued that the ruling allows the government, in some instances, to use the whistleblower case as a “dress rehearsal” before bringing a second case and getting a second ‘bite at the apple.’

Currently, the Eleventh and Fifth Circuit Courts of Appeal allow the government to bring False Claims Act claims against a Defendant after a whistleblower has lost a similar case. However, the Seventh and Ninth Circuits have ruled that such a loss by a whistleblower will preclude the government from bringing a case. In their petition of certiorari, Bristol Myers Squibb Co. and Sanofi-Aventis US LLC asked the Court to resolve the split among the circuits. However, the Court denied the petition without explanation.

Although the Supreme Court declined to review the case, the denial was not a ruling on the merits. The parties will continue to litigate the case in the trial court. Our firm is proud to prosecute these whistleblower cases because of the public good they represent. You can contact any of our whistleblowers / qui tam lawyers if you have a matter concerning a potential False Claims Act case or just need more information. Contact Lance Gould at beasleyallen.com, Larry Golsten at beasleyallen.com, Leon Hampton at beasleyallen.com, Lauren Miles at beasleyallen.com or Tyner Helms at beasleyallen.com. The members of the team are listed in the Whistleblower Litigation section of the Report.
Whistleblowers are the key to exposing corporate wrongdoing and government fraud and their role has intensified greatly. 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. The experienced group of lawyers on our team are dedicated to handling whistleblower cases.

If you are aware of any fraudulent activity in Corporate America against the federal or state governments, you could be rewarded for reporting the fraud. If you have any questions about whether you qualify as a whistleblower, you can contact one of the lawyers on Beasley Allen’s Whistleblower Litigation Team for a free and confidential evaluation of your claim.

The following Beasley Allen lawyers are on the Whistleblower Litigation Team: Larry Golston (Larry.Golston@beasleyallen.com), Lance Gould (Lance.Gould@beasleyallen.com), James Eubank (James.Eubank@beasleyallen.com), Paul Evans (Paul.Evans@beasleyallen.com), Leslie Pescia (Leslie.Pescia@beasleyallen.com), Leon Hampton (Leon.Hampton@beasleyallen.com), Tyner Helms (Tyner.Helms@beasleyallen.com) and Lauren Miles (Lauren.Miles@beasleyallen.com). Dee Miles, who heads up our Consumer Fraud & Commercial Litigation Section, also participates in the whistleblower litigation and works with the Litigation Team. The lawyers can be reached by phone at 800-898-2034.

Supreme Court Considers Personal Jurisdiction Issue In Ford Defect Cases

We wrote last month about the U.S. Supreme Court being expected to hand down a decision over whether Ford can be sued in Montana and Minnesota over accidents involving used cars with defective tires or air bags. Ford is seeking to have the justices reverse two 2019 decisions from the Montana Supreme Court and Minnesota Supreme Court respectively that kept alive lawsuits from drivers injured in those states who bought their cars in other states. Ford contends this violates due process even though it admitted to doing substantial business in both states.

According to Ford, Plaintiffs should bring product liability lawsuits only in Michigan, where it is headquartered, or in a state where a specific in-state contact between Ford and the Plaintiff caused the Plaintiff’s injuries. In other words, Ford is attempting to shift the personal jurisdiction analysis away from its substantial contacts in the state where its defective product causes injury and, instead, implement an impossible causation standard that can hardly be met at the preliminary jurisdictional stage.

The justices acknowledged that Ford’s proposed causation standard could not be found in the Due Process Clause, or in previous jurisdictional precedent. In fact, adopting such a standard would go directly against previous jurisdictional precedent, which has always allowed a Plaintiff to bring suit against a car manufacturer wherever its products cause injury as long as the manufacturer utilizes that state’s market by “directly or indirectly” selling its products there. This is called the stream of commerce test for jurisdiction, and has been utilized by courts across the nation, including Alabama, for more than 40 years.

The Due Process Clause focuses on fairness, reasonableness, and predictability. Ford’s proposed causation standard is in derogation of everything the Due Process Clause standards for. Clearly, Ford would like to limit the number of places it can be sued while continuing to profit off of its defective products that are killing consumers in every state. This type of gamesmanship should not be rewarded any longer. We hope the U.S. Supreme Court puts an end to this argument once and for all by rejecting Ford’s nonsensical causation standard.

Opioid Bellwether Trials To Start

A number of eagerly anticipated bellwether trials over the opioid epidemic have been postponed into 2021 due to the pandemic. U.S. District Judge Dan Aaron Polster, the Ohio federal judge overseeing the opioid MDL, is doing a good job of keeping the litigation on track. Bellwether trials in Ohio, West Virginia and New York should be heard this year.

3M Earplug Litigation Heats Up

The largest MDL in the country revolves around allegations that defective 3M earplugs damaged hearing, with claims brought by 220,000 veterans and service members. The MDL includes suits from state courts in California, Minnesota, Oklahoma and Texas, as well as 600 related actions in more than 30 federal courts. The suits claim that 3M and a predecessor, Aearo LLC, supplied “CAEv2” earplugs that were defective and didn’t protect against service-related tinnitus and hearing loss.

The MDL was initially created in April 2019, with eight suits from California, Minnesota, Oklahoma and Texas courts, along with 635 related actions in federal courts.

We are writing in more detail on the 3M litigation in the Product Liability section of this issue.

“Forever” Toxic Chemicals Litigation Continues

Litigation over a toxic group of substances called PFAS is expected to continue to grow next year against chemical companies that manufacture products with toxic per- and polyfluoroalkyl substances. The chemicals do not easily degrade over time and have been linked to a number of diseases, including testicular cancer, kidney cancer and thyroid disease. They are also known for contaminating humans through the skin.

One type of product containing PFAS is a firefighting foam known as aqueous film-forming foam, or AFFF, which is used at military bases, airports and other industrial sites to extinguish liquid fuel fires. Brought by individuals,
municipalities, local water authorities and states, the cases hinge on allegations that the foam contaminated groundwater.

The PFAS litigation has taken a turn toward consumer products. Violations of consumer products and state deceptive business practices statutes with violations related to PFAS.

More COVID-19 False Advertising Claims Expected

Lawyers in our firm's Consumer Fraud & Commercial Litigation Section believe they will most likely see a number of false advertising lawsuits this year brought over personal protective equipment claiming to prevent or treat COVID-19. Additional activity from the Federal Trade Commission (FTC) is also expected.

In November of last year, the FTC sent warning letters to more than 300 retailers and manufacturers about unsubstantiated claims associated with products and therapies involving that claim – for example, vitamin D helps with the progress of COVID-19 or reduce symptoms.

There will likely be other areas of litigation where false advertising relating to the pandemic by companies caused injury and resulting damages to individuals, other companies and even governmental entities.

There will likely be many more companies in corporate America that made false claims in promoting their products. Unfortunately, the pandemic, with all of the surrounding confusion, created a perfect storm for corporate fraud.

Whistleblower Litigation

Beasley Allen lawyers who handle False Claims Act Litigation under the Whistleblower provisions of the Act believe there will be a huge spike in this litigation in 2021. We wrote in more detail on the whistleblower litigation in the Whistleblower Section of this issue.

XI. PRODUCT LIABILITY UPDATE

A Look at Motor Vehicle Products Liability Cases

Lawyers in our Personal Injury & Products Liability Section often handle cases involving defective auto products. Lawyers at Beasley Allen have been handling these cases for years. They are now particularly a major focus of the lawyers in our Atlanta and Mobile offices. Our Product Liability attorneys at all locations are handling claims of serious injuries and deaths related to automobile and truck accidents. We thought it would be helpful to let us readers know a little more about this area of the law.

Many products liability claims are tied to automobile defects and consumer products. Automotive products liability claims may involve the following: single vehicle accidents, airbags, defective tires, auto crashworthiness, rollover, seatbelts, vehicle fires, roof crush, heavy truck crashworthiness, cab guards, guardrails, seat back failure, autonomous vehicles.

Something to look for that may be a sign of a defective auto product is when a single-vehicle accident or minor “fender bender” results in catastrophic injury or death that seems out of proportion to the severity of the crash. In these cases our lawyers often find the driver and passengers were following all the safety rules – driving the speed limit, obeying traffic laws, wearing seatbelts – and their cars were equipped with safety technology like anti-lock brakes and airbags. Yet tragedy occurred.

This is a sign that a product might not have worked as intended. Some well-known cases our lawyers have worked on involving auto product defects include the Toyota sudden unintended acceleration cases, the GM defective ignition switch cases, and Takata exploding airbags. These cases affected a large number of consumers nationwide.

Our lawyers also have successfully litigated cases for individuals, proving their injuries were linked to defective motor vehicle products including seat belts and tires, as well as crashworthiness issues involving vehicles that were poorly designed.

Unbelievably, quite often our lawyers find the manufacturers are clearly aware of the defects in these products, but hid and covered up the defect from the public.

It is often a complex process to uncover the defective product at the heart of a serious injury or death. Time is also a factor in order to preserve evidence and build the chain of proof. Beasley Allen has a team of investigators who physically visit the scene of an accident or workplace injury and examine vehicles or other machinery that was involved in a client’s injury. They collect and preserve evidence our lawyers will need to use during the course of a trial. The investigators are familiar with these complex cases and the many rules and regulations that often go into evaluating a claim.

Beasley Allen lawyers in our Personal Injury & Products Liability Section would like to talk with you if you have a claim for catastrophic injury or death you feel may be related to a defective auto product. They look at cases involving both passenger vehicles and commercial vehicles like trucks and buses. Contact Cole Portis, Head of the Section at Cole.Portis@beasleyallen.com; Chris Glover, Managing Attorney for our Atlanta office at Chris.Glover@beasleyallen.com, or Frank Woodson, Managing Attorney of our Mobile office at Frank.Woodson@beasleyallen.com. You can also call the firm at 800-898-2034 or contact Sloan Downes, who is Director for this Section at Sloan.Downes@beasleyallen.com. Sloan can put you in touch with one of our lawyers.

An Update on the 3M Earplug MDL

Judge Casey Rodgers, the U.S. District Judge presiding over all federal 3M Combat Arms Earplugs Version 2 (CAEv2) lawsuits, recently ordered that the first bellwether trial will involve three separate cases brought by veterans left with hearing loss, which is scheduled to go before a single jury in April 2021. In December, five service members and veterans who suffered hearing damage asked Judge Rodgers to group all five of their cases in a single trial in April, saying their cases “involve overlapping, and frequently coextensive, issues and facts.”

The five service members and veterans were selected for an initial bellwether case pool in the multidistrict litigation (MDL), in which they and 220,000 others say 3M Co. and a predecessor, Aearo LLC, supplied CAEv2 earplugs that were defective and didn’t protect against service-related tinnitus and hearing loss.

The Plaintiffs claim the earplugs were defective and didn’t come with full and honest warnings. Additionally, they say they received the earplugs during their military service, had their hearing measured through military-issued audiograms and were injured during their military training.
Under Federal Rule of Civil Procedure 42(a), a district court may consolidate multiple cases involving "common question[s] of law or fact" for trial. In doing so, federal courts in the Eleventh Circuit consider several factors such as weighing the risks of prejudice and confusion versus the risk of inconsistent adjudications of common factual and legal issues.

However, instead of consolidating all five of the cases, Judge Rodgers compromised and entered an order consolidating only three of the cases for a trial date in April, noting that the efficiencies to be gained by consolidation of the three cases outweighed any potential prejudice to the Defendants or potential risk of jury confusion, given the substantial overlap in the issues, facts, witnesses, and other evidence, as well as the potential similarities in the state laws applicable to their claims. Judge Rodgers noted that there would also be some benefit to trying the remaining two cases individually in consideration of the Defendants' arguments. With that in mind, the two remaining bellwether cases will be tried individually in May and June.

If you need more information, contact Will Sutton, a Beasley Allen lawyer who is handling 3M litigation for the firm, at 800-898-2034 or by email at William.Sutton@beaslevallen.com.

Source: Law360.com

Fire Extinguisher Company To Pay $12 Million Over Recall Reporting

A fire extinguisher manufacturer has agreed to pay $12 million to settle the government’s claims that it misled the Consumer Product Safety Commission (CPSC) about the scope of problems with its products that were subject to a 2017 recall. According to a consent decree filed by U.S. District Judge Loretta C. Biggs, Walter Kidde Portable Equipment Inc. will pay the stated amount to avoid the costs and risks of litigation, but has not admitted to any violations of the Consumer Product Safety Act.

In the complaint filed in the Middle District of North Carolina, the government alleged that Kidde violated the safety act by failing to tell the CPSC about information it discovered regarding a defect in its fire extinguishers. Acting Assistant Attorney General Jeffrey Bossert Clark of the Justice Department’s Civil Division said in a statement:

"Companies must immediately report to the CPSC information about unreasonable risks and defects that create substantial hazards. The Department of Justice will continue to take appropriate enforcement actions against companies that jeopardize consumer safety by failing to comply with reporting requirements.

In particular, the defect made it so fire extinguishers could fail to work in an emergency, and their nozzles could detach, according to the complaint. While the extinguishers were subject to recalls in 2015 and 2017, the government alleged that Kidde underreported the scope and nature of the defect prior to the first recall, and didn't immediately report that the nozzles could detach.

Kidde also misused a registered safety certification mark in its products. In addition to the $12 million penalty, Kidde must also immediately report to the CPSC any information it obtains that shows any of its products contains a hazardous defect, according to the consent decree. The company will also be subject to a compliance program to ensure it abides by the CPSC's rules and the terms of the consent decree, with any violation of the decree subjecting the company to a $5,000 penalty.

In a statement to Law360, Walter Kidde acknowledged the settlement. The company said:

"We worked closely with relevant authorities to ensure that these fire extinguishers were recalled as quickly as possible and replaced with different, unaffected models. Since this recall, we have made many improvements to product safety, including conducting robust product safety assessments on both new and existing products, and enhancing our customer service processes.

CPSC Acting Chairman Robert Adler congratulated his staff on their work in the case and their "dogged pursuit" of consumer protection. He said:

"This penalty is important not only because of its size, but also because it represents the first such penalty by CPSC after an unfortunate hiatus of several years.

The American Red Cross estimates that heating equipment, like space heaters, are involved in one of every six home fires. Furthermore, one in every five home fire deaths and half of all fires caused by home heating occur between December and February. The Red Cross says that most home fires start in the kitchen during cooking – usually on stovetops – not in the oven. One can see how important it would be to have properly functioning non-defective fire extinguishers. We will write further on the subject of "home fires" in the Consumer Corner Section and will make information available on our website.

Sources: Mike Curley- Law360.com and American Red Cross

XII. UPDATE ON THE BOEING LITIGATION

Boeing MAX Fraud Results In $2.5 Billion Criminal Fine

The Boeing Company has admitted that two of its 737 MAX test pilots fraudulently deceived the Federal Aviation Administration (FAA). As a result of the Boeing MAX fraud, the aviation industry giant has agreed to pay a $2.5 billion fine. The U.S. Department of Justice (DOJ) announced the settlement. It said that Boeing agreed to pay the fine to avoid prosecution over a criminal charge of conspiracy to defraud the U.S. The DOJ filed the criminal information in the Northern District of Texas on Jan. 7 after completing a criminal probe surrounding the two fatal crashes of the Boeing MAX involving Lion Air flight 610 and Ethiopian Airlines flight 302. The two crashes, which occurred in October 2018 and March 2019, respectively, claimed 346 lives.

For years, Boeing’s focus has been solely on the company’s bottom line and it has consistently prioritized profits over human life. Holding Boeing accountable for its callous, profit-driven behavior in rushing a defective and dangerous aircraft into commercial service is a step in the right direction. This settlement with the Department of Justice cannot bring back those who were killed in the two deadly MAX flights but it sends a message that such indifference for human life and such intentional deception will not be tolerated. Ultimately our clients are seeking accountability and real changes in aviation safety.

In a statement by the DOJ related to the Boeing MAX fraud, it was stated:

"Boeing will pay a total criminal monetary amount of over $2.5 billion, composed of a criminal monetary penalty of $243.6 million, compensation payments to Boeing's 737 MAX airline customers of $1.77 billion, and the establishment of a $500 million
crash-victim beneficiaries fund to compensate the heirs, relatives, and legal beneficiaries of the 346 passengers who died in the Boeing 737 MAX crashes...

During an evaluation of the Boeing MAX by the FAA's Aircraft Evaluation Group (AEG), two of Boeing's MAX test pilots lied to the FAA AEG about a key component of the aircraft – the Maneuvering Characteristics Augmentation System (MCAS). The MCAS impacted the MAX's flight control system and was determined to be at the center of a similar series of events that led to the crash of both flight 610 and flight 302. These findings were comparable across several investigations.

The DOJ's investigation into the Boeing MAX fraud revealed that the two pilots learned about an important change to the MCAS “in and around November 2016,” which was two years before the first fatal crash. One of those pilots was then the 737 MAX Chief Technical Pilot and the other would later become the 737 MAX Chief Technical Pilot.

Instead of sharing this information with FAA AEG regulators, the test pilots buried the information, leading the FAA AEG to delete “all information about MCAS from the final version of the 737 MAX FSB Report published in July 2017.”

Nothing about the MCAS would be included in the airplane manuals and pilot training materials for U.S.-based airlines. Pilots flying the 737 MAX for Boeing's airline customers would not have this information, nor would they be aware of the MCAS until after the Lion Air crash. Even then, Boeing attempted to deny the MCAS or any other part of the aircraft was faulty. Further, Boeing failed to take steps to improve the aircraft's safety.

Five months later, flight 302 crashed under similar circumstances and within days, the MAX was grounded worldwide for the next 20 months. The U.S. was one of the last countries to ground the MAX, but in November 2020, it was the first country to lift the ban on the aircraft despite objections and outrages from family members of those who perished in the two crashes.

While the FAA asserts that Boeing has implemented enough changes to make the MAX safe for resuming commercial service, critics believe it is “business as usual” for Boeing and the FAA. Their argument gained support from the U.S. Senate, which announced findings from its own investigation of the two crashes in November 2020. A detailed report of the findings cited “a number of significant lapses in aviation safety oversight and failed leadership in the FAA.” The findings further support critics' claims that Boeing and the FAA had a "cozy relationship" that intensified the weakened FAA oversight authority and reinforced Boeing’s ability to “self-certify” its aircraft.

The MAX tragedies prompted the federal government to enact reforms in how the FAA certifies newly designed aircraft. The law restored some of the oversight authority the agency had conceded to the powerful aviation industry for years.

As part of its agreement with the DOJ regarding the Boeing MAX fraud, Boeing will comply with ongoing or future investigations and prosecutions and will “report any evidence or allegation of a violation of U.S. fraud laws committed by Boeing’s employees or agents upon any domestic or foreign government agency (including the FAA), regulator, or any of Boeing’s airline customers.” It also “agreed to strengthen its compliance program and to enhanced compliance program reporting requirements.”

Source: U.S. Department of Justice

Mike Andrews Handles Aviation Litigation For Beasley Allen

Mike Andrews, a lawyer in our Personal Injury & Products Liability Section, focuses much of his practice on aviation litigation. Currently, he is representing a number of families in the Boeing litigation. Mike, who is also currently investigating other potential cases, visited the Ethiopian Airlines flight 302 crash site and surrounding areas several times last year and was overwhelmed at the carnage left behind after the flight hurled itself and passengers 30 feet into the earth. If you would like to have more information on the Boeing litigation, or any other aspect of aviation litigation, contact Mike at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com. Mike also has written a book on litigating aviation cases to assist other aviation lawyers, “Aviation Litigation & Accident Investigation.” The book offers an overview to the practitioner about the complexities of aviation crash investigation and litigation.

If you would like to have more information on the Boeing litigation, or on any other aspect of aviation litigation, contact Mike Andrews at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com. Mike, who is in our Personal Injury & Products Liability Section, is the lead lawyer handling aviation litigation for the firm. Mike also has written a book on litigating aviation cases to assist other aviation lawyers, “Aviation Litigation & Accident Investigation.” The book offers an overview to the practitioner about the complexities of aviation crash investigation and litigation.
Darley from the firm serves on the PSC in the California state court consolidated litigation against JUUL. Beasley Allen has devoted a team of talented lawyers to work on this critical litigation. The firm represents hundreds of youth patients who became severely addicted to nicotine because of JUUL and suffered other serious physical injuries.

Beasley Allen also represents hundreds of school districts who have sued JUUL for the public nuisance its products have caused in schools around the country.

If you or a loved one has experienced physical, mental or emotional harm from using a JUUL product, call 800-898-2034 or email Joseph VanZandt@beasleyallen.com or Beau Darley@beasleyallen.com to reach out.

The JUUL Litigation Team

Beasley Allen lawyers Joseph VanZandt, Sydney Everett, James Lampkin, Beau Darley, Soo Seok Yang, and Mass Torts Section Head Andy Birchfield are currently representing a number of individuals who are suing the top U.S. vape maker JUUL for the negative impact its products have had on their lives. These lawyers currently make up our firm’s JUUL Litigation Team. Lawsuits have also been filed on behalf of school districts nationwide, which seek to protect students and recover resources spent fighting the vaping epidemic. If you have a potential claim or need more information on JUUL, contact any of the lawyers on the team at 800-898-2034 or by email at Joseph.VanZandt@beasleyallen.com, Sydney.Everett@beasleyallen.com, James.Lampkin@beasleyallen.com, Beau.Darley@beasleyallen.com, SooSeok.Yang@beasleyallen.com or Andy.Birchfield@beasleyallen.com.

XIV. MASS TORTS LITIGATION

Johnson & Johnson Elmiron Lawsuits Sent To New Jersey Federal Court

On Dec. 15, 2020, the Judicial Panel on Multidistrict Litigation (JPML) sent lawsuits concerning Johnson & Johnson’s (J&J) popular prescription drug, Elmiron (pentoxyflline, sodium), to the District of New Jersey for centralization.

The JPML stated in its order that U.S. District Judge Brian R. Martinotti would efficiently oversee the litigation as he is experienced in complex multidistrict litigation (MDL). The JPML panel’s order sent 42 lawsuits to the District of New Jersey. A lawyer representing some of the Plaintiffs argued that the litigation should be transferred to the Eastern District of Pennsylvania. But other Plaintiff lawyers and Defense counsel for Janssen (a subsidiary of J&J) contended that the matter should be sent to the District of New Jersey. Notably, Janssen is headquartered in New Jersey, and that is where all of the documents are kept and witnesses reside. Elmiron is used for the treatment of bladder incontinence in people with interstitial cystitis, a condition that causes chronic pain and urinary frequency in as many as 12 million people in the U.S. The lawsuits allege that J&J’s pharmaceutical unit hid the harmful side effects of Elmiron, which include serious eye damage including retinal hemorrhage, macular degeneration, and light perception blindness.

Recently, independent studies by the Canadian Ophthalmological Society, Emory Eye Center, Harvard Medical School, and Kaiser Permanente have highlighted the issues with Elmiron’s frequency for resulting in visual complications and impairments.

Beasley Allen lawyers are investigating cases involving individuals who have been diagnosed with retinal maculopathy after taking Elmiron. For more information, contact Melissa Prickett at 800-898-2034, or by email at Melissa.Prickett@beasleyallen.com.

Source: Law360.com

B. Braun Medical Issues Warning Letter Regarding Univation® Knee Implants

Surgeons have reported that B. Braun Medical Inc. issued a Nov. 16, 2020, warning letter regarding a possible malfunction occurring in its Aesculap knee implants. The letter reportedly instructed physicians to halt using Univation X System implants through Jan. 31, 2021, while B. Braun investigates the problem. No official recall has been issued on the knee implant.

The letter reportedly stated that “locally accumulated number of aseptic loosening have been reported to us in connection with the Univation X System. In the affected patients, the loosen knee endoprostheses had to be revised or will be revised.” An aseptic loosening is when a new implant loosens without sign of infection, and can be caused by a flaw in the product. However, B. Braun’s letter asserted that “no technical factor and no connection between the reported cases could be identified” and that the company was “not assuming a product-related malfunction.”

Nevertheless, B. Braun asked surgeons to stop using the implants because “the possible harm to the patient is classified as critical.” A loose knee implant can cause a myriad of problems, including severe pain, difficulty walking, infection, swelling, and may require a hazardous corrective surgery. Financial burdens from medical bills and missing work for treatment can compound upon these physical injuries.

B. Braun’s group of companies include Aesculap Inc., Aesculap Implant Systems, LLC., and Aesculap USA, among others. B. Braun’s knee implant products include VEGA System® Knee Implant System, Advanced Surface Technology, EnduRo™ AS Knee Revision System, Columbus® Knee System, MIOS® Knee Instruments, Columbus® AS Revision Knee System, and the implant at issue in the Nov. 16 letter, Univation® X Uni-Condylar Knee System. Versions of Univation were U.S. Food and Drug Administration (FDA) cleared in 2008 and 2013.

Over the past few years, B. Braun has been subjected to numerous lawsuits alleging its knee implants were defective. These suits allege the ceramic coating on the implant causes moisture to accumulate between the implant and the bone cement, disrupting the bonding process. Plaintiffs in those cases claim the company was aware that in corrective surgeries the implants could be removed easily without even cutting at the bone cement.

In its Nov. 16 letter, B. Braun estimated that 0.18% of its Univation implants were affected and stated plans to complete a corrective action within three months.

Beasley Allen lawyers continue to investigate cases involving physical injury and financial harm due to defective knee implants and bone cement. If you or a loved one has experienced complications from a knee implant, contact Roger Smith or Ryan Duplechin, lawyers in our firm’s Mass Torts Section. Call 800-898-2034 or email Roger.Smith@beasleyallen.com or Ryan.Duplechin@beasleyallen.com to reach out.

Sources: Dailyhornet.com, baltimoresun.com, mcall.com, massdevice.com, johnsonbecker.com, bbraunusa.com, aesculapimplantsystems.com, aesculapusa.com, schmidtlaw.com, and consumersafetyguide.com

Ruling In Zantac MDL Involving Labeling Claims

A Florida federal judge presiding over the multidistrict litigation (MDL) involving the
carcinogens found in the heartburn medication Zantac has reduced more claims from the litigation, holding that design defect claims are barred by federal law.

U.S. District Judge Robin L. Rosenberg said that state design defect claims against name-brand Zantac manufacturers, like Pfizer Inc. and Sanofi-Aventis U.S. LLC, are preempted by the Federal Food Drug and Cosmetic Act because it was impossible for the companies to change the drug’s formulation without the approval of the U.S. Food and Drug Administration (FDA).

Judge Rosenberg rejected arguments by consumers and third-party payers that their claims are not preempted because the heartburn drug was misbranded, as the presence of a cancer-causing substance in the drug was not disclosed. The judge said:

As with generic drugs, a claim based on an allegation that a brand-name drug’s FDA-approved formulation renders the drug misbranded is a preempted claim because the drug’s manufacturer cannot independently and lawfully change a drug formulation that the FDA has approved.

This ruling follows another set of rulings Judge Rosenberg issued on New Year’s Eve that held that state labeling and design defect claims against Zantac generics makers, repackers, retailers and distributors are preempted by federal law. The suits generally accuse Pfizer Inc., Sanofi SA Inc. and GlaxoSmithKline LLC, as well as generics makers, distributors, pharmacies and others in the supply chain, of false advertising, failure to warn and other claims associated with the discovery of cancer-causing chemical nitrosodimethylamine (NDMA) in the medication.

The FDA issued a warning in September 2019 that trace amounts of NDMA were found in Zantac and similar generic drugs. On April 1, the agency pulled all prescription and over-the-counter drugs featuring ranitidine – the active ingredient in the heartburn medications – from the market over concerns that the drug, when stored above room temperature, could produce unacceptable levels of the carcinogen.

The FDA has set an allowable daily limit of 96 nanograms of NDMA, but researchers have found more than 3 million nanograms in a dose of Zantac. NDMA is also found in red meat, tobacco and beer.

Since February, the Plaintiffs have filed three separate master complaints against the defendants, including a personal injury complaint, a proposed nationwide consumer class action and a proposed class action on behalf of third-party payers. Judge Rosenberg did say that Plaintiffs correctly argued that some state laws take the adequacy of a drug’s labeling into consideration as part of a design-defect claim.

Since a brand-name manufacturer can strengthen warnings on drug labels without waiting for the FDA’s sign-off – as part of the agency’s changes being effected process – a labeling claim against a branded drug manufacturer isn’t necessarily preempted, Judge Rosenberg said. He added:

Therefore, the Plaintiffs are granted leave to re-plead design-defect claims against the defendants that are based on the labeling of ranitidine products.

In a statement, the Plaintiffs’ co-lead counsel said that the ruling provides clarity to move forward with claims over Zantac.

The Plaintiffs said:

Based on today’s order and the orders issued in late December, Plaintiffs can re-plead all claims against certain groups of Defendants and other claims against all groups of Defendants. These rulings are especially important in light of the 60,000-plus individuals diagnosed with cancer who have already submitted claims to the MDL registry, as well as approximately 1,000 cases filed to date in federal and state courts across the country.

Judge Rosenberg also dismissed state law claims seeking to recoup monetary losses from buying over-the-counter ranitidine, finding that Congress didn’t intend for any state to classify a claim as a product liability claim when the Plaintiff was not personally injured.

The Plaintiffs are represented by co-lead counsel Tracy A. Finken of Anapol Weiss, Robert C. Gilbert of Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Michael L. McGlamry of Pope McGlamry PC and Adam Pulaski of Pulaski Kherkher PLLC. The case is In re: Zantac (Ranitidine) Products Liability Litigation (case number 9:20-md-02924) in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

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**XV. INSURANCE INDUSTRY LITIGATION**

**Insurance Litigation To Watch In The New Year**

There are a number of significant areas of litigation involving insurance matters that are ongoing. We will cover several of them below. Insurance litigation at Beasley Allen is handled by lawyers in our Consumer Fraud & Commercial Litigation Section.

**COVID-19**

A significant issue for many businesses throughout the country is whether their insurance policies will cover income losses incurred during the COVID-19 pandemic as a result of closing their doors or significantly decreasing their business operations. Business interruption insurance is typically part of a business owner’s commercial property coverage, but may be a stand-alone policy. Regardless, business interruption insurance helps a business cover bills and payroll in the event of a disaster that forces the business to temporarily close. Because many business owners were required to close as a result of the COVID-19 threat and the resultant government orders, many businesses have turned to their insurance policies to determine if business interruption coverage may provide them some relief.

Unfortunately, insurance companies have overwhelmingly denied business interruption claims for losses due to the COVID-19 pandemic and the shutdowns, sparking many businesses to file lawsuits either seeking a declaratory judgment that their claims are covered or claiming breach of contract after coverage has been denied by their insurers. As of November 2020, approximately 1,423 lawsuits business interruption coverage had been filed in state and federal courts across the country.

Coverage for business interruption losses due to coronavirus closures will depend on the specific language of each business’s policy, the nature of the business, and whether COVID-19 was allegedly present at the insurer premises. As prerequisite for coverage, nearly all property insurance policies require “direct physical loss or damage” to the insured premises. Unfortunately, many
policies specifically exclude losses caused by viruses or microorganisms. Suits seeking business interruption coverage have achieved mixed results, with the majority of court decisions favoring insurers. As of early January 2021, courts granted 96 motions to dismiss in favor of insurance companies while denying 22 motions to dismiss in favor of businesses. Of the 96 dismissals, a vast majority (approximately 70) involved businesses whose policies included virus exclusions. Further, many courts dismissing business interruption claims have held that “direct physical loss or damage” requires visible, tangible “physical alteration” to property. Where motions to dismiss were denied in 22 cases, there was an even split between policies with virus exclusions and those without such exclusions.

Several courts deciding motions to dismiss have found allegations concerning the threat or presence of COVID-19 at the insured premises determinative as to whether businesses sufficiently alleged physical loss or damage. The majority of cases surviving dismissal involved businesses that alleged COVID-19 was present at their business or a property nearby. For instance, in Studio 417, Inc. v. Cincinnati Insurance Co., No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), the court held that the Plaintiffs “plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable” such that dismissal was unwarranted.

As of time of this publication, no Alabama court has addressed whether allegations concerning the presence of COVID-19 is sufficient to withstand motion to dismiss. However, the Southern District granted two motions to dismiss against businesses who alleged Alabama’s shutdown orders caused business interruption losses. The Southern District in both cases held the shutdown orders themselves did not cause direct physical loss or damage to property, but did not address whether the alleged presence of COVID-19 would be sufficient. See Hillcrest Optical, Inc. v. Cont’l Cas. Co., No. 120-CV-275-JB-B, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020); Drama Camp Productions, Inc. v. Mt. Hawley Ins. Co., No. 1:20-cv-00266-JB-B (S.D. Ala. Dec. 30 2020). Similarly, the Northern District of Georgia has granted at least two motions to dismiss against businesses alleging Georgia’s shutdown orders caused business interruption losses. See KD Unlimited Inc. v. Owners Insurance Company, No. 1:20-cv-02163-TWT (N.D. Ga. Jan. 5, 2021); Henry’s Louisiana Grill, Inc., v. Allied Insurance Company of America, No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *1 (N.D. Ga. Oct. 6, 2020). However, the Northern District of Georgia in KD Unlimited Inc., stated in dicta that, even if the business had alleged COVID-19 was physically present at the insured premises, such an allegation would not constitute physical loss or damage in the absence of some change in the structure of the property.

Additionally, business interruption insurance litigation continues in appellate courts across the country, both at the state and federal level, as dozens of businesses have appealed trial court decisions dismissing their cases. Further, a case in which a North Carolina state court granted summary judgment in favor of a business on its business interruption claim has been appealed by the insurer in the case, The Cincinnati Insurance Company.

First State High Court to Decide Coverage for Ransomware Attack

The Supreme Court of Indiana is set to become the first state high court to determine whether crime insurance covers ransomware attacks. The case of G&E Oil Co. of Indiana v. Continental Western Insurance Co., Case No. 20S-PL-00617, involves an oil company that was the victim of an attack on its computer servers where the hacker demanded the company pay a ransom of $35,000 in bitcoin in exchange for restoring access to its servers. After paying the bitcoin ransom, the company turned to the computer fraud provision of its Continental Western Insurance Company crime insurance policy for coverage.

The computer fraud coverage provision required the fraudulent use of a computer for coverage. The trial court granted summary judgment, finding that the oil company’s bitcoin payments were not the result of fraud; rather, the court analogized the hacker’s ransom demands to the actions of a thief instead of a fraudster. The intermediate Indiana appellate court upheld the trial court’s finding. Although the appellate court recognized the hacker’s actions constituted a crime, it reasoned that the ransomware attack did not trigger coverage because the hacker did not deceive the oil company into paying the ransom.

The oil company appealed to the Indiana Supreme Court arguing that the lower court incorrectly held that the attack was not the result of deception. As hacking businesses’ computer systems for ransom payments have increased dramatically, the result of the case is certainly one to watch.

Choice of Law for Delaware Corporations under D&O Coverage

The Supreme Court of Delaware will decide whether an insurer is obligated to pay the full $10 million policy limit under Dole Food Co.’s directors and officer’s liability (D&O) policy after the company and its CEO, Robert Murdock, reached a $222 million settlement with stockholders in underlying lawsuits. The underlying settlement arose from allegations that Murdock and Dole’s former general counsel engaged in fraud and self-dealing. The case is RSUI Indemnity Co. v. David H. Murdock et al. (Case No. 154, 2020). The trial court, in concluding the insurer was required to pay policy limits under the D&O policy, applied Delaware law. Although Dole is headquartered in California and the D&O insurance policies were formed in that state, the trial court applied Delaware law rather than California law because Delaware was the state in which Dole was incorporated and where the underlying suits were filed.

The choice-of-law decision was important because California law expressly bans insurance for fraudulent conduct, which the insurer argues would preclude D&O coverage for the settlement, while Delaware law contains no such coverage prohibition. In appealing the trial court’s decision, the insurer argues that Dole’s only contact with Delaware was its incorporation while contract formation took place in California.

The insurer argues that the trial court’s choice-of-law decision would create an “inflexible rule” where Delaware law is applied to any and all D&O disputes if the policyholder is incorporated there.
The Delaware high court’s decision will have broad implications for future D&O disputes because many companies are incorporated in the State of Delaware.

Beasley Allen lawyers continue to monitor areas involving insurance litigation, including all the development in the business interruption cases. Dee Miles, head of our Consumer Fraud & Commercial Litigation Section, Rachel Boyd and Paul Evans are spearheading the handling of insurance claims litigation for our firm. You can contact these lawyers at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Rachel.Boyd@beasleyallen.com or Paul.Evans@beasleyallen.com if you have any questions or would like to discuss potential insurance claims.

Sources: Law360.com and https://ccit.law.upenn.edu/judicial-rulings/

XVI. SECURITIES LITIGATION

The Revolving Door Of Government And Private Practice In Securities

It’s that time again: presidential transition. Across Washington, officials looking to “cash in” on their government experience have left agencies for law firms, lobbying shops, and other lucrative positions where they will help private companies navigate the very same regulatory systems they had just been helping to shape and enforce. This goes both ways, of course, with many positions in the Biden administration already quickly filling up with individuals drawn from the same industries they will soon be charged with overseeing.

Nowhere does the “revolving door” spin more quickly than at the Securities and Exchange Commission (SEC). One recent study found that a majority of the agency’s enforcement attorneys ultimately leave to join the private sector. Another showed how the agency has abandoned a longstanding practice of promoting career government officials to senior management roles and is instead increasingly filling these positions with individuals drawn from the regulated industry.

But, even at the SEC, not all doors spin so fast — or at all.

In a new paper, set for publication in the April 2021 Journal of Corporation Law, Alexander I. Platt, Associate Professor of Law at the University of Kansas School of Law, examines the movement of personnel between the SEC and Plaintiffs’ side law firms that represent injured shareholders in class action litigation. There are good reasons to expect that SEC attorneys would be attracted to this work. Joining a Plaintiffs’ firm might allow an SEC attorney to feel they were pursuing the same mission of holding companies accountable for fraud and protecting investors. There is also a significant overlap between the legal regimes and skills relevant to both types of practice.

Finally, lawyers do seem to move between governmental and private enforcement positions in other areas where there is a similar dual-track enforcement regime, such as false claims act, environmental law, civil rights, and (to a lesser extent) antitrust.

Given all this, you might be surprised to learn that the door between the SEC and the Plaintiffs’ bar does not revolve. Notably, Professor Platt’s paper shows that:

- None of the 10 leading Plaintiffs’ side securities litigation firms employ any attorneys with recent SEC experience doing traditional Plaintiffs’ side work;
- None of the attorneys that Professor Platt identified as working for the SEC’s Enforcement Division in 2015 left to pursue traditional Plaintiffs’ side litigation;
- None of the upper or middle-managers in the SEC’s Enforcement Division as of January 2020 had worked for the Plaintiffs’ bar; and
- Only five of the attorneys that Professor Platt identified as working for the Enforcement Division in 2019 had prior experience in Plaintiffs’ side shareholder litigation.

For decades, SEC leaders, Congress and the courts have repeated the mantra that private securities litigation is an “essential supplement” to SEC enforcement. The real people doing this work may beg to differ. The non-revolving door between the SEC and the Plaintiffs’ bar may be an example of “cultural capture” at work. While traditional academic analysis of the “revolving door” focuses on evidence of a material quid pro quo — for instance, an enforcement lawyer who receives an offer of lucrative private sector employment in exchange for going “easy” on that target while he or she is in government — more recent work has acknowledged that government officials may come to internalize industry preferences as a result of softer mechanisms and influences.

The rapidly revolving door between the SEC and the Defense bar, and the close contact SEC lawyers have with Defense-side lawyers throughout investigations and enforcement actions, give SEC lawyers ample exposure to the Defense bar’s characteristic skepticism and hostility toward securities class actions and the lawyers who pursue those cases.

By contrast, SEC lawyers are unlikely to have any direct contact with Plaintiffs’ lawyers, even when there is a parallel private lawsuit against a company they are pursuing. This narrowed perspective on any given enforcement action has the potential to skew an SEC lawyer’s views of the merits of private claims for securities fraud.

A possible cultural bias against private enforcement among SEC lawyers would have significant consequences for SEC enforcement. The SEC’s enforcement activities can have substantial downstream effects on the flow of private securities litigation, and the agency’s line lawyers often wield broad discretion to shape those effects. If SEC enforcement lawyers harbor a bias against private litigation, they might systematically exercise their discretion to undercut rather than catalyze private litigation.

Some longstanding trends in SEC enforcement — including the agency’s persistent failure to require corporate Defendants to admit wrongdoing when settling charges — seem to point in this direction. Mistrust or animus between public and private enforcers might also increase the “coordination costs” in our decentralized multi-enforcer regime for policing corporate misconduct. While the SEC often works closely with other governmental actors, such coordination is strikingly absent when it comes to private enforcers.

There is one area where SEC lawyers do move into private enforcement. Created by Dodd-Frank, the SEC’s whistleblower program provides monetary incentives for individuals to come forward and report possible violations of the federal securities laws to the SEC. Although SEC lawyers have almost completely avoided traditional Plaintiffs’ side lawyering, they have been jumping through the revolving door to represent whistleblowers.

From the perspective of the lawyers involved, this new revolving door is eminently reasonable. Unlike traditional Plaintiffs’ side work, whistleblower representation is oriented around the agency itself, and therefore allows these lawyers to leverage their unique government expertise and connections for a competitive advantage.

But the rise of the whistleblower industrial complex is also troubling. A whistleblower firm led by five former SEC officials has been disproportionately successful in obtaining awards from the agency. Professor Platt found that, as of September 2020, clients represented by that firm had obtained about
one quarter of all dollars paid out by the agency to date. This figure may actually
understate the firm’s dominance: the SEC
does not disclose the names of the law firms
or lawyers representing successful whistle-
blowers, and so this calculation includes only
the successes that have been voluntarily
publicized. (Professor Platt has several
Freedom Of Information Act [FOIA] requests
pending with the agency on the subject.)

Concerns about the rapidly revolving door
between regulators and industry (at the SEC
and beyond) are not going away. As this
important debate continues, we should
broaden our focus, watching not only the
doors government officials walk through,
but also the ones they don’t.

Beasley Allen has an experienced team of
lawyers dedicated to handling consumer
fraud cases, with extensive experience in
whistleblower actions and securities fraud.
If you need more information or have com-
ments, contact James Eubank, a lawyer in
our firm’s Consumer Fraud & Commercial
Litigation Section, at 800-898-2034 or by
e-mail at James.Eubank@beasleyallen.com.
Before joining our firm, James worked for
years as a securities regulator with the
Alabama Securities Commission. He is
leading the Whistleblower team on securi-
ties fraud investigations.

Video Game Developer CD Projekt
 Faces Shareholder Class Action
 Lawsuit

When a product fails to live up to its manu-
facturer’s advertising, the first legal issues
that come to mind are likely consumer-
based. There are several potential claims,
including a claim for violation of a state con-
sumer fraud or false advertising statute, a
claim for breach of warranty, or an unjust
enrichment claim. But, if the company that
sold the over-hyped product is publicly
traded in the United States, another type of
legal claim should be considered – violation
of Section 10(b) of the 1934 Securities
Exchange Act and S.E.C. Rule 10b-5, both of
which prohibit “manipulative and deceptive
practices” in securities trading.

A classic example involves video game
developer CD Projekt, which has been sued
by its investors in a class action lawsuit in
California federal court. The investors allege
violation of federal securities laws arising
out of the much-hyped and ultimately disap-
pointing December 2020 launch of CD Pro-
ject’s newest video game, “Cyberpunk 2077.”

According to the complaint, filed on Dec.
24, 2020, in the U.S. District Court of the
Central District of California, CD Projekt,
which has a history of producing wildly
popular video games, including the “Witcher”
series, had devoted virtually all of its
resources to the development of Cyberpunk
2077, which they described as an “open
world, narrative-driven role playing game.”
The game was to be released on various
video game platforms, including Sony’s Play-
Station and Microsoft’s Xbox.

The complaint alleges that between Jan.
16, 2020, and Dec. 17, 2020, CD Projekt held
numerous investor calls and published
various reports, all of which touted the new
game as “amazing” and having “remarkable
potential,” despite numerous issues that
pushed back the game’s original April 17,
25, 2020, conference call with investors, the
company’s CEO claimed “we believe that the
game is performing great on every platform”
and “[t]he extra time gained by postponing
the release is being used to further optimize
the game, and we feel that was the right
decision.”

According to the complaint and various
news reports, Cyberpunk 2077 failed to live
up to CD Projekt’s lofty promises. The game
was finally released on Dec. 10, 2020, and
consumers quickly determined that the
game was “virtually unplayable” on two of
the most popular game consoles, PlayStation
4 and Xbox One. In fact, due to the game’s
serious issues, Sony removed Cyberpunk 2077
from the PlayStation Store, and most
retailers offered full refunds on the game.

Following this extremely disappointing
release, CD Projekt’s stock price dropped
sharply, and the investors claim they suf-
dered damages as a result. The complaint
alleges that by publicly stating that Cyber-
punk 2077 was ready to be played onnumer-
ous popular platforms when, in reality, at
the time of its release it was not, CD Projekt
and certain directors and officers violated
Section 10(b) and Rule 10b-5, which prohibit,
among other things, the making of “any
untrue statement of a material fact or to
omit to state a material fact necessary in
order to make the statements made, in
the light of the circumstances under which they
were made, not misleading.”

It should be noted that, unlike the Defend-
ants in most well-publicized Section 10b
cases, CD Projekt’s securities are not traded
on New York Stock Exchange or NASDAQ.
CD Projekt is headquartered in Poland but
incorporated in Delaware. Instead of tradi-
tional stock, the company trades its Ameri-
can Depository Receipts (ADRs) on the OTC
Pink exchange, a highly speculative over-
the-counter stock market.

We will continue to monitor this litigation
and other cases at the intersection of con-
sumers’ and investors’ rights. If you have
questions or need more information, contact
Lydia Keeney Reynolds, a lawyer in our firm,
at 800-898-2034 or by email at Lydia.Reyn-
olds@beasleyallen.com.

Sources: https://www.polygon.
com/2020/12/24/22199252/cyberpunk-2077-cd-
projet-class-action-lawsuit-filed.

XVII.
PREMISES LIABILITY
LITIGATION

Holding Shopping Malls Accountable
For Gun Violence

It is no secret that crime has risen
throughout the country during the year of
2020. Many may attribute the increase in
crime to the rise in poverty due to COVID-19,
unemployment increases and varying other
factors. Crime, and specifically gun violence,
has also risen due to lax or inadequate secu-
riety measures undertaken by property
owners. Crimes like shootings on certain
types of premises (i.e., shopping malls) are
increasingly occurring and property owners
are on notice that these types of events can
happen at their establishment and on the
premises in parking lots.

In Atlanta, Georgia, the homicide count
for 2020 was the highest it’s been in more
than 20 years. There was a total of 155 fatal
shootings that the Atlanta Police Depart-
ment investigated in 2020. One incident in
particular occurred on Dec. 21, 2020, where
a shooting started in the parking lot of Sax
Fifth Avenue at Phipps Plaza, a high-end
shopping center located in Buckhead Atlanta.
As Kennedy Maxie, a 7-year-old girl, and
her family were driving by in their car, a
stray bullet struck Kennedy in the back of
her head. Kennedy was rushed to the hos-
pital and unfortunately died seven days later.

As a result of the string of gun violence at
shopping malls and centers, each event pro-
vides the owners of each shopping center
with notice that a shooting incident at their
premises is foreseeable and that, as a result,
they should take reasonable measures to
secure their premises. While property
owners like to argue that no crime is pre-
ventable, there are studies that prove that
when there are adequate security measures
in place crime substantially decreases.
Shopping malls in Buckhead (Lenox Mall and
Phipps Plaza) have the resources to increase their level of security and when they fail to do so, shooting incidents like the one involving Kennedy Maxie may occur.

Lawyers at Beasley Allen are committed to holding shopping malls and other commercial property owners accountable for their failure to provide reasonable and adequate security measures to protect the public from gun violence. Parker Miller and Donovan Potter, lawyers in our Atlanta office, are the lead Beasley Allen lawyers handling premises liability cases. If you or a loved one was seriously injured or a family member killed as a result of a criminal act, or if you have any questions about these cases, contact Parker or Donovan at 800-898-2034 or by email at Parker.Miller@beasleyallen.com or Donovan.Potter@beasleyallen.com.

Sources: AJC and WBTV

**XVIII. WORKPLACE HAZARDS**

**OSHA Weighs In On Covid-19**

Without even a shadow of doubt, we are living in unprecedented times. As of this writing, there have been more than 24.5 million reported cases of COVID-19 in the United States, and over 400,000 deaths. As the country tries to slow the spread of this infectious disease, businesses continue to operate. Most of the businesses are able to function at some level by allowing employees to work remotely or by incorporating other safety precautions. The legal community, like many areas of business, has transitioned more to remote meetings and gatherings through technology such as Zoom. However, many businesses do not have this luxury due to the nature of the business and must require workers to be present in order to conduct their operations. In these situations the Occupational Safety and Health Administration (OSHA), has promulgated an employer’s best practices guideline.

The purpose of OSHA’s guidelines is simply to give employers the information they need to ensure their workers are as safe as possible. The best practices cannot stop the pandemic or the spread of the virus but enable employers to use the best means to slow the spread as much as possible. OSHA recognizes that COVID-19 will likely increase absenteeism, change patterns in commerce, and interrupt supply and delivery of goods or services. Despite these and many other challenges businesses now face, OSHA’s guidelines are an attempt to mitigate these issues. OSHA’s best practices instruct employers to:

1. Develop an Infectious Disease Preparedness and Response Plan
   a. Identify where, how, and to what sources of COVID-19 employees might be exposed.
   b. Identify non-occupational risk factors at home and in community settings.
   c. Assess workers’ individual risk factors such as age, presence of chronic medical conditions etc.
   d. Develop controls to address these risks.
   e. Assess the need for social distancing, staggered work shifts, downsizing operations, delivering services remotely, and other exposure reducing measures.

2. Prepare to Implement Basic Infection Prevention Measures
   a. Promote frequent and thorough hand washing and/or provide alcohol-based hand sanitizers.
   b. Encourage workers to stay home if they are sick.
   c. Encourage respiratory etiquette.
   d. Explore flexible worksites, flexible work hours, increase physical distance.
   e. Discourage the use of communal areas or workspaces.
   f. Maintain regular housekeeping practices and increase disinfecting of worksites and surfaces.

3. Develop Policies and Procedures for Prompt Identification and Isolation of Sick People
   a. Prompt identification and isolation of potentially infectious individuals is critical.
   c. Employers should develop policies and procedures for employees to report sickness.
   d. Develop policies and procedures to isolate people with signs or symptoms of COVID-19.
   e. Take steps to limit respiratory spread by using masks.
   f. Restrict the number of employees in given areas.

4. Develop, Implement, and Communicate about Workplace Flexibilities and Protections
   a. Actively encourage sick employees to stay home.
   b. Ensure that sick leave policies are flexible and consistent.
   c. Talk with companies that provide the business with employees to about the importance of implementing similar policies.
   d. Do not require a health care provider note to validate illness.
   e. Maintain flexible policies for employees to stay home to care for sick family members.
   f. Work with state and local health care agencies to provide workers with accurate information regarding COVID-19.

5. Develop Administrative Controls.
   a. Address engineering controls such as installing high-efficiency air filters, increase ventilation, install physical barriers such as sneeze guards.
   b. Address administrative controls such as requiring sick workers to stay home, minimize contact amongst workers, clients and customers, establish staggered shifts, discontinuing non-essential travel, develop emergency communication plans, training workers to use protective clothing such as masks.
   c. Develop safe work practices such as no touch trash cans, paper dispensers, etc.
   d. Provide proper PPE such as face masks, gloves, etc.

It is imperative that all businesses follow OSHA and Centers for Disease Control and Prevention (CDC) guidelines to protect workers in this dire time. Those who knowingly violate the guidelines must be held accountable. If you need more information, contact Evan Allen at 800-898-2304 or by email at Evan.Allen@beasleyallen.com.

Source: https://www.osha.gov/Publications/OSHA3990.pdf

**Pandemic Shines Light On Workers’ Compensation Disparity Between Workplace Injury And Disease**

A report by the National Academy of Social Insurance released during the early months of the COVID-19 pandemic reveals just how “complex, opaque and fragmented” the U.S. workers’ compensation system is. There is no federal oversight or mandate to set stan-
It will be interesting to see how all of this plays out. The adverse effect of COVID-19 on employees throughout America will cause many legal problems.

If you need more information, contact Kendall Dunson or Evan Allen at 800-898-2304 or by email at Kendall.Dunson@beasleyallen.com or Evan.Allen@beasleyallen.com.

Source: NASI

Another Foster Farms Employee Dies Of COVID-19 Complications

There have been lots of COVID-19 related problems in plants involving meat processing and poultry processing. In those plants, employees work in confined spaces and often without protective equipment. One such plant is Foster Farms, a poultry company based in Livingston, California. This company has plants primarily on the west coast.

A number of employees have died in Foster Farms plants. Another Foster Farms employee in the Central Valley of California has died due to complications from COVID-19. The plant worker’s death was confirmed by the California Division of Occupational Safety and Health (Cal/OSHA). After being notified of the death on Dec. 28, the agency began the process of inspecting the Foster Farms facility in Fresno, California. At press time there had been a total of three COVID-related deaths at that facility.

Another Foster Farms plant in Livingston, California, was shut down for six days in September after an outbreak resulted in at least 392 workers testing positive for coronavirus, with nine dying from complications from COVID-19. The latest death follows an outbreak of at least 193 COVID-19 infections at the same poultry plant confirmed by the Fresno County Department of Public Health in early December. Three separate Foster Farms facilities in the Central Valley of California have reported outbreaks.

A Merced County judge has ordered Foster Farms to comply with health orders after finding the company may have engaged in unfair business practices by failing to comply with an Aug. 28 health order issued by the Merced County Department of Public Health. The ruling requires Foster Farms to provide face masks, stagger employee meal and start times, investigate close contacts of workers who test positive, to ensure infected employees do not come to work, and inform all employees of testing requirements and any outbreaks that occur, among other requirements.

The United Farm Workers of America and two employees of a Foster Farms poultry processing plant in the Central Valley filed a lawsuit against the company on Dec. 17, stating that the company is operating in “naked disregard of both national and local guidelines.”

Those orders stem from a lawsuit aiming to compel Foster Farms to improve safety protocols. The complaint filed by the United Farm Workers and Foster Farms workers says its workers are spaced “substantially less than six feet apart from each other for prolonged periods of time with no plastic divider or similar protection between them,” and that the company fails to “rigorously or effectively enforce social distancing or even to supply masks,” among other allegations. The complaint also alleges Foster Farms “continues to ignore baseline workplace safety protocols, inexorably leading to further spread and infection in the Plant and community at large.”

KQED TV, located in San Jose, California, has done a tremendous job of investigating and reporting on the situation described above.

Source: KQED.com

XIX.
AN UPDATE ON MOTOR VEHICLE LITIGATION

Ford F-150 Buyers Say Defect Caused Trucks To Guzzle Oil

A new proposed class action in a Michigan federal court alleges that Ford knowingly concealed manufacturing defects in its F-150 vehicles believed to cause an excessively high rate of engine oil consumption. It’s claimed this usually manifests after the vehicle’s warranty period has expired.

Three Ford owners sued the car manufacturer last month, alleging that their Ford F-150 vehicles guzzle oil “at an abnormally high pace” and that instead of disclosing the defect, Ford fraudulently concealed it from customers because it favored profits over safety and performance. The complaint says:

The oil consumption defect constitutes a safety issue because it can cause the class vehicles to run out of engine oil and fail, and as such, Ford had a duty to disclose the safety issue to consumers.

The suit brought by vehicle owners David Lyman, Timothy Thuering and Vincent Brady
says Ford knew about the supposed oil consumption defect since the car manufacturer is required to test its vehicles, which they say would have exposed the defect.

In their suit, the three Plaintiffs take issue with expenses and inconveniences incurred from constantly monitoring and changing their engine oil levels as a result of the consumption defect. Thuering’s 2018 Ford F-150 vehicle consumed a quart of engine oil for every 1,000 miles driven, according to the suit. Upon assessing the engine’s oil consumption, the dealership concluded that Thuering’s engine was not leaking. After further queries, the dealership later informed Thuering that the vehicle’s oil consumption was considered normal and that guidance from Ford suggested adding an additional quart of oil during each oil change.

The consumers pinpoint the defect to “insufficient piston ring tension,” which results in engine oil moving past the vehicle’s oil control and piston rings to enter the engine’s combustion changer, where the oil is then burned. “Once in the combustion chamber, oil is burned off rather than returned for further lubrication,” the complaint says. “This not only causes a decrease in engine performance but also decreases fuel efficiency, causes carbon deposits to form, and can damage the engine and various ignition and emission components.”

It’s stated in the complaint that Ford issued at least four technical service bulletins to dealerships related to excessive oil consumption in the vehicles, which provide guidance on how to repair Ford vehicles and respond to customer complaints. The bulletin’s fourth version proposes the installation of a new engine oil level indicator known as a dipstick, which changes the engine oil and the oil filter. But the new dipstick uses a wider “normal operating range,” which the consumers argue does not fix the defect, saves Ford repair costs and is used “to mask the oil consumption problem.” The complaint says:

This change means that a dipstick reading that was once at or below the minimum fill line, previously requiring an engine replacement, and perhaps caused customers to become alarmed or concerned with excessive oil consumption, is now considered normal and within Ford’s acceptable parameters.

It’s quite obvious that the F-Series is extremely important for the car manufacturer – roughly $50 billion of Ford’s annual $160 billion in sales is derived solely from sales of the F-Series truck as of 2018 – and that’s a factor to consider. On average, Ford sold 900,000 F-150 vehicles per year over the last three years, according to the complaint. The National Highway Traffic Safety Administration (NHTSA) received numerous complaints about the oil consumption defect citing concerns over vehicle safety, the suit says.

The consumers seek to establish a nationwide class of those who purchased or leased Ford’s F-150 vehicles in addition to three subclasses of California, Ohio and New York residents who purchased or leased the class vehicles. In their suit they request a monetary award to repair or replace the class vehicles and want Ford to repair, recall and replace the class vehicle. In this suit, Ford faces accusations of negligence, breach of warranty and violating an array of local statutes.

The suit, filed on Jan. 6, would not be the first against Ford over the F-150 model. In 2019, Ford was sued over accusations that it overhyped its fuel economy in its F-150 and Ranger pickup trucks, which turned into a huge multidistrict litigation against the carmaker.

The proposed class is represented by E. Powell Miller, Sharon S. Almonrode, Emily E. Hughes, Dennis A. Lienhardt and William Kalas of The Miller Law Firm; Joseph G. Sauder, Matthew D. Schelkopf and Joseph B. Kenney of Sauder Schelkopf; William H. Anderson of Handley Farah & Anderson PLLC and Jon Herskowitz of Baron & Herskowitz. The case is David Lyman et al. v. Ford Motor Co. (case number 2:21-cv-10024) in the U.S. District Court for the Eastern District of Michigan.

Source: Law360.com

NHTSA Found No Proof Of Tesla Acceleration Defect

The National Highway Traffic Safety Administration (NHTSA) said on Jan. 8 it was shutting down its review of claims that about a half-million Tesla Inc. vehicles are affected by a defect that causes sudden unintended acceleration. The agency said it found no evidence of a defect.

NHTSA’s Office of Defects Investigation (ODI) received a petition just over a year ago requesting that it investigate cases of sudden acceleration in certain Tesla models. However, after looking into the 246 complaints and crash data, which included video and Tesla log data, the ODI said it hadn’t found any evidence of a defect that caused sudden acceleration.

Instead, according to an agency notice, each instance reviewed by the office showed that the crashes were caused by human error. NHTSA said:

There is no evidence of a design factor contributing to increased likelihood of pedal misapplication. The theory provided of a potential electronic cause of [sudden unintended acceleration] in the subject vehicles is based upon inaccurate assumptions about system design and log data.

The December 2019 petition claimed that 2012-2019 Tesla Model Ss, 2016-2019 Tesla Model Xs and 2018-2019 Tesla Model 3s may all be affected by the glitch and that more than 500,000 vehicles may have the problem.

A NHTSA spokeswoman told Law360 that the agency found no evidence of a defect in the brake systems, accelerator pedal assemblies or motor control systems in the vehicles cited in the complaints. The spokesperson said:

This denial does not foreclose the agency from taking further action if warranted or the potential for a future finding that a safety-related defect exists based upon additional information.

Tesla is facing a proposed class action in California federal court over sudden acceleration allegations from drivers who say the company’s competitive innovation of electric vehicles compromised safety. The Plaintiffs contend they have “empirical and anecdotal evidence” indicating that the integrated electronic hardware and operating software of Tesla’s 2013-2020 Model S, 2016-2020 Model X and 2018-2020 Model 3 all suffer from the sudden unintended acceleration defect.

The suit was originally filed in January 2020, after NHTSA received the petition, on behalf of eight Tesla vehicle owners in five states, and was expanded in July to include 23 named Plaintiffs in 11 states alleging Tesla’s Model S, Model X and Model 3 electric vehicles contained the defect.

The consumers say that Tesla’s strategy is to release vehicles first and fix their problems later. They also say that the sudden acceleration defect is all the worse because Tesla vehicles are designed as a “black box,” allowing Tesla to withhold vital information from drivers and the general public.

In a blog post last January, Tesla had previously said that the petition was false and brought by a Tesla short-seller. The company denied that there was unintended acceleration in its vehicles.

Source: Law360.com
XX.
TOXIC TORT LITIGATION

U.S. Supreme Court Rejects Georgia Carpet Makers’ Efforts To Dismiss Alabama Water Pollution Case

A case being litigated by Beasley Allen cleared a major hurdle last month when the U.S. Supreme Court rejected the Defendants’ arguments that Alabama courts lacked jurisdiction over the case. The decision affirmed the Alabama Supreme Court’s 2019 ruling upholding most of the rulings by two lower courts, which refused to dismiss the lawsuits, finding that the trial courts had jurisdiction over five of the eight Defendants.


The Defendants were located less than 100 miles northeast of the Plaintiffs in Dalton, Georgia, which is known as the carpet capital of the world. The water boards claimed that the Defendants discharged their industrial wastewater into the Dalton Utilities treatment plant. The wastewater contained perfluorinated compounds (PFCs) and the Defendants knew that the water treatment facility would not be able to treat or remove the harmful chemicals. Further, the lawsuit explained that water from the Dalton water treatment facility was then sprayed on thousands of acres of land in Georgia and the tainted runoff water entered the Conasauga River, which feeds into the Coosa River flowing into Alabama. The Coosa River provides drinking water for the Plaintiffs’ residents and the Plaintiffs argue that the Defendants knew or should have known that their contaminated wastewater would pollute the Plaintiffs’ drinking water.

Perfluorinated compounds are a group of synthetic chemical compounds that manufacturers use on fabric, cookware, firefighting foam, and a variety of other consumer products to make them non-stick and water-proof. Carpet manufacturers in Dalton treat carpet with PFCs to make them stain resistant.

Once released into the environment, PFCs do not break down. The chemicals not only pose a tremendous threat to the environment and wildlife, they also are known to cause serious health problems in humans. People exposed to PFCs in drinking water or food may develop cancer, problems with liver, kidneys, pancreas, and thyroid problems. PFCs can also have adverse developmental effects on fetuses and infants, even in trace amounts.

In 2018, the trial courts rejected the Defendants’ requests to dismiss the lawsuits citing a lack of jurisdiction by the courts. The courts agreed with the Plaintiffs finding that the companies knew the PFCs in their wastewater couldn’t be treated or removed and therefore, how they disposed of their wastewater was not proper.

On appeal to the Alabama Supreme Court, the Defendants submitted eight petitions for a writ of mandamus ordering the trial courts to dismiss the suits. The court denied five of the petitions. It granted the petitions of Kaleen Rugs, Milliken & Co. and Indian Summer Carpet Mills, finding that the three Defendants had shown they were not involved in contaminating the Plaintiffs’ drinking water.

Rhon Jones, head of our firm’s Toxic Torts Section, leads the lawyers handling this case, which is currently in the discovery stage. Rhon is pleased that the firm will now be able to continue this highly significant litigation as originally planned.

Sources: Law360.com

PFAS Litigation Expected To Increase In 2021

Numerous legal publications have included PFAS on their lists as one of the emerging environmental litigation trends for this year. Beasley Allen lawyers have been engaged in PFAS litigation for five years. Therefore, we have closely followed how this family of toxic chemicals grew from relative obscurity in 2016 to the forefront of the public’s attention in 2020 and became the subject of the movie “Dark Waters.”

For the uninformed, PFAS are a group of manmade chemicals commonly referred to as “forever chemicals” because they are highly persistent in the human body and the environment meaning they do not break down and they can accumulate over time. As we have consistently reported, there is ample evidence that exposure to PFAS can lead to adverse human health effects including developmental and reproductive problems, increased risk of cancers like liver, kidney, and testicular, and immunological effects.

These chemicals have been the target of litigation throughout the country as utilities face pressure and regulation to remove the chemicals from drinking water. Utilities in nearly every state have sued chemical manufacturers to fund the purchase, installation and operation of costly filtration systems.

There are more than 9,000 chemicals in the PFAS family that are engineered to repel water, oil, and grease. Since the 1940s, they have been used in a variety of consumer products including nonstick cookware, clothing, textiles, furniture, food wrappers, and in aqueous film-forming foam (AFFF) which is used to battle fuel-fed fires. PFAS imparts a long-lasting repellency to products because they contain a carbon-fluorine bond which is one of the strongest ever created. This is why PFAS do not degrade in the environment and can bioaccumulate in humans and animals. The widespread use of PFAS for many years, its environmental persistence, and its accumulation in humans is what makes these chemicals particularly worrisome.

Previous issues of the report have discussed new lawsuits involving PFAS and have analyzed impending governmental action. We thought it would be helpful to provide our outlook on what we can expect to see happen on the PFAS front this year. It’s expected that these chemicals will play an important role in environmental litigation for years to come.

Governments Take Action

Despite its widespread use over the past 80 years, it should be noted that PFAS are currently not regulated by the EPA and have only recently been subject to state regulations. In 2019, the EPA released an Action Plan that outlined several steps the agency planned to take to address PFAS and protect the public health. The most important was to initiate the process to establish maximum contaminant levels (MCLs) for PFOA and PFOS under the federal Safe Water Drinking Act. Another was to determine whether regulation of additional PFAS chemicals was warranted.

Other proposals include considering designating PFOA and PFOS as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act.
(CERCLA). That designation would impose cleanup duties on the party responsible for the contamination. It would also add more PFAS chemicals to the Toxic Release Inventory, which requires industry to report information regarding the manufacture and use of these chemicals; institute more regular monitoring of nationwide drinking water. Finally, the EPA would continue to study the most effective treatment and remediation methods to existing water systems grappling with PFAS contamination.

As of December 2020, the EPA’s proposed rule to regulate PFOA and PFOS elicited over 11,000 public comments, which evidences a growing concern over these chemicals. In June 2020, the EPA issued a final rule to add 172 PFAS chemicals to the Toxic Release Inventory and set a use threshold of 100 pounds for each listed substance, which is low given the prevalence of PFAS in consumer products. In November 2020, the EPA issued a memorandum that recommended that PFAS discharges be considered as part of the National Pollutant Discharge Elimination System (NPDES) permitting process.

Although the EPA has made some progress under its Action Plan, it will take years for concrete action to be taken. Therefore, a number of states (California, Connecticut, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina and Vermont) have proposed or adopted various standards or regulations to address the widespread contamination that impacts the drinking water for tens of millions of Americans. These state actions are more stringent than the EPA’s 2016 lifetime health advisory of combined 70 parts per trillion of combined PFOA and PFOS, which provides a baseline limit at which continued exposure can lead to adverse health effects. Also, numerous states have convened task forces to study and enact a plan to address PFAS contamination statewide.

For example, New Jersey has taken several actions to address PFAS contamination. First, the state amended its Safe Water Drinking Act to establish an MCL of 14 ppt for PFOA, 13 ppt for PFOS, and 13 ppt for PFNA which is another PFAS contaminant. As of January 2020, New Jersey reported 169 public water systems in 19 out of 21 counties detected concentrations of PFOA and PFOS above their respective MCLs. Consequently, New Jersey now requires all public water systems to begin monitoring for PFOA and PFOS beginning on April 1, 2021.

Second, New Jersey added PFOA and PFOS to the state’s list of “hazardous substances” under the New Jersey Spill Compensation and Control Act, which provides strict liability for cleanup and removal costs. Finally, the state now requires certain facilities that are permitted to discharge pollutants to monitor for PFNA, PFOA and PFOS.

Two significant lawsuits were filed against PFAS manufacturers after these laws were passed. The first was filed by the State of New Jersey, which sued two companies (Solvay Specialty Polymers USA, LLC and Arkema, Inc.) it alleged were responsible for the widespread contamination of PFAS emanating from a manufacturing facility that contaminated the drinking water in the region. The second was filed by Suez Water New Jersey against DuPont and its subsidiaries for contaminating its drinking water which exceeded the newly passed limits.

Looking to 2021

The growing public concern and governmental action in response to PFAS will likely increase this year. President Joe Biden pledged during his campaign to address PFAS contamination and fast-track certain proposals contained in the Action Plan, including the designation of certain PFAS as “hazardous substances” and setting federally enforceable drinking water limits. Notably, because concern for PFAS contamination is bipartisan in Congress, it is possible that both Democrats and Republicans will agree on certain PFAS measures, particularly to address the contamination at military bases.

Despite increasing governmental attention, litigation will probably increase in the near future. States including Michigan, New Jersey, North Carolina and Maine have conducted PFAS sampling statewide and confirmed the widespread proliferation of these chemicals. The published sampling results will likely spur additional litigation, especially in the states that adopted their own PFAS regulations.

Litigation Updates

Various types of Plaintiffs have sued PFAS manufacturers and users for contaminating the environment or causing personal injuries. They include states – Minnesota, New Hampshire, Michigan, Vermont, New York and North Carolina – and public water suppliers, private landowners, and individuals who have been diagnosed with certain health conditions linked with exposure to PFAS.

The most notable results achieved by states include the State of Minnesota’s $850 million settlement with 3M in February 2018, and the State of Michigan’s $69.5 million settlement with 3M, shoe manufacturer Wolverine, and others in December 2019 which involved the contamination from a specific manufacturing plant. Michigan has subsequently filed another lawsuit against 3M and others for contaminating various sites across the state. The number of lawsuits filed and the high-dollar settlement values reached so far are good indications that PFAS litigation will continue to be a hot topic for years to come. The following are two significant multidistrict litigations (MDLs) that involve PFAS cases.

The AFFF MDL

The bulk of contamination is attributable to the use of AFFF at firefighting training facilities, airports, and military bases across the country. For example, the Department of Defense has identified 401 sites with a known or suspected release of PFAS to groundwater. This does not include the hundreds of civilian airports or firefighting training facilities that may have used AFFF.

Due to the increasing number of lawsuits filed against AFFF manufacturers across several states, an MDL (No. 2873) was created in the District of South Carolina in December 2018. As of last November, 883 cases were part of the MDL. A vast majority were filed by individuals alleging property damage or personal injury (84%), towns/municipalities (4%), companies (4%), water suppliers (4%), and others (4%). The number of lawsuits exploded from 70 in 2019 to 691 in 2020. The bulk of the MDL work has involved initial discovery and selecting bellwether Plaintiffs to conduct
“core discovery” related to general liability.

The first settlement in the MDL was reached just last month between a class of 300 homeowners in Peshtigo, Wisconsin, and Defendant AFFF manufacturers Tyco Fire Products, LP and others that operated an AFFF training facility nearby and contaminated the drinking water in the homeowners’ private wells. The $17.5 million settlement includes $15 million for property-damage related claims while $2.5 million will be allocated to individuals diagnosed with certain health ailments including kidney and testicular cancer.

DuPont MDL

This MDL No. 2433 was formed in the Southern District of Ohio in 2013 and originally included over 3,500 cases alleging personal injury or wrongful death due to exposure to PFOA discharged from DuPont’s Washington Works Plan near Parkersburg, Virginia. In March 2017, the parties agreed to settle those pending cases for $671 million. Since then, new cases were filed in the MDL and juries have awarded a $50 million verdict to a man who suffered from two bouts of testicular cancer but deadlocked on another test case selected by DuPont.

Conclusion

PFAS litigation is sprawled across the country and has resulted in significant jury verdicts and settlement amounts. Every day, the public learns more about the toxicity of these chemicals and the full extent of the contamination. Hopefully, increasing litigation and more robust governmental action will hold polluters accountable for contaminating the environment. We expect it to be the most prominent source of environmental litigation for years to come.

Beasley Allen represents water utilities that face the costly problem of removing PFAS from drinking water and our lawyers are investigating cases involving PFAS. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, Ryan Kral, Matt Griffith and David Diab, 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, Matt.Griffith@beasleyallen.com or David.Diab@beasleyallen.com.

Sources: Fox Rothschild and Law360.com

XXI.
A LOOK AT ENVIRONMENTAL CASES IN 2021

Environmental Cases To Watch In 2021

I join with many others who predict that the Biden Administration will be very active as a protector of our environment over the next four years. This is good news for those who believe we must protect the environment and that we have a moral duty to do so for future generations. There should be significant and needed changes to the government’s position in pending litigation on crucial issues such as Clean Water Act jurisdiction and greenhouse gas emissions from vehicles, oil and gas operations and power plants. The U.S. Supreme Court is expected to decide what information agencies should be required to release to the public from rulemakings. That is something badly needed.

Without a doubt, the Trump Administration was bad news for the environment and for environmental regulation. After four years of Trump, many Obama-era environmental regulations and policies have been reversed and replaced with alternatives that have taken a narrower and less effective regulatory approach. Fortunately, many of those actions are currently being litigated. Environmental, tribal, community and public health groups and state attorneys general, among others, have filed suits.

The Biden Administration will face many of the same choices the Trump Administration did four years ago in terms of how to handle pending litigation. But it’s believed the litigation will be handled aggressively and thus more effectively by the new administration. Law360 lists five important environmental law cases to watch in 2021. Those cases are:

Limits of EPA Authority Over Emissions From Power Plants

In October, the D.C. Circuit heard oral arguments in a challenge by states, green groups and clean energy companies to the U.S. Environmental Protection Agency’s (EPA) rule rescinding the Obama-era 2015 Clean Power Plan, which regulated carbon dioxide emissions from existing power plants, and the replacement, the less restrictive 2019 Affordable Clean Energy rule.

Both the Clean Power Plan and the Affordable Clean Energy rule established emissions standards for carbon dioxide from existing power plants, but the newer version eliminated an option for states to phase out fossil fuels in favor of renewable energy sources and to participate in emissions credit-trading programs.

While many observers expect the Biden administration to seek a quick stay of most pending litigation regarding such moves, some think the oral arguments went well for the challengers, so the new administration may let the D.C. Circuit rule.

“The Biden administration is confronted with the fact that they ran on some very ambitious goals with respect to their climate agenda, and yet they are facing some very difficult questions about how far EPA can go in addressing GHG [greenhouse gas] emissions under its existing authority under CAA [Clean Air Act],” said Ethan Shenkman, a partner at Arnold & Porter. “So, it’s possible that the Biden administration would decide, ‘We’d like to know what the D.C. Circuit thinks the scope of our authority is ... because that will inform how we move forward on our agenda.’”

The case is American Lung Association et al. v. U.S. Environmental Protection Agency et al., case number 19-1140, in the U.S. Court of Appeals for the District of Columbia Circuit.

Nationwide CWA Permit in Question

The Ninth Circuit is currently considering whether a Montana federal judge was right to block oil and gas pipeline projects from using Nationwide Permit 12, which provides an expedited route for such endeavors to achieve compliance with the law.

U.S. District Judge Brian Morris in April vacated the entire permit, then the next month narrowed the ruling to just cover oil and gas pipeline projects. In July, the U.S. Supreme Court limited the order further to only affect TC Energy’s Keystone XL project, which is the only project at issue in the underlying litigation. The U.S. Army Corps of Engineers and TC Energy have appealed Judge Morris’ decision and have been joined by a number of business interests.

The environmental groups challenging the Corps’ approval of Nationwide Permit 12 for the Keystone XL pipeline
Where Does the Government’s Right to Shield Info End?

In November, the U.S. Supreme Court heard oral arguments in environmental groups' lawsuit seeking access to government documents concerning regulations on how power plants discharge water that's used to cool the facilities. At issue is the Ninth Circuit's 2018 ruling that the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) must turn over draft documents that found a version of the EPA's Cooling Water Intake Structure rule, proposed in 2011 and finalized in 2014, was likely to put federally protected species at risk.

The government has asked the high court to reverse that decision, arguing the documents are part of the agencies' private, deliberative process and exempt under the Freedom of Information Act. The Sierra Club filed a Freedom of Information Act (FOIA) suit for access to documents related to the rule, including biological opinions from the FWS and NMFS.

The case is U.S. Fish and Wildlife Service et al. v. Sierra Club Inc. (case number 19-547) before the U.S. Supreme Court.

EPA and Corps of Engineers on Defense Over Narrower CWA Rule

Roughly a dozen separate lawsuits have been filed at this point challenging the EPA and Army Corps of Engineers' jointly issued Navigable Waters Protection Rule, which replaced a broader rule promulgated by the Obama administration. The new rule narrows which waters qualify as navigable waters of the United States and are under Clean Water Act jurisdiction.

A South Carolina federal judge is considering motions for summary judgment filed by environmental groups challenging the rule, while a Colorado federal judge has blocked implementation of the rule in that state, and a California federal judge has refused a request by a coalition of states and cities for a nationwide block.

Matt Leopold, a partner at Hunton Andrews Kurth LLP who recently left his position as general counsel at the EPA and oversaw the litigation for the agency, said the Biden administration will face the same challenges the Trump administration has if it wants to set a new regulatory course. Leopold said:

Given that the Supreme Court decided WOTUS [waters of the U.S.] cases have to be challenged in district courts rather than in the courts of appeal, it presents an obstacle for any administration to quickly turn around a WOTUS interpretation and move forward its defense in the courts, given there are so many venues to challenge in, giving litigants the opportunity to forum shop.


Ambitious NEPA Regulations in the Crosshairs

The White House Council on Environmental Quality issued a final rule in July revising how agencies implement the National Environmental Policy Act (NEPA) in their project reviews and permitting.

The new rule, which was the first change to NEPA implementing regulations since the 1970s, has become a lightning rod for litigation, drawing several challenges that are now playing out in federal district courts around the country.

The Trump Administration argued in several cases that the Plaintiffs challenging the rule, including states, green groups and others, lack standing to pursue their claims. The reason given was because they need to wait until the rule is applied to a specific action first.

The case is State of California et al. v. Council on Environmental Quality et al. (case number 3:20-cv-06057) in the U.S. District Court for the Northern District of California, San Francisco Division.

Source for all of the above: Law360.com

Toyota To Pay $180 Million Penalty For Clean Air Act Violations

Toyota Motor Corp. and related entities will pay $180 million to settle the government's claims that the automaker flouted the Clean Air Act's emissions reporting requirements for a decade. This is the largest-ever civil penalty to be paid for such violations, prosecutors said last month. The settlement brings an end to a civil suit filed by the U.S. Department of Justice (DOJ) and includes a consent decree in which Toyota admits its misdeeds and accepts responsibility.

Between 2005 and late 2015, Toyota "systematically violated" the CAA's emissions reporting requirements by failing to notify the U.S. Environmental Protection Agency (EPA) about emissions control defects in its vehicles in a timely manner. Audrey Strauss, acting U.S. Attorney for New York's Southern District, said in a statement:

Toyota shut its eyes to the noncompliance, failing to provide proper training, attention, and oversight to its Clean Air Act reporting obligations. Toyota's actions undermined EPA's self-disclosure system and likely led to delayed or avoided emission-related recalls, resulting in financial benefit to Toyota and excess emissions of air pollutants.

According to the consent decree, which will be published in the Federal Register and open to public comment for the next 30 days, Toyota specifically admits to "routinely" filing emissions defect reports “materially late” and failing to file many of the reports at all until it self-disclosed its noncompliance in late 2015. Prosecutors laid out the following information:

Toyota delayed submitting 78 Emissions Defect Information Reports, which are notifications to the EPA when 25 or more vehicles or engines in a model year have the same emissions defect. The EDIRs covered millions of vehicles that could have been potentially defective.

By the time Toyota disclosed its reporting shortcomings, some of the EDIRs were eight years late. The
manufacturer also failed to file more than 20 Voluntary Emissions Recall Reports with the EPA to recall cars with affected emissions-related parts, as well as over 200 Quarterly Reports required to update the EPA on the progress of such recalls.

In addition to the $180 million fine to be paid to the DOJ, the company agreed to special compliance reporting requirements on top of the EPA's reporting requirements.


Source: Law360.com

XXII.
THE ONGOING ROUNDPUP LITIGATION

An Update On The Roundup Litigation

As dozens of Roundup cases move toward trial, reports suggest that potential settlements are underway for many. Monsanto, now owned by Bayer AG, has reported substantial progress toward settling thousands of U.S. lawsuits brought by individuals alleging they or their loved ones developed cancer from Monsanto's Roundup herbicides. According to one of the lead law firms representing Plaintiffs in the litigation, more than 95% of “eligible claimants” are participating in the settlement negotiated by that firm with Bayer. For many settlement plans negotiated thus far, Plaintiffs can choose to opt out of the program and take their claims to mediation, followed by binding arbitration if they so desire, or they can try to find a new lawyer who would take their case to trial.

Meanwhile, U.S. District Judge Vince Chhabria has resumed litigation for dozens of pending cases. With thousands of Roundup lawsuits still not resolved, Judge Chhabria said it’s time to move forward following a period during which all the federal cases were on hold due to pending negotiations. Beasley Allen lawyers are among those with active cases that are moving toward trial in federal and state court.

Our lawyers represent clients whose cancer was caused by Roundup herbicides for the 3,500 individual clients. Beasley Allen lawyers have not yet reached a settlement within our cases. Our lawyers will continue to fight for fair and reasonable results for our clients in their cases, either through trial or settlement.

For more information on this litigation, contact one of the members of the Roundup Litigation Team set out below.

Beasley Allen Roundup Litigation Team

Beasley Allen lawyers are currently representing 3,500 clients who have been exposed to Roundup and developed non-Hodgkin’s lymphoma. Our Roundup Litigation Team is willing to answer any questions you might have. For more information, contact one of the members of the Roundup Litigation Team. Rhon Jones, who heads up our Toxic Torts Section, is now in charge of this litigation. Other members of the team are Michael Dunphy, Danielle Ingram and William Sutton, lawyers in our Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Michael.Dunphy@beasleyallen.com, Danielle.Ingram@beasleyallen.com or William.Sutton@beasleyallen.com. I have joined the trial team and will be involved in the trials involving Beasley Allen clients. My contact information is Jere.Beaasley@beasleyallen.com.

XXIII.
CLASS ACTION LITIGATION

Beasley Allen Files ERISA Class Action For Mercedes-Benz Employees

Beasley Allen has filed a proposed Employee Retirement Income Security Act (ERISA) class action lawsuit against Mercedes-Benz US International, Inc. and the administrators of its U.S. employees’ 401(k) plan, alleging their failure to properly manage retirement investments resulted in thousands of workers paying “unreasonable and excessive” service fees. Under ERISA, employers are required to monitor their employee investment plans to ensure that service fees and other charges are “reasonable and prudent.

The Plaintiffs, two of the plan’s participants, filed the proposed ERISA class action on Jan. 15, in an Alabama federal court. The complaint alleges:

• Mercedes mismanaged employee retirement funds sinking workers’ 401(k) investments.
• Mercedes-Benz allowed overseers of its employees’ retirement plan to charge service fees that were seven times higher than the standard market rate.
• During the class period, the Plan paid between $239 and $567 per participant annually for retirement plan services. During the Class Period, reasonable retirement plan service fees for a plan of this size would have averaged $53 per participant annually. Failures by ERISA fiduciaries to monitor costs for reasonableness have stark financial consequences for retirees. Every extra level of expenses imposed upon plan participants compounds over time and reduces the value of participants’ investments available upon retirement.
• Mercedes-Benz overpaid the investment plan’s financial adviser, R.V. Kuhns & Associates, by about three times what it should have paid.
• Defendants did not engage in prudent decision-making processes, as there is no other explanation for why the plan paid these objectively unreasonable fees for retirement plan services.

Dee Miles, who heads up Beasley Allen’s Consumer Fraud & Commercial Litigation Section, told Law360:

We believe the Mercedes plan participants were not treated fairly and have been overcharged with excessive fees. The case was filed to rectify that inequity.

The class period covers the time from Jan. 1, 2015, through the date of judgment. The lawsuit demonstrates how $100,000 invested in a 401(k) plan over a 20-year period falls $30,000 short (14% less) with annual fees of 1%, compared to a plan charged annual fees of 0.25%.

ERISA requires Mercedes-Benz to shop around for the best deal for the administration of its employee 401(k) plan, yet the automaker’s failure to do that resulted in workers paying around seven times the reasonable market rate for plan administration services. The administrative fees also should have gone down as the number of participants grew, but instead they increased.

The lawsuit seeks to represent all participants and beneficiaries of the Mercedes-Benz U.S. International, Inc. Retirement and Savings Plan. Approximately 4,500 Mercedes-Benz employees are invested in the
Takeda Pharmaceuticals Sued Over Retirement Plan

Three former Takeda Pharmaceuticals workers have filed suit against the company in a proposed Employee Retirement Income Security Act (ERISA) class action. The suit filed in Massachusetts federal court accuses the company of including massively underperforming investment funds in its $1.8 billion employee retirement plan.

The ERISA suit, filed on Jan. 18, accuses Takeda Pharmaceuticals USA Inc. and its retirement plan managers of abandoning their responsibility to act in their employees' best interest. It's alleged:

- That the company retained the underperforming Northern Trust Focus Funds as an investment option for the Takeda Pharmaceuticals USA Inc. Savings and Retirement Plan and failed to remove these funds in time to protect workers' retirement savings, the ex-workers said.
- That funds performed much worse than similar investment options, such as the Vanguard Target Date Retirement Trust Plus funds, accusing Takeda of recognizing this underperformance much too late.
- That by the time Takeda removed the Northern Trust Focus Funds from its retirement plan in 2019, Takeda workers who chose this investment option had already lost millions of dollars due to the funds' underperformance.
- Had Takeda's plan managers upheld their responsibilities under ERISA, they would have removed the funds in 2015.
- By failing to act as a prudent and diligent investment professional, Defendants caused plan participants to lose substantial retirement assets.

The suit, which estimates workers' losses at between $22 million and $36 million, seeks to represent everyone who has participated in the company's retirement plan since 2015, with the exception of the plan's managers. Takeda is a Japanese multinational pharmaceutical company whose U.S. headquarters is in Massachusetts. The Takeda Pharmaceuticals USA Inc. Savings and Retirement Plan had 8,712 participants with account balances as of Dec. 31, 2018.

The proposed class is represented by Robert T. Naumes and Christopher Naumes of Naumes Law Group and Jerome J. Schlichter, Michael A. Wolff, Troy A. Doles, Heather Lea, Kurt C. Struckhoff, Sean E. Soyars and Joel Rohlf of Schlichter Bogard & Denton LLP.

The case is Robert Ford et al. v. Takeda Pharmaceuticals USA Inc. et al. (case number 1:21-cv-10090) in the U.S. District Court for the District of Massachusetts.

Source: Law360.com

Investor Suit Against Walmart Over DOJ Opioid Crisis Investigation

Walmart shareholders have filed suit against the retail giant, accusing it of withholding details about its alleged involvement in the opioid crisis. As previously reported, there is a U.S. Department of Justice (DOJ) investigation ongoing. It's alleged that the company's stock price fell sharply after the controversy came to light.

The Justice Department has accused Walmart – which operates about 5,000 pharmacies – of distributing and dispensing opioids in unlawful ways that fueled the opioid crisis. Meanwhile, the company has criticized the DOJ's professional conduct during the probe, saying it is «tainted by historical ethics violations.»

In the suit, named Plaintiff Richard Stanton said the company misled investors about the conduct at the heart of the DOJ investigation. In the suit Stanton said:

- In several U.S. Securities and Exchange Commission filings dating back to 2016 in which he claims Walmart failed to disclose that it knowingly filled prescriptions issued by so-called pill mill prescribers.
- Walmart filled thousands of prescriptions that showed obvious red flags, "including highly dangerous cocktails of drugs."
- Walmart's management pressured the pharmacists to fulfill as many orders as possible.
- The company's pharmacy revenues were inflated because the company filled thousands of invalid prescriptions in violation of the Controlled Substance Act dispensing requirements.
- Stanton is looking to represent a class of potentially thousands of shareholders who purchased Walmart stock between March 2016 and last December. He's alleging several violations of the Securities Exchange Act and seeking unspecified damages, court costs and attorney fees.

Walmart is one of many drug companies being sued separately by local governments in multidistrict opioid litigation. The companies are generally accused of recklessly selling narcotic painkillers for years, leading to widespread addiction and death.

The investors are represented by Michael J. Farnan and Brian E. Farnan of Farnan LLP and Laurence Rosen and Philip Kim of The Rosen Law Firm PA. The case is Richard Stanton v. Walmart Inc. et al., (case number 1:21-cv-00055) in the U.S. District Court for the District of Delaware.

Source: Law360.com

XXIV. PHARMACY BENEFITS MANAGER (PBM) LITIGATION

New Health Care Rules Benefit The Industry

The U.S. Department of Health and Human Services (HHS) gifted the health care industry with significant changes to existing regulations that generally reduce regulatory burdens and offer health care entities more flexibility. Specifically, HHS implemented changes to the Anti-Kickback Statute, the Physician Self-Referral Law – commonly known as the Stark Law – and the civil monetary penalty rules regarding beneficiary inducements. The final rules went into effect on Jan. 19, 2021, and offer a number of industry-friendly changes that will have a far-reaching impact on the health care industry.

For example, the rules establish three new anti-kickback statute (AKS) safe harbors and four new Stark Law exceptions that offer protection for remuneration exchanged between participants in a qualifying value-based arrangement. Value-based care is a payment model where payors offer health care providers and suppliers financial incentives to meet certain performance measures that improve quality of care or appropriately reduce costs.

The key initiative behind HHS’s regulatory changes is to ease the transition of health care services to value-based arrangements and move the Medicare program away from its traditional emphasis on fee-for-service...
arrangements, while maintaining strong safeguards to protect patients and programs from fraud and abuse. CMS and the OIG thus created the three value-based exceptions under the Stark law and the safe harbors under the AKS. The exceptions and safe harbors primarily benefit hospitals and physician groups, as they offer these entities a great deal of flexibility to enter into innovative value-based care arrangements that are protected under the AKS and comply with the Stark Law.

Pharmacy benefit managers, on the other hand, are generally excluded from the protections afforded under the new rules – as are other stakeholders in the health care supply chain, like drug manufacturers. The OIG specifically finalized the value-based arrangements safe harbors to exclude PBMs.

The impact of these substantial changes remains to be seen, but they are predicted to be favorable to health care providers and payors and aim to facilitate improved quality of care and lower health care costs.

If you have any questions about our firm’s health care litigation practice, contact Dee Miles, Ali Hawthorne, or James Eubank, lawyers in our Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com; Alison.Hawthorne@beasleyallen.com; or James.Eubank@beasleyallen.com.

Source: Law360.com

XXV. THE CONSUMER CORNER

The Shield Of Immunity For Amazon Is At Last Starting To Have Cracks

Recently, Amazon was sued by the parents of a 19-month-old who had swallowed the battery of a remote. The remote in the batteries create a caustic fluid that can eat through the esophagus. The 19-month-old almost died. The parents bought the remote from a seller they found on Amazon. The remote was defective and did not comply with the standards promulgated by UL LLC, a global safety certification company accredited in both the U.S. and Canada.

You may be surprised to learn that when you buy a product on Amazon, there’s little guarantee that what you are getting has been expertly vetted for safety. The Wall Street Journal reported recently that more than 4,000 banned, unsafe and mislabeled products were on the Amazon’s platform, ranging from faulty motorcycle helmets to magnetic toys labeled as choking hazards. That should shock even the most conservative person in your community.

Those faulty products have resulted in serious, sometimes fatal, injuries, setting loose a tidal wave of liability claims. According to court records viewed by The Verge, Amazon has faced more than 60 federal lawsuits over product liability in the past decade. The suits are a grim catalog of disaster: some allege that hoverboards purchased through the company burned down properties. A vape pen purchased through the company exploded in a pocket, according to another suit, leaving a 17-year-old with severe burns. Two days after Christmas in 2014, a fire started at a Wyoming home, blamed on holiday lights purchased through the company. Firefighters found a man inside, facedown and unconscious, according to court filings. He died that night.

Amazon has defended most of these lawsuits by arguing that it is not the “seller” of the product and thus cannot be held liable for the defect in the product that injures and/or kills its customers. Some may not realize that although Amazon acts as a direct seller of certain products, in some cases, it provides a platform, called Marketplace, for third parties to sell their products. Some of these third-party vendors store their products in Amazon’s warehouses which then ships them directly to customers. As Amazon tells it, Marketplace is more like Craigslist than Home Depot. The company is providing technology to connect two people – a buyer and a seller – but anything that goes wrong is their responsibility.

But a recent decision from a federal circuit court has produced cracks in Amazon’s liability shield. In 2014, a woman named Heather Oberdorf lost vision in one eye after a dog chewed a hose she had ordered from an Amazon Marketplace seller broke as she took her dog for a walk. Oberdorf sued Amazon, arguing that it was negligent for having the product on its platform. Ms. Oberdorf lost the case in a Pennsylvania district court, but the decision was reversed on appeal. The appeals court decided Amazon was so involved in the purchasing process that the company meets the definition of a “seller” of products under state law, and so could be held liable for defective third-party products on its platform.

In another recent case, the Texas Supreme Court has agreed to take up a certified question from the Fifth Circuit to determine whether Amazon.com Inc. can be considered a seller and held liable for the allegedly defective remote that was sold through its website that injured the 19-month-old after she swallowed the deadly battery (the case was described in the opening paragraph above). Jeff Meyerson of The Meyerson Law Firm PC, representing Plaintiff Morgan McMillan, stated:

“Unless they’re held accountable, there’s just no incentive for them to ensure the products on their website are safe. In our case, a little redhead girl from the Houston area, she almost died from a product that was clearly not compliant with UL standards.

After the Southern District of Texas found that Amazon could be held liable for the allegedly defective remote, the company petitioned the Fifth Circuit in May, arguing it only facilitated the sale, but had no control over the remote or its quality, as it was made and sold by a third-party seller in China. The Fifth Circuit sent the question to the state’s high court in December, saying it can only be answered by that court.

In November, the Ninth Circuit sided with Amazon in a case over allegedly defective hoverboards, affirming a district court’s dismissal of the case. A week later, however, the California Supreme Court let stand a precedent state appeals court ruling that found the online retailer can be held liable for the sale of allegedly faulty batteries through its online marketplace.

A New York trial court addressed for the first time whether Amazon.com Inc. can be strictly liable under New York law for injuries caused by an allegedly defective product offered on its website by a third-party vendor. Finding liability attached, the court joined only a handful of other courts nationwide that have addressed this issue head-on.

In 2019, a federal district court in Wisconsin held that Amazon.com could be held liable for damages caused by a product sold by a Chinese company through its Marketplace program. There, Luke Cain bought a bathtub faucet adapter from a Chinese company with no presence in the U.S. The Chinese company sold its product on Amazon.com. The faucet adapter malfunctioned and flooded Cain’s home. After State Farm paid to repair the home, it sued Amazon for selling and distributing a defective product. The court held that Amazon may be held liable under Wisconsin law as a “seller or distributor.” The court explained:

Amazon provided the only conduit between XMJ, the Chinese seller, and the American marketplace. Without Amazon, XMJ products would not be available at all in Wisconsin. Amazon did not directly set the price for the
Amazon means buying from a product. For most people, buying the sale from the beginning to the end.” The professors say, this makes its brand ahead of the product. Taken fulfillment services. Through services the company works with merchants to offer winners and losers through the place- of Corporate, Financial & Commercial Law published next year in the academe paper set to bezx18’s goods. This change in perspective has been a long time coming. In an academic paper set to be published next year in the Brooklyn Journal of Corporate, Financial & Commercial Law, two professors argue that Amazon acts as a “heavy hand” in its Marketplace, closely influencing purchases on its platform. “In our view,” the professors write, “the courts do not grasp the magnitude of the problem or the reality of the situation.” The company’s “contention that it is a neutral platform that simply facilitates sales between sellers and buyers is a myth,” they conclude.

The professors argue that Amazon influences winners and losers through the placement it gives products on its platform, including the coveted “buy box,” where sellers compete to appear. In some cases, the company works with merchants to offer fulfillment services. Through services Amazon Prime, the company directly places its brand ahead of the product. Taken together, the professors say, this makes Amazon much more than a background player just facilitating a transaction.

Aaron Twerski, a professor at Brooklyn Law School and one of the authors of the paper, says “Amazon’s got its fingers all over the sale from the beginning to the end.” The average consumer buying through Amazon has no idea of the logistics that go into shipping a product. For most people, buying through Amazon means buying from Amazon. “You’d have to be a genius to figure out what’s going on,” Twerski says.

Hopefully, the trend of holding Amazon accountable for selling defective products will continue. As the New York Court explained:

There is no question that e-commerce, and specific to this instance Amazon, has revolutionized the way New Yorkers and Americans generally shop. E-commerce has displaced brick and mortar storefronts. The consumer goes to Amazon’s website to look for a product in the same manner one would walk into a Lowes, Home Depot, or a neighborhood True Value, or order from one of those entities’ website. Amazon by its actions has charted its own course. The product is virtually, and in cases such as a Fulfillment by Amazon transaction, physically on an Amazon shelf. While Amazon has disclaimed title, it certainly maintains possession of the subject product. It is an Amazon employee who handles the product once the consumer makes the decision to purchase. It is Amazon who sets the rules of the transaction to which the consumer purchases the item. If a consumer has a problem with a product, it is Amazon who they contact. It is Amazon who demands indemnification in their services agreement. Amazon seeks to have all the benefits of the traditional brick and mortar storefront without any of the responsibilities.

We will continue to monitor the Amazon litigation. It’s quite evident that this company will be a major player in the retail market with no expected slowdown in sight. In fact, their sales will likely increase greatly. Clearly, Amazon should be held accountable when it puts a defective product on the market. If you need more information on the Amazon litigation, contact Dana Taunton, a lawyer in our firm’s Personal Injury & Products Liability Section, at 800-898-2034 or by email at Dana.Taunton@beasleyallen.com.

Sources: Law360.com and theverge.com

Pilgrim’s Pride settles out of price-fixing case for $75 million

Pilgrim’s Pride became the largest chicken producer so far to settle out of a massive price-fixing case in Illinois federal court. This case targeted as Defendants companies like Tyson Foods and Perdue. Pilgrim’s Pride and direct chicken buyers, or direct purchaser Plaintiffs, filed a notice of settlement saying they had reached an agreement resolving “all claims against Pilgrim’s.” No details on the settlement were given in the notice – the latest in a case that has also seen settlements between smaller chicken producers and direct and indirect buyers – but Pilgrim’s Pride Corp., disclosed in announcing the agreement that it would be paying $75 million. The agreement is subject to court approval.

Private Plaintiffs began suing the nation’s largest broiler chicken producers, including Pilgrim’s Pride, Tyson and Perdue, over claims of anti-competitive conduct in September 2016. The suits accuse the companies of coordinating and limiting production with a goal of raising prices, as well as exchanging detailed information about prices, capacity and sales volume through data compiler Agri Stats Inc.

The U.S. Department of Justice (DOJ) revealed an investigation into the industry in 2019 when it asked the Illinois federal court overseeing multidistrict litigation (MDL) on the allegations to let it seek a partial discovery stay, a request that was granted. Then in June, the DOJ announced the indictment of four poultry executives, including the sitting president and CEO of Pilgrim’s Pride and the president of Claxton Poultry, followed in October by the indictment of six more individuals. Pilgrim’s Pride then entered a plea agreement with the DOJ, saying it would pay a penalty of more than $110.5 million and cooperate with the investigation.

The settlement amount surpasses that of other settlements so far reached in the litigation, including a $13 million cluster of agreements reached with Peco Foods Inc., George’s Inc. and Amick Farms LLC.

Tyson said previously that it is cooperating with investigators and applying for leniency.

The direct purchasers are represented by Lockridge Grindal Nauen PLLP, Pearson Simon & Warshaw LLP and Hart McLaughlin & Eldridge LLC. The case is In re Broiler Chicken Antitrust Litigation (case number 1:16-cv-08637) in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

Neglect, Abuse Was Rampant in Georgia Nursing Homes During COVID-19 Lockdown

Last April, nursing homes and assisted living facilities in Georgia were ordered by Gov. Brian Kemp to close their doors to family members and advocates of patients to stop the spread of COVID-19 among their vulnerable populations. But doing so opened the door to breakdowns in care and unre-
ported criminal acts of neglect, abuse, and wrongful death, according to an investigative report published last December by the Atlanta Journal-Constitution (AJC).

The incidents the AJC reported were heartbreaking. In just one example, the paper reported Elaine Furman is still struggling to understand how her husband, John, died. Last March, when her 79-year-old husband’s dementia became too difficult for her to handle on her own, she moved him into Sandy Springs Place, an upscale facility she trusted. Mr. Furman was in otherwise good condition then, able to walk and feed himself.

When the nursing home shut down due to COVID-19, staff reassured Mrs. Furman that her husband was doing well. But less than two months later, when she was finally able to visit him again, what she saw shocked and terrified her. His body was covered in bruises and bedsores. He died the next day. Police investigated, eventually charging the administrator and head nurse with felony elderly neglect.

The Long-Term Care Community Coalition ranked Georgia’s nursing homes 43rd nationally in overall care staffing for the second quarter of 2020, and 48th in nursing care staffing. To help nursing homes staff their facilities, Georgia authorized an emergency Temporary Nurse Aide program, which allows nursing homes to hire staff without putting them through usual training.

But the AJC report noted that program enabled workers like Henrii Reynoso to get a job as a temporary aide at the PruittHealth-Shepherd Hills facility in LaFayette. Reynoso was later accused of committing numerous sexual assaults against residents during the lockdown months of the pandemic. When one victim told another aide what Reynoso had done to her, the aide told a nurse but the nurse said “it was very chaotic” at the facility and the incident went unreported. When the victim told a family member what happened, they called the police.

Cases of abuse and neglect among residents of nursing homes and assisted living facilities cannot be ignored by long-term facilities, especially during the pandemic. Our most vulnerable residents in these facilities must be protected.

Source: Atlanta Journal-Constitution

Home Fire Protection Recommendations

Most people consider their home to be their sanctuary from the dangers of the world. It’s the place to find comfort and security. It provides shelter, and a refuge from worry. Unfortunately, this peace can be shattered by a home fire.

Home fires are a major problem in America, and especially during the colder months of the year, causing tremendous property loss, injuries, and even deaths. According to the U.S. Fire Administration, residential fires are the leading property type for fire deaths (75%), fire injuries (77.1%) and fire dollar loss (43%).

The National Fire Protection Association reported from 2014-2018 more than one quarter of all reported fires occurred in homes. During this period, U.S. fire departments responded to an estimated average of 353,100 home structure fires per year. These fires caused an annual average of 2,620 civilian deaths; 11,030 civilian fire injuries; and $7.2 billion in direct property damage.

There are some simple things you can do to better protect your home from fires. You can find a list of these steps and more information on our website at beasleyallen.com/news/home-fire-protection-recommendations/

XXVI. CURRENT CASE ACTIVITY AT BEASLEY ALLEN

Our BeasleyAllen.com website provides all the latest information on all of the current case activity at Beasley Allen. The list can be found at the bottom of our homepage, top navigation, or on our Practices page of the website (BeasleyAllen.com/Practices/)

The following are some of the current case activity listing:

Business Litigation
- Antitrust
- Business Interruption Insurance
- Commercial Disputes
- Intellectual Property
- Pharmaceutical Pricing
- States & Municipalities

Consumer Protection
- Class Actions
- Insurance Disputes
- Pension Plans

Defective Products
- Defective Airbags
- Defective Tires
- E-Cigarette Explosions
- Heavy Truck Defects
- JUUL Vaping Devices
- On-the-Job Injuries
- Talcum Powder

Employment Law
- Fair Labor Standards Act
- Sexual Harassment
- Whistleblower
- Workplace Discrimination
- Workplace Retaliation

Medical Devices
- Hip Replacements
- Knee Replacements
- Physiomes

Medication
- Belviq Cancer
- Proton Pump Inhibitors
- Zantac Cancer

Serious Injuries
- Truck Accidents
- Auto Crashworthiness
- Aviation Accidents
- Heavy Equipment Injuries
- Premises Liability
- Sexual Abuse
- Single Vehicle Accidents

Toxic Exposure
- Benzene
- Environmental Exposures
- Mesothelioma
- Roundup
- Water Contaminations

The cases in the categories listed above are handled by lawyers in the four sections at Beasley Allen, which are Personal Injury & Products Liability, Mass Torts, Toxic Torts and Consumer Fraud & Commercial Litigation. The subject matter of a claim will determine which section would get the case.

XXVII. RESOURCES TO HELP YOUR LAW PRACTICE

Beasley Allen has been recognized as one of the country’s leading law firms, representing only claimants involved in complex civil litigation. We at Beasley Allen are both honored and humbled to have received that recognition. Our firm has truly been blessed. We understand the importance of sharing resources and teaming with peers in our profession. The firm is committed to investing in resources, including books authored by our lawyers, to help our fellow lawyers. For those who may be looking to work with
Beasley Allen, or simply are seeking information that will help their law firm with a case, the following are among our most popular resources. The names of the books and the authors are set out below.

Aviation Litigation & Accident Investigation

Beasley Allen lawyer Mike Andrews discusses the complexities of aviation crash investigation and litigation. The veteran litigator offers an overview to the practitioner of the more glaring and important issues to be aware of early in the litigation based on years of handling aviation cases. He provides basic instruction on investigating an accident, preserving evidence, and insight into legal issues associated with aviation claims while weaving in anecdotal instances of military and civilian crashes.

Tire Litigation: A Primer

Although tire failures, blowouts and detreads are foreseeable and preventable events, all too often consumers are unaware of the potential dangers from defective, old or degraded tires. Beasley Allen lawyer Ben Baker provides lawyers guidance on evaluating tire litigation and underscores the importance of inspecting the tires of all vehicles involved in a crash.

Nursing Home Abuse & Neglect Brochure

Long-term care facilities, including nursing homes, are rife with abuse and neglect and alarmingly high rates of underreporting. To assist families and lawyers pursuing justice for victims, Beasley Allen has prepared a brochure with information to help identify the signs of abuse and neglect, and advice about how to file a claim.

Co-Counsel E-Newsletter

Beasley Allen also sends out a Co-Counsel E-Newsletter, which is specifically tailored with lawyers in mind. It is emailed monthly to subscribers. Co-Counsel provides updates about the different cases the firm is handling, highlights key victories achieved for our clients, and keeps readers informed about the latest resources offered by the firm.

The Jere Beasley Report

We also consider The Jere Beasley Report to be a service to lawyers as well as the general public. We provide the Report at no cost monthly, both in print form and online. You can get it online by going to https://www.beasleyallen.com/publishing/jere-beasley-report/

You can reach Beasley Allen lawyers in the four sections of our firm by phone toll free at 800-898-2034 to discuss any cases of interest or to get more information about the resources available to help lawyers in their law practice. To obtain copies of any of our publications, visit our website at beasleyallen.com/publishing/.

XXVIII. PRACTICE TIPS OF THE MONTH FOR TRIAL LAWYERS

Beginners Primer To Identifying A Defective Knee Product Liability Case

This month Roger Smith, a lawyer in our Mass Torts Section, will give us some pointers on how to take in and handle a defective products case. He will discuss “a defective knee” product liability case. Let’s see what he has for us.

A potential client calls in. She had a total knee replacement surgery two years ago that she thought had gone well, but six months ago she woke up in immense pain. The pain persisted for months. After numerous doctor’s visits, her doctor shared that the knee device had loosened and would require a revision surgery to replace the loose components. Following the surgery and months of rehab, your potential client is now pain free again. But the ordeal has left her in financial ruin, and she just doesn’t understand how a device that was supposed to last 20-25 years failed so quickly. She is in tears.

You don’t have experience in medical device litigation. Do you take the case on yourself? Do you associate with another firm?

During the consultation, your new client doesn’t recall a lot of the details – only the dates of surgeries, surgeon names, and hospital names, but don’t let her leave the office without asking some basic questions – did her knee pain follow some type of injury or trauma? Did she experience any type of infection in her knee following her original knee procedure? A “yes” to either of these questions would be a red flag for a product liability claim. She answers “no” to both.

After she leaves your office, you stare out your office window – where do I start?

First, identify the medical records you need and order them. Ordering “any and all” medical records can lead to huge medical records bills. Instead, try target-ordering the records, which can help you manage costs while conducting your preliminary investigation. Ordering progress notes and imaging from treating orthopedic surgeons, operative reports, consultations, discharge summaries, imaging, labs, product identification (sticker) pages from the original (index) surgery as well as the second (revision) surgery will generally provide you with an overview of the case. Be prepared to spend an outlay of cash to get adequate records, but don’t go overboard!

Recognize and inform your client that COVID-19 has put a huge strain on our hospital systems, and to be prepared for long delays in receiving the medical records. Assess any statute of limitations issues up front, taking into consideration the length of time it may take to obtain records.

Once the records arrive, locate the product sticker page from the index records and identify the knee device model used in the original procedure. Some models are cemented in place while others are cementless. If cement is utilized, the brand of cement will also be identified.

A quick Google search of the device and/or cement will often lead to pages and pages of results with websites offering information about known defects in the devices used in your client’s surgery. If you aren’t so lucky, a Google Scholar search could identify medical articles and case reports of emerging issues with the devices that support a product defect claim. Don’t give up after a product-specific Google Scholar search doesn’t turn up anything. Sometimes general searches in Google Scholar are more fruitful.

As you review the medical records, look for terms that support your causation theories – metallosis, cement debonding, cement delamination, aseptic loos-
ening (loosening unrelated to an infection), and/or “gross” loosening. Working properly, the interface between the device and bone should be as strong as bone. If a surgeon is able to remove a device with little to no effort, something has gone wrong.

The question remains, however, whether the device failed due to a defect or due to other causes. Be mindful of common causation issues as you review the records. For example, doctor error is a huge causation question in medical device cases. Was the device properly aligned? References to “malalignment” or “improper placement” in the revision surgery records could be indicative of shifting of the device due to the loosening itself, but references to improper placement or malalignment following the original index surgery likely create a causation hurdle too difficult to overcome.

Did the doctor’s surgical procedure contribute to the failure? Unfortunately, medical records don’t always provide details, which leaves numerous open questions for a future treater deposition.

Be sure to also look out for references to infections or trauma. Unfortunately, our clients don’t always have perfect recollection.

At this point you’ve made it through the records. There are no apparent causation issues. The records reflect there was a delamination between the underside of the tibial baseplate and the cement mantle. The surgeon notes that no cement was adhered to the underside of the baseplate. Is there a defect in the tibial component? Did a defect cause the bone cement to fail? Be prepared to address both, and if the components are manufactured by different manufacturers, be prepared for a lot of finger pointing. These cases are expert intensive!

When you have finished your full assessment of the case and are prepared for filing, inform the client. It is critical when speaking to the client at this stage that you emphasize the complex nature of medical device cases. Carefully and thoroughly manage the client’s expectations, as these cases take a significant amount of time to litigate.

Beasley Allen lawyers continue to investigate cases involving individuals that have suffered premature failure of their knee implant devices. For more information, contact Roger Smith or Melissa Prickett at 800-898-2034 or by email at Roger.Smith@beasleyallen.com or Melissa.Prickett@beasleyallen.com.

XXIX. RECALLS UPDATE

A large number of safety-related recalls were issued in January. Significant recalls are being made available on our website, https://www.beasleyallen.com/recalls/.

You will always find the latest important product recalls on our site throughout the month. The response to this new approach for handling recalls in the Report has been good. You are encouraged to contact Shanna Malone, the Executive Editor of the Report, at Shanna.Malone@beasleyallen.com if you have any questions or to let her know your thoughts on recalls.

XXX. FIRM ACTIVITIES

Beasley Allen Lawyer And Employee Spotlights

DAVID DEARING

David Dearing, a lawyer in the firm’s Mass Torts Section, has more than 30 years of experience as a trial lawyer. Currently, David is primarily working on talcum powder cases linked to the development of ovarian cancer. He was part of all five talcum powder trial teams that won verdicts in 2016 and 2017 against Johnson & Johnson (J&J) and Imerys Talc America (Imerys), totaling more than $700 million. Five different juries in St. Louis and California found J&J liable for injuries resulting from the use of its talc-containing products, such as Johnson’s Baby Powder and Shower to Shower body powder. Two of the juries also awarded substantial amounts against Imerys, J&J’s body powder talc supplier. More talc cases are set for trial in 2021.

When David first joined the firm in 2012, he worked on the Hormone Replacement Therapy (HRT) litigation team, focusing on drugs such as Premarin, Prempro and Provera, which were shown to cause breast cancer in some women. He has also worked on Fosamax cases linked to spontaneous femur fractures in long-term users, and cases involving a class of diabetes drugs (Byetta, Januvia, Janumet, and Victoza) linked to pancreatic and thyroid cancer.

Nearly all David’s current clients have suffered the devastation of ovarian cancer, and many did not survive it. David describes how they got cancer:

“They unwittingly used J&J Baby Powder for feminine hygiene, just as the company advertised for them to use it.

A career that has spanned three decades took root when David was a young boy walking hand-in-hand with his father, also a lawyer, through a grocery store parking lot. David said he recalled asking his father questions about being a lawyer and trying to understand a lawyer’s job.

“Suddenly my dad opened the door to a stranger’s parked car and turned off the headlights,” David recalled. “Then he closed the door, and we kept walking.” David remembers asking, “Dad, is that what lawyers do?” David says, “He looked down at me, smiled, and said ‘Sometimes.’” David says that translated in his 6-year-old brain as, “lawyers help people,” and he added that, adding:

“Dad enjoyed his career as a lawyer, and for the past 30 years, a Circuit Court Judge. He still enjoys helping people both in and outside the courtroom.

David explains: “It’s a cliché as it sounds, my favorite part of practicing law is that I get to help people too. For the past 26 years, I’ve been helping people who have suffered tremendous pain and loss. I’ve walked with, sat with, prayed with and cried with some very special people facing devastating injury and hardship, and I like to think my representation and guidance was a comfort to them.”

Reflecting on his career, David said he has been thinking back on why he pursued this career and whether he achieved the goals he had when he entered the legal profession. His first job as a lawyer was as a criminal prosecutor in Jacksonville, Florida. After four years as a prosecutor, David left his civil service position and joined a small, high-stakes personal injury and medical malpractice firm, and he has been a Plaintiff trial lawyer ever since.

David is a member of the Alabama State Bar, The Florida Bar Association, Florida Justice Association, American Inns of Court – Chester Bedell Inn of Court and E. Robert Williams Inn of Court, where he holds the position of Emeritus, Master of the Bench,
The Million Dollar Advocates Forum, and the United States District Court, Middle District of Alabama, and the Middle and Southern Districts of Florida.

An award-winning lawyer, David is an AV Preeminent Rated attorney, the highest possible rating in both legal ability and ethical standards. He was the recipient of Beasley Allen’s 2016 Mass Torts Lawyer of the Year Award. In addition, David also was named one of Florida Trend Magazine’s Florida Legal Elite, as well as a Jacksonville “Top Lawyer” by 904 Magazine.

David says that he believes there are two things that set Beasley Allen apart from other firms. He made this observation:

First, it’s the quality of the people. The lawyers at the firm litigate with compassion and zeal and at the highest skill level, making it a nationally respected firm. And, we have extremely talented paralegals, assistants, tech gurus, investigators and staff. In short, the people of Beasley Allen believe in the mission of helping those who need it most, and they’re very good at it.

Second, Beasley Allen is a Christ-centered law firm. I’ve never worked anywhere else that exemplifies the love of Christ like the firm does. In this brutal and combative legal world we operate in, taking on some of the world’s largest, richest corporations, where lawyers often engage in scorched-earth tactics, and the public sees lawyers as untrustworthy scoundrels—some for good reason—Beasley Allen stands out like a light in the darkness. The firm’s commitment to those in need is genuine, and in keeping with Christ’s directive to love thy neighbor. And we do it with utmost professionalism and ethics.

David received his law degree in 1991 from Samford University Cumberland School of Law, where he served as associate editor of the Cumberland Law Review. Prior to law school, he attended Furman University, earning a bachelor’s degree in economics.

David and his wife, the former Vicki Millo, meet in law school, and have been married 27 years. Vicki is a professor at Hofstra University School of Law. David and Vicki have two children, one in law school at Emory University, and one in graduate school at Troy University. They are members of Legacy Anglican Church where David and Vicki serve on the vestry. David also is the former varsity basketball coach for Ezekiel Academy in Montgomery. The Dearings enjoy travel and spending time on the water.

David, a talented lawyer, is a definite asset to our firm. He is totally dedicated to the mission of the firm and to his clients. We are blessed to have him with us at Beasley Allen.

MATT GRIFFITH

Matt Griffith, a lawyer in Beasley Allen’s Toxic Torts Section, joined the firm in January and he is based in the firm’s Mobile office. Matt is part of the team representing the State of Alabama in the Opioid litigation. He also handles cases involving environmental contamination of water systems. Before joining Beasley Allen, Matt was involved in high-stakes commercial litigation, representing both Plaintiffs and Defendants, across the Gulf Coast and eastern seaboard.

He represented corporations both in the boardroom and in courtrooms, gaining a unique understanding of how corporations make key decisions as it relates to litigation. Further, Matt handled numerous lawsuits involving environmental and toxic exposure issues including cases focused on solid waste landfills, reclaimed dump pits and cases involving the Clean Water Act and the Resource Conservation and Recovery Act (RCRA).

“Since fifth grade, I knew I wanted to be a lawyer so that I could help people,” Matt recalled. “I enjoy tackling complex issues head-on and helping my clients navigate the complex legal system.”

Matt graduated magna cum laude from Faulkner University Thomas Goode Jones School of Law. While in law school, Matt received the American College of Trial Lawyer’s Lewis F. Powell, Jr. Award for Advocacy Excellence. He was a national semi-finalist for the National Trial Competition (2008) and recognized for the Best Submission at the National Mock Trial Competition (2007). While in law school Matt received the Dean’s Scholarship (2006-2008) and received recognition as having the best paper in several law school courses. He also served as junior editor and articles editor for the Jones Law Review. Matt completed his undergraduate work at Auburn University, earning a B.A. in political science.

Matt is a member of the Alabama State Bar Association, American Bar Association and the Mobile Bar Association. He also is a member of the Mobile Chapter of the National Multiple Sclerosis Society.

Matt says tackling complex, sophisticated legal issues and navigating the legal system on behalf of his clients keep him motivated in his practice of law. Matt explained:

Nothing is more professionally rewarding at the conclusion of a case than knowing I helped make a real, and hopefully meaningful, difference for my clients.

Matt says he looks forward to bringing his passion and experience in handling complex litigation to Beasley Allen, adding:

The firm routinely and successfully handles complex litigation on behalf of clients across the nation. I joined the firm because I am excited about the opportunity to practice with some of the country’s best trial lawyers while litigating sophisticated cases.

Matt lives with his wife Lauren and their three children in Mobile. When not working, he enjoys spending time at the beach on Ft. Morgan Road with his family.

Matt is another tremendous addition to our firm. He is totally dedicated to the practice of law and to helping folks obtain justice. We are most fortunate to have Matt with us in the Mobile office.

MARY LEAH MILLER

Mary Leah Miller is now a lawyer in Beasley Allen’s Atlanta office. She is a member of the firm’s Personal Injury & Product Liability Section. Mary Leah’s practice focuses primarily on product liability actions with an emphasis on automotive defects. She has dedicated her legal career to exclusively representing individuals who have been injured and the families of victims of wrongful death. Mary Leah considers it an honor and a privilege to represent injured clients and their families.

“I became an attorney in order to be a voice for people that need help,” Mary Leah says. And, that is what she has done throughout her career.

Before joining Beasley Allen, Mary Leah worked with Tom Willingham, a tremendously talented lawyer who has been very successful in Birmingham. Tom is now at Beasley Allen. Their firm specialized in product liability litigation. Mary Leah has represented individuals who have been catastrophically injured or killed against foreign and domestic manufacturers of various products, including automobiles, motorcycles, all-terrain vehicles, heavy trucks, car seats and juvenile products, tires, consumer products, prescription drugs, and medical devices. Mary Leah’s knowledge and experience have enabled her to obtain millions of dollars in settlements and more than $30 million in judgments for those who have been wrongfully killed.
Mary Leah says having the capacity to make a difference in the life of a client following a tragic, life-changing event is what fuels her passion for practicing law. She says:

While I cannot heal their catastrophic injuries, or bring their loved one back, my hard work can bring a good result by way of settlement or judgment that will ease their burdens and significantly make a difference in their life moving forward. This is especially true of clients who have suffered a catastrophic injury. It is truly humbling, a joy and an honor to achieve a good result that will help provide access to medical care, equipment, and other previously cost-prohibitive items to improve their quality of life.

Mary Leah was named to the Super Lawyers “Rising Stars” list (2014-2017), which recognizes the top up-and-coming attorneys and has been named to the Super Lawyers List since 2018. She is a member of the Georgia Trial Lawyers Association (GTLA), the Attorneys Information Exchange Group (AIEG) where she serves on the Board of Directors, and the Alabama, Georgia and Mississippi Bar Associations. Mary Leah is also a member of the Judge James Edwin Horton American Inn of Court and is a national member of the Oder of Barristers. She previously served on the Junior Board of Directors of the Alabama Civil Justice Foundation.

A Duke University graduate, Mary Leah obtained a B.A. in 2004. She earned her law degree, with a Certificate in Trial Advocacy, from Samford University Cumberland School of Law in 2007. While in law school, Mary Leah was a member of the National Trial Advocacy Team and served on the Trial Advocacy Board. She also was a member of the American Journal of Trial Advocacy, elected to the Honor Court, and selected as a Who’s Who Among Students in National Colleges and Universities.

Mary Leah is also actively involved in her community including serving on the board of directors for Blessed Brokenness where she also leads a small group through the organization for women walking through infertility, miscarriage and infant loss. Blessed Brokenness is a nonprofit organization that brings spiritual healing and financial blessings to couples who suffer from infertility and loss through faith-based studies and scholarships.

Mary Leah and her husband Rodney (also a lawyer) live in Birmingham, Alabama, with their two very spoiled dogs, Jack (a dachshund) and Molly (a German shorthaired pointer). Mary Leah and Rodney are active members at Church of the Highlands where she serves in many capacities including the prayer team, outreach team and leads small groups. In addition to spending time with Rodney and their dogs, Mary Leah enjoys watching and attending sporting events, particularly basketball. She also enjoys running, traveling and cooking.

Mary Leah says she always respected Beasley Allen and is happy to now be part of the firm, saying, “as the firm continues to grow, it has not compromised the Biblical values upon which it was built. It is a firm of people with great character that put their faith into action in the representation of their clients.”

We are most fortunate to have Mary Leah join our firm. She brings a tremendous amount of talent and experience in an important area of law. We are blessed to have her with us in the Atlanta office.

MEGAN OWENS

Megan has been with the Firm for more than a year. She is a Specialist II in the IT Section, assisting in developing Microsoft 365, automation projects with Power Platform, and productive collaboration through Microsoft Teams, Planner, and SharePoint. Megan recently began working alongside the Marketing Team to develop strategic policies and procedures.

Megan grew up in Millbrook and graduated with a degree in Computer Science. Megan and her 17-year-old daughter, Kristina, live in Auburn. Kristina is a Junior at Auburn High School and dually enrolled at Auburn University. One of Megan and Kristina’s favorite activities to do together is working out at Crossfit. In her spare time, Megan loves vacationing at any beach, but 30A is an all-time favorite. She also loves spending time with her parents, brother, and nieces.

Megan joined Beasley Allen after working in the IT and Marketing Industry for 16 years, but Megan says that she has never worked for a company where people care as much as they do at Beasley Allen. Megan says, “Beasley Allen feels like a family. I love working with so many talented, caring people.”

Megan is a definite asset to Beasley Allen and has an important role in the firm. We are most fortunate to have her with us.

ALEX SALLAS

Alex Sallas has been with the Firm for one year and is a Law Clerk in our Consumer Fraud & Commercial Litigation Section. Alex assists the lawyers with research questions and works with them on discovery issues through document review.

Alex, who is from Ozark, Alabama, is a third-year law student at Jones School of Law where she is the Vice President of the Student Bar Association. Alex is also the Curriculum Committee Student Representative, and student representative of the Alabama State Bar for Jones. Over the years Alex has been able to compete in several trial competitions where she was given the chance to travel and compete with law students all over the country. Last year Alex was asked to compete in the National Trial Competition where Alex and her team advanced to the semi-finals.

In her spare time, Alex enjoys running or participating in a workout class. She also enjoys spending time at the local coffee shops around town like Prevail and Cafe Louisa.

When asked what her favorite thing about working at Beasley Allen is, Alex says, “it has to be the people here. Everyone is always willing to help you no matter how busy they may be.”

Alex is in a position to learn the practical side of being a lawyer. She is gaining valuable experience that will help her once she becomes a lawyer. Law clerks at Beasley Allen are important to the firm. We wish Alex the very best and predict a bright future for her as a lawyer.

HANNAH SANDERS

Hannah Sanders has been with the Firm for a year. She is a Relief Receptionist and is an Intake Specialist for the Consumer Fraud & Commercial Litigation Section. As the Fraud Intake Specialist, Hannah speaks to new clients about cases related to employment fraud, auto defect class actions, life insurance fraud, property insurance fraud, sexual harassment, and health care fraud. Hannah also assists with document review related to auto class action lawsuits.

Hannah and her husband Jason have been married for two years. Hannah has two bonus children, Paige (18) and Chase (13). Their family has a lab-mix puppy, Marley, who is a year old. In her spare time, Hannah says she loves spending time with her family, friends, and of course the puppy! She loves going to the beach, to the gym, and just being active.

When asked what her favorite thing about working at Beasley Allen is, Hannah says, “I love getting to know the clients and helping them in their time of need. I love the people I work with and I absolutely love what this firm believes in and stands for.”
Hannah performs a valuable service at the firm. She does good work and we are fortunate to have her at Beasley Allen.

**HAYDEN SIZEMORE**

Prior to joining Beasley Allen on Jan. 4, Hayden Sizemore was a solo practitioner handling a variety of cases including civil litigation, criminal defense and family law matters. Hayden now works with the firm’s Mass Torts Section, helping investigate claims by Zantac users who developed certain types of cancers after taking the drug including liver, bladder, stomach, colon, kidney and pancreatic cancer.

Hayden says witnessing injustices while growing up in the rural south led her to pursue a career as a lawyer. She says: “I knew the only way to truly make a difference was to become an attorney and advocate for change, one client at a time.” Additionally, the six years she spent working for Alabama’s prison system strengthened her desire to become a lawyer.

Hayden earned a B.S. degree in criminal justice from Faulkner University before completing her Master’s level work and earning an M.S. in justice & public safety from Auburn University Montgomery. She earned her law degree, magna cum laude, from Faulkner University Thomas Goode Jones School of Law in 2020. During law school, Hayden served as a law clerk at another Plaintiff’s firm, as well as for the Alabama Office of Attorney General, Criminal Appeals Division and for Judge Patrick D. Pinkston, 19th Judicial Circuit, Elmore County District Court. She also was a student intern in the law school’s Elder Law Clinic.

Additionally, Hayden served as editor of the Faulkner Law Review and served as Junior Advocate for the Faulkner Law Board of Advocates. She received Best Appellate Brief Award in the 1L Moot Court Competition and the Justice Lewis F. Powell, Jr. Award for Excellence in Advocacy. Hayden was recognized for Best Paper in several law school courses and was recognized as a Dean Fellow. She was also regional winner of the New York City Bar Association National Moot Court Competition.

When asked what is her favorite part of practicing law, Hayden says:

> It is meeting with the clients. Oftentimes, clients come to us nervous, scared even, and are not sure whether to trust us. It is my goal that every client leaves my office feeling better about their situation with a good understanding of the proceedings and all potential outcomes.

Hayden is a member of the Alabama State Bar and the Montgomery County Bar Association. She is also a member of the American Inns of Court Hugh Maddox Chapter, the Alabama Criminal Defense Lawyers Association (ACDLA) and the Alabama Peace Officers Association. She also is active in the Montgomery Volunteer Lawyers Program where she has participated in “Lawyer for a Day” events.

Hayden is married to Bryan Sizemore and they have three children. They make their home in Prattville, Alabama. Outside of work, Hayden is an avid Auburn fan and enjoys spending time with her family, gardening, and crafting.

Hayden says she admires Beasley Allen because of the individuals it represents, people “who would otherwise have no recourse against powerful entities.” She says: “I believe Beasley Allen is unique because not only does the firm handle a variety of cases, but the cases impact real people in our communities.”

Hayden is a definite asset to the firm and we are glad to have her with us. She is doing very good work in an area of critical concern.

**DAVIS VAUGHN**

Davis Vaughn joined Beasley Allen in December as a lawyer in the Mass Torts Section. But Davis is not new to the firm. He began working at Beasley Allen in high school, helping in the mailroom with clerical tasks and assisting paralegals. During that time, Davis says he developed a passion for the law and for helping folks in need.

Now, Davis is working on cases related to the use of JUUL vaping devices by minors and young adults. Davis came to us from a very good law firm where he had represented clients in both state and federal courts across the country in a broad range of commercial, product liability and pharmaceutical cases. He is an experienced lawyer and has frequently been involved in high-stakes litigation matters.

As with many of our lawyers, Davis explains that he “developed a passion for advocating on behalf of others” at a young age. He says: “I felt a calling to become a lawyer as I would use this passion to help further the interests of people seeking solutions to serious problems.”

This passion continues to be his driving force as a practicing lawyer and Davis says advocating for his clients is his favorite part of practicing law. Davis observed:

> Unfortunately, the legal system features many barriers in both access and understanding. But lawyers have the privilege of helping alleviate the stress of navigating those barriers. It is so fulfilling to feel like my advocacy played a part in helping a client achieve a desired result.

The University of Alabama graduate (cum laude) received a full scholarship as a member of the University’s Speech and Debate Team and competed successfully in tournaments throughout the country. Davis earned a B.A. in communication studies and political science. He was a member of the Delta Kappa Epsilon fraternity where he served in multiple executive positions and as the undergraduate representative on the fraternity’s international board. Davis also served as President of UA Greek Relief, a philanthropic organization aimed at helping those affected by the April 2011 tornado.

In 2017, Davis earned his J.D. (summa cum laude) from the University of Mississippi School of Law. During law school, he served on the executive boards of the Mississippi Law Journal and the Federal Courts Law Review. Davis won the 1L Moot Court Competition, continuing on to compete as part of the National Environmental Moot Court team and coaching the National Health Care Law Moot Court team. Davis also worked with the Mississippi Innocence Project and helped with the initial representation of three innocence claims. Davis was also published multiple times, including articles in the Texas Review of Entertainment and Sports Law and the Consumer Finance Law Quarterly Report.

Davis is a member of the Alabama State Bar and the Birmingham Bar Association where he serves on the Mentoring Committee and Court Liaison Committee. He also is actively involved in the Birmingham community, serving as a member of Alzheimer’s of Central Alabama Junior Board and the Alabama and Lyric Theatres Junior Board.

What brought Davis back to our firm is his belief that the lawyers at Beasley Allen practice law in the right way. He says:

> In high school, I worked at the firm in the mailroom and also assisted with different clerical tasks. I was nothing more than a kid trying to make some money but working closely with the attorneys piqued my legal interests. Every single attorney in the firm treated me as if I was just as valued and respected as anyone else. The way the attorneys treated people (whether that be a client, opposing counsel, or the high school mail temp) stuck with me. It is why I chose to come back to Beasley Allen as a practicing attorney.
A Montgomery native, Davis now lives in Birmingham. Away from the office, he enjoys spending time with his puppy, Leo. Davis is a very good lawyer and we are fortunate to have him with us.

TOM WILLINGHAM

Tom Willingham has returned to his hometown of Atlanta, Georgia, to join Beasley Allen’s Personal Injury & Products Liability Section. Before joining our firm, Tom was the founding partner of the Law Offices of Thomas P. Willingham, P.C., based in Birmingham, Alabama. His practice remains focused primarily on product liability actions with an emphasis on automotive defects.

In 1987, Tom began his law career as a defense attorney, primarily representing automobile manufacturers. Tom says:

After seeing firsthand the devastating consequences to victims of carelessness made by automotive manufacturers, I was compelled to change the focus of my practice to help the victims.

It was then when Tom began his career representing those who had been catastrophically injured or wrongfully killed. His prior experience as a defense lawyer gives him unique insight into screening, evaluating, and prosecuting these complex product liability cases. Since 1992, Tom has exclusively represented victims, many of whom have been catastrophically injured or killed in automobile accidents as a result of a defectively designed automobile. The veteran litigator has handled automotive product liability cases involving virtually every known automobile defect. Some of these include cases involving lack of vehicle stability, manufacturers’ failure to install electronic stability control, manufacturers’ failure to install rear seat lap-shoulder belts, defective steering system components, seatbelt restraints, airbags, fuel tanks, roof structure components, brakes and door latch components.

Takata Corporation, a manufacturer of airbag inflators, and Honda had hidden for years that defective Takata airbags explode and sent metal shrapnel throughout the vehicle resulting in injuries and deaths to vehicle occupants. These defective airbags were originally thought to be only associated with Honda vehicles. Tom was lead counsel in Brandt v. General Motors, which showed that the defective Takata airbags were not just limited to Honda vehicles, like Takata had said, but were in virtually every vehicle in which a Takata airbag was installed prior to 2015. This case led to the expansion of the largest safety recall in automotive history with tens of millions of vehicles being recalled.

“My favorite part of practicing law is being able to persuade a jury to right a wrong to those victims,” Tom says.

Finding his niche in product liability actions with an emphasis on automotive defects, Tom has obtained verdicts and settlements in favor of his clients in excess of $150,000,000 over the course of his career and has been involved in automotive product liability litigation against virtually all automotive manufacturers, both domestic and foreign including General Motors, Ford, DaimlerChrysler, Toyota, Nissan, Honda, Suzuki, Daihatsu, Hyundai, Mazda, Mitsubishi, Freightliner, Kenworth, BMW, and Kia.

Tom has been recognized as an AV Preeminent Rated attorney by Martindale Hubbell. This is the highest possible rating in both legal ability and ethical standards. Tom is also regularly selected to the Super Lawyers list since 2014. This designation means that he is a top-rated attorney as recognized by peers. He has been named to various Super Lawyer lists including Alabama, Georgia, Mid-South Region (featuring attorneys in Alabama, Arkansas, Mississippi and Tennessee). Super Lawyers uses a patented selection process that includes independent research, peer nominations and peer evaluations. In 2020, Tom was selected to the Top 50 Super Lawyers in Alabama and the Top Personal Injury Products: Plaintiff category for Mid-South Super Lawyers.

Tom is a Board Member of the Attorneys Information Exchange Group, which is a nationwide group of Plaintiff lawyers who actively prosecute automotive defect cases. This group collectively pulls information and testing to assist their members in handling these extraordinarily complex and expensive cases. He is also a member of the Georgia Trial Lawyers Association (GTLA) and the Alabama and Georgia Bar Associations.

Tom completed his undergraduate study at Mercer University, graduating with a B.A. in 1984. He earned his law degree at Samford University Cumberland School of Law in 1987. Tom is a native of Atlanta, Georgia, and has two adult children. His daughter, Gracie, is a lawyer practicing law in New York and his son, John, is a Pediatric Resident in Baton Rouge, Louisiana.

Tom says he is glad to become a part of Beasley Allen. He says:

The firm has a reputation as a premier litigation law firm that works hard to achieve a fair and equitable outcome for its clients. Ensuring justice to all those who have been victims of circumstances beyond their control is Beasley Allen’s primary focus, which aligns perfectly with my passion for helping those in need.

The addition of Tom to our firm is most significant. He is tremendously successful trial lawyer and we are quite pleased that he would come with us. We are blessed by his joining the firm.

XXXI. SPECIAL RECOGNITIONS

Greg Allen Named To Lawdragon Hall of Fame

We are pleased to let you know that Greg Allen was recently named to the Lawdragon Hall of Fame. Greg has been working for the firm since 1980, shortly after I opened the office as a sole practitioner and while he was a law student at Jones. Greg is our Lead Products Liability Attorney, and I don’t think anyone could argue that he isn’t one of the very best products lawyers – best lawyers, period – in the country.

According to Lawdragon, “Hall of Fame inductees are among the most acclaimed of their generation, having led America’s signature law firms to unprecedented heights, achieved civil rights advances and changed our world for the better.” This year 34 lawyers across the country were selected for induction to the Hall of Fame. Greg had this to say about receiving this honor:

I am humbled by the recognition by Lawdragon. It has been in honor to represent and serve my clients over the years. The people I represent have had life altering experiences with defective products. I enjoy fighting on their behalf to obtain justice.

Recognition by Lawdragon is an honor as it stands as one of the most respected groups in the profession. Recipients of this honor are determined by editorial staff research of top verdicts and settlements as well as one-on-one interviews with lawyers across the nation. The 2021 designees also consist of United States Supreme Court Justices.
XXXII. FAVORITE BIBLE VERSES

Ben Baker, a lawyer in our firm’s Mass Tort Section, furnished several Bible verses that he says have brought him great comfort during this time of civil and political unrest.

Learn to do good; Seek justice, Rebuke the oppressor; Defend the fatherless, Plead for the widow. Isaiah 1:17

Likewise you younger people, submit yourselves to your elders. Yes, all of you be submissive to one another, and be clothed with humility, for “God resists the proud, But gives grace to the humble.” 1 Peter 5:5

David Byrne, a lawyer in our firm’s Mass Tort Section, furnished several Bible verses that he says have brought him great comfort during this time of civil and political unrest.

First and foremost, we are called upon to “[turn] the world upside down” through preaching the gospel (Acts 17:6-7), not by rioting. And “yes,” the Bible tells us we are to respect our governing officials:

Every person is to be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God. (Romans 13:1)

But make no mistake, David says our first duty is to God – and not to any public official whose words or actions run contrary to God’s commands. As we learn from the book of Acts:

We must obey God rather than men” (Acts 5:29). More specifically, we are commanded to “Act as free men, and do not use your freedom as a covering for evil, but use it as bond slaves of God” (1 Peter 2:16).

Finally, in these times of stress and political anxiety, David reminds us that it’s important to understand that God is not aligned or affiliated with any political ideology or man-made belief system. Instead, Peter tells us in the book of Acts that “I most certainly understand now that God is not one to show partiality, but in every nation the man who fears Him and does what is right is welcome to Him” (Acts 10:34-35).

XXXIII. CLOSING OBSERVATIONS

Congress Must Reject Insurers’ Virus Liability Shield

It’s most unfortunate that many in Corporate America have attempted to take advantage of the pandemic for their own purposes. A prime example is the proposed and very broad COVID-19 liability shield for corporations, schools, health care providers and other organizations. This broad shield was proposed by GOP Senators, but it fell into question in January when control of the U.S. Senate shifted to the Democrats. The legislation was being pushed hard by the insurance industry.

It was quite obvious that the insurance industry was banking on the Safe to Work Act, legislation to shield corporations nationally for coronavirus-related lawsuits to feather their own nest so to speak. The industry was saying that without this Act their policyholders would be hit with a slew of COVID-19-related lawsuits, many of which they predictably claimed would be frivolous. Democrats, on the other hand, correctly said a corporate liability shield would strip away much-needed protections for workers and consumers. The plight of workers in crowded and unsafe meat packing plants could be exhibit “A” to rebut the industry’s claim of frivolous lawsuits being a threat.

Jenny Chou, Executive Assistant to our Managing Attorney Tom Methvin, sent in two scriptures for this issue. She says her all-time favorite scripture is Micah 6:8 NIV. Jenny says she uses this scripture as a compass and guide in her life.

He has shown you, O mortal, what is good. And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God. Micah 6:8

Jenny says she also finds comfort in John 14:27 given the turmoil in the world and all of the uncertainty.

Peace I leave with you; my peace I give you. I do not give to you as the world gives. Do not let your hearts be troubled and do not be afraid. John 14:27 NIV

Mitch McConnell (R-Ky), while still Majority Leader, had called the shield a deal breaker, which stalled negotiations of a second relief package for months, both before and after the election. Democrats refused to back down as well, arguing that such protections for corporations were nothing more than a contemptuous attempt at blatant tort reform and were anti-worker.

But since Democrats flipped both of Georgia’s Senate seats and swung control of the Senate – albeit narrowly – to the Democrats, the chances of further discussion on the COVID-19 liability shield will likely die in its tracks as aid to state and local governments should take precedence with the Biden administration.

However, the Democrats will have to remain vigilant in order to win this battle and give workers exposed to the coronavirus in the workplace and denied personal protective equipment (PPE) or other protections by their employers the opportunity to recover damages in valid and legally sound litigation.

Meanwhile, the U.S. COVID-19-related death toll has reached more than 450,000, surpassing the number of Americans killed in World War II. The numbers are expected by the experts to soon surpass 500,000, saying the toll may go as high as 609,000. Neither side in the Senate should use the pandemic as a means of passing legislation that is pushed by special interests and unrelated to the deadly virus. That is especially true when it comes to tort reform measures.

Sources: Law.com and Law360.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

Injustice anywhere is a threat to justice everywhere.

There comes a time when one must take a position that is neither safe nor politic nor popular, but he must take it because his conscience tells him it is right.

The ultimate tragedy is not the oppression and cruelty by the bad people but the silence over that by the good people.

Martin Luther King, Jr.

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

Vincent Lombardi

Kindness is a language which the deaf can hear and the blind can see.

Mark Twain (1835-1910)

I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country....corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.

U.S. President Abraham Lincoln, Nov. 21, 1864

In his December 1902 State of the Union address, Theodore Roosevelt said of corporations: "We are not hostile to them; we are merely determined that they shall be so handled as to subserve the public good. We draw the line against misconduct, not against wealth."

The 'Machine politicians' have shown their colors. I feel sorry for the country however as it shows the power of partisan politicians who think of nothing higher than their own interests, and I feel for your future. We cannot stand so corrupt a government for any great length of time."

Theodore Roosevelt Sr., December 16, 1877

The opposite of poverty is not wealth; the opposite of poverty is justice.

Bryan Stevenson, 2019

Get in good trouble, necessary trouble, and help redeem the soul of America.

Rep. John Lewis speaking on the Edmund Pettus Bridge in Selma, Alabama, on March 1, 2020

Ours is not the struggle of one day, one week, or one year. Ours is not the struggle of one judicial appointment or presidential term. Ours is the struggle of a lifetime, or maybe even many lifetimes, and each one of us in every generation must do our part.


XXXIV.
PARTING WORDS

The MAPS Project By Mercy House

Long-time Montgomery television station WSFA has donated its former building at 12 East Delano Avenue to the Mercy House, a nonprofit organization that runs a daytime shelter for homeless and is a gathering spot for neighborhood youth in West Montgomery. An official ribbon cutting was held on the front steps of the building on Jan. 18. WSFA broadcast “12 News” at the Delano facility for more than 65 years before moving to a new downtown building at 445 Dexter Avenue in 2020. Mercy House has a mission of providing opportunities to persons in need. The securing of this building will greatly assist their efforts.

Beasley Allen has been on board with Mercy House for several years and also has given them assistance on the MAPS project.

Mercy House’s “Ministry About People” (MAPS) not only provides shelter for the homeless, it also serves food for the hungry. MAPS will also assist in preparing people for good jobs. Prior to the pandemic, Mercy House was serving 35 meals per day to those in need. Now, the nonprofit provides up to 150 meals daily. Mercy House provides a tremendous service in many other ways to people in need.

Rev. Ken Austin has been hard at work in West Montgomery. He got the Mercy House started. “The needs in our community are overwhelming; homeless people, people hungry, kids who are not being fed daily,” Austin said during the ribbon cutting ceremony. “We went to the food bank and started loading up food that we can help families who had a need for food.”

Renovations are currently underway to turn the building into a trade school where those in need can learn trades and earn livable wages, “so they can provide for their families and for themselves,” Ken Austin said. The new center is expected to be open by March.

Mercy House is a dedicated ministry that is making a difference in Montgomery. We have considered it a privilege to support the mission of Mercy House through the years, and especially honored and humbled to play a role in their new facility. You can see the hand of God at work in this ministry, as they are able to reach more people.

The pandemic has thrown into stark relief the very real needs of so many of our neighbors. Sometimes you need a hand, sometimes you can lend a hand. All of us at Beasley Allen are glad we were able to lend a hand in this project. Leon Hampton, a Beasley Allen lawyer, serves on the Board of Directors for the Mercy House.

It’s encouraging to see something that is good and positive happening in the Capitol City at a time when much of the daily news in our country is not good. God has and will continue to bless Ken Austin and all of those at Mercy House for making a difference in the lives of people in need. We need more people like Ken involved in all phases of life in America!

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No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.
On January 7, 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 more than 40 years since he began the firm with the intent of “helping those who need it most.” Today, Beasley Allen has offices in Atlanta, Montgomery and Mobile, and employs more than 275 people, including more than 80 personal injury lawyers. Beasley Allen is one of the country’s leading law firms involved in civil litigation on behalf of claimants, having represented hundreds of thousands of people.