



THE
JERE BEASLEY REPORT

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Beasley Allen

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I. CAPITOL OBSERVATIONS

ATTACKS ON THE CIVIL JURY HURT AMERICAN CITIZENS

In recent years Corporate America has been highly successful in cases before the U.S. Supreme Court. This corporate windfall has come at the expense of ordinary citizens who are unable to win redress for their injuries. It has appeared on occasion that many Americans have forgotten how important the jury system is in the U.S. We should all be reminded that the civil jury has a constitutional function in our American system of government. Unfortunately, the jury is a structural element of our system of separated powers. The influence of civil juries has been greatly reduced because of rulings from the highest court in the land.

Americans sounded the alarm when the original Constitution was silent on the civil jury, and the Seventh Amendment—which protects the civil jury—was ultimately sent to the states with the Bill of Rights. The civil jury, which provides a forum in which all citizens stand equal, remains an important political institution. It distributes power in our divided government, vesting citizens with the authority to resolve disputes among themselves. Under our system of government—and because of the Seventh Amendment, the civil jury is immune from the traditional exercises of political influence. It provides security against corruption, which is extremely important and a protection for all American citizens.

The civil jury was designed to be a guard against the encroachments of “the more powerful and wealthy.” Corporations exert massive influence over executive and legislative branch officials, through lobbyists, campaign contributions and super PACs. But tampering with a jury is a crime. A huge corporation doesn’t like being on an equal footing with a regular person in a forum it cannot influence with corporate power. That is not a corporation’s accustomed state. That’s why efforts to elect judges and influence judicial appointments have intensified in Corporate America.

One line of recent cases has seen the Supreme Court expand arbitration in ways that allow powerful commercial interests to divert litigants away from civil juries, even allowing arbitrators to adjudicate whether an arbitration clause is unconscionable. Supreme Court decisions also have departed from the simple and long-standing notice pleading

standard (preferring to test complaints for “plausibility”) and have made it far harder for injured individuals to band together and proceed to a jury via class action. The Supreme Court has also limited the civil jury’s discretion to impose punitive damages, concluding that they were too unpredictable for corporations. That’s most difficult to comprehend since we have seen cases where corporations actually weighed the effect of punitive damages when deciding safety issues.

These decisions all restrict the civil jury in its constitutionally intended political function. The founding fathers intended citizens, sitting as a jury, to decide disputes among fellow citizens. Today, however, more and more disputes are diverted to corporate-funded arbitrators, screened out by judges before they get to a jury, or not permitted to proceed in an economically feasible manner. Even when cases do make it to trial, the jury’s authority to choose a remedy is cramped by new judicial control. As a result, the civil jury exercises a lesser share of the “sovereignty of the people” and is less able to prevent “the encroachments of the more powerful and wealthy citizens.”

There are ways to restore the civil jury to its rightful place in our democracy, and have the Seventh Amendment stand equally beside other amendments. The Supreme Court could find the Seventh Amendment jury right to be “deeply rooted in this nation’s history and tradition” and “fundamental to our scheme of ordered liberty,” and thus “incorporate” it against the states under the 14th Amendment. The court also could ask, for example:

- whether a rule “chills” the exercise of the civil jury right (as it asks in the First Amendment context); or
- whether only a knowing waiver of the jury right will be accepted (as is required in the context of the Fifth Amendment); or
- whether the solicitude recently shown by the court to the Second Amendment should also be directed to the Seventh Amendment.

While at one time it seemed very unlikely, we could also see Congress act. They could override most, if not all, of the Supreme Court’s recent decisions that have undermined the civil jury. The public could pressure Congress into taking action and there is a strong movement underway to put pressure on Congress. Bills to ban mandatory predispute arbitration, to restore notice pleading, to protect class actions and to enshrine the jury’s proper discretion regarding punitive damages all have been introduced. Hopefully, they will receive broad support. A breakwater built into our system of government by

our nation’s founding fathers—the civil jury—is designed to stand firm against the tide of influence and money. We allow it to crumble, or be disassembled, at our peril!

Source: Law.com

\$21.8 MILLION RECOVERED FOR ALABAMA CONSUMERS

Attorney General Luther Strange announced last month that about 15,000 Alabama consumers will receive payments totaling \$21,828,276 from a national settlement. This comes as a result of the state’s participation in the National Mortgage Settlement. The settlement administrator has approved 962,278 valid claims from June 10th

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through June 17th. Borrowers who are eligible to receive the payments had their mortgage serviced by one of the settlement's five participating mortgage servicers. They all lost their homes to foreclosure between January 1, 2008, and December 31, 2011. In order to participate in the settlement, each person had to submit a valid claim form. The participating servicers include Ally (formerly GMAC), Bank of America, Citi, JPMorgan Chase and Wells Fargo. Attorney General Strange had this to say about the settlement: "I am pleased with these results of the National Mortgage Settlement, which continues to bring much needed relief to Alabama borrowers."

In February 2012, the federal government and 49 state attorneys general announced the joint federal-state National Mortgage Settlement with the country's five largest mortgage servicers. According to preliminary data, the servicers have provided more than \$50 billion in direct settlement relief to borrowers nationwide. Hopefully, consumers in Alabama have already received other forms of mortgage relief as a result of this settlement. That should have included refinances, short sales and partial mortgage forgiveness. It's been estimated that this feature of the settlement could amount to about \$104,814,256. But of course that amount is very difficult to calculate. Additional relief has been promised, and is pending, with more expected for the future.

In Alabama, approximately \$21,828,276 will be paid out and apply toward a total of 14,707 loans. Every borrower who filed a claim should have already received a letter regarding their outcome. Borrowers with questions about their National Mortgage Settlement payment should contact the settlement administrator at 1-866-430-8358. A relatively small number of borrowers will not receive a check in the initial mailing or will receive a split payment. Those are as follows:

- Some borrowers will receive a check for less than the approximate \$1,480 payment in situations where borrowers are divorced or separated and no longer live at the same address. The full per-loan amount will be paid on these loans, but the payment will be evenly split between the borrowers.
- A small number of borrowers who submitted a claim form but do not have a valid Social Security number on file will be delayed in receiving their payments while tax-related issues are addressed.
- Two servers recently provided information on an additional 31,000 borrowers. Those were not included in this distribution. Later this summer, these consumers should receive a notice and will have the opportunity to submit a payment application.

It's good to see attorneys general from around the country working for people now instead of just for the giants in Corporate America.

Source: Attorney General's Office

STATE ATTORNEYS GENERAL BELIEVE GOOGLE HELPING ONLINE DRUG DEALERS

A national group of state attorneys general have taken Google to task over what they say amounts to aiding drug dealers online. According to Mississippi Attorney General Jim Hood, who chairs the National Association of Attorneys General, Google, a search company, allows advertisements and YouTube videos for sellers of counterfeit drugs and dangerous but legal drugs. These include drugs like Adderall and Oxycontin, which can be obtained without prescriptions. Google has responded in a statement, saying:

We take the safety of our users very seriously and we've explained to Attorney General Hood how we enforce policies to combat rogue online pharmacies and counterfeit drugs. In the last two years, we've removed more than 3 million ads for illegal pharmacies, and we routinely remove videos that are flagged for violating YouTube's Guidelines regarding dangerous or illegal content.

Google paid out one of the largest fines on record a few years ago to end a drug-related case with the government. In 2011, Google ended up paying out \$500 million to the U.S. Department of Justice. This huge fee was punishment for Google AdWords sales for controlled and non-controlled drugs from Canadian pharmacies. This is what Google said in a statement about that settlement:

We banned the advertising of prescription drugs in the U.S. by Canadian pharmacies some time ago. However, it's obvious with hindsight that we shouldn't have allowed these ads on Google in the first place.

If Google is doing what Attorney General Hood says it is doing, they should again be taken to task. We will continue to monitor this matter.

Source: medcitynews.com

II. A REPORT ON THE GULF COAST DISASTER

BP GUILTY OF GROSS NEGLIGENCE

Based on the testimony that came out in the First Phase of the Limitation trial, BP and the contractors aboard the Deepwater Horizon drilling rig appear clearly responsible for the April 2010 blowout of the Macondo well and the subsequent Gulf of Mexico oil spill. Importantly, U.S. District Judge Carl Barbier will determine whether the actions of the London-based company, including some of the contractors aboard the rig (most notably Transocean and Halliburton), amounted to gross negligence. A gross negligence finding by Judge Barbier could subject BP to billions more in damages.

Previously, Judge Barbier had set a deadline for June 21st, for all of the parties to file proposed findings of fact and conclusions of law. This comes two months after the trial on fault heard by Judge Barbier was completed. Lawyers for BP, Halliburton and Transocean have filed their conclusions, asking Judge Barbier to reject findings of gross negligence against them. Alternatively, lawyers for the U.S. government have also filed briefs, seeking a finding of gross negligence against BP. Lawyers for the private party plaintiffs and the states of Louisiana and Alabama stated in filings with the court:

BP's employees engaged in willful and wanton conduct and such willful and wanton conduct was a substantial contributing cause of the blowout, explosion, fire, and initiation of the discharge of oil.

This conduct by BP employees "was the result of corporate policy and/or was otherwise known to, approved by, and/or ratified by corporate officials with policymaking authority," they said. Identical claims were filed against Transocean and Halliburton. We believe that each defendant acted with gross negligence and a strong case for punitive damages proved against each of the defendants. While the standards are stringent and exacting standards, we believe they have been met.

U.S. Justice Department lawyers asked Judge Barbier to find that BP acted with gross negligence and willful misconduct. They stated that BP failed to take any action when pre-blast testing showed a heightened risk of a blowout on the well. For example, the facts related to the negative pressure test demon-

strate willful misconduct. BP also committed gross negligence through other acts and omissions, including “failures in the process safety management system.”

If Judge Barbier finds that BP acted with gross negligence it will increase the company’s potential damages in the billions of dollars. It will also be a boost for state and local governments who were excluded from the private class settlement. Transocean, owner of the Deepwater Horizon drilling rig, and Halliburton, which provided cementing services for the project, could also be held liable for punitive damages if those companies are found to have handled their duties in a grossly negligent manner.

Some or all of the contractors may not face compensatory damages, since Judge Barbier ruled last year that the project contract required BP to indemnify them from such costs. Judge Barbier has been asked to consider whether this indemnification, if gross negligence or reckless conduct is found, would be rendered invalid “as a matter of public policy.”

BP was over budget and behind schedule, prompting it to cut corners and ignore safety tests showing the well was unstable. BP was \$60 million over budget and 54 days behind schedule on the well by April 9, 2010, 11 days before the blowout. It has been proved that Halliburton’s cement job was defective and poorly orchestrated. In addition, Transocean employees made a series of mistakes on the rig, including disabling safety systems, failing to properly maintain controls aboard the rig, and not providing adequate training for its crew.

BP has tried to shift blame to its partners. It claimed during the trial that Transocean failed to maintain the drilling rig and that Halliburton provided defective cementing services. But Transocean and Halliburton have returned fire on BP. BP’s cost-cutting led to “reckless decisions” that increased risks. BP employed the “Every Dollar Counts” culture, driven from its top management, directly affected the reckless decisions that were made to disregard known risks in order to save the company time and money.

The negative pressure test taken before the blast was a major factor in what happened on the rig. BP engineers had actual knowledge that the negative pressure test was questionable at best. Nevertheless, they proceeded with conscious disregard to the significant risk of foreseeable danger. The test monitors the well for any increase in pressure or flow of oil or gas up the well. Any pressure increase or fluid flow is an indication that the well isn’t secure and that oil and natural gas could be entering the well. That’s a recipe for disaster. Misinterpretation of this test as successful when it wasn’t was a key cause of the

explosion. Both BP and Transocean share blame for the failure.

Judge Barbier has said he may not issue a judgment on fault and gross negligence before the second phase of the trial, which is set for September 16th. The second phase, which concerns the size of the spill and the efforts to contain it, is critical to the Justice Department’s case in proving fines attributable to BP. Damages trials will likely follow.

It should be noted that BP’s settlement last year didn’t cover claims of financial institutions, casinos, real estate businesses, insurance companies, private plaintiffs in parts of Florida and Texas, and residents and businesses claiming harm from the deep-water drilling moratorium imposed after the spill. The settlement also excluded federal and state government claims.

Hundreds of new lawsuits have been filed this year by individuals, businesses and governments around the third-year anniversary of the event, including claims by Texas, Florida and Mississippi. Our firm has successfully handled hundreds of claims thus far and currently represents hundreds more whose claims are either pending or will be filed very soon. If you need more information on any of the above, contact either Rhon Jones, John Tomlinson, Parker Miller, Chris Boutwell or Grant Cofer at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, John.Tomlinson@beasleyallen.com, Parker.Miller@beasleyallen.com, Chris.Boutwell@beasleyallen.com or Grant.Cofer@beasleyallen.com.

CLAIMS CONTINUE TO COME INTO THE OIL SPILL ECONOMIC SETTLEMENT

Confidence in the Deepwater Horizon Economic and Property Damages Settlement is continuing to grow. Since going online one year ago this month, the Settlement Program is providing benefit to business and individuals in the Gulf states. To date, the Settlement Program has received more than 190,000 claims and by all accounts, claims will continue to be filed as we move toward the current April 2014 deadline for filing claims. Claims’ activity is also at an all-time high, as claim determinations from the Program have risen to \$3.6 billion—\$3.2 billion of which have been accepted by claimants.

Originally, BP estimated (which they claimed was for the benefit of their shareholders) that the Settlement Program would pay out a total claim value of \$7.8 billion, leading many observers who had not paid close attention to the settlement agreement to believe the Program was actually capped at that number. The Settlement agreement, however, is not capped and some believe the program will far exceed BP’s “estimate.” The bottom

line is all of the claims should be paid pursuant to the terms of the settlement agreement, and if that number is more than BP’s estimate, then so be it. I always thought it was odd that a large, publicly traded company like BP would attempt to make an estimate of the total dollar value of claims that would be paid when they agreed before a federal judge that the settlement amount was not capped in any way for business and individual claims.

STUDY CONTRADICTS BRITISH NEWS SUGGESTIONS THAT SETTLEMENT PROGRAM OVER-COMPENSATES THE GULF COAST ECONOMY

Some observers have argued that the Settlement Program’s payment process will result in a wave of overcompensation to the Gulf Coast economy. Not surprisingly, the vast majority of these complaints are originating from BP’s homeland—Great Britain. But, a closer look the statistics and Gulf Coast studies suggest a completely different picture.

A study conducted by regional scholars throughout the Gulf Coast, and published by the Texas A&M University Press in 2007, reveals that the Gulf of Mexico generates \$234 billion in economic activity from its four biggest industries: oil, tourism, fishing and shipping. If the Gulf of Mexico was a country, it would be the 29th largest economy in the world, the study notes. The tourism industry alone is responsible for nearly \$100 billion of the \$234 billion. Oil and gas interests account for \$124 billion, or 53 percent, of the total impact.

The oil spill affected all of these industries in a major way and for an extended period of time. The massive oil slick led to the federal moratorium on Gulf of Mexico drilling, oiled the region’s white sandy beaches throughout the tourism season and resulted in the closure of hundreds of square miles of pristine fishing waters at the height of the fishing season. Needless to say, it is no wonder the Settlement Program is paying—and will continue to pay—billions in compensation to those directly and indirectly affected by the spill’s impacts. Gulf Coast businesses and individuals are not greedy for seeking compensation from this historic disaster. Instead, BP grossly underestimated the totality of the oil spill’s impact on the region.

Source: *CNN Money*; http://money.cnn.com/2010/05/30/news/economy/gulf_economy/index.htm

BP IS WELL-POSITIONED TO MEET ITS OBLIGATIONS IN THE SETTLEMENT

There has been speculation that the current Settlement Program could compro-

mise BP's viability and leave it vulnerable to collapse. That is far from being accurate. Most likely, BP, or its sympathizers, are putting this information out to scare either the Settlement Program or some court into seeing its way on denying claims. It's part and parcel of BP's public relations plan. In fact, BP's own records indicate a completely different story. In the midst of litigating the massive limitation trial in New Orleans, paying for the administration of an army of accountants in New Orleans to process claims and physically paying billions in claims, BP managed to still eek out a \$4.2 billion profit. What's more, the profit report actually beat industry profit forecasts by \$1 billion. Needless to say, BP's financials are fine.

Source: *Bloomberg*

BUSINESSES THAT HAVE NOT ALREADY PARTICIPATED IN THE SETTLEMENT NEED TO MOVE ON THEIR CLAIMS

As of now, April 22, 2014 will mark an end to what is quite possibly the most significant monetary settlement in United States history. Almost any business in Alabama, Louisiana, Mississippi, the Florida Panhandle, the Western-most counties of Florida to Key West, and the Eastern-most counties of Texas could have a claim in the settlement. To date, lawyers in our firm have filed hundreds of business claims, and our experience in the system suggests these claims will be substantial. However, the claims take time to prepare for filing. With the surge in BP appeals and the claim facility's meticulous review process, claims need to be carefully constructed to withstand close scrutiny by the claim facility. If the claim concerns a business with more than \$100,000 of annual revenues, our experience suggests BP will likely appeal the claim. Many times, these appeals are filed regardless of whether there are any issues with the claim. The appeals are quite complex, involving legal briefs full of settlement interpretation arguments.

Many ask our lawyers whether the Settlement Program is still paying claims. In the last two months, the lawyers in our firm have obtained substantial recoveries for the businesses. Some of these recoveries are six and seven figure recoveries. A large number of businesses located north of the coast are covered by the settlement and are being paid. If you have any questions about the settlement or about a business claim, contact Sandra Walters, the Section Head Administrator in the Toxic Torts Section, at 800-898-2034 or by email at Sandra.Walters@beasleyallen.com. She will have a lawyer contact you.

BP ENDS OIL SPILL CLEANUP IN ALABAMA, FLORIDA AND MISSISSIPPI

The U.S. Coast Guard announced on June 10th that BP has completed cleanup work in Alabama, Florida and Mississippi. This decision comes three years after the April 20, 2010, catastrophe. BP said that the announcement "is the result of the extraordinary progress made cleaning the Gulf of Mexico shoreline." The Coast Guard said it was concluding "active cleanup operations" in the three Gulf coast states, but that the work continues along 84 miles of Louisiana's shoreline. Capt. Duke Walker, Federal On-Scene Coordinator for the Deepwater Horizon Response, had this to say:

This is another important step towards meeting our goal of returning the shoreline to as close to pre-spill conditions as possible while managing the scale of the response to meet conditions on the ground.

The Coast Guard says it will continue responding to reports of oil that washes up anywhere along the Gulf Coast. BP said in a statement that it will take responsibility for removing any oil that came from its blown-out Macondo well. Hopefully, there won't be any "storms" in the Gulf that would send more oil and chemicals onto the shorelines of the coastal states. The cleanup by BP contractors ended on June 7th in Alabama, on June 1st in Florida and on May 1st in Mississippi, according to a BP spokesman. Sightings of oil can be reported to the National Response Center by calling 1-800-424-8802 or filing a report online with the Coast Guard.

Frankly, based on what we have learned during the BP litigation, I don't trust the oil giant and neither should the U.S. government. But for now, it appears as to the clean-up of the beaches, we will have to hope that the Coast Guard will do the right thing.

Source: *AL.com*

BP SHOULD HAVE LEARNED A LESSON FROM THE OIL SPILL

BP should have learned a lesson from the disaster in the Gulf, but I have to wonder if it really has. The oil giant has done a masterful job of convincing the public that it has cured all of the problems caused by the massive and record-setting Gulf oil spill. BP wants the public to consider the spill to be distant history and that all is now well. Frankly, the ongoing public relations campaign by BP has been its best work. Through the years, the public has heard daily on television that the environment has been restored, tourism is back and BP has made its operations safer.

The well-done ads tell us the company spends more money in the U.S. than any of its competitors. BP wants the public, as well as the government, to forgive and forget. But what BP caused in the Gulf, with all of the damage done and to be done for years to come, is indefensible. The company's conduct was grossly negligent and actually reached the level of wantonness. If ever a huge corporation deserved to be punished, it's BP.

Research into the long-term effects of the oil and chemicals in the Gulf is ongoing. Even though BP has paid tens of billions of dollars to cover criminal and civil settlements, there are a huge number of lawsuits and government investigations still underway. To believe that the Gulf itself, and the states on the Gulf, are back to normal, one would have to ignore reality. There are still major problems on the coast and there will very likely be additional problems for years to come. Declaring the crisis over, or that BP has paid its dues, is premature. I am not at all sure that BP has learned its lesson. The tenor of the oil giant's intense advertising blitz certainly doesn't give that impression.

Source: *Forbes*

III. DRUG MANUFACTURERS FRAUD LITIGATION

WALGREENS AGREES TO RECORD \$80 MILLION SETTLEMENT OVER DISTRIBUTION OF PAINKILLERS

Walgreens has agreed to a settlement with the federal government that will cost the company about \$80 million. The DEA accused Walgreens of committing an "unprecedented" number of record-keeping and dispensing violations of the Controlled Substances Act. Walgreens was said to have negligently allowed controlled substances such as the narcotic oxycodone and other prescription painkillers to be distributed to abusers and sold illegally on the black market. Mark Trouville, special agent in charge in the DEA's Miami field division, said in a statement:

National pharmaceutical chains are not exempt from following the law. All DEA registrants will be held accountable when they violate the law and threaten public health and safety.

Kermit Crawford, Walgreens president of pharmacy, health and wellness, in a statement said the company has taken and will take further steps to improve oversight and train-

ing “to ensure the appropriate dispensing of controlled substances and to improve collaboration across the industry.” The settlement with the Deerfield, Illinois-based company also resolves a probe by U.S. Attorney Wifredo Ferrer in Miami. Walgreens operates more than 8,000 drug stores in all 50 U.S. states, the District of Columbia, and Puerto Rico.

As part of the settlement, Walgreens admitted that it failed to uphold its obligations as a DEA registrant. Six Walgreens pharmacies in Florida and a distribution center in Jupiter, Fla., were given a two-year ban from dispensing various controlled substances, according to the DEA. Walgreens also agreed to enhance training and compliance programs, and set up a Department of Pharmaceutical Integrity to help prevent similar violations. Florida has long been considered a center of prescription drug abuse, and the DEA has dismantled dozens of sham clinics known as “pill mills” where doctors have written prescriptions for drug dealers and addicts.

The Centers for Disease Control and Prevention (CDC) reported that the U.S. death rate from drug overdoses has more than tripled since 1990. It said prescription painkillers, also known as opioid or narcotic pain relievers, were involved in more than 15,500 overdose deaths in the United States in 2009. Walgreens had previously set aside \$80 million for a settlement, including \$25 million in its fiscal third quarter, which ended May 31st.

Source: *Insurance Journal*

SETTLEMENT ANNOUNCED IN KENTUCKY OXYCONTIN LAWSUIT

A settlement in a lawsuit involving the drug OxyContin in a Kentucky court was announced last month. The drug maker Purdue Pharma agreed to pay \$4 million to settle a lawsuit over abuse of the narcotic. Most of the terms of the agreement are confidential. Pike County initially filed the lawsuit in 2007, asking for damages the community suffered after the company marketed OxyContin as a “safer alternative” to other pain medicine. The drug became so pervasive in eastern Kentucky that it was dubbed “Heroin of the Hills.”

As a result of the settlement, Pike County Government will have the funds to make a difference in drug addiction. They are establishing the Pike County Re-Entry Partnership for people convicted of drug violations. Their goal is to rehabilitate people who are addicted to drugs. Gary C. Johnson, a lawyer from Pikeville, Ky., represented the county in this case. He worked very hard for a long time,

didn't give up and ultimately brought about the settlement.

Source: *Claims Journal* and *The Appalachian News-Express*

IV. COURT WATCH

SUPREME COURT EXPANDS IMMUNITY FOR BIG PHARMA

The U.S. Supreme Court gave pharmaceutical companies another huge gift on June 25th, largely shielding the generic industry from lawsuits for the design of their drugs. This is the second Supreme Court decision giving the generic drug industry immunity. In 2011, the Court decided generic makers cannot be held responsible for failing to warn about a drug's side-effects, saying the generic maker is only making a “copy” of the brand drug and must follow the brand drug's label. American Association for Justice President Mary Alice McLarty had this to say:

I know of no other industry where the maker of a product has such limited responsibility for the safety of the product they make. Over eighty percent of drugs dispensed are generic; the manufacturers must be held responsible for their drugs' harmful effects.

The case (*Mutual Pharmaceutical v. Bartlett*) is about Karen Bartlett, a woman who permanently suffers from Stevens-Johnson syndrome after taking the generic drug sulindac for shoulder pain. The disease left Karen nearly blind and caused over 60% of her skin to burn off. She spent months in a coma and a year being tube fed. Karen is permanently disfigured and will need care for the rest of her life.

Two lower courts in New Hampshire ruled sulindac is unreasonably dangerous and awarded Karen \$21 million. The Supreme Court's decision nullifies those rulings. It has been two years since the Supreme Court granted generic drug companies immunity for their drugs' warning labels in *Pliva v. Mensing*. The Supreme Court has now expanded that immunity.

It's essential for the Food and Drug Administration to address the huge disparity between generic and brand drug makers' responsibility. Senators Patrick Leahy and Mary Landrieu have sent letters to the FDA, calling on the agency to address generic drug accountability. Public Citizen had previously filed a citizen petition, asking the FDA to address the *Mensing* decision and the group will join in with the current request.

Hundreds of cases have been dismissed because of the Supreme Court's *Mensing* decision. Public Citizen has issued a new report highlighting how many potential hazards are not discovered until years after drugs have been on the market and the risk this poses to patients. People who have been injured and damaged have been denied access to justice just because they took a generic drug. Does anybody believe that the public's health and safety will benefit from what the Supreme Court has done? The drug industry has to be still celebrating with this undeserved win. Hopefully, the public outrage over what the court has done may be enough to make this a short-lived victory.

ARIZONA'S PROOF OF CITIZENSHIP LAW IS ILLEGAL

The U.S. Supreme Court has ruled that it's illegal for states to require would-be voters to prove they are U.S. citizens before using the “Motor Voter” federal registration form. The justices voted 7-2 to throw out Arizona's voter-approved requirement that prospective voters document their U.S. citizenship in order to register to vote while getting their driver's license. Federal law “precludes Arizona from requiring a federal form applicant to submit information beyond that required by the form itself,” Justice Antonia Scalia wrote for the court's majority. Alabama, along with Georgia, Kansas and Tennessee, have similar requirements.

The U.S. Court of Appeals For the Ninth Circuit said that the 1993 National Voter Registration Act, which doesn't require such documentation, trumps Arizona's Proposition 200 passed in 2004. Arizona officials claimed that their law was needed to stop non-Americans from voting in elections. The simple truth is that the law was just another attack on minorities, immigrants and the elderly. Fortunately, the high court agreed with the federal government in the case.

Justices Clarence Thomas and Samuel Alito dissented from the court's ruling, saying that the Constitution “authorizes states to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied.” The federal “motor voter” law, enacted in 1993 to expand voter registration, requires states to offer voter registration when a resident applies for a driver's license or certain benefits.

Another provision of that law—the one at issue before the court—requires states to allow would-be voters to fill out mail-in registration cards and swear they are citizens under penalty of perjury, but it doesn't require them to show proof. Under Proposi-

tion 200, Arizona officials require an Arizona driver's license issued after 1996, a U.S. birth certificate, a passport or other similar document, or the state will reject the federal registration application form. The case is *Arizona v. Inter Tribal Council of Arizona, Inc.*

Sources: AL.com and Associated Press

OKLAHOMA SUPREME COURT INVALIDATES CIVIL JUSTICE LAW

A civil justice reform measure, one hailed in 2009 as the most comprehensive bill to ever affect Oklahoma's legal system, has been declared unconstitutional by the Oklahoma Supreme Court. In a 7-2 decision, the state's highest court declared that the law, known as the Comprehensive Lawsuit Reform Act of 2009, violated the single-subject rule in the Oklahoma Constitution and amounted to unconstitutional logrolling, or the passing of legislation that contains multiple subjects. The court concluded that "The bill is unconstitutional and void in its entirety." The 2009 law made sweeping changes to the way Oklahomans file lawsuits.

The law placed unconstitutional barriers to Oklahomans' right to go to court and seek judicial remedies to injuries and other wrongful acts. Guy Fortney of Tulsa, president of the Oklahoma Association for Justice, said the decision will force the Legislature to adhere to constitutional guidelines when addressing issues like lawsuit reform. Guy had this to say:

It is certainly a victory in our view for the citizens of Oklahoma who have a right to access to not only the courtroom, but to a jury that can consider all the evidence before it, including the full amount of damages which would remedy the defendant's wrong.

Fred Morgan, the president and CEO of the State Chamber of Oklahoma, a pro-business group that supported the legislation, expressed his extreme disappointment. "Regrettably, the activist judges on this court have shown they will continue to anoint themselves the ultimate arbiter of the state's social, moral and legal values," the former state lawmaker, who has been active in lawsuit reform efforts, said in a statement.

A coalition of consumer advocacy groups and lawyers who specialize in medical malpractice and product liability cases initially fought the bill, arguing that it would block Oklahomans' access to the state's courts. In a separate 7-2 decision, the court also invalidated a requirement that injured people submit a certificate of merit before they can file professional malpractice lawsuits. The majority opinion said the requirement was

"an unconstitutional burden on accessing the courts."

Source: *Insurance Journal*

U.S. SUPREME COURT RULING MAY HINDER ABILITY TO CHALLENGE AGENCY AUTHORITY

In a ruling that will make it even more difficult to challenge agency rulemakings, the U.S. Supreme Court has decided that courts must defer to an agency's interpretation of a statute it enforces, even when addressing the jurisdictional reach of the agency itself. In *City of Arlington v. FCC*, the Court held that courts must apply the Chevron framework to an agency's interpretation of the scope of its regulatory authority. This decision may apply to every federal agency, including the USEPA, giving the agencies the upper hand in judicial challenges to agency rulemakings. The Chevron case, decided in 1984, requires two steps in reviewing an agency's construction of a statute the agency administers. Pursuant to that ruling courts must:

- Applying the ordinary tools of statutory construction, determine whether Congress has directly spoken to the precise question at issue; if the intent of Congress is clear, the inquiry ends; however,
- If the statute is silent or ambiguous as to the specific issue, determine whether the agency's answer is based on a permissible construction of the statute; if so, that construction is entitled to deference by the court.

Since Chevron was decided in 1984, there have been significant questions as to which agency decisions it applies. That has created a circuit split over whether Chevron applies in jurisdictional matters. As the Fifth Circuit noted in its underlying opinion in the city of Arlington case, the Third, Fifth and 10th Circuits generally grant deference to agencies in jurisdiction cases, while the Seventh and Federal Circuits have explicitly refused to do so. The Circuit Court for the District of Columbia—which reviews most challenges to USEPA regulations—has, at various times, both applied and refused Chevron deference in jurisdiction cases.

In *City of Arlington*, the city brought suit on the theory that the FCC did not have authority under the statute to set a time frame for local government decision-making because the savings clause left the decision up to the local government. It was contended that the judicial review clause put the determination of "reasonable period of time" in the hands of the judiciary. The Fifth Circuit followed circuit precedent and disagreed, holding that the FCC's authority to make the

rule was ambiguous and that the FCC's interpretation was a permissible construction of the statute, and it was therefore entitled to Chevron deference. In a 5-3-1 decision written by Justice Antonin Scalia, the U.S. Supreme Court affirmed the Fifth Circuit, holding that if the scope of the agency's authority is unclear, the agency's interpretation of its authority must be deferred to by courts if it is a permissible interpretation under the statute.

While this case is generally viewed as a win for the federal agencies, the decision does not mean that all agency actions will be completely immune from court challenges. The Court itself notes that where Congress has established a clear scope of authority, that line must stand, and if an ambiguous limitation exists, the agency can go no further than the ambiguity will fairly allow. Many "experts" believe that an alternative ruling creating a separate standard of review for "jurisdictional" challenges could have added a confusing layer, which would be costly, to already complex litigation.

Source: Lexology.com

HIGH COURT RULES FOR AMERICAN EXPRESS IN CLASS ACTION CASE

The U.S. Supreme Court ruled on June 20th that an arbitration agreement prevents merchants from bringing class action claims against American Express Co. The nine-member court ruled, on a 5-3 vote, that American Express's arbitration agreement did not preclude merchants from effectively vindicating their rights. The case stemmed from a 2003 class action lawsuit, filed by restaurants, retailers and other merchants, alleging American Express violated antitrust law by forcing them to accept its credit cards as a condition of accepting its charge cards. Justice Sonia Sotomayor recused and, as a result, didn't participate in the opinion.

Charge cards require their holders to pay the full outstanding balance at the end of a billing cycle; credit cards require payment of only a portion, with the balance subject to interest. The opinion was written by Justice Antonin Scali. Justice Elena Kagan wrote an excellent dissent for three justices who disagreed with the majority. American Express argued that the lawsuit was barred by the arbitration agreement signed by the merchants. The merchants countered that the agreement should not be enforced because it would not be economically feasible for many of them to bring individual claims in arbitration.

The case has been closely watched by major corporations, which have increasingly relied on arbitration agreements to settle dis-

putes with consumers and other parties. Those arbitration clauses also frequently prohibit plaintiffs from banding together to bring one action on behalf of a larger class. Consumer advocates claim the clauses give unfair advantages to companies, which is absolutely correct. In recent years, the Supreme Court has upheld the enforcement of these arbitration clauses under the Federal Arbitration Act. Of course, that Act was never intended to be used in consumer transactions and the legislative history clearly proves that to be true. The case is *American Express Co et al v. Italian Colors Restaurant et al, in the U.S. Supreme Court*.

Source: *Insurance Journal*

U.S. SUPREME COURT PERMITS CLASS ACTION IN ARBITRATION

The U.S. Supreme Court has affirmed a Third Circuit decision upholding an arbitrators' decision that a case could proceed as a class action in arbitration. In reaching its decision, the Court stressed the very heavy burden that rests on parties who would challenge arbitrators' decisions. Justice Kagan, writing for the Court, held that the issue was not whether the Court thought the arbitrator was right on the merits, but whether the arbitrator properly interpreted the parties' contract. The Court distinguished the Stolt-Nielsen case, on the grounds that the plaintiffs in that case had stipulated that there was no agreement on class arbitration.

Corporate America was seeking a double standard in the case before the high court, where arbitrators' decisions would almost never be reviewable. That is except when an arbitrator would allow a case to proceed as a class action. Corporations, as has been most evident, dislike class actions with a passion. The Supreme Court unanimously rejected this unprincipled concept, holding that the normal rules about judicial review of arbitration apply to decisions about class actions in arbitration.

This is an unusual win for Plaintiffs in a case involving arbitration in the U.S. Supreme Court. The high court has been very much anti-consumer in most of its decisions with the forced arbitration issue. The lawyers who worked on the case, Eric Katz of Roseland, New Jersey; Scott Nelson of the Public Citizen Litigation Group and Eric Schnapper of the University of Washington School of Law, did a very good job in this case.

Source: Justice.org

THE ALABAMA SUPREME COURT LOOKS WITH DISFAVOR ON RULE 54(B) CERTIFICATIONS

In two recent cases, the Alabama Supreme Court let it be known that the Justices on the court do not favor Rule 54(b) certifications. The trial court in each case had certified summary judgment orders for appeal. It appears that if any issues remain with the trial court that are "intertwined" with the issues presented in the claims certified as final, and on appeal, the Supreme Court likely will dismiss such an appeal.

THE ALABAMA SUPREME COURT NAMES A NEW CLERK

The Alabama Supreme Court has unanimously selected Montgomery lawyer Julia Jordan Weller to be the court's new clerk. She will succeed Bob Esdale, who is retiring at the end of this month after nearly 30 years as clerk. Mrs. Weller, who currently serves as chief administrative law judge in the Attorney General's office, will be the first woman to serve as Alabama Supreme Court clerk. I believe the justices made a very good choice in selecting Mrs. Weller as the successor to Bob Esdale.

V. THE NATIONAL SCENE

PUBLIC CITIZEN AT WORK FOR THE PEOPLE

I have written on numerous occasions about the good work Public Citizen has consistently done for U.S. consumers. The consumer advocacy group has been hard at work protecting the rights of the American people. Public Citizen, which doesn't accept special interest money, has been involved on a number of different fronts during the past year. I believe it's important to give our readers a review of some of the group's work. For example, Public Citizen has:

- Spearheaded the nationwide grassroots movement to overturn the U.S. Supreme Court's anti-democratic *Citizens United v. Federal Election Commission* ruling. So far, 13 states and hundreds of cities and towns have joined Public Citizen in calling for a constitutional amendment to restore democracy to We the People.
- Led the charge for the Securities and Exchange Commission (SEC) to require

corporations to disclose the money they spend trying to influence our elections.

- Mobilized grassroots and congressional action on the farce of "too big to jail," which hopefully will pay dividends very soon.
- Resisted all efforts, whether originating in Congress or at the White House, to weaken Medicare or Social Security. It's shameful, nonsensical and disingenuous for our leaders to be considering anything other than fortifying these bedrock programs.
- Demanded a formal government response to the egregious ethical lapses—which Public Citizen first brought to the public's attention—of a clinical trial involving oxygen levels for premature babies where the parents, and even some of the doctors, were inadequately informed about the risks and methodology of the study.
- Pushed for a financial speculation tax on Wall Street's wheeling and dealing.
- Worked to prove that the Keystone XL pipeline would—contrary to myths promoted by the few who stand to profit from its construction—actually increase domestic gas prices and decrease national energy security.
- Guarded against intensive campaigns by proponents of so-called "free trade" to gut laws that keep American workers, our food and our environment safe. Public Citizen pressured the U.S. Department of Agriculture (USDA) to strengthen popular and life-saving country-of-origin labeling standards for meat.
- Called out both Congress and President Obama for their "shameful" and "sneaky" repeal of a key provision of the STOCK Act, a commonsense and popular law meant to prevent insider trading by those who glean privileged information while working in Congress.
- Argued—and won—cases in the U.S. Supreme Court. For example, the Litigation Group won a case preserving the right of automobile owners to sue towing companies that sell their cars against their wishes.
- Worked to make sure that BP is not rewarded for its blatant, criminal and fatal misdeeds with taxpayer-supported federal contracts.
- Publicized the lack of federal oversight and safety spending that led to a catastrophic explosion at a Texas fertilizer plant. Future workplace tragedies will happen if the governments both national and local don't act.

- Fought Big Business' attempts to sneak fine print into contracts—for everyday goods and services—that denies customers access to justice if a company rips them off. Forced arbitration—the insidious anti-consumer trend—must be reversed.
- Defended the free speech rights of consumers from baseless attacks by businesses that are the subject of unfavorable online reviews.
- Held Chevron accountable for possible violations of rules against political contributions by federal contractors with its \$2.5 million donation to a Republican super PAC.
- Disproved industry-funded anti-regulatory propaganda and worked to preserve public protections whose benefits—from strengthening our economy, to safeguarding our environment, to keeping us safe and healthy—far exceed their costs.
- Warned consumers as well as federal regulators of the personal and public health risks of unsafe and under-tested drugs and devices. This has been a long-time fight led by Dr. Sidney Wolfe.
- Challenged an illegal proposed settlement in a class-action lawsuit over Facebook's use of members' images in online ads.

We need more groups like Public Citizen that are willing to fight for “real people” in the ongoing battle with the giants in Corporate America. When you get down to it, corporate greed in this country has infected every aspect of our lives. That's most unfortunate and the trend must be reversed. Huge corporations have been hard at work in their attempts to take over our elections. Emboldened by the U.S. Supreme Court's dumbfounding Citizens United ruling, which opened the door for corporate control of elections, we have seen tens of millions of dollars poured into recent elections. Quite often it's virtually impossible to name who the real donors are.

The bottom line is that democracy can't survive if corporate dollars are allowed to trump votes. Public Citizen is ready to respond if the U.S. Supreme court doubles down on Citizens United when it hears *McCutcheon v. Federal Election Commission*, another campaign finance case. It's feared that the high court might use that case to allow unlimited individual campaign donations. A brief will be filed by Public Citizen in the case and they are ready to activate grassroots action.

There is nothing wrong with huge corporations making good profits. In fact, it's a necessity. But not being content merely with making record profits in the United States,

huge corporations like Apple, Pfizer and Citigroup are offshoring profits to avoid their fair share of taxes while simultaneously backing absurd multinational “trade” pacts that pit countries against each other in a race to the bottom for food and product safety, labor standards and environmental protections. Public Citizen has been at work to expose this sort of thing and they will intensify the fight on behalf of the American people.

We must all stand together to save our Democracy. This will require each of us being willing to fight back with all the strength and passion we can summon. It isn't just about safeguarding consumers from unsafe products or corporate rip-offs. Neither is it just about advancing progressive ideals like fairness, justice and the American dream. The real fight is to save our democracy for this and future generations. If you would like to join with Public Citizen and support their efforts—or just need more information—go to citizen.org or contact them by phone at 1-800-289-3787.

Source: Public Citizen Release

TRACKING A NATIONAL DEBATE OVER PHONE CALLS TO STOP TERRORISM

Most Americans don't appear to mind the fact that the National Security Agency (NSA) tracks the phone records of millions of citizens. At least that was the conclusion reached based on the results from the Pew survey released last month. According to a Pew Research Center study, 56 percent of Americans believe its acceptable for the NSA to go through a secret court to track the calls of millions of Americans in efforts to fight terrorism. But another 41 percent did say it is unacceptable. Interestingly, the results change when the question is about email. Just 45 percent of respondents said the government should be able to monitor everyone's emails to prevent terrorism. A majority—52 percent—opposed that practice.

Questions about government intrusions on privacy became more relevant after former Booz Allen Hamilton employee and NSA contractor Edward Snowden revealed details about certain federal phone tracking practices. Nearly two out of three Americans think it is more important to investigate terrorist threats, according to Pew, than to not intrude on privacy.

Personally, I have no problem with the federal government tracking my telephone calls, considering current circumstances, if it will help keep America safer. Keeping our nation secure and safe has to be a top priority with our government. That has to override some of the privacy issues involved in the current debate. We are in a constant battle

against terrorism. Based on information supplied during congressional hearings last month it appears a large number of specific terrorist threats were abated due to the use of phone tracking practices.

Source: AL.com

SEN. RICHARD SHELBY CALLS U.S. PROTECTION AGAINST CYBER ATTACKS AN IMMEDIATE PRIORITY

A great deal of attention is being paid in Washington to cyber attacks in the U.S. and for good reason. These attacks are a major concern for our country. Congress has been hard at work trying to get a handle on the problem and how to combat it. Sen. Richard Shelby told a Senate committee last month that more needs to be done to protect the United States from these threats. The Senator had this to say:

We have seen recent and stark reminders of the threat with constant cyber attacks on the financial sector, Chinese backing of the New York Times and Wall Street Journal, Iranian attacks against a Saudi oil company and reports that information on our most advanced weapons systems was stolen by the Chinese. These troubling developments remind us of how urgently we need a coordinated effort to counter and respond to these attacks.

Sen. Shelby, who has an extremely strong presence in the U.S. Senate, urged the committee to take a leading role in fighting cyber attacks, a battle that he called an “immediate priority.” He added these comments:

Clearly more needs to be done. I look forward to hearing from our witnesses on the best way to protect government systems and information as you partner with industry to strengthen our cyber infrastructure across the board.

The federal government, acting through the Executive and Legislative branches, is taking the cyber attacks seriously. Hopefully, much more has been done in this area of concern than appears to be the case. In any event, Sen. Shelby has hit the nail squarely on the head. I believe many others in Washington share his opinion and will take all actions necessary to protect our country and all of its institutions.

Source: AL.com

VI. THE CORPORATE WORLD

BAUSCH & LOMB UNIT PLEADS GUILTY AND IS EXCLUDED FROM MEDICARE AND MEDICAID

A unit of Bausch & Lomb pled guilty recently to a felony and was excluded from Medicare and Medicaid. A unit of ISTA Pharmaceuticals, Bausch & Lomb, pled guilty to a felony charge of misbranding its eye drug Xibrom. A whistleblower lawsuit filed under the False Claims Act (FCA) got the ball rolling. The whistleblower was represented by Daniel Oliverio, a lawyer with Hodgson Russ, a firm with seven offices, including one in Buffalo, N.Y.

It's quite apparent that exclusion from federal programs is considered the death penalty for pharmaceutical companies. That's because they rely on federal payments to keep their record profits rolling in. But in this case, the prospects of a death penalty didn't matter to Bausch & Lomb. In June 2012, Bausch & Lomb acquired ISTA and under the agreement ISTA is going to transfer its drugs and other assets over to them. Interestingly, there will be no exclusion of Bausch & Lomb under any federal program. Neither were any charges made against Bausch & Lomb. Daniel R. Levinson, Inspector General of the U.S. Department of Health and Human Services, had this to say:

We agreed to enter into this divestiture agreement based on the facts of this case, including that Bausch & Lomb did not have a corporate relationship with ISTA during the improper conduct. In addition, Bausch & Lomb acquired ISTA more than a year after the improper conduct ended, and Bausch & Lomb did not hire any of ISTA's executives or senior management.

As part of the ISTA plea agreement, the government agreed not to prosecute Bausch & Lomb. In most of these pharmaceutical cases, only the subsidiaries have been prosecuted, with the parent companies being left alone. That may seem sort of weird, realizing the control a parent company generally has over a subsidiary. Nevertheless, the parent, as a rule, escapes prosecution.

As we have pointed out on numerous occasions, it's illegal for a drug company to introduce into interstate commerce any drug that the company intends will be used for uses not approved by the Food and Drug Administration. Xibrom is an ophthalmic, nonsteroidal, anti-inflammatory drug that was approved by

FDA to treat pain and inflammation following cataract surgery.

ISTA promoted Xibrom for unapproved new uses, including the use of Xibrom following Lasik and glaucoma surgeries, and for the treatment and prevention of cystoid macular edema. ISTA pled guilty to a felony based on evidence that some ISTA employees were told by management not to memorialize in writing certain interactions with physicians regarding unapproved new uses, and not to leave certain printed materials in physicians' offices relating to unapproved new uses. These instructions were given in order to avoid having their conduct relating to unapproved new uses being detected by others.

ISTA agreed that this conduct represented an intent to defraud under the law and the company also pled guilty to a conspiracy to knowingly and willfully offering or paying remuneration to physicians in order to induce those physicians to prescribe Xibrom. This was in violation of the federal Anti-Kickback Statute. Under that law, it's illegal to offer or pay remuneration, directly or indirectly, overtly or covertly, in cash or in kind, to physicians to induce them to refer individuals to pharmacies for the dispensing of drugs, for which payments are made in whole or in part under a Federal health care program.

Under the terms of the plea agreement, ISTA will pay a total of \$18.5 million, including a criminal fine of \$16,125,000 for the conspiracy to introduce misbranded Xibrom into interstate commerce, \$500,000 for the conspiracy to violate the Anti-Kickback Statute, and \$1,850,000 in asset forfeiture associated with the misbranding charge. ISTA also entered into a civil settlement agreement under which it agreed to pay \$15 million to the federal government and states to resolve claims arising from its marketing of Xibrom, which caused false claims to be submitted to government health care programs. The civil settlement resolves two lawsuits filed under the whistleblower provisions of the False Claims Act (FCA) by Keith Schenker. The whistleblower will receive \$2.5 million from the federal share of the civil recovery.

Source: *Corporate Crime Reporter*

OIL GIANT TOTAL WILL PAY \$242.5 MILLION IN BRIBERY CASE

The French oil giant Total has agreed to pay \$242.5 million to settle criminal charges alleging the company used middlemen to pay bribes to win lucrative contracts in Iran. Total was said to have paid \$60 million in bribes between 1995 and 2004 that allowed the company to re-renter the Iranian oil and gas market. The bribes helped Total land contracts with the state-owned National Iranian

Oil Company to develop oil and gas fields in and around Iran's Sirri Island in the Persian Gulf. The bribes also helped Total land a contract to develop a portion of the South Pars gas field, the world's largest gas field. The case was jointly pursued by the U.S. and French governments and was filed in U.S. District Court in Alexandria, Va.

The Paris prosecutor's office announced that it wanted to pursue corruption charges against the oil giant and its chief executive after years of investigation. An investigation was opened in 2006 into the Paris-based oil company and its CEO, Christophe de Margerie, for alleged abuse of company assets and corruption of foreign agents in connection with oil and gas contracts. The prosecutor's office said it was prepared to move forward with the case, but a judge still needs to decide if there is enough evidence. Total has issued a statement claiming that it has not violated French law.

According to a statement of facts filed in the U.S. case, the company admitted that it made \$60 million in illegal payments under U.S. law. Acting Assistant Attorney General Mythili Raman, who said this case is the first coordinated action by French and U.S. law enforcement in a major foreign bribery case, added:

Our two countries are working more closely today than ever before to combat corporate corruption, and Total, which bought business through bribes, now faces the criminal consequences across two continents.

The charges were settled under what is called a deferred prosecution agreement, which requires the company to pay the \$242.5 million, agree to cooperate with authorities and enter a compliance program for the next three years to avoid further action. Neil MacBride, U.S. Attorney for the Eastern District of Virginia, who prosecuted the case, said the "deferred prosecution agreement, with both its punitive and forward-looking compliance provisions, dovetails with our goals of bringing violators to justice and preventing future misconduct."

Total, which most recently reported a quarterly profit of \$2 billion, had reported last year it had set aside hundreds of millions of dollars because of the U.S. investigation. The case was brought in the U.S. under the Foreign Corrupt Practices Act (FCPA), which prohibits companies that are publicly traded in the U.S. from making corrupt payments to foreign government officials to obtain business.

There have been other similar cases. New York-based Ralph Lauren Corp. paid \$1.6 million to settle a case under the FCPA alleging bribe payments to Argentine import offi-

cial. Wal-Mart is also under investigation on allegations that company officials authorized millions of dollars in bribes in Mexico and other countries to speed up getting building permits and gain other favors. It should be noted that the U.S. Securities and Exchange Commission has also entered into an order against Total requiring it to pay an additional \$153 million.

Source: *ABC News*

WHO WINS IN THE NATIONAL FORECLOSURE SETTLEMENT?

The national foreclosure settlement has come under sharp criticism from consumer groups. It appears that homeowners may have become two-time victims of a broken foreclosure system. The settlement was reached by the Justice Department with five big banks in February of this year. This settlement, engineered by the U.S. government, was to compensate millions of borrowers for past foreclosure abuses. Payments are now being made.

In one reported case, a couple in North Carolina lost their home in 2010 to a foreclosure they contend shouldn't have happened. It came while they were working on a loan modification. After the big bank settlement, the couple expected a payment from the deal. The North Carolina couple expected a payment of at least \$6,000 and even as much as the maximum—\$125,000—but when their check arrived in April it was for \$800. That was less than a month's rent on their apartment, according to the couple.

It was reported that nearly \$3.4 billion had been paid out to almost 4 million borrowers under the settlement. The low payouts, far from closing the books on an economic catastrophe that rocked millions of households in the Great Recession, appear to have reignited old feelings of anger and frustration. The banks and the government have at last put a price on foreclosure injustices—and unfortunately it's very low. The renegotiated settlement created a \$3.6 billion pot to compensate borrowers for "shoddy foreclosure practices" that ran the gamut from wrongful foreclosures to lost consumer documents. It's being reported that about two-thirds of the recipients received \$300—the smallest possible amount. Fewer than 1,200 got \$125,000, the most allowed. The rest of the victims fell into one of 10 other categories for compensation, mostly in the \$400 to \$7,500 range.

Exactly how individual borrowers' compensation was determined is just one of many questions being asked about the settlement's design and fairness. Regulators defined the categories for compensation, set the amounts and laid out the rules for mortgage servicers

on how to classify people. Those who fit in more than one category were assigned to the one paying the highest amount, according to the regulators. Actually the agreement the government made with the banks leaves consumers little recourse. They cannot appeal their payouts to the banks or to the regulators. While consumers can still sue their mortgage servicers, most don't realize this option is available to them. Federal banking regulators devised 12 payout categories for the banks' victims. Those categories include:

- \$125,000 for borrowers who lost homes even though they weren't in default or were in the military and had some legal protection from foreclosures.
- \$25,000 to \$50,000 for people who lost homes even though they were meeting requirements of written trial loan plans.
- \$3,000 to \$6,000 for those who lost homes and had loan modifications denied.
- \$300 to \$500 for "all other loans."

The regulators instructed the servicers on how to "slot" folks based on how far they had gotten in the foreclosure process. A person involved in a completed foreclosure sometimes received more than a person whose foreclosure was halted.

Critics of the settlement agreement question the size of the "settlement pot," given that so few reviews were actually done. The following are two of the major areas of concern:

- It's impossible to draw any conclusions from the completed reviews about error rates at particular companies, according to Lawrence Evans of the Government Accountability Office, who testified at a Senate hearing. He said not enough reviews were done in a statistically valid way.
- Consumer advocates question how good the actual reviews would have been, given that the servicers were actually paying for them. But they would have provided more insight into foreclosure errors than is known now, according to housing advocate Bruce Marks.

So this question remains, who were the real winners under the settlement? If you need more information on the settlement or the option of filing suit, contact Dee Miles or Lance Gould, lawyers in our Consumer Fraud Section, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com or Lance.Gould@beasleyallen.com. You can also get information from the homeowner advocacy group Neighborhood Assistance Corp. of America.

HSBC SUED BY NEW YORK OVER FORECLOSURE ABUSES

New York State has sued HSBC Holdings Plc for ignoring a law designed to protect struggling homeowners from being thrown into foreclosure without getting a chance to renegotiate their mortgages. The lawsuit, filed by Attorney General Eric Schneiderman, accuses Europe's largest bank of letting foreclosure cases languish by ignoring a state law intended to give homeowners a chance to negotiate loan modifications. General Schneiderman said such delays have trapped as many as 25,000 homeowners in a "shadow docket" of foreclosure cases backlogged as long as two and a half years, causing them to rack up thousands of dollars of needless interest, fees and penalties.

The lawsuit was filed in a New York state court in Buffalo. HSBC is accused of regularly ignoring a state law requiring lenders to file paperwork, known as a request for judicial intervention, which entitles homeowners to settlement conferences within 60 days to negotiate loan modifications. A sampling showed that since 2010 HSBC has been too slow to file required paperwork in 297 cases in the counties of The Bronx, Erie, Monroe and Suffolk, and that thousands of similar cases may exist in 58 other counties in the state. General Schneiderman said in a court filing: "HSBC's business practices not only violate the law, but they make it more likely that homeowners will unnecessarily lose their homes."

The Attorney General is still considering possible lawsuits against Bank of America Corp and Wells Fargo & Co for violating terms of a nationwide settlement over mortgage servicing abuses. General Schneiderman has accused the nation's second- and fourth-largest banks of having failed to timely process modification applications. Wells Fargo is also the largest U.S. mortgage lender. The \$25 billion settlement reached in February 2012 also covered Ally Financial Inc, Citigroup Inc and JPMorgan Chase & Co, but not HSBC. The Attorney General has not publicly suggested plans to sue those other lenders, but he has indicated that unnamed financial institutions may become targets. Apparently a decision there will depend on the outcome of the HSBC lawsuit. It appears this Attorney General means business and my unsolicited advice to the banks would be to comply with their agreements.

As of March 31st, HSBC Bank USA had \$183.9 billion of assets, and operated more than 250 branches in 11 U.S. states and Washington, D.C., with about two-thirds of the branches in New York State. The Attorney General's lawsuit seeks restitution for homeowners, a waiver of improper accrued

charges and fees, other damages, and a requirement that HSBC file papers properly in the future. The case is *New York v. HSBC Bank USA et al*, in the New York State Supreme Court, Erie County.

Source: Reuters

WELLS FARGO SETTLES COMPLAINT ON FORECLOSED HOMES

Wells Fargo has agreed to spend at least \$42 million to settle claims that it neglected the maintenance and marketing of foreclosed homes in black and Latino neighborhoods across the country. The National Fair Housing Alliance announced the settlement last month. A year-long investigation by the advocacy group found that homes serviced by Wells Fargo in minority communities were far more likely than those in white areas to be left in disrepair, with broken windows, unkempt yards or water damage. These homes were also less likely to have for-sale signs than ones in predominantly white neighborhoods.

Under the agreement, Wells Fargo, which as expected did not admit any wrongdoing, will provide \$27 million to nonprofit groups to promote homeownership, neighborhood stabilization and property rehabilitation in minority communities in 19 metropolitan areas, including Prince George's County and the District of Columbia. It will also provide \$11.5 million to the Department of Housing and Urban Development (HUD) to help 25 other cities. Shanna Smith, president and chief executive of the alliance, had this to say about the settlement:

Many neighborhoods across the country have been seriously damaged by the foreclosure crisis. This agreement will help lay the foundation for the industry to get some of those neighborhoods back on their feet.

The agreement addresses one of the lingering scars of the housing crisis. As the number of foreclosures climbed in the aftermath of the housing crash, lenders scrambled to offload foreclosed properties, with many piling up in minority neighborhoods where there was a high concentration of subprime loans. Consumer groups point out that communities have been eager to see these vacant properties sold because over time they can bring down property values and attract crime.

For example, areas such as Prince George's are still struggling to rebound. About 7.4 percent of homes in that area, known for its concentration of affluent African Americans, were empty in 2010, according to the Census Bureau. This compares with 4.6 percent in Prince William County, another hard-hit area.

Even as home prices rise in Prince George's, the county still has about 51,000 foreclosed homes on the market, according to the county Department of Environmental Resources.

The settlement agreement resolves an April 2012 complaint that the advocacy group filed with HUD. While HUD did not rule on whether Wells Fargo violated any fair housing laws, the agreement will close the case. As part of the agreement, Wells Fargo agreed to give borrowers who plan to live in a home after the purchase priority in the bidding process over investors eager to buy up cheap houses to rent out or flip. Traditional buyers will get more time before investors, which has increasingly included Wall Street firms, are allowed to make an offer. That's a good thing and hopefully it will pay off for persons who want to be homeowners.

Wells Fargo also agreed to develop a fair housing training program for its employees and the real estate agents who sell foreclosed properties. In addition, Wells Fargo is giving \$250,000 to the housing alliance to sponsor seminars on foreclosure prevention and \$300,000 to hold two conferences on fair housing laws. The housing alliance has filed two similar complaints against Bank of America and U.S. Bank. But, according to reports, it appears negotiations in those cases have reached an impasse. Interestingly, and predictably, both banks have denied the group's allegations. Stay tuned!

Source: Washington Post

VIOLATIONS OF THE ANTI-KICKBACK LAW

The president of Parsippany, N.J.-based Biodiagnostic Laboratory Services LLC (BLS), three BLS employees and three associates have admitted to a conspiracy in which millions of dollars in bribes were paid to physicians during a number of years in exchange for blood sample referrals worth more than \$100 million to the company. Each of the seven defendants—David Nicoll, Scott Nicoll, Cliff Antell, Luke Chicco, Doug Hurley, Kevin Kerekes and Craig Nordman—pled guilty to charges of one count of conspiracy to violate the Anti-Kickback Statute and the Federal Travel Act and one count of money laundering.

The defendants entered their guilty pleas in a Newark federal court. Paul J. Fishman, U.S. Attorney for the District of New Jersey, had this to say:

Today seven men, including the president of a diagnostic lab, admitted to a conspiracy making more than \$100 million in illegal income from business brought through bribes. Individual greed has no place in a treatment plan,

and people seeking medical help deserve to know a doctor's recommendations are based on professional expertise, not illicit profits. Today is an important step, but we aren't finished holding criminals responsible for this conspiracy, or who break the law to put profits over patients.

The conspiracy was said to have generated millions in illegal profits between 2006 and April of 2013. During their guilty pleas, David and Scott Nicoll admitted that BLS made substantially more than \$100 million from Medicare and private insurance companies—just from bills related to blood specimens sent to BLS by bribed doctors. Federal officials detailed the means through which BLS paid doctors millions of dollars—in cash or under the guise of sham lease, service and consulting agreements through an elaborate network of shell entities used for that purpose. The defendants also admitted that one component of the bribery scheme was to pay some doctors a fee per test to induce them to increase their ordering of certain tests.

Those who pled guilty each face a maximum potential penalty of five years in prison and a \$250,000 fine on the bribery conspiracy charge and 20 years in prison and a \$500,000 fine on the money laundering charge, or twice the gross gain or loss from the offense. David Nicoll and Scott Nicoll have agreed to forfeit \$50 million and \$25 million to the United States, respectively. The other five defendants will forfeit amounts ranging between \$800,000 and \$1.3 million. Sentencing for all seven defendants is scheduled for September 11, 2013.

Source: Corporate Crime Reporter

FEDERAL JUDGE FINES ENGINE MAKER \$473 MILLION FOR OVERCHARGING THE AIR FORCE

United Technologies Corp. must pay the U.S. government \$473 million—plus interest—for inappropriately manipulating costs in order to win a jet engine contract with the Air Force that dates back to 1986. U.S. District Judge Thomas Rose ruled in favor of the federal government and wrote in his opinion: "The government should not have paid the amounts that the government proved it paid as a direct result of United Technologies' fraud."

Because the contract was entered into so long ago, and because interest rates were much higher in the '80s and '90s than they are today, interest accrued on the judgment may add hundreds of millions of dollars to Judge Rose's decision. United says it will appeal. The lawsuit decided by Judge Rose was filed in 1999. The Department of Justice

accused United subsidiary Pratt & Whitney in the lawsuit of overcharging the Air Force.

Sources: *Reuters* and *AL.com*

SAIC To Pay \$11.75 Million To Settle False Claims Act Charge

Science Applications International Corp. (SAIC) will pay \$11.75 million to settle a whistleblower lawsuit that alleged SAIC cheated the government out of millions of dollars under a first responder training program. It was alleged in the whistleblower lawsuit that SAIC was inflating the costs of the government-funded program it has run for 15 years to train firefighters, police and other first responders to deal with emergency situations involving explosives and incendiaries as part of the government's Weapons of Mass Destruction (WMD) First Responder Program. The whistleblower, Richard Priem, worked for SAIC for almost 16 years. Prior to that he had spent 21 years in the U.S. Army in a variety of command and staff positions. Priem was a SAIC project manager for the WMD First Responder Program and other training programs.

Congress set up the WMD First Responders Program in 1998 in response to the 1995 Oklahoma City bombing. SAIC worked as a subcontractor to New Mexico Institute of Mining and Technology, which has received government funding for the program annually since 1998. SAIC had been awarded the contract by New Mexico Tech on a sole-source basis since 1998. This meant SAIC never had to compete on a price basis for the contract. But it was required to provide accurate information about its costs and profits.

SAIC falsely certified that its costs included payment for full-time employees who received fringe benefits to conduct the training. Instead, SAIC used cheaper, part-time employees who received few benefits. This enabled SAIC to keep its costs low and collect exorbitant profits. Both the federal government and New Mexico Tech each relied on SAIC to provide accurate information about its costs. It was alleged that "SAIC instead inflated its costs so that it could capture roughly one-third of New Mexico Tech's total appropriation."

Tim McCormack and Peter W. Chatfield, lawyers with Phillips & Cohen, a Washington, D.C. firm, represented the whistleblower. Department of Justice (DOJ) Senior Trial Counsel Don Williamson and Trial Attorney Daniel Hugo Fruchter, who is with the Commercial Litigation Branch, were involved in the case and they all did a very good job.

Source: *Corporate Crime Reporter*

A CHICAGO HOSPITAL ALLEGEDLY CHEATS THE GOVERNMENT

It was reported recently that a federal investigation is underway at the Sacred Heart hospital, located on the west side of Chicago. The probe involves allegations of unneeded tracheotomies at the hospital. The FBI says there was a scheme in place to defraud Medicare and Medicaid. Based in part on surreptitious tape recordings, an FBI affidavit lays out allegations that a Sacred Heart pulmonologist kept patients too sedated to breathe on their own, then ordered unneeded tracheotomies for them—enabling the for-profit hospital to reap revenue of as much as \$160,000 per case. Tracheotomies are typically used to open an air passage directly to the windpipe for patients who can't breathe otherwise.

The government has charged Edward Novak, the owner of Sacred Heart, his chief financial officer and five physicians with Medicare fraud in a criminal complaint. It was alleged that they gave or received kickbacks in return for patient referrals. A physician and two Sacred Heart administrators worked with federal investigators, secretly taping conversations with other hospital staff members, according to the complaint.

Sacred Heart is located in a neighborhood with half the median household income and twice the poverty rate of the city overall. The hospital has been filling less than half its 119 beds in recent years, according to reports it files with the Medicare program. It was reported that almost all its customers are Medicare or Medicaid recipients. Still, Novak reported a jump in profit for the hospital to \$9.4 million for the year ended June 30, 2012—up from \$1.3 million the previous year.

Source: *Bloomberg*

VII. CONGRESSIONAL UPDATE

CONFIDENCE IN CONGRESS HITS NEW LOW

According to the results from a new Gallup Poll, the number of Americans who have "confidence" in Congress is at an all-time low. This makes the 113th Congress the least-trusted American institution on record. The poll found that just 10 percent of Americans have confidence in Congress, which is down 3 percent from 2012. This finding caps a long-term trend dating back to the 1970s. Gallup reports that the 10 percent rating is the lowest for any institution it has measured since 1973. Interestingly, Democrats, Repub-

licans and Independents all rate Congress just about the same. That should send a message to the leaders in both parties.

Not surprising are the findings that the military and small businesses fared the best in the Gallup Poll. The military was at 76 percent favorable, with small business at 65 percent. Interestingly, big business was at 22 percent favorable. That should also send a strong message to the bosses in Corporate America and to members of Congress who carry water for them in our nation's capitol.

Health maintenance organizations (HMOs) are the only institution that even approaches Congress's low numbers. The polls found that 31 percent say they have "little or no confidence" in HMOs. I have to wonder, however, if the poll revealed how many ordinary folks really know what an HMO is and what they actually do. In any event, when compared to the feelings about Congress, the HMOs are in much better standing with the American people.

NO ONE IS SAFE WHEN NO ONE IS ACCOUNTABLE

The American Association for Justice (AAJ) sent a letter last month to members of Congress outlining important legal principles that must be upheld in efforts to reform the Toxic Substances Control Act (TSCA). In order to effectively protect public safety, those principles must be upheld. The letter details how the civil justice system and state laws complement federal regulation, ensure accountability and provide a safety net when federal regulation is insufficient. AAJ CEO Linda Lipsen, who does a tremendous job for the association, said:

We have seen time and again how dangerous chemicals in our drinking water, children's toys and consumer products can disastrously impact the lives of American families. AAJ strongly supports efforts to reform TSCA, but in order for reform to effectively protect the American public, it is imperative that Americans' access to state courts is protected.

The civil justice system provides an additional layer of accountability and safety for the American people. This is especially true when federal agencies are underfunded, have limited access to information or have insufficient resources to adequately enforce safety measures. When regulations fail and enforcement is unavailable, state-based tort law is the only remedy to ensure that companies and manufacturers can be held accountable for the harm they cause. Eliminating Americans' rights under state law removes a key incentive for manufacturers to update their products to

reduce health and safety risks. Linda said further in her letter:

Accountability achieved through our civil justice system is a vital component of the effort to protect the public from toxic chemicals and to shed a light on products harmful to human health. If no one is accountable, no one is safe. Any effort to reform TSCA must specifically preserve the ability of individuals to pursue their rights under state law.

There are a number of chemicals that are affected by TSCA reform. Those chemicals are set out below:

- Formaldehyde (a cancer-causing chemical present in temporary housing for Hurricane Katrina victims);
- Hexavalent chromium (cancer-causing chemical leaked into ground water);
- Asbestos (which kills as many as 10,000 Americans every year);
- Polychlorinated biphenyls (PCBs) are cancer-causing chemicals found to harm reproductive health, immune systems, and cause childhood diseases and is found in coolants and industrial equipment and has been found in food, surface soil, and drinking water);
- Lead (causes permanent brain damage in children and miscarriage with uses ranging from industrial facilities to paint and plumbing materials); and,
- Bisphenol A (BPA) is a substance which leeches from plastics and plastic coatings and causes heart disease, diabetes and abnormalities in brain and hormone development).

Hopefully, Congress will consider the consequences of failing to adequately regulate the chemicals industry. Lawyers at Beasley Allen know from experience how important strong—but fair—regulation is from a health and safety perspective. It's also critically important to have an effective court system in place. When nobody is held accountable for their actions, nobody is safe.

Source: AAJ

VIII. PRODUCT LIABILITY UPDATE

THE SCIENCE OF VEHICLE CRASHWORTHINESS

The handling of product liability lawsuits involving defective automobile design requires a working knowledge of a principle referred to as crashworthiness. Vehicle crashworthiness is the science of focusing on protecting occupants involved in frontal, side, rear and rollover accident events through the utilization of various safety systems and safety principles. In simple terms, crashworthiness is the ability of a vehicle to protect occupants in a crash. The concept of crashworthiness include:

- Minimizing crush to maintain survival space;
- Providing proper restraint throughout the entire accident event;
- Preventing ejection from the vehicle and nominal seating positions;
- Distributing energy and dissipating crash forces; and
- Preventing post-crash fires.

Crashworthiness safety systems must work together to provide adequate occupant protection throughout an entire accident. These safety systems can be compared to safety links in a chain. If one link fails, the safety chain has failed. It should be noted that crashworthiness safety systems do not prevent accidents from occurring. Instead, they prevent and minimize the risks of serious injury or death once an accident has occurred. If all crashes could be eliminated, there would be no need for safety systems that help prevent or minimize injuries after a crash has happened. In a products liability case involving an automobile, there is a distinction between the cause of an accident as opposed to the cause of an injury. This is a distinction that lawyers, who don't handle product liability cases on a regular basis, fail to comprehend. Unfortunately, there are a few judges who don't either.

Whether a vehicle was designed with features to ensure the safety of its occupants in a foreseeable highway crash requires an investigation of the vehicles' crashworthiness. The vehicle's safety cage is an important part of the vehicle's crashworthiness.

In the event of a collision, the vehicle safety cage protects occupants by maintaining survival space and dissipating collision forces that the occupants would be exposed

to otherwise. Safety cages work in conjunction with seatbelts and airbags to slow occupants during the longest possible time and distribute crash forces across the largest area possible. When these systems function correctly, they effectively decrease the loads exerted upon occupants in a crash and reduce the likelihood of injury.

In addition to being designed to provide protection, vehicle safety cages are also integral to the handling characteristics and fuel efficiency of a vehicle. By selectively incorporating higher strength materials throughout the design of the vehicle's safety cage, manufacturers can balance safety and weight concerns. They can build vehicles that are both safe and efficient. There are certain issues that have to be investigated when considering whether a viable products liability case exists when a highway crash occurs with serious injuries or death. The investigation will include the following:

- The crash severity, determined by Delta V is very important;
- You might determine whether or not seatbelts were used and, if not, would they have made a difference;
- A determination of whether the restraint systems functioned properly is necessary;
- You must determine how the subject vehicle's crashworthiness performed compared with crash testing for the same model, and with vehicles of a similar vintage; and
- Find out if feasible occupant protection systems were available, but not incorporated into the design of the subject vehicle.

If you would like to have a more detailed explanation of crashworthiness, contact Greg Allen at 1-800-898-2034 or by email at Greg.Allen@beasleyallen.com. I am reasonably sure that Greg has investigated more crashworthiness cases during the past 10 years than any lawyer in the U.S.

MOTORCYCLE SAFETY-ABS BRAKES

While the overall traffic motorist fatalities are declining every year, unfortunately, the number of motorcycle fatalities and serious injuries are increasing. In April 2013, the Governor's Highway Safety Association (GSA) released a report confirming that motorcycle deaths increased approximately 6 percent from 2011 to 2012, and that over 5,000 motorcyclists were killed in 2012. This marks the fifteenth consecutive year in which motorcycle deaths have increased. While increasing rider safety will help, improving certain

safety components of the motorcycle, such as its braking system, is a must.

One of the most common motorcycle accidents is where the driver of an automobile turns in front of a motorcycle. In such an emergency situation, the motorcycle rider needs a braking system to help control his motorcycle and avoid a potential fatal accident. Most motorcycles have separate controls for the front and rear brakes, and braking too hard can lock up a wheel, causing a fall. Improper braking has been shown to be a common cause of crashes. Antilock-brakes (ABS) help by automatically reducing brake pressure when a lockup is about to occur and increasing it again after traction is restored. ABS allows a rider to easily maximize braking force in an emergency without the fear of locking ones brakes.

ABS have been available for almost 25 years and have a proven track record of saving lives. BMW first equipped its motorcycles with ABS in 1988. By the year 2000, most of the European manufacturers equipped its production models with ABS. In 2005, the Japanese manufacturers began offering ABS as options, particularly in Europe. Finally, in 2008, Harley-Davidson began to make its bikes with ABS. In 2008, the Insurance Institute of Highway Safety (IIHS) documented the effectiveness of ABS in preventing the number of crashes and fatality rates associated with motorcycle crashes. The IIHS report, discussing the usefulness of ABS, stated:

Stopping a motorcycle is trickier than stopping a car. For one thing, front and rear wheels typically have separate brake controls. Both underbraking and overbraking the front and rear wheels contribute to crashes. In an emergency, a rider faces a split-second choice to brake hard, which can lock the wheels and cause a motorcycle to overturn, or to hold back on the brakes and risk running headlong into the emergency.

This is when antilocks can help. They reduce brake pressure when they detect impending lockup and increase the pressure again when traction is restored. Brake pressure is evaluated multiple times per second, so riders may fully brake without fear of locking the wheels.

In summary, the IIHS concluded that ABS equipped motorcycles were involved in 38 percent fewer fatal crashes than motorcycles without this feature. In 2011, BMW announced that it would not sell a motorcycle without ABS. In doing so, BMW stated:

It's time for all of us in the motorcycle industry to embrace the benefits of ABS. Extensive testing by safety

experts, law enforcement authorities and journalists around the world consistently demonstrates that ABS reduces overall crashes and saves lives.

Many law enforcement agencies, including the California Highway Patrol, concluded after testing that ABS reduced the number and severity of accidents and now mandate them on their police motorcycles. Recently, the European Commission (2012) mandated ABS for on-highway motorcycles beginning in the near future.

On May 30, 2013 the IIHS and the Highway Loss Data Institute (HLDI) petitioned the National Highway Traffic Safety Administration to upgrade the Federal Motor Vehicle Safety Standard (FMVSS) No. 122 Motorcycle brake systems (49 CFR 571.122). The current standard allows manufacturers to install ABS and specifies performance standards specific to ABS. However, IIHS take the position that this standard should be strengthened to require ABS on all new motorcycles manufactured for on-highway use in the United States.

Manufacturers selling motorcycles in this Country could reverse the trend of increasing deaths on our highways involving motorcycle riders by following BMW's lead. Until Kawasaki, Suzuki and all other manufacturers accept the responsibility for their role in making bikes safer, lives will be lost. Hopefully, they will see the light and do the right thing. If you need more information on this subject, contact Rick Morrison, a lawyer in our Personal Injury/Product Liability Section, at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com.

CAR MANUFACTURERS KNOW HOW TO PREVENT FUEL FED FIRES

A great deal of media attention was focused on fuel-fed vehicle fires after the recent refusal by Chrysler of the U.S. government's request that the automaker recall 2.7 million Jeep SUVs. The carmaker's refusal decision was soon changed, the result of the negative media coverage, and a recall took place. But this issue deserves further comment. The request to Chrysler was made because of known fire risks. The fuel tank on the Jeep SUVs is located behind the rear axle of these vehicles, which is a terrible design concept and can't be justified.

This is the latest chapter in the National Highway Traffic Safety Administration's scrutiny of gas tank positioning, which has been ongoing since the late 1970s. According to NHTSA, fires caused by gasoline leaking from punctured gas tanks in rear-end crashes have killed 51 people. I suspect the fatalities may be greater since some deaths may go unre-

ported or not associated with a fuel tank issue.

NHTSA has repeatedly investigated gas tank issues through the years. NHTSA noted in the Chrysler case that in 2002 and 2003, only the Jeeps and the Ford Crown Victoria/Mercury Grand Marquis and Ford Mustang had fuel tanks located behind the axle. In 2002, NHTSA spent 10 months investigating whether Ford Crown Victoria police cruisers should be recalled because of the danger of high-speed crashes. From the early 1980s until 2002, 18 officers were killed in 29 fires when Crown Victoria gas tanks ruptured and caught fire. This occurred often after the car was struck in the rear in a high-speed crash.

NHTSA determined the Crown Victoria police car exceeds federal standards for fuel system safety and found the rate of fires was no greater than with Chevrolet Caprice police cars. Perhaps it was unrelated, but NHTSA's decision came days after Ford agreed to pay about \$50 million for the installation of shields around the gas tanks on some 350,000 Crown Victoria police cars to reduce fire risk after a rear-end crash.

Ford also came under pressure from Congress to issue gas tank shields to all Crown Victoria sedans used as taxi cabs, following the burning death of a New York City cab driver in 2005. Ford also offered the kits to owners of Lincoln Town Car limousines and made the kits available for purchase by private owners of the Crown Vic, Lincoln Town Car and Mercury Grand Marquis for \$105, plus labor costs.

Prior to the 1970s, fuel tanks in most cars and trucks were located behind the rear axle. As NHTSA noted in its letter to Chrysler, the issue came to public attention with Ford's recall of 1.5 million Ford Pinto and Mercury Bobcat cars in 1978 after 38 rear crashes resulted in 27 deaths and 24 injuries. Chrysler had to know that its fuel-tank design for the SUVs created a safety hazard. In August 1978, Chrysler had said in an internal memo that it would place the gas tank of its new K-car forward of the axle, as it had done with the Omni and Horizon cars. The memo to Chrysler's head of product development stated:

This location provides the protection of all the structure behind the rear wheels—as well as the rear wheels themselves—to protect the tank from being damaged in a collision.

Chrysler also moved its gas tanks from behind the rear axle with the 1987 Dodge Dakota truck and 1998 Dodge Durango SUV. NHTSA cited a 1993 study of fire-related deaths from 1977 to 1989 that concluded relocating gas tanks had a substantial effect on the reduction of fire deaths.

There have also been safety hazards created by other designs. In 1994, NHTSA ordered a recall of up to six million 1972-1987 General Motors pickups with side-saddle fuel tanks due to vulnerability in severe side crashes, a recall estimated to cost \$1 billion at the time. The tanks were located under the cab and bed outside the frame rails. According to the Department of Transportation, the trucks may have caused 150 deaths. But in a settlement just days before a public hearing, NHTSA withdrew the recall request and in exchange GM agreed to pay \$51.3 million for safety programs. The automaker ultimately settled a class-action lawsuit in 1996 for \$5 billion, which consisted of \$1,000 vouchers to 5 million owners.

The infamous Ford Pinto has probably been the best-known example of a poor design decision. The Pinto had a fuel tank mounted behind the rear axle. This position allowed for dangerous, and often explosive, consequences in rear impact accidents. The overall safest positioning of a gas tank is between the front and rear axles of the vehicle. But, unfortunately, manufacturers don't always follow this guideline and many vehicles do not provide the proper structural protection for the tank. Collisions with these vehicles can lead to fuel-fed fires.

It should be noted that it's not always the location of the fuel tanks that can cause fuel fed fires. Design defects related to fuel fed fires can involve several different vehicle systems. The design issues can relate to issues of fuel filler cap design, fuel line design, fuel tank design, and also include fuel pump design. Fuel systems should be designed to maintain their integrity during reasonably foreseeable accidents so that occupants do not lose their lives in otherwise survivable accidents. If the occupants can survive crash forces without serious injury, so should the fuel system. Engineers have known for decades how to protect fuel systems from leaking in most crashes. The following design criteria have been known by the automobile manufacturers for years:

- The gas tanks should be located away from the "crash zone," and not placed behind the rear axle;
- the tanks should be situated over the car's rear axle and within the vehicle's protective frame;
- the tanks should be kept away from protruding objects that could puncture them;
- the tanks should have shields on them to protect them from such objects;
- tank filler necks should be configured and constructed so they won't rupture or break away from the tank in a crash; and

- safety "check valves" should be installed that prevent gasoline from siphoning out of the fuel tanks after a crash.

Lawyers in our firm have handled numerous cases involving fuel-fed fires. If you would like more information relating to this matter contact Greg Allen, Cole Portis, Ben Baker or Dana Taunton, lawyers in our Personal Injury/Product Liability Section at 1-800-898-2034 or by email at Greg.Allen@beasleyallen.com, Cole.Portis@beasleyallen.com, Ben.Baker@beasleyallen.com or Dana.Taunton@beasleyallen.com.

Source: *The Detroit News*

IX. MASS TORTS UPDATE

THERE IS STILL TIME TO SUBMIT TRANSVAGINAL MESH CLAIMS FOR REVIEW

Thousands of women continue to experiencing life-altering and painful adverse events as a result of the implantation of transvaginal mesh. Many women have not yet sought medical or legal advice regarding these difficulties. Women who are experiencing significant complications, injuries, or pain caused by transvaginal mesh or bladder slings but have not submitted their claim for review should still consult an attorney to discuss their legal rights and their statute of limitations as soon as possible. Lawyers in our Mass Torts Section are actively investigating claims where woman have experienced organ perforation, bleeding, urinary incontinence, fecal incontinence, pelvic pain, infection, discomfort or pain during sexual intercourse and the need for corrective surgeries following the transvaginal placement of mesh for pelvic organ prolapse (POP) or stress urinary incontinence (SUI) repair. If any of our readers, a loved one, friend, or co-worker has suffered such an injury, contact Leigh O'Dell or Chad Cook, lawyers in our Mass Tort section. They can be reached at 1-800-898-2034 or by email at Leigh.Odell@beasleyallen.com or Chad.Cook@beasleyallen.com.

MIRENA LITIGATION

In December 2000, the FDA approved Mirena, an intrauterine contraceptive (IUD) that consists of a small T-shaped device made of soft flexible plastic that is inserted into the uterus and releases a progestin into the uterus to prevent pregnancy. In 2009, Mirena usage

was expanded to include the treatment of heavy menstrual bleeding. Mirena is indicated for intrauterine contraception for up to five years. To date, more than 2 million women in the United States use Mirena, currently manufactured and sold by Bayer Healthcare Pharmaceuticals, Inc.

While Bayer promotes Mirena as being safe and effective, as well as easily removable by a physician at any time users choose, more than 50,000 complaints have been made to the FDA regarding Mirena since 2004. According to the FDA, the most serious adverse events associated with Mirena since its time on the market include perforation of the uterine wall and embedment of the IUD in the uterine wall.

As a result, many lawsuits have been filed across the country claiming, among other things, that Bayer failed to warn of the potential for such serious injuries. In March 2013, the Judicial Panel on Multidistrict Litigation met to decide whether to consolidate in one court all Mirena cases filed in federal courts across the country. On April 8, 2013, the Panel decided that consolidation would promote the just and efficient administration of the cases and assigned the consolidated litigation to U.S. District Judge Cathy Seibel in the Southern District of New York.

If you need more information on this litigation, or you or someone you know has been injured as a result of using a Mirena IUD, contact Roger Smith, a lawyer in our Mass Torts Section at 800-898-2034 or by email at Roger.Smith@beasleyallen.com.

AN UPDATE ON THE ACTOS LITIGATION

Lawyers in our Mass Torts Section have been heavily involved in the litigation involving Actos, the diabetes drug. In June 2011, the FDA warned the public that Actos usage for more than one year may be associated with an increased risk of bladder cancer. Actos, manufactured by Takeda Pharmaceuticals, is in a class of insulin-sensitizing drugs known as thiazolidinediones and was approved by the FDA to treat Type 2 diabetes. Since gaining FDA approval in July 1999, Actos has been included in the top 10 best selling medications in the United States in various years.

To date, more than 1500 lawsuits have been filed in the Actos multidistrict litigation (MDL), which is pending before U.S. District Judge Rebecca Doherty in the Western District of Louisiana. Earlier this year, Judge Doherty issued a scheduling order setting out litigation deadlines for plaintiffs and defendants for the first two Actos bladder cancer trials scheduled in the MDL in January and April 2014. Accordingly, the bellwether trial process is in full swing, and bellwether case

selections are slated for the 15th of this month. As a matter of interest India, has decided to suspend the sale of Actos in that country.

As a reminder, the bellwether trial process involves taking to trial a sample of cases large enough to yield reliable results. The resulting verdicts are used by the lawyers on both sides and by the judge as a basis for resolving or at least evaluating the remaining outstanding claims. The Actos MDL bellwether process involves taking to trial two cases, one selected by our side and one selected by Takeda. The process is to be repeated until an overall resolution of the claims can be reached, if a resolution can be reached.

Aside from the Actos MDL, there are also hundreds of cases pending in state courts across the country. The first Actos trial concluded earlier this year in a California state court. The jury in that case found that Takeda failed to warn of potentially severe side effects and awarded \$6.5 million in damages to the Plaintiff. Unfortunately, the trial judge—after the jury verdict was handed down—excluded the Plaintiff's expert witness testimony and threw out the damage award.

Lawyers in our firm's Mass Torts Section are currently investigating claims involving bladder cancer with usage of Actos, Actoplus Met, Actoplus Met XR, and/or Duetact. Our firm currently represents 500 claimants in this litigation and are in the process of evaluating hundreds of other potential claims. If you have any questions regarding the litigation, or if you would like for us to review a potential claim, contact Roger Smith, a lawyer in the Mass Torts Section, at 1-800-898-2034 or by email at Roger.Smith@beasleyallen.com.

DOES LIPITOR CAUSE DIABETES?

As has been widely reported, Lipitor is the largest selling drug in history. It should come as no big surprise that the drug has been a huge moneymaker for Pfizer. But it has also been reported that the use of cholesterol lowering statin drugs, like Lipitor, may be associated with an increased risk of diabetes in middle-aged and older women. In a new study, researchers analyzed data on nearly 154,000 women followed for an average of seven years.

Women who reported taking a statin such as Lipitor, Pravachol, Zocor or other statin drugs, were almost 50 percent more likely to report developing Type 2 diabetes than women who did not take statins, according to study researcher Yunsheng Ma, MD, of the University of Massachusetts Medical School. The study included 153,840 postmenopausal women with an average age at enrollment of 63. Most were followed for about seven

years. None of the women had diabetes when they were included in the study, but 10,242 cases of self-reported diabetes were found by the end of follow-up.

After taking into account older age, obesity, lack of physical activity and other risk factors for diabetes, statin use was associated with an almost 50 percent chance of developing the disease. Adults with diabetes are two to four times more likely to have heart disease or a stroke than adults without diabetes, the very disease state these drugs are to prevent.

But the study is not the first to suggest that statins may raise the risk for diabetes. An analysis of 13 studies, published in February of 2010, found that statin users had a 9 percent increased risk for diabetes. Another study, published last June, suggested a similar increase in risk among patients taking high doses of statins. If the drugs do increase diabetes risk, the study by Dr. Ma and colleagues suggests that the risk is an effect shared by all statins. A spokesman for Lipitor manufacturer Pfizer Inc. says the drug has been shown in multiple studies to reduce heart attack and stroke risk in high-risk patients, including those with Type 2 diabetes. Pfizer media representative MacKay Jameson said:

We believe the risk of diabetes is outweighed by the [healthy heart] benefits of Lipitor therapy and we encourage patients to work with their physicians to discuss their treatment options.

Lawyers in our Mass Torts Section are investigating claims involving Lipitor and diabetes for peri- and post-menopausal women. Currently, about 18 lawsuits are pending involving these claims and the Judicial Panel on Multidistrict Litigation (JPMDL) will soon be hearing petitions for the establishment of a multidistrict litigation (MDL). If you have a case for investigation, or need more information on the subject, contact Frank Woodson, a lawyer in our Mass Torts Section at 1-800-898-2034 or by email Frank.Woodson@beasleyallen.com.

Source: Web MD

GRANUFLO CAUSING DIALYSIS CARDIAC DEATHS

GranuFlo, produced and marketed by Fresenius, is a product used to help balance chemicals in the blood during dialysis treatment. It contains an ingredient that metabolizes in the body as bicarbonate. GranuFlo has more of this ingredient in it than competitor products. Studies have shown that elevated bicarbonate levels in dialysis patients increase the risk of patient death. An internal review at Fresenius discovered that 941 patients in 667 Fresenius dialysis clinics died from cardiovas-

cular-related incidents between January 1, 2010 and December 31, 2010.

Fresenius sent a memo to doctors at Fresenius dialysis clinics warning them that the instructions for GranuFlo could be confusing and to consider this when prescribing the product to patients. Unfortunately, Fresenius did not make patients aware of this risk, nor did the company inform doctors or other clinics who purchase and use GranuFlo of the risk. Neither did Fresenius inform the Food and Drug Administration (FDA) of these serious adverse events, even though it's required to do so by law.

Interestingly, it wasn't until someone anonymously sent a copy of the internal memo to the FDA three months later that federal drug regulators began to investigate the matter. Fresenius was required to notify patients and recall its products in order to update its labels. Federal lawsuits involving GranuFlo have been centralized in Boston, Mass. For more information, contact Frank Woodson or Matt Munson, lawyers in our Mass Torts Section, at 1-800-898-2034 or at Frank.Woodson@beasleyallen.com or Matt.Munson@beasleyallen.com.

Sources: Beasley Allen website and Drugrisk.com

DEPUY ASR LITIGATION UPDATE

More than two years after DePuy pulled the ASR hip implant from the market, ASR plaintiffs who have been injured by the defective product are finally seeing cases coming to trial. In fact, two trials ended recently. A judgment was returned in one case in excess of \$8 million in a case tried in Los Angeles, California. Almost immediately after the verdict, DePuy's lawyers filed motions for a new trial and to set aside the jury's \$8.3 million verdict. The trial judge denied both motions, noting "there was a legitimate conflict as to what DePuy knew about the ASR and when they knew about it."

Although the trial in Los Angeles has ended and the plaintiff survived DePuy's post-verdict motions, the litigation is not over. Lawyers for DePuy have asked the California Superior Court to place the judgment on hold while an appeal is filed. Most observers anticipated an appeal. The second trial, which took place in Chicago, resulted in a defense verdict.

In addition to the two recent DePuy ASR trials, several more trials are set to begin in the upcoming months. The first federal trial, which will take place in the multidistrict litigation (MDL) in the Northern District of Ohio, is set for September 9, 2013. The trial was initially set for May of 2013, but was continued to allow for further discovery. The first New Jersey state court trial is set for

October 21, 2013. A second trial is set to begin in Chicago later this year. The Cook County, Ill., court originally scheduled one trial a month. However, the discovery and trial of these ASR cases proved too onerous, which forced Judge Dooling to vacate the initial scheduling order entered in the Chicago litigation.

These initial trials will play an important role in the future of the DePuy ASR litigation and will have an impact on all DePuy ASR lawsuits. The first trials are testing the waters and allowing both the Plaintiffs and Defendants to gauge the strengths and weaknesses of their respective cases. The trials also provide information about how jurors will respond and react to each side's presentations and arguments.

The remaining DePuy ASR lawsuit claims stemming from the 2010 DePuy hip recall continue to move forward in courts throughout the country. There are more than 10,000 DePuy ASR hip lawsuits currently pending in courts throughout the U.S. If you need more information on this subject, contact Navan Ward, a lawyer in our Mass Torts Section, at 1-800-898-2034 or by email at Navan.Ward@beasleyallen.com. Navan has been working very hard in this area for a good while and is heavily involved in the MDLs.

STRYKER REJUVENATE AND ABG II HIP IMPLANT LITIGATION SENT TO A MINNESOTA FEDERAL COURT

The United States Judicial Panel on Multidistrict Litigation (JPMDL) has ordered 41 lawsuits involving Stryker Rejuvenate and Stryker ABG II total hip replacement systems transferred to the District of Minnesota. According to the Transfer Order, the Stryker hip replacement system cases will be before U.S. District Judge Donovan W. Frank, who will coordinate or consolidate pretrial proceedings. Stryker Orthopaedics issued a recall of its Rejuvenate and ABG II modular-neck stems in July of 2012. Individuals who experienced problems with metal-on-metal hips may file lawsuits against the device manufacturers to seek compensation for their injuries.

Individuals who have suffered from severe pain, typically radiating into the groin and/or back, difficulty standing or walking, necrosis (death of body tissue), bone and soft tissue damage, metallosis, elevated cobalt or chromium levels in blood, implant loosening, lysis (destruction of dissolution of cells), osteolysis, device failure, fluid collection and/or masses of tissues collecting around the joint or the need for additional revision surgeries (which may or may not be successful in correcting the problem) due to a metal-on-metal hip replacement device may be entitled to com-

penensation for their medical care, pain and suffering, lost wages and/or other damages.

If you have any questions concerning this litigation, contact Navan Ward, a lawyer in our firm's Mass Torts Section, at 1-800-898-2034 or by email at Navan.Ward@beasleyallen.com.

Source: WSAV.com

HEPARIN LITIGATION UPDATE

The anticoagulant drug Heparin, made by Baxter Healthcare, has been plagued by problems during the past few years. In 2008, the U.S. Food and Drug Administration ordered a recall of Heparin after finding that contaminants in the drug caused severe injury and death in a number of patients. It was reported that Baxter's confusing packaging led to Heparin overdoses in infants and small children, causing injuries and deaths.

Heparin (also known as heparin sodium) is an anticoagulant, or blood thinner. Because blood thinners make it harder for blood to clot, doctors use them to treat and prevent blood clots in veins, arteries and lungs. Heparin comes in liquid form and is usually injected into a vein, under the skin, or by way of an intravenous catheter. In some instances, doctors use large multiple-dose vials of intravenous heparin (called bolus doses) in order to thin a patient's blood over a short period of time.

Heparin is also used to coat some medical devices, such as lock flushes (used to clear IV lines and catheters), catheters and oxygenators. Prior to 2008, Baxter Healthcare manufactured about half of the heparin available in the United States. The other big heparin manufacturer is APP Pharmaceuticals. Beginning around 2006, patients and physicians reported an increase in severe allergic-type reactions to bolus doses of Baxter's heparin. Those reactions—which caused a number of patient deaths included extreme nausea, vomiting, breathing difficulty, excessive sweating and decreased blood pressure.

In January and February 2008, almost all Baxter heparin products were recalled from the market. Subsequent investigation revealed that Baxter's Heparin contained a contaminant that caused the adverse reactions in patients. The contaminant, known as oversulfated chondroitin sulfate, was supplied by a Chinese firm, Changzhou SPL. Oversulfated chondroitin sulfate mimics the biological activity of Heparin, but is less expensive. According to reports, the contaminated Heparin killed 81 people and sickened hundreds more.

Even before the FDA ordered the heparin recall, lawsuits were being filed against Baxter Healthcare because of patients'

adverse reactions to bolus doses. The FDA recall definitely was good for the plaintiffs in the Heparin litigation. The lawsuits, which alleged that Heparin bolus doses caused some patients to get sick or die, include several theories of liability. Those theories include:

- **Negligence**—Baxter had a duty to ensure that heparin was safe and failed to fulfill that duty by not adequately monitoring or testing the drug for contaminants or adverse side effects.
- **Product liability**—Baxter knew, or should have known, that the heparin was defective, but manufactured, marketed and supplied it anyway.
- **Strict product liability**—In strict liability, a manufacturer is held liable for injuries caused by a defective drug regardless of how careful the manufacturer was in producing or marketing the drug. It's contended in the heparin lawsuits that Baxter's heparin was defective because of the contaminant and because it caused such severe side effects.
- **Fraud**—Baxter or Changzhou SPL knew the contaminant might be dangerous, but used the cheaper ingredient to dilute heparin sodium in order to increase profits. Baxter misrepresented the safety of heparin in its marketing of the drug.
- **Breach of warranty**—It's alleged under the theory that Baxter's heparin was not fit for its intended purpose.

In the last four years, a number of children have died or been injured because hospitals unintentionally gave them massive overdoses of heparin. Some parents sued Baxter, alleging that it was at fault for the dosing errors because it packaged adult and pediatric versions of heparin in vials of the same size and with nearly identical blue backgrounds, so that hospitals had difficulty distinguishing between the two. Parents also claimed that although Baxter agreed to change the labeling, it did not recall the existing stock of pediatric heparin.

In the summer of 2008, all of the federal Heparin lawsuits (more than 50 in number) were transferred to the U.S. District Court in Toledo, Ohio, becoming part of multidistrict litigation (MDL) coordinated by Judge James G. Carr.

For more information concerning this litigation, contact Melissa Prickett, a lawyer in our firm's Mass Torts Section, at 1-800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

Source: NOLO.com

BAXTER IS A REPEAT OFFENDER

The U.S. Food and Drug Administration is cracking down on manufacturing violations and has issued numerous warning letters to violators. Baxter Healthcare, a repeat offender, appears to have serious problems at several different plants. For example, a Baxter plant in North Carolina had various environmental issues. The FDA has also found numerous problems affecting health and safety at other Baxter plants.

Source: pharmaalive.com

X. BUSINESS LITIGATION

RETAILER'S LAWSUIT CHALLENGES CREDIT CARD INDUSTRY

The lawsuit filed by Genesco, a Nashville retailer, against credit card giant Visa could have far-reaching financial consequences for the card industry, merchants and consumers. The suit in federal court is the first to directly challenge card companies' authority to fine merchants and their banks for data breaches. The result in the case could alter how security standards are enforced and has the potential to make it more expensive both for consumers to use credit and debit cards and for merchants to accept them.

Genesco's suit, filed in March, stems from a 2010 data breach of its computer system. Genesco operates nearly 2,500 retail footwear and apparel stores under the Johnston & Murphy, Lids Locker Room, Journeys and other brand names. Visa and MasterCard said the breach resulted from Genesco's failure to comply with the Payment Card Industry Data Security Standards, also known as PCI-DSS. Card companies require merchants and their banks to follow the standards, which were implemented in 2004. MasterCard and Visa then levied \$15.5 million in fines and costs against the two banks that processed card transactions for Genesco. The banks took the money from Genesco's merchant bank accounts.

Genesco contends it was compliant with the standards and that Visa's \$13.3 million fine was arbitrary because there was no evidence that hackers actually stole card data. So far Genesco has not filed suit against MasterCard over its \$2.2 million fine. Merchants have long complained about the system's set-up, saying card companies have financially benefitted by having unilateral power to determine non-compliance and punish viola-

tors. A National Retail Federation spokesman called the system a "near-scam," trade publication *Wired* reported. Experts say non-compliance fines are a significant revenue source for card companies, but how much they generate isn't known.

Another potential result of the suit would be the creation of an independent entity to oversee the system. It should be noted that although the PCI Security Standards Council develops the standards, it has no power to enforce them. It's widely believed that this lawsuit has the potential to bring about fundamental changes to the system. As a result, many interested parties are keeping a close watch on it. Lots of interested parties have a potential stake in the outcome of this case, which is seen as an "important case nationally." We will continue to monitor the progress in this case.

Source: *USA Today*

DRUG MAKERS CAN BE SUED FOR "PAY FOR DELAY"

The U.S. Supreme Court has ruled that drugmakers can be sued for paying rivals to delay low-cost versions of popular medicines. The high court, in a decision last month, has rewritten the rules governing the release of generic drugs. The 5-3 ruling is a victory for the Federal Trade Commission (FTC) and for the American people. The court reversed a lower-court decision that had effectively insulated pharmaceutical companies from liability. The FTC says those "pay for delay" accords cost drug purchasers as much as \$3.5 billion a year. The industry claims the deals are legitimate patent settlements.

The ruling may lead to lawsuits by wholesalers, retailers, insurers and antitrust enforcers. Bayer AG, Merck & Co. and Bristol-Myers Squibb Co. units already have faced claims. The FTC says 40 pay-for-delay agreements, also known as reverse payments, were reached in fiscal 2012 alone.

Justice Stephen Breyer said in the court's majority opinion "a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects." But Justice Breyer stopped short of adopting the FTC's proposal that such agreements should be presumed anticompetitive. He said the accords should be evaluated under a long-standing antitrust test known as the "rule of reason." A federal appeals court had said pharmaceutical companies can't be sued unless the patent litigation is a sham or a generic-drug maker agrees to delay introduction even after the patent has expired. FTC Chairman Edith Ramirez said in a statement:

The Supreme Court's decision is a significant victory for American consumers, American taxpayers, and free markets. The court has made it clear that pay-for-delay agreements between brand and generic drug companies are subject to antitrust scrutiny.

The Generic Pharmaceutical Association's chief executive officer, Ralph Neas, said the ruling "continues to provide a lawful pathway for companies to resolve disputes through settlements." The case divided the court along ideological lines, with Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan joining Breyer in the majority.

The disputed settlements stem from the economics of the pharmaceutical industry, where companies can reap billions of dollars from blockbuster drugs and then have sales plummet the moment a generic alternative appears. The FTC says generic drugs sell for an average of 15 percent of the original price, with the brand-name company losing 90 percent of its market share by unit sales. Generics have saved purchasers \$1.1 trillion in the last decade, the industry says.

Pharmaceutical patent settlements typically arise just as a generic-drug maker is securing Food and Drug Administration approval to introduce its version of a drug. At that stage, only the brand-name company's patents stand in the way of competition. The FTC has said that it doesn't object to settlements that merely set the date for a generic drug's entry to the market. But the FDA says a payment to the generic-drug maker changes the equation, suggesting the companies are agreeing to delay the generic drug, keep prices high and split what economists call "monopoly profits." A 2010 FTC study found that the accords cost purchasers \$3.5 billion a year. The case decided by the high court centered on Androgel, a treatment for low testosterone in men that is made by Solvay Pharmaceuticals Inc. The FTC sued Solvay and three generic-drug companies, including Actavis Inc.

The FTC says the price for Androgel was poised to fall at least 75 percent in 2007 after the FDA cleared the way for competition. Faced with the prospect of losing \$125 million in annual profits, Solvay instead paid the generic-drug makers as much as \$42 million a year to delay their competing versions until 2015, the FTC says. At the time, Actavis was known as Watson Pharmaceuticals. The companies said Solvay, which is now part of AbbVie Inc., had a patent that, if backed by the courts, would have protected the drug an additional five years, until 2020.

Source: *Insurance Journal*

XI. AN UPDATE ON SECURITIES LITIGATION

A SIGNIFICANT SEC WHISTLEBLOWER CASE UNDER DOBB-FRANK LAW

Whistleblower litigation under the Securities and Exchange Commission is relatively new. In its short history, there haven't been many cases filed. For the second time in its existence, the SEC has rewarded several whistleblowers for reporting wrongdoing. The three unnamed whistleblowers were each awarded five percent of a recovery for stepping forward and reporting their knowledge of fraud. The awards to the whistleblowers stem from the overall funds recovered by the SEC due to the information obtained from the three whistleblowers.

The whistleblowers' information assisted the SEC's enforcement action against Locust Offshore Management LLC, a fraudulent hedge fund, managed by Andrey C. Hicks. Hicks, who pled guilty for his involvement in the sham hedge fund, was sentenced to 40 months in prison. The SEC alleges that while Locust Offshore Management falsely claimed it would sell shares to an investment fund, instead it pocketed the money it solicited. The whistleblowers alerted the SEC to the fraud and that led to a judgment against Locust and Hicks for \$7.5 million.

I believe the SEC whistleblower program will result in a great deal of litigation. Most experts believe the program will move forward at a much faster rate. SEC whistleblowers with helpful information about SEC violations amounting to more than \$1 million are able to obtain a percentage of the government's recovery as an award. The Dodd-Frank legislation increased the award percentage for whistleblowers to between 10 percent and 30 percent. Additionally, Dodd-Frank added protections from employer retaliation on employee whistleblowers. That's a very good thing and was badly needed.

As we have previously reported, the SEC whistleblower program is new, beginning in August 2011. The first award occurred a year later in August 2012 and from all accounts it appears the new program will take off from here. The first whistleblower obtained \$50,000 fee which was 30 percent of the recovery for stepping forward. The Obama administration has made it a priority to prosecute fraudsters who leech funds from the federal government. President Obama has made it clear that whistleblowers play a key role and are a huge asset in recovering hun-

dreds of millions of dollars for the government.

It should be noted that in addition to the SEC whistleblower program, whistleblowers can also help prosecute government fraud through the False Claims Act. In order to qualify as a whistleblower under the False Claims Act, a person must have direct knowledge of a false claim being submitted to the federal or state government for payment. False Claims Act cases are being filed for a variety of fraudulent schemes against the government. The health care industry, specifically Medicare and Medicaid, are commonly defrauded and are ripe for a False Claims Act lawsuit. Additionally, many government contractors, especially defense contractors, have defrauded the federal government during the past 10 years as the War on Terror continues.

Any person considering filing a False Claims Act lawsuit should know that their suit will be under seal for potentially several months or even years until the government decides whether it wants to intervene in the case. Also, the False Claims Act forbids employers from retaliating, harassing or threatening employees for reporting fraud to the government. Finally, the possibility of earning 15-25 percent of the government's recovery is a positive incentive for whistleblowers to step forward, tell the truth, and expose fraud. It is in the taxpayers interest that whistleblowers speak out against fraud being committed against the federal government.

As we have reported previously, many states have adopted state versions of the False Claims Act. Most fraudulent schemes are very complex and only insiders know the intricate details of the fraud. Unfortunately, through the years a great deal of fraud against the government went unreported and undetected. That has changed, which is a good thing. It is not a requirement that the whistleblower be an employee of the company defrauding the government, so long as the whistleblower has direct knowledge of the fraud committed. That's important to know since lots of folks have believed the whistleblower had to be an employee.

Lawyers in our firm continue to vigorously investigate fraud against both the federal and state governments and encourage anyone who knows of fraudulent activities to step forward. Potential whistleblowers have the right to not be retaliated against for doing the right thing and reporting the fraud they have witnessed. Anyone considering doing the right thing and blowing the whistle are strongly urged to seek legal advice before doing so. Lawyers at Beasley Allen are very familiar with the federal False Claims Act and its state counterparts and can guide whistleblowers along the process. If you have any

information and would like to speak with an attorney, contact Andrew Brashier, a lawyer in our Consumer Fraud Section, at Andrew.Brashier@beasleyallen.com, or at 1-800-898-2034 or 334-269-2343.

Sources: <http://blogs.wsj.com/riskandcompliance/2013/06/14/sec-hands-out-second-ever-dodd-frank-whistleblower-award/?KEYWORDS=whistleblower&cb=log>
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XII. INSURANCE AND FINANCE UPDATE

NEW YORK SETTLES WITH FOUR ADDITIONAL FORCE-PLACED INSURERS

New York's "force-placed" insurance reforms now cover 100 percent of the New York market. This is the result of the New York State Department of Financial Services reaching agreements with four New York force-placed insurers that had not agreed to implement those reforms. These four additional insurers are American Modern Insurance, Chubb, Fidelity and Deposit Company of Maryland, and FinSecure. The latest agreements follow regulators' earlier settlements with Assurant and QBE announced in March and April respectively. Assurant and QBE control at least 90 percent of the force-placed insurance market in New York.

Gov. Andrew Cuomo's administration said the force-placed insurance reforms will help better protect homeowners from abuse; eliminate the kickbacks DFS uncovered in this industry; and save homeowners, taxpayers and investors millions of dollars going forward through lower rates. New York's Financial Services Superintendent Ben Lawsky said in his department's announcement:

These reforms will now cover all of the New York market, but more can and should be done. Unless other regulators across the country move swiftly to crack down on the kickbacks and payoffs we found in the force-placed insurance industry, millions of Americans will remain at risk. We're continuing to urge other regulators to implement the reforms New York helped pioneer so that every single homeowner is protected.

DFS' reform settlement with American Modern Insurance includes a \$1 million penalty and restitution for homeowners who were harmed. Chubb, Fidelity and Deposit Company of Maryland, FinSecure—which had

each written relatively smaller volumes of force-placed insurance and were not found to have engaged in the kickback arrangements uncovered at other companies—voluntary agreed to sign proactive codes of conduct implementing New York’s reforms. New York’s force-placed insurance reforms include the following prohibitions:

- Force-placed insurers shall not issue force-placed insurance on mortgaged property serviced by a bank or servicer affiliated with the insurers.
- Force-placed insurers shall not pay commissions to a bank or servicer or a person or entity affiliated with a bank or servicer on force-placed insurance policies obtained by the servicer.
- Force-placed insurers shall not reinsure force-placed insurance policies with a person or entity affiliated with the banks or servicer that obtained the policies.
- Force-placed insurers shall not pay contingent commissions based on underwriting profitability or loss ratios.
- Force-placed insurers shall not provide free or below-cost, outsourced services to banks, servicers or their affiliates.
- Force-placed insurers shall not make any payments, including but not limited to the payment of expenses, to servicers, lenders, or their affiliates in connection with securing business.

DFS said it will soon issue regulations that include the Cuomo administration’s force-placed insurance reforms. The regulations would cover any company—present or future—that decides to offer force-placed insurance in New York. Hopefully, other states will follow New York’s lead in this matter and take action to protect policyholders.

Source: *Insurance Journal*

INSURER FINED NEARLY \$1.3 MILLION IN FLORIDA FOR CLAIMS PAYMENTS DELAYS

Florida’s second largest property insurer has been hit with a fine of nearly \$1.3 million. According to Florida Insurance Commissioner Kevin McCarty, the fine is being assessed by his office against Universal Property & Casualty Insurance Company. Universal has about 542,000 policyholders in Florida and collects more than \$765 million a year in premiums. Only Citizens Property Insurance Corp. has more residential customers.

A review by state regulators determined that Universal had unnecessary delays in

paying claims. The company was also unable to prove that it timely mailed out cancellation notices or notices of non-renewal. The president and chief executive officer for Universal stepped down from his position back in February while the review was still underway. Universal had 21 days to decide to challenge the \$1.26 million fine.

Source: *Claims Journal*

UTILIZING THE “PLACE OF INJURY” TEST REGARDING TERRITORIAL LIMITATION CLAUSES IN INSURANCE POLICIES

Territorial limitation clauses can be found universally in domestic and international insurance policies. Under this coverage restriction, the policy typically covers bodily injury if the bodily injury ... is caused by an occurrence that takes place in the coverage territory.” In domestic insurance policies, the territorial limitation clause typically limits coverage to the United States, Puerto Rico and U.S. territories. By designating specific territorial locations that are covered, the policy’s territorial limitation clause attempts to set forth clear boundary lines for the geographical reach of the insurance policy coverage. Quite often, those boundary lines can become blurred, causing uncertainty and resulting problems.

In the majority of jurisdiction, case law holds that “it is the location of the injury—not some precipitating cause—that determines the location of the event for purposes of insurance coverage.” The blurry boundary line arises in cases involving injuries that are sustained outside of the United States because of some act or omission that occurred in the United States and the policy restricts coverage to the United States. In this situation, courts have generally held that “[t]he location of an ‘occurrence’ is determined by the place where the injury happened; it does not matter that a precipitating event took place elsewhere.”

Source: *Claims Journal*

INSURER ORDERED TO PAY \$20 MILLION TO CONNECTICUT AUTO BODY SHOPS

A Connecticut judge has ordered The Hartford insurance company to pay \$20 million to auto body shops for an unfair trade practice related to hourly labor rates for vehicle repairs. The decision handed down last month by Stamford Superior Court Judge Alfred J. Jennings Jr. awarding punitive damages is in addition to a jury award of nearly \$15 million awarded against the company in 2009. The Auto Body Association of Connecticut, the Plaintiff in the case,

alleged that The Hartford pressured its in-house appraisers to put artificially low labor rates in their appraisals. The jury found that the company’s practices regarding hourly rates paid for auto body repairs was an unfair trade practice. A company spokesman says they will appeal. The case involves about 1,500 shops in Connecticut.

Source: *Claims Journal*

XIII. PREDATORY LENDING

OFFICIALS INVESTIGATE BIG BANKS’ ROLE IN INTERNET PAYDAY LENDING

As we have written previously, payday loans that come by way of the internet have become a major problem. These payday loans have very high interest rates and other exorbitant fees, causing the borrowers financial trouble. There have been complaints that major banks assist in predatory Internet lending practices by allowing companies to operate illegally in states in which they are banned.

Internet payday loans are loans that are expected to be paid back with the borrower’s next paycheck, usually in two weeks. In other words, they are advertised as short-term loans. If the borrower does not advise the lender that he or she intends to make a full payment and close the loan prior to the end of the term, the lender often only withdraws the interest and renews the loan for another month. The assumption on the part of the lender, under that practice, is that the borrower will only pay the interest and the loan can be renewed. That’s true, even though the loan is only intended to be until payday. All too many of the borrowers simply can’t afford to pay back the loan in two weeks. In those cases, the decision to renew the loan is made by the borrower.

While some states have laws against payday loans, their availability over the Internet has made regulation of the loans difficult. Folks who live in states that prohibit payday loans can easily apply for them online, and may not realize they live in a state that has banned the loan. Large banks are not the lenders in these situations. Rather, the loans come from payday loan companies. But the banks play a role if they allow the lender to automatically withdraw money from the borrower’s account. While that might not sound all that bad, the banks can make a lot of money off these automatic withdrawals.

If there is not enough money in the customer's account to cover the automatic withdrawal, the withdrawal can trigger insufficient fund fees, overdraft fees or other financial fees, making money for the bank. According to a report by The Pew Charitable Trusts, 27 percent of borrowers are forced into overdraft by an automatic withdrawal from a payday lender. You can get the report, *How Borrowers Choose and Repay Payday Loans: Payday Lending in America*, by going to pewstates.org.

Some customers complain that banks still allow these automatic withdrawals even after a customer has requested the withdrawals be stopped. *The New York Times* reported on one customer who requested a bank close her account to stop the automatic withdrawals. The bank, however, left the account open and from April to May, the customer racked up more than \$1,500 in fees linked to payday lender automatic withdrawals. *NBC News* reported on a man who initially borrowed \$400 for a car repair but wound up taking out \$3,000 in loans to cover interest costs, owed \$12,000 and was kicked out of his apartment. Officials are now looking into what role the major banks play in allowing payday lenders to do business in states where such companies are prohibited.

Sources: Lawyersandsettlements.com; *New York Times*; *NBC News* and pewstates.org

XIV. PREMISES LIABILITY UPDATE

POOL SAFETY IN THIS COUNTRY MUST BE IMPROVED

Nearly 400 children who are alive today will not be alive by the end of swimming season, according to government safety data. Government safety regulators have issued a "call to action" in an effort to spare young children from needless, preventable drowning deaths and other pool- and spa-related injuries this summer. Although there have been no pool entrapment deaths in the U.S. since 2008, children continue to drown in pools for other reasons, according to the U.S. Consumer Product Safety Commission (CPSC). Sadly, most of these deaths occur in private backyard swimming pools. That's because most of the commercial or public pools know about standards, rules and regulations that apply to pools.

A new CPSC report says there is an average of 390 pool and spa drownings for children younger than 15 years, with 296 of those (76

percent) involving children younger than 5. About 5,100 children are treated in hospital emergency rooms every year in the U.S. for pool and spa related injuries, with about 4,000 of those (78 percent) involving children younger than 5. Government data also show that African-American and Hispanic children between the ages of 5 and 14 are at a higher risk of drowning than other demographic groups. CPSC Chairman Inez Tenenbaum had this to say:

Drowning is the leading cause of unintentional death for children between the ages of 1 and 4 and minority children drown in pools at an alarming rate. The lives of countless children can be saved this summer. Take simple safety steps today—teach all children to swim, put a fence around all pools, and always watch children in and around the water.

According to data from USA Swimming, the national governing body of competitive swimming in the U.S., 70 percent of African-American children and 62 percent of Hispanic children cannot swim. This makes them several times more likely than children of other demographic groups to drown. Rep. Debbie Wasserman Schultz, who joined CPSC Chairwoman Tenenbaum at a recent swimming safety event in Washington D.C. said:

As we head into summer and families across the country are getting ready to take their kids to the pool, we must remind everyone how important it is to keep a careful watch on our children as they swim and ensure that their pools and spas have proper safety equipment. Working together, we can improve the safety of all pools and spas by increasing the use of layers of protection and promoting uninterrupted supervision to prevent child drowning and entrapment.

Suzy DeFrancis, Chief Public Affairs Officer for the American Red Cross, emphasized the importance of teaching children how to swim as a way to prevent drowning deaths and submersion injuries. "Learning how to swim saves lives. The American Red Cross encourages all families to enroll in Learn-to-Swim programs by contacting your local pool."

While there are federal laws in place mandating the safety requirements of all public pools in the country, such as drain entrapment prevention covers, other pool laws vary by municipality. For instance, in Montgomery, Ala., where our firm is based, the municipal code requires that all swimming and wading pool areas on commercial properties as well as private residences be enclosed by a fence, wall or screen enclosure at least 44 inches

tall, with a lockable gate. There also are regulations about any openings in the enclosure, which cannot be any wider than would allow the passage of a six-inch diameter sphere. The CPSC sets the distance at four inches, which is accepted as the industry standard.

Owners of commercial or private property with a pool or spa on the premises are advised to check federal, state and municipal laws to ensure they are in compliance. In most states, a property owner is liable for injuries or death resulting from an improperly maintained or inadequately protected pool or spa.

Source: Kurt Niland

DOUBLE DROWNING CASE SETTLED IN MONTGOMERY

Our firm settled a pool drowning case last month involving the drowning death of two children at Cyprus Court Apartments in Montgomery, Ala. The apartments were owned and operated by Fontenbleu Management Company, based in New Orleans, La. The children, ages 7 and 5, wandered away from their family's apartment on April 23, 2012, to go to the playground at the apartment complex. Their father had gone to the gas station and the mother was making a bottle for the boys' younger brother when the two children, who had been watching cartoons, left the apartment without anyone knowing that they were gone. As pointed out above, almost 400 small children are drowned each year in swimming pools. The Consumer Protection Safety Commission has made this data, along with safety recommendations, available to owners and operators of swimming pools. The information has been readily available for several years.

The apartment complex swimming pool in this case was located just a few feet away from a playground that was open to residents without restriction. Once the boys arrived at the playground, they saw the swimming pool and went over to it. They found a hole in the fence that was around the swimming pool. The city of Montgomery has an ordinance that requires fences around all swimming pools. It also prohibits holes in the fences greater than 6 inches so that unattended children can't get access to the pool area. The younger brother, who couldn't swim, entered the pool area and he fell in the pool and drowned. Statistics show that a child his age would drown in as little as 20 seconds. The older brother, who was also unable to swim, jumped into the pool in an effort to save his brother. He also drowned.

The management and employees of the apartment complex denied that a hole had ever existed in the fence. But residents coun-

tered those claims when they testified in depositions that there had been holes in the fence for months leading up to the drowning. Several residents testified that other children had been seen entering the pool area the day before the incident through the very same hole that the two victims used to get in. In fact some of the residents said they had actually gotten into the pool themselves through a hole in the fence when they were younger.

The case was vigorously litigated with as many as 41 depositions being taken and thousands of pages of documents produced. Each side had experts, a total of five, and the legal issues involved in the case were extremely complex. We alleged and were ready to prove that the swimming pool at the complex was poorly managed and improperly maintained. Required inspections of the pool were either not done or done improperly from a distance or in some cases from a vehicle.

Personnel at the complex, including the manager, had to have known that children were getting into this pool area when it was closed through holes in the fence. Fortunately, our firm's investigators were able to obtain photographs taken by a company in North Carolina that had inspected the property. These photographs that were extremely damaging to the Defendants revealed that the apartment complex had a history of holes in the fence that had existed several years back. In fact, one of those photographs showed an employee of the complex at the pool and a hole in the fence clearly visible. This employee had testified that he had never seen a hole in the fence.

This case is a testament to hard work and persistence by the lawyers, staff and investigators in our firm who were involved in the case. The family lost so much and they have had a most difficult time dealing with their loss. The amount of the settlement is confidential. Chris Glover, Cole Portis and Dana Taunton from our firm, along with Montgomery lawyer Darron Hendley, handled this case. They did a very good job and got an excellent result for the family.

JURY AWARDS \$55 MILLION TO CALIFORNIA MAN IN GANG SHOOTING

A jury has awarded \$55 million to a Southern California man in a lawsuit filed against a private security firm. The Plaintiff alleged in the suit that he lost his legs because the guard working for the security firm failed to protect him from gang members who shot him at an apartment building. The Plaintiff, Antonio Steward, filed his lawsuit against Stratus Security Services.

The lawsuit alleges that the security guard failed to break up a small party of men associ-

ated with a gang in August 2006 and didn't tell the Plaintiff and his two friends to go inside their homes because the situation might be dangerous. It was further alleged that the guard left the area and went to his car, listened to the radio and then drove away. The Plaintiff, who was 17 at the time, was shot nine times without justification. Gangrene set in, which was caused by a lack of blood flowing to the Plaintiff's legs. The Plaintiff has undergone 56 surgeries and had more than 40 percent of his stomach removed. Both of his legs had to be amputated. He will need constant care for the rest of his life and will battle an array of infections. A gang member, Roosevelt Turner, is currently serving two consecutive life prison sentences for the shooting.

Source: *Insurance Journal*

CARNIVAL FILES SUIT AGAINST ALABAMA SHIP REPAIR FIRM

The Carnival Corp. has filed a lawsuit seeking more than \$12 million in damage that its cruise ship, Triumph, sustained in an early April windstorm. In the lawsuit, Carnival contended that mooring equipment being used by BAE Systems was defective. The ship broke free of its mooring during a storm with winds of more than 60 mph.

BAE Systems Support Solutions is the company that owns the private dock where the cruise ship was undergoing repairs after being stranded off the coast of Mexico for five days in February. The Triumph was towed to Mobile, Ala., for repairs after an engine room fire left it adrift for days at sea with thousands of passengers on board. The Carnival lawsuit claims that the Triumph was dependent on shore power and other services that were being provided by BAE Systems because the ship's main and emergency generators were not functioning when the storm hit.

The complaint alleges that four bollards that the Triumph's mooring lines were tied to failed and broke free from the pier where the roughly 900-foot ship was being repaired during the storm. According to officials, three of the rear lines broke and one of the lines at the front of the ship failed. According to the Carnival complaint, this left a disproportionate amount of strain on the ship's mooring arrangement, and caused the ship to tear away from the dock. During the windstorm, the ship crashed into a cargo vessel and the impact left a large gash in its hull. According to reports, about 600 crew members and 200 contractors were working on the ship.

Source: *Insurance Journal*

XV. TRANSPORTATION

\$4.3 MILLION SETTLEMENT IN LAWSUIT OVER FATAL PENNSYLVANIA TEST DRIVE

The family of a Pennsylvania man who was killed during a test drive with an intoxicated salesman has settled their lawsuit for \$4.3 million. The former salesman Michael Hershey is in prison for the December 2010 crash in Lancaster County, which killed 48-year-old Jon Jensen and injured his 20-year-old son. The car dealership, Imports of Lancaster County, will pay \$1.3 million. Landyshade Mulch Products, a mulch supplier whose truck caused Hershey to swerve, will pay another \$3 million. The judge who sentenced Hershey to up to 14 years in prison called the Landisville man "a disaster waiting to happen," given his drinking problem and prior driving violations. The victim had been a health administrator at the York County Prison.

Source: *Claims Journal*

DETACHED TRAILER KILLS SEVEN PEOPLE ON UPSTATE NEW YORK HIGHWAY

Seven people including four young children and three young adults were killed last month when their minivan was struck by a runaway trailer loaded with crushed cars. Information from authorities investigating the horrific crash in the rural upstate New York community indicates the trailer separated from the rig that was hauling it while traveling on a stretch of Route 13 about 25 miles north of Syracuse. The minivan was ripped apart by the collision, which occurred around 6 p.m. on May 29. Both vehicles came to a rest on the shoulder of the highway.

The seven victims were from two local families, one from the town of Truxton and the other from another nearby area. The four children killed in the crash were all younger than 10 years old. Rescuers removed an eighth passenger, an adult male, from the minivan and transported him to a hospital in Syracuse for treatment. Two people from the truck that was hauling the trailer were uninjured. The driver of the minivan saw the trailer coming at the vehicle and tried to avoid it by veering off the road. Based on investigative reports, he was unable to do so.

Sources: Associated Press and rightinginjustice.com

SETTLEMENT IN “HUFFING DEATH” LAWSUIT

A civil case, filed against a teenager accused of “huffing” a cleaning product before striking a family with a car and killing a 5-year-old girl, has been settled. The teenager, Carly Rousso, who is now 19 years old, is out of jail on \$500,000 bond. The teenage driver lost control of her car, went across several lanes of traffic and then onto the sidewalk, striking Modesta Sacramento Jimenez and her three children. Five-year-old Jaclyn Santos-Sacramento died in the Labor Day crash.

Before the incident, the teenager inhaled fumes from a computer cleaning product, a practice sometimes called “huffing.” A canister of the cleaning product involved was found in her car. On the criminal side, if she is convicted on all charges, the 19-year-old faces up to 26 years in prison. While 26 years would be a tough sentence for a teenager, it pales in comparison to the death of an innocent victim caused by a totally irresponsible act. Young people must be made aware of the hazards created by doing things that not only hurt themselves, but also put others at risk of being injured or killed.

The parents of the victim, Modesta Sacramento Jimenez and Tomas Santos DeJesus, filed the lawsuit, alleging wrongful death, negligence and negligent infliction of emotional distress. Robert Baizer, a lawyer with Baizer Kolar & Lewis, represented the parents. He did a very good job in the case.

Source: *Chicago Tribune*

JETBLUE SETTLES LAWSUIT STEMMING FROM PILOT RAMPAGE

A lawsuit accusing JetBlue of negligence after a pilot had a “meltdown” on a New York-to-Las Vegas flight has been settled. The lawsuit was settled without a great deal of fanfare and the terms were not disclosed. Passengers claimed in the lawsuit that JetBlue was “grossly negligent” in allowing Capt. Clayton Osborn to fly. The pilot allegedly yelled about “terrorism” and “September 11th” during a flight in March 2012. The plane made an emergency landing in Amarillo, Texas. Osborn was found not guilty by reason of insanity on a charge of interfering with a flight crew. An expert said he had a psychotic disorder caused by a lack of sleep. The civil case was settled.

Source: *Washington Post*

SCHOOL BUS SAFETY LAW IN ALABAMA WILL BE VIGOROUSLY PROSECUTED

A new law in Alabama, recently passed and signed into law, making the unauthorized stop or delay of a school bus a crime should help protect students and bus drivers. The recent murders of a school bus driver and the taking of a child as a hostage in Dale County, Ala., got tremendous attention nationally. Alabama Transportation Director Joe Lightsey, who says the new law will be “vigorously prosecuted,” observed:

All too often, unauthorized persons have boarded school buses and threatened or assaulted students and school bus drivers. Current trespass laws do not specifically address the unauthorized entry of a school bus.

The law, passed as the “Charles ‘Chuck’ Poland Jr. Act” during the 2013 legislative sessions, makes it a Class A misdemeanor to trespass on a school bus, punishable by up to a year in jail. It is named in honor of the bus driver who was fatally shot by Jimmy Lee Dykes, a 65-year-old Vietnam War-era veteran, who boarded the school bus and demanded Poland hand over children—a request that Poland refused. The incident resulted in a seven-day hostage crisis on Dykes’ property near Midland City. Under the new law, a person commits the crime of first-degree trespassing on a school bus if they are found guilty of any of the following:

- Intentionally demolishing, destroying, defacing, injuring, burning or damaging any public school bus;
- Entering a public school bus while the door is open to load or unload students without lawful purpose while at a railroad grade crossing or after being forbidden from doing so by the bus driver in charge or an authorized school official;
- As an occupant of a public school bus, refusing to leave the bus after the bus driver in charge or authorized school officials demands that he or she do so;
- Intentionally stopping, impeding, delaying or detaining any school bus from being operated for public school purposes with the intent to commit a crime.

The Alabama Department of Education credits Sen. Cam Ward from Jefferson County and Rep. Alan Baker, who is from Brewton, with passage of the legislation. These men are to be commended for working hard and getting this legislation passed. The Charles “Chuck” Poland Jr. Act specifically addresses the issue of trespassing on an Alabama school bus and it will help school systems protect

students and school bus drivers if persons who violate the act are vigorously prosecuted and sent to prison. It appears that will happen.

Source: AL.com

XVI. HEALTHCARE ISSUES

FDA INVESTIGATING TWO DEATHS FOLLOWING INJECTION OF ZYPREXA

The U.S. Food and Drug Administration is investigating two unexplained deaths in patients who received an intramuscular injection of the antipsychotic drug Zyprexa Relprevv (olanzapine pamoate). The patients died 3-4 days after receiving an “appropriate dose” of the drug, well after the 3-hour post-injection monitoring period required under the Zyprexa Relprevv Risk Evaluation and Mitigation Strategy (REMS). Both patients were found to have very high olanzapine blood levels after death.

Under the REMS, patients are required to receive the Zyprexa Relprevv injection at a REMS-certified health care facility, to be continuously monitored at the facility for at least 3 hours following an injection, and to be accompanied home from the facility. The Zyprexa Relprevv label contains warnings about the risk of post-injection delirium sedation syndrome (PDSS), a serious condition in which the drug enters the blood too fast following an intramuscular injection, causing greatly elevated blood levels with marked sedation (possibly including coma) and/or delirium.

The FDA has provided this information to health care professionals while it continues its investigation. If therapy with Zyprexa Relprevv is started or continued in patients, health care professionals should follow the REMS requirements and drug label recommendations. Patients and caregivers should consult with their health care professionals about any questions or concerns they may have.

Source: FDA MedWatch

HEALTH GUIDELINES SHOULD BE BASED ON SCIENCE AND NOT CONTRIBUTIONS

A study that appears in the March 28, 2013, issue of the Archives of Internal Medicine shows that more than half of the nearly 500 writers and reviewers of recent cardiology clinical practice guidelines reported a con-

flict of interest due to ties with drug makers and other companies. That doesn't sound like a very good percentage, even when those conflicts are reported and made with full disclosure, and in reality, it isn't.

The findings are troubling because clinical practice guidelines (CPGs) are often adopted as the standard of care and taught in medical training programs, according to background information in the study. Researchers examined the 17 most recent American College of Cardiology/American Heart Association clinical practice guidelines issued through 2008. Of the 498 people involved in creating those guidelines, 277 (56 percent) reported a conflict of interest. The most common types of conflict of interest that were reported are:

- being a consultant or member of an advisory board;
- receiving a research grant;
- being on a speaker's bureau and/or receiving honoraria; and
- owning stock.

Dr. Todd B. Mendelson of the University of Pennsylvania in Philadelphia and his colleagues wrote:

Our finding that most episodes of guidelines participation involve conflicts of interest, and that most individuals involved in producing guidelines report conflicts, is a cause for concern. These findings are a particular cause for concern given the fact that many of the newest ACC/AHA guideline recommendations are based more on expert opinion than on clinical trial data.

The findings "raise disturbing questions about the independence and reliability of CPGs in cardiovascular medicine," Dr. Steven E. Nissen of the Cleveland Clinic Foundation wrote in an accompanying commentary. Our Mass Torts lawyers have seen evidence of conflicts of interest throughout the years in our ongoing battle with "Big Pharma." The fact that the drug industry is influencing medical decisions with financial or other support to experts in this field comes as no surprise.

Source: Drugs.com

JUDGE UPHOLDS \$23 MILLION AWARD IN CALIFORNIA BED SORE DEATH

A Sacramento judge has upheld a \$23 million jury award over the bed sore death of a woman at a Northern California assisted living facility. The judge also awarded \$4.3 million in legal costs to the family of Joan

Boice. Relatives sued the Emeritus senior living corporation for wrongful death and elder abuse after Ms. Boice died at the Emerald Hills facility in Auburn five years ago. The 82-year-old had Alzheimer's disease. Her death certificate indicated that bed sores contributed to her death. A jury found against the Seattle-based company earlier this year. An Emeritus spokeswoman says the company believes the verdict was tainted by improper evidence and it will appeal.

Sources: *The Sacramento Bee* and *The Insurance Journal*

XVII. ENVIRONMENTAL CONCERNS

MINING GIANTS PLAN MASSIVE OPEN-PIT MINE IN PRISTINE ALASKAN WILDERNESS ADJACENT TO BRISTOL BAY

Despite outspoken opposition from local residents, community leaders, businesses and environmental groups, foreign mining companies Anglo American and Rio Tinto are proceeding with plans to build a massive open-pit gold and copper mine in pristine Alaskan wilderness. The land in question is located just above Alaska's Bristol Bay, a critical watershed that sustains fish and wildlife crucial not only to the area's ecology, but to its economy as well.

Design plans for the proposed Pebble Mine indicate the complex would encompass 20 square miles of state land in the Bristol Bay watershed. Because of its sheer size and location at the headwaters of the Kvichak and Nushagak Rivers, two of the eight major rivers that feed Bristol Bay, the Pebble mine poses a serious risk of polluting Bristol Bay.

Bristol Bay is one of the world's few and most productive wild salmon strongholds, and supports a \$500 million commercial and sport fishing industry, and provides 10,000 jobs for Alaska's working families. Additionally, the salmon is key to the area's food chain and ecosystem, supporting bears, whales, seals and eagles, as well as providing a mainstay for the Native communities who have called the area home for thousands of years.

The Natural Resources Defense Council (NRDC), an environmental action group made up of nearly 1.5 million members, online activists, lawyers, scientists and other professionals, reports plans for the mine that are frightening in scale. The proposed plans include:

- A gaping pit wide enough to line up nine of the world's longest cruise ships and deep

enough to swallow the Empire State Building;

- The largest earthen dam in the world needed to hold back billions of tons of toxic waste;
- The dam and 10-square-mile containment pond are intended to hold between 2.5 billion and 10 billion tons of mine waste that Pebble would produce over its lifetime;
- The Pebble mine waste would require environmental treatment forever;
- Any release of mine waste into the surface or groundwater has the potential to harm the salmon runs;
- The mine would be sited on an earthquake-prone area near the Lake Clark fault, a 135-mile tectonic zone and 125 miles north of the site of the most powerful earthquake in North American history, which occurred in 1964;
- The destruction of miles of salmon streams and the likely poisoning of countless other streams and rivers; and
- The construction of a deep-water port in Cook Inlet, a direct threat to the last 312 beluga whales that make their home there.

The NRDC reports more than 80 percent of residents in the area are opposed to the project, including Native communities and commercial fishermen. In August 2010, the Anchorage Daily News reported the Bristol Bay Native Corp. (BBNC) sent a letter to the U.S. Environmental Protection Agency (EPA) imploring the agency to stop the project using its authority under the Clean Water Act. The BBNC has 8,600 Eskimo, Aleut and Athabaskan shareholders. Despite their objections, the plans for the mine are moving forward. If the mine is constructed, it spells almost certain destruction for the Bristol Bay.

All Americans should be appalled at this affront to one of our most important natural environments for the benefit of these multinational corporate giants. Why should we tolerate their lining their pockets at our expense? I encourage our readers to let their voices be heard. Tell EPA's acting administrator Robert Perciasepe to exercise the agency's authority under the Clean Water Act to protect Bristol Bay by stopping the Pebble Mine. There is an online petition at www.StopPebble.org. If you believe the Pebble Mine is a bad thing, fill out the petition and hit "send," before it's too late for Bristol Bay, and for Alaska, and for our future generations. The seriousness of this endeavor cannot be underestimated.

Sources: NRDC, StopPebble.org, SaveBristolBay.org, *Anchorage Daily News*

XVIII. THE CONSUMER CORNER

CHRYSLER BACKS DOWN AND WILL RECALL 2.7 MILLION OLDER-MODEL JEEPS

After a public disagreement that threatened to blow up into a larger battle, Chrysler agreed to recall 2.7 million Jeep vehicles that the National Highway Traffic Safety Administration said could potentially erupt into fire if rear-ended. Chrysler had been expected to refuse to comply with a voluntary recall request sent by NHTSA. That request covered Jeep Grand Cherokees in model years 1993 to 2004 and Libertys in model years 2002 to 2007.

NHTSA had warned after investigations that a crash from behind on these vehicles could puncture the fuel tank, located in the rear of the models, spill fuel and potentially cause a fire. The safety agency said the defect may have been responsible for up to 51 deaths. Chrysler had disagreed with NHTSA's assessment. But it appears that the agreement between NHTSA and the automaker that led to the recall may need further review.

The Center for Auto Safety, the group responsible for the investigation that led to Chrysler's recall, says Chrysler's remedy—adding a factory-built trailer hitch—won't properly protect consumers. Chrysler's recall plan, which the automaker contends was worked out with approval from NHTSA, is to install a trailer hitch on Jeeps that do not have them and inspect vehicles that already have hitches installed. Trailer hitches protrude from the rear of the vehicle behind the fuel tank, but they were designed to carry a load, not crumple to absorb the energy of a crash.

Clarence Ditlow, the executive director of the Center, says that adding a trailer hitch provides inadequate protection for fuel tanks that could leak as a result of an impact, increasing the risk of fire. He is concerned that the hitches are mounted in the center of the rear bumper. That means another vehicle could still hit the gas tank at an angle and puncture the fuel tank. In addition, a vehicle that was braking hard before colliding with the rear end of an affected Jeep model might dive under the trailer hitch in a crash. The front end of the striking vehicle would dip under hard braking.

Chrysler's report to NHTSA said the hitch would "incrementally improve the performance of certain of the subject vehicles in certain types of low-speed impacts." The report also says that the hitch "cannot and will not mitigate the risk of the high-energy

rear collisions identified in your (NHTSA) recall request letter."

In at least one case, in which a child died, a police investigator concluded a trailer hitch was responsible for the fire. In that case, in 2006, a police investigator concluded that a trailer hitch was responsible for puncturing the fuel tank and causing a fire in a 1993 Jeep Grand Cherokee involved in a rear-end crash in Cleburne, Tex. The Grand Cherokee was stopped on a two-lane highway and was struck from behind by a 2001 Chevrolet Lumina. A child who was a passenger in the Grand Cherokee survived the impact but died later from burns and smoke inhalation. It was unclear whether the Jeep's hitch was a factory-installed unit.

Ditlow believes a better solution to Jeep's fuel tank problem would be to install a skid plate—a metal shield made to protect the fuel tank when driving off-road—on recalled vehicles. Skid plates were an available option on the models covered by the recall. In 2009, the Center for Auto Safety filed a defect petition with NHTSA over the Jeep fuel tank problem, a move that required the agency to consider the issue, which it had not previously done. The Center has contended that 1993-2004 Jeep Grand Cherokees are more vulnerable to fires than vehicles of the same era because the gas tank was mounted behind the rear axle and somewhat below the bumper.

Chrysler said that it had agreed to recall 1993-98 Grand Cherokee and 2002-7 Liberty models, even though it maintains there is a no safety problem. A sample of the letter it plans to send owners announcing the recall says there is a "small chance" of experiencing a fuel leak "during certain types of rear-end collisions." But in a report filed last year, NHTSA expressed a higher level of concern, noting that "rear-impact-related tank failures and vehicle fires are more prevalent in the Jeep Grand Cherokee than in non-Jeep peer vehicles."

Ditlow believes NHTSA should crash-test the trailer hitches before allowing the recall to go forward. The automaker's remedy fails to address a second concern raised by the auto safety center: a fuel-filler hose from the gas tank on the Grand Cherokee that is prone to breaking away and lacks a valve to prevent fuel from leaking. The Center commissioned crash tests that, according to Ditlow, showed pressure on the tank could cause gas to spray out. Or, if the vehicle rolled over, the fuel would pour out of the tank. However, the safety agency never investigated that assertion.

Source: *NBC News*

HONDA ODYSSEY BEING INVESTIGATED FOR SUDDEN AIRBAG DEPLOYMENT

The National Highway Traffic Safety Administration is investigating the Honda Odyssey for airbags that can inadvertently deploy. NHTSA received six complaints from owners of 2003-2004 Honda Odyssey models alleging that their front airbags deployed without warning or a crash. The agency said it received 41 additional complaints regarding illuminating air bag warning lights, although the two issues are not necessarily linked.

Honda sourced its airbags from supplier TRW, which also supplied airbags for nearly 920,000 Jeep models that were recalled in November for inadvertent airbag deployment. The Odyssey's airbags contain the same electrical circuit that was prone to "overstress" in the Jeep models, the filings said. As many as 320,000 vehicles may be affected. In December, Honda recalled 870,000 vehicles for faulty ignition interlocks that can let the autos roll away unexpectedly when parked, including the 2003-2004 Odyssey.

In April 2013, Honda, along with five other automakers that share the same parts, recalled 561,000 cars, including the 2002 Odyssey, for front passenger airbag inflators that could rupture and injure occupants during a crash.

Source: *MSN.com*

PONTIAC G6 BEING INVESTIGATED FOR FAULTY BRAKE LIGHTS

NHTSA is also investigating the Pontiac G6 for brake lights that can fail to switch on while stopping. General Motors sent NHTSA more than 1,100 reports of brake light malfunctions on the 2005-2008 Pontiac G6, a discontinued midsize sedan. The complaints, along with at least 314 sent directly by individuals to NHTSA, allege that the light operation was reversed; the brake lights illuminated when the brake pedal wasn't depressed and switched back off when the pedal was depressed.

Other complaints show that some G6 models were difficult to shift from the park position and that the cruise control system did not function properly. GM also reported more than 14,000 related warranty claims regarding the brake lights. About 551,511 cars may be affected.

On June 5th, General Motors recalled 1,627 cars from the 2013 and 2014 model years to fix brake lights that could flash intermittently and cruise control systems that could switch off. While NHTSA investigations often lead to recalls, this is not always the case. No recall is

official until the manufacturer announces it formally to the agency.

Source: MSN.com

SUZUKI SMALL SUVs TARGET OF NHTSA PROBE

In another probe, NHTSA is investigating problems with airbag sensors in the seats of some small Suzuki SUVs. The probe covers 205,000 vehicles including Grand Vitara from the 2006 through 2011 model years and SX4s from 2007 through 2011. U.S. safety regulators said Tuesday that they are investigating problems with airbag sensors in the seats of some small Suzuki SUVs. The probe covers 205,000 vehicles including Grand Vitara from the 2006 through 2011 model years and SX4s from 2007 through 2011.

NHTSA said on its website that 128 owners have complained about problems with sensors in the front passenger seats that turn off the airbag when a child is sitting there. In some cases, the sensors won't detect a child and airbags will inflate. If that happens, a child could be hurt. In other cases, warning lights go off because of software problems. Investigators will check to see if the problems are bad enough to cause a recall. The safety agency says it hasn't received any complaints of crashes or injuries.

American Suzuki Motor Corp. filed for bankruptcy protection in November and said it would stop selling automobiles in the U.S. as part of a plan to restructure its business. The company, based in Brea, California, is the sole distributor of Suzuki Motor Co. vehicles in the continental U.S. According to American Suzuki Motor, it has enough cash to operate during the restructuring. The company says it intends to honor all car warranties.

Source: *Claims Journal*

JUDGE GRANTS TOYOTA MORE TIME TO WIN APPROVAL OF \$1.1 BILLION SETTLEMENT

Toyota Motor Corp. and lawyers suing the company were given more time to win final approval of a \$1.1 billion settlement of claims that recalls related to unintended acceleration hurt the value of U.S. customers' vehicles. U.S. District Judge James V. Selna, after a hearing on June 14th granted requests from lawyers for both sides to provide updated figures about how the money will be allocated to beneficiaries in the settlement. Judge Selna scheduled a July 19th hearing for final approval. Judge Selna said that "A lot of hard work has gone into this and it's been a remarkable effort on the part of everyone." This came after lawyers for both sides said they will give financial details to overcome

concerns the judge expressed about the disbursement of the settlement funds.

As you will recall, Toyota, based in Toyota City, Japan, recalled more than 10 million vehicles for problems related to unintended acceleration in 2009 and 2010. This process started with a September 2009 announcement that the company was recalling 3.8 million Toyota and Lexus vehicles because of a defect that may cause floor mats to jam accelerator pedals. The company later recalled vehicles over defects that it said involved the pedals themselves. Celeste Migliore, Toyota spokeswoman, said in an e-mailed statement after the hearing:

This agreement is structured in ways that we believe provide significant value to our customers and demonstrate that they can count on Toyota to stand behind our vehicles. We believe that approval of this settlement, as amended, is in the best interests of all affected parties.

The settlement would resolve the economic-loss portion of the Toyota sudden-acceleration litigation. Class actions were filed on behalf of Toyota owners who said the company drove down their vehicles' value by failing to disclose or fix defects. One of the Plaintiffs' lawyers, Steve Berman, who is co-lead attorney for the Plaintiffs, had this to say at the hearing:

This was a remarkable settlement. I believe this is the largest settlement in a U.S. automobile case in terms of the amounts of dollars and the number of class members.

The settlement came about after two years of intense negotiations and hard work. Judge Selna had previously agreed in a tentative order that the accord was "fair, adequate and reasonable," but he delayed final approval. Judge Selna explained his decision, saying:

Certain difficulties in the plan of allocation of the settlement funds preclude the court's final approval of the proposed settlement at this time. The court needs to ensure that class members are compensated to the maximum degree possible.

Judge Selna said that the settlement didn't appear to precisely address the cost of administering the accord. He also questioned whether more funds should be allocated to class members and Toyota owners who haven't filed claims. Lawyers for both sides said that they had agreed on changes to the allocation of funds to address the judge's concerns. Toyota agreed last year to the settlement, taking a \$1.1 billion pretax charge

against earnings without specifying the amount going to economic-loss plaintiffs in the cases before Judge Selna.

The value of the settlement is more than \$1.6 billion, including noncash benefits. This was stated in the April 23rd filing seeking approval. The agreement includes \$757 million in cash and \$875 million in "non-monetary benefits," including installation of brake overrides in eligible vehicles, the lawyers said. The economic-loss cases were combined in a multidistrict litigation (MDL) before Judge Selna, who is also handling federal personal injury and death suits related to sudden-acceleration claims. The personal injury and death cases remain pending, with the first federal trial set for November in Santa Ana.

Our firm will be involved in the first Toyota sudden unexpected acceleration trial in a state court in October. Lawyers from our firm will try this case, which involves the death of one woman and injuries to another, in Oklahoma. Obviously, this is a most important case. In January, Toyota settled the first federal case that had been set for trial before Judge Selna. Toyota also paid \$66.2 million in fines to the U.S. National Highway Traffic Safety Administration for how some of the recalls were conducted. The company last year agreed to pay \$25.5 million to settle an investor lawsuit claiming Toyota's alleged failure to disclose information on unintended acceleration problems caused the stock to plunge in 2010.

Settlement notices have been mailed to more than 22.6 million potential class members. "There have been only 76 objections on behalf of 90 individual objectors," he said. By June 7th, the administrator for the settlement had received requests from 1,949 plaintiffs to opt out of the agreement. The proposed accord includes \$200 million in attorneys' fees and \$27 million in expenses. Objections filed with the court protested the amounts available to individual Plaintiffs and the size of the potential award for attorneys' fees. Judge Selna said at the hearing that the objections were without merit and wouldn't block final approval.

Under the settlement, Toyota will install a brake override system in more than 3 million vehicles that were subject to floor mat recalls, provide \$250 million for former Toyota owners who sold their cars from September 2, 2009, to December 31, 2010, and provide another \$250 million for current owners whose vehicles are ineligible for brake overrides, according to court filings. The federal cases are combined as *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and Products Liability Litigation*, in the U.S. District Court, Central District of California (Santa Ana).

Source: *Insurance Journal*

TRUTH-IN-LENDING LAW BANS MORTGAGE LOAN ARBITRATION CLAUSES

A ban on mandatory arbitration clauses in some mortgage loans took effect last month as part of new rules created by the Consumer Financial Protection Bureau. The rule, which was effective as of June 1st, prohibits mandatory arbitration clauses in residential mortgage loans or home equity lines of credit. Such loans cannot contain "terms that require arbitration or any other non-judicial procedure to resolve any controversy or settle any claims arising out of the transaction," because consumers cannot be barred from suing in court for an alleged violation of federal law. The ban is contained in final rules from the Consumer Financial Protection Bureau (CFPB) that amended the Truth in Lending Act and implemented key provisions of the Dodd-Frank Act.

The effective date means the ban covers loans for which applications are received on June 1st or later. Loans that close on or after June 1st are not covered by the rule as long as the application was received before June 1st. Mandatory arbitration clauses in existing loan documents for loans that have closed are not affected by the rule. Further regulation on mandatory arbitration clauses in other consumer financial contracts could be on the horizon. The CFPB is authorized by Dodd-Frank to conduct a study of mandatory arbitration provisions in financial products and service agreements and to "prohibit or impose conditions or limitations" on mandatory arbitration based on what the study finds.

Source: *Lawyers USA Online*

\$13 MILLION AWARDED IN LAWSUIT AGAINST VATTEROTT COLLEGE

A single mother was looking for a way to improve her family's future in 2009 when she decided an education at Vatterott College would be her key to success. Like thousands of others, Ms. Jennifer Kerr, who was then living partially on state assistance, had seen Vatterott's ads on television. When she went to the local campus and told the admissions representative that her dream was to be a nurse, the representative told her that although the school did not offer a nursing degree, it did offer a medical assistant's degree. That degree, she allegedly was told, would help her earn \$15 to \$17 an hour and, with the transfer of her credits, put her on the "fast track" to becoming a nurse. Only none of that happened.

After securing more than \$27,000 in loans and being in the program for nearly 60 weeks, Ms. Kerr was shocked to learn that she wasn't even enrolled in the medical assistant's

program. Instead, she was enrolled in the preliminary medical office assistant's program. Ms. Kerr was told that if she wanted to continue on and get the medical assistant's degree, it would take a total of 90 weeks and cost her about \$10,000 more.

A jury ruled for Ms. Kerr in her lawsuit against Vatterott, finding that the Missouri-based Vatterott Educational Centers Inc. had violated the Missouri Merchandising Practices Act. The corporation was ordered to pay Ms. Kerr \$27,676 in actual damages and \$13 million in punitive damages. Vatterott, which was started in 1969, has 19 locations in nine states, most of them in Missouri. It also has a large online enrollment, according to the company's website. The jury verdict will give Ms. Kerr the money to repay thousands of dollars in federal loans for a certificate of completion as a medical office assistant that she said has been all but useless to her.

This case is not the first to cast a negative light on the for-profit college industry, which has long been criticized for enrolling students into expensive courses of study that deliver degrees or diplomas that lead to few job or at best, low-paying jobs. In 2010, an undercover investigation of 15 for-profit colleges (not including Vatterott), conducted by the U.S. Government Accountability Office, (GAO) revealed, among other findings, that "four colleges encouraged fraudulent practices and that all 15 made deceptive or otherwise questionable statements to GAO's undercover applicants." Four undercover applicants were encouraged to falsify financial aid forms to qualify for federal aid.

Other colleges exaggerated applicants' potential salaries after graduation and underestimated the total cost of their programs. Although some of the colleges did provide applicants with accurate and even sound advice, such as not borrowing too much money, others pressured applicants to sign contracts for enrollment before allowing them to speak to financial aid advisers. Last year, U.S. Sen. Tom Harkin of Iowa released the results of a two-year investigation into some 30 for-profit colleges that included Vatterott. Among the Senator's findings, covering 2008 and 2009, were:

- Students who attended for-profit colleges accounted for 47 percent of all federal student loan defaults.
- Because 96 percent of students who enroll in for-profit colleges take federal student loans (compared to 13 percent at community colleges), nearly all students who leave have student-loan debt, even when they do not have a degree or diploma or increased earning power.

- Most for-profit colleges charge significantly more than similar programs at community college or even flagship state universities.
- In 2008 and 2009, more than 1 million students started at schools owned by the for-profit companies examined in the investigation. By mid-2010, 54 percent had left school without a degree or certificate; among associate's degree students, 63 percent left without that degree.

Vatterott made national news itself in 2009 and early 2010, when three top Vatterott employees, including Kevin Earl Woods, the former director of the Kansas City campus, pleaded guilty to roles in a conspiracy to fraudulently obtain federal student grants and student loans for students who were ineligible for such loans between August 2005 and July 2006. After Ms. Kerr left Vatterott, she tried for six months to find full-time employment. Earning her medical office assistant diploma, not only placed her deep into debt, which she could not repay, but the degree was not even necessary to become a medical office secretary. The diploma she received was for all practical purposes worthless.

Ms. Kerr contacted the Missouri attorney general and a lawyer was found who would take her case. She initially took a part-time job, working in a cafeteria lunchroom and she now works full-time making baked goods for a large corporation. Ms. Kerr says "It's a good job." She supports two children, ages 6 and 12. Ms. Kerr was represented by Martin Myers, a lawyer with The Myers Law firm located in Kansas City. He did a very good job for her.

Source: *The Kansas City Star*

KOBE BRYANT SETTLES HIS LAWSUIT

Kobe Bryant has reached a settlement with a New Jersey auction house in some most interesting litigation. New Jersey-based Goldin Auctions had allowed the NBA star's mother to sell some of his memorabilia. Bryant also got an apology from his parents, who thanked him for his financial support. The Los Angeles Lakers star reached the settlement last month with the auction house. Because of a confidentiality agreement, only a limited amount of information can be released relating to the terms. But the settlement identifies six items that will be auctioned, including two uniforms worn by Bryant at Lower Merion High School outside Philadelphia and two 2000 NBA championship rings Bryant gave to his parents.

Goldin Auctions sued in federal court after Bryant's lawyers wrote the company telling it to cancel a planned auction of close to 100 items. The Los Angeles Lakers star claimed his

mother, Pamela, didn't have the right to sell the items. Subsequently, Bryant filed suit against the auction company in a California court. A trial had been scheduled to begin there on June 17th. Under the settlement, Goldin Auctions also will sell Bryant's 2000 NBA All-Star game ring and his medallion and ribbon from Magic's Roundball Classic, a high school all-star game. In an emailed statement, Bryant's parents wrote:

We regret our actions and statements related to the Kobe Bryant auction memorabilia. We apologize for any misunderstanding and unintended pain we may have caused our son and appreciate the financial support that he has provided to us over the years. We also would like to apologize to Goldin Auctions for their inadvertent involvement in this matter and thank them for their assistance.

The owner of Goldin Auction says auction prices can be difficult to predict. But he says the high school uniforms and the All-Star Game ring will bring the highest prices. He expects the items to go for \$100,000 to \$250,000 each. The auction was scheduled to run from June 17th to July 19th. The owner of the auction house, who seemed pretty well-pleased, said

We are very happy it settled and we are happy with the items. If I'd looked at the list from the beginning and picked nine items I wanted to get my hands on, I've got five of them.

Bryant jumped from high school straight to the NBA in 1996. He was instrumental in winning five championships with the Lakers, most recently in 2010. I didn't realize it, but his father, Joe, played eight seasons in the NBA with Philadelphia, San Diego and Houston. Hopefully, this family can reunite and get on with their lives.

Source: *The Washington Post*

XIX. RECALLS UPDATE

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

CHRYSLER AGREES TO RECALL JEEPS

The change of heart by Chrysler involving the recall of the Jeep SUVs was covered in the Consumer Section. A recall by Chrysler is now underway. The negotiated agreement that led to the recall, however, isn't universally accepted by safety groups. More was said on that in the Consumer Section of this issue.

CHRYSLER TO RECALL 630,000 SUVs WORLDWIDE

Just two days after initially refusing NHTSA's request to recall 2.7 million older-model Jeeps, Chrysler decided to issue two other recalls totaling 630,000 vehicles worldwide. The automaker has recalled more than 409,000 Jeep Patriot and Compass small SUVs across the globe from the 2010 and 2012 model years to fix air bag and seat-belt problems. It's also recalling 221,000 Jeep Wranglers worldwide from 2012 and 2013 to fix transmission fluid leaks, according to documents posted on the NHTSA website. In the Patriots and Compasses, a software error could cause late deployment of the side air bags and seat-belt tightening mechanisms, and that could cause injuries in rollover crashes. Dealers will repair the software for free starting this month.

For Wranglers with 3.6-liter V-6 engines, Chrysler said a power steering fluid line can wear a hole in the transmission oil cooler line. The SUVs can leak fluid, damaging automatic transmissions. Dealers will inspect the lines for free and replace them or install a protective sleeve. The recall begins this month. No crashes or injuries have been reported in either case, according to Chrysler. The Compass and Patriot recall includes 254,400 vehicles in the U.S., 45,400 in Canada and another 109,400 outside North America, according to Chrysler. The Wrangler recall includes 181,000 vehicles in the U.S. as well as 18,400 in Canada, 3,300 in Mexico and another 18,400 outside North America. Concerned customers in either case can call Chrysler at 1-800-853-1403.

DODGE DART RECALL

Chrysler has also recalled about 15,000 new Dodge Dart compact cars worldwide because the engines can stall in cold weather. The recall affects 2013 model year cars with 1.4-liter four-cylinder engines and dual-clutch automatic transmissions. The company found the

problem itself while testing a Dart that had been parked for eight hours in a room at 20 degrees Fahrenheit. After being pulled out of the room, the car stalled moments after it was started, according to a statement from Chrysler, which owns the Dodge brand.

After the incident, the company checked with dealers and found that some customers had experienced a similar experience with the car. Further investigation traced the problem to the computer that controls the engine and transmission. Canadian safety regulators say the problem could cause a loss of power, increasing the risk of crash, injury, or property damage. Engine stalling is particularly dangerous for drivers entering highways and crossing busy intersections. Dealers will recalibrate the computer at no cost to customers.

Most of the affected Darts, about 12,900, are in the United States, with about 1,900 in Canada. Chrysler refused a government request to recall 2.7 million older Jeep Grand Cherokee and Liberty SUVs. The U.S. National Highway Traffic Safety Administration (NHTSA) asserts that the cars are at risk of a fuel tank fire. Chrysler says the vehicles are safe. The Dart recall is Chrysler's third since the refusal.

FORD RECALLING 465,000 CARS FOR FUEL LEAK

Ford Motor has recalled 388,000 of its current model year cars in the U.S. due to a fuel leak that poses a fire risk. The models include 2013 Ford Explorer, Taurus, Flex, Fusion, Interceptor Utility and Interceptor Sedan, as well as the Lincoln MKS, MKT and MKZ. At issue is a part within the gas tank that may fail and leak fuel onto the ground. If the spilled fuel catches a spark, a fire could occur. Ford said it is not aware of any incidents of fire due to the fuel leak, or of any injuries caused by the defect. Ford said it had received 600 complaints about the fuel leak from customers as of March 31st. Owners who detect the smell of gas or notice a leak are urged to contact their dealer immediately for a service appointment.

The recall also affects nearly 77,000 vehicles in other global markets, including Canada and Mexico. Ford alerted NHTSA of the recall on May 28th. Last July, Ford recalled 11,500 of its 2013 Escape SUVs because a defect in the fuel line could cause a fire. At that time Ford took the unusual step of advising drivers not to

even drive the vehicles until they were repaired. There was no such warning with the most recent recall.

FORD RECALLS 13,100 EXPLORER, TAURUS AND MKS MODELS

Ford Motor Co. has recalled more than 13,100 Ford Explorer, Taurus and Lincoln MKS models because the child safety locks on the rear doors may not work properly. The recall affects 2013 models, and the malfunction could mean the child safety locks would turn off automatically, allowing the doors to be opened from the inside. No accidents or injuries have been reported due to the malfunction, according to Ford. The affected vehicles were built at the automaker's Chicago Assembly Plant between Nov. 29, 2012 and Dec. 12, 2012. Most of the recalled vehicles are located in North America. Ford said dealers will test and replace the rear child safety locks for no cost if necessary.

FORD RECALLS LINCOLN MKZ AND 2013 FUSIONS

Ford has also announced two relatively small in number recalls. The automaker recalled 500 2013 Lincoln MKZ vehicles because the insulation on the engine block heater can crack at extremely low temperatures. Additionally, according to Ford, 25 2013 Fusions are at risk of impaired steering or the loss of steering control due the lack of an internal retaining clip.

TOYOTA RECALLS SOME HYBRIDS TO FIX BRAKES

Toyota has recalled nearly a quarter of a million vehicles because of a braking problem. The Japanese automaker said the global recall would affect 242,000 Prius and Lexus hybrid cars made between March and October 2009. Toyota said it had received more than 90 complaints from drivers who said they needed to step more heavily on the brake pedal than they were used to. According to the company, a flaw was allowing nitrogen gas to leak into the brake fluid, reducing the effectiveness of the brakes. The automaker said brake pressure parts in the vehicles could crack due to vibration, slowing response times. According to Toyota, there have been no reports of accidents or injuries.

Most of the cars affected are in Japan, where 117,000 vehicles are being

recalled, followed by 91,000 in North America, 30,000 in Europe and smaller numbers in other markets. The sedans are sold in the U.S. and in Japan. Toyota Motor Sales, U.S.A., Inc., said it would inspect the brake booster pump assembly on recalled Prius and Lexus HS 250h vehicles and replace it if necessary.

HONDA RECALLING 104,500 CARS TO FIX BRAKES

Honda has recalled 104,500 cars in 49 countries worldwide to fix problems with the brakes. In the U.S., the recall covers more than 18,000 Acura RSX compact cars from 2006 and the Honda S2000 sports car from the 2006 and 2007 model years. About 70,000 of the recalled cars were sold in Japan. Outside the U.S., the recall includes the 2006 and 2007 Honda Edix, the 2006 Honda Mobilio, the 2006 Honda Spike, the 2005 and 2006 Honda Air Wave, the 2006 Honda Stream and the 2005 and 2006 Honda Integra.

According to Honda, some power brake booster parts weren't made to specifications. That could cause a decrease in braking power over time and could increase the risk of a crash. But the company says it doesn't know of any accidents or injuries from the problem. Included in the recall are about 13,000 RSX compacts and 5,000 S2000s in the United States. Honda is notifying owners by mail. Dealers will replace the brake booster if needed. In the U.S., RSX owners can call 1-800-382-2238 for information, while S2000 owners can call 1-800-999-1009.

GM RECALLING 193,652 SUVs FOR FIRE RISK

General Motors has recalled more than 193,652 SUVs from the 2006 and 2007 model years because a circuit board in the driver's door could short and cause a fire. The vehicles involved are the Chevrolet Trailblazer, GMC Envoy, Buick Rainier, Saab 9-7x and Isuzu Ascender from the 2006 and 2007 model years. The 2006 Chevrolet Trailblazer EXT and GMC Envoy XL are also included. GM says owners should park the vehicles outside until they're repaired.

GM says the defect is caused when water gets into the driver's side door and corrodes a circuit board. If it shorts out, the power door and window switches may stop working. It could also cause overheating, which can lead to smoke or fire.

GM is notifying owners. Dealers will repair the vehicles for free.

SALSA CYCLES RECALLS BICYCLE FORKS DUE TO FALL HAZARD

About 1,700 Salsa Bicycle Forks have been recalled by CWI, of Taiwan. The bicycle fork can bend above the disc brake mount, posing a fall hazard to the rider. This recall involves all Salsa Vaya bicycle forks stamped with the batch codes 2011 02 21, 2011 04 11, 2011 06 14 and 2011 09 09 and all Salsa La Cruz bicycle forks stamped with the batch codes 2011 03 01, 2011 04 08, 2011 05 30 and 2011 09 09. The batch code is stamped on the steerer tube. The forks are made of tubular chromoly steel and can be installed on any bicycle that takes a threadless 1 1/8 inch steerer tube. They were sold individually and as original equipment on Salsa Vaya bicycles and framesets. Salsa Vaya bicycle forks are orange or dark gray. La Cruz bicycle forks are black. The manufacturer's insignia "CWI" is stamped on the steerer tube. "Salsa" is printed on the bicycle's frame. Salsa Cycles has received eight reports of forks bending above the disc brake mount. No injuries have been reported.

The bicycles were sold at bicycle stores nationwide and on various websites from February 2011 through June 2012 for about \$100 individually for La Cruz forks and on Salsa Vaya bicycles for between \$1,300 and \$1,600. Consumers should immediately stop using bicycles equipped with the recalled Salsa Vaya and La Cruz bicycle forks and contact a Salsa dealer for a free inspection, replacement fork or a full refund. Contact Salsa Cycles toll-free at 1-877-774-6208 from 8 a.m. to 6 p.m. CT Monday through Friday, or online at www.salsacycles.com and click on the Fork Recall button for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2013/Salsa-Cycles-Recalls-Bicycle-Forks/>

STROLLERS RECALLED BY KOLCRAFT DUE TO PROJECTILE HAZARD

Kolcraft Enterprises Inc., of Chicago, Ill., has recalled its Jeep Liberty Strollers. The inner tube of the tire on the stroller can rupture causing the wheel rim to fracture and fly off as a projectile, posing a risk of bodily injury and property damage. The recall includes Jeep Liberty branded strollers with model numbers starting with JL031, JL032, JL034, JL035

or JL036 manufactured between June 2010 and September 2011. The model number and date of manufacture are printed on a white tag on the rear upper center of each seatback pad. The three-wheeled strollers were sold in different color fabric combinations with a metal black and silver frame.

“Jeep” is printed on the side of the stroller and on the front of the stroller tray. There is a plastic red toy steering wheel, ignition key and orange shift lever mounted on a yellow base attached to the stroller tray. If your stroller wheels have a gray triangle located on the rim at the valve stem then your stroller wheels are not included in this recall.

Kolcraft and the CPSC have received 39 reports of inner tube ruptures causing the wheel rim to fracture and fly off as a projectile. Of these, 18 included reports of injury, with 14 occurring while filling the tire with air by adult caregivers. Two children received lacerations to their chin or leg while standing near the stroller and 16 adults received abrasions, contusions and/or lacerations to their arms, legs, stomach or head/face. Two of the reports included property damage.

The strollers were sold at Burlington Coat Factory, Sears and Toys R Us nationwide, online and at other mass market and independent juvenile specialty stores from June 2010 through June 2013 for between \$150 and \$180. Consumers should immediately stop using the product and contact the company to receive free replacement wheels. Consumers should use a manual bicycle pump to inflate stroller tires to a maximum of 30 p.s.i. Do not use gas station air pumps to inflate stroller tires. Contact Kolcraft at 1-800-453-7673 from 8 a.m. to 5 p.m. ET Monday through Friday or go online at www.Kolcraft.com then click Safety Notifications for more information.

AXIS ARROWS RECALLED BY EASTON DUE TO INJURY HAZARD

Easton Technical Products Inc., of Salt Lake City, Utah, has recalled its Easton Axis arrows. The arrows can break when fired and hit unintended targets, including the user and bystanders. This recall involves Easton Axis arrows in four different sizes and batch numbers, including size 300 with batch number 13169686, size 340 with batch number 13170143, size 400 with batch number 13170142 and size 500 with batch number 13169487. The carbon compos-

ite arrows are used for hunting and target archery. They are black with green and gray-colored graphics. Axis, Focused Energy, Easton, the size number and the batch number are printed on the arrows.

The arrows were sold at archery specialty stores and Academy Sports, Bass Pro, Cabela's, Gander Mountain and Scheels stores nationwide from February 2013 through May 2013 for about \$154 per dozen. Consumers should stop using the recalled arrows immediately and contact Easton to receive free replacement arrows. Contact Easton Technical Products toll-free at 1-888-380-6234 or go online at www.eastonarchery.com and click on Axis Recall for more information, or go to www.axisrecall.com.

NAP NANNY AND CHILL INFANT RECLINERS RECALLED BY BABY MATTERS

Baby Matters LLC of Berwyn, Pa., has recalled all models of its Nap Nanny and Nap Nanny Chill infant recliners and covers. This recall was announced as part of the settlement of an administrative case filed by the CPSC. From 2009 to the present, the Commission staff has received at least 92 incident reports involving the Nap Nanny and Nap Nanny Chill products, including five infant deaths. The CPSC says it is aware of four infants who died in Nap Nanny Generation Two recliners and a fifth death involved in the Chill model. In the incident reports received by the CPSC, there were 92 reports of infants hanging or falling over the side of the products, including some infants who were restrained in the product's harness.

The CPSC has urged consumers to immediately stop use of all Nap Nanny and Nap Nanny Chill recliners. Baby Matters LLC is no longer in business and is not accepting returns. In December 2012, four major retailers—Amazon.com, Buy Buy Baby, Diapers.com, and Toys R Us/Babies R Us—announced a voluntary recall of Nap Nanny and Chill models sold in their stores. Consumers who purchased a Nap Nanny from one of these retailers should contact the retailer for instructions on how to obtain a refund for the product. CPSC urges other consumers to immediately dispose of the products to ensure that they are not used again.

About 165,000 of the Nap Nanny and Chill products were sold between 2009 and 2012 for about \$130. The recalled products were sold at toy and children's

retail stores nationwide and online, including at www.napnanny.com. In December 2012, CPSC staff filed an administrative complaint against Baby Matters LLC seeking a recall of the Nap Nanny and Nap Nanny Chill infant recliners. CPSC staff and Baby Matters LLC reached a settlement agreement that includes the recall and ends the legal proceeding against the firm.

The settlement resolves CPSC staff's allegations that the Nap Nanny and Chill products create a substantial product hazard. CPSC alleged that the products contain a design defect, their use presents a risk of injury to infants, and the instructions and warnings are inadequate. It is illegal under federal law for any person to sell, offer for sale, manufacture, distribute in commerce, or import into the United States any model of the Nap Nanny or Chill recliner or the covers.

FRED & FRIENDS RECALLS BABY RATTLES DUE TO CHOKING HAZARD

Easy Aces, Inc. doing business as Fred & Friends, of Cumberland, R.I., has recalled “Buff Baby” baby rattles. This includes about 47,500 in the United States and 9,300 in Canada. The rattle's end cap can separate, releasing small parts, posing a choking hazard to small children. This recall involves the “Buff Baby” baby rattle. The gray plastic rattle is shaped like a dumbbell and has plastic pellets inside. The rattle measures about 5.5-inches long and 2-inches wide and “0.2” is embossed on both pentagon-shaped ends of the rattle. The rattles were packaged in clear cylindrical packages featuring a picture of a young girl lifting the rattle. The UPC code 728987019098 can be found on the bottom of the package. Fred & Friends has received two reports of rattle caps separating. No injuries have been reported.

The baby rattles were sold at specialty toy and baby stores nationwide, in Canada, and online at www.amazon.com and various other websites from October 2011 through June 2013 for between \$7 and \$10. Consumers should immediately take these rattles away from young children and contact Fred & Friends to receive a full refund. Consumer Contact: Fred & Friends toll-free at (877) 647-8644 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.fredandfriends.com and click on Product Recall Information at the bottom of the

page for more information. Consumers can also send an email to Buffbabyratle@fredandfriends.com.

DIVEALERT EMERGENCY SIGNALING DEVICES RECALLED BY IDEATIONS

About 2,500 DiveAlert and DiveAlert PLUS signaling devices have been recalled by Ideations DiveAlert, of Seattle, Wash. The signaling device can malfunction when used and restrict the diver's air flow, posing a drowning hazard. This recall involves DiveAlert and DiveAlert PLUS scuba dive signaling devices with model numbers DA2, DP2 or DV2. The signaling device is attached to the buoyancy compensator device (BCD) power inflator/alternate regulator system by a chrome-plated brass coupling and is used to activate a loud surface horn or an underwater percussion noise to alert others in the event of a diver's emergency. The devices are also used in non-emergencies to get the attention of the pickup boat or other divers. The DA2 is black with an orange button, the DP2 is black with a gray knob and red button and has DiveAlert PLUS printed on it, and the DV2 is black and red. They can be used with Aqualung AirSource, Oceanic Air XS, Aeris Air Link and Mares Air Control regulator/inflators. Only these signaling devices without any stamped writing on the couplis collar are included in this recall.

NEPHRON PHARMACEUTICALS CORP. RECALLS EZ BREATHE ATOMIZER

A Medical Device Recall has been issued due to a manufacturing defect which could result in the washer (Plate A) becoming dislodged from the EZ Breathe Atomizer. If this occurs, users may accidentally swallow the washer or choke on it, which can lead to serious adverse health consequences or death. The EZ Breathe Atomizer is a device that is intended to spray liquid medication in aerosol form into the air that a person will breathe. Devices were distributed between August 2012 and April 2013. The EZ Breathe Atomizer is manufactured by Health & Life Co., LTD and sold to Nephron Pharmaceuticals Corporation. Nephron Pharmaceuticals Corporation distributes the EZ Breathe Atomizer for sale and use in the Asthmanefrin Starter Kit. The EZ Breathe Atomizer was also sold by Nephron Pharmaceuticals Corporation as an individual device in a carton labeled EZ Breathe Atomizer, Model #EZ-100.

Customers should stop using any EZ Breathe Atomizer units contained in the Asthmanefrin Starter Kits with the affected lot numbers and also those that were sold individually. Refer to the Recall Notice for a link to the affected lot and serial numbers. Health care professionals and patients are encouraged to report adverse events or side effects related to the use of these products to the FDA's MedWatch Safety Information and Adverse Event Reporting Program. Complete and submit the report online at www.fda.gov/MedWatch/report.htm or download the form; or call 1-800-332-1088 to request a reporting form. Complete and return the form to the address on the pre-addressed form, or submit by fax to 1-800-FDA-0178.

METAL HALIDE LAMPS RECALLED DUE TO FIRE AND LACERATION HAZARDS

About 8,100 Metal Halide Lamps have been recalled by Philips Lighting Company, of Bath, N.Y. The internal wiring can arc causing the lamp to catch fire or the glass to shatter. This poses fire and laceration hazards. The recalled items are egg-shaped, clear glass, 150-watt industrial metal halide lamps. They are about five inches long and have a medium base. Recalled lamps were manufactured between November 2012 and March 2013. "Philips," "150W" "ALTO M142/0," "Hg," "USA 3A-1" and "MHC150/U/MP/4K" are stamped on the lamp. Each lamp comes in a protective cardboard sleeve. The Philips logo appears at the top of the protective sleeve on all sides. "MasterColor," "Ceramic Metal Halide ED-17 Protected," "Hg—Lamp Contains Mercury" are on the side of the sleeve. "MHC150/U/MP/4K ALTO" and Universal Product Code (UPC) "46677 37724" are on a label on the side of the sleeve. Philips says it has received one report of a failure that damaged a lamp, but apparently there has been no reports of injury or property damage.

The lamps were sold by professional electrical wholesale supply distributors sold the lamps for use by industrial and commercial property owners from November 2012 to April 2013 for about \$20. The lamps have been installed in retail stores and recreational facilities. Consumers should immediately stop using the lamps and contact Philips for a full refund or a replacement. Philips will issue a refund as a credit to all distributors with recalled lamps in their invento-

ries and will replace recalled lamps that have been installed at no cost to the consumer. Contact Philips Lighting Company at 1-800-372-3331, from 7 a.m. to 5 p.m. CT Monday through Friday, e-mail qualityadvisory2013@philips.com, or go online at www.philips.com/recall for more information.

HORIZON HOBBY RECALLS BATTERIES DUE TO FIRE HAZARD

About 117 Dynamite 7.4 V LiPo Batteries have been recalled by Horizon Hobby Inc., of Champaign, Ill. Hazard: The positive and negative battery leads are incorrectly wired to the battery connector. The use or charging of the battery can cause the battery to overheat, posing a fire hazard. This recall involves Dynamite 7.4 volt LiPo batteries that are used to power Horizon Hobby's Losi Micro remote control vehicles. The batteries measure about 2 inches long by 1 inch wide by ½ inch thick. The batteries were sold separately from the vehicles and have red and black wires coming out of the end into a white plastic connector. Dynamite, 180 mAh, 2S, 20C Li-Po and DYN1429 are printed on the side of the black and orange batteries.

The batteries were sold at: Hobby stores nationwide and online at www.horizonhobby.com from December 2012 through April 2013 for about \$20. Consumers should stop using the recalled battery immediately. Disconnect it from the product or charger and return the battery to Horizon Hobby for a full refund or a replacement battery. Consumer Contact: Horizon Hobby; toll-free at (877) 504-0233 from 8 a.m. to 7 p.m. CT Monday through Friday, from 8 a.m. to 5 p.m. CT on Saturday, and 12 p.m. to 5 p.m. CT on Sunday, or online at www.horizonhobby.com and click on Product Recalls at the bottom of the page for more information.

IKEA RECALLS LYDA JUMBO COFFEE/TEA CUPS DUE TO BURN HAZARD

LYDA jumbo cups have been recalled by IKEA North America Services LLC, of Conshohocken, Penn. The cups can break when hot liquid is poured into them, posing a burn hazard. This recall involves IKEA's LYDA jumbo coffee/tea cups. The 20-ounce cups are four inches tall and are white with a pink rose and green leaves. Printed on the bottom of the cup is the following information: Model number 302.033.7; Supplier number 10866; the IKEA logo; the words

“IKEA of Sweden Design and Quality,” and “Made in Thailand.” While no incidents of injuries have been reported in the United States, there have been 20 incidents reported worldwide, including 10 scalding injuries.

The cups were sold exclusively at IKEA stores nationwide and on the firm’s website at www.ikea-usa.com from August 2012 through April 2013 for about \$5. Consumers should immediately stop using the recalled LYDA jumbo cups and return them to any IKEA store for a full refund. Contact IKEA toll-free at 1-888-966-4532 anytime or online at www.ikea-usa.com and click on the recall link on the home page.

VIVE LA FETE RECALLS CHILDREN’S PAJAMAS

About 710 children’s two-piece pajama sets have been recalled by Vive La Fete Inc., of Miami. The pajamas fail to meet federal flammability standards for children’s sleepwear, posing a risk of burn injuries to children. This recall involves Vive La Fete children’s cotton or cotton/polyester two-piece pajama sets with style numbers HSH158BPL and HSH159BPL. They were sold in children’s sizes 6 months through size 12. They consist of a long-sleeve shirt with collar and buttons paired with matching full-length pants with elastic waistband. Pajama set style HSH158BPL is blue with a white snowflake pattern. Pajama set style HSH159BPL is red and white gingham checkered pattern. The style number is printed on a white label located on the garment’s hangtag. There are two tags sewn into the neckline. “VIVE LA FÊTE” is printed on the top tag. The garment size and fiber content with the phrases “CARE ON REVERSE” and “MADE IN EL SALVADOR” are printed on the bottom tag.

Consumers should immediately stop using the pajamas and contact Vive La Fete for instructions on how to receive a full refund. Contact Vive La Fete at 1-800-535-7396, or online at www.vivelafete.com and click on “Product Recall” at the bottom of the page under the “Shopping With Us” section.

KICHLER LIGHTING RECALLS CHANDELIERS DUE TO INJURY HAZARD

About 48,900 Aztec Light Chandeliers have been recalled by The L.D. Kichler Co., of Cleveland, Ohio. The chandelier’s fixture loop that connects the hanging chain to the lamp can fail during use

causing the chandelier to fall from the ceiling and injure bystanders. This recall involves Aztec nine-light chandeliers sold at Lowe’s stores under the PORTFOLIO brand name. The chandeliers are metal with an olde bronze finish and measure about 31-inches wide and 31-inches high. They come with etched amber glass shades and a decorative faux marble ball in the center. The upper arms of the fixture are single long curves and the lower arms of the fixture are “S” shaped. “Aztec” and model number 34330 are printed on a sticker located inside the ceiling canopy at the top of the chandelier. Kichler Lighting has received six reports of the chandeliers falling from the ceiling. No injuries have been reported. Approximately \$6,000 in property damage has been reported.

The chandeliers were sold exclusively at Lowe’s stores nationwide and at www.lowes.com from July 2006 through August 2011 for about \$240. Consumers should prevent people from going into the immediate area under the chandeliers and contact Kichler for information on how to obtain a free repair kit or replacement for chandeliers that have fallen. Contact: Kichler Lighting’s Home Center Division (“Aztec”) at 1-800-554-6504, from 9 a.m. to 5 p.m. ET Monday through Friday, or go online at www.kichler.com and click on “Aztec” and then on “Model No. 34330 Safety Information” for more information.

BEL AIR LIGHTING RECALLS CHANDELIERS DUE TO IMPACT INJURY HAZARD

About 20,500 Portfolio and Transglobe nine-light chandeliers have been recalled by Bel Air Lighting Inc., of Valencia, Calif. The mounting loop that holds the chandeliers to the ceiling can break, causing the chandelier to fall, posing an impact injury hazard to consumers. The recalled nine-light chandeliers have a two-tone antique bronze-colored metal frame with antique gold-accented and champagne frosted color glass shades. The six antique gold colored lamp holders at the bottom and three at top have a floral pattern that is repeated on components at the top and bottom of the center lamp stem. Antique bronze-colored ornamental scrolling connects all the elements. The chandeliers were sold at Lowe’s as Portfolio brand with item number 256047 and at other stores as Transglobe item number 2579 EBG. The item numbers are located inside the ceiling canopy of the chandelier. Bel Air has received 18 reports of the chande-

liers falling from ceilings with some incidents resulting in property damage.

The Portfolio brand sold exclusively at Lowe’s stores and the Transglobe brand sold at lighting stores nationwide, both from February 2007 to June 2010 for about \$250. Consumers should prevent people from going into the immediate area under the chandeliers. Contact Bel Air immediately to receive a free replacement mounting ring to repair the chandelier and instructions on being reimbursed for the cost of the installation. Consumer Contact: Bel Air Lighting; toll-free at (888) 803-0509 from 7 a.m. to 6 p.m. CT Monday through Friday, or online at www.regcen.com/belair for more information.

GENLYTE RECALLS CAPRI TRACK LIGHTING DUE TO IMPACT INJURY HAZARD

About 80,300 Capri track lighting have been recalled by Tai Sing Group Ltd., of Hong Kong. The light fixtures can fall off of the track rail, posing an impact injury hazard to bystanders. This recall involves Capri track lighting used in commercial buildings and includes 15 styles of metal or polycarbonate light fixtures, accessories and adapters. The track and light fixtures were sold in white, black or silver colors. A complete list of catalog numbers and date codes included in this recall is at www.recall.philips.com. The catalog number and date code are printed inside the lighting fixture. “Capri Lighting” is printed on a white label inside the track rail. Genlyte has received 12 reports of the light fixtures cracking, including three reports of light fixtures falling off of their track rails. No injuries have been reported.

Consumers should immediately stop using the recalled track lights, remove them from the track rail and contact Genlyte for free replacement track lights. Consumer Contact: Genlyte Thomas Group LLC; at (800) 375-6007 from 9 a.m. to 5 p.m. ET Monday through Friday, or online at www.recall.philips.com, choose United States/English and click on the Capri track lighting recall for more information or email the firm at capritrack@philips.com.

GERBER RECALLS MACHETES WITH STITCHED SHEATHS DUE TO LACERATION HAZARD

Gerber Legendary Blades, of Portland, Ore., has recalled its Gerber® Bear Grylls Parang Machete with stitched sheaths.

The Parang machete can cut through the stitching of the sheaths when the blade is taken from or replaced in the sheath, posing a laceration hazard. This recall involves stitched sheaths sold with curved blade Parang machetes. The stitched sheath is made of black nylon, with only stitching on the curved side. There are five rivets on the bottom of the sheath and two rivets bordering the strap on top. The machete measures 19.5 inches with a blade length of 13.5 inches. The sheath measures 16 inches long and 3.5 inches wide and has "GERBER" printed in gray and two Bear Grylls logos in orange.

The machetes with sheaths were sold as a set or as part of Gerber's Apocalypse Survival Kit, which includes a Parang machete among other items in a foldable black cloth case with "GERBER" printed on the inside right. The model numbers are on the package. Model numbers are: 31-000698, 31-001507 and 31-002289. Model number 30-000601 is on the package for the Apocalypse Survival Kit. The stitched sheath is the only one of three styles of sheaths sold with the Parang machete included in this recall.

Gerber says it has received eight reports of lacerations to the user's hands or fingers, including three injuries that required stitches. Consumers should immediately store the covered Parang machete in a safe area away from children. To receive a free replacement fully riveted sheath contact Gerber Legendary Blades toll-free at 1-877-314-9130 from 9 a.m. to 5 p.m. PT Monday through Friday or online at www.gerbergear.com and click on "Product Notifications" at the bottom of the page.

PADDYWAX RECALLS FRAGRANCE DIFFUSERS

About 2,100 Paddywax Fragrance Diffusers have been recalled by Paddywax LLC, of Franklin, Tenn. The label on the diffusers violates the Federal Hazardous Substances Act (FHSA) by omitting the presence of petroleum distillates. Petroleum distillates pose an aspiration hazard if swallowed. The recall includes ECO and RELISH Paddywax diffusers sold in three fragrances. Fragrances include ECO Blood Orange with Bergamot, ECO Grapefruit with Coriander and RELISH Ocean Tide with Sea Salt. The diffusers were sold in a solid tan cylinder-shaped container measuring about 11-inches high by 2-3/4 inch diameter. The diffuser includes a green or blue

glass vase and evaporating diffuser sticks. "Paddywax" and the fragrance name are printed on the front of the cylinder.

The diffusers were sold at small gift shops, grocery, pharmacy, plant nurseries and spas nationwide and online at www.Paddywax.com from January 2013 through April 2013 for about \$28. Consumers should immediately stop using the diffusers and move out of reach of children and pets. Contact Paddywax for instructions on returning unopened containers and disposal of opened containers to receive a replacement product. Consumer Contact: Paddywax toll-free at (888) 442-3088 from 8 a.m. to 5 p.m. CT Monday through Friday, email at customer.service@paddywax.com or go online at www.paddywax.com and click on Recall for more information.

STRIDE RITE RECALLS GIRLS SANDALS DUE TO CHOKING HAZARD

About 7,500 "Joanna" Girls Sandals have been recalled by Stride Rite Children's Group LLC, of Lexington, Mass. The metal flower on the shoe can detach, posing a choking hazard. The "Joanna" girl's sandals have an ankle strap, three bands and a flower on top. They were sold in white with a silver-colored metal flower and brown with a copper-colored metal flower in girl's sizes 8.5 through 10. The name "Joanna," the style number CG40723 (white shoe) or CG40725 (brown shoe) and the size are printed on the underside of the front shoe strap. "StrideRite" appears on the bottom of the shoe. The company says it has received six reports of the flowers detaching and eleven reports of flowers loosening. No injuries have been reported, according to the company.

The shoes were sold at Stride Rite stores and other department stores nationwide and online at striderite.com and various online retailers from December 2011 through May 2013 for between \$30 and \$42. Consumers should immediately take the recalled shoes away from children and contact Stride Rite to receive a prepaid envelope for the return of the shoes. Upon return, customers will receive a voucher for the purchase price redeemable at Stride Rite stores or striderite.com. Contact Stride Rite at 1-800-365-4933, from 8 a.m. to 5 p.m. ET Monday through Friday, or online at www.striderite.com. Click on Product Safety Information under Customer

Service for more information or e-mail JoannaReturns@striderite.com.

ADVANCE PHARMACEUTICAL INC. RECALLS ONE LOT OF ENTERIC COATED ASPIRIN TABLETS, 81 MG

Advance Pharmaceutical Inc. has recalled one lot of Rugby label Enteric Coated Aspirin Tablets, 81 mg. Advance Pharmaceutical Inc. first initiated the recall on June 17, 2013, after receiving a complaint about a bottle labeled as Enteric Coated Aspirin Tablets, 81 mg, actually containing Acetaminophen 500 mg tablets.

The product is indicated for the temporary relief of minor aches and pains and is packaged in bottles of 120 tablet with NDC 0536-3086-41 and UPC 3 0536-3086-41 9. The affected lot of Enteric Coated Aspirin Tablets is Lot 13A026 with Expiration Date 01-2015. The lot was manufactured and packaged by Advance Pharmaceutical Inc. under the label of Rugby Laboratories. Rugby Laboratories (Major Pharmaceuticals) distributed the product nationwide to wholesalers and retailers.

Consumers may be inadvertently taking Acetaminophen 500 mg instead of Enteric Coated Aspirin 81 mg which may cause severe liver damage to those who take other drugs containing acetaminophen, consumers who take 3 or more alcoholic drinks every day, or those who have liver disease. The labeled directions instructs patients to take 4-8 tablets every 4 hours, but not more than 48 tablets in 24 hours. Consumers who take 48 tablets daily of the defective product may be ingesting up to 24,000 mg of Acetaminophen, which is about six times the maximum recommended daily dose of acetaminophen (4,000 mg).

Consumers who have the affected lot should immediately discontinue its use and return it to the pharmacy or store where it was purchased. Consumers with questions about the recall may contact Advance Pharmaceutical Inc., Monday-Friday, 9 a.m.- 5 p.m. EST. Consumers should contact their physician or health care provider if they have experienced any problems that may be related to taking or using this product.

COUNTRY LIFE RECALLS TARGET-MINS IRON SUPPLEMENT BOTTLES

About 1,100 Target-Mins™ Iron Supplement Bottles have been recalled by Country Life LLC, of Hauppauge, N.Y.

The packaging is not child-resistant as required by the Poison Prevention Packaging Act. The supplement tablets inside the bottle contain iron, which can cause serious injury or death to young children if multiple tablets are ingested at once. This recall involves Country Life Target-Mins 25 mg iron supplements bottles. The bottle is brown with a black top and has a white label with a yellow banner at the top and a green banner at the bottom. The words "IRON," "Country Life" and "90 tablets" are printed on the label. Bar code 015794024927 and Lot Number 13A866B are printed on the far left side of the front label.

The product was sold at New Seasons, Sprouts Farmers Market, Vitamin Cottage, Whole Foods Market and other natural food stores nationwide from January 2013 to May 2013 for about \$10. Consumers should immediately place recalled bottles out of the reach of children and return them to the place of purchase for a full refund or a replacement bottle. Contact Country Life at 1-800-645-5768, from 9 a.m. to 6 p.m. ET Monday through Friday, by email at sales-admin@countrylifevitamins.com or visit the company's website at www.countrylifevitamins.com and click on the "Contact Us" icon, then "Product Questions" for more information.

BETA LABS, LTD ANNOUNCES A RECALL OF DIETARY SUPPLEMENTS

Beta Labs, LTD ("Beta"), a dietary supplement retailer, has recalled Oxyphen XR Lot #s 200910 and 200911, Phentalene Lot # 58800512, Phen FX Lot # 1205129, and Red Vipers Lot # 1205128 (hereinafter referred to as the "Products"). The recall was initiated on June 15, 2013, after a review of recent FDA communications related to 1,3 dimethylamylamine ("DMAA"). The Products contain DMAA.

The UPC codes for each of the products are: Oxyphen XR, 70541 59974; Phentalene, 70541 59982; Phen FX, 29882 55980; Red Vipers, 29882 55981. The Products are all in capsule form. DMAA is commonly used as a stimulant, pre-workout, and weight loss ingredient in dietary supplement products. The Food and Drug Administration has warned that DMAA is potentially dangerous to health. See <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm347270.htm>. Ingestion of DMAA can elevate blood pressure and lead to cardiovascular problems. A number of adverse effects associated with DMAA contain-

ing dietary supplements have been reported to the FDA. The FDA has also warned that DMAA is not a dietary ingredient and thus, is not Dietary Supplement Health and Education Act (DSHEA) compliant.

This recall affects Oxyphen XR Lot #s 200910 and 200911, Phentalene Lot # 58800512, Phen FX Lot # 1205129, and Red Vipers Lot # 1205128. The products are in capsule form. Beta distributes dietary supplements to retailers. The Products were sold via telephone in all fifty (50) United States. There have been no reports of adverse events associated with these Products to date. No other products distributed by Beta are subject to recall.

Consumers who may have purchased the affected lot numbers of Oxyphen, Phentalene, Phen FX, and/or Red Vipers should immediately discontinue using the products and contact their health care professional if they have experienced any adverse effects. Consumers can contact Beta at accounting(at)betalabs(dot)net or call 1- 877-283-1742, Monday—Friday, 10 a.m.—5 p.m. CST to receive further instructions for returning the product(s), refunds, or with any questions. We sincerely regret any inconvenience to consumers. This is a voluntary recall. This recall is being made in cooperation with the US Food and Drug Administration.

Adverse reactions or quality problems experienced with the use of these product(s) may be reported to the FDA's MedWatch Adverse Event Reporting program online, by regular mail, or by fax. The form and instructions for the form may be found at <http://www.fda.gov/Medwatch/getforms.htm>

There have been an extremely large number of recalls since the June issue. We weren't able to include all of them in this issue. But we tried to include those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm's web site at www.BeasleyAllen.com/recalls. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

XX. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

JULIA ANN BEASLEY

Julia Ann Beasley is a Shareholder in our firm's Personal Injury and Product Liability Section. She handles cases involving catastrophic injury and death caused by the negligence of others. Julie also handles cases involving defective products. Recently, she has settled several cases for substantial amounts, including the following:

- A case against a trucking company whose driver was traveling at an excessive speed, causing a collision so horrific that it ripped the car in half, killing the driver and its passenger;
- A case involving a permanent injury to a construction worker who fell in a hole (leading to a 21 foot concrete shaft) which had no warning and no secure cover;
- A case against a beer company in a wrongful death action when its driver negligently ran over a 5-year-old boy on a bicycle after making a delivery at a convenience store;
- A case in Tennessee against a day care owner for negligent supervision of an 18-month-old child, which led to the child's death after she was left unattended in a highchair. A forensic medical expert confirmed that the child suffocated after becoming stuck between the tray and the highchair.

Julie has been selected for inclusion on the 2012 Best Lawyers in America list, published by *U.S. News & World Report*; and to the prestigious Super Lawyers list in 2012 and 2013. She is a member of the Montgomery County Bar Association, American Bar Association, Alabama State Bar (where she participates in the Volunteer Lawyers Program), American Association for Justice and Alabama Association for Justice.

Julie attended Huntingdon College, where she played tennis on scholarship. Following her graduation in 1985 with her B.A. degree, Julie worked for American Airlines, based in Dallas-Ft. Worth for two years. When Julie returned to Alabama, she worked for our firm as a legal assistant. She says Judge Sharon Yates encouraged her to go to law school. Julie took the LSAT, was soon enrolled at Cumberland School of Law, and earned her J.D. from Cumberland in 1992. Julie still keeps in touch with one of her favorite professors at Cumberland, Governor Albert P. Brewer.

Julie is a member of The Fresh Anointing House of Worship and is involved in many charity events in the community and other non-profit organizations. She competes on a local and national level in cutting horse competitions with her horses, including "Duallin in the Snow" who is called Vern. Currently, Julie owns 9 quarter horses and enjoys having friends and family come to her barn to see and ride the horses. She is also a member of the National Cutting Horse Association. Currently, Vern, who is Julie's favorite is ranked 19th in the world in the \$15,00 Novice/Non-Pro class.

Julie is a member of the UAB Health Center Advisory Board, serves as a Trustee of the Southeastern Livestock Exposition and is a member of the Cumberland School of Law Advisory Board. Julie is a very good lawyer, who works hard for her clients, believes in their cases, and gets good results for them.

KENDALL DUNSON

Kendall Dunson grew up in LaGrange, Ga., and graduated with honors from LaGrange High School in 1989, serving his senior class as president. He was awarded a full scholarship at the University of Georgia (UGA). Kendall earned a degree in Corporate Finance from UGA. While at UGA, Kendall was being elected president of Kappa Alpha Psi Fraternity.

A recipient of the Calloway Scholarship, Kendall is a graduate of the University of Alabama School of Law. He is licensed to practice in both Alabama and Georgia. Kendall has participated in numerous legal and community organizations, including a task force charged with reconfiguring Alabama's method of rendering legal services to the State's underprivileged population. Kendall says it was not any individual who influenced him to become a lawyer, but rather it was the role of law in history. He says his study of American history, and realizing how critically important the legal system is in this country, led him to the law.

Before coming to Beasley Allen, Kendall worked in the litigation section of a prominent defense firm for two and a half years. In our firm, Kendall practices in the areas of Product Liability, General Personal Injury, and Workers' Compensation cases involving defective industrial machinery. Kendall has handled a large number of cases and works hard to see that clients were adequately compensated. He also wants to influence corporations to design and manufacture safer products. The following are a few of Kendall's notable cases.

- Kendall was a member of the trial team that handled a wrongful death case against a corporate defendant resulting in a multi-million verdict, the largest jury verdict in

Selma, Ala. The suit influenced the corporate defendant to outfit its entire fleet of trucks with audible backup alarms.

- Kendall also handled a school bus crash case in Huntsville, Ala. Four students were killed and a number of others injured. That suit resulted in the cancellation of the contract between the County and the company that was responsible for safely transporting students to school.
- Most recently, Kendall was lead counsel in a maritime lawsuit resulting in a \$5.75 million verdict in Mobile, Ala., for the children who lost their father.
- We wrote about the case in Montgomery County where 7 occupants of a van were burned to death in a fiery highway crash.

Kendall has served as the president of both the Alabama Lawyers Association and the Capital City Bar Association. He recently completed a term as a Board Member for the National Bar Association. Kendall served on the Board of the Montgomery County Bar Association until he was elected to the Executive Committee. He is Past President of the Montgomery County Bar Association having the distinct honor of being its first African-American President. He is a member of the Alabama State Bar and serves on the Diversity Committee. Kendall is a Martindale Hubbell AV rated lawyer and was named to the prestigious Super Lawyers list in 2012 and 2013.

Kendall regularly speaks at continuing legal education seminars on the topics of product liability, industrial accidents and defective machinery. He also takes time from the busy practice of law to speak to high school and grade school students about the law, the importance of attending college, and ways in which they can achieve success in the future. Kendall says he really enjoys speaking and reading to public school children.

Kendall is a charter member of the 100 Black Men of Birmingham. He currently sits on the Boards of the YMCA of Montgomery and Child Protect. While Kendall says he enjoys all his service in the community, the mission of Child Protect really touches his heart. Kendall believes in the purpose of this organization, which is protecting and helping children who have been physically and/or emotionally abused.

Kendall is married to Samarria Munnerlyn Dunson, who is also a lawyer and is the Assistant General Counsel for the Alabama Department of Public Health. Kendall and Samarria have three children. The Dunsons worship at both First Baptist Church and Holy Spirit Catholic Church. Kendall is a very good lawyer and we are most fortunate to have him in the firm.

HEIDI BOWERS

Heidi Bowers, who has been with the firm for 12 years, is a Legal Assistant in our Consumer Fraud Section. In this position, she works on employment law cases, *qui tam* (false claims) cases, breach of contract and bad faith cases. Heidi graduated *Magna Cum Laude* from Auburn University of Montgomery in 2001 with a Bachelor of Science in Justice and Public Safety. She also has a Legal Assistant Certificate. Heidi enjoys participating in 5ks, 10ks and half-marathons. She is an active member of Taylor Road Baptist Church, where she teaches the 1-year-olds Sunday School Class. Heidi is a very hard worker, who is dedicated to the clients she works for in their cases, and we are blessed to have Heidi with the firm.

THERESA PERKINS

Theresa Perkins, who has been with the firm for 14 years, works as the Legal Assistant for Graham Esdale in our Personal Injury/Products Liability Section. Theresa handles claims against manufacturers for defective products and personal injury cases. Her job duties include helping with the drafting of complaints and responding to discovery requests and preparing and organizing cases for trial.

Theresa has a Bachelor of Science in Justice and Public Safety from Auburn University Montgomery (AUM) and a Legal Assistant certificate from AUM. Theresa has been married to Scott Perkins for 18 years. Scott is a senior officer with the State of Alabama, Board of Pardons and Paroles. Scott and Theresa have one daughter, Katie Rose, who is 11 years old and in the fifth grade at St. Bede School. Katie Rose keeps her parents busy with school activities, cheerleading and softball. The family are members of St. Bede Church. Theresa enjoys outdoor activities and exercising including bike riding, church activities and spending time with family. She is a very hard worker who is dedicated to the clients she works for in their cases. We are blessed to have Theresa with us.

XXI. SPECIAL RECOGNITIONS

MONTGOMERY WOMAN PUBLISHES DEBUT NOVEL

Although she had never written fiction before, about two years ago Montgomery native Lisa Cheek Temple found she had a story inside her that couldn't be contained. The result is *Illuminating Gracie*, a story of hope and redemption with a supernatural and

spiritual twist. Wendi Lewis wrote the following account of Lisa's book and tells us about Lisa:

The novel, classified as Young Adult Fiction, tells the story of 17-year-old Grace Bennett, a lonely and bitter young woman on a path of depression and self-destruction. Her life changes when she meets a mysterious old woman, Mrs. B., her dedicated manservant Willem, and two enigmatic young men who together struggle to bring Gracie into the light and give her the strength to fight her demons—as it turns out, both figuratively and literally.

Lisa says she was spurred to begin writing the story shortly after her father, Ted Cheek, was diagnosed with Lou Gehrig's disease. Ted passed away earlier this year. As she struggled to come to terms with his illness, Lisa says she was troubled by regrets about her past, and the trials her parents went through as she tried to find herself.

The story is not autobiographical, although Lisa says there are definitely parts of herself in Gracie. "To say I put my parents through their paces in my younger years is an understatement," she says with a rueful chuckle. "But through it all, they were always there for me. My dad was very much my hero and stood by my side and helped me get my life together, so it really threw me for a loop when he was diagnosed," she says. "I had a tough time with the guilt and feeling bad about it and wishing I could go back and change things."

Without giving too much away, Illuminating Gracie delves into this idea of the ultimate "do-over." One evening, Lisa says, she simply picked up a pencil and paper, and began to write. She spent the next several months writing the story out by hand. Somewhere in the back of her mind, she says, she started writing the book as a sort of self-help book for young adults. Lisa started thinking about how to write something that might impart a message—"You're not alone. Look inside yourself."

"I had this idea of it also being kind of a warning, like be careful about the decisions you make. But what 18-year-old is going to read a self-help book? At that age, you know everything," she says with a laugh. "But because I'd never put pen to paper on it, it was just

an idea. So how could I get this type of information to young people, without it coming across as preaching?"

Influenced by popular Young Adult Fiction that has been embraced by people of all ages, and which she herself enjoys, like the Twilight series and The Hunger Games, the story began to take an otherworldly turn. However, unlike some other fiction that takes its inspiration from those types of stories, Lisa's characters are much more based in faith. Lisa says she is not really sure how this came to her, except that it grew out of this idea of the literal and figurative "fighting your demons." It just leant itself to the idea of angels and demons," she explains. "I wanted to impart a source of light and hope as opposed to a lot of the dark stuff I was seeing out there. This book certainly has dark elements in it, in Gracie's depression and her negativity, so helping her to overcome that. I really think the Lord put it in my heart and in my head and that's what came out on the paper. Every day I got up, the only character I knew was Gracie, and I almost didn't know what was going to happen to her until it came out of my pencil," Lisa says.

Lisa says she doesn't define the book as strictly Christian fiction, but does hope it can be inspirational. "There has to be a gulf between clearly Christian fiction and then on the other side, no spiritual value—drugs, sex and rock n' roll," she explains with a laugh. "Maybe there's room to fill that gap between the two. Illuminating Gracie is not written in a way that would alienate someone who isn't necessarily a Christian from reading it and getting something out of it. But there's a spiritual message to it, and it's something that young people are interested in—this otherworldly type subject, and where do I fit in in the world?"

Lisa hopes that young people will like the book, but she also feels that people of all ages would enjoy the story. "First and foremost, I just hope readers have a good time. I meant it to be fun and entertaining, and I hope kids that read books like Twilight read it and enjoy it just on the top level. And then I hope that people both young and old read it and if they need to see something else in it, if they need to see themselves in it, or hope in it, or that it's never too late to change, they can. Who hasn't, at some point in their life, wished for a

chance to do things differently?" she says. "It's something sort of universal in us."

Illuminating Gracie is available in paperback through online booksellers Amazon and on CreateSpace. It will soon be released for the Kindle. Lisa already is working on a sequel, which will follow Gracie into high school and explore issues of popularity, peer pressure, and the challenges young people face trying to be accepted and figure out who they are. You can follow Lisa's blog through the website www.illuminatinggracie.com. If you would like more information about Lisa's book, contact Kim Carr Public Relations at 334-320-6752.

BOB ESDALE RETIRES AS CLERK OF THE ALABAMA SUPREME COURT

Bob Esdale was honored on June 18th as he prepared to retire from his position as Clerk of the Alabama Supreme Court. Bob has served with distinction in that position for the past 30 years. His retirement was effective on June 30th. A ceremony recognizing Bob's long and distinguished career was held in the rotunda of the State Judicial Building on Dexter Avenue. It was attended by present and former Supreme Court justices, including current state Chief Justice Roy Moore. Many past Presidents of the Alabama State Bar were in attendance. Among many tributes, a portrait of the retiring clerk was presented to the court by Montgomery lawyer Walter Byars, a past Bar president, on behalf of a group of Alabama lawyers. The portrait will hang in the judicial building.

As clerk of the court, Bob was responsible for filing and maintaining court records, financial files, employee records and copies of legal documents. But beyond the basics, he was responsible for coordinating the many activities of the justices and their staffs. That's a job that requires a great deal of finesse, organization and people skills. Perhaps, Bob's greatest asset may be his ability to get along with lawyers on both sides of the litigation bar. He has had the unique ability to keep all of these lawyers "reasonably happy!"

During the course of his career, Bob served with eight chief justices and 30 associate justices. He watched the judicial system move from paper to electronic systems of record keeping. The ability to work well with courts made up of majority Democrats and majority Republicans served Bob and the people of Alabama well.

Bob is a member of the Saint Mary's on the Highlands. He is married to the former Susanne Sageser Flack, and they have six children: Graham, James, and Phillip Esdale,

Mary Masoner, Wesley Winebrenner, and Hunter Flack. We are pleased to have one of Bob's sons, Graham, in our firm. Graham is a shareholder in our Personal Injury / Product Liability section. Bob Esdale, a good man, has had a tremendously successful career. He will be missed at the Supreme Court. We wish him the very best in his retirement.

Source: *The Montgomery Independent*

XXII. FAVORITE BIBLE VERSES

My long-time friend Horace Powell, who is from Prattville, Ala., sent in his favorite verse. Horace was a highly successful high school football coach. Currently, he is a New York Life Insurance agent. His son Chip played defensive back for Auburn under Coach Pat Dye and to quote the coach, he was "a good one!"

For I know the thoughts that I think toward you, says the Lord, thoughts of peace and not of evil, to give you a future and a hope.

Jeremiah 29:11

Another good friend, Les Henderson, who is a retired banker and business owner, also furnished a verse for this issue. Les attends St. James United Methodist Church.

Fear not, for I am with you; Be not dismayed, for I am your God. I will strengthen you, Yes, I will help you, I will uphold you with My righteous right hand.'

Isaiah 41:10

Lisa Cheek Temple, who is featured in this issue, sent in a verse that she says inspired her to write her first novel. Lisa is a dedicated Christian who "walks the walk" daily.

Let your light so shine before men, that they may see your good works and glorify your Father in heaven.

Matthew 5:16

Eric Armster, who serves as Urban Area Director with the Fellowship of Christian Athletes, sent in two verses for this issue. Eric does a tremendous job of ministering to young people in our state. The FCA is doing the Lord's work throughout the country and that is certainly true in Alabama. Thousands of young people are directly affected by the

FCA's mission in our state. The organization is blessed to have my friend Eric on board.

For God so loved the world that He gave His only begotten Son, that whoever believes in Him should not perish but have everlasting life.

John 3:16

Have nothing to do with the fruitless deeds of darkness, but rather expose them.

Ephesians 5:11 (NIV)

XXIII. CLOSING OBSERVATIONS

I have been a longtime fan of the folks who operate the highly successful Chick-fil-A chain in the U.S. These folks have their priorities in order and they do things the right way and for the right reasons. I have been especially impressed with how well the bosses treat their employees. Libby Wilbanks, who worked with me for 25 years before moving to Georgia, sent me an interesting article recently on Chick-fil-A. It is right on target!

Christianity In The Workplace

"But seek ye first the kingdom of God, and his righteousness; and all these things shall be added unto you."—Matthew 6:33 NIV

Practicing Christianity inside the walls of the church is one thing. In fact, it's probably the easiest place to act "Christ-like." Practicing Christianity in the secular workplace is an altogether different thing. The following story is about a company who has refused to compromise their Christian principles, regardless of what the world says.

Chick-fil-A has grown to be the second largest chicken chain in America. Some would say it's the food. Others would point to its clever advertising. (Let's face it, there is something appealing about seeing a cow beg you to "Eat Mor Chikin.") But, Founder Truett Cathy has a different view. He declares that the secret of his success is the company's high quality of people and their attention to customer service.

How do they attract such people? Truett

says it all goes back to Chick-fil-A being closed on Sundays. Truett believes everyone should have a day off a week—for church, rest, or to enjoy family. Restaurant professionals appreciate that lifestyle and are attracted to the company. Accordingly, Chick-fil-A has attracted outstanding teams—many industry experts will say its people are the best in the food industry.

And what do the employees say? In an industry known for its high turnover (50 percent annual turnover for managers is not unusual), Chick-fil-A experiences a turnover of just 3 percent. "It was not hard to decide to close on Sunday," said Truett Cathy. Dan Cathy, President and COO of the company, says, "Jesus Christ did not die for a company, He died for individuals, personally." The company wants to operate on Biblical principles and acknowledge the Lord in all ways.

Now, that's what I call putting the Lord first, even in business!

All of us who are in business could take a lesson from the Chick-fil-A folks. They aren't afraid to put God first in their business and aren't concerned with any criticism that comes their way as a result. I commend them for their stand!

MONTHLY REMINDERS

If my people, who are called by my name, will bumble themselves and pray and seek my face and turn from their wicked ways, then will I bear 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

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

XXIV. PARTING WORDS

Sara and I went out of town for the weekend recently and got back to Montgomery on a Sunday morning. Since it was too late for us to make it to our church, we decided to watch a television sermon on WSFA. Dr. Lawson Bryan, the lead pastor at First Methodist Church in Montgomery, was preaching that day. His sermon was one of the best that I have ever heard. It hit the nail squarely on the head and was one I needed to hear.

Lawson very clearly laid out the responsibility for every Christian to spread the gospel message. He reminded me of Jesus' instruction to his Disciples to take the gospel message to all people throughout the world. I

must confess that I haven't always carried out that mandate. There have been times when I was concerned that folks would consider a person sort of weird if he or she told them about Jesus. In his sermon, Lawson discussed the story of Jesus' meeting with His disciples after His resurrection. The message from this meeting, as told by John, was as follows:

This is the word of God, and it WILL change your life. It is written: On the evening of that first day of the week, when the disciples were together, with the doors locked for fear of the Jewish leaders, Jesus came and stood among them and said, "Peace be with you!" After he said this, he showed them his hands and side. The disciples were overjoyed when they saw the Lord. Again Jesus said, "Peace be with you! As the Father has sent me, I am sending you." And with that he breathed on them and said, "Receive the Holy Spirit. If you forgive anyone's sins, their sins are forgiven; if you do not forgive them, they are not forgiven."

John 20:19-23

It was very clear that God had sent His Son Jesus and that Jesus was sending His disciples to carry on the work. Lawson ended the sermon with this powerful prayer:

O God, the Holy Spirit, come to us, and among us, come as the wind, and cleanse us; come as the fire, and burn; come as the dew, and refresh; convict, convert, and consecrate many hearts and lives to our great good and to Your greater glory; and this we ask for Jesus Christ's sake. Amen.

Breathe On me, Breath Of God

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