The JERE BEASLEY REPORT

March 2022

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LAW FIRM

I.
CAPITOL OBSERVATIONS

Important Arbitration Victory In Congress

Our firm has been a longtime staunch opponent of forced arbitration in consumer and employment contracts. Beasley Allen lawyers have been at the forefront fighting the use of arbitration and other tactics by Corporate America designed to suppress access to the U.S. civil justice system by victims of corporate abuse and wrongdoing. All of us at Beasley Allen applaud passage in Congress of H.R. 4445 (Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2022) – an Act restoring access to justice to survivors of sexual assault and harassment.

This legislation will reinstitute the right of victims to hold their attackers and the huge corporations they hide behind accountable in a court of law. The Act gives survivors their voice back and is long overdue. Forced arbitration is one of the many ills devised by those who want to silence victims of wrongdoing, limit their access to justice and secretly hide deplorable behavior of wrongdoers behind the closed doors of arbitration. Individuals have arbitration forced on them in their consumer and employment contracts, and most never know it until they are injured and damaged and have a claim.

Beasley Allen has fought for decades to protect plaintiffs' access to justice. Our work on behalf of victims has been critical to improving health and safety and holding bad corporate actors accountable. Hard-won victories on behalf of consumers and workers have successfully removed defective products from the stream of commerce; uncovered false and deceptive marketing schemes and other fraudulent activities; exposed ruthless employers willing to jeopardize worker health and safety to increase profits.

Source: U.S. Congress

II.
BIG TRUCK ACCIDENT LITIGATION

Why An Experienced Trucking Lawyer Is Always Needed

Lawyers in our line of work see lots of claims involving serious motor vehicle accidents. More than 20 million motor vehicle accidents occur each year in the United States. All too many of these involve semi-trucks. It's true that the United States and various other countries around the world benefit greatly from the transportation of commercial goods carried by trucks. It is estimated that more than 70 percent of the goods in the United States today are transported by approximately 1.9 million semi-trucks.[1] The trucking industry provides over 8.9 million jobs to people in the United States.[2] The benefits of trucks are unquestionable, but the dangers caused by trucks on our highways can be unparalleled.

[1] Wagner, Rob, *The History of Semi Trucks* (http://www.ehow.com/about_5387749_history-semi-trucks.html)

[2] *Available at* (http://www.truckinfo.net/trucking/stats.htm)

In 2009, there were approximately 3,380 fatalities and 74,000 injuries due to large truck-related accidents. Those numbers jumped to 5,237 fatal crashes, an increase of 47%. The injuries increased 62%, up to 97,000. The ratio of injuries to trucks on the road is extremely high, with approximately 90,000 plus accidents and injuries each year. Noncommercial drivers, especially those that commonly utilize the American interstates, share the roadways with commercial motor vehicles (CMVs) or trucks. The risk of fatalities is far greater when a truck is involved in a collision for obvious reasons. The truck is larger and causes much larger damages when in a collision.

To put this in perspective—a Toyota Camry, one of the more common vehicles on the road, weighs approximately 3,400 pounds; a fully loaded semi-truck can weigh from 80,000 to 230,000 pounds and be over 175 feet in length while hauling electric windmills.[3] When a truck and car collide, the truck will win every time, often resulting in serious injury or death to the car's driver. If a death occurs in a crash involving a truck, 98 percent of the time, the deceased is the other vehicle's driver.[4] The chances are a lawyer in private practice will run across at least one truck wreck case during their career is very high.

Yet, these cases are extremely complex. Numerous reg-

[3] Allen, Roger C. and Chipman, Charlie, *How to Teach Jurors the Dangers of Trucks* (AAJ Reference Material, 2011)

[4] *Available at* (http://www.truckinfo.net/trucking/stats.htm)

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ulations apply to commercial truck drivers and the trucking companies operating on our highways. Handling an accident case involving an 18-wheeler, log truck, or other commercial truck requires a special investment of time and resources and a detailed knowledge of Federal Motor Carrier Administration (FMCSA) safety regulations.

All aspects of handling a truck accident lawsuit – including investigation, discovery, technology, and the laws and legal issues involved – are significantly different than a standard automobile crash case. In a truck accident case, not only are the damages significantly greater but several complex laws and regulations governing the trucking industry come into play.

A lawyer who is not equipped with the proper background, knowledge, experience, or resources to handle a truck accident lawsuit can do a great disservice to the client that lawyer represents. Overlooking even the most seemingly minor detail – a violation or piece of evidence – can significantly diminish the value of a claim. Conversely, a truck accident law firm with a long history of negotiating settlements and winning awards for its clients has the insight and experience needed to maximize a claim and get a person the compensation they need and deserve. Our truck accident lawyers know how to spot potential negligence, violations, and defective product liability claims in a truck crash that might otherwise go overlooked. That's because those lawyers have successfully handled a huge number of truck cases and have developed expertise in this area of litigation.

Look Behind A Crash Involving A Big Truck To Further Identify Liability Issues In Trucking Crash Litigation

In the majority of traffic crashes involving tractor-trailers or other "heavy truck" commercial carriers, the tractor-trailer is quite often at fault. However, the cause of the crash may not always be in the way one would think, such as a driver running a red light, making an improper lane change, or driving too fast. Sometimes the wrongful conduct on the part of the driver or motor carrier occurs before the tractor-trailer involved even gets on the roadway.

Many wrecks are attributable to mechanical failures that result from negligent or wanton inspection, repair or maintenance of a commercial motor vehicle. Federal regulations require motor carriers to systematically inspect, maintain, and repair all motor vehicles subject to their control. These regulations also require that the truck and its component parts be in safe operating condition at all times. A motor carrier can be held responsible for any injury caused by its failure to properly inspect, maintain or repair any equipment in its control.

But a lawyer's investigation can't stop with only the conduct of the driver of the tractor-trailer and the employer being considered. The lawyer must also investigate who else has been involved in maintaining the subject tractor-trailer. For instance, our firm has recently filed a case where the tire and axle assembly of a tractor-trailer unit detached from the trailer, crossed the highway's center line, and collided with our client's vehicle, resulting in severe injuries. During our investigation, we discovered that the tractor-trailer unit was actually owned by a separate entity and was leased to the truck driver and his employer. Additionally, the lease agreement between the truck driver's employer and the tractor-trailer owner provided that the owner retained responsibility for the maintenance, repair and general upkeep of the tractor-trailer unit.

The agreement in place does not absolve the driver and his employer of liability, as they are still responsible for the pre- and post-trip inspections required by the Federal Motor Safety Regulations. However, learning this information reveals how multiple individuals and entities can bear responsibility in commercial motor vehicles cases.

When any crash on the highway occurs that involves a commercial motor vehicle, particularly a tractor-trailer or other "heavy truck," a lawyer must begin the investigation immediately to discover all parties whose conduct may have contributed to the crash.

The lawyers and investigators at Beasley Allen have extensive experience investigating these crashes. If you have a client who has been injured in a crash involving a tractor-trailer or other commercial motor vehicle, contact Sloan Downes, Director of our Personal Injury & Products Liability Section, at 800-898-2034 or by email at Sloan.Downes@BeasleyAllen.com. Sloan will put you in touch with a lawyer in the section who handles trucking litigation. We would be honored to have the opportunity to work with you.

The Beasley Allen Truck Accident Litigation Team

Beasley Allen has been successfully handling major big truck litigation for years. The cases are handled by lawyers in the firm's Personal Injury & Products Liability Section, headed by Cole Portis. Many truck cases involve complicated products liability issues that are quite often overlooked and missed by lawyers who don't regularly handle product liability litigation. Most truck cases involve speed, inattention, fatigue, and other driver issues. But there will be accidents where a products liability issue will also be involved in causing the accident.

Greg Allen, the Lead Products Liability Lawyer for the firm, has handled a number of the major truck cases involving a defective product issue. We have a team of experienced lawyers making up the Trucking Litigation Team. In addition to Cole and Greg, lawyers on the team are Chris Glover, Evan Allen, Mike Crow, Parker Miller, LaBarron Boone, Ben Baker, Warner Hornsby and Wyatt Montgomery.

If you have any questions or want to discuss a case, contact Sloan Downes, Section Director, at 800-898-2034 or email Sloan.Downes@BeasleyAllen.com. She will have the appropriate lawyer contact you.

III.
AN UPDATE ON MOTOR VEHICLE LITIGATION

U.S. Road Deaths Rose At Record Pace In 2021

U.S. traffic deaths increased in the first nine months of 2021 to 31,720, according to the Associated Press, citing a government report released last month. This continued a record pace of increased dangerous driving during the coronavirus pandemic. There was an estimated 12% increase in the number of deaths by motor vehicles from January to September 2021 than the same period for the previous year.

It was the highest percentage increase within a nine-month period since 1975 when the U.S. Department of Transportation began documenting fatal crash data. The number of deaths was the highest nine-month figure since 2006.

The National Highway Traffic Safety Administration (NHTSA) data showed that traffic fatalities increased the most over the period in 38 states with states in the West and South, including Idaho, Nevada and Texas. The number remained the same in two states while it decreased in 10 states and the District of Columbia. Transportation Secretary Pete Buttigieg, recognizing a crisis, has pledged help. He has a new national strategy aimed at reversing the trend.

Secretary Buttigieg told The Associated Press that his department over the next two years will provide federal guidance, as well as billions of dollars in grants under President Biden's new infrastructure law. This is intended to spur states and localities to lower speed limits and embrace safer road design. Speed cameras could be part of the plan with the encouragement that they "could provide more equitable enforcement than police traffic stops." Sec. Buttigieg cited the "safety benefits under the infrastructure law by building out alternative modes of travel to cars such as rail and public transit."

NHTSA also plans to move forward on rulemaking to require automatic emergency braking in all new passenger vehicles. The agency will also set new standards on car safety performance by emphasizing crash-avoidance features such as lane-keeping assistance. However, no firm deadlines were set for action by NHTSA. Traffic deaths began to increase in 2019 but had fallen for the preceding three years. NHTSA attributes the increase during the pandemic to reckless driving behavior and cites behavioral research showing that speeding and traveling without a seat belt have been higher.

The increase in traffic deaths in 2021 represented an almost 33 percent rise over the past decade. Auto safety advocates are urging NHTSA to implement safety rules ordered by Congress years overdue. The Associated Press noted that "[n]early 7,800 more people died from January through September in 2021 compared with figures from 2011, according to government data." Sec. Buttigieg, in a statement, on Feb. 1, said:

> *People make mistakes, but human mistakes don't always have to be lethal. In a well-designed system, safety measures make sure that human fallibility does not lead to human fatalities. That's what we will be doing for America's roads with the National Roadway Safety Strategy and the safe system approach that it embraces.*

Jonathan Adkins, Executive Director of the Governors Highway Safety Association, which represents state safety offices, described the latest figures as a "nightmare," but said the Biden administration appears to be taking the right approach on broad safety fixes. He added:

> *We've got to do more of what works. Traffic enforcement has got to be part of the solution. But we've got to look at how we build roads. We've got to look at the whole system.*

Hopefully, there will be greater emphasis on highway safety by governments at every level so that driving on our highways can be made much safer. It will take a bi-partisan, aggressive approach by all concerned in order to get the needed job done.

Source: Associated Press

GM 5.3L Engine Defect Theory Advances In Georgia And Approaches August Trial In California

One of our firm's GM 5.3L engine defect class action lawsuits is active in the Southern District of Georgia. U.S. District Judge Lisa G. Wood recently held that our Plaintiff's claim under the Florida Deceptive and Unfair Trade Practices Act should proceed to the discovery phase and eventually determine class certification status.

Plaintiff Hackler purchased his new Silverado in April 2013. Within five years, he discovered that its engine was burning oil, resulting from a design defect that invites aggressive piston ring wear and eventual serious engine component damage. GM engineers have confirmed in prior depositions that the company intends for its piston rings to last 100,000 miles, but some wear out as early as 30,000 miles. Here, the piston rings in Plaintiff Hackler's vehicle showed aggressive wear and inability to control oil well before 100,000 miles.

Judge Wood found that Plaintiff Hackler successfully pleaded that his claims were tolled after GM deliberately concealed the defect. Plaintiff Hackler described in his complaint that GM conducted an internal investigation to find the cause of the defect and released Technical Service Bulletins that instructed dealership technicians to fix the issue with "band-aid" methods that GM engineers knew did not work. Judge Wood found those facts compelling and cited them in her order.

This GM 5.3L engine class action in Georgia is one of over a dozen cases that our firm is prosecuting. We are actively litigating these classes in federal district courts in Alabama, California, Colorado, Massachusetts, New York, North Carolina, Ohio, Oklahoma, Utah, Washington and West Virginia.

Additionally, our lawyers are preparing for a GM 5.3L engine defect class action trial in August 2022 in the Norther District of California, which was filed on behalf of plaintiffs from California, North Carolina and Idaho. There, U.S. District Judge Edward M. Chen certified these plaintiffs' class defect allegations for trial and rejected GM's attempt to disqualify our testifying experts.

With our evidence prepared and our experts cleared for trial, our lawyers expect to deliver the jury a comprehensive story of engines that did not meet GM engineers' expectations for reliability and durability. We will show how they jeopardized owners' safety by stranding them on the highways after an engine malfunction.

Beasley Allen lawyers Dee Miles, Clay Barnett, Mitch Williams, Rebecca Gilliland, Dylan Martin and Ben Keen, represent the GM 5.3L plaintiffs, along with Adam J. Levitt, John E. Tangren and Daniel R. Ferri of DiCello Levitt Gutzler LLC.

The Georgia case in federal court is *Hackler v. General Motors LLC*, case number 2:21-cv-00019, in the U.S. District Court for the Southern District of Georgia.

The New Tesla Autopilot Investigation For 'Phantom Braking'

The National Highway Traffic Safety Administration (NHTSA) has opened its second formal investigation into Tesla Inc.'s advanced driver-assistance system Autopilot in six months, according to Law360. The agency will be looking into a phenomenon characterized as "phantom braking."

Over the past nine months, NHTSA's Office of Defects Investigation has received 354 reports of the phenom-

enon occurring in 2021-2022 Tesla Model 3 and Model Y vehicles. These vehicles are equipped with advanced driver-assistance systems, or ADAS – a feature Tesla calls Autopilot. The investigation could include up to 416,000 vehicles. NHTSA said in a statement:

> *The complaints allege that while utilizing the ADAS features including adaptive cruise control, the vehicle unexpectedly applies its brakes while driving at highway speeds. Complainants report that the rapid deceleration can occur without warning, at random and often repeatedly in a single drive cycle.*

Tesla describes Autopilot as an advanced driver-assistance system with features such as traffic-aware cruise control, automatic lane changes, and semiautonomous navigation on certain roadways. Tesla's website says it offers a standard Autopilot package and a more advanced package known as Full Self-Driving Capability, but both "are intended for use with a fully attentive driver, who has their hands on the wheel and is prepared to take over at any moment."

NHTSA announced in August it was investigating Autopilot in model years 2014-2021 Teslas, after a series of crashes with emergency or first-responder vehicles. That probe, which covers Tesla's Model Y, X, S and three vehicles, could include up to 765,000 Tesla vehicles.

The August investigation began after NHTSA identified 11 accidents – some of them fatal – since early 2018 involving a Tesla vehicle that was confirmed as having Autopilot engaged and crashed into a first responder vehicle at roadside emergency scenes. The following are two examples:

- a January 2018 crash in Culver City, California, involving a Tesla Model S with Autopilot engaged that struck a firetruck parked on I-405; and
- a December 2019 accident involving a Tesla Model 3 with Autopilot engaged crashed into a parked firetruck along I-70 in Cloverdale, Indiana. More will be written in this issue since a lawsuit was filed last month.

Four of the 11 crashes took place in 2021, according to NHTSA. They include a February 2021 crash in Montgomery County, Texas; a March crash in Lansing, Michigan; a May crash in Miami, Florida; and a July crash in San Diego, California. The Feb. 16 report did not identify any crashes or fatalities stemming from the apparent phantom braking issue.

There have been numerous other high-profile accidents involving Tesla vehicles suspected of having Autopilot engaged that have crashed into highway barriers or other vehicles or trees in residential areas. The National Transportation Safety Board (NTSB), which investigates transportation accidents, has publicly criticized Tesla for not adequately warning consumers about Autopilot's limitations.

The NTSB in 2020 determined that a deadly 2018 crash on a California highway was partially the fault of shortcomings in Tesla's Autopilot system, as well as the driver's distraction by a videogame. The NTSB report said that the driver, 38-year-old Walter Huang, had been playing a videogame on March 23, 2018, just before his 2017 Tesla Model X slammed into a highway barrier at more than 70 miles per hour. The report blamed the crash on Huang's distraction and "overreliance" on a system that wasn't meant to be used in those conditions. The NTSB said Tesla's Autopilot system didn't adequately monitor whether the driver was actually paying attention, and "the timing of alerts and warnings was insufficient to elicit the driver's response to prevent the crash or mitigate its severity."

NHTSA said in January that Tesla would recall nearly 54,000 SUVs and cars due to problems with its "full self-driving" software. The company said that the software intentionally drives through stop signs with its "rolling stop" functionality. Federal regulators explain that "the recall amounts to an 'over-the-air' software update that will delete the feature sometime this month."

The malfunctioning event typically occurs in vehicles equipped with the feature traveling on roads with speed limits below 30 mph and approaching an intersecting road also with speed limits below 30 mph. If such a vehicle were traveling below 5.6 mph and didn't detect other cars, cyclists or pedestrians, it would proceed through a four-way stop without halting. Tesla and NHTSA met in October 2020 to talk about the rolling stop aspect of the beta software. About 10 days after the second meeting. Tela said it would voluntarily disable the feature.

The investigation subject is Unexpected Brake Activation, investigation number PE 22-002, before the National Highway Traffic Safety Administration.

Source: Dave Simpson, Law360.com

Tesla Is Aware That Its Vehicles May Crash Into Emergency Vehicles

Elon Musk, founder of Tesla, faces a lawsuit filed by the husband of a woman killed while the two were traveling in their Tesla Model 3 when it ran into a stationary fire truck. The lawsuit claims Musk deceived the public with claims about the vehicles' "self-driving" systems' capability, though unproven.

On Dec. 29, 2019, Derek Monet was driving on Interstate 70 in Indiana with his wife, Jenna, as a passenger. He was operating the vehicle in Autopilot mode when it ran into the back of a fire truck stopped on the interstate after responding to an earlier crash. Jenna's injuries sustained in the crash were fatal, and Derek was also injured but survived. It's alleged in the complaint:

- The National Highway Traffic Safety Administration (NHTSA) is aware of at least 11 incidents in which Tesla's software failed to react to emergency vehicles with flashing lights.
- NHTSA launched an investigation last August and in October ordered Tesla to release documents relating to purported non-disclosure agreements with drivers who agreed to test its "full-self driving" systems.
- NHTSA also asked Tesla why it did not recall its vehicles after the company transmitted a wireless software update designed to prevent crashes into stationary objects.
- Tesla has known for years that 'stopping for stationary objects has been a particularly difficult problem for Autopilot and other vision-based systems like Mobileye in the real world, and
- Numerous drivers have rear-ended stopped vehicle such as highway patrol cars of fire trucks.'"

Monet filed the lawsuit in the Santa Clara County, California Superior Court, where Tesla was once based. But the company moved its headquarters to Austin, Texas, last year, and Tesla removed the lawsuit to the US Dis-

trict Court for the Northern District of California. Monet's lawyers have filed a motion to remand the case back to Santa Clara County.

According to the Claims Journal, at least five additional lawsuits have been filed against Tesla over product defects, based on federal court records. The other lawsuits claim that Tesla vehicles suddenly accelerated independently of their operators.

Source: Claims Journal

IV.
TWO HISTORIC RESULTS IN MASS SHOOTING CASES

Sandy Hook Families Settle For $73 Million With Gun Maker Remington

Sandy Hook Elementary School shooting victims' families agreed to settle a lawsuit against Remington, the manufacturer of the rifle used in the 2012 mass shooting, for $73 million. Among the victims were 20 first-graders and six teachers. This case has been watched closely by gun control advocates, gun rights supporters and manufacturers. It provides a roadmap for victims of other shootings to sue firearm makers. It's very clear that this historic settlement has the support of an overwhelming majority of American citizens.

The lawsuit was filed in 2015 by families of the shooting victims and one survivor, arguing that Remington "should never sold such a dangerous weapon to the public," the Associated Press explained. The plaintiffs' goal was to "prevent future mass shootings by forcing gun companies to be more responsible with their products and how they market them." It is a "bittersweet victory," explained some of the parents who were part of the lawsuit during a news conference about the settlement. Nicole Hockley, whose 6-year-old son was killed in the shooting, said:

> *Nothing will bring Dylan back. My hope for this lawsuit is that by facing and finally being penalized for the impact of their work, gun companies along with the insurance and banking industries that enable them will be forced to make their practices safer than they've ever been, which will save lives and stop more shootings.*

The civil lawsuit in Connecticut focused on how the firearm used by the Newtown shooter – a Bushmaster XM15-E2S rifle – was marketed. It was alleged that the marketing targeted younger, at-risk males in advertising and product placement in violent video games. For example, one of Remington's ads features the rifle against a plain backdrop and the phrase: "Consider Your Man Card Reissued."

In addition to the financial aspect, a significant part of the settlement was Remington agreeing to allow the families to release numerous documents obtained during the lawsuit. This includes documents showing how the company marketed the weapon. The gun maker argued that it should have been shielded from the lawsuit based on a federal law that gives the gun industry broad immunity. However, the Connecticut Supreme Court allowed the lawsuit to continue under state law. It found that an exception to the federal law existed to allow the lawsuit to move forward due to how Remington marketed the rifle. On appeal by Remington, the U.S. Supreme Court declined to hear the case.

Congress should repeal the immunity law (The Protection of Lawful Commerce in Arms Act). But the NRA will do its best to keep that ill-advised law on the books. There can be no justification for such a law. The American people must let Congress know how they feel and demand action.

A 20-year-old gunman, Adam Lanza, entered Sandy Hook Elementary School on Dec. 14, 2012, and opened fire with a rifle his mother owned, who he killed before going to the school. As police arrived, Lanza killed himself with a handgun, also owned by his mother. The Associated Press described Lanza as suffering from "severe and deteriorating mental health problems," having a "preoccupation with and access to his mother's weapons," and all of this "proved a recipe for mass murder," according to Connecticut's child advocate.

Funds from the settlement will go only to the families who signed onto the lawsuit and not to other victims' families. The families have not decided yet what they will be doing with the money from the settlement, according to their spokesperson, Andrew Friedman. The plaintiffs said, "Four insurers for the now-bankrupt company agreed to pay the full amount of coverage available, totaling $73 million." Francine Wheeler, whose 6-year-old son, Ben, was killed in the shooting, said:

> *Today is about what is right and what is wrong. Our legal system has given us some justice today. But ... David and I will never have true justice. True justice would be our 15-year-old healthy and standing next to us right now. But Benny will never be 15. He will be 6 forever because he is gone forever.*

This clearly was a historic happening in the ongoing battle to hold gun manufacturers accountable for this wrongdoing and immense harm caused to the public. Hopefully, this milestone settlement and the disclosure of marketing documents will lead to more accountability and more safety in the country. The public will not tolerate mass murders, and the politicians had better start listening to them. The NRSA has run the show, but those days may now be close to over!

Source: Dave Collins, Associated Press

U.S. Ordered To Pay $230 Million To Victims Of Texas Church Massacre

A federal judge ruled on Feb. 7 that the U.S. government must pay victims and families of victims of the 2017 Texas church massacre more than $230 million, according to NPR. On a Sunday in November that year, Devin Patrick Kelly killed 26 people and wounded 22 other churchgoers at First Baptist Church Sutherland Springs. If the U.S. Air Force had included Kelly's name in the correct database, his previous domestic violence conviction would have legally barred him from owning the firearms.

U.S. District Judge Xavier Rodriguez of the Western District of Texas awarded damages to approximately 80 people injured or lost loved ones in the massacre. At least two young children – a 6-year-old girl shot three times and a 5-year-old shot four times – were among Kelly's victims.

Kelley was court-martialed in 2012 while he was in the Air Force and discharged in 2014. The charges were for

assaulting his then-wife and stepson, charges that, based on federal law, should have blocked him from legally buying guns. But Kelley was able to purchase an AR-556 rifle that he used in the massacre.

Last July, Judge Rodriguez determined that the Air Force was "60% responsible" for the shooting due to a mistake that kept Kelley's name off an FBI database. The result was the November 2017 shooting, one of the deadliest in modern U.S. history, and it should have been avoided. This case was a classic example of how regulation – when enforced – can keep guns out of the hands of criminals or persons who have been designed as unfit to own or possess a gun.

Source: NPR

V.
PRODUCT LIABILITY UPDATE

Beasley Allen Defective Product Litigation Has Brought About Needed Safety Changes

Trial lawyers play a highly significant role in the regulation of corporate America. That role is critically important relating to the safety of products, health issues and consumer protection. We know from experience that courts and juries have played a major role in bringing about needed changes that would never have happened if left to the board rooms of 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 below some cases involving defective products in motor vehicles and farm equipment that brought about significant safety changes.

Beasley Allen Cases That Have Made A Difference

- Rollover Protection Systems (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.
- 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 a 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.
- We discovered in the case *Johnson v. General Motors* that "silent recalls" were being used by GM. The automaker was notifying dealers that vehicles had a defective computer chip, causing stalling problems. Vehicle owners were not notified of the defect. The result, in our case, brought about a change in how GM handled recalls.
- 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. The case of Jernigan v. GM brought this program to the attention of the public and NHTSA.
- A serious ignition switch defect and coverup by General Motors was discovered and exposed in the case of *Melton v. General Motors*. This brought about massive litigation, including creating a multidistrict litigation (MDL) and the settlement of hundreds of cases. Delphi – a supplier – gave our firm documents needed to prove a 10-year coverup by GM. Lance Cooper, a tremendously talented Atlanta lawyer, brought Beasley Allen into the Melton case. Lance deserves all the credit for taking a case that many lawyers would have turned down.
- Our lawyers discovered information relating to a sudden acceleration defect in the case of *Bookout v. Toyota*. A coverup by the automaker was exposed, and there were massive settlements in the MDL that was established. The 10-year coverup by Toyota of a known defect was discovered in the *Bookout* case.
- In the case of *Neloms v. Toyota*, a defective Toyota SUV suspension system was discovered involving the Toyota 4-Runner. Recalls of the vehicles subsequently took place.
- 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 the industry.
    - *Blair v. Pro Tech* (2003) first cab guard trial and verdict in the country was $12 million. The plaintiffs' expert wrote the National Transportation 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. Merritt added a new warning to its cab guards: "Do not use on Pole or Log trucks."
    - *Harkness v. Road Gear* was also a case that involved a log truck cab guard. The trial judge ruled as a matter of law that the cab guard was defective and, therefore, a defective product. The manufacturer made significant safety changes to its warnings, including telling the industry that 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 resulting from the Harkness case. Since the filing of the Dement case, Road Gear has ceased doing business.

- Bad Boy Buggies were recalled, and doors and seat belts were required as a result 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.
- Sikorsky replaced the S-76 helicopter throttle quadrant to include a lock for the fly position. This design change will prevent a bird strike from ever taking down an S76 helicopter due to power loss. The case was *Ballenger v. Sikorsky Aircraft Corporation*.
- *Stacy McCleary v. Forest River* was a case Beasley Allen worked with Morgan & Morgan. The case involved a death when a Murphy bed snapped closed in an RV trapping two people resulting in the death of one. As a result of litigation, NHTSA enacted a new rule requiring Murphy Beds in RVs to be equipped with a positive latch to prevent future injuries. This new rule was added to NFPA 1192 RV Standards.
- Beasley Allen is working with Lance Cooper in an ongoing death case. A worker was killed when his leg inadvertently activated the hopper, causing him to be entrapped, leading to positional asphyxia. After a second identical death, the manufacturer issued a notice, changed the design as suggested by our expert and paid for every model in the field to be modified with a new guard preventing inadvertent activation. Later, NHTSA instituted a mandatory recall in accordance with the previous design change.
- *Clarke v Goldkist* was a case where the defendant modified a truck with a feed tank obstructing the driver's rear view. The driver of the truck backed over and killed the owner of the property. We claimed the truck needed a backup alarm. The case obtained a $2,500,000 verdict. On appeal, Goldkist announced it had outfitted its entire fleet (thousands) of trucks with backup alarms
- Three-year-old Sadie Grace Andrews was playing with siblings outside an ice cream shop when she stepped on an unsecured lid of a grease trap. The lid flipped open, and Sadie Grace fell in and drowned. Alabama's Sadie Grace Andrews Act requires all restaurants and commercial food establishments with outside grease traps to have lids on the grease traps that can withstand loads from traffic and are inaccessible to children. This law went into effect on June 1, 2018.
- The work of Beasley Allen lawyers in a case resulted in all the seatbelts in a fleet of "heavy" trucks being replaced with a new, safer design. A driver in a subsequent wreck thanked us and credited us with saving his life.
- A farm equipment case involving a tractor-mounted 3-point posthole digger that amputated a worker's leg resulted in safety changes. Beasley Allen lawyers and our experts developed the alternative design guard, which the manufacturer adopted for all their diggers.

There were many other Beasley Allen cases involving defective products where the firm and our clients clearly made a difference. Because of space limitations, we can't include all of them in this issue. There are also many cases, ongoing in litigation, that are candidates for inclusion in future issues.

Used Tires Purchased Can Be Defective

Are used tires a safety hazard? That can quite often be the case.

Many deal-seekers might purchase used tires for their vehicle because those tires often are the most affordable option. That may even be more prevalent today than ever before because of the severe shortage of cars, tires and other equipment items. While trying to get a deal is not bad, it is essential for a tire purchaser to know of the risks associated with purchasing used tires.

The type of tire that a person buys is important: statistics released by the federal government have indicated that approximately 200 people are killed, and thousands are injured every year due to tire-related accidents.

While some used tires show signs of wear and tear that creates an obvious cause for concern, tire damage can also occur internally or in ways that are harder to detect. For example, knowing the tire history is important - does it have improper repairs, or is it too old. Often, this information cannot be determined without a tire professional's help.

The danger, it seems, lies in the fact that a used tire brings with it many unknowns. Because these tires don't come straight from the manufacturing plant, it is impossible for a purchaser to truly know the history of the tires being purchased.

Therefore, tire purchasers should be extra vigilant when getting tires for their vehicles. Doing so protects themselves and their friends and family. Ensure the tire professional involved in the purchase is qualified, has performed a proper inspection of the tire, and is aware of the tire's history. Also, be sure the tire is not too old for service. In many cases, auto manufacturers warn against using six years old or older tires – no matter the tread depth. So, check the age information on the tire to learn the tire's age.

Beasley Allen lawyers have successfully handled cases involving fatal and non-fatal accidents involving tire failures. For more information or if you have any questions, contact Cole Portis or Ben Baker, lawyers in our Personal Injury & Products Liability Section, by phone at 800-898-2034 or by email at Cole.Portis@BeasleyAllen.com or Ben.Baker@BeasleyAllen.com. Both Cole and Ben handle tire-related litigation for our firm.

Sources: https://www.ustires.org/unsafe-used-tires-put-lives-risk

Hyundai And Kia Vehicles Have A Serious Fire Hazard Issue

Hyundai and Kia have recalled and warned owners of nearly 485,000 vehicles that they are at an increased risk of fire regardless of whether the engine has been turned off. The Associated Press reported that "contamination in the antilock brake control module...can cause an electrical short." This defect increases the risk of fire while the vehicles are moving or parked.

The affected vehicles include certain Kia Sportage SUVs from 2014 through 2016 and K900 sedans from 2016 through 2018. Recalled Hyundais include certain 2016 through 2018 Santa Fe SUVs, 2017 and 2018 Santa Fe Sports,

the 2019 Santa Fe XL and 2014 and 2015 Tucson SUVs.

In the most recent recall, the automakers confirmed 11 reports of fires in the U.S., all without injury or death. Still, the problem is just the latest in a number of recalls due to fires and engine failures over the last six years. NHTSA documents show that the first recall occurred in 2015, and the automakers have issued eight additional recalls since then, all involving an assortment of engine problems.

U.S. safety regulators echoed the warnings that vehicle owners should park the affected vehicles outside and away from structures until the defect can be repaired. The National Highway Traffic Safety Administration (NHTSA) says owners can go to www.nhtsa.gov and enter their 17-digit vehicle identification number to see if their automobile is recalled.

The agency heightened its investigations into recent engine compartment fires in vehicles made by the Korean automakers. In December, NHTSA "consolidated two investigations from 2017 into a new engineering analysis covering more than 3 million vehicles from the 2011 through 2016 model years," the Associated Press reported. "At the time, NHTSA had received 161 complaints of engine fires, some of which occurred in vehicles that had already been recalled."

Michael Brooks, chief counsel for the nonprofit Center for Auto Safety, said the recalls on Feb. 8 are different from the engine failure problem that caused most of the previous Hyundai-Kia fire recalls. He said in a statement:

> *Although NHTSA has the authority to order a recall and potentially a buyback of all affected vehicles, the separate fire defects that have plagued millions of Hyundai vehicles across multiple model years makes this a very difficult task.*

NHTSA fined Kia and Hyundai $137 million in fines to settle an investigation over multiple recalls by the companies for various models dating to the 2011 model year. Safety regulators determined the companies failed to recall more than 1 million vehicles promptly. Additionally, the agency ordered the companies to pay for safety improvements.

Specifically, NHTSA fined Kia $27 million and ordered it to pay $16 million to improve safety performance. However, NHTSA agreed to defer the $27 million fine if Kia meets its safety requirements. Kia denied wrongdoing but opted to limit its legal battle.

The Associated Press reported the Center for Auto Safety data shows "more than 30 U.S. fire and engine-related recalls from Hyundai and Kia since 2015. The recalls involve more than 20 models from 2006 through 2021, totaling over 8.4 million vehicles. Some recalls "involved manufacturing defects that stopped oil from flowing through the engine block," others "involved expensive engine replacements." The two automakers covered 3.7 million vehicles "to install software that will alert drivers of possible engine failures" as part of a "product improvement campaign."

Source: Associated Press

CPSC Sues Pillow Co. Over Product Recall After Two Deaths

The U.S. Consumer Product Safety Commission (CPSC) is considering whether to force a recall of 180,000 baby loungers produced by Oklahoma-based Leachco Inc. This comes after the company refused an earlier request from the agency. The CPSC filed an administrative lawsuit on Feb. 9, heightened its demands that Leachco recall the Podster product and refund consumers. The CPSC's complaint says the infant pillows pose a risk of asphyxiation to babies and have led to the deaths of at least two babies.

Alex Hoehn-Saric, CPSC chair, said the agency was left with no other option but to file this complaint since Leachco has failed to recall its products. He said in a statement:

> *Infants are the most vulnerable members of our society. The commission will not turn a blind eye on products that put them at unnecessary risk and can lead to parents' worst nightmare. Filing complaints like this one is a last resort when a manufacturer fails to respond to the type of safety concerns raised in this case, yet in the interest of protecting consumers we were left with no other options.*

It should be noted that packaging for the infant pillow, marketed as a hands-free way of supervising a baby, states that adult supervision is always needed when in use. Also, Leachco has never marketed the product for sleep and cautions explicitly against using it in that manner. The agency's suit said:

> *Despite the warnings and instructions, it is foreseeable that caregivers will use the Podster without supervision. It is also foreseeable that caregivers will use the Podster for infant sleep.*

The CPSC said that two babies, one 17-days-old and one 4-months-old, died in January 2018 and December 2015, respectively, while using the Leachco product. In January this year, the agency asked parents to "immediately stop using" the baby pillows. The agency's complaint against Leachco comes a few months after another company, Boppy Co., issued a recall of nearly 3.3 million loungers, according to a September 2021 announcement on the agency's website. Boppy's pillows are tied to eight infant deaths between 2015 and June 2020, the CPSC said.

The case is *In the Matter of Leachco Inc.*, docket number 22-1, before the U.S. Consumer Product Safety Commission.

Source: Law360.com

VI.
AVIATION LITIGATION

Beasley Allen Settles Wrongful Death Case Involving Plane Crash

Aviation in the U.S. has generally become safer thanks to laws and safety standards regulating things like flight training and manufacturing. However, small plane crashes happen more frequently than commercial airline crashes. Among the leading causes for crashes are defective plane parts, maintenance failures and pilot negligence.

While larger jetliners have the redundancy factor – a system of checks to mitigate the failure of a single defective piece of equipment – small planes typically lack this safety measure. A defective aircraft part in a small aircraft can result in severe and often fatal consequences. Similarly, larger airlines are subjected to stricter maintenance programs intended to catch failures before

they occur. Maintainers should be properly trained and equipped for their work.

Mike Andrews, who handles aviation litigation for our firm, recently settled a case involving a defective aircraft component that resulted in a fatal crash, claiming the life of our client's husband. Mike is a lawyer in the firm's Personal Injury & Product Liability Section. He represented the widow, Jean Moir, in this case.

In 2015, Dr. Michael Moir was piloting his Mooney aircraft during a personal, cross-country flight to a training fly-in for Mooney owners. Dr. Moir took off from Gaylord Regional Airport in Gaylord, Michigan, headed to Atlantic City, New Jersey. Unfortunately, due to defects in his oxygen system, his oxygen supply was rapidly depleted in flight, rendering him unconscious and ultimately causing his death. The National Transportation Safety Board (NTSB) investigation revealed that approximately 16 minutes into the flight, Dr. Moir read back the assigned altitude instructions from an air traffic controller. That was his last response during the flight. The aircraft was equipped with autopilot, and radar data showed that it remained at the altitude Dr. Moir had set before his last communication with air traffic control until it ran out of fuel and crashed in the ocean.

Mike filed a lawsuit alleging that the aviation inspection and maintenance company responsible for maintaining the Mooney M20T aircraft failed to inspect and maintain the aircraft's oxygen system properly, ultimately resulting in Dr. Moir's death. Indeed, a post-crash inspection revealed a loose-fitting in the oxygen line allowed the oxygen to escape the canister more quickly than Dr. Moir anticipated. Additionally, the system was configured with an improper pressure relief valve. As a result, pressurized oxygen was purged from the system within minutes of being activated in flight. The lack of oxygen forced Dr. Moir to suffer hypoxia and caused his death. Mike settled the case for an undisclosed amount. At the close of the crash investigation, Dr. Moir's death certificate was officially changed to reflect his cause of death as the effects of hypoxia.

A more recent crash also demonstrates how hidden defects in an airplane's equipment can result in a crisis requiring pilots to rely on their training, knowledge, and skill to land a faulty plane safely. In January, a Cirrus SR-22 plane crashed in Lake Murray, west of Columbia, South Carolina. Unlike our client's husband, the pilot and his passenger in this crash survived. The pilot told federal investigators he conducted a preflight inspection, and nothing was out of the ordinary. He specifically explained adding oil after checking the level.

About 20 minutes into the flight, while the plane was at 5,500 feet, the pilot said he saw a "red oil annunciator light illuminate, followed by the oil pressure gauge fall to zero pressure... the engine tachometer was near red line and that the engine sounded like it was over speeding." He radioed air traffic control to report the emergency and began looking for a place to land safely. As he approached Lake Murray, the pilot descended to 2,000 feet and deployed the aircraft's parachute.

A preliminary report by the NTSB said, "A post-accident examination of the airplane by a Federal Aviation Administration inspector revealed substantial damage to the fuselage and left elevator. Additionally, the engine exhibited a hole on the top of the case near the No. 6 cylinder."

The ongoing investigation will likely take approximately 18 months to conclude. However, the evidence and the pilot's account of the emergency show the potential for catastrophic defects can be hidden even in a thorough preflight inspection.

Sources: National Transportation Safety Board

Aircraft Litigation At Beasley Allen

If you would like to have more information on any aspect of aviation litigation, including the Boeing litigation, or you need help on an aviation case, contact Mike Andrews at 800-898-2034 or email Mike.Andrews@BeasleyAllen.com. Mike is the lead lawyer in our firm in all aircraft-related litigation.

VII.
THE TALC LITIGATION

An Update On The State Of The J&J Bankruptcy

As we have previously reported, Johnson & Johnson (J&J) utilized a controversial maneuver last year, known as the Texas two-step, in a brazen attempt to shield corporate assets from thousands of plaintiffs harmed by its talcum powder products. J&J used an elaborate process to create a new subsidiary, LTL Management, LLC (LTL). All of J&J's talcum powder liabilities were transferred into LTL, which then filed for bankruptcy in North Carolina. Shortly later, the bankruptcy case was transferred to New Jersey, and a 60-day preliminary injunction was entered.

The Official Committee of Talc Claimants (TCC), which represents the plaintiffs, has filed a motion to dismiss the bankruptcy case. The TCC argues that the bankruptcy case should be dismissed because it was not filed in good faith. At the same time, LTL has filed a motion requesting that the bankruptcy court issue a permanent injunction against the talcum powder litigation. LTL argues that absent a permanent injunction, piecemeal litigation against J&J would severely impair LTL's reorganization plan.

Judge Michael B. Kaplan of the U.S. Bankruptcy Court for the District of New Jersey conducted hearings on both motions from Feb. 14 through Feb. 18. He is expected to issue a ruling on the motions on Feb. 28. In the interim, Judge Kaplan has entered a bridge order extending the preliminary injunction through Feb. 28.

The American people, and especially victims of wrongdoing by J&J, should know by the time this issue is received whether J&J's bad faith use of bankruptcy to try to resolve billions of dollars in cancer claims has worked or if the consumer products giant will rightfully have to defend approximately 38,000 lawsuits.

The case is *LTL Management LLC, 21-30589*, U.S. Bankruptcy Court, Western District of North Carolina (Charlotte). For additional information, contact Lauren James, a lawyer in our Mass Torts Section, at Lauren.James@BeasleyAllen.com.

Source: Law360.com

Special Report By Reuters On J&J's Secret Plan To Cheat The System And Further Hurt Cancer Victims

There has been a great deal of activity in the J&J bankruptcy, and as stated above, it's still ongoing! Media reports

have resulted almost daily relating to these developments. There is one specific bit of news that is clearly noteworthy.

A special report by Reuters revealed information exposing the creation of the plan by Johnson & Johnson (J&J) last year to use the bankruptcy courts to limit the company's huge exposure in the talcum powder cancer litigation. Reuters learned that J&J assigned more than 30 staffers to what was labeled "Project Plato." In a July memo on the project, a J&J lawyer warned the team: "Tell no one, not even your spouse." Chris Andrew, a J&J lawyer, wrote: "It is critical that any activities related to Project Plato, including the mere fact the project exists, be kept in strict confidence."

I encourage all of our readers to locate and read the Reuters article. Reuters reveals, based on their investigation and discovery of internal J&J documents, how J&J intended, in bad faith, to use the bankruptcy courts to cheat the system and further hurt J&J's cancer victims and to help its own financial bottom line.

The Reuters article can be found at this link: https://www.beasleyallen.com/article/reuters-reveals-the-lengths-jj-went-to-skirt-talcum-powder-lawsuits/.

Beasley Allen Talc Litigation Team

Beasley Allen lawyers Ted Meadows and Leigh O'Dell head the Beasley Allen Talc Litigation Team. Andy Birchfield, who heads our Mass Torts Section, has been directly involved in all phases of the talc litigation. The team handles claims of ovarian cancer linked to talcum powder use for feminine hygiene. Currently, several key team members are focused on the bad faith bankruptcy move by J&J.

Charlie Stern and Will Sutton, lawyers in our Toxic Torts Section, are also on the team, but they exclusively handle mesothelioma claims. Charlie and Will are looking at cases of industrial, occupational, and secondary asbestos exposure resulting in lung cancer or mesothelioma and claims of asbestos-related talc products linked to mesothelioma.

The following Beasley Allen lawyers are members of the Talc Litigation Team: Leigh O'Dell (Leigh.ODell@BeasleyAllen.com), Ted Meadows (Ted.Meadows@BeasleyAllen.com), 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).

VIII.
OPIOID LITIGATION

Sacklers Offer Another $1.6 Billion For Purdue Ch. 11 Settlement

Purdue Pharma's former owners, the Sackler family, will add more than $1.6 billion to the $4.3 billion settlement they would have paid under a previous bankruptcy plan that was rejected on appeal by U.S. District Judge Colleen McMahon. The announcement comes from U.S. Bankruptcy Judge Shelley C. Chapman, overseeing the new Chapter 11 negotiations. Judge McMahon rejected the previous bankruptcy plan last December because she determined that bankruptcy courts lacked the statutory authority to approve nonconsensual third-party releases in favor of non-debtors.

Judge Chapman reported to the New York bankruptcy court that the new "proposal has been accepted by most, but not all, of the nine state governments engaged in the mediation with the Sacklers and Purdue," Law360 reported. Judge Chapman then asked that the mediation be extended to the end of last month to try and reach a unanimous agreement or a new settlement structure that does not require unanimous support.

In early January, U.S. Bankruptcy Judge Robert Drain appointed Judge Chapman to oversee mediation after his confirmation order for Purdue's Chapter 11 plan was overturned. This was in hopes of reaching a global settlement that will allow a modified version of the plan to proceed.

According to Judge Chapman, the Sacklers' proposal would add $1.175 billion in cash to the prior settlement, plus up to $500 million contingent on the net proceeds of the sale of other companies owned by the Sacklers.

The agreement would require unanimous approval by the nine participating states, all of which had opposed the prior Chapter 11 plan. It appears not all states have agreed. That's the reason Judge Chapman asked for the mediation deadline to be extended to Feb. 28.

Purdue entered bankruptcy in September 2019 after reaching a settlement agreement with 24 state governments to resolve claims that the company's sales of OxyContin played a major role in creating the opioid crisis in the U.S. Judge Drain confirmed a bankruptcy plan in September 2020 that called for the Sacklers to contribute $4.275 billion into Purdue's estate and to give up their ownership of the company in exchange for broad liability releases for their role in the marketing and sale of opioid painkillers.

Questions remain whether the district court and the U.S. Trustee will permit the appeal to be withdrawn. The U.S. Trustees program is a component of the U.S. Department of Justice that serves as a watchdog for the bankruptcy court system. It is possible the U.S. Trustee may not drop its original appeal of the bankruptcy plan. The district court's decision overturning the bankruptcy deal is itself currently on appeal to the Second Circuit Court of Appeal.

The case is *In re: Purdue Pharma, et al.*, case number 7:19-bk-23649, in the U.S. Bankruptcy Court for the Southern District of New York.

Tribes Reach $590 Million Opioids Settlement With J&J And Distributors

Johnson & Johnson (J&J) and major opioid distributors agreed to a nearly $590 million settlement with the country's Native American tribes over the companies' roles in the nation's opioid crisis.

A statement filed Feb. 1 by the committee handling the tribes' claims in the national Opioid Multidistrict Litigation (MDL) shows that J&J will pay $150 million over two years to all federally recognized tribes. Opioid distributors

AmerisourceBergen Corp., Cardinal Health Inc. and McKesson Corp., will pay $440 million over seven years. This does not include the $75 million settlement the distributors agreed to last September to resolve a lawsuit by the Cherokee Nation, one of the bellwether cases in the MDL.

Law360 reports that although not all federally recognized tribes (more than 400 of the 574) filed lawsuits in the MDL consolidated in Ohio federal court, "all tribes will be eligible to participate in the new settlements if they choose to do so, according to court filings."

U.S. District Judge Dan Polster oversees the MDL, named Special Master David Cohen as Trust Administrator for the settlement, and appointed Judge Layn Phillips to work with Special Master Cohen to decide how the funds will be allocated to tribes. The Tribal Leadership Committee requested judge Phillips' appointment. Judge Polster also agreed to the committee's request to appoint directors of the tribal settlement trust to help carry out the deal, including former Indian Health Service Director Mary Smith, Kathy Hannan and Kevin Washburn, Dean of the University of Iowa College of Law.

Special Master Cohen and Judge Phillips have already been involved in the MDL. Special Master Cohen mediated the proposed deal between the tribal committee and J&J. Judge Phillips oversaw the negotiations for the committee and distributors' proposed agreement. Tribes would receive a total of $515 million from the distributors in the new settlement and the companies' $75 million agreement in September in the Cherokee bellwether suit.

J&J, its subsidiary Janssen Pharmaceuticals and the same distributors reached a $26 billion agreement in July to resolve most claims against the companies, but the tribes continued to pursue a resolution of their claims. Janssen is part of the new agreement.

Court filings show that 85% of the distributors' funds and a slightly larger percentage from the J&J settlement will support tribe-sponsored drug treatment and related programs. Those funds will also help sustain tribal health care organizations, which are also involved in the MDL. The settlement requires approval of 95% of tribes taking part in the litigation, based on their proposed allocation of funds.

Tara Sutton of Robins Kaplan LLP, who negotiated with the distributors on behalf of the committee, said in a statement:

> *The settlement is a crucial first step in delivering some measure of justice to the Tribes and reservation communities across the United States that have been ground zero for the opioid epidemic.*

Spirit Lake Nation Chairman Douglas Yankton, telling how the American Indians have suffered in the Opioid crisis, said:

> *American Indians have suffered the highest per capita rate of opioid overdose and are more likely than other groups in the United States to die from drug-induced deaths. Given this, the dollars that will flow to Tribes under this initial settlement will help fund crucial, on-reservation, culturally appropriate opioid treatment services.*

Lloyd B. Miller of Sonosky Chambers Sachse Endreson & Perry LLP, who serves on the committee, had this to say:

> *Tribes are sovereign governments and must be able to vindicate their own interests to protect the health and welfare of their tribal communities, and the new settlement is particularly historic because at long last Tribes and States are standing shoulder to shoulder in addressing mass disasters.*

The new settlement doesn't settle all the tribes' claims in the opioid MDL, as there remain pending claims against major pharmacies and drugmakers Teva Pharmaceuticals, Allergan Inc. and Endo Pharmaceuticals.

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. The bellwether is *Cherokee Nation v. McKesson Corp. et al.*, case number 6:18-cv-00056, in the U.S. District Court for the Eastern District of Oklahoma.

Source: Law360.com

Teva And Texas Reach Opioid Settlement Valued At $225 Million

Texas and Teva Pharmaceutical Industries Ltd have reached a settlement worth $225 million. The settlement will resolve claims the drugmaker fueled an opioid epidemic in Texas by improperly marketing addictive pain medications. According to Reuters, "Teva agreed to pay $150 million over 15 years and provide $75 million worth of generic Narcan, a medication used to counter the effects of opioid overdoses."

The settlement is the largest from the Israeli drugmaker, which has also settled with Oklahoma and Louisiana. Teva and other drug companies have faced more than 3,500 lawsuits over their roles in the opioid epidemic spawned from the companies' highly addictive opioid drugs that led to widespread opioid abuse and hundreds of thousands of overdose deaths over the last 20 years nationally.

Teva has been trying to settle the thousands of opioid lawsuits by state, counties and municipalities it faces. The company offered in 2009 to donate $23 billion in opioid addiction treatment drugs and pay $250 million over 10 years. Attorneys general from four states, including Texas, negotiated that proposal with Teva. However, no nationwide settlement agreement came about. Lawyers for some of the plaintiffs questioned, and for good reviews, the true value of the drugs.

Source: Reuters

The Beasley Allen Opioid Litigation Team

Beasley Allen's Opioid Litigation Team continues to work on a large number of existing cases. There has been no slowdown of activity in this litigation. As previously stated, Beasley Allen lawyers, in addition to the State of Alabama, also represent the State of Georgia, numerous local governments and other entities. Our lawyers also handle individual claims on behalf of victims in this litigation.

Our Opioid Litigation Team includes Rhon Jones (Rhon.Jones@BeasleyAllen.com), Parker Miller (Parker.Miller@BeasleyAllen.com), Ken Wilson (Ken.Wilson@BeasleyAllen.com), David Diab (David.Diab@BeasleyAllen.com), Rick Stratton (Rick.Stratton@BeasleyAllen.com), Will Sutton (William.Sutton@BeasleyAllen.com), Jeff Price (Jeff.Price@BeasleyAllen.com), Gavin sKing (Gavin.King@BeasleyAllen.com), Tucker Osborne (Tucker.Osborne@BeasleyAllen.com), Elliott Bienenfeld (Elliot.Bienenfeld@BeasleyAllen.com) and Matt Griffith

(Matt.Griffith@BeasleyAllen.com).

If you need more information on any phase of the opioid litigation, contact one of the lawyers on the team listed above at 800-898-2034 or by email.

IX.
THE WHISTLEBLOWER LITIGATION

DOJ Recovers $5.6 Billion In 2021 For Second Highest FCA Recoveries

The U.S. Department of Justice (DOJ) announced on Feb. 1 that it had secured roughly $5.6 billion in False Claims Act (FCA) recoveries in 2021. That is the second-highest FCA recoveries ever. Law360 reported that "[t]he more than $5.6 billion in FCA judgments and settlements in fiscal year 2021 was up significantly from the $2.2 billion recovered in 2020, and was the most since the record $6.2 billion recovered in 2014, according to the DOJ." Acting Assistant U.S. Attorney General Brian M. Boynton said in a statement:

> *Ensuring that citizens' tax dollars are protected from fraud and abuse is among the department's top priorities. The False Claims Act is one of the most important tools available to the department both to deter and to hold accountable those who seek to misuse public funds.*

Continuing a trend that began in 1997 – except for the record recoveries in 2014, "built on massive settlements related to the previous decade's housing and mortgage crisis – health care and life sciences companies once again accounted for the majority of FCA recoveries in 2021." The DOJ said more than $5 billion in related settlements and judgments came from those companies.

More than half of that $5 billion arose from an October 2020 agreement with Purdue Pharma LP, the manufacturer of opioid OxyContin, intended to resolve the company's criminal and civil liability over its "promotion of the drug to providers it knew were writing "unsafe, ineffective, and medically unnecessary" prescriptions, the DOJ said. The DOJ reached a $2.8 billion FCA settlement as part of that agreement, in the form of an unsecured claim in the company's bankruptcy." However, as reported in this report, that issue is still under litigation. In December, a district court overturned the bankruptcy court's confirmation of Purdue›s plan of reorganization.

Additionally, the department supplemented efforts to hold Purdue Pharma's former owners, the Sackler family, accountable for the company's role in the opioid epidemic. It secured a $225 million FCA settlement and another $209.3 million FCA settlement, which was part of a "broader $600 million settlement with Indivior PLC related to the alleged false marketing of addiction treatment Suboxone." The DOJ's other health care-related FCA priorities last year involved mounting lawsuits and investigations of plan operators for Medicare's managed care program, Medicare Advantage. The department alleges the providers "make their patients appear sicker than they actually were." The efforts are part of the department's work to combat the billing of the government for unnecessary medical services.

The DOJ explained that its recoveries were also attributable to unlawful kickbacks, an issue that was key to recoveries the previous year, including a settlement with diabetic testing supply company Arriva Medical LLC and its parent Alere Inc., for $160 million. The settlement resolved "claims related to Arriva providing Medicare beneficiaries with 'free' glucometers and routinely waiving copayment for testing supplies."

While a substantial basis for recoveries in the past, procurement fraud seemed to be a small part of the total 2021 recoveries. One of the higher-profile procurement cases settled for $50 million. The case involved allegations that Navistar Defense LLC "fraudulently induced the Marine Corps to pay inflated prices for armored vehicle components." According to the DOJ, it was the largest procurement-related recovery.

According to the department's annual statistical sheet, which includes more granular details about FCA cases and recoveries each year and was made available on Feb. 2, 203 new FCA cases were filed by the DOJ itself in 2021. That was down from the 259 cases filed in 2020. However, this was still the second-highest number of FCA suits filed by the department since 1995, when the number of whistleblower suits first exceeded the government's own FCA filings.

Whistleblowers filed 598 FCA suits in 2021, down from 675 in 2020. The DOJ marked the lowest number of qui tam suits filed since 2010. Recoveries from lawsuits originally filed by whistleblowers were close to $1.67 billion in 2021, similar to the $1.7 billion recovered due to qui tam cases in 2020.

So far, FCA litigation involving fraud related to Covid-19 didn't become real heavy in 2021. However, the DOJ is working to identify, monitor and investigate misuse of emergency funding by Congress. It's anticipated that the volume of this litigation will increase significantly during this year.

Source: Daniel Wilson, Law360.com

Cardinal Health Pays Over $13 Million To Settle Claims It Paid Physicians Kickbacks

Pharmaceutical distributor, Cardinal Health, Inc., has agreed to pay $13,125,000 to settle claims that it paid "upfront discounts" to its physician practice customers, in violation of the False Claims Act and Anti-Kickback Statute. This was announced last month by the U.S. Attorneys Office for the District of Massachusetts. Cardinal Health made upfront payments to doctors to persuade them to buy federally reimbursable drugs from the distributor instead of its competitors.

The settlement resolves two separate whistleblower actions. Each claim that Cardinal Health issued "rebates" or "upfront discounts" to doctors to encourage them to buy specialty drugs paid for by the government through Medicaid and Medicare programs. Massachusetts U.S. Attorney Rachael Rollins said in a statement:

> *Cardinal Health recruited new customers by offering and paying cash bonuses in violation of the Anti-Kickback Statute and False Claims Act. Kickback schemes, such as this one, have the potential to pervert clinical decision-making and are detrimental to our federal health care system and taxpayers.*

The relators, or whistleblowers, Omni Healthcare and three individuals – John Crowley, Jeffrey Lovesy and Mi-

chael Mullen – will receive about $2.6 million combined from the overall settlement, according to the government.

The following is a summary of The Anti-Kickback Statute application and specifically how it applies to Cardinal Health:

> The law prohibits pharmaceutical distributors from offering or paying any compensation to induce physicians to purchase drugs for use on Medicare patients. When a pharmaceutical distributor sells drugs to a physician practice for administration in an outpatient setting, the distributor may legally offer commercially available discounts to its customers under certain circumstances permitted by the Office of Inspector General for the Department of Health and Human Services (HHS-OIG).
>
> However, HHS-OIG has cautioned that upfront discount arrangements raise substantial kickback concerns unless those discounts are connected to specific purchases, and the distributors maintain appropriate procedures to ensure that discounts are clawed back in the event the purchaser ultimately does not purchase enough product to earn the discount.
>
> According to the settlement agreement, Cardinal Health's upfront discounts to its customers were not attributable to identifiable sales or were purported rebates that the customers had not actually earned. Therefore, Cardinal Health discounts did not meet the requirements set forth by HHS-OIG.

This False Claims Act settlement resolves claims initially brought in lawsuits filed by whistleblowers under the qui tam provisions of the Act, which gives private parties a right to bring suit on behalf of the government and share in any recovery. In connection with the settlement, the whistleblowers will receive approximately $2.6 million of the recovery.

Cardinal Health said it entered a five-year corporate integrity agreement with the government. This will require having an independent organization perform annual reviews and prepare reports to the Office of Inspector General and the U.S. Department of Health and Human Services. Cardinal says that it no longer offers upfront discounts.

Omni Healthcare is represented by David A. Koenigsberg of Menz Bonner Komar & Koenigsberg LLP and Tracy N. LeRoy of Yetter Coleman LLP. The individual relators are represented by David W.S. Lieberman, Suzanne E. Durrell and Robert Thomas of Whistleblower Collaborative LLC.

The government is represented by Evan Panich and Lindsey Ross of the U.S. Attorney's Office for the District of Massachusetts.

The underlying whistleblower cases are *Omni Healthcare Inc. v. Cardinal Health Inc. et al.*, case number 18-cv-12039, and *United States ex rel. Jeffrey Lovesy et al.*, case number 19-cv-12488, both in the District Court for the District of Massachusetts.

Source: Ivan Moreno, Law360.com and U.S. Attorneys Office, District of Massachusetts

The Beasley Allen Whistleblower Litigation Team

Whistleblower litigation is still very active around the country. Members of Beasley Allen's Whistleblower Litigation Team are still very busy handling cases under the False Claims Act (FCA). Our lawyers don't see any slowdown in the whistleblower litigation. Fraud against the federal government is being committed by all too many industries in this country, especially in the healthcare field. This continues to be a huge problem, and we have increased our staffing to handle the influx of new cases.

A person who has first-hand knowledge of fraud or other wrongdoing may have a whistleblower case. Before you report suspected fraud or other misconduct – before you "blow the whistle" – it is essential to make sure you have a valid claim and that you prepare for what lies ahead. The experienced group of lawyers on our team is dedicated to handling whistleblower cases.

It's important to know that 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 in Beasley Allen's Whistleblower Litigation Team for a free and confidential evaluation of your claim. There is also a contact form on the Beasley Allen website that you can use.

The Beasley Allen lawyers listed below are in 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), Leon Hampton (Leon.Hampton@BeasleyAllen.com), Tyner Helms (Tyner.Helms@BeasleyAllen.com) and Lauren Miles (Lauren.Miles@BeasleyAllen.com). Dee Miles (Dee.Miles@BeasleyAllen.com) heads our Consumer Fraud & Commercial Litigation Section, participates in the whistleblower litigation, working with the litigation group. The lawyers can be reached by phone at 800-898-2034 or email.

X.
SECURITIES LITIGATION

Oppenheimer Seeks Dismissal Of Class Action Over Ponzi Run By One Of Its Investment Advisors

Oppenheimer & Co., one of the nations' largest investment advisory firms, is asking a Georgia federal judge to dismiss claims that it should have been aware one of its advisors was running a Ponzi scheme within the company for a time. Briefing was completed in late January, but a hearing is not set.

In August 2021, the U.S. Securities and Exchange Commission (SEC) filed an enforcement action against John J. Woods, Southport Capital and Horizon Private Equity, III, LLC (HPE). It alleges that Woods, who worked at Oppenheimer's Atlanta, Georgia, office until 2016, had been soliciting clients to invest in HPE for over a decade. Woods, and others at Southport, promised that HPE would deliver stable returns of 6-7% per year, investing in stocks, bonds and real estate.

In reality, Woods was using new investors' funds to pay off prior investors – a classic Ponzi scheme. According to the SEC, as of July 2021, HPE owed investors over $110 million in principal but had liquid assets worth less than $16 million. The SEC action did not name Oppenheimer as a defendant.

Less than two weeks after the SEC complaint was filed, a private class action was filed in the U.S. District Court for the Northern District of Georgia. The class complaint al-

leges numerous violations of Georgia state law. In addition to the defendants in the SEC complaint, the class action also names advisors from Southport (including Woods' brother and cousin), two accounting firms and Oppenheimer as defendants. Unlike the SEC, the class action alleges that Oppenheimer knew that Woods was running HPE and offering his clients investments into the Ponzi.

According to both complaints, Woods began selling HPE investments in or around 2008 while working for Oppenheimer. In 2016, Woods resigned from Oppenheimer and continued to keep the Ponzi going as an advisor with Southport, which he partially owned. According to the class complaint, Woods set up an HPE office in the same building and on the same floor as the Oppenheimer office where he was employed and walked freely between the two offices.

In December 2021, Oppenheimer moved to dismiss the class complaint, arguing that the class plaintiff invested after Woods had already left Oppenheimer. They further argue that the Securities Litigation Uniform Standards Act (SLUSA) of 1998 preempts the claims because covered securities were involved in the sale. SLUSA bars certain class actions alleging fraud based on state law when the misrepresentations or omissions are connected with the purchase or sale of a "covered security." Publicly traded stocks and bonds are considered public securities.

Whether through the class action, individual actions, or FINRA arbitrations, if the allegations of the class complaint are proven, Oppenheimer could face serious liability related to the scheme, even for persons who were never Oppenheimer clients. Investment advisory firms have a duty to adequately supervise their employees to prevent such fraud. Additionally, traditional respondeat superior theories of liability could apply since Woods offered these investments while carrying out his official duties at Oppenheimer.

Lawyers in our firm's Consumer Fraud and Commercial Litigation Section are actively investigating claims against Oppenheimer related to investments in Horizon Private Equity, regardless of whether the investor was an Oppenheimer client. If you need more information or have comments, contact James B. Eubank, who heads our firm's Securities Litigation Team, at 800-898-2034 or by email at James.Eubank@BeasleyAllen.com. James, who worked for years as a securities regulator with the Alabama Securities Commission, leads the Beasley Allen team on securities fraud investigations.

Beasley Allen Securities Litigation Team

Our Beasley Allen Securities Team is Dee Miles, James Eubank, Rebecca Gilliland and Paul Evans. They can be reached at 800-898-2034 or by email at Dee.Miles@BeasleyAllen.com, James.Eubank@BeasleyAllen.com, Rebecca.Gilliland@BeasleyAllen.com and Paul.Evans@BeasleyAllen.com.

XI.
THE JUUL LITIGATION

Update On The JUUL Litigation

The JUUL MDL continues to move towards the first personal injury Bellwether trial set for April 2022. JUUL recently filed a round of motions for summary judgment, which the Plaintiffs vigorously opposed. JUUL also filed multiple *Daubert* motions regarding the first trial of plaintiff B.B., a 16-year-old minor from McMinnville, Tennessee, who Beasley Allen represents. Plaintiffs responded to these *Daubert* motions, and the court will hear oral arguments on both the summary judgment and *Daubert* motions over the next month.

As the parties progress towards the first trial, another round of bellwether discovery is being discussed. Plaintiffs and defendants have submitted their proposals for what the second round of bellwether discovery should encompass. And the court will review and determine the types of cases and timeline for this new round. Additionally, the court has indicated that a third personal injury case will be tried in 2022. Beasley Allen represents the two plaintiffs that the court previously selected for the third and fourth personal injury bellwether trials. We will provide additional updates on the second bellwether phase and third personal injury trial as information becomes available.

Beasley Allen continues to file cases on behalf of individuals suffering from personal injuries and claims on behalf of school districts and government entities across the country. Beasley Allen's Joseph VanZandt serves on the JUUL Plaintiff Steering Committee (PSC) and is counsel for the first bellwether trial. Joseph and Mass Torts Section Head Andy Birchfield heads our firm's efforts to hold JUUL accountable for the damage it caused to thousands of youths and communities around the country. Beasley Allen's Beau Darley, a lawyer in our Mass Torts Section, also serves on the PSC for the California state court litigation.

You can contact Joseph VanZandt (Joseph.VanZandt@BeasleyAllen.com) or Beau Darley (Beau.Darley@BeasleyAllen.com) to discuss potential cases or any part of the ongoing JUUL litigation.

The Beasley Allen JUUL Litigation Team

Beasley Allen lawyers, led by Joseph VanZandt, have been heavily involved in the JUUL litigation for several years. Our lawyers represent individuals suing JUUL, the top U.S. vape maker, for the negative impact its products have had on their lives. Beasley Allen also represents a number of school systems in the JUUL litigation. The firm's JUUL Litigation Team has filed JUUL lawsuits on behalf of school districts nationwide. This litigation seeks 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 JUUL Litigation Team at 800-898-2034 or email. Members are Joseph.VanZandt@BeasleyAllen.com, Sydney.Everett@BeasleyAllen.com, Beau.Darley@BeasleyAllen.com, Davis.Vaughn@BeasleyAllen.com, Seth.Harding@BeasleyAllen.com or SooSeok.Yang@BeasleyAllen.com. Andy Birchfield (Andy.Birchfield@BeasleyAllen.com) heads the firm's Mass Torts Section and works closely with the team on the JUUL litigation.

XII.
THE ASBESTOS LITIGATION

Industrial Talc — An Unrecognized Threat

Over the last few years, there has been a lot of news about cosmetic talc in the world of litigation. These stories in-

clude the first groundbreaking verdicts, which found that some talcum powder products are contaminated with asbestos fibers, earth-shattering judgments against Johnson & Johnson (J&J) for billions of dollars related to asbestos in their signature product Baby Powder, and, just recently, J&J's nefarious attempt to escape liability by shifting all of their asbestos liabilities into a shell corporation.

But with all of this news about cosmetic talc, people may be surprised to learn that there is another product out there called "industrial talc," and it can have even more asbestos in it than does cosmetic talc. Much of this industrial talc was mined in the Gouverneur Region of New York state, and it is contaminated with tremolite and anthophyllite asbestos. Industrial talc is used in ceramics, construction materials, tire-making, the paint industry, and several other products.

Exposures to this industrial talc often occur during the manufacturing process of certain products, and because it contains asbestos can cause someone to develop mesothelioma decades later. Amazingly, some of the companies that mined and milled industrial talc marketed its "asbestiform" qualities as selling points in the 1960s, but now they tell juries all over the country that their products are and always have been asbestos-free!

Industrial talc exposures can be difficult to identify, and the responsible parties even harder to find. At Beasley Allen, our team of mesothelioma lawyers have extensive experience working up and litigating industrial talc cases and can ensure our clients receive the maximum compensation to which they are entitled. If you have any questions or would like to discuss a potential claim, contact one of the lawyers on our Asbestos Litigation Team.

The Asbestos Litigation Team

Asbestos litigation continues to be extensive nationwide. Beasley Allen's Asbestos Litigation Team is headed by Charlie Stern. Other team members are Will Sutton and Cindy Lopez. Rhon Jones, who heads our Toxic Torts Section, works with the team. Charlie has years of experience in asbestos litigation, and that's why he was selected to lead the team. If you need assistance with cases involving asbestos products, contact one of the team members by phone at 800-898-2034 or email at Charlie.Stern@BeasleyAllen.com, William.Sutton@BeasleyAllen.com, or Cindy.Lopez@BeasleyAllen.com.

XIII.
MASS TORTS LITIGATION

The Belviq Litigation Update

On Dec. 13, 2021, Bergen County, New Jersey Judge Gregg A. Padovano refused to dismiss claims in a lawsuit filed by a Beasley Allen plaintiff. The claims were for design defect for their weight loss drug, Belviq, and punitive damages were sought against defendants Eisai, Inc. and Arena Pharmaceuticals, Inc. In his decision, Judge Padovano explained that, upon a careful review of the complaint, "Plaintiff has set forth sufficient facts to satisfy the initial stage of the pleading requirement." Specifically, Judge Padovano held that the plaintiff provided sufficient "information concerning design development, preclinical trials and studies and other factual details concerning the product 'Belviq.'"

On the punitive damages claim, Judge Padovano, determined that, although punitive damages are not a cause of action but rather a remedy, there was "no basis to restrict or otherwise dismiss the punitive damages allegation at this time." He also will allow the plaintiff to pursue these damages in discovery due to Belviq's alleged reckless and fraudulent failure to advise the FDA of Belviq's increased risk of cancers.

Belviq, or lorcaserin hydrochloride, was FDA-approved in 2012 for weight management in adults with a BMI of 30 or greater (obese) or a BMI of 27 or greater (overweight) who also had at least one weight-related condition, such as high blood pressure, type 2 diabetes, or high cholesterol. An extended release version of the drug, Belviq XR, was later approved in 2016. After its initial approval, the manufacturers conducted a 4-year clinical trial, ultimately showing an increased risk of certain cancers, the most prevalent of which were pancreatic, colorectal, and lung cancer. The clinical trial concluded on May 14, 2018, but results were not posted until more than a year later, on July 16, 2019. Belviq was later recalled in January 2020 due to these findings.

Beasley Allen lawyers have filed 14 cases against the Belviq makers, and most are filed in New Jersey state court, where one of the manufacturers, Eisai, Inc., is located. The cases allege multiple cancer types, including pancreatic, breast, colorectal, kidney, thyroid, esophageal, and brain cancer. Beasley Allen lawyers continue investigating cases on behalf of individuals prescribed Belviq and subsequently diagnosed with cancer. For more information, contact Melissa Prickett or Roger Smith at 800-898-2034 or by email at Melissa.Prickett@BeasleyAllen.com or Roger.Smith@BeasleyAllen.com.

Source : *Rose v. Eisai, Inc., et al.*, BER-L-1208-21, Trans ID: LCV20212927090; LCV2021292791

Tolling Agreement For Philips CPAP Litigation

Cases filed as a result of Philips' recall of millions of sleep and respiratory care devices have been consolidated before U.S. District Judge Joy Flowers Conti in the U.S. District Court for the Western District of Pennsylvania. The cases are part of a multidistrict litigation (MDL) ordered by the Judicial Panel on Multidistrict Litigation. For those who don't already know, an MDL is a consolidation of civil cases transferred from different jurisdictions around the country to a single U.S. District Court to achieve certain pre-trial efficiencies. The goal is to preserve judicial resources, eliminate duplication in the fact-finding process, and prevent inconsistencies in pre-trial rulings.

As of early February 2022, 221 lawsuits were pending in the MDL court. Those include both class action cases and individual personal injury cases. While users of Philips' devices who have experienced injuries after using one or more of the devices have the option to file suit, users now have the option to enter into a Tolling Agreement to toll, or pause, the statute of limitations.

Members of the Plaintiffs' Interim Lead Counsel and counsel for Philips have agreed to terms set forth in a Tolling Agreement that will be published on the MDL court's website at https://www.pawd.uscourts.gov/mdl-3014-re-phillips-recalled-cpap-bi-level-pap-and-mechanical-ventilator-products-litigation.

In lieu of filing suit, counsel for plaintiffs will now have

the option to include claimants on the Tolling Agreement to pause the running of the statute of limitations. To include their clients on the Tolling Agreement, counsel for plaintiffs will be required to provide counsel for Philips with identifying information for each claimant.

The required identifying information includes the individual's name and address, date of birth, and the name, address, and email of their counsel if represented. All potential claimants must also provide counsel for Philips with their recalled device name and serial number unless they no longer have the recalled device in their possession.

On June 14, 2021, Philips issued a voluntary recall notification for certain sleep and respiratory care devices. The recall addressed identified potential health risks related to the sound abatement foam in these devices. Philips has utilized polyester-based polyurethane (PE-PUR) sound abatement foam to dampen device vibration and sound during routine operation. In the recall, Philips identified two issues with the foam:

- the potential of the foam to degrade; and
- the potential for chemicals to be emitted from the foam.

Philips has determined from user reports and lab testing that the foam may degrade and produce particulates that can enter the device's air pathway and be inhaled by the user. Philips' own lab testing of degraded foam particles has revealed the presence of multiple potentially harmful chemicals, including toluene diamine, toluene diisocyanate, and diethylene glycol.

Philips also reported that lab testing identified Volatile Organic Compounds (VOCs) that can be emitted from the foam. Testing identified two compounds of concern that may be emitted from the foam and are outside of safety thresholds. The compounds identified are:

- Dimethyl Diazine, and
- Phenol, 2,6-bis (1,1-dimethyllethyl)-4-(10methylpropyl)-.

Beasley Allen lawyers are currently investigating claims related to the devices recalled by Philips where users have developed lung cancer, asthma, chronic respiratory injuries, or kidney disease. For more information, contact Beau Darley, Alexa Wallace or Melissa Prickett, lawyers in our Mass Torts Section at 800-898-2034 or by email at Beau.Darley@BeasleyAllen.com, Alexa.Wallace@BeasleyAllen.com, or Melissa.Prickett@BeasleyAllen.com.

Sources: Philips Recall Notification for Sleep and Respiratory Care Devices – June 14, 2021; Philips Sleep and Respiratory Care Update, Clinical Information for Physicians – June 14, 2021; Pretrial Order No. 7, *In re: Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Prods. Liab. Litig.*, MDL No. 3014 (W.D. Pa. Feb. 8, 2022).

Milk Banks Help Babies At Risk For Necrotizing Enterocolitis

Last month we reported on the increased risk of premature infants developing necrotizing enterocolitis (NEC) from use of bovine-derived formula nutrition products such as Enfamil and Similac. NEC is a dangerous gastrointestinal condition that damages intestinal tissue. Many babies require surgery, and some sadly succumb to the disease. Those who do survive may suffer long-term complications.

To combat this serious illness, milk banks are providing hospitals with donations for premature and low birth weight infants. A human milk bank is "a service which collects, screens, processes, and dispenses by prescription human milk donated by nursing mothers who are not biologically related to the recipient infant." (CDC.gov)

Premature and low birth weight infants are shown to have better outcomes with human milk instead of formula. The risk of developing NEC is lowered by 79% for infants fed human milk. Formula-fed premature infants are six to ten times more likely to develop this potentially devastating condition.

Unfortunately, demand is quickly surpassing supply. New donors are continually needed, as most donors only pump while their child is nursing. This problem is made even more difficult due to COVID. Being at home has meant many parents spend less time pumping and therefore have less milk to spare. COVID has also made it difficult for milk banks to host educational events and solicit donors.

Milk banks across the country call on lactating individuals with extra milk to provide donations to help provide human milk for vulnerable babies. The Human Milk Banking Association of America provides resources for those looking for a local milk bank and how to donate.

For more information on baby formula and NEC, contact Brittany Scott or Melissa Prickett at 1-800-898-2034 or email at Brittany.Scott@BeasleyAllen.com or Melissa.Prickett@BeasleyAllen.com.

Sources: hmbana.org, web.archive.org, cdc.gov, insider.com and WVTM13.com

XIV.
EMPLOYMENT AND FLSA LITIGATION

Employment And Labor Law

Beasley Allen lawyers have been very busy handling cases involving employer-employee issues, including labor law abuse litigation. Several years back, our firm dedicated a portion of our law practice to helping victims injured and damaged in some manner in their employment. These cases are handled in our Consumer Fraud and Commercial Litigation Section by a specific number of lawyers on a designated litigation team. These cases would not include workplace injuries and deaths, which are handled by lawyers in the firm's Personal Injury & Products Liability Section.

The Beasley Allen lawyers on the Employment Litigation Team pursue litigation on behalf of employees against employers in all industries. Every person deserves to be compensated for what they provide in the workplace and to be treated fairly and justly. Upholding the laws and the rights those laws bestow to individuals benefit all workers. Actually, those employers that follow and obey the law also benefit. Our firm welcomes any opportunity to investigate employment cases and seek justice for employees.

The Beasley Allen Employment Litigation Team

The following lawyers are on the Employment Litigation Team: Lance Gould, Larry Golston, Leon Hampton and Lauren Miles. They can be reached at 800-898-2034 or by email at Lance.Gould@BeasleyAllen.com, Larry.Golston@BeasleyAllen.com, Leon.Hampton@BeasleyAllen.com or Lauren.Miles@BeasleyAllen.com.

XV.
PREMISES LIABILITY LITIGATION

Two Types Of Premises Liability Litigation

Lawyers in our firm's Atlanta, Montgomery and Mobile offices have handled a large number of premises liability cases over the years. The cases vary greatly and involve defendants of all sorts, such as property owners, business owners and operators, security providers and more. These cases can involve individuals who visit retail establishments such as a restaurant, retail store or theater and who are harmed by a dangerous condition that exists on the property and / or an employee's direct actions. In some states, such as Georgia, these two types of cases are analyzed and evaluated differently by the courts.

When most folks think of "premises liability," they think of the first type of case – a case where a dangerous condition exists on a property that the facility such as a retail store, restaurant or theater knew about, or should have known about the condition, and allowed the hazard to exist. An example of such a case would be if a retail store knew or should have known that a customer or employee spilled a foreign substance on the floor, but the store failed to clean up the spill or put a warning sign up, resulting in another customer slipping and falling and sustaining injuries.

In these cases, the premises' owner must have had some degree of control over the defective condition. One of the main questions courts must consider in these types of cases is whether the injured victim also knew, or should have known, about the dangerous condition or whether the owner or employees of the store had superior knowledge.

The other type of case occurs when an employee's direct actions injure the victim. This is often referred to as active negligence. Going back to our spilled foreign substance example, the store could also be liable for active negligence if one of its employees spilled the foreign substance instead of another customer. These cases are evaluated just like any other simple negligence case – the elements for such cases are negligence, causation, and damages.

In an active negligence case, the liability threshold is lower. The premises owner would presumably be unable to obtain summary judgment based on the Superior Knowledge Doctrine.

Regardless of the type of case, an individual may have a viable claim if they were injured by a hazardous condition or an employee's direct actions. Parker Miller, a lawyer in Beasley Allen's Atlanta office, handles numerous premises liability cases across Georgia and other states. If you have any questions about these cases, contact Parker at Parker.Miller@BeasleyAllen.com or 800-898-2034.

Large Venues Are Legally Responsible For Their Security

A specific area of premises liability involves "venues" where large crowds gather for an event of some sort. Venues have a way of enriching our lives by bringing us together with others who share our passion for profession, the arts, sports, or food. There is nothing quite like enjoying a thrilling concert or sporting event with thousands of other people or sharing that moment of excitement with moviegoers at a thrilling blockbuster movie. As venues continue to reopen from the devastating impacts of COVID, customers are returning to movie theatres, concerts, sporting events, conventions, and festivals. With this reopening, businesses are looking to make up for years of lost revenues. Still, they must be careful not to forget lessons learned from pre-COVID days when we experienced what seemed to be monthly shooting events at venues.

We all remember the horrifying consequences of the 2015 San Bernardino, the 2016 Pulse Nightclub, and the 2017 Las Vegas Mandalay Bay Hotel shootings that took numerous lives. We have seen what happens when just one individual with a weapon can enter a movie theatre, nightclub, concert, sporting event, or other venue packed with people. The results are always catastrophic. Businesses must be diligent in ensuring they have measures in place to protect the safety of their guests from these threats.

Parker Miller, our lead premises liability lawyer in Atlanta, has litigated negligent security and mass shooting cases. He explained, "Churches, concerts, nightclubs, sporting events, festivals, conventions, and movie theatres all have one key thing in common – they have all been targeted for mass shootings, and a lot of people have died as a result."

Parker continued by explaining that the first step to combating these threats is acknowledging that they still exist. He said, "Mass shootings occurred so frequently before the pandemic that we lost count. Common sense measures, such as frisking, metal detectors, onsite security, cameras, lighting, enforced policies and procedures, training, and awareness can make all the difference. Many of these can be accomplished at no cost, while the rest are surprisingly inexpensive."

Parker is currently litigating a mass shooting case involving a concert in Atlanta, Georgia, where multiple shots were fired in a crowded venue. Two of our clients were murdered, and others were shot as well. Parker says:

> *Entirely preventable. Certainly, when you can entertain tens, hundreds, or thousands of guests at the same time, there is the opportunity to make a lot of money. There is nothing wrong with making a lot of money in your given profession, but with that great reward comes immense responsibility to protect your customers. They are counting on you.*

Premises liability and negligent security laws exist in many states to obligate premises owners to take reasonable measures to protect customers from foreseeable harm. Foreseeable harm could be the threat of criminal activity, such as shootings, sexual assault, or beatings. It could also be the threat of a fire-related event. "Mass shootings get a lot of attention, and they certainly should, but a fire-related event in a crowded room can be absolutely catastrophic. Business owners have to be aware of these threats and take proper precautions," Parker said. "Following state and federal regulations, conducting frequent vulnerability assessment inspections, and making exits available and clearly marked, are critical to mitigating loss of life if a fire breaks out."

Lawyers in our firm are investigating and litigating numerous major premises cases in the Southeast. If you have any questions about these cases, contact Parker Miller at Parker.Miller@BeasleyAllen.com or by phone at 800-898-2034.

XVI.
WORKPLACE LITIGATION

On-The-Job Injury- Logging Accident

Evan Allen, a lawyer in Beasley Allen's Mobile office, was recently hired to investigate the untimely death of Mr. Armon Dale Reed. Mr. Reed was working as a logger in rural Washington County, Alabama, on Feb. 1, 2022, when the logging equipment he was operating malfunctioned. Mr. Reed was pinned when the hydraulic system on the cutter he was operating failed suddenly. Beasley Allen's products liability lawyers are investigating the incident and will determine why the cutter's hydraulics failed, causing Mr. Reed's sad and preventable death. He was 56 and had worked in the timber industry for many years.

The Bureau of Labor Statistics reports that logging workers have had one of the highest fatal on-the-job injury rates. In 2020, logging workers had the second-highest fatal injury of all other occupations in the U.S. When on-the-job injuries are caused by industrial equipment like the equipment that fatally injured Mr. Reed, third parties like the equipment manufacturer/designer, installers or even product modifiers may be implicated. We will keep our readers updated on the status of the investigation of what led to Mr. Reed's tragic on-the-job injury.

If you need more information on this case, contact Evan Allen (Evan.Allen@BeasleyAllen.com) in our Mobile office. Evan is one of the lawyers handling the firm's workplace injury and death cases.

Sources: Bureau of Labor Statistics

XVII.
TOXIC TORT LITIGATION

Beasley Allen Named Interim Class Counsel For J&J Sunscreen (Benzene) MDL

U.S. District Judge Anuraag Singhal of the Southern District of Florida has appointed Beasley Allen and four other firms as interim class counsel in the Johnson & Johnson (J&J) Sunscreen multidistrict litigation (MDL) proceeding. The firms will act on behalf of the nationwide class as the parties work towards the approval and implementation of a proposed settlement agreement to address the marketing and sale of benzene-contaminated sunscreen products. The other firms that will serve as interim class counsel are Aylstock, Witkin, Kreis & Overholtz, PLLC, Bradley/Grombacher, LLP, Keller Lenkner, LLC, and Walsh Law, PLC.

David Byrne, a lawyer in our firm's Mass Torts Section, leads the Beasley Allen litigation team that has been pursuing a federal class action lawsuit on behalf of consumers who bought recalled J&J sunscreen products from the Neutrogena and Aveeno product lines and that were found to be tainted with benzene. Benzene is a known carcinogen, and exposure to it has been linked to cancer and other illnesses.

Last May, the independent laboratory, Valisure, announced that it had detected benzene in 78 of the 294 sunscreen and after-sun care products it tested (26.5%). Fourteen of the tested product lots had benzene concentrations that exceeded the Food and Drug Administration (FDA) provisional limit of 2 parts per million (2ppm). Two months later, J&J subsidiary Johnson & Johnson Consumer Inc. (JJCI) finally recalled five of its Neutrogena and Aveeno sunscreen spray product lines.

If you or someone you know has experienced harm from using sunscreen products, call 800-898-2034 or email Melissa.Prickett@BeasleyAllen.com or David.Byrne@BeasleyAllen.com.

The case is *In re: Johnson & Johnson Sunscreen Marketing, Sales Practices and Products Liability Litigation, Multidistrict Litigation*.

Sources: HarrisMartin and Law360.com

Paraquat MDL Update

The Paraquat Products Liability Litigation Multidistrict Litigation (MDL) was formed on June 8, 2021 (Case No. 3:21-MD-3004), with Chief Judge Nancy J. Rosenstengel of the Southern District of Illinois presiding.

On Oct. 27, 2021, Judge Rosenstengel entered Case Management Order No. 10, implementing the Plaintiff Assessment Questionnaire (PAQ). Each of the court's Orders, as well as the PAQ, can be found on the court's web page regarding the paraquat litigation: http://www.ilsd.uscourts.gov/mdl/mdl3004.aspx

The PAQ is a detailed, thirteen-page questionnaire regarding a plaintiff's exposure to paraquat and health history. It requires extensive details regarding farming history, information about training and licensure to apply restricted-use herbicides, and personal protective equipment (PPE) worn during each exposure to paraquat. The PAQ must be signed under oath by the client or the client's representative. The court held that "the effect of a [p]laintiff's response to the questions contained in the PAQ shall be considered the same as interrogatory responses." The PAQ is due 30 days after the complaint has been entered on the docket.

Obtaining this comprehensive information from the client is a time-intensive process, which can be challenging due to the devastating nature of the client's Parkinson's disease, which has been linked to paraquat exposure. We suggest filling out the PAQ with your client before filing suit to learn more about the client's exposure information and ensure a timely filing date after filing the complaint. Often, a client's exposure to paraquat occurred several decades ago. Work with any exposure witnesses to help refresh your client's recollection of each exposure. Each time a client was directly exposed to paraquat should be disclosed on the PAQ.

Beasley Allen lawyer, Julia A. Merritt, is a member of the Plaintiffs' Executive Committee on the Paraquat MDL. She would be happy to answer any questions about the status of this litigation or the intricacies of the PAQ. Beasley Allen continues accepting cases where clients applied paraquat and have Parkinson's Disease or Parkinson's-like symptoms. You can contact Julia at 800-898-2034 or by email at Julia.Merritt@BeasleyAllen.com, and she will be glad to assist you in your paraquat applicator cases.

The Paraquat Litigation Team

The Paraquat Litigation Team at Beasley Allen, consisting of lawyers in our Toxic Torts Section, handles the paraquat

applicator cases. The lawyers are Julia Merritt (Julia.Merritt@BeasleyAllen.com), who heads the team, Trisha Green (Trisha.Green@BeasleyAllen.com), and Matt Pettit (Matt.Pettit@BeasleyAllen.com). Rhon Jones (Rhon.Jones@BeasleyAllen.com) heads our Toxic Torts Section and works with the team on this important litigation. You can contact these lawyers by phone at 800-898-2034 or email for more information on the litigation, including the MDL.

$65 Million Settlement In New York Forever Chemical Water Suit

U.S. District Judge Lawrence E. Kahn has granted final approval to a $65 million settlement resolving claims that Saint-Gobain Performance Plastics Corp., 3M Co. and Honeywell International Inc. were responsible for water contamination that negatively affected hundreds of Hoosick Falls, New York, residents. A Feb. 4 order by Judge Kahn approved the settlement as fair and adequate relief for the classes involved, coming after arm's length negotiations. The case will continue against another defendant, E.I. DuPont de Nemours & Co., which is not a party to the settlement.

According to Judge Kahn's order, more than 2,300 claims have been made, with class counsel estimating that it comprises more than 70% of class members with property and nuisance claims and 60% of class members with medical monitoring claims. This represents a substantial, positive reaction to the settlement, the judge wrote, noting that there have been no objections to the settlement and neither have there been any opt-outs from class members.

Judge Kahn also approved class counsel's request for just under $12.4 million in attorneys fees and $1 million in expenses, finding that it's a reasonable sum given the novel and complex nature of the case, and at 19% of the common fund, it's well within reasonable amounts, as the Second Circuit has previously approved attorney fees that are 33% of common funds.

The settlement also includes $25,000 service awards for each of the 10 class representatives — Michele Baker, Charles Carr, Angela Corbett, Pamela Forrest, Michael Hickey, Kathleen Main-Lingener, Kristin Miller, Jennifer Plouffe, Silvia Potter and Daniel Schuttig — for their work in prosecuting the case.

The plaintiffs say a facility in their town used a perfluorooctanoic acid (PFOA) containing foam from "at least 1967" to 2003 that was emitted into the air and groundwater, polluting the area and causing elevated levels of the chemical in residents' blood. The plaintiffs argued that because Honeywell used to own that facility, Saint-Gobain does now, making them responsible.

PFOA chemicals are referred to as "forever chemicals" because of their longevity in the human body and the environment. These chemicals are associated with a range of adverse health events, including developmental and reproductive problems, increased risk of cancers in the liver and kidney, and immunological effects.

In addition, 3M and DuPont are linked to manufacturing the Teflon products that were used and knew about the health risks PFOA posed long before they told the public. The residents say the manufacturers failed to warn them of the harm.

According to Stephen Schwarz, a lawyer with Faraci Lange LLP, representing the plaintiffs, the settlement will fund a 10-year medical monitoring program to help the residents diagnose and treat illnesses related to the contamination. He said further:

> *More than 2,500 current and former residents of the Town of Hoosick and Village of Hoosick Falls who were damaged by this contamination will now receive partial compensation for their losses.*

James J. Bilsborrow, a lawyer with Weitz & Luxenberg PC, also representing the plaintiffs, added:

> *The response to the settlement has been "outstanding" given the high rate of claims being submitted. This is a testament to the quality of the settlement and its benefits, and we are optimistic this resolution will bring a real measure of relief to the Hoosick Falls community.*

As stated above, the case will go forward against DuPont. A motion for class certification for claims against that company is pending.

The plaintiffs are collectively represented by James J. Bilsborrow and Robin L. Greenwald of Weitz & Luxenberg PC, Stephen Schwarz and Hadley L. Matarazzo of Faraci Lange LLP and Gerald Williams of Williams Cedar LLC.

The case is *Michelle Baker et al. v. Saint-Gobain Performance Plastics Corp. et al.*, case number 1:16-cv-00917, in the U.S. District Court for the Northern District of New York.

Source: Law360.com

3M Earplug Litigation's Largest Verdict

Jurors in Pensacola, Florida, recently awarded U.S. Army veterans Ronald Sloan and William Wayman the largest verdict to date in the 3M Combat Arms Earplug litigation. The jury awarded $15 million in compensatory damages and $40 million in punitive damages. Notably, Wayman and Sloan will individually receive more than the previously largest verdict in the litigation of $22.5 million.

Nearly 300,000 service members are pursuing claims against 3M, claiming they suffered hearing damage because of earplugs. The trial was the eleventh so far to reach a verdict. In six trials, plaintiffs won more than $160 million combined. Juries sided with 3M in the other five.

Five more bellwether trials are scheduled this year, beginning in March and continuing through May. The bellwether trials are part of consolidated multidistrict litigation over the 3M Combat Arms version 2 earplugs (CAEv2). The plaintiffs are predominantly current and former members of the military who developed hearing loss and tinnitus from the defective earplugs. The case is *In re: 3M Combat Arms Earplug Products Liability Litigation* (case number 3:19-md-02885) in the U.S. District Court for the Northern District of Florida. The service members and veterans are represented by a team led by Bryan Aylstock of Aylstock Witkin Kreis & Overholtz, Shelley Hutson of Clark Love & Hutson, and Christopher Seeger of Seeger Weiss LLP.

Source: Reuters

The Regulation Of PFAS Is Overdue

As the Environmental Protection Agency (EPA) continues pledging action to solve challenges addressing PFAS,[5] nearly three dozen states will consider new laws to address the widespread environmental contami-

[5] https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf

nants.[6] Several bills have been introduced at the state level that would address PFAS testing and concentration limits in water. As many as 10 states are now considering a broader approach to restrict the use of the chemicals in consumer products. These bills and regulations range in efforts to require disclosure of the PFAS use and the outright ban of PFAS use in things like personal care products, food packaging, and carpets.

Federal and state regulators and legislatures' attention continues to pressure major retailers to eliminate the use of PFAS in their products. Public attention and litigation also pressure manufacturers of PFAS and PFAS-containing products to shift to other chemistries altogether. Lawsuits have been filed against major chemical manufacturers like 3M and DuPont and manufacturers of PFAS-containing products such as carpet mills, paper mills, and firefighting foam makers. These lawsuits allege a variety of claims from personal injury, trespass and nuisance, and state natural resource damages.

XVIII.
CLASS ACTION LITIGATION

Breach Of Contract Claim Relating To Ticket Prices Is Not Preempted By The Airline Deregulation Act, Per The Eleventh Circuit

On Feb. 3, 2022, the Eleventh Circuit Court of Appeals, in a *per curiam* opinion, reversed a decision from the Southern District of Florida that found a proposed class action against an airline over undisclosed passenger exit fees from Miami was preempted by the Airline Deregulation Act (ADA). The Eleventh Circuit's ruling finding no such preemption in *Cavalieri v. Avior Airlines C.A.*, Case No. 19-11330 (11th Cir. Feb. 3, 2022), is an important and welcome departure from a line of cases holding that the ADA preempts state law claims relating to ticket prices charged and the services provided by airlines.

The ADA, enacted in 1978 to promote competition among national airlines, prohibits states or political authorities from enforcing laws or regulations on airlines related to their prices, routes or services. The purpose of the preemption provision of the ADA is to ensure states do not undo the federal deregulation of airlines by imposing their own regulations that might undermine the federal policy of promoting low prices, efficiency and innovation in the airline industry.

The statute has been interpreted broadly and has been held to preempt many common law and statutory claims relating to prices, routes and services, no matter how attenuated from the policies underlying the statute. Thus, claims for consumer fraud, false advertising, seating of mobility-impaired passengers, detention of passengers by security personnel, failure to seat confirmed passengers, and even a case arising from a data breach at an airline have all been held to be preempted by the ADA.

In *Cavalieri*, plaintiffs asserted a single claim against Avior Airlines alleging breach of contract under Florida law for being ordered as passengers to pay $80 each to board their flight from Miami to Venezuela. Plaintiffs alleged the airline breached its contract of carriage, which did not disclose the fee. The exit fee was in addition to the flight's ticket price.

In resisting the airline's ADA preemption argument, plaintiffs argued their breach of contract claim was not subject to preemption, relying on the U. S. Supreme Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). In *Wolens*, the Supreme Court excepted from preemption a breach of contract claim relating to mileage credits for free tickets and upgrades based on an airline's frequent flyer program, holding that passenger-airline frequent flyer agreements are privately ordered obligations, undertaken voluntarily by airlines, and thus do not amount to state regulation of prices, routes and services. The *Wolens* ruling has been interpreted as a narrow exception to the otherwise broad reach of ADA preemption.

In *Cavalieri*, the claim *did* relate to ticket prices, and, unlike in *Wolens*, the contract was directly related to price – the contract of carriage – under which the airline agreed to transport the passenger for a ticketed price, inclusive of fees and taxes. Plaintiffs argued, however, that the contract of carriage was a voluntary obligation undertaken by Avior to charge the ticketed price and because it did not explicitly disclose in the contract of carriage that it would charge an exit fee for the flight from Miami to Venezuela, the airline breached the contract. The exit fee was extra-contractual.

The lower court dismissed the complaint finding, based on a magistrate's recommendation, that the contract on its face related to prices and therefore was not excepted by *Wolens*, and sought to enlarge the airline's contractual obligation in reliance on state law because there was no voluntary undertaking by the airline to disclose the exit fee in the contract of carriage.

The Eleventh Circuit rejected this analysis. It held that just because a contract relates to price doesn't necessarily mean it is subject to preemption under the ADA, and that plaintiffs' claim for breach of contract "seeks merely to enforce the parties' private agreements regarding the cost of passage and does not invoke state laws or regulations to alter the agreed-upon price." In other words, plaintiffs were not invoking a state law or regulation to *expand* the obligations the airline undertook in the contract of carriage, which arguably could be preempted under the ADA, but to comply with them.

The Eleventh Circuit's decision is a pointed rejection of what amounts to a game of "gotcha" by the airline. Simply put, *Cavalieri* stands for the just proposition that an airline cannot charge passengers one price to fly somewhere and, after they pay and arrive at the airport ready to leave, charge them something more to get on the airplane. This important and fair pro-consumer ruling is sure to generate interesting case law in its wake and, no doubt, lead airlines to reassess the language in their contracts of carriage.

The defendant airline may petition for rehearing *en banc* and / or seek certiorari in the Supreme Court. We will keep our readers posted on any new developments, if any, regarding this important decision. If you have any questions, contact Demet Basar, a lawyer in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Demet.Basar@BeasleyAllen.com.

Ninth Circuit Rejects Challenges To "Conjoint Analysis" In Consumer Class

Over the last few years, "conjoint analysis" has been trending as an available methodology in consumer class

[6] https://news.bloomberglaw.com/environment-and-energy/dozens-of-states-seek-to-regulate-pfas-other-chemicals-in-2022

actions as a method for calculating class-wide damages. Conjoint analysis is so named because it is used to study the *joint* effects of multiple product attributes on consumers' choices. This methodology uses survey data to measure the strength of consumers' preferences for particular product features. In essence, it tries to isolate how much people care about an individual product attribute in a multi-feature product.

While conjoint analysis first emerged as a market research tool to help businesses optimize their products, *Mondaq* explains that "many plaintiffs (and their experts) have attempted to employ conjoint analysis as a tool for measuring the 'price premium' attributable to a labeling statement or the effect that the disclosure of a product defect would have had on the product's price."

The publication further explains that "[d]efendants have taken the position that conjoint analysis is only capable of measuring consumer preferences, cannot account for the array of competitive and supply-side factors that affect the price of a product, and that it is, therefore, incapable of measuring the price effect attributable to a labeling statement or disclosure."

Since the U.S. Supreme Court's opinion in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), a class action plaintiff's ability to win class certification now turns heavily with the plaintiff's ability to develop a class-wide damages model. Accordingly, defendants in consumer class actions frequently argue that conjoint analysis is unsuited to measuring class-wide damages consistent with *Comcast* and that it is inadmissible under Federal Rule of Evidence 702.

A recent Ninth Circuit opinion—*MacDougall v. American Honda Motor Co.*, may threaten a defendant's ability to challenge conjoint analysis in such a manner—at least under *Daubert* grounds. The *MacDougall* case was a putative class action alleging that American Honda Motor Co., Inc., failed to disclose the transmission defect in its vehicles. The plaintiffs relied upon the testimony of an economist and statistician expert to determine class-wide damages.

The expert relied on a conjoint survey that gave consumers a choice between products whose features or attributes differed. Consumers' responses served as the basis for determining a dollar value that could be attached to each measured feature.

In this case, plaintiffs' expert witness relied on the conjoint study to measure the value difference between vehicles with transmission defects and those without defects. The value was used to establish the amount of damages towed by the defendants.

In opposing class certification, Honda moved to strike the expert testimony under Federal Rule of Evidence 702 and *Daubert*, arguing this conjoint analysis was flawed and inadmissible, both "because it only accounts for demand-side and not supply-side considerations" and "because it utilizes an invalid design that obtains mostly irrational results." The district court agreed and excluded the plaintiff's expert's conjoint analysis. It granted Honda's request for summary judgment after finding that the plaintiffs failed to offer admissible evidence of class-wide damages.

In so holding, the district court concluded the expert's conjoint analysis improperly inflates damages because, as *Mondaq* notes, it "does not ... account for supply-side considerations and only measures a consumer's willingness to pay for certain product features—not the market price that the product would command in the absence of the purported defect." The court also took issue with the expert's failure to conduct a pretest of the final conjoint survey, which is standard procedure to prevent respondents from being confused, or misled by the questions, to ensure respondents' preferences and the product attributes that are being surveyed are measured accurately in the conjoint survey.

The Ninth Circuit summarily reversed, finding that the admissibility of expert testimony was a "case-specific inquiry" and therefore rejecting Honda's argument that "conjoint analysis categorically fails as a matter of economic damages." The Ninth Circuit also observed that the "district court relied on numerous cases that do not analyze the admissibility of conjoint analysis under Rule 702 or *Daubert*" and concluded that "Honda's challenges—*inter alia*, the absence of market considerations, specific attribute selection, and the use of averages to evaluate the survey data—'go to the weight given the survey, not its admissibility.'"

Honda asked the court for an extension to file a petition for panel rehearing or rehearing *en banc*. Though the decision was unpublished, and it remains to be seen whether the Ninth Circuit's decision will stand, it presents good news for class action plaintiffs that attacks on conjoint surveys go to the weight, not admissibility, of an expert opinion, regardless of the results.

Sources: *Mondaq*, JDSupra, Lexology

Class Action Settlements

There have been a number of significant class action settlements during February, and several of them have received court approval. We will include some of them below.

Settlement In The Home Depot Data Breach Litigation

An Eleventh Circuit Court of Appeals panel has ordered a Georgia federal court to award $11.7 million in attorney fees, plus interest, to lawyers representing banks and other financial institutions in litigation over Home Depot's 2014 data breach. This ends a four-year fight over the issue involving the fees. The total value of the settlement was $27.2 million, plus equitable relief of forcing Home Depot to upgrade its security system.

Home Depot's 2014 data breach compromised 56 million credit and debit card numbers and was one of the largest payment card data breaches in history. Our firm was fortunate to have been involved in the leadership of this multidistrict litigation case in federal court in Atlanta, a case that obtained tremendously good class relief for both consumers and the financial institutions.

The 2017 settlement agreement provided $27.2 million in cash to the class and required the retailer to improve its data security. In addition, Home Depot gave money to the financial institutions affected by the breach, including an extra $14.5 million to obtain releases from putative class members of their claims in the litigation.

After settling, the class of financial institutions sought $18 million in attorney fees, comprising the $11.7 million lodestar and a multiplier of 1.55, which Home Depot opposed as excessive. The retailer had argued that $5.6 million in fees was appropriate.

In a *per curiam* opinion, the appeals court found that the Northern District of Georgia erred by using a percentage method as the basis of a $14.5 million (including interest) attorneys' fees' award after the Georgia federal

court held that an $11.7 million lodestar amount was "fully supported by the record."

The panel remanded the case and instructed the district court to enter an order requiring Home Depot Inc. to pay class counsel for the financial institutions $11.7 million plus interest from the date of the amended fee award in January 2020. The panel said, referencing the previous appeal in the case:

The law of the case doctrine and Home Depot's mandate precluded the district court from awarding class counsel an attorney's fee other than the $11.733 million lodestar plus interest.

In September 2017, a Georgia federal judge set attorney fees at $15.3 million. But in July 2019, the Eleventh Circuit reduced the award against Home Depot, saying U.S. District Judge Thomas W. Thrash Jr. improperly enhanced an $11.7 million lodestar amount by a multiplier of 1.3 to factor in attorney risk.

On remand, Judge Thrash agreed with new arguments from the class of financial institutions and awarded $14.5 million in attorney fees, including interest, in January 2020 against Home Depot, plus about $730,000 in costs.

Home Depot appealed again, arguing the settlement agreement clearly states the retailer should pay the amount of attorney fees that were reduced on appeal, plus interest.

Home Depot argued in December 2020 that the trial judge didn't have the authority to reconsider an appropriate attorney fees amount using a different calculation method because the appellate court affirmed all but the multiplier in his previous decision, including the $11.7 million lodestar. Although the appellate panel did not explicitly state in its 2019 opinion that $11.7 million was the appropriate amount of attorney fees, Home Depot said that was implied by its affirmation of all but the risk multiplier. It was successfully argued by the class:

Judge Thrash did have discretion on remand to take a second look at what was appropriate, as long as he didn't use the 1.3 risk multiplier that appellate judges had rejected. The trial judge could instead apply a percentage method to calculate fees rather than rely on the $11.7 million lodestar, which is what he actually did.

This case has finally reached a conclusion. The most important goal reached in the case was that consumers and banks were compensated for their losses because of the security breach and that Home Depot was ordered to improve their security systems to prevent a future data breach. If you need more information, contact Dee Miles, Section Head of our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Dee.Miles@BeasleyAllen.com.

Source: Sarah Jarvis, Law360.com

Facebook Settlement For $650 Million Reached While On Appeal

After years of hotly contested litigation, the class action case against Facebook was headed to a jury trial when the parties reached an initial $550 million settlement in 2020. Class counsel hailed it as the largest amount ever paid out to resolve a privacy-related lawsuit. But U.S. District Court Judge James Donato had problems with the initial proposal, which he noted gave users just 1.25%, or $300 at most, of what they could be entitled to under BIPA, even though the state statute comes with a $1,000-per-violation fine and a $5,000 enhancement for intentional or reckless violations.

The objectors' comments came during a hearing on an appeal of multiple aspects of Facebook's revised $650 million settlement resolving claims saying that the social media giant breached the Illinois Biometric Information Privacy Act (IBIPA) by using facial recognition technology without users' consent to fuel its photo tag suggestion feature.

At the time, Judge Donato told the parties that the enhancement appeared to be a potentially viable claim in light of the $5 billion fine Facebook agreed to pay the Federal Trade Commission in 2019 for violations of a 2012 consent decree over its privacy practices. The parties subsequently filed a motion asking Judge Donato to preliminarily approve a revised $650 million settlement agreement, which attempted to address the judge's concerns by narrowing the release provision and increasing class members› potential recoveries to up to $400.

In February 2021, Judge Donato signed off on the revised agreement, calling it a "landmark result," but he reduced the $110 million requested attorney fees to $97.5 million, which reflected a 15% portion of the settlement. He also reduced the requested incentive awards to three class representatives from $7,500 to $5,000 each.

Source: Law360.com

JBS And Beef Buyers Reach $52 Million Price-Fixing Settlement

JBS USA Food Co. (JBS) and a proposed class of direct buyers have reached a $52.5 million settlement – the first in the massive antitrust litigation – resolving claims that the meat processing giant participated in an anti-competitive scheme to constrain beef supplies and drive up prices. The direct purchasers said the proposed settlement provides both monetary relief to the class and JBS' "extensive cooperation" in the buyers' prosecution of the ongoing litigation against nonsettling defendants. A memorandum in support of the motion for preliminary approval was submitted to the court. The buyers said in the memorandum:

This is the first settlement for the DPP class and the first public settlement overall in any of the coordinated, complex beef antitrust cases. This icebreaker settlement represents an excellent recovery for the class, both in terms of financial relief to class members and benefit to those class members in pursuing their claims against other defendants.

The direct purchaser plaintiffs filed their complaints in June and July 2020, accusing the meat processing defendants, including JBS, of conspiring to drive up the price of beef to make bigger profits by suppressing slaughter volumes and constraining the supply of meat.

The buyers are seeking to represent a nationwide settlement class of potentially thousands of people and entities who, from Jan. 1, 2015, through Feb. 10, 2022, bought for use or delivery directly from any of the defendants beef processed from fed cattle, which are fattened to become beef products. Ground beef made from culled cows is excluded from the proposal. The motion stated:

Under the agreement, JBS will pay $52.5 million into a settlement fund that will be used to compensate the direct purchaser class, pay for notice and administration of the settlement, and pay litigation fees and expenses.

In addition to the monetary compensation, JBS agreed to provide an eight hour attorney proffer where JBS' counsel is required to summarize the principal facts known to it that are relevant to the alleged conduct, market and industry participants at issue in the actions. The company will also produce: its structured data; data and contact information needed to facilitate class notice and settlement administration; witness interviews with up to six JBS employees; depositions of up to six JBS employees; up to three current employee witnesses at trial; and assistance with authentication and laying a foundation for admissibility at trial of JBS documents.

In exchange, the direct buyers will release their claims against JBS. Co-lead counsel for the buyers — Gustafson Gluek PLLC, Cotchett Pitre & McCarthy LLP, Hartley LLP and Hausfeld LLP — told Law360 in a joint statement that they are pleased with the settlement.

The direct buyers' complaint is part of the lead antitrust case accusing the so-called Big Four meatpacking companies — Tyson Foods Inc., Cargill Inc., JBS and National Beef Packing Co. — of working together to slash the price paid to ranchers for cattle by limiting production. A group of ranchers started the antitrust litigation in 2019 before the cases were consolidated in Minnesota with a suit filed by industry trade groups.

In September 2020, U.S. Magistrate Judge Hildy Bowbeer ordered the meatpacking companies to turn over documents to the ranchers that were produced in response to civil investigative demands from the U.S. Department of Justice's Antitrust Division. U.S. District Judge John Tunheim had ruled in September 2021 that the meatpacking companies couldn't escape the ranchers› suit.

Interim co-lead counsel for the direct purchasers are Daniel E. Gustafson, Daniel C. Hedlund, Michelle J. Looby, Joshua J. Rissman, Brittany Resch and Dennis J. Stewart of Gustafson Gluek PLLC, Adam J. Zapala, Elizabeth T. Castillo, Reid W. Gaa and Alexander E. Barnett of Cotchett Pitre & McCarthy LLP, Jason S. Hartley of Hartley LLP and Megan E. Jones and Timothy S. Kearns of Hausfeld LLP.

The case is *In re: Cattle and Beef Antitrust Litigation*, case number 0:20-cv-01319, in the U.S. District Court for the District of Minnesota.

Source: Law360.com

Final Approval Granted In Glumetza Antitrust Settlement

Judge William Alsup of the U.S. District Court for the Northern District of California has granted final approval of three settlements, totaling $454 million, resolving direct buyers' class claims that drugmakers plotted to delay the generic version of the blockbuster diabetes drug Glumetza. The judge awarded $50 million in attorney fees to class counsel, less than half of the $112.8 million they had sought.

On Feb. 3, Judge Alsup ruled that it is more effective to determine attorney fees by using the lodestar method in "so-called megafunds, settlements above $100 million." The lodestar method occurs when "a court determines a prevailing market billing rate and then multiplies that by a reasonable number of hours expended on the case." In this case, the reasonable lodestar amount of hours at a reasonable rate multiplier is 2.2, so that the attorney fee award is $50 million of the $22.5 million settlement amount rather than 25% of the $453.85 million settlement fund proposed by class counsel.

The $112.8 million award that class counsel suggested amounts to a 4.99 lodestar multiplier. Judge Alsup said that is significantly higher than the 1 to 2 multiplier that's been applied in similar cases. Judge Alsup added: "This award constitutes the second-highest amount of attorney's fees granted in a generic delay antitrust action filed post-Actavis." Judge Alsup was "referring to a 2013 landmark U.S. Supreme Court ruling that certain large payments to settle patent disputes amount to so-called reverse payments that likely trigger Sherman Act violations."

In referencing the *Actavis* ruling, Judge Alsup explained that the lawyers, in this case, faced substantially less risk than other lawyers litigating similar cases before the *Actavis* ruling, and the risk was divided among seven firms: Hagens Berman Sobol Shapiro LLP, Sperling & Slater PC, Hilliard & Shadowen LLP, Taus Cebulash & Landau LLP, the Roberts Law Firm, Tadler Law LLP and Frank LLP. Judge Alsup said:

Despite the fact that counsel undertook this litigation on a purely contingent basis, the risk of non-payment was spread out over seven different law firms, ensuring that no one firm would take too big a hit upon an adverse ruling. And, as previously discussed, unlike other reverse-payment antitrust actions with larger multipliers, counsel initiated this action nearly six years after the Actavis decision.

Class counsel was awarded what it had sought to cover expenses: $2.4 million for administrative costs and consulting fees. On Jan. 3, Judge Alsup had finalized the three settlements (Bausch $300 million, Lupin $150 million and Assertio $3.85 million) totaling $454 million. Those direct purchasers objected to the $112.8 million proposed attorney fees and asked the court to reduce the award to $22.5 million. The buyers accused the makers of Glumetza of paying Lupin $3 million to delay the launch of generic Glumetza until Feb. 1, 2016 and promising Lupin that they would not launch an authorized generic of Glumetza until February 2017. The makers of Glumetza then raised prices by as much as 800%.

The direct buyers say the generic blood sugar drug could have gone on pharmacy shelves as early as December 2012, with Glumetza's authorized generic launching simultaneously. They say the delay caused hundreds of millions of dollars in overcharges.

In March 2020, Judge Alsup ruled that even though an allegedly unlawful settlement that blocked Lupin from marketing its Glumetza generic was reached in 2012, and the lawsuit was filed seven years later, the direct purchasers' claims were within the statute of limitations.

On Aug. 15, 2020, Judge Alsup certified a class of direct purchasers, consisting of "all persons or entities in the United States and its territories who directly purchased Glumetza or generic Glumetza from a defendant from May 6, 2012, until the date of this order."

The parties settled ahead of trial, and in September 2021, Judge Alsup preliminarily approved the slate of settlements. The direct-purchaser class is represented by Hilliard Shadowen LLP, Hagens Berman Sobol Shapiro LLP and Sperling & Slater PC.

The case is *In re: Glumetza Antitrust Litigation*, case number 3:19-cv-05822, in the U.S. District Court for the Northern District of California.

Source: J. Edward Moreno, Law360.com

Fitness App To Pay $56 Million To Settle Subscription-Renewal Suit

Noom, a weight-loss app, has faced putative class claims in New York federal court over allegations that it used a deceptive subscription auto-renewal scheme, cheating 2 million users. The company agreed to pay $56 million and an additional $6 million in subscription credits to resolve the claims. The class of subscribers announced the settlement on Feb. 14. It seeks conditional certification as a part of the settlement and requested the court to preliminarily approve the settlement. Subscribers said that the settlement includes "robust programmatic" relief valued at between $31 and $120 million based on the plaintiffs and their experts' analysis. They said:

The cash portion of this settlement is the largest-ever cash recovery for consumers in an autorenewal case, far exceeding payments in past private and public cases. Further, the programmatic relief in the settlement goes well beyond past public or private autorenewal settlements. Weighing the benefits of settlement against the risks of litigation, the outcome achieved here is an excellent result.

The suit, filed in May 2020 by a group of Noom users, claims the company employs unethical user design to pressure visitors into enrolling in a trial for a nominal fee, then automatically charges customers up to $199 for a nonrefundable subscription the moment the trial ends. The company bills itself as a "behavior change company" that purports to deliver weight loss through "successful behavior change at scale," the users said in a fourth amended complaint. The users said:

Yet rather than employing cognitive behavioral therapy in service of their actual weight loss program defendants use their scientific knowledge to take advantage of the consuming public, as defendants' entire sales and automatic renewal model is designed to exploit well-studied weaknesses in human decision-making.

The complaint says:

- Noom lures users in with an opportunity to "try" its programs but then throws up a bunch of barriers to cancellation, trapping users into nonrefundable advance lump-sum payments for up to eight months at a time.
- The Noom co-founder boasts on his LinkedIn page of taking a "psychology of decision-making class" at Princeton, and points to a presentation that he's given, which, it says focuses on the "behavioral insights" that Noom used in its deceptive enrollment trap.
- The presentation is full of terms that describe "well-studied" patterns of human behavior, such as "ability" and "trigger." "Defendants know that once they convince a consumer to 'try' Noom, they can charge exorbitant non-refundable advance fees as soon as the trial period expires, and most customers will be stuck paying the fee because Noom intentionally hinders a customer's 'ability' to cancel the program and takes away the 'triggers' that might otherwise spur a customer to action."
- Noom's "cynical exploitation" of these behaviors is apparent in the misrepresentations and omissions in its marketing material and disclosures.
- The company does not allow users to cancel their subscription through email, mail, phone, fax, or through its website. Instead, it requires users to cancel through their virtual coach.

The subscribers lauded the Noom settlement as "no easy feat." They had this to say on the work in the case:

It is the result of extensive discovery (the production of more than 100,000 documents and the analysis of billions of data points), and the contributions of fifteen consultants and experts in the fields of autorenewal litigation, database discovery and data science, statistics, [electronically stored information] discovery, consumer behavior, and customer satisfaction.

The class, if conditionally certified by the court, will consist of anyone in the U.S. who bought a Healthy Weight subscription on the Noom app or website between May 2016 and October 2020 who did not get a full refund, according to the motion for preliminary approval. The settlement excludes those who bought the program through the Apple App Store or Google Play Store. The class would be divided into two subclasses based on the relative strength – as determined by the parties with court input – of their cases, the subscribers said.

The programmatic relief would require Noom to provide clear disclosures about its autorenewal practice and a "cancel" button visible on a user's account page. Noom would be barred from using the language "no commitment" and "100% risk free" on the payment page for the program in question.

Some named plaintiffs in this federal court suit also filed injunctive-relief suits against Noom in New York state court in May. The proposed settlement would release Noom from those lawsuits as well.

The users are represented by Steven L. Wittels, J. Burkett McInturff, Tiasha Palikovic, Steven D. Cohen, Ethan D. Roman and Jessica L. Hunter of Wittels Mcinturff Palikovic and Benjamin F. Johns of Chimicles Schwartz Kriner & Donaldson-Smith LLP.

The case is *Nichols et al. v. Noom Inc. et al.*, case number 1:20-cv-03677, in the U.S. District Court for the Southern District of New York.

Source: Law360.com

Class Action Lawyers At Beasley Allen

Beasley Allen is heavily involved in class action litigation around the country. Dee Miles, who heads the Consumer Fraud and Commercial Litigation Section, leads the effort. Other lawyers in the section who handle class action cases are Demet Basar, Lance Gould, Clay Barnett, James Eubank, Mitch Williams, Rebecca Gilliland, Rachel Minder, Paul Evans and Dylan Martin. They can be reached at 800-898-2034 or by email at: Demet.Basar@BeasleyAllen.com, Lance.Gould@BeasleyAllen.com, Clay.Barnett@BeasleyAllen.com, James.Eubank@BeasleyAllen.com, Mitch.Williams@BeasleyAllen.com, Rebecca.Gilliland@BeasleyAllen.com, Rachel.Minder@BeasleyAllen.com, Paul.Evans@BeasleyAllen.com and Dylan.Martin@BeasleyAllen.com.

XIX.
THE CONSUMER CORNER

Ohio Medicaid Cracks Down On Pharmacy Benefit Managers

Pharmacy Benefit Managers (PBMs) are making millions of dollars through Ohio Medicaid's program, for which Medicaid can›t account, through a deceptive practice called "clawbacks." However, the Ohio Department of Medicaid is now cracking down, as they have announced their requirement for a detailed accounting of all clawback fees that PBMs assess pharmacies after prescription drugs are dispensed.

Clawbacks occur where PBMs pay pharmacists for dispensing medications at one rate, then return months later to "clawback" the difference between that amount and the contracted rate established by a Medicaid-managed care carrier—after state Medicaid agencies have closed the books on the prescription drug purchase.

One of the many problems that state Medicaid programs face is that PBMs don't charge the clawback until well after the prescription drugs are dispensed to the Medicaid recipient. This makes it extremely difficult for the state Medicaid program to keep track of all the PBMs' clawbacks.

This has resulted in various problems for Medicaid, including causing the drug prices that the state reports to the federal government to be inaccurately inflated for hundreds of thousands of prescription drugs. Additionally, the data on which Medicaid relies to set its payment rates, including how much state and federal taxpayers are assessed, is potentially wrong, thus harming taxpayers as well.

PBMs have repeatedly said they do not charge "clawbacks" as the Medicaid agencies have defined them and that the money assessed to pharmacies is allowed under complex "generic effective rate" contracts. Critics, including the Ohio Department of Medicaid, disagree.

The Director of the Ohio Department of Medicaid commented that the PBMs are violating at least the intent and spirit of an Ohio law banning clawbacks. They are also violating a separate provision mandating pass-through pricing, which requires PBMs to charge the State the same price they pay pharmacists to fill a prescription for a Medicaid recipient.

Ohio's Medicaid program provides healthcare coverage for over three million Ohioans—which accounts for some of the poorest and disabled citizens of the state. The Ohio Department of Medicaid, like all state Medicaid programs, has a heavy burden to oversee the use of taxpayer dollars that fund the health coverage for these millions of Medicaid recipients. A representative for the Ohio Medicaid agency, Lisa Lawless, commented that the agency is merely exercising its oversight authority in light of PBMs' past "lack of transparency and excess profits," stating that the agency needs "visibility into post adjudication adjustments" made by the PBMs after the Department in effect has deemed the drug transactions closed.

This is a positive move by the Ohio Department of Medicaid and one that will hopefully hold PBMs more accountable for how taxpayer dollars are spent on prescription drugs. Several other states are moving to pass bans on PBM clawbacks, as Ohio has previously done, in addition to other regulations of PBMs. Over the past year alone, there has been a great deal of state legislation aimed to regulate PBMs and their abusive practices. Since at least 2018 and continuing today, hundreds of bills each year related to PBM regulation have been introduced in state legislatures across the country attempting to protect patients against some of the worst practices by PBMs.

If you have any questions about PBMs and their unlawful practices, contact Dee Miles, Ali Hawthorne, James Eubank, or Rebecca Gilliland, lawyers in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Dee.Miles@BeasleyAllen.com, Alison.Hawthorne@BeasleyAllen.com, James.Eubank@BeasleyAllen.com, or Rebecca.Gilliland@BeasleyAllen.com.

Source: The Columbus Dispatch

Federal Judge Reinstates Financial Institutions In TelexFree Ponzi Case

Recently, a Massachusetts federal judge reinstated several of the nation's largest financial institutions as defendants in class action litigation over one of the world's largest pyramid schemes. The ruling by Judge Hillman cited "substantial new" allegations of wrongdoing in support of reinstating Wells Fargo, Bank of America, TD Bank and PricewaterhouseCoopers (PwC) as defendants in the litigation.

TelexFree, based in Massachusetts, held itself out as an internet phone service company. TelexFree ran its scheme by charging people to become promoters of a Voice over Internet Protocol (VoIP) service that was rarely used, promising commissions for online advertisements the promoters placed. The scheme sold fake securities and used part of the VoIP membership fees to pay what appeared to be returns on investments or commissions.

The scheme by TelexFree raised its first $2 billion in only two years before being shuttered by Brazilian authorities, according to the *Insider*. TelexFree then focused its marketing efforts on U.S.- based victims, bringing in another $2 billion before it was raided and shuttered by the FBI and the U.S. Department of Homeland Security. Reportedly, TelexFree's founders lived a lavish lifestyle before the scheme unraveled, buying a Brazilian soccer team, mansions, and boats. One of TelexFree's founders was sentenced to six years in prison after pleading guilty to one count of wire fraud conspiracy and eight counts of wire fraud.

In 2019 the Court dismissed the financial services companies from the case. But new information obtained through a settlement with one defendant in the case and the bankruptcy trustee for TelexFree presents "substantial new facts," enough to rope the institutions back into the sprawling multidistrict fight, the judge's ruling said.

The proposed complaint alleged the three banks continued to service TelexFree accounts after Brazil cracked down on the operation. The banks themselves had suspended or shut down some of the scheme's other accounts. According to the proposed complaint, consulting giant PwC was well aware of TelexFree's legal problems when it advised the scheme's players on how to keep funds out of the reach of U.S. regulators.

The banks and consulting giant had called attempts by the victims of the pyramid scheme to add them back to the case a costly waste of time. However, Judge Hillman disagreed and said the "proposed complaint is not clearly futile," in part, because under Massachusetts law, an institution could be found liable for assisting in a civil charge if it had actual knowledge of the wrongdoing.

The victims have previously reached a settlement with Fidelity Bank for $22.5 million. There are a number of other defendants that are now in the crosshairs of the multidistrict litigation's (MDL)'s leadership, which is rapidly gathering discovery from these financial institutions, financial firms and individuals.

Beasley Allen lawyers did not join the MDL when it was created. The court named leadership in the MDL in 2014. Lead counsel in 2021 asked our firm to join the case. Beasley Allen was asked to lead the case against Wells Fargo, Wells Fargo Advisors and two Wells Fargo pay processors. To that extent, our firm is part of the leadership leading the charge on this case for the plaintiffs. Dee Miles is lead counsel in our effort, assisted by Lance Gould, James Eubank and Tyner Helms. They are busy working on a recovery for the victims of the Telexfree Ponzi scheme.

We will keep our readers posted on any new developments in this important securities fraud case. If you have any questions, contact Lance Gould, a lawyer in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Lance.Gould@BeasleyAllen.com. He will be glad to answer any questions.

Sources: *Insider*, Law360.com

Capital One And Consumers Reach $190 Million Data Breach Settlement

Capital One customers have reached a $190 million settlement with Capital One and Amazon to resolve claims stemming from the bank›s 2019 data breach. The agreement is said to be one of the largest settlements in data breach multidistrict litigation. The consumers filed a motion on Feb. 1, seeking preliminary approval of the agreement. The motion states:

> Under the settlement, members of the settlement class would get cash compensation for out-of-pocket losses traceable to the data breach, cash compensation for time spent dealing with issues stemming from the breach and at least three years of identity theft prevention and resolution services. Capital One has agreed to make improvements to its cybersecurity.

The consumers' complaint is one of several suits in multidistrict litigation filed after Capital One revealed that it was the target of a data heist in which 106 million people had their personal information stolen. Consumers claimed that the breach led to an imminent threat of identity theft and that Capital One and Amazon's failure to prevent the theft amounted to negligence under Virginia state law.

Amazon Web Services' (AWS) stored the stolen Capital One data on its cloud storage, though AWS did not experience any breach itself. Magistrate Judge John F. Anderson has stayed all non-settlement-related proceedings in the case. The court had been considering motions for class certification and summary judgment when the settlement agreement was reached.

Under terms of the proposed settlement, the settlement class would include 98 million U.S. residents whose information was compromised in the breach disclosed on July 29, 2019. The consumers' co-lead counsel – lawyers with Stueve Siegel Hanson LLP, Lockridge Grindal Nauen PLLP and Morgan & Morgan Complex Litigation – can seek fees and court costs of up to 35% of the settlement fund. And the eight settlement class representatives could receive up to $5,000 each in service awards. The 10 other MDL plaintiffs deposed by Capital One may also receive service awards.

Capital One has taken "no position on these requests." In exchange, Capital One and Amazon will be released from consumers' claims.

Capital One has said the attack affected about 100 million U.S. residents and 6 million Canadian residents who held or applied for Capital One accounts. The breach exposed an estimated 140,000 Social Security numbers and about 80,000 linked bank account numbers. Former software engineer Paige A. Thompson, the alleged hacker, has been criminally charged.

Capital One said that most of the breached data included personal information such as names, addresses, postal codes, phone numbers, email addresses, dates of birth and self-reported income. It also included credit scores, credit limits, balances, payment history, contact information and fragments of transaction data from a total of 23 days over the past three years.

The consumers are represented by Steven T. Webster of Webster Book LLP, Norman E. Siegel of Stueve Siegel Hanson LLP, Karen Hanson Riebel of Lockridge Grindal Nauen PLLP and John A Yanchunis of Morgan & Morgan Complex Litigation Group.

The case, under U.S. District Judge Anthony Trenga, is *In re: Capital One Customer Data Security Breach Litigation*, case number 1:19-md-02915, in the U.S. District Court for the Eastern District of Virginia.

Source: Law360.com

UCLA Settles Sex Abuse Suit For $243.6 Million

The Associated Press reported that the University of California will pay $243.6 million to settle claims by hundreds of women that allege a former UCLA gynecologist, Dr. James Heaps, sexually abused them. The settlement was announced last month and covered about 50 cases involving 203 women over 35 years. The women claim Dr. Heaps "groped or otherwise abused" them and that UCLA ignored and "deliberately concealed abused" for decades. Each survivor will receive $1.2 million. A UCLA statement said:

> *The conduct alleged to have been committed by Heaps is reprehensible and contrary to the university's values. We express our gratitude to the brave individuals who came forward, and hope this settlement is one step toward providing healing and closure for the plaintiffs involved.*

The University of California, Los Angeles, began investigating Dr. Heaps in 2017, and he retired the following year after the school declined to renew his contract. Dr. Heaps was also criminally charged last year with 21 sexual offenses involving seven women. He has pleaded "not guilty" and has denied wrongdoing.

John C. Manly, one of the plaintiffs' lawyers, said Dr. Heaps was "a sophisticated predator who committed abuse under the guise of normal medical procedures such as pelvis and breast examinations. Many of the people who made accusations of abuse were cancer patients."

UCLA settled a similar class action lawsuit involving Dr. Heaps last year for $73 million. The case involved more than 100 women. The class action settlement specified that approximately 6,600 former patients would receive between

$2,500 and $250,000 based on the extent of bodily injury and emotional distress, which will be decided by a panel of experts.

The plaintiffs, in that case, alleged that between 1983 and 2018, Dr. Heaps "groped [them], simulated intercourse with an ultrasound probe or made inappropriate comments during examinations at the UCLA student health center, Ronald Reagan UCLA Medical Center or his on-campus office."

The University will change its procedures for preventing, identifying, investigating and dealing with sexual misconduct. It joins other universities making similar massive payouts to settle patients' claims of abuse at the hands of doctors. These universities include prestigious schools such as Ohio State, Johns Hopkins and Columbia. The following are similar settlements:

- The University of Michigan in Jan. 2022 announced a $490 million settlement with more than 1,000 people who say they were sexually assaulted by a sports doctor, Dr. Robert Anderson, during his nearly four-decade career at the school. He died in 2008.
- In March 2021, the University of Southern California agreed to an $852 million settlement with more than 700 women who accused its longtime campus gynecologist, Dr. George Tyndall, of sexual abuse.
- SoCal reached a $215 million settlement in a separate suit.
- In 2018, Michigan State University agreed to a $500 million settlement – considered the largest of its kind at that time – that settled claims from more than 300 women and girls who said they were assaulted by Larry Nassar, who was a campus sports doctor and a doctor for USA Gymnastics.

Source: Associated Press

Soccer Club Settles Fourth Sexual Abuse Case For $7.5 Million

The Blackhills Football (Soccer) Club recently settled a sexual abuse lawsuit against it for $7.5 Million. This is the organization's fourth settlement stemming from sexual abuse allegations that span over 20 years. The most recent case involves an incident that occurred in 2005. The plaintiff, Courtney Butler, 33, alleged that she was raped by her soccer coach while away at a tournament in Oregon. She alleged that the soccer club failed to protect her and her teammates from the coach's sexual advances. She further alleged that:

> During the 2005 tournament, Blackhills' coaches required players to stay at a hotel while they strongly discouraged parents from staying there. While at the hotel, Ms. Butler's coach lured her into his hotel room under the guise of needing a "strategy session" before the tournament. Once in the room, the coach sexually assaulted the then 16-year-old and threatened to destroy her life if she ever told anyone about the encounter.
>
> After the tournament, the plaintiff's mother sensed something was wrong and confronted the coach. The coach became irate and abruptly left the soccer club.

After many years of remaining silent, the plaintiff, now a social worker for Child Protectives Services, came forward with her allegations. In 2018, she filed a complaint in Thurston County Superior Court. While the coach was not named as a defendant in the complaint, the plaintiff and her lawyers have been in contact with law enforcement agents, hoping he will be prosecuted. However, at the heart of the plaintiff's complaint is the soccer club's negligent hiring, screening, and supervision procedures.

Claims like Ms. Butler's shed light on the abuse that can result from entrusting children with adults in youth sports. If your child has suffered sexual abuse while under the supervision of an organization, feel free to contact any of our lawyers who handle sexual abuse claims. They include Larry Golston, Leon Hampton, Lauren Miles and Jessi Haynes. They can be reached at 800-898-2034 or by email at: Larry.Golston@BeasleyAllen.com; Leon.Hampton@BeasleyAllen.com; Lauren.Miles@BeasleAallen.com; JessiHhaynes@BeasleAallen.com

XX.
CURRENT CASE ACTIVITY AT BEASLEY ALLEN

A New Look At Case Activity At Beasley Allen

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

Practices

- Business Litigation
- Class Actions
- Consumer Protection
- Employment Law
- Medical Devices
- Medication
- Personal Injury
- Product Liability
- Retirement Plans
- Toxic Exposure
- Whistleblower

Cases

The cases in the categories listed below are handled by lawyers in the appropriate section at Beasley Allen. The list can be found on our homepage, top navigation, or the Cases page of our website (BeasleyAllen.com/Recent-Cases/).

- Auto Accidents
- Aviation Accidents
- Belviq
- Benzene in Sunscreen
- CPAP Devices
- Defective Tires
- JUUL Vaping Devices
- Mesothelioma
- NEC Baby Formula
- On-the-Job-Injuries
- Paraquat
- Talcum Powder
- Truck Accidents

XXI.
RESOURCES TO HELP YOUR LAW PRACTICE

Beasley Allen is a firm that only handles litigation for persons, companies and governmental entities that have been injured or damaged in some manner. All of us at the firm are humbled and pleased that our law firm has consistently been recognized as one of the country's leading law firms representing solely claimants involved in complex civil litigation. We consider that to be an honor and a privilege. Beasley Allen has truly been blessed, and we understand the importance of sharing resources and teaming with peers in our profession. The firm is committed to investing in resources that will help our fellow lawyers in their work. For those looking to work with Beasley Allen lawyers or simply seek information that will help their law firm with a case, the following are among our most popular resources.

Co-Counsel E-Newsletter

Beasley Allen sends out a Co-Counsel E-Newsletter 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.

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.

The Jere Beasley Report

We also consider *The Jere Beasley Report* to be a service to lawyers and the general public. We provide the *Report* at no cost monthly, print and online. You can get it online by going to https://www.beasleyallen.com/the-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/Publications.

XXII.
PRACTICE TIPS

A Refresher On Depositions

This month, Gavin King, a lawyer in our firm's Toxic Torts Section, will give our readers some tips on depositions. Gavin has been with the firm for almost three years. He began working as a law clerk in June 2019. In 2020, Gavin returned to the firm as a lawyer in the same section after a brief absence. Gavin currently represents a variety of plaintiffs, primarily in environmental litigation. He has been actively involved in some major litigation and was lead counsel in a nursing home case that went to trial resulting in a plaintiff's verdict. So let's see what Gavin has to say relating to deposition.

As a newer lawyer, I learned that taking depositions—sometimes on short notice—would be a common piece of my practice. Today, taking a deposition is one of the more enjoyable parts of what I do as a trial lawyer. When seeking advice prior to taking a deposition, I sought advice from some of my mentors. One mentor, a seasoned plaintiff lawyer, gave me a simple but valuable piece of information: "read the applicable rules." So that's what I did. I read every rule relating to taking and defending depositions that I could find. I digested all the jurisprudence I could on those rules in preparation for those depositions.

As you can imagine, I showed up to my first deposition heavily armed with this freshly obtained information. I expected the far-more experienced lawyers to have a superior level of knowledge on these rules. I was disappointed. I have noticed over the last couple of years of my practice that so many seasoned litigators (certainly no one reading this article) seem to neglect the applicable rules. For example, I have been shocked by how often lawyers will agree to the "usual stipulations" and then proceed to lodge dozens of speaking objections.

In my short time of practice, I have seen lawyers instruct deponents not to answer a question that was not protected by privilege, create arbitrary time constraints, and make impermissible or untimely objections. If I were not familiar with the rules, I would not be able to intelligently respond to these lawyers. Because I followed the advice of my mentor, I was able to stand my ground and avoid being bullied by an opposing lawyer.

My admonition to anyone who may be reading this: consider re-reading the rules if you have not recently. You just might be shocked at what you've forgotten.

XXIII.
RECALLS UPDATE

A large number of safety-related recalls were issued during February. Significant recalls are available on our website, BeasleyAllen.com/Recalls/. We try to put the latest and most important product recalls on our site throughout the month. You are encouraged to contact Shanna Malone, the Executive Editor of the *Report*, at Shanna.Malone@BeasleyAllen.com if you have any questions or let her know your thoughts on recalls. We would also like to know if we have missed any significant recalls over the past several weeks.

XXIV.
FIRM ACTIVITIES

Employee Spotlights

Tre Bramberg

Tre is a Paralegal in the firm's Mass Torts Section in the Montgomery office. She works on the Talcum Powder Litigation and all other cases filed. Tre also works with the in extremis team to prepare clients for depositions and assists with special projects as needed. Tre joined the firm in 2015 and has worked as a dedicated employee for nearly seven years now. Tre is an asset to the firm, and we are fortunate to have her with us!

Tre lives in Millbrook, Alabama, which is where she grew up. She and her husband, Danny, have been married for 15 years. They have two dogs, Ruger and Moose, who are essentially their babies. Tre says her pups are "spoiled rotten!" Tre and Danny also have two beautiful horses, Charlotte and Lucy. Tre says that you will probably find her someplace on a horse if it's on the weekend. She is an avid trail rider and loves to haul her horse, Lucy, to state parks and riding clubs throughout Alabama. Tre's other hobbies are photography, music, and traveling.

Tre says that her favorite thing about working at Beasley Allen is the family-feeling atmosphere. She added, "everyone seems to care so much about you, and I have never had that feeling in a workplace before. I also love my talcum powder litigation team. I work with awesome, hard-working people and do not know what I would do without them."

Beau Darley

Beau Darley, a lawyer in the firm's Mass Torts Section, is working on cases in a number of areas involving mass torts. Currently, Beau is involved heavily in transvaginal mesh litigation. This is a type of surgical mesh used to repair common pelvic floor disorders and cases involving the chemotherapy drug Taxotere, which has been linked to claims that the drug causes permanent hair loss. He is also working on the JUUL litigation handling claims for people suffering from addiction and physical and mental injuries due to vaping. Beau is one of 20 lawyers appointed to the Plaintiff Steering Committee to help lead the JUUL litigation consolidated in California state court. He is also investigating cases involving the Philips CPAP machines recall.

Beau says that being a lawyer was always in the back of his mind, and his job at a bank after graduating college helped him realize the corporate world wasn't for him. He says:

I knew I had to do something different and more exciting, and that's what gave me that final push to start studying for the LSAT and apply to law school. I knew that if I were able to get a law degree, then that would open a lot of doors for me and allow me the opportunity to provide a voice for people that need help.

Beau is a member of the Alabama State Bar, serving on the Governmental Relations Liaison Committee; Alabama State Bar's Young Lawyers Section, serving on the Executive Committee; and the Montgomery County Bar Association, where he previously served on the Executive Committee of the Young Lawyer's Section. He is a member of the Alabama Association for Justice (ALAJ), serving on the Board of Directors and previously served as First Chair of ALAJ's Emerging Leaders section (under-40 section).

Beau is also a member of the Alabama Civil Justice Foundation's Board of Directors, which assists in removing barriers to a civil and just society for Alabama families and children. He is also a former member of the Jimmy Hitchcock Memorial Award Committee, which awards high school student-athletes who excel in athletics and exhibit Christian leadership.

Serving in leadership roles for professional and civic organizations demonstrates Beau's passion for helping others. It is this passion that drives Beau's zeal for practicing law. He says:

I feel like I have always been one to pull for the underdog and fight for those who need help. I really enjoy getting to meet the clients we represent and hear their stories so I can provide a voice for them. I also really enjoy taking depositions and all of the work that goes into preparing for depositions.

Beau earned his B.S. degree in agricultural business and economics from Auburn University in 2007. He then attended Samford University Cumberland School of Law, earning his J.D. in 2011. He was a member of the Cumberland National Trial Team and was a member of the team that won the AAJ Regional Trial Competition in Dallas, Texas, in February 2010. He was also a member of the Cumberland Trial Advocacy Board, a quarterfinalist in the Parham Williams Freshman Trial Competition, and a quarterfinalist in the James O. Haley Summer Trial Competition.

Beau says there are many reasons he enjoys working at Beasley Allen, but the one that stands out the most he says is the number of lawyers with experience in a wide range of practice areas. He says:

I don't think there's another firm in the country that has the range of experience across our different practice sections than we have here at Beasley Allen. I think that is extremely unique, especially for a firm that only represents plaintiffs. I think the number of talented attorneys we have also set us apart. I am blessed to work with some of the brightest and most respected attorneys in the country that are also very relatable can effectively communicate with our clients.

Beau is a tremendous asset to our firm. He is a really good lawyer, works very hard and is dedicated to helping his clients receive justice.

Alison Hawthorne

Alison "Ali" Hawthorne joined Beasley Allen in November 2010 as a lawyer in the Consumer Fraud and Commercial Litigation Section. She has focused her practice primarily on complex civil litigation on a national level. In addition to representing clients in litigation, Ali assists with managing the section, allowing her to work with all of the section's lawyers on the successful pursuit of their cases.

Since joining the firm, Ali has specialized in representing state Attorneys General. Most recently, she has led several different litigations in multiple states that seek to recover money on behalf of states that paid for pharmaceutical products and devices due to fraudulent and deceptive acts. Additionally, Ali is heavily involved in class action litigation and qui tam litigation under the False Claims Act.

The Kennesaw, Georgia, native worked for several Atlanta law firms before moving to Montgomery to start her law school career. Before becoming a lawyer at Beasley Allen, Ali worked as a law clerk in the firm's Consumer Fraud and Commercial Litigation Section for more than two years, assisting lawyers in complex consumer and securities fraud litigation. Ali was named a Principal in the firm in January 2016.

Ali, who says she has wanted to be a lawyer for as long as she can remember, states:

I have had the drive to help people since a very young age, and I have always wanted to have a career where I could use my knowledge and skills to help others. When I first began working at a law firm at sixteen, I realized the unique opportunity lawyers have to help a wide range of people. I realized there were people in our country with circumstances far beyond their control, and lawyers were some of the only professionals that could fight for them when they could not fight for themselves.

Ali began her career at Beasley Allen, working on the Average Wholesale Price (AWP) and McKesson litigations, which sought to recover millions of dollars lost by state Medicaid agencies due to fraudulent price reporting by the nation's largest drug manufacturers. Since the beginning of the AWP and McKesson litigations, Beasley Allen has recovered more than a billion dollars for the states Ali has represented. She has made a tremendous positive impact on state agencies throughout the country. Most recently, Ali worked with the Kentucky Attorney General's office and helped secure a $10.3 million settlement in its case against Fresenius Medical Care Holdings Inc., a Massachusetts-based dialysis company, for Medicaid fraud.

Ali says she loves being a lawyer because it is rewarding and challenging. She says:

Everyone wants to be able to 'change the world,' and by being a lawyer, you can do that. I love that being a lawyer allows you to bring about positive changes and make a major difference in society. I am proud to think that the tireless work our firm does on cases throughout the country has resulted in tremendously positive changes in the world in which we live. Making a difference, unfortunately, is not always easy. Often, it is much simpler to give up or not attempt the challenge at all. I have learned in my life, however, that it is necessary to take on those challenges. It is essential for me always to strive to step outside of my "comfort zone" and be faced with things that are unfamiliar and unaccustomed to me. That is how great things are accomplished, and being a lawyer allows me to do that.

An award-winning lawyer, Ali received an AV Preeminent Rating from Martindale-Hubbell. She was selected as the Beasley Allen Lawyer of the Year for the Consumer Fraud & Commercial Litigation Section in 2014 and 2015 and was named to the Midsouth Super Lawyers "Rising Stars" lists (2016-2021). Ali was also selected for the Alabama State Bar Leadership Forum Class 13 (2017-2018), and the National Trial Lawyers organization has named Ali a "Top 40 Under 40" lawyer.

Ali is a driven leader in her profession and the community. She is the Vice President of the Montgomery County Bar Association and will serve as President in 2023. She also serves on the following:

- Alabama State Bar Task Force (2019-2021)
- Executive Board for the Alabama State Bar Leadership Forum Alumni Section
- Mid-Year Meeting 2019-2020 Task Force
- Improving the Image of Lawyers 2019-2021 Task Force
- Leadership Forum Selection Committee (2018-2021)
- Lawyer Public Relations Task Force (2020-2021)

Additionally, Ali was a member of the Board of Directors for the Montgomery County Association for Justice and is on the Hugh Maddox American Inn of Court. Previously, Ali served as a member of the Alabama Association for Justice's (ALAJ's) Emerging Leaders (2012-2018). Ali was also a member of the Leadership Forum's Class 13 (2017-2018).

Ali has this to say about the firm:

Beasley Allen is unique in that while we have a large number of lawyers and staff, everyone here shares a common desire to do what is right and to work hard to accomplish a common goal—help those who need it most. We have a strong culture at Beasley Allen in that our clients are our number one priority in the work that we do, we never take shortcuts, we do not step over others to get our clients the results they deserve, we are always prepared, and we handle all of our affairs in the most professional manner. Our firm recognizes the need for maintaining high standards in our profession, and we always strive to be models of the utmost ethical behavior. Last, our firm maintains a unique balance of being a national law firm with cases all over the country, yet still strongly rooted in faith, family, and compassion for others.

Ali is married to Ray Hawthorne Jr., a successful trial lawyer in private practice in Montgomery. They have two sons, Jack and Barnes Hawthorne, and they are members of First United Methodist Church, located in downtown Montgomery.

Ali is an outstanding lawyer and a tremendous asset to our firm. We are blessed to have her with us.

Theresa Perkins

Theresa works in the firm's Personal Injury & Product Liability Section as a Paralegal to Graham Esdale in the Montgomery office. She is responsible for drafting complaints and other pleadings, responding to discovery requests, scheduling depositions, and communicating with clients and expert witnesses. Additionally, Theresa spends a lot of time organizing and preparing cases for trial. Theresa joined the firm in 1999 and will celebrate 23 years in October. We are blessed to have Theresa, a tremendously talented paralegal, with us.

Theresa grew up in Montgomery and is where she met her husband, Scott, while in college. They will celebrate their 27th anniversary in August. Scott is a Probation and Parole District Manager with the State of Alabama, Board of Pardons, and Paroles. Their daughter, Katherine, is a sophomore at Auburn University, majoring in Business with a minor in Psychology. They also have two rescue dogs, Honey (11) and Rosie (7). Theresa and her family are members of the Holy Spirit Catholic Church, where they enjoy volunteering. Theresa also enjoys running, bicycling, and hiking. Her big-

gest passion is volunteering at the Montgomery Humane Society, where they help place abandoned animals into loving families and promote responsible pet ownership.

Theresa's favorite thing about working at Beasley Allen is working with and getting to know the clients. Theresa says, "knowing that we did our best to help them with the best resolution of their case is most gratifying."

Stephanie Qrys

Stephanie Qrys works in the Marketing Department of our firm as a Web Developer, where she is responsible for maintaining the firm's website, design, and implementation of newly added features. She manages the web lead intake and utilizes analytic reporting tools to assist the Marketing team with various projects and initiatives. Stephanie joined the firm in 2016 and is a huge asset!

Stephanie and her husband, Jeffrey, have been married for five years. Jeffrey is currently a computer science major at Auburn University at Montgomery. They have two cats, Freya and Sally. Stephanie says that she is a "DIY enthusiast" obsessed with home improvement and learning new things on platforms such as YouTube, Udemy, LinkedIn Learning, and Duolingo. She enjoys unwinding with her husband while doing a combination of yoga and binge-watching their favorite TV shows together. Stephanie says that she comes from a big family and loves spending time with them working on projects, cooking, or playing games together.

Stephanie says that her favorite thing about working at Beasley Allen is the people and the nature of her work. She added, "I feel very fortunate to have a Director who cares about her team, is encouraging and engaged with us, and goes above and beyond to foster a positive work culture."

Stephanie has an important role in the firm, and she does excellent work in the job. We are fortunate to have her with us.

XXV.
SPECIAL RECOGNITIONS

Beasley Allen's Section Heads Guide Firm's Success

Since Beasley Allen was founded more than 40 years ago, the firm has grown to become a national powerhouse in civil litigation representing victims of wrongdoing. Much of our success comes from how the firm structured itself in the early years. Our long-standing managing partner, Tom Methvin, recognized that if lawyers could focus on specific areas of law, they could remain current on emerging trends and innovations in their focused areas.

Tom convinced the Board to reorganize the firm into separate and distinct sections based on case type, placing Beasley Allen at the forefront of a practice that's become common today.

Currently, Beasley Allen has four litigation sections —Mass Torts, Toxic Torts, Fraud, and Personal Injury & Product Liability. Each section is headed by one of our experienced, veteran lawyers.

Personal Injury & Product Liability Section

Cole Portis heads up the firm's Personal Injury & Product Liability Section, which represents individuals who have been seriously injured or the families of those who lost their lives due to unreasonably dangerous and defective products. The section is nationally recognized for its long-heralded success in representing clients throughout the country.

Lawyers in this section recently filed a lawsuit against chemical company Daikin America on behalf of an employee who developed serious lung injuries and subsequently died following exposure to a toxic chemical while working at the company's Decatur, Alabama, plant. OSHA later cited the company for not providing its workers with adequate PPE and respirators.

The firm is also handling lawsuits for several passengers injured or killed in horrific van accidents that recently occurred in Georgia and Alabama. Fifteen passenger vans are notorious for being prone to rollover accidents. Yet, the manufacturers of these vans continue to market them for sports teams, scout troops, daycare centers, and other groups.

The section also recently settled a case involving a defective aircraft component that depleted the oxygen supply of the pilot of the personal aircraft and rendered him unconscious shortly after takeoff, resulting in a tragic, preventable fatal crash.

Mass Torts Section

Andy Birchfield manages the firm's Mass Torts Section, recognized as a national leader in pharmaceutical litigation. The section successfully resolved claims for thousands of clients in the Vioxx, Bextra/Celebrex, Baycol, Rezulin, PPA, and Ephedra litigations. Andy's efforts have been indispensable in heading the firm's Vioxx litigation.

In April 2005, Andy was chosen to co-lead the Plaintiff's Steering Committee for the federal Vioxx Litigation Multidistrict Litigation; and he was lead counsel or co-lead counsel in five Vioxx trials, including one that resulted in a $51 million verdict against Merck. The Mass Torts Section recently filed a federal class action against Johnson & Johnson, seeking to hold the company accountable for benzene-tainted sunscreen products. Andy has been working with the firm's Talc Litigation Team on cases related to cancer claims involving Johnson & Johnson's talcum powder products.

Toxic Torts Section

Rhon Jones heads Beasley Allen's Toxic Torts Section, where he has helped secure an estimated $3 billion in verdicts and settlements and more than $30 billion in total recoveries for clients. One of the top environmental lawyers for plaintiffs in the country, Rhon, is on the cutting edge for representing governments and water systems for various forms of environmental harm. More recently, the section has taken on the issue of seeking justice for those harmed by the nation's opioid epidemic.

Rhon's leadership is far-reaching. He served on the Plaintiffs' Steering Committee for the BP Deepwater Horizon multidistrict litigation. He also served as class

counsel in the economic and property class settlement against BP. Rhon helped negotiate the method by which all business claims have been paid in the economic class settlement, upwards of $10 billion to date. He was also involved in the $18.5 billion agreement to settle federal, state, and local government claims against BP, including more than $2 billion for Alabama.

Consumer Fraud and Commercial Litigation Section

Dee Miles oversees the firm's Consumer Fraud and Commercial Litigation Section, which handles cases involving financial harm to consumers, deceptive business practices, whistleblower litigation and employment and labor law. A proven leader in complex litigation nationally, Dee has been appointed by federal district judges to serve in leadership roles for the plaintiffs in numerous multidistrict litigations throughout the country.

Most recently, Dee served as co-lead counsel for the team that secured a $28 million settlement agreement between U.S. Financial Life Insurance Company and a class of nearly 12,000 policyholders. Dee also served as co-lead counsel for the team that secured a $38.2 million settlement for plaintiffs in two class actions involving nearly 11,000 policyholders of Banner Life Insurance Co. and William Penn Life Insurance Co. universal life insurance policies.

LaBarron Boone Named President-Elect Of National Trial Lawyers

During the 2022 Trial Lawyers Summit in January, the National Trial Lawyers tapped LaBarron Boone from Beasley Allen to serve as President-Elect. The National Trial Lawyers is an invitation-only professional organization comprised of the premier trial lawyers from across the country. The organization provides networking opportunities, advocacy training, and education programs for trial lawyers.

LaBarron joined Beasley Allen in 1995 and soon became the first African American to become a partner at a major law firm in Montgomery. He has been instrumental in handling litigation involving product liability, consumer fraud, and personal injury cases. His cases have included everything from crashworthiness, seatbelt restraint failures, accidental airbag deployments, tractor rollovers, and tire tread separation to consumer and insurance fraud. LaBarron has been recognized as one of the best products liability lawyers in the country.

The Auburn University Engineering graduate, who is now an outstanding trial lawyer, has been named among the Top 100 Civil Plaintiff National Trial Lawyers and The National Black Lawyers Top 100. He is also the recipient of numerous other accolades, including the firm's Chad Stewart Award, the Marquis Who's Who in America, and Lawdragon 500 Leading Lawyers in America.

LaBarron is affiliated with numerous professional associations and currently serves as President of The National Black Lawyers (NBL), an elite network of top African American plaintiffs, defense, and governmental attorneys representing law firms, counties, cities, and the federal government. The organization provides members with a wealth of professional resources and opportunities to increase their knowledge and build referral connections.

Sources: National Trial Lawyers Association

Beasley Allen Attorneys Named 2022 Georgia Super Lawyers

We are proud to announce that five lawyers at our Atlanta location have received special recognition by Super Lawyers rating service. Four of the firm's lawyers were named to the 2022 Super Lawyers, including Chris Glover, Rob Register, Parker Miller, and Tom Willingham. In addition, Beasley Allen principal Alyssa Baskam was included on the Super Lawyers "Rising Stars" list, which recognizes the top up-and-coming lawyers 40 years old or younger or those who have been practicing 10 years or fewer.

Super Lawyers, a Thomas Reuters business, is a research-driven, peer-influenced rating service of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. The objective is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource for attorneys and consumers searching for legal counsel. The focus is on lawyers who can be hired and retained by the public, such as those in public practice and Legal Aid attorneys.

The three-step selection process for Super Lawyers and Rising Stars involves peer nominations, independent research and peer evaluation. Only 2.5% of the lawyers nominated are selected to Rising Stars, and only 5% are selected to Super Lawyers.

The Super Lawyers lists are published in Super Lawyers Magazines and leading city and regional magazines across the country. The Super Lawyers Magazines also feature editorial profiles of lawyers who embody excellence in the practice of law. For more information, go to superlawyers.com.

Sources: Super Lawyers

XXVI.
FAVORITE BIBLE VERSES

Stephanie Monplaisir, a lawyer in the firm's Personal Injury & Products Liability Section, supplied the following for this issue. She says:

The Story of the Good Samaritan has been on my mind this week. In this story, "an expert in the law" asked Jesus, "Teacher, what must I do to inherit eternal life?" Jesus did not answer the question but put the ball back into the "expert's" court to answer for himself. The expert answered, "Love the Lord your God with all your soul and with all your strength and with all your mind," and "Love your neighbor as yourself." Jesus agreed that this was the way to live.

Still not satisfied with this answer, the "expert" wanted to know who counts as a neighbor. The "expert" was clearly trying to limit the types of people he should consider a neighbor, i.e. only those who look and think like him. Jesus rejected this line of thinking by telling the Parable of the Good Samaritan.

"A man was going down from Jerusalem to Jericho, when he was attacked by robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. [31] A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. [32] So too, a Levite, when he came to the

place and saw him, passed by on the other side. [33] But a Samaritan, as he traveled, came where the man was; and when he saw him, he took pity on him. [34] He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. [35] The next day he took out two denarii[a] and gave them to the innkeeper. 'Look after him,' he said, 'and when I return, I will reimburse you for any extra expense you may have.'

"Which of these three do you think was a neighbor to the man who fell into the hands of robbers?" The expert in the law replied, "The one who had mercy on him." Jesus told him, "Go and do likewise." Luke 10: 30-37

Several things stick out to me about this story. First, the person who had mercy was the least that anyone would expect. Second, the Samaritan did not blame the victim of the robbery for what befell him or gossip about his misfortune. Third, the Samaritan did not take credit for his good deed or take pictures for his social media accounts. This was a pure act of love and sacrifice between two people who probably did not look, think, or act alike. This is what it is like to love our neighbor.

Tabitha Dean, a paralegal in the Mass Torts Section, furnished two verses this month, and she had this to say:

I have been a proclaimed "independent" person and at times when faced with problems my independence can create additional worry. These verses remind me to give God my little insignificant problems as well as great burdens that weigh me down. He will fight my battles and remove my worries.

The LORD will fight for you; you need only to be still. Exodus 14:14

Casting all your care upon Him; for He cares for you. 1 Peter 5:7

Trisha Green, a lawyer in our Toxic Torts Section, has three verses for this issue. Trisha had this to say:

When my family first moved to Alabama, the first sermon we attended was about being where you needed to be when you needed to be there. We had not necessarily intended to end up in Alabama, but a string of random events led to us leaving Missouri and moving south. There were so many unknowns and we questioned if we had made the right decision. Hearing those words that day reassured us that our paths lead us to the place we need to be when we need to be there. I wanted to share these scriptures because we all may have different paths and purposes, but God leads us to where we are supposed to be when we need to be there.

Whether you turn to the right or to the left, your ears will hear a voice behind you saying This is the way; walk in it. Isaiah 30:21

Your word is a lamp for my feet, a light on my path. Psalm 119:105

In their hearts, humans plan their course but the LORD establishes their steps. Proverbs 16:9

XXVII.
CLOSING OBSERVATIONS

Celebrating The Firm's Female Lawyers And Their Tireless Efforts For Our Clients

The month of March has been designated Women's History Month to recognize the contribution of women, including in the legal profession. While it is important to look back and remember those who paved the way for gender equality in the legal profession, it is equally important to recognize those female lawyers who continue those efforts today, leaving their mark on the profession and paving the way for future generations of women lawyers.

When I first started in 1962 as a young lawyer in Tuscaloosa, there were very few female lawyers in Alabama. Fortunately, that has changed dramatically over the years. However, there are still some judges who don't recognize female lawyers as being on the same level as male lawyers, and that's most unfortunate. There are also some lawyers with the same mindset. Hopefully, both the ranks of judges and lawyers who have yet to accept females as equals is very small in number.

As mentioned last month, our firm strives to maintain a diverse and inclusive environment among all our employees, including lawyers. It is an honor to recognize our female lawyers this month. I can say without reservation that the talents, experience, and passion of our female lawyers equal – and quite often surpass those of their male counterparts.

The varied backgrounds and perspectives of our female lawyers and their leadership and determination to represent their clients – despite challenges in the courtroom and in a profession that has been slow to turn the tide on gender equity – greatly benefit the firm and our clients.

Our female lawyers demonstrate a solid commitment to carrying out the firm's fundamental principle of "helping those who need it most." We are pleased to celebrate the different journeys that led them to practice law, the leadership they exhibit, and the distinguished careers they have had and are still building.

The complete article celebrating Beasley Allen's female lawyers is available on the website: https://www.beasleyallen.com/article/celebrating-the-firms-female-lawyers/. I encourage our readers to take the time to read this story and visit their individual bio pages. Diversity is a cornerstone of Beasley Allen law firm, and that is something I am most pleased to be able to say is a reality.

XXVIII.
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.

Rep. John Lewis on movement building in *Across That Bridge: A Vision for Change and the Future of America*

XXIX.
PARTING WORDS

Public Citizen, a non-profit consumer advocacy organization, is a real champion of the public interest. It has been an effective voice for the American people in the halls of power in America. I have been a long-time supporter of Public Citizen, and I am convinced that supporting their work is more important now than ever before. Beasley Allen lawyers have seen first-hand how important it is to have Public Citizen engaged in the ongoing fight to save our democracy and preserve the rule of law in America.

Since 1971, Public Citizen has worked to make our country safer and healthier and preserve our republic. Public Citizen has been a powerful advocate for the American people in this ongoing battle and has worked tirelessly to preserve and strengthen the civil court system.

Public Citizen has helped make products of all kinds safer and make the workplace safer for employees. Protecting the constitutional rights of consumers has been the cornerstone of what Public Citizen does.

Needless to say, defending democracy and combating the awesome corporate power is a full-time job. We must all work to ensure that government at every level, especially in Washington, works for the American people and not against them.

Public Citizen is truly the people's advocate. While there have been many victories over the past 50 years, the ongoing battle on behalf of the American people is far from over. I urge all citizens to support Public Citizen and work with their dedicated staff to achieve liberty and justice for all Americans. Learn more about Public Citizen by going to their website Citizen.org.

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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. His short-lived political career ended in 1978 when he ran, unsuccessfully, for Governor.

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 of products liability, insurance fraud, business litigation 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's primary offices are based in Atlanta, Georgia, Dallas, Texas, Mobile, Alabama, and Montgomery, Alabama. Beasley Allen is one of the country's leading firms involved in civil litigation on behalf of claimants. The firm has been privileged to represent businesses and hundreds of thousands of individuals who have been wronged by no act of their own.

beasley allen
LAW FIRM

YOUR ATLANTA CONNECTION

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