THE JERE BEASLEY REPORT

SEPTEMBER 2014

Beasley Allen

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Attorneys at law

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I. CAPITOL OBSERVATIONS

Public Justice Recognizes Toyota Litigation Trial Team

In previous issues, I have made reference to our work on behalf of the Bookout and Schwarz families in their fight for justice against Toyota in the sudden unintended acceleration lawsuit. Our trial team, along with Larry Tawwater of The Tawwater Law Firm in Oklahoma City, Okla., and Paul Martin of Martin Jean Jackson in Ponca City, Okla., were selected as finalists for the 2014 Public Justice Trial Lawyer of the Year award. The team from Beasley Allen ncluded Cole Portis, Graham Esdale, Ben Baker and this writer. Together, we led the charge against Toyota in *Bookout v. Toyota Motor Corp.*, the first suit to go to trial against Toyota tying sudden unintended acceleration to electronic throttle control problems. This case is recognized as the game-changer in this litigation. It was the one case that brought about a successful conclusion to the Toyota litigation.

When thousands of Toyota Camrys were suddenly and unexpectedly accelerating, the company reacted by blaming the incidents on individual parts of the car: first floor mats, then so-called sticky pedals. But, according to Toyota documents and testimony before Congress, these problems only accounted for 16 percent of the sudden unintended acceleration complaints. The problem was actually bigger: the software in the Toyota Camry that controlled the electronic throttle system was poorly designed and did not conform to industry standards. One of those Camrys that suddenly accelerated was owned by Jean Bookout. Mrs. Bookout was injured and her passenger Barbara Schwarz killed in a September 2007 crash.

The jury's October 2013 verdict in this landmark acceleration case—awarding $3 million in compensatory damages and finding that the Plaintiffs, because of Toyota being found guilty of "reckless conduct," were entitled to punitive damages—not only led Toyota to settle the case for a confidential amount before the jury could determine the amount of punitive damages, but caused Toyota to try to reach a global settlement of the hundreds and hundreds of cases pending in multidistrict litigation proceedings.

According to Public Justice, the Trial Lawyer of the Year award honors lawyers who take great risk and overcome incredible odds to advance the common law, to make new law, and to win justice for their clients and for the common good of the public. The finalists were honored and the award presented at the annual Public Justice gala in Baltimore, Md., on July 27. A full list of the nominees and more information can be found at www.pulicjustice.net. I hope you will take a few minutes to look over the Public Justice website and also visit our YouTube channel to view a very good video (2014 Trial Lawyer of the Year Finalist—*Bookout v. Toyota*) put together by Dave Tavani and the folks at Rich Tolsma Productions.

Montgomery Circuit Judge Makes Important Ruling In Payday Lenders' Lawsuit

Montgomery County Circuit Judge Truman Hobbs, ruling last month in favor of the Alabama State Banking Department, dismissed a lawsuit filed by several payday lenders in 2013. Judge Hobbs' order stated "there was no conflict between the [payday lending] statute and the [State Banking Department's] regulation." This will give the Banking Department the tools necessary to ensure payday lenders adhere to the law. Without any doubt, this is a major step in the right direction.

Shay M. Farley, legal director at Alabama Appleseed, spent a great deal of time gathering documents and meeting with the State's lawyers preparing to testify as the Department's expert witness. Now, the group's attention can turn to the enactment of meaningful legislative reforms. It's high time that all consumer advocacy groups take a stand against loan scams. The legislature must end triple-digit interest rates and require lenders to examine a borrower's ability to repay before knowingly saddling them with insurmountable debt.

If you live in Alabama, and agree with the need to better regulate these predatory lenders, let Gov. Bentley and your legislators know how you feel. Judge Hobbs is to be commended for rendering the badly needed order that will help protect persons doing business with the payday lenders.

Source: *The Montgomery Advertiser*

The Fair Pay And Safe Workplaces Executive Order

On the last day of July 2014, President Obama signed an executive order that binds prospective government contractors to stronger labor laws, called the Fair Pay and Safe Workplaces order. One part of the order requires transparency about a company's history of labor violations, requiring companies seeking contracts of $500,000 or more to make any of its previous labor law violations public. This is designed to push companies to resolve back wage claims and other labor disputes.

But that's not even the exciting part. The order also prohibits companies pursing federal contracts of more than $1 million from requiring their workers to sign mandatory arbitration agreements, usually as a condition of employment. Forced arbitration strips workers of their right to sue their employer for labor violations, steering complaints to an intermediary (in most every case chosen by the company) that hears both sides of the dispute and decides the case.

Paul Bland, executive director of Public Justice, calls the order "one of the most important positive steps for civil rights in the last 20 years." President Obama did something that was long overdue when he signed

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this monumental executive order that will protect millions of American citizens.

The following is a statement from Lisa Blue Baron, American Association for Justice President, on the announcement of the Fair Pay and Safe Workplaces executive order. Lisa explains the significance of this highly important action by the president.

> *We are pleased and strongly encouraged by the announcement of the Fair Pay and Safe Workplaces executive order, which will restore access to justice for millions of Americans whose rights have been eliminated by the abusive practice of forced arbitration. For far too long, corporations have used forced arbitration to deny Americans their Constitutional and statutory rights by kicking employees and consumers out of court and sending them to a dispute mill that is rigged, secretive, contains virtually no right to appeal, and consistently favors corporate America.*
>
> *This executive order is a tremendous victory for all employees of big corporations that do business with the government. Now workers will be able to enforce their rights to be employed in a workplace free from discrimination. "Still, there are other fundamental federal and state laws that workers will not be able to enforce in court because of forced arbitration. Forced arbitration also prevents credit card users, nursing home residents, service members, and students from holding corporate wrongdoers accountable. We must continue the fight to ban forced arbitration in all contexts, otherwise there is nothing to prevent corporations from eviscerating Americans' rights with the fine print."*
>
> *The Fair Pay and Safe Workplaces executive order prohibits corporations with federal contracts of $1 million or more from subjecting their employees to forced arbitration for accusations of employment discrimination or civil suits related to sexual assault or harassment. This prohibition extends to all employees—not just those performing work related to the federal contract.*
>
> *The Department of Labor estimates that there are roughly 24,000 businesses with federal contracts, employing about 28 million workers. In addition to the ban on forced arbitration for disputes under Title VII, and sexual assault and harassment, the executive order will:*
>
> *Require prospective contractors and their subcontractors to disclose labor law violations from the past three years before they are awarded a federal government contract; ensure that corporations that repeatedly violate the rights of their employees and disregard workplace safety don't receive federal government contracts; require corporations to provide employees with information concerning their hours worked, overtime hours, pay, and any additions to or deductions made from their pay so employees can be sure they're getting paid what they're owed.*
>
> *Because corporations with workplace violations are more likely to encounter performance problems, the president's action will also improve the efficiency of federal contracting and result in savings to American taxpayers.*

President Obama is to be commended for taking this action. No longer can the overwhelming majority of companies doing business with the federal government hide behind forced arbitration and use it as a shield when their employees are victims of wrongful conduct.

Source: Sarah Jones; American Association for Justice; 202-684-9582; sarah.jones@justice.org

II. THE ONGOING SAGA OF THE GENERAL MOTORS SAFETY PROBLEMS

The Melton Lawsuit Moves Forward

During a Saturday hearing on August 9, Judge Kathryn Tanksley denied GM's motion to dismiss the wrongful death and fraud lawsuit filed against General Motors (GM) by the Melton family in Georgia state court. The lawsuit, which has been described by the media as the "linchpin" of the GM litigation, alleges that GM committed fraud when it negotiated a settlement agreement with the Melton family late last year.

As we have written, in February, GM finally began recalling vehicles affected by the ignition switch defect, which the automaker had covered up for more than 10 years. All who keep up with the news known now that the defect causes power steering, brakes and airbags to be deactivated and creates a very dangerous hazard. The Melton case has been given credit—and rightfully so—for bringing about the massive recalls and bringing GM's wrongful conduct to the attention of the National Highway Traffic Safety Administration (NHTSA) and Congress.

After learning that GM did, in fact, know about an ignition switch defect, Ken and Beth Melton, parents of 29-year-old Brooke Melton, who was killed in the 2010 crash of her Chevy Cobalt linked to the ignition switch defect, asked that their settlement be rescinded. They refiled the current lawsuit on behalf of their daughter on May 12. Their goal in this lawsuit is to uncover what GM knew about the defect and about the hundreds of deaths and injuries that were caused by it. GM unsuccessfully attempted to move the Melton case to federal court. However, in July, U.S. District Judge Thomas Thrash, Jr., ruled the case should be handled in a Georgia state court.

We will now be able to proceed with extensive and badly needed discovery in the Melton case. Judge Tanksley ordered GM to produce all of the documents relating to the ignition switch defect by late September. We expect that GM will fight the Meltons every step of the way as this case moves forward. For example, GM is asking Judge Tanksley for permission to file an appeal at this early stage of the litigation. Of course, we have opposed GM on this request and we don't believe it will be granted. Then we learned late last month that GM plans to ignore the court's order relating to discovery.

GM does not want to put any of its "key folks" up for deposition. Neither does the automaker want the Melton litigation team to have access to certain documents that will prove how truly bad the company has been. The bottom line is that GM will do its best to avoid complying with discovery requests in the Melton case. In fact, because GM's lawyers don't intend to comply with Judge Tanksley's order requiring document production, the discovery battle is on. It will be a real battle and we look forward to the fight.

Lance Cooper, Who Uncovered GM Ignition Switch Defect, Has Been Selected To Serve On MDL Executive Committee

U.S. District Judge Jesse M. Furman has named the lawyers who will head up the General Motors multidistrict litigation (MDL) related to claims surrounding the defective ignition switch. Selected as co-lead counsel are Steve W. Berman, Elizabeth J. Cabraser and Robert C. Hilliard. Judge Furman also filled out the rest of the leadership team, which includes the 10-member executive committee. Lance Cooper, the Georgia lawyer who uncovered the defect, and is directly responsible for exposing GM's cover-up, resulting in massive recalls, was named to the executive committee.

It's widely recognized that without Lance's work in the Melton case the defect would not have been revealed by GM. The automaker had successfully engaged in a cover-up of the known defect and the hundreds of deaths it caused for more than10 years. It's quite appropriate that Lance should be in a leadership role.

GM Attorneys May Be Subject Of Probe Over Pre-Recall Evidence

It has been reported that the U.S. Department of Justice is investigating General Motors (GM) attorneys for hiding evidence of the faulty ignition switch that led to massive recalls. This appears to be a part of a bigger criminal probe into misleading statements GM executives have made to regulators. The concealment of evidence delayed recalls of vehicles with the defective switches. There can be no doubt about that. It will be interesting to see which attorneys are involved in this probe.

A Brief Review Of GM Recalls

The number of cars in North America that GM has called back for repairs related to the defective ignitions has now passed 17 million. That's more than the 9.71 million vehicles the Detroit-based company sold worldwide in 2013. The National Highway Traffic Safety Administration (NHTSA) investigation into GM's actions involving the ignition switch defect already show the company had evidence of a safety defect that it covered up and hid from government investigators for years. NHTSA's acting administrator, David Friedman, confirms this in an emailed statement. He said further:

> *GM knew about the safety defect for years, did not report it as required by law and did not take action to protect Americans from that defect until earlier this year. GM's decision-making, structure, process, and corporate culture stood in the way of safety at a time when airbags were failing to work properly in millions of GM products.*

This GM debacle may wind up being the worst performance involving safety issues by an automaker in U.S. history. GM's massive cover-up of a safety hazard caused by a defect known to the automaker could send a number of folks to jail. If that happens, it would be "complete justice" and would send a needed message to the automobile industry!

GM Faulty Ignition Victim Compensation Fund Accepting Claims

The GM compensation fund, which was up set up to pay for deaths and injuries caused by its vehicles with faulty ignitions, is now accepting claims. As we have previously reported, the five-month filing period that began on Aug. 8, 2014, is being administered by Ken Feinberg. Drivers, passengers and pedestrians killed or hurt by one of the defective GM vehicles can file a claim through Dec. 31.

GM said it had absorbed a $400 million charge to cover the potential payments to be made by the fund. The amounts paid out could run even higher because the fund has no cap. The automaker has advised investors that it might have to set aside an additional $200 million to compensate the victims of its wrongdoing. About 309 claims had been filed with the Fund as of Aug. 22, including 107 death claims. Camille Biros, a lawyer in Mr. Feinberg's law firm, who is experienced in this sort of work, is working with Mr. Feinberg on the GM project. The fund covers a range of defective GM vehicles, including the Chevrolet Cobalt and Saturn Ion. But he should be noted that lots of cars with the identical defective switch are not included in the fund. In my opinion, GM made a mistake in restricting the fund.

Source: *Claims Journal*

Rental-Car Companies Pushed GM On Fatal Crashes Before Recall

There can be little doubt that for more than 10 years General Motors covered up a safety-related defect that killed or injured hundreds of innocent people. Not only did GM know about the defect as early as 2003, it actually received numerous notices of the tragic events the defective ignition switch was causing. For example, General Motors was put on notice of a fatal crash involving a new Chevrolet Cobalt rented from a rental-car company in 2006. This was more than seven years before GM began the biggest wave of motor vehicle recalls in U.S. history.

An investigator for Vanguard Car Rental USA contacted GM about the fatal rollover crash that happened in California. A driver in the Cobalt rented from Vanguard's Alamo unit lost control of the car in September 2006. Traffic had been light, according to the police report, when the sedan drifted across lanes, got caught in a gravel median and rolled over. The driver's seat belt was buckled and the air bag failed to deploy. Even though the driver was killed, and GM definitely knew about it, the National Highway Traffic Safety Administration (NHTSA) was not notified by the automaker. The recalls, as we all know, didn't start until this year—more than seven years later—which is totally inexcusable.

There was enough evidence provided to GM by the Vanguard claims adjuster to put the company on notice of a safety problem. It was stated in a letter to GM: "Due to the serious nature of this accident we feel that it is imperative that you open a claim and inspect this vehicle for possible defects." But Vanguard wasn't alone in its concern. GM customer-service call transcripts, warranty records, letters and police reports obtained by *Bloomberg News* reveal that Clayton-based Enterprise also was pressing GM about a potential Cobalt defect because air bags in the cars were failing in routine crashes. In 2007, Enterprise bought Vanguard's Alamo and National brands. Avis, Budget and Hertz also had Cobalts in their fleets and those cars also were crashing.

GM has no explanation—other than the obvious cover-up—for why no recalls were issued prior to 2014. Files obtained by Bloomberg News are among scores of exchanges between GM and NHTSA over an eight-year period beginning in 2005 involving cars stalling and air bags not deploying in crashes. In the files GM submitted, there were 30 crashes involving 37 fatalities in the Cobalt and the Saturn Ion. The victims' names were redacted. The number of deaths will be at least 300 according to reliable sources.

Source: STLToday.com

A Rather Weird Statement By GM To SUV Owners

General Motors (GM), as all Americans who watch the evening news or read a newspaper know, has been busy in the past several months dealing with all of its safety problems. The automaker has had to issue warnings about all of the defective vehicles it has on the road and those numbers grow daily. But the latest warning sent to GM vehicle owners may be the weirdest of all. The automaker has SUV owners concerned, according to a report by CBS News, and that's because SUVs could catch on fire. GM warned them that they shouldn't park their vehicle inside a garage.

After reflecting on the warnings given by GM, I suppose it really is better to let a GM SUV burn outside rather than in a garage. That would save the burning down of a house and, more importantly, could save the lives of occupants in case of a night fire that would involve the house.

Approximately 169,000 vehicles are affected, sold between 2006 and 2007, including the Chevrolet TrailBlazer, GMC Envoy, Buick Rainier, Isuzu Ascender and Saab 97-X. GM announced six recalls on June 30 that covered 7.6 million vehicles. GM says parts won't be available for the SUVs until October.

Source: AL.com

GM Knew Of Seat Bolt Issue In 2013

The ignition switch problem is not the only area where GM is having safety issues. According to The National Highway Traffic Safety Administration (NHTSA), in 2013 General Motors knew of at least 27 complaints about faulty power driver seats in a number of vehicles before bringing the issue to the agency's products investigation team in May of this year. This is just another example of how little attention GM paid to known safety defects and how it hides damaging information from public view. This led to the recent recall of 414,000 vehicles for defective bolts. In a recall notice from NHTSA, GM said it first learned of the issue in April 2013, after its engineering team identified a noise complaint on a pre-production durability test vehicle. Subsequently, the automaker received more than two dozen consumer complaints over the issue, but NHTSA products investigators were not notified for more than a year.

GM sent a notice of the recall of 414,333 vehicles in late July. The following vehicles are in the recall: Chevrolet Camaro and Equinox, GMC Terrain, Buick Regal and LaCrosse, and Cadillac SRX vehicles. All are from model years 2010-2012, and involve the bolt that secures the power height adjuster. The bolt can become loose and fall out. NHTSA said in a statement:

> *In the affected vehicles, the bolt that secures the driver's and passenger's power front seat height adjuster may fall out causing the seat to drop suddenly to the lowest vertical position.*

GM told NHTSA in its July 22 recall notice that when the issue was first discovered at one of its pre-production facilities, engineers found the issue stemmed from a clamp condition on the seat's height adjuster spindle bolt and seat cushion frame caused by poor extrusion on the bracket, which caused the bolt to become loose but not fall out. Interestingly, the engineers considered the issue to be a "customer annoyance." But in July, the company was notified of a customer claim regarding a 2011 Chevrolet Camaro, stating that the power driving seat moved while driving, causing a rear end collision with another vehicle. The company determined the bolt in question actually fell out in this case, and soon learned that 27 cases of loose or missing height adjuster bolts had been recorded as of September 2013. GM said in its notice:

> *There were no other claims identified involving crashes or injuries and no effect on vehicle safety was determined.*

For reasons known only to GM, the automakers didn't assign an investigator to look into the issue until May. During the investigation, an elevated rate of claims for vehicles built beginning in July 2010 through July 2011 was identified. It was discovered by the investigator that a component supplier source change occurred in October 2010 and that GM didn't begin using parts from a new supplier until July 2011. After GM began using the new supplier, the number of complaints went back down, according to the notice.

Source: Law360

Troubles For GM Continue To Grow At An Alarming Rate

While most of the news surrounding General Motors has, of late, rightly focused on recalls and accidents caused by the company's defective ignition switch, those aren't the only troubles the automaker is facing. According to a filing dated August 4, 2014, General Motors Financial Company, Inc. (GM Financial), was served with a subpoena by the U.S. Department of Justice (DOJ). The DOJ is seeking documents relating to GM's automobile loan contracts dating back to 2007. Specifically, DOJ is looking for potential violations of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) in contemplation of a civil proceeding relating to possible subprime lending by GM Financial.

The FIRREA is a federal law spawned as a result of the savings and loan crisis of the 1980s, when a multitude of savings and loan executives went to jail for their financial crimes. In the subpoena, DOJ asked, among other things, for information relating to the underwriting criteria used to originate the automobile loans, along with the representations and warranties relating to those criteria.

Warning signs that subprime automobile lending is on the rise abound. *The New York Times* reported in July of this year that subprime auto-lending has increased 130 percent in the five years since the financial crisis (which many blame largely on subprime mortgage lending); last year, roughly one in four auto loans went to borrowers that were considered subprime. *The New York Times* also examined more than 100 bankruptcy court cases, dozens of civil lawsuits against lenders, and hundreds of loan documents and found that subprime auto loans can come with interest rates that can exceed 23 percent. The loans were typically at least twice the size of the value of the used cars purchased, including dozens of battered vehicles with mechanical defects hidden from borrowers.

Such loans can thrust already vulnerable borrowers further into debt, even propelling some into bankruptcy, according to the court records, as well as interviews with borrowers and lawyers in 19 states. In another echo of the mortgage boom, *The Times* investigation also found dozens of loans that included incorrect information about borrowers' income and employment, leading people who had lost their jobs, were in bankruptcy, or were living on Social Security to qualify for loans that they could never afford.

As for GM, this isn't the first time the Justice Department has looked into GM Financials' lending practices. In December, Ally Financial, GM's former financing arm, agreed to pay $98 million to resolve claims that it charged minority borrowers a higher interest rate than white borrowers.

In the last few years, DOJ has been exercising its authority under the FIRREA to investigate subprime mortgage lending, but this is the first known look at the automobile industry. FIRREA grants the government broad powers to bring civil claims and has more relaxed requirements for establishing liability than commercial fraud statutes. The Act was used in the wake of 2008 to prosecute liability for the crisis and specifically targeted financial institutions that misrepresented the quality of loans.

If the subpoena to GM Financial reveals evidence of subprime lending, this DOJ investigation could sweep up more automobile manufacturers. If you need more information, contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

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III. MORE AUTOMOBILE NEWS OF NOTE

Electronic Defects Are The Future Of Product Liability Litigation Against Auto Manufacturers

In years past, lawyers handling product liability litigation involving the automobile industry were primarily concerned with visible defects in automobiles, such as faulty airbags, seatbelts, and cabs. Although these safety components are still important, and will continue to be a part of automobile litigation, there is a new “invisible defect” lurking on the horizon. With the recent and ongoing incorporation of electronic technologies into automobiles, lawyers like those in our firm can expect the focus of litigation to change. While new technology has, in some ways, made automobiles safer, this new technology also is causing safety problems for drivers and passengers. We believe that the wiring and sensors, the software, and the security concerns that come along with this technology will become the focus of future automobile product litigation.

It should be noted that modern cars contain more than three miles of wiring. Weighing in at heavier than 150 pounds, wiring is the third heaviest component in a car. Sensors are attached to these wires and measure physical conditions, such as impact, occupant presence in a seat, and seatbelt use. The sensor then reports this information to an electrical component that makes important safety decisions, such as whether to deploy an airbag. The most prominent wiring defect is its susceptibility to water accumulation, which can affect all sorts of important functions on your car. For instance, last year, Toyota recalled 2012-2013 vehicles because water accumulation was causing wiring to short circuit and resulting in airbags either not deploying when they were supposed to or inadvertently deploying. This water accumulation was also causing loss of power steering.

Software is the second major area of concern in modern auto litigation. Today, an average car has around 25 computers that are talking to each other and using the information they get from sensors to make safety decisions for the driver. The software that runs these computers can contain bugs that cause unwanted effects. An example of this is the Toyota unintended acceleration claims. Our firm recently handled one of these cases. In Bookout v. Toyota, lawyers in our firm’s Product Liability Section, Jere Beasley, Graham Esdale, Ben Baker and Cole Portis, successfully settled with Toyota after a jury found that the defective software in our client’s car caused unintended acceleration. Defective software is now prompting recalls from Honda and Toyota for unexpected braking.

The third, and perhaps the most frightening area of concern in automobile defects, is the potential for hacking. All computers are vulnerable to hacking. With an increase of computers being used to control cars, it is only logical that hackers will eventually find a way to control cars remotely without your permission. The security defects will surely lead to complex litigation against manufacturers in the future.

For Plaintiff’s lawyers, this means that we must stay alert to the possibility that accidents and injuries are not always caused by a visible defect in a car. We have to start looking beyond the physical damage of the car and into the electronics to make sure that the wiring, sensors, software and security in the car were not the real cause of the accident.

Lawyers in our firm have been heavily involved in Toyota’s Sudden Acceleration Litigation for several years. We learned a great deal during that litigation about the electronics issues. Our lawyers who handle products liability cases involving motor vehicles believe that this new area will create a great deal of litigation. We have developed the expertise in this area so that our Personal Injury/Products Liability Section can be ready for what’s coming.

If you have any questions concerning this topic, please contact our Personal Injury/ Product Liability Section Head, Cole Portis, at Cole.Portis@beasleyallen.com. Cole is involved in the Toyota and GM litigation and is totally familiar with this area of concern for the driving public.

$3.3 Million Verdict Against TRW In Faulty Air Bag Lawsuit

A jury in Nevada returned a $3.3 million verdict against air bag control maker TRW Automotive US LLC last month. Nicole Thompson, who was 19 years old in 2007 was the plaintiff in this case. She suffered a massive stroke following an accident in 2007 in which her air bags didn’t deploy. TRW knew there were deployment problems with the air bags in some of its cars, including the model installed in her 1998 Dodge Neon. The jury ruled in favor of the Ms. Thompson, who was partially paralyzed and lost a college scholarship because of her injuries. She has had a most difficult time.

Ms. Thompson was driving about 27 miles an hour when the crash occurred. The seatbelt that was supposed to hold her, instead spooled out, allowing her body to be thrown forward on impact. The air bag never deployed. TRW manufactured the air bag electronic control module that was installed by Dodge into the car.

Ms. Thompson is represented by Edward J. Achrem of Edward J. Achrem & Associates and Clay Robbins III of Magana Cathcart & McCarthy, a Los Angeles firm. They did a very good job for their client in this case, which was tried in the U.S. District Court for the District of Nevada.

Source: Law360.com

NHTSA Steps Up Investigation Of Honda Air Bag Problems

The National Highway Traffic Safety Administration (NHTSA) has started an engineering analysis involving the safety problem in 2008 Honda Accords that can cause air bags to deploy when a front-seat passenger shuts the door. It’s believed that this problem has caused more than a dozen injuries. This action by NHTSA is the result of an investigation by the agency’s Office of Defects Investigation (ODI). The task force found nearly 300 incidents of air bags deploying unnecessarily in 2008 Honda Accord four-door vehicles, an issue that has injured at least 14 people, according to NHTSA.

Thus far NHTSA’s investigation has shown that the driver or passenger-side air bags can activate when one of the front-seat occupants shuts their door. The agency said in its defect investigation update:

> *An engineering analysis has been opened to determine, among other things, the risk of air bag deployment injuries to vehicle users in vulnerable positions.*

Honda Motor Co. took steps to address the potential problem in certain vehicles in 2008 when it adjusted certain crash thresholds to account for the force of shutting doors, according to the NHTSA. It made those software design changes for vehicles made in the U.S. and Japan, according to the agency.

NHTSA launched a separate investigation in July into air bags made by Takata Corp. This came after Toyota Motor Corp.’s announcement that it has expanded a previous recall for air bags to include 2.3 million vehicles. As we have reported, Toyota—which said in June that it is recalling 650,000 vehicles in Japan for the problem—isn’t the only company affected by the Takata air bag problems. Last year, more than 3.3 million Toyota, Honda and Nissan Motor Co. vehicles were recalled for a problem with their air bags that could cause them to fail to inflate or explode, sending metal particles into the car’s interior.

Between 2008 and 2011, Honda conducted a series of recalls concerning the driver’s bag inflator ruptures on various 2001 through 2004 models. According to ODI, none of the recalls were regional in nature or attributable to atmospheric conditions in field use. The ODI has also investigated a report of a Chrysler Group LLC Dodge Charger that also had an air bag rupture. The office said three injuries appear to have resulted from the issue. There will be much more to report as the defective airbag saga develops.

Source: Law360.com

Subaru Recalls 5 Models For Takata Airbag Explosion Risk

Subaru of America Inc. is recalling an unknown number of Legacy, Outback, Impreza and Baja vehicles for problems with Takata Corp. airbags, which may explode during use. According to the National Highway Traffic Safety Administration (NHTSA), Subaru is conducting the recall for certain model year 2003 to 2005 Legacy, Outback, and Baja vehicles, as well as 2004 to 2005 Impreza, and 2005 Saab 9-2X vehicles that are currently or have ever been registered in Florida, Puerto Rico, Hawaii and the U.S. Virgin Islands, and equipped with Takata-brand passenger side air bag inflators.

NHTSA said that frontal airbag inflators could rupture during deployment, releasing metal fragments that could seriously injure passengers. Subaru said in a letter to NHTSA that it has not made a determination that a safety defect exists in these vehicles and is not aware of any incidents involving ruptured inflators on the models that will be affected by this parts collection campaign.

Source: Law360.com

Hyundai Sued Over Santa Fe Stalling Defect

A lawsuit involving certain Santa Fe SUV models was filed last month against Hyundai Motor Co. in a California federal court. The automaker was accused of concealing a defect in its models that causes unexpected stalling and subsequent power loss, posing a risk to passengers and pedestrians. The suit, a putative class action, alleges that the Korean automaker has known for years that its 2010-12 Santa Fe vehicles are prone to unexpectedly stalling, which leads to braking and steering problems.

It's alleged that Hyundai intentionally concealed information about the defect from consumers and that the "service campaign" it launched last month to address the defect doesn't remedy the problem.

The suit was filed by the lead Plaintiffs on behalf of themselves and other purchasers or lessors of 2010-12 Santa Fe vehicles. The lead Plaintiffs say their vehicles stalled on multiple occasions under various driving conditions, from heavy traffic on a major street to driving over a speed bump and slowing down to make a right turn.

The suit says Hyundai was aware of the stalling defect at least through incident reports on the National Highway Transportation Safety Administration (NHTSA) website, where vehicle owners detailed various stalling incidents. The complaint also alleges that consumers who complained directly to the automaker about the defect were either told that nothing was wrong with their vehicles or that the problem could not be replicated and therefore couldn't be addressed, or provided with ineffective "fixes."

Source: Law360.com

Hyundai To Pay $17.4 Million Fine Over Its Late Report Of Brake Defect

Hyundai Motor America has agreed to pay a $17.35 million fine for failing to promptly report a brake defect in its 2009 to 2012 Genesis luxury vehicles that caused corrosion and decreased braking effectiveness. U.S. Transportation Secretary Anthony Foxx said in a written statement:

> *Safety is our top priority, and all automakers should understand that there is no excuse for failing to report a safety-related defect, as required by law. This administration will act aggressively and hold automakers accountable when they put the American public at risk.*

Hyundai and General Motors learned about the defect in 2012, when a supplier notified the automakers that certain incompatible brake fluids didn't prevent corrosion on certain important parts of the brake system, according to the National Highway Traffice Safety Administration (NHTSA) consent order with Hyundai. The order says the corrosion could cause the brake pedal to go soft and become less effective, potentially increasing the risk of a crash.

General Motors initiated safety recalls in 67 foreign countries in January and September of 2012 and issued a technical service bulletin to its U.S. dealers in November of that year describing the potential consequences of leaving the defect unfixed. The automaker also notified its customers.

Hyundai issued a technical service bulletin in the U.S. in March 2013, telling dealers to replace the brake fluid in 2009 to 2012 Genesis and Equus vehicles. But the TSB failed to mention the potential safety consequences of not doing so. Hyundai, according to NHTSA, also did not notify customers about the problem. NHTSA opened an investigation in response to consumer complaints about reduced braking effectiveness in Genesis vehicles in October 2013. Hyundai recalled the vehicles less than two weeks later. No serious injuries or fatalities had been reported as a result of the braking problems, according to the NHTSA. Six consumers had reported crashes, including two with apparently minor injuries, the document said.

As part of its agreement with NHTSA, Hyundai admitted it failed to provide notice to the government under the National Traffic and Motor Vehicle Safety Act for the safety-related defect within five working days. NHTSA Acting Administrator David Friedman said in the statement:

> *Federal law requires automakers to report safety-related defects to NHTSA within five days, and neither NHTSA nor the American public will accept anything less. Hyundai failed to act to protect their customers and others that were harmed in an accident, and must change the way they deal with all safety related defects.*

Based on what we have learned in litigation, it appears that automakers make it a practice all too often not to comply with the notice requirements relating to safety defects and resulting hazards.

Source: Law360.com

Settlement By Kia And Hyundai In Fuel Efficiency MDL Is Approved

Hyundai Motor America and Kia Motors America have received approval from a California federal judge for a settlement potentially worth more than $255 million. The settlement will resolve claims made in multidistrict litigation (MDL) that the companies overstated the fuel efficiency of more than 900,000 vehicles. U.S. District Judge George H. Wu approved the settlement. But the judge indicated that he still has significant issues with the proposed class notice. In any event, Judge Wu will certify the class and grant preliminary approval to the settlement. The agreement will resolve dozens of consolidated class actions claiming Hyundai and Kia—U.S. distributors for their Korean parents—touted in advertisements and on miles-per-gallon stickers fuel mileage estimates that their vehicles couldn't achieve.

Source: Law360.com

GM Sued For Alleged Antifreeze Defect In Chevy Cruze Models

A class action lawsuit has been filed by a Chevrolet Cruze owner against General Motors Co., alleging that the automaker concealed defects that allowed antifreeze to leak from radiators in 2011 and later Cruze models, and that this damaged the cars. It was alleged by Plaintiff Sheiah Feliciano that the defect can cause mechanical troubles and create a noxious odor inside the cars. GM allegedly knew about the problems from repeated consumer complaints but did not disclose that its cars were not as reliable as promised.

It appears that car owners have been complaining to GM since at least 2012, according to the complaint. It's alleged that GM issued two service bulletins aimed at fixing the problem. GM continues to tout the Cruze's safety, but fails to tell consumers about the odorous leak. The complaint states:

> *Rather than disclose the truth, General Motors concealed the existence of the antifreeze leakage defect and promised consumers that any known defects had been corrected.*

The allegations in the complaint include claims of false advertising, breach of express and implied warranty, revocation of acceptance, breach of contract, unjust enrichment, fraud and violation of the Magnuson-Moss Warranty Act.

Source: Law360.com

Class Action Lawsuit Filed Against Mazda For Engine Valve Defect

A putative class action lawsuit was filed last month against Mazda Motor of America Inc. in a New Jersey federal court. The lawsuit accuses Mazda of concealing from consumers an engine valve system defect in certain Mazda vehicles. The automaker is accused of refusing to make the required repairs. The suit alleges Mazda falsely advertises and guarantees that its new vehicles are defect-free. It alleges that Mazda knows that some of its vehicles' engines have faulty continuous variable valve-timing assembly, causing its engine's timing chain to loosen or detach, which can lead to partial or total engine failure. Although the defect is covered under Mazda's warranty, it's alleged that the automaker refuses to repair the defect.

Source: Law360.com

NHTSA Offers Online Vehicle Recall Check

NHTSA is offering a free online service for folks to find out if their vehicles have been recalled but not repaired. Drivers can key in their vehicle identification number to get the results. As you probably know, this number can be found on the dashboard near the windshield or on the driver's door post near the latch. Automakers must also keep the same data on their own websites and they will have to update it at least once a week.

IV. A REPORT ON THE GULF COAST DISASTER

BP Seeks Certiorari Review Of The Business Economic Loss Settlement

As anticipated, BP has sought certiorari review before the United States Supreme Court of the Fifth Circuit's business economic loss settlement decisions earlier this year. The oil giant's latest effort is yet another in a long line of attempts to renege on the settlement the company negotiated, wrote and supported publicly just two years ago.

Needless to say, BP's efforts to torpedo its own settlement are nothing short of extraordinary. After failing in the District Court, the company appealed the business settlement under the false pretense that another, undefined and unknown alternative causation parameter should exist in the settlement to tie a business's losses to the oil spill. In reality, it's undisputed that BP's own lawyers negotiated and wrote objective causation parameters and formulas into the settlement. The company lauded these parameters as generous and proof of the great deal class members were getting if they chose to avail themselves of the settlement's benefits.

Now, even after stating in open court that a claimant need not prove losses actually resulted from the oil spill if they met the settlement's negotiated causation parameters, BP wants the Supreme Court to ignore the deal BP made and craft a new one that denies tens of thousands of claimants compensation the company promised to make.

It's quite evident that BP is now at the end of the line. For good reason, both legally and from a moral perspective, the company has lost at every turn and at every stage of this appeal process. While BP's secondary goal to delay and frustrate claimants has worked to some degree, it has been Gulf Coast claimants—many of whom have been waiting years for full compensation—who are suffering. We must all remain resilient and keep in mind the type of company BP is. At the end of the day, we are confident that BP's onslaught will be overruled one more—and one last—time. It's time for BP to quit playing games and learn to keep its word!

Federal Government Releases Rules For Gulf Coast States To Use RESTORE Act Funds

On August 13, the U.S. Treasury Department finally released rules that will allow Gulf Coast states affected by the 2010 BP Deepwater Horizon oil spill to use funds from the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act, or RESTORE Act. The Act, which was passed by congress in 2012, directs fines paid by companies who violated the Clean Water Act during the 2010 BP Oil Spill to be used to help Gulf Coast communities recover economically and environmentally, and to promote tourism in the region.

To date, Transocean has already paid $1 billion to settle the Federal Government's civil penalty claims, and BP and Anadarko face at least $4 billion in civil penalties. These fines will be determined at the end of a civil trial, which is currently underway in U.S. District Court in New Orleans. The penalty phase of the trial is scheduled for January 2015.

The Treasury plans to use 80 percent of the penalties to create the Gulf Coast Restoration Trust Fund, which will serve to help affected states research and clean up the lingering effects of the oil spill. The other 20 percent of fines collected will go into the Oil Spill Liability Trust Fund, which is designed to respond to future oil spills.

States that will receive money from the fund include Alabama, Texas, Louisiana, Florida and Mississippi. Thirty-five percent of the fund will be divided equally among the five states for ecological and economic restoration. Projects will be approved by representatives of each state designated to administer the funds. Florida's share of the fund will be available only to 23 coastal counties.

Thirty percent of the money will be distributed to projects selected by those states and six federal agencies that comprise the Gulf Coast Ecosystem Restoration Council, which was set up to oversee RESTORE Act projects. This money will be used exclusively for ecosystem restoration. Another 30 percent of the money will be distributed to the five Gulf states, depending on how they were impacted by the oil spill.

Finally, 5 percent will go toward state-selected marine research centers and federal monitoring programs, including 2.5 percent designated for a "Centers of Excellence" research grant, for the establishment of a science center.

These rules will provide some help to those coastal communities that were devastated by the oil spill. How much the fund ultimately pays out will be dependent, in part, on the outcome of BP and Anadarko's *en* *banc* contest of a Fifth Circuit order upholding a liability judgment against them. All the while, BP and Anadarko continue their fight with the Federal Government in the Clean Water Act ("CWA") trial phase, which could expose BP to as much as $18 billion in CWA penalties.

The next step in the process will be up to states and municipalities, which must select projects to submit for grants. This process could take several months. For example, the Alabama Gulf Coast Recovery Council already has received 47 project applications totaling around $360 million.

In July, a number of lawmakers were most unhappy with the slow progress of rulemaking. This should have been completed within 180 days of the RESTORE Act's signing in June 2012. Three federal departments were responsible for developing the rules for administering the fund—treasury, commerce and interior. The treasury rules become final in 60 days.

Sources: Al.com, *New Orleans Times-Picayune*, *Pensacola News Journal*, Law 360

V. DRUG MANUFACTURERS FRAUD LITIGATION

Pfizer Pays $35 Million To Settle Rapamune Marketing Claim

Pfizer Inc. has agreed to pay $35 million to a number of states across the country to settle claims by attorneys general that Wyeth Pharmaceuticals Inc. pushed Rapamune, an immunosuppressive drug used to prevent organ rejection after kidney transplants, for off-label uses including liver, heart and lung transplants. The New York-based drug giant has agreed, among other things, not to promote off-label uses for its drugs, not to make unsubstantiated claims about their efficacy—or compare its drugs to others' in the absence of legitimate evidence—and not to influence the prescribing of Rapamune in hospitals or transplant centers. New York Attorney General Eric T. Schneiderman, whose staff led the multistate investigation, said in a statement:

> *Patients and consumers need to have confidence in the truthfulness of claims made to them by medical providers without having to worry about drug companies manipulating the doctor-patient relationship.*

Colorado Attorney General John W. Suthers, in a separate statement, pointed out that Wyeth had been marketing the varied uses of the drug despite several U.S. Food and Drug Administration (FDA) "black box" warnings related to liver, lung and other patients. Attorney General Suthers' office, in a statement, said further:

> *Despite Rapamune's limited FDA approval for use in kidney (renal) transplant only, and despite black box warnings relating to use in lung and liver transplants, Wyeth promoted Rapamune off-label for nonrenal transplants.*

Wyeth misrepresented the range of uses for Rapamune through an orchestrated campaign of promotional talks by Wyeth-retained doctors, the attorneys general said. Prosecutors also alleged Wyeth pushed Rapamune for conversion use—switching a patient from another drug to Rapamune—which was also unapproved, and pushed the drug in unapproved combinations with other medications.

In January 2009 Pfizer agreed to pay $2.3 billion to settle allegations that it improperly marketed its anti-inflammatory drug Bextra. That same year Pfizer bought Wyeth for $68 billion. Pfizer said in a statement that the conduct occurred prior to its acquisition of Wyeth and that the company voluntarily disclosed the conduct to investigators in 2012.

In addition to New York and Colorado, 38 states—Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin—as well as the District of Columbia—will benefit from this settlement.

Source: Law360.com

Taro Settles Medicaid Claims With Texas For $19.5 Million

The State of Texas has reached a $19.5 million settlement with Taro Pharmaceuticals USA Inc. to resolve allegations that the drug company fraudulently reported inflated drug prices to the Medicaid program. Taro will pay $8.75 million to the state's general revenue fund. The federal government is also entitled to part of the settlement proceeds since it jointly funds the Medicaid program with the state. The federal government will receive $8.75 million, with the state keeping the remaining $2 million of the settlement funds for attorneys' fees and costs.

Taro violated Texas law by misreporting the prices of numerous drugs to Medicaid for 11 years. Dozens of pharmaceutical manufacturers have been investigated for reporting inflated drug prices to the Medicaid program since 2000. Drug manufacturers are required under state law in Texas to file reports with the Medicaid program that reveal the prices they charge pharmacies, distributors and wholesalers for their products.

Taro used illegally created spreads—a difference between the reimbursement amount and the actual market price of the drug—to illegally induce pharmacies and other providers to purchase Taro's drugs. Recoveries for the State of Texas by the Civil Medicaid Fraud Division have exceeded $500 million since 2002. The liability theories in Texas were identical to the theories utilized in all of the states that sued drug companies over the Medicaid fraud. Our law firm represented 8 of those states and were able to recover a huge amount of money for the taxpayers.

Source: Law360.com

VI. PURELY POLITICAL NEWS & VIEWS

The National Scene

The battle around most of the country for control of the Senate and House of Representatives in Washington is really heating up. While the general election is still over two months down the road, the campaigns in many states have been going full steam for a very long time. The consensus of belief amongst the pollsters is that the American people are sick and tired of politics as usual in our nation's capital. I didn't need a poll to tell me this. It's as clear as a bell that members of Congress are not "held in high esteem" these days. In fact, their overall approval rating is around 12%. Interestingly, recent polls indicate that Democrats currently have a slight lead over GOP Congressional candidates across the country. More will be written next month on the races for the House and Senate.

The General Election In Alabama

I have decided not to write on the political scene in Alabama until after Labor Day. Thus far, the public has shown little interest in any of the races on the ballot in Alabama. It has been less than dull so far and I really don't expect things to heat up until later this month. There will be a few statewide races that could be fairly competitive.

VII. COURT WATCH

Alabama Supreme Court Rules Makers Of Brand-Name Medications Can Be Held Liable For Warnings On Generic Drugs

The Alabama Supreme Court recently upheld its decision in *Wyeth v. Weeks,* holding that brand-name drug manufacturers can be held liable for injuries caused by their generic counterparts. The decision is great news for Alabamians who have been harmed by ingesting generic drugs, but who have been unable to attain a judicial remedy due to federal regulations governing the ability of generic drug manufacturers to unilaterally strengthen their own warning labels. The ruling is clearly a victory for consumers, but it's very limited in application.

There has been some unjustified criticism of the Court, coming primarily from uniformed sources. *The Wall Street Journal* editorial board jumped on the bandwagon, calling the Supreme Court ruling "dubious" and saying it set a dangerous precedent against innovation. That's totally false and educated folks should know better. This Alabama Supreme Court decision is important because it finally makes a theory of liability available to these plaintiffs who have no other means of redress for the harm they suffer.

The ruling come from a certified question sent to the Court by a federal judge in a lawsuit filed by Danny and Vick Weeks against five current and former drug makers alleging that long-term use of the heartburn drug metoclopramide, which was also sold under the brand name Reglan, caused a debilitating movement disorder known as tardive dyskinesia. The safety labels on the generic drugs failed to warn of potential side effects, including the risk of tardive dyskinesia.

Justice Michael Bolin wrote the main opinion, saying it is not unfair for the maker of a brand-name drug to be liable for warnings on generic counterparts, because generic drug companies by law must use the same safety labels as their brand-name counterparts. Justice Bolin notes the ruling applies only to a specific set of facts involving a medication that is subject to a lot of heavy federal regulation.

Lew Garrison and Chris Hood, lawyers with the Birmingham firm Heninger Garrison Davis, represented the plaintiffs in this case. They have done a very good job. If you need more information about the general subject matter, contact Danielle Mason, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at Danielle.Mason@beasleyallen.com.

Important Facts About Texas Fertilizer Blast Should Be Made Public

You will recall that in previous issues we wrote about the 2013 fertilizer plant explosion in West, Texas. Now it appears that important health and safety information could be hidden from the public forever because in Texas a judge has approved confidentiality agreements for more than a dozen lawsuits relating to the explosion. The agreements approved by a state District Judge were requested by lawyers involved in at least 15 separate lawsuits. As a result, these lawyers can label as "confidential" virtually all information uncovered as they prepare for trial. Hopefully, the judge will revisit the issue of "confidentiality" as the cases progress.

The Dallas Morning News reported that the information could include more details about injuries and safety testing of the fertilizer that exploded at the West Fertilizer Co. in April 2013. It should be noted that 15 people were killed in the blast and hundreds more injured. It's difficult to justify critical information relating to safety and hazardous conditions being hidden from the public. That sort of information should be made available as a matter of public policy. I am writing about a report on this incident in the Premises Section of this issue.

Sources: *Insurance Journal* and *The Dallas Morning News*

VIII. THE NATIONAL SCENE

Chemical Plant Terror Risk Underestimated

The government is underestimating the threat of a chemical attack on America's densely populated cities, and has failed to inspect virtually all of the chemical facilities that it considers particularly vulnerable to terrorists, according to congressional investigators. The year-long investigation by staff on the Senate Homeland Security Committee reveals a history of inspection delays, government errors in risk assessment and industry loopholes in the $595 million terror prevention program passed by Congress in 2006. A copy of the investigators' report was obtained by The Associated Press.

Coming a year after the massive explosion at the fertilizer plant in West, Texas, that is discussed in this issue, the report points to threats from the release of toxic and flammable chemicals. Roughly half of the 4,011 high-risk facilities on the Department of Homeland Security watch list are in 10 states: California, Texas, Ohio, Illinois, Pennsylvania, New York, North Carolina, Florida, Michigan and New Jersey. Committee investigators have indicated that larger metropolitan regions such as Los Angeles, Chicago, New York and Philadelphia might be more vulnerable to a chemical attack. The report notes that rural accidents like the West, Texas, plant explosion "pale in comparison with the consequences of releasing large quantities of toxic gas into a densely populated city."

The findings were discussed last month at a meeting of the Senate Homeland Security and Governmental Affairs Committee. The U.S. effort is "a broken program that is not making us measurably safer against the threat of a terrorist attack," states the report commissioned by Sen. Tom Coburn. The report said widespread problems have left many of the nation's riskiest chemical facilities "effectively unregulated."

The report relies in part on internal Department of Homeland Security (DHS) documents, including an assessment of the terror program completed late last year that hasn't been released, and a federal database of higher-risk facilities. The study was shared with the committee's Democratic chairman, Sen. Tom Carper, who concurred with the main findings. S.Y. Lee, a DHS spokesman, noted that the department has stepped up monitoring efforts, having approved security plans for 750 facilities in the last two years. DHS officials have called on Congress to authorize the program for multiple years—not just year to year—so the government and chemical companies can better plan for longer-range security.

Obviously, the Chemical Facility Anti-Terrorism Standards program "is an important part of our nation's counterterrorism efforts." DHS must be committed to make sure the program works. But as of June 30, according to the report, DHS had failed to conduct security compliance inspections on 3,972 chemical facilities, or 99 percent of the 4,011 facilities initially considered at a higher risk for terrorism. Many facilities are chemical manufacturers; they also include farm supply retailers or fertilizer distribution warehouses.

DHS considers a chemical facility "higher risk" based on the amount of toxic or flammable chemicals on site, such as chlorine, a corrosive, or ammonium nitrate, which can be used to make explosives. The committee found that roughly 3,111 of the facilities had yet to have security plans approved despite statements to DHS officials that it would be done. Investigators said it could take years for DHS to reduce the backlog.

The report also cites a DHS-commissioned study completed late last year that raised concerns the list of 4,011 higher risk facilities was not accurate, in some cases relying on outdated data or treating densely populated areas as lower threats due to coding errors. Among other findings, the report points to industry loopholes. DHS grants exemptions to a number of industries including water and wastewater treatment, which use high amounts of chlorine, a toxic chemical. While the program regulates ammonium nitrate, it does not regulate 12 other chemicals that can also be used to make explosives.

Source: *Claims Journal*

IX. THE CORPORATE WORLD

Judge Orders Bank Of America To Pay $1.27 Billion For Its "Hustle" Fraud

Bank of America has been ordered to pay a $1.27 billion penalty for fraud resulting from a jury's ruling in a U.S. District Court that the bank was liable for the sale of defective loans to government-controlled mortgage companies Fannie Mae and Freddie Mac by the former Countrywide Financial Corp. through its "hustle program." The "hustle" lawsuit was filed by prosecutors in the U.S. attorney's office in Manhattan against Bank of America in 2012. It was alleged that the company urged workers to churn out loans with little regard for quality. After the jury's ruling against Bank of America, U.S. District Judge Jed Rakoff ordered Bank of America to pay the $1.27 billion penalty.

As we have previously reported, in July 2008, Bank of America purchased Countrywide Financial Corp. to create the nation's leading mortgage originator and servicer. Bank of America is the second-largest bank in the United States and focuses on home lending, serving as the leading source of mortgages for the American consumer. The "hustle" lawsuit against Bank of America involved Countrywide's mortgage lending program known as "Hustle" or the "hustle program," "High Speed Swim Lane," or "HSSL," where mortgage products were moved quickly with little regard for quality.

The case was originally brought by whistleblower Edward O'Donnell, who is a former Vice President at Countrywide. The allegations were based upon the company's fraudulent practices whereby it not only encouraged but rewarded its employees for producing more and more loans and eliminating checkpoints that are designed to ensure the quality of the loan.

The company's "hustle program" included loans that produced losses after being sold to investors. While this program ended in May of 2008, lasting only nine months, it caused a great deal of harm to its victims and has played a big role in the financial system crisis. According to Judge Rakoff, this nine-month fraudulent "hustle" for profits caused investors and mortgage giants Fannie Mae and Freddie Mac to pay for 17,611 defective loans, totaling $2.96 billion paid to Countrywide.

The jury also found Countrywide executive Rebecca Mairone liable for the sale of the defective loans. Ms. Mairone, the only individual who was found liable by the jury, was ordered by the Judge to pay $1 million in penalties. Ms. Mairone was found to have had a leading role in the fraudulent sale of the loans. Marc Mukasey, a lawyer who represented Ms. Mairone, had this to say in an interview with Reuters:

> *Rebecca never intended to defraud anyone and never did defraud anyone. Unfortunately, more powerful people chose her as a scapegoat because they thought she was an easy target. We will fight on to clear her name.*

Judge Rakoff said in his opinion that the "hustle program" was a "vehicle for a brazen fraud" and was "driven by a hunger for profits and oblivious to the harms" it inflicted on investors and the financial system as a whole. The Judge's $1.27 billion penalty was about 60 percent of the $2.1 billion the government was seeking in penalties against Bank of America. It's obvious, and widely recognized, that Countrywide and Bank of America's fraudulent behavior contributed to the financial crisis, which ultimately falls on the shoulders of taxpayers. Steve A. Linick, the Inspector General of the Federal Housing Finance Agency, stated:

> *This type of conduct is reprehensible and we are proud to work with our law enforcement partners to hold all parties accountable.*

Hopefully, we will eventually see a slowdown in corporate fraud in this country. But when you consider how truly bad things have been especially in the financial world, it's obvious that there is much more work to be done. Regulation must be much stronger and effective and the court's open to deal with the bad guys in Corporate America. Our firm has a section staffed with lawyers and support staff who deal with corporate fraud on a regular basis.

If you need more information on this subject contact Alison Hawthorne, a lawyer in our Consumer Fraud Section, at 800-898-2034 or by email at Alison.Hawthorne@beasleyallen.com.

Source: Reuters

Lloyds Banking To Pay $370 Million To Settle With The Government

There has been a lot of news coverage recently regarding the "LIBOR scandal." LIBOR stands for London Interbank Offered Rate. In fact, the U.S. Department of Justice (DOJ) just announced a deferred prosecution agreement (DPA) with Lloyds Banking Group that requires the bank to admit to participation in the scheme and pay an $86 million penalty. Combined with penalties the bank is paying to several other agencies, Lloyds has racked up a total of almost $370 million in penalties and fines for the scheme. In the financial sector, the scandal was big news, but the manipulation of the LIBOR rates has much further reaching effects than most people realize. The term alone, LIBOR, sounds like an abstract, obscure financial term—and it is—but it can affect individuals much more directly than one might realize.

First, it needs to be said that LIBOR is a self-calculated, self-reported, semi-subjective standard in the banking industry. Currently there are 11 to 18 contributor banks for 10 currencies, including the five major currencies U.S. dollar (USD), Euro (EUR), pound sterling (GBP), Japanese yen (JPY) and Swiss franc (CHF), and involving 15 different maturities ranging from overnight to one year. Every day, a group of analysts calls up those banks (the same banks every day) and asks them how much interest they would pay to borrow money from another bank. The LIBOR for a given currency at a specific maturity was the result of a calculation based upon submissions from a panel of banks for that currency (the Contributor Panel) selected by the British Bankers' Association (BBA), a trade association based in London and the former publisher of LIBOR. LIBOR is calculated each day for all reported rates. Essentially, the contributor banks set the LIBOR at their whim. Looking back, the potential for manipulation is obvious, but at the time, nobody suspected the banks would lie. At the same time, however, there was no system to verify accurately reported rates and nobody ever checked to see if the banks were telling the truth. It turns out they were not.

LIBOR's primary function is to serve as the benchmark reference rate for debt instruments, including government and corporate bonds, mortgages, student loans, credit cards, derivatives such as currency and interest swaps, and many other financial products.

LIBOR still sounds like an abstract concept, right? Consider this: most adjustable rate loans, including adjustable-rate mortgage (ARM), are some percentage point above LIBOR. If the LIBOR falls, your ARM rate would also go down. Conversely, if LIBOR rises, so does your ARM.

Thus, the manipulation of LIBOR to a rate that favored banks and their friends trickles down to affect those with ARMs, and that's just one example. Any and every loan and credit with an interest rate based on LIBOR was affected by this scandal—fixed-rates included, but more so if the interest rate is adjustable. The Bank of International Settlements estimated that as of the second half of 2009, outstanding interest rate contracts were valued at approximately $450 trillion. Assistant Attorney General Leslie R. Caldwell of the Justice Department's Criminal Division said in a recent press release:

> *Because investors and consumers rely on LIBOR's integrity, rate-rigging fundamentally undermines confidence in financial markets.*

Lloyds is not the only bank to pay large settlements: Royal Bank of Scotland agreed to pay $612 million to U.S. and British authorities; UBS agreed to pay $1.5 billion; and Barclays agreed to pay $453 million. The investigations are ongoing and, thankfully, so is a class action in the Southern District of New York. Schemes like this—the result of back-room, clandestine agreements and conversations—damage not only consumer confidence in the financial markets, but also consumer bank accounts. If you need more information, contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Sources: Reuters; Marketplace.org, Justice.org and *The Corporate Crime Reporter*

X. WHISTLEBLOWER LITIGATION

Recoveries In Whistleblower Cases Hit New Records

It appears that the federal government is on track to receive record payouts this year in whistleblower lawsuits involving contractor fraud. Following a $2.2 billion payment in November by Johnson & Johnson for its off-label use of Risperdal and other drugs, the Department of Justice (DOJ) should collect more than $5 billion under the federal False Claims Act by the close of fiscal year 2014. That comes from a report by Patrick Burns, co-director of the nonprofit Taxpayers Against Fraud Education Fund.

While the amounts recovered may be a drop in the bucket, compared to what the government is owed—including some $300 billion in unpaid taxes—it's still a significant increase over the $86 million the government collected in 1987. It was in 1987 when the DOJ decided to significantly boost payouts to whistleblowers in an effort to fight fraud. That year, 30 citizens filed cases *qui tam* and the results have been very good for us taxpayers.

In 2013, a record 753 suits were filed under the False Claims Act, making whistleblowers responsible for 89 percent of DOJ fraud cases filed that year. Health-care fraud currently makes up the bulk of DOJ's cases, and whistleblowers receive 16 percent of the settlement amount, on average. This has helped the government collect $39 billion since 1987, which would be $55 billion if you include criminal fines. Thus far, whistleblowers have earned $4.3 billion, including $388 million in 2013.

Source: Karen Aho and Businessweek.com

A Summary Of Activities In Whistleblower Litigation

There were a number of settlements and verdicts around the country in whistleblower cases in August. This is an area of litigation that is expanding rapidly. I will mention a sampling of them below.

Community Health Systems To Pay $98 Million In Settlement

The nation's largest operator of acute care hospitals, Community Health Systems, Inc. (CHS), has agreed to pay $98 million to settle claims that the company billed government health care programs for inpatient services that should have been billed as significantly less expensive outpatient or observation services. CHS was said to have engaged in a corporate-driven scheme to increase inpatient admissions of Medicare, Medicaid and TRICARE beneficiaries older than 65. The government further claimed that the inpatient admissions were not medically necessary and should have been provided in a less costly outpatient or observation setting.

According to the government, CHS has entered into a Corporate Integrity Agreement with the U.S. Department of Health and Human Services—Office of Inspector General, requiring CHS to engage in significant compliance efforts for the next five years. CHS is required to hire independent review organizations to review the accuracy of its claims for inpatient services furnished to federal health care program beneficiaries.

The settlement resolves lawsuits filed by several whistleblowers under the *qui tam* provisions of the False Claims Act. Since January 2009, the Justice Department has recovered more than $20.2 billion through False Claims Act cases.

McKesson To Pay $18 Million To End CDC Drug Shipment Claims

Pharmaceutical distributor McKesson Corp. will pay $18 million to settle whistleblower claims that it improperly set temperature monitors outside contractual limits when shipping vaccines for the Centers for Disease Control and Prevention (CDC). The U.S. Department of Justice (DOJ) announced the settlement on August 8. San Francisco-based McKesson signed a contract with the CDC in 2007 requiring it to set electronic devices in shipping containers to detect whether temperatures strayed outside a slim range just above freezing. The False Claims Act suit, filed by a former financial director, alleged the company instead set the monitors for a much wider range that would have allowed vaccines to freeze or reach room temperature without alerting personnel.

The CDC said the monitors were a backup system and that the vaccines were properly packed in insulated containers and transported at the right temperatures. McKesson maintained that the temperature monitors complied with the contract. The relator in the lawsuit, Terrell Fox, alleged that from April to November, McKesson shipped vaccines from manufacturers to health care providers and set monitors to go off only if the vaccines were colder than -1 degree Celsius and warmer than 25 degrees.

It was alleged that the vaccines were supposed to stay refrigerated and never freeze and that the correct range should have been from 2 to 8 degrees Celsius. Fox said that McKesson violated the contract and knowingly submitted false claims in an attempt to avoid liability for replacing potentially ruined vaccines. The vaccines shipped by McKesson were intended for children. Trevor W.

Source: Law360.com

Vascular Solutions Settles False Claims Act Case

Vascular Solutions (VSI) will pay $520,000 to resolve allegations that it caused false claims to be submitted to federal health programs by marketing a medical device for the ablation (or sealing) of perforator veins without U.S. Food and Drug Administration (FDA) approval and despite the failure of its own clinical trial. VSI, a medical device company based in Minneapolis, Minn., markets and sells medical devices that treat varicose veins by sealing the veins with laser energy—endovenous laser ablation. Their products include consoles, which generate the laser energy, and accessory kits.

In 2010, DeSalle Bui, a former Vascular Solutions salesperson, sued the company. The U.S. Attorney's Office in Texas subsequently intervened in the case. The lawsuit accused VSI of "off-label promotion" of its Vari-Lase products, saying the company marketed the product for the treatment of perforator veins despite the fact that it wasn't approved for such uses. The lawsuit alleged that the improper promotion of the product, as well as kickbacks that VSI paid to physicians, caused the government to lose roughly $20 million, as health care providers submitted claims to government programs such as Medicare.

Source: *Corporate Crime Reporter*

Jury Awards $730,000 In Whistleblower Lawsuit

A jury has returned a $730,000 verdict in favor of a whistleblower who reported on an unethical pain management study on prison inmates by researchers at the University of California, Davis. Janet Keyzer, a former UC Davis administrative nurse, claimed in a lawsuit that her career was ruined when she raised questions about whether the research project on physically and mentally disabled inmates at San Quentin Prison had obtained consent from its subjects. The Superior Court jury's verdict was in favor of the 59-year-old Keyzer. She had worked for the university's Center for Healthcare Policy and Research for more than nine years at the time of her termination in 2007.

Source: *The Sacramento Bee*

If you have any questions or need any help with whistleblower litigation contact Dee Miles, Lance Gould, Larry Golston, Archie Grubb, Andrew Brashier or Leslie Pescia, all lawyers in our Consumer Fraud Section, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Lance.Gould@beasleyallen.com, Larry.Golston@beasleyallen.com, Archie.Grubb@beasleyallen.com, Andrew.Brashier@beasleyallen.com, or Leslie.Pescia@beasleyallen.com.

XI. CONGRESSIONAL UPDATE

Auto Safety Bill Would Increase Penalties To Life In Prison

A most important piece of legislation was introduced last month by U.S. Sen. Claire McCaskill, D-Mo., in the U.S. Senate. The bill would stiffen criminal penalties for auto industry executives and others to include sentences of up to life in prison for auto safety violations that result in death. The legislation would also prohibit the rental or sale of rental vehicles subject to a safety recall. The Motor Vehicle and Highway Safety Enhancement Act, a six-year renewal of highway and motor vehicle safety funding at the National Highway Traffic Safety Administration, was introduced by Sen. McCaskill.

Sen. McCaskill, who chairs the Senate Commerce Committee's Subcommittee on Consumer Protection, said in a statement that the bill is aimed at keeping travelers safe on the road and holding accountable companies who ignore or violate safety laws. She added:

Painful recent examples at Toyota and GM have shown us we ... must make it easier to hold accountable those who jeopardize consumers' safety. For too long, auto safety resources have remained virtually stagnant while cars and the safety challenges they present have become more complex.

The legislation covers three areas: highway safety, motor vehicle safety and rental car safety. Under the highway safety section, the bill reauthorizes highway safety funding from the Highway Trust Fund for six years, escalating from $699 million in 2015 to $892 million in 2020. It would also update highway safety programs to address emerging traffic safety issues and revise the criteria states must meet to receive ignition interlock grant funding.

As part of the motor vehicle safety section, the bill would reauthorize motor vehicle safety funding for six years, doubling National Highway Traffic Safety Administration (NHTSA) funding for vehicle safety over six years—from $152 million in 2015 to $268 million in 2020—to help the agency modernize and meet evolving and increasingly complex auto safety challenges. The bill would amend legal requirements related to recalls for manufacturers going through bankruptcy. It would expand the current law, which only covers manufacturers in bankruptcy reorganizations, to cover liquidation bankruptcies. And it would increase civil penalties for auto safety violations, eliminating the maximum total penalty, which is currently set at $35 million.

Sen. McCaskill's office said the National Traffic and Motor Vehicle Safety Act's current criminal penalties provision has never been used by federal prosecutors and noted that the U.S. Justice Department's record criminal settlement with Toyota earlier this year was for violations of the Wire Act, not auto safety laws. The office said:

The bill gives federal prosecutors greater discretion to bring criminal prosecutions for auto safety violations and increases the possible penalties, including up to life in prison for violations that result in death.

The law would apply to any person who violates a range of federal safety laws, including auto industry executives. To strengthen rental car safety, Sen. McCaskill's bill would prohibit the rental or sale of rental vehicles subject to a safety recall and would require rental companies to ground vehicles under a safety recall. It would also permit rental companies to rely on temporary measures identified by manufacturers.

As has been widely reported, Sen. McCaskill presided over two hearings examining General Motors' response to the defective ignition switches that have killed and injured hundreds of innocent victims and resulted in the recall of 2.6 million vehicles earlier this year. She did an outstanding job in keeping the hearings moving and kept GM's feet to the fire. Sen. McCaskill also led a hearing last year on rental car safety. The office said:

The subcommittee's work on auto safety issues will continue, with a hearing being planned for the fall to examine various legislative proposals aimed at modernizing and better equipping auto safety regulators to ensure the tragedies and failures associated with the GM recall are not repeated.

Hopefully, Sen. McCaskill's bill will make it through both the Senate and House and be signed into law by President Obama. It would serve as a tremendous incentive for persons in positions of authority with the automakers to make safety a top priority for a change.

Source: Law360.com

Congress And Two Federal Agencies Have Taken An Interest In Mobile Cramming

As we reported in the August issue, the Federal Trade Commission (FTC) filed suit against T-Mobile making allegations related to cramming bogus charges on consumers' cellphone bills. The FTC has now taken the matter a step further and testified before Congress. Testifying on behalf of the Commission before the Senate Committee on Commerce, Science and Transportation, FTC Commissioner Terrell McSweeny told lawmakers that the Commission believes mobile cramming represents a significant consumer protection issue. He stated in his testimony:

> *Mobile cramming is a significant problem that threatens to undermine confidence in the developing payment method known as 'carrier billing.' As stakeholders have noted, carrier billing of third-party charges may be particularly beneficial for unbanked and underbanked consumers. Additionally, consumers have used text messages to donate funds to a charitable organization, with the charge placed on their mobile phone account. As carrier billing has developed, however, fraud has become a significant problem for consumers.*

Cramming originated as a landline issue but, not surprisingly, it has evolved to include cellphones as more and more consumers move away from traditional landline phones. Over a time spanning two decades, the FTC brought more than 30 cases to combat landline-cramming. Through those cases, brought in cooperation between the FTC and state attorneys general, tens of millions of dollars were returned to consumers in the past 20 years. Tracking the migration to cellphones, the FTC has brought six cases against mobile cramming since the Spring of 2013. Of those, three have been partially or totally resolved, bringing judgments of more than $160 million and court orders preventing further illegal cramming.

The FTC is not the only federal agency investigating cramming issues. The Federal Communication Commission (FCC) announced on July 1, 2014, that it too had opened an investigation into T-Mobile's cramming practices. Like the FTC, the FCC has investigated several other cramming cases, which have resulted in more than $33 million in proposed fines for the U.S. Treasury. The two agencies are coordinating their efforts regarding T-Mobile. If you need more information on this subject, contact Rebecca Gilliland, a lawyer in our firm's Consumer Fraud Section, at 800-898-2034 or by email at Rebecca.Gilliland@beasleyallen.com.

Sources: http://www.ftc.gov/news-events/press-releases/2014/07/ftc-testifies-congress-mobile-cramming-issues?utm_source=govdelivery; http://www.fcc.gov/document/fcc-investigates-cramming-complaints-against-t-mobile

XII. PRODUCT LIABILITY UPDATE

More Problems With Goodyear RV Tires

I have written on numerous occasions about the Goodyear G159 RV tire and the crashes, injuries and deaths it has caused. Goodyear originally designed the G159 tire for metro pickup and delivery trucks, such as those used by UPS. These vehicles are used in urban settings and not for extended trips for several hours at highway speeds. The design features that made the G159 tire appropriate for delivery trucks made it dangerous and prone to fail when used on large RVs driven at highway speeds. The tire's thick tread and wide belt package caused the tire to run too hot and fail.

Goodyear sold the G159 as a RV tire from 1996-2003 because it did not make a tire specifically for RVs. During this time, Goodyear started to develop a tire designed specifically for RVs and to replace the G159. In 2003 Goodyear began selling the G670 RV for RV applications and, at first, it appeared that its issues with RV tires might be solved. Unfortunately, we are beginning to see an increasing number of failures with the G670 RV. In the last few years, at least 10 deaths and numerous other serious injuries have been linked to the G670 RV.

Goodyear makes the G670 RV in 2 sizes. The larger tire, the 295/80, is made by Goodyear at its plant in Buffalo, N.Y. The other size, the 275/70 is made by Goodyear at its plant in Danville, Va. The vast majority of the failures our lawyer's know of are occurring with the 295/80 made at the Dunlop plant in Buffalo, N.Y. Most of the failures with the 670 made in Buffalo are occurring with tires that are approximately five years old and have signs of accelerated aging and belt edge failures due these tires running too hot.

Some of the design features to prevent these failures are a tread and belt package that assures lower operating temperatures in the belts and a good inner liner. Remarkably, the 670 RV made in Buffalo is designed with a thick tread and wide belt package closer in design to the G159 than the smaller G670 RV made by Goodyear at its Danville plant. As we established in our G159 cases, the thick tread and wide belt design proved to be unsuitable for extended highway use as it resulted in the tire running too hot and leading to failure. Further, the 670 RV made in Buffalo has an extremely thin inner liner, less than half the gauge of the 670 made in Danville, Va.

Tragically, it is becoming apparent that Goodyear's RV tires are once again causing safety concerns for consumers. We will continue to pursue claims involving these tires. If you need more information on this subject, contact Rick Morrison, a lawyer in our firm's Personal Injury/Products Liability Section, at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com. Rick has successfully handled a large number of tire cases over the past several years.

Lawsuit Against Volkswagen Passat To Be Tried

Lawyers in our firm are preparing for trial in a case involving the unintended acceleration of a Volkswagen Passat turbo diesel. Similar to many other unintended acceleration cases, the Passat in our case appeared to be operating normally before it suddenly began increasing speed even after the driver removed her foot from the accelerator. Unfortunately, although the driver attempted to bring the Passat under control, the event ended in a crash and catastrophic injuries. Unlike some other acceleration cases, however, the cause of the acceleration in our case does not appear to be related to a faulty "drive-by-wire" electronic throttle. Rather, our vehicle was designed in such a way that over time a component of the turbocharger system accumulated engine oil that later acted as a secondary fuel source.

Because our vehicle was a diesel, the combustion process operates differently from a typical gasoline engine. A diesel does not require a "set" fuel-air ratio and as a result will continue to operate even if the fuel mix is extremely rich. Additionally, because our vehicle was equipped with a turbocharger (intended to squeeze more horsepower out of a smaller engine), it was also equipped with an intercooler, which operates to cool down hot air exiting a turbocharger before it is fed into the engine intake.

Unfortunately, one of the internal seals in our turbocharger was gradually leaking over time and allowing engine oil to escape into the exiting air flow. The accumulating engine oil built up in the intercooler until it reached such a volume that it began to be pulled into the engine intake and acted as a secondary fuel source. As a result, even though the driver removed her foot from the accelerator, the Passat continued to pull oil from the intercooler and continued to accelerate.

In order to test the effect of engine oil ingested into the intake, we purchased a similar Passat and conducted a series of tests. In one of the tests, a volume of engine oil was injected directly into the engine intake system and the engine accelerated without any input from the accelerator pedal. Incredibly, during the test the key was turned off and the Passat continued to accelerate! We also learned that, although publicly available specifications show the Passat should produce around 100 horsepower, when it ingests engine oil the Passat produces much more power than running on diesel fuel alone. That creates a hazard and a dangerous condition.

This case, pending in Federal Court in Columbus, Ga., will be set for trial very soon. We anticipate a lengthy trial. But considering that our client suffered such catastrophic injuries, and because the evidence is clear that a defective vehicle is responsible for the crash, we believe this is a most worthy case to take to trial. Additionally, with all the GM news over faulty ignition switches, consumers are more aware than ever that vehicles will malfunction even when car makers claim they meet all of the federal standards. Mike Andrews, a lawyer in our firm's Personal Injury/Products Liability Section, whose specialty is in product liability litigation, is the lead lawyer in this case. We will keep you updated as this case proceeds to trial.

XIII. MASS TORTS UPDATE

The Ad Campaign By J&J Regarding Toxic Ingredients Misses A Real Problem Area

About two years ago Johnson & Johnson (J&J) announced it would remove certain controversial ingredients from its baby and infant products. This came as a result of pressure from consumer groups concerned about toxicity. Now J&J has decided to turn this into sales with an advertising campaign in the form of a series of videos targeted at mothers and focusing on a commitment to remove the toxic ingredients. Reportedly, the videos show J&J employees saying: "We heard your concern about certain ingredients in our products. Although always safe, for your peace of mind, we removed them."

This news comes just days after the National Cancer Institute updated its website to say there is "solid evidence" that genital talc exposure is associated with an increased risk of ovarian cancer, and that "talcum powder dusted on the perineum (the area between the vagina and the anus) may reach the ovaries by entering the vagina." As we reported previously, this is not news to J&J—it has been aware of this risk since at least the early 1980s and has yet to remove talc from its Baby Powder and Shower to Shower products. Neither has it placed any type of warning on the products.

Lawyers in our firm's Mass Torts Section have filed a number of lawsuits on behalf of women who used J&J Baby Powder or Shower to Shower in the genital area and were subsequently diagnosed with ovarian cancer. They have also filed class actions on behalf of consumers who paid for these products, but suffered no physical injury. It's our hope that these lawsuits will draw attention to the risks of the highly dangerous talcum powder and that J&J will be forced to remove this carcinogen from these products or otherwise place a warning so that women can be aware of the hazard.

If you have any questions regarding the personal injury cases our firm is handling, contact Ted Meadows, a lawyer in our firm's Mass Torts Section. Ted can be reached at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com. If you would like further information about the class action cases that the firm is involved in, contact Dee Miles, the Head of the Consumer Fraud Section, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com.

Source: www.fiercepharmamarketing.com, and www.cancer.gov

An Update On The TVM Litigation

On July 29, 2014, a Massachusetts jury returned a defense verdict in favor of Boston Scientific, in its first state court transvaginal mesh trial, *Albright v. Boston Scientific Corporation*, pending before Judge Diane Kottmeyer in the Superior Court of the Commonwealth of Massachusetts. In this case, Plaintiff Diane Albright suffered severe pain, erosion, bleeding and other physical problems as a result of being implanted with the Boston Scientific Pinnacle Pelvic Floor Repair Kit in August of 2010.

The Pinnacle product was placed to help reinforce weakened muscles in the pelvic region. In addition to product defect claims, Ms. Albright alleged that neither she nor her physicians received adequate warnings regarding the risks and complications associated with the Pinnacle kit. The *Albright* jury deliberated for two days following the three week trial. Citing Massachusetts state law, the Court did not allow testimony regarding the lack of clinical testing of the product, the defective nature of the polypropylene material or other evidence of Boston Scientific's failure to provide adequate warnings about the product.

The Albright case was filed in Middlesex County Superior Court in 2012, where there are currently more than 1,700 similar lawsuits pending. This is a small percentage of the total cases pending nationwide against Boston Scientific, with more than 15,000 transvaginal mesh cases on file involving implants for both pelvic organ prolapse and stress urinary incontinence. Most of the cases are consolidated in West Virginia federal court under Judge Joseph R. Goodwin, who is overseeing seven transvaginal mesh-related Multi-District Litigations (MDLs), with more than 60,000 active cases.

There is currently another trial ongoing against Boston Scientific in Massachusetts state court before Judge Kottmyer in Boston. Another trial began the last week in August against Boston Scientific in Texas state court in Dallas. The trial is expected to last at least three weeks and involves claims related to Boston Scientific's Obtryx, a product designed to treat stress urinary incontinence. Lastly, two trials involving Boston Scientific products are scheduled to begin in federal court in Florida this fall, one involving multiple claims related to the Pinnacle product and the second involving multiple claims related to the Obtryx product.

With respect to C.R. Bard, there are approximately 8,700 claims pending against Bard in MDL No. 2817 before Judge Goodwin. There are currently no Bard bellwether trials set in either the MDL or New Jersey Superior Court. Judge Goodwin issued a Pretrial Order on July 31, 2014, setting more than 300 Bard cases for expedited discovery and trial, which will include depositions of both the Plaintiff and spouse, as well as depositions of physicians and sales representatives who will be deposed by written questions. The Order provides that these cases shall be trial ready by December of this year.

On the Ethicon front, there are more than 18,500 cases currently pending against Ethicon in the federal MDL. The *Huskey* case, which involves a Gynecare TVT-O stress urinary incontinence product, started on August 25, 2014. This trial is expected to conclude in early September. We will certainly keep you updated on any new transvaginal mesh developments.

If you need more information on the TVM Litigation, please contact Leigh O'Dell or Chad Cook, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Leigh.Odell@beasleyallen.com or Chad.Cook@beasleyallen.com.

Viagra Linked To Melanoma

Recent studies have suggested a possible link between the erectile dysfunction medication, Viagra® (Sildenafil) and melanoma, a deadly form of skin cancer often caused by extensive ultraviolet radiation exposure. Viagra®, manufactured by Pfizer Labs, was approved in 1998 by the U.S. Food and Drug Administration (FDA) to treat erectile dysfunction. Since Viagra's inception, Pfizer has seen its annual sales of the erectile dysfunction medication reach nearly $1.9 billion.

A recent study published in the *Journal of the American Medical Association* indicates that men using Viagra® may be 84 percent more likely to develop the deadly form of skin cancer than men who have not used the drug. Preliminary research indicates that phosphodiesterase 5A (PDE5A) inhibitors, such as Viagra®, may increase the rapid spread of melanoma cells through a process known as "melanin synthesis," causing the development of melanoma.

Statistical data from the American Cancer Society suggest that physicians in the United States diagnose approximately 76,000 cases of melanoma per year. Approximately 6,400 men die each year from melanoma. The group being diagnosed with melanoma at the highest rate is men older than 49, also the target group for the erectile dysfunction drug. Researchers suggest that further investigation of the correlation between Viagra® use and melanoma is underway. If you have any questions regarding any aspect of this potential litigation, or if you would like a lawyer at Beasley Allen to review a potential claim, contact Melissa Prickett, a lawyer in our firm's Mass Torts Section, at 800-898-2034 or by email at Melissa.Prickett@beasleyallen.com.

Lipitor MDL Judge Sets Aggressive Schedule

Lipitor, one of the best-selling prescription drugs of all time, causes Type 2 Diabetes. Post-menopausal women appear to be at greatest risk. The link between Lipitor and diabetes has been shown in recent medical studies and this risk is also the subject of an FDA advisory. Lipitor lawsuits filed across the country have been consolidated and assigned to U.S. District Judge Richard M. Gergel in Charleston, South Carolina. Fortunately for clients, Judge Gergel has set an aggressive schedule for moving the litigation forward. The first MDL trial is expected to take place next July.

Discovery is currently taking place. Documents are being produced and depositions are being set. Frank Woodson, a lawyer in our Mass Torts Section, was appointed by Judge Gergel to serve on the Lipitor Plaintiffs Steering Committee. Frank is actively involved in the discovery process that is already in high gear. If you have questions about the Lipitor litigation, contact Frank Woodson or Matt Munson at 1-800-898-2034 or by email at Frank.Woodson@beasleyallen.com or Matt.Munson@beasleyallen.com.

First Trials Slated To Begin In DePuy Pinnacle Hip MDL

The first trial in the DePuy Pinnacle Metal on Metal hip multidistrict litigation (MDL) is scheduled to start on Sept. 2, in the U.S. District Court for the Northern District of Texas. It will be the first "bellwether" trial for the DePuy Pinnacle cases. Bellwether trials are designed to help the parties gauge the relative strengths and weaknesses of their cases. In general, the Pinnacle cases are much stronger than many previously believed them to be. During discovery, strong evidence was uncovered that proved Johnson & Johnson and its subsidiary, DePuy, were well aware that the Pinnacle device was defective.

The scheduled trial involves a bilateral Pinnacle metal-on-metal device. Both of the Plaintiff's hips were implanted with a Pinnacle metal cup, Ultamet metal liner and metal head. The Plaintiff was required to undergo a revision surgery on each hip to remove the failed Pinnacle device due to cup loosening and metallosis (metal poisoning).

Three other bellwether trials are also scheduled—one in November of this year—and two in January and March of next year. Our firm has one case included in the pool of cases from which the January and March cases will be selected. Bellwether trials are a vital part of the MDL litigation process and will impact all Pinnacle cases. The bellwether process also provides information about how jurors will respond and react to each side's arguments. The outcome of bellwether trials can provide direction to both Defendants and Plaintiffs, particularly in personal injury cases, as to whether it might be more prudent to reach a settlement rather than go to trial.

Currently, more than 6,000 product liability lawsuits are in Pinnacle MDL before U.S. District Judge Ed Kinkeade. Each complaint makes similar allegations against DePuy for injuries sustained from the metal-on-metal Pinnacle device. Specifically, the claims are that the Pinnacle device was defectively designed or manufactured and inadequate warnings were provided about the risk of early complications or problems. Patients have reported issues similar to those reported in DePuy ASR patients, including pain, swelling, component loosening and need for premature revision surgery. A danger for metallosis also exists, a condition involving the build-up of metallic debris in the soft tissues of the body.

Anyone implanted with a metal-on-metal hip implant should have his or her case investigated to determine its merits. If you need more information, contact Navan Ward, a lawyer in our firm who is heavily involved in this litigation, at 800-898-2034 or by email at Navan.Ward@beasleyallen.com. Navan will be happy to help any person who needs more information or has a potential hip claim. Feel free to contact him.

Matt Teague Appointed To Plaintiff Steering Committee For Testosterone Replacement Therapy Litigation

Matt Teague, a lawyer in our Mass Tort section, was appointed by U.S. District Judge Matthew Kennelly to serve as a member of the Plaintiff's Steering Committee (PSC) for MDL No. 2545, In *re: Testosterone Replacement Therapy Products Liability Litigation*, pending in the United States District Court for the Northern District of Illinois. The PSC is responsible for the management of all of the cases consolidated in the MDL. Matt's appointment reflects Beasley Allen's commitment as a firm to seek justice for all those injured by testosterone replacement therapy.

The Testosterone Replacement Therapy MDL was formed in response to the rising number of men who have suffered serious and sometimes fatal injuries as a result of using Testosterone Replacement Products, such as AndroGel, Testim, Axiron, AndroDerm, Fortesta, Depo-Testosterone and other testosterone products, whether in the form of gels, patches, injections, or implanted pellets. There are more than 200 cases currently pending in the Testosterone Replacement Therapy MDL with many more expected in the future.

As we recently reported, the U.S. Food and Drug Administration recently required testosterone manufacturers to increase the warning in the drug labeling of all approved testosterone products about the risk of blood clots in the veins, including the risk of injuries such as deep vein thrombosis and pulmonary embolism. The FDA is requiring the drug label change to provide a more general warning regarding venous blood clots and to ensure this risk is described consistently in the labeling of all approved testosterone products. Additionally, the FDA continues to investigate the possible risk of stroke, heart attack, and death identified in recent medical studies published in the Journal of the American Medical Association and elsewhere.

Lawyers in our firm's Mass Torts Section are currently representing men who have been injured by their use of testosterone drugs. If you have any questions about the

MDL, or believe you, a loved one, or client have been injured by a testosterone drug, contact Matt Teague, to discuss this litigation. Matt can be contacted at 800-898-2034 or by email at Matt.Teague@beasleyallen.com.

XIV. BUSINESS LITIGATION

$450 Million Apple E-Books Settlement Gets Court Approval

A federal judge in New York has signed off on a $450 million e-books antitrust settlement with the U.S. Department of Justice (DOJ). U.S. District Judge Denise Cote found that further discussions with class attorneys satisfied her concerns about a provision of the settlement that could result in Apple paying much less money depending on the outcome of an appeal. The settlement avoids the need for second trial over Apple's financial liability stemming from violations of U.S. antitrust law relating to the launch of its iBooks store in 2010.

Judge Cote had expressed reservations over a provision that allowed Apple to pay $50 million to consumers and $20 million to lawyers if her 2013 decision on Apple's antitrust liability is vacated or reversed and remanded back to her. Judge Cote wrote:

> *These provisions ... reduce the likelihood of the remand scenario, as well as the likelihood of confusion—and future litigation—concerning whether the remand scenario has been triggered. Plaintiffs emphasize that they strongly believe that the remand scenario is unlikely to occur.*

Judge Cote was asked by the Plaintiffs to consider the total payments e-books customers and the states would receive as a result of prior settlement with major U.S. publishers when reviewing the Apple settlement. Those settlements with the publishers were worth a combined $166 million, pushing the potential recovery to $616 million if Apple ends up paying the full value of the settlement.

In June, Apple appealed Judge Cote's July 2013 ruling that the company had orchestrated the plot in violation of the Sherman Act. Judge Cote also issued an injunction that forced Apple to renegotiate all of its e-book distribution deals with the companies and imposed a host of other requirements.

Source: Law360.com

Judge Koh Rejects $324 Million Apple And Google Anti-Poaching Settlement

U.S. District Judge Lucy H. Koh has denied a request to preliminarily approve a $324.5 million settlement agreement that would have ended a high-profile antitrust class action. It was claimed that Google Inc., Apple Inc., Intel Corp. and Adobe Systems Inc. illegally agreed not to "poach each other's software engineers," calling for at least $55 million more. Judge Koh ruled that class members would recover proportionally less from the settlement than from settlements agreed to last year with Intuit Inc., Lucasfilm Ltd. and Pixar Animation Studios Inc. Judge Koh said further that she was especially troubled that the latest settlement came after she granted class certification, giving the Plaintiffs substantial leverage. Judge Koh wrote in his decision:

> *Counsel's sole explanation for this reduced figure is that there are weaknesses in plaintiffs' case such that the class faces a substantial risk of nonrecovery. However, that risk existed and was even greater when plaintiffs settled with the settled defendants a year ago, when class certification had been denied.*

It's recognized that Judge Koh's order denying the Plaintiffs' request to preliminarily approve of the settlement is a most serious setback to the tech giants' bid to end allegations that they suppressed software engineer pay by secretly agreeing not hire each other's workers.

The basis for the antitrust class action came to light in 2012 when a Department of Justice (DOJ) investigation revealed that the Silicon Valley giants had brokered agreements not to compete for one another's engineers. The DOJ concluded the companies had reached "facially uncompetitive" deals that limited the employees' job prospects. Although the companies agreed to halt those practices in 2010, a large number of private class actions were filed.

Software engineers sued Apple, Google and other Silicon Valley companies for damages, claiming that the companies had agreed to provide each other notice whenever one made an offer to another company's employee. They also agreed to cap pay packages for prospective hires in order to prevent bidding wars and to abstain from recruiting one another's personnel. The agreements also allegedly depressed the workers' pay 10 to 15 percent lower than it would have been with natural market conditions.

Judge Koh said that the settlement should be at least $380 million. The judge used last year's settlements as a baseline for how much the Plaintiffs should receive from the remaining Defendants. The companies behind last year's $20 million in settlements represented only 5 percent of the total compensation paid to the tens of thousands of engineers. Other Defendants in this case had already settled before the court granted class certification. In 2013, Lucasfilm Ltd. and Pixar Animation Studios Inc. paid $9 million and were dismissed from the suit, while Intuit Inc. paid out $11 million.

Michael Devine, the named Plaintiff, lodged objections to the settlement in June. He claimed that, given the strength of the Plaintiffs' evidence and the ability of the tech giants to pay more, the proposed $324.5 million payday for the class was insufficient to deter similar nonpoaching practices in the future. It appears Judge Koh agrees with Mr. Devine.

Source: Law360.com

Judge Approves $6.4 Million Settlement In Tomato Antitrust Suit

A California federal judge has signed off on a $6.4 million settlement in a putative antitrust class action accusing a group of tomato processors of engaging in a price-fixing and bid-rigging scheme that intersected with a parallel criminal investigation. U.S. District Judge Edmund F. Brennan approved the settlement in which Defendants Ingomar Packing Co., Los Gatos Tomato Products each agreed to pay millions of dollars to settle claims that their alleged collusion restrained competition in violation of federal antitrust laws by forcing purchasers to pay a higher price for processed tomato products than they would have absent the activity. In his order Judge Brennan agreed that a settlement was the best medium of relief for the purchaser Plaintiffs. He wrote:

> *Given the complexity of the action and related criminal and bankruptcy proceedings, the risk and expense of litigating this action through trial and possibly subsequent appeals is apparent.*

Another company, SK Foods LP, the second largest processor of tomatoes for commercial use in the U.S., was forced into bankruptcy in 2009, and a year later its former CEO Scott Salyer was charged with criminal antitrust violations. In 2013 he was sentenced to six years in prison after pleading guilty to charges of racketeering and price-fixing, according to court filings.

The Plaintiffs—buyers including Four In One Company Inc. and Bruce Foods Corp., which bills itself as one of the nation's largest private food manufacturers—filed four separate actions alleging that from as early as

2005 to at least December 2008 the tomato processors colluded to raise prices amid declining consumer demand and increasing supply. The antitrust suits were consolidated in 2009.

The settlement fund comprises two separate settlements of Ingomar and Los Gatos, each of whom are paying $3.5 million and $2.9 million, respectively, to a class of as many as 110 purchasers. The funds have been held in escrow since January pending Judge Brennan's final approval.

Source: Law360.com

$40 Million Foam Antitrust Settlement

Leggett & Platt Inc., a furniture components producer, will pay about $40 million to settle with a class of direct purchasers who accused the company of conspiring to fix prices on flexible polyurethane foam. The tentative settlement, which requires court approval, was revealed last month in a stay order by U.S. District Judge Jack Zouhary. The direct purchasers, which include a variety of foam, packaging and carpet companies, have accused L&P and a number of foam producers of conspiring since at least 1999 to fix the price of the polyurethane foam.

This foam is widely used as cushioning and insulation in products such as bedding, packaging, flooring and cars. Numerous proposed class actions alleging a price-fixing conspiracy in the foam industry were filed in courts around the country throughout 2010. This came after the FBI and European Commission raided the offices of several foam makers in July 2010. It should be noted that a company called Vitafoam Inc. blew the whistle on the price-fixing conspiracy in February 2010, and sought acceptance into the U.S. Department of Justice's corporate leniency program.

According to a consolidated complaint filed by the direct purchaser class in 2011, the Defendants engaged in phone conversations, letters and in-person meetings in order to coordinate the timing and amount of the foam price increases. Pointing to interviews provided by Vitafoam employees in connection with government inquiries into potential foam price-fixing, the direct purchasers alleged that the mechanisms and participants of the purported conspiracy had been revealed, and lodged violations of the Sherman and Clayton Acts.

In April Judge Zouhary certified the direct- and indirect-purchaser classes and designated seven named direct purchaser Plaintiffs, including Ace Foam Inc., Adams Foam Rubber Co., Cambridge of California Inc., Foam Factory Inc. and others, as the direct purchaser class representatives. A few months later defendant Mohawk Industries Inc., on Aug. 12, won a bid to compel arbitration and stay the claims of absent members of the direct purchaser class. Judge Zouhary granted the motion said he said, "reluctantly," conceding that he was bound by case law's "pro arbitration bent."

The settlement between L&P, a Missouri-based company that produces a variety of industrial materials and residential furnishing components, comes about two years after Vitafoam Inc. and Vitafoam Products Canada Ltd. agreed to pay between $9 million and $15 million to the direct purchaser Plaintiffs. Judge Zouhary noted in his recent order that, although proceedings between L&P and the direct purchasers were halted, the stay did not apply to other lawsuits filed against the furniture component producer in the multidistrict litigation.

Source: Law360.com

XV. AN UPDATE ON SECURITIES LITIGATION

AIG Pays $960 Million To Settle Securities Fraud Class Action

American International Group Inc. (AIG) will pay $960 million to settle a consolidated securities class action alleging the insurer misrepresented the value of credit default swaps between 2006 and 2008, costing investors billions. AIG revealed the settlement in a filing with the U.S. Securities and Exchange Commission (SEC) last month. The investors, led by the state of Michigan, said the proposed settlement was among the largest ever reached in a securities fraud class action stemming from the 2008 financial crisis, according to statements from the Plaintiffs' attorneys. The settlement must be approved by a New York federal judge before it becomes final.

AIG disclosed it would pay the sum in its quarterly report. The settlement ends the 2008 consolidated litigation, but not nine individual suits filed between 2011 and 2013 that are still pending, according to the company's SEC filing. Those lawsuits assert "substantially similar" claims to the 2008 consolidated litigation, AIG said. The investors, led by a quartet of Michigan pension systems, alleged the company concealed the true value of its credit default swaps (CDS)—essentially an insurance policy against potential losses in an investment that itself became a securitized asset that could be bought and sold—for two years, and that the company's stock plummeted in 2008 when the CDS' value was revealed to be lower than anticipated.

It appears the proposed securities class action settlement is one of the largest ever achieved in the absence of a criminal indictment or an SEC enforcement action. It is clear proof of the importance of private securities litigation as a means of recovery for injured investors. According to AIG's 10-Q filing, the company reached an agreement with the Plaintiffs on July 15. A day later, the insurer announced that it had resolved disputes with Bank of America Corp. over residential mortgage-backed securities.

Bank of America will pay AIG $650 million in cash, plus a *pro rata* share of whatever is paid out to investors in connection with the Countrywide repurchase settlement. The recent settlement covered AIG's objections to the $8.5 billion settlement of Countrywide's mortgage repurchase obligations to investors.

Source: Law360.com

Google Will Spend $250 Million To Settle Investor Suit Over Pharma Ads

Google Inc. has agreed to spend a total of $250 million on product quality control to end a suit brought by shareholders after its $500 million settlement with the U.S. government for allowing Canadian pharmaceutical companies to advertise on its site. The settlement, which remains subject to Google stockholder and court approval, would end claims that Google and its directors breached their fiduciary duty by facilitating illegal imports of prescription drugs through the advertising program AdWords, leading to a $500 million settlement with the U.S. Department of Justice (DOJ).

As a part of the agreement, Google agreed to launch a "user safety initiative," the goal of which it will be to frustrate and disrupt the operations of rogue pharmacies online through messaging campaigns and cooperation with law enforcement and regulatory agencies. The company will dedicate $50 million per year over the course of five years to the initiative. A Google spokesman said in an e-mailed statement:

> *We've been investing very significantly to fight rogue online pharmacies, and have stopped millions of ads from appearing. This settlement will continue and expand these ongoing efforts to keep users safe online.*

The Plaintiffs alleged that Google was aware as early as 2003 that its AdWords marketing program might be violating the Federal Food, Drug and Cosmetic Act or the Controlled Substances Act by allowing Canadian pharmacies to advertise services such as shipping prescription drugs to the U.S. But its officers issued misleading financial statements from 2003 to 2009 that did not include revenue from the improper ads, according to the Plaintiffs allegations.

The shareholders initially filed three actions in 2011, five days after the DOJ announced that Google would settle a criminal investigation into the company's AdWords service. According to the DOJ, AdWords accepted advertisements from online Canadian pharmacies that illegally sold prescription medications to U.S. Customers. The DOJ said that even though Google had taken steps to block pharmacies in countries other than Canada from advertising in the U.S. through AdWords, it had continued to allow Canadian pharmacies to target U.S. consumers through online ads. The directors did not ban the ads until after the company became aware of the DOJ investigation, the shareholders said. The three cases were later consolidated.

Source: Law360.com

Shareholders Granted Class States In Securities Class Action

A Minnesota federal judge has certified a class of investors suing Best Buy Co. Inc. and top executives. It's alleged that the company misled shareholders about performance and expectations resulting in artificially inflated share prices during a three-month period in 2010. U.S. District Judge Donovan W. Frank approved the class. Shareholders who purchased Best Buy common stock between 10 a.m. Sept. 14, 2010, and Dec. 13, 2010 are included in the class. It's alleged that the company's shares traded artificially high during the class period based on misstatements by Best Buy and several of its officers and directors.

In his order, Judge Frank wrote that the class had successfully proven its members were entitled to the presumption of reliance, and had proposed a model that calculates damages caused by the alleged fraud on a classwide basis. It's alleged that Best Buy boasted a healthy demand for its electronic products and projected that its fiscal year 2011 earnings per share would hit \$3.55-\$3.70. As a result, according to allegations in the suit, Best Buy stock maxed out at \$44.81 per share between Sept. 14 and Dec. 13, 2010. When Best Buy released its third-quarter results, however, it revealed that its product sales were falling, a trend that began in June 2010, according to the Plaintiffs. There was a 14 percent drop in Best Buy's share price closing at \$34.52 on Dec. 14, 2010.

The Plaintiffs contended that the company and its executives made numerous misstatements and omissions about its financial well-being in news releases, conference calls and public meetings, and that it acted with "scienter," knowing or recklessly disregarding the truth about Best Buy's state. The judge wrote in his order that the Plaintiffs showed that the stocks increased after the allegedly misleading statements were made and dropped after they were revealed to be untrue, and found the Plaintiffs successfully proposed a model to calculate damages.

Source: Law360.com

A&P Agrees To \$9 Million Settlement In Securities Class Action

A New Jersey federal judge has given preliminary approval to a \$9 million class action settlement resolving securities claims that senior executives at The Great Atlantic & Pacific Tea Co. Inc. (A&P) failed to disclose the grocery chain's financial problems shortly before it went into bankruptcy. U.S. District Judge William Martini granted preliminary approval to the settlement that was submitted to the court in May. The Judge vacated an order from April dismissing the lawsuit against A&P. A final hearing over whether to grant final approval of the settlement has been scheduled for December.

Shareholders filed the lawsuit in 2011 alleging that A&P officers disseminated false and misleading statements that deceived investors about the condition of A&P's business, artificially inflated the company's stock price and enabled A&P to sell more than \$430 million in debt on more favorable terms. A&P, based in Montvale, N.J., and 53 affiliates filed for Chapter 11 bankruptcy protection in December 2010, burdened by an increasingly competitive marketplace and a heavy debt load that shaved away profits as the recession cut into sales.

The complaint, filed on behalf of all those who purchased A&P stock between July 2009 and December 2010, names current and former A&P executives Christian W.E. Haub, Eric Claus, Ron Marshall, Samuel Martin and Brenda Galgano as co-defendants. A&P, which emerged from bankruptcy in 2012, itself is not named as a defendant.

Source: Law360.com

XVI. INSURANCE AND FINANCE UPDATE

California Identifies 900,000 Violations By A Single Insurance Company

According to the California Department of Insurance (DOI), one California insurance company violated the law more than 900,000 times. The problems for the company began in 2005 when United Healthcare acquired PacifiCare. After that acquisition, the California Medical Association (CMA) saw a large spike in complaints about the way PacifiCare was processing claims and contracts. Between July 2006 and March 2007, the DOI processed 44 justified complaints and identified more than 144 violations of the Insurance Code, but during the entire preceding year, PacifiCare had received only two justified complaints.

When attempts by CMA to work with the insurer failed, CMA forwarded dozens of complaints to DOI for investigation. Following its investigation, the DOI filed an administrative proceeding against United Healthcare charging it with violations that included: (1) failing to give providers notice of their appeal rights and members notice of their right to an independent medical review; (2) failing to timely pay or correctly pay claims as well as interest on late-paid claims; (3) failing to acknowledge receipt of claims; (4) failing to timely respond to provider disputes; (5) illegally closing claims files; and (6) sending untimely collection notices for overpayment.

The administrative trial lasted more than four years. At the conclusion, and after issuing a 220-page decision, Commissioner Dave Jones issued an historic \$173 million penalty. Interestingly, Commissioner Jones' ruling overrode a ruling last year by an administrative Law Judge that recommended United Healthcare be fined no more than \$11.5 million. Commissioner Jones' justification was:

> *No other insurer has violated [the insurance laws] hundreds of thousands of times. And no other insurer has repeatedly misrepresented its business practices, failed to correct the root causes of its violations, or ignored its statutory obligations to the extent shown herein.*

I would have to agree with Commissioner Jones. Without any doubt, 900,000 is a lot of violations. Not surprisingly, United Healthcare disagreed with the commissioner and sued him to block the fine, alleging he was abusing his power and using the case to set a precedent rather than base the penalty on United Healthcare's actions. Using a method that hadn't been used before, DOI aggregated the violations and fined the insurer for each letter that was not properly mailed out. To justify aggregation, Jones would have to have found that United Healthcare acted in bad faith. The aggregation method, however, is not limited just to health insurance. This action could be taken as a warning to other companies in California.

For consumers, this action is seen as a mixed bag. The good news is that all insurers should really be "minding their Ps and Qs" in light of this decision. But the bad news, at least according to United Healthcare, is because the ruling treats errors in paperwork more severely than errors that actually affect patient health, the whole health care system could be slower, less efficient, and more expensive. Consumers should be aware that these infractions have occurred, and may still be occurring, by United Healthcare or by any other insurance company. At this point, there is no indication that other states are looking into these types of violations. PacifiCare is a California-based insurance company.

Sources: http://www.cmanet.org/news/detail/?article=united-healthcare-fined-173-million-by

$39.2 Million Prudential Settlement With Military Families Is Approved

U.S. District Judge Michael Ponsor, a Massachusetts federal judge gave preliminary approval last month to a $39.2 million settlement in a consolidated class action alleging Prudential Insurance Co. of America failed to pay death benefits to military service members, veterans and their families under a group life insurance program. The Plaintiffs claimed that Prudential didn't pay lump sum death benefits under several group life insurance policies as required by law. Instead, Prudential provided military service members, veterans and other beneficiaries with an interest-bearing retained asset account.

The consolidated class claimed the accounts amounted to a breach of contract and various tort law claims were alleged. The bulk of the proposed settlement will come in $20.5 million of charitable donations over the next five years from Prudential to an organization focusing on veteran or military causes of the company's choice. About $8.4 million will go into a common fund escrow account to provide cash payments to settlement class members.

The Plaintiffs said in a memorandum that "(t)he settlement closely tracks the goals of the Plaintiffs and the settlement class members they represent." Ponsor signed off on the settlement on Aug. 5, saying it was a reasonable agreement and the class should be notified about the proposal. He stated:

> *The court finds that the agreement between representative plaintiffs and Prudential was entered into at arm's length by experienced counsel for the parties and only after extensive negotiations.*

It's estimated that there will be approximately 67,000 class members in the settlement class, each of whom will receive a $125 check if they don't opt out of the approved settlements. The consolidated suit stems from four cases filed across the country over the Prudential asset accounts. The first suit, filed in Massachusetts in July 2010, alleged Prudential only paid military families one percent interest on the unpaid balance of their life insurance benefits when in fact the company was earning more than 5.69 percent interest by investing the money.

Source: Law360.com

Ohio Workers' Comp Agency Settles Overcharges Lawsuit

The Ohio Bureau of Workers' Compensation (BWC) has reached a settlement in principle to settle the San Allen case, a class action lawsuit filed in 2007 against the BWC over the pricing of workers' comp policies that were in place between 2001 and 2008. Under the agreement, BWC will pay no more than $420 million to settle the lawsuit that was filed in 2007 by a group of Ohio businesses claiming that the agency had overcharged mostly small-business owners who paid non-group premiums.

In December 2012, a Cuyahoga County judge agreed the case could go forward but requested that the group lower the amount of the damage request. In May 2014, the 8th Ohio District Court of Appeals said the BWC group premium plans in place at the time amounted to an illegal rating system that resulted in employers being overcharged nearly $860 million over several years. According to the appeals court, the agency had established a system of winners and losers by giving discounted premiums to companies that joined group insurance plans and charging companies outside of the plans excessive rates to pay for the discounts.

The lawsuit claimed around 270,000 companies had been overcharged. The BWC said that while the appeals court upheld most of the initial trial court decision, it remanded the case to the trial court to reduce the original award to account for benefits received by class members who were also in group rating. At the end of June, the BWC filed an appeal with the state Supreme Court.

The original amount of $860 million was subsequently reduced to just under $651 million, according to the final settlement agreement filed with the Court of Common Pleas in Cuyahoga County, Ohio. The amount was then further reduced to $420 million. In a statement announcing the proposed settlement, Steve Buehrer, the BWC Administrator/CEO, had this to say:

> *Ohio has made major changes to its workers' compensation system over the past several years. The policies that were at issue in this litigation in 2007 are not the same ones in place today, and we're pleased that we have reached a settlement so we can move forward. Improvements have been made to how premiums and discounts are calculated, as well as to billing practices, and premiums are continuing to go down as a result. Sound management of the trust fund made it possible to return $1 billion in rebates to customers last year, and major investments in workplace safety are helping employers do a better job of preventing injuries by keeping their workers safe. All of these improvements are paying off for workers and businesses, and we're going to keep building on them.*

Under the settlement agreement, a third party administrator will manage the claims process. A $420 million fund will be created to pay for claims to employers participating in the lawsuit, the class's attorney fees, court costs and the costs of administering the fund. Under the settlement terms, claims submitted by eligible class members must be postmarked no later than Sept. 22, 2014. The settlement agreement is subject to the final approval by the court.

Source: *Claims Journal*

XVII. EMPLOYMENT AND FLSA LITIGATION

There has been a great deal of activity in the employment litigation arena over the past few weeks. As you probably have figured out by now, this has become a most active field for litigation. The claims are based on both federal and state laws. I will give a brief summary of some of the cases.

Workers $5.8 Million Award Against Tyson Upheld

The Eighth Circuit has affirmed a $5.8 million judgment awarded to a class of Tyson Foods Inc. employees in a compensation dispute over the time they spent putting on and taking off protective gear. The court said a lower court properly certified the workers' claims under both the Fair Labor Standards Act and Iowa state law. The court affirmed a jury verdict and awarded liquidated damages to workers challenging the company's so-called "gang time compensation system," in which workers alleged they were paid only during the time they are present on the actual production assembly line and not for time spent donning and doffing protective gear. The panel's ruling affirms the lower court's decision to certify the worker's FLSA claims as a collective action and their Iowa state law claims as a class action.

The plaintiffs, who first brought the suit in 2007 alleging violations of FLSA and Iowa state law, comprised of employees at Tyson's meat-processing facility in Storm Lake, Iowa. The workers claimed that Tyson's existing policy for compensating donning and doffing time was insufficient to cover compensable pre- and post-production line activities. In September 2011, an Iowa jury found that the plaintiffs had proven that the time they spent donning and doffing hard hats, work boots, hairnets, aprons, gloves and earplugs constituted an indispensable part of their work at Tyson plants. The verdict awarded the workers $2.9 million, and a subsequent ruling on liquidated damages upped the total final judgment to $5.8 million.

Source: Law360.com

FedEx Drivers Found To Be Employees

The Ninth Circuit has ruled that FedEx Ground misclassified truck drivers in California and Oregon as independent contractors. The appeals court said the drivers were employees who could, in turn, pursue class allegations that they were short-changed on benefits and wages. A three-judge appellate panel overturned a lower court's summary judgment in favor of FedEx Corp.'s FedEx Ground Package System Inc., finding that truck drivers who delivered packages for FedEx in California and Oregon should have been considered employees.

The California case was brought by a proposed class comprising drivers who delivered FedEx packages between 2000 and 2007, while the Oregon case was brought by drivers who delivered packages between 1999 and 2009.

The California and Oregon cases were part of a number of lawsuits filed by FedEx drivers in about 40 states across the U.S., according to the Ninth Circuit. The suits, which were eventually consolidated in multidistrict litigation and certified as class actions, included similar allegations that FedEx improperly classified its drivers as independent contractors, depriving them of benefits that employees would normally receive and forcing them to cover business expenses. The Ninth Circuit appeals were filed after the Indiana federal district court handling the MDL granted summary judgment to FedEx on the question of whether the drivers were employees.

Capital One Agrees To A $3 Million Settlement

A New York federal judge has given preliminary approval to a $3 million settlement of a putative class suit with New York, New Jersey and Maryland subclasses that accused Capital One NA of denying assistant branch managers proper overtime. U.S. Magistrate Judge Henry Pitman's entered the order on the class and collective action settlement in the Southern District of New York. The assistant branch managers had sued Capital One in March, claiming the bank violated the Fair Labor Standards Act (FLSA) as well as wage-and-hour laws in New York, New Jersey and Maryland by wrongly deeming them exempt from federal and state overtime requirements. A hearing has been set to make a final determination on the fairness of the settlement, fix the amount of attorneys' fees and costs and hear any objections, according to the court's order.

Morgan Stanley Will $4.2 Million To Settle Overtime Class Action

Morgan Stanley & Co. has agreed to pay $4.2 million to settle a collective action accusing the financial services company of failing to provide overtime pay to client services associates. Phillips Amador, a former client services associate, filed the suit in 2011. He alleged that Morgan Stanley failed to provide associates with overtime in violation of both the Fair Labor Standards Act (FLSA) and state labor law. It was contended that even though Morgan Stanley classified the employees as nonexempt from overtime requirements, the financial company told them not to record the overtime hours they worked. U.S. District Judge Richard J. Sullivan had conditionally certified the FLSA collective action, finding the Plaintiffs had adequately claimed they were subject to an unlawful overtime policy.

The settlement came as Morgan Stanley was battling a consolidated action accusing the company of failing to pay overtime to financial advisers and financial adviser trainees and taking unlawful deductions. In May, the judge overseeing that case reduced the scope of that by dismissing a claim related to its alleged failure to reimburse certain business expenses.

Kindred To Pay $16.5 Million To Settle Workers' Wage Class Action

Kindred Healthcare Inc. will pay $16.5 million to settle claims by hospital workers in a class action lawsuit. The workers said that the hospital giant violated state labor laws by not paying for late hospital shifts and missed meal breaks. The proposed settlement, which has been submitted for a California judge's approval, would end two class actions that are being handled together. Kindred was accused of forcing employees to waive certain meal breaks as a condition of employment and not following state waiting time pay rules, among other claims. U.S District Judge Dean Pregerson granted certification in March 2013 to five subclasses of workers, ruling they met the standards to proceed collectively on most of their claims, including the allegation that Kindred unfairly evaded paying overtime to employees with schedules.

$550,000 MetroPCS Settlement Approved In Overtime Suit

A Florida federal judge has approved a $550,000 collective action settlement between MetroPCS Wireless Inc. and a group of account service representatives who said they had been improperly denied overtime. U.S. District Judge Virginia M. Hernandez Covington found the deal was fair and reasonable. She ruled that the settlement, which provides credit for roughly five hours of overtime worked by each Plaintiff for each week during the class period, represented a fair compromise, as discovery had shown the service representatives had worked an average of one to 10 hours overtime each week.

Named Plaintiffs Karen Palma and Hallie Selgert sued MetroPCS in March 2013, claiming they routinely worked overtime hours but were misclassified as exempt employees in violation of the Fair Labor Standards Act (FLSA). Judge Covington conditionally certified the class in December, finding the Plaintiffs were similarly situated and that MetroPCS' "barrage" declarations challenging the motion were inappropriate for that stage in the litigation process.

Skechers Pays $1.2 Million To Settle Overtime Class Action

A California judge has tentatively approved a $1.2 million settlement to resolve class claims by about 4,800 Skechers USA Inc. employees who alleged the shoe retailer failed to pay them for overtime worked and deprived them of meal and rest breaks. Judge Jane L. Johnson's order provided for a maximum of $714,000 to be paid out to class members with a $357,000 minimum. Class counsel would receive $400,000, plus about $31,300 in costs. The named Plaintiffs would each receive $5,000 in incentive awards, and $36,000 would go to cover claims administration costs. Lead Plaintiff Roneshia Sayles sued the company in 2011, claiming Skechers unlawfully withheld pay from employees, including compensation for missed meal and rest breaks, overtime and earned wages, in violation of California labor laws.

Sayles, a former assistant manager, claimed Sketchers would regularly perform mandatory security checks after employees had clocked out for the day or were on their breaks in order to ensure that employees were not stealing merchandise, but refused to compensate employees for their time spent on the compulsory procedures. Sayles claimed Skechers covered up its unlawful policies by refusing to provide employees with accurate and itemized wage statements.

Employees were also required to perform customer service duties that only a limited number of sales associates were authorized to do, so many times employees had to stay on the floor to assist customers and were deprived of meal and rest breaks. Sayles also claimed that Skechers had failed to pay several of the class members the wages they had earned after they left the company. The parties reached the settlement following mediation meetings last year.

AT&T To Pay $5 Million To End Wage-And-Hour Class Action

AT&T Mobility LLC has agreed to pay $5 million to resolve a putative class action brought by employees at the company's retail stores who alleged they were shortchanged on overtime and other wages. Andrew Prizler, who sued AT&T on behalf of a putative class of employees in California, has asked a judge to grant final approval to a settlement that would resolve wage and hour allegations leveled against the mobile phone company. Under the agreement, which secured preliminary court approval in March, AT&T would pay $5 million that would go toward costs, attorneys' fees and payouts to more than 2,600 employees. The settlement class would include all AT&T retail sales consultants who worked for the company between Oct. 19, 2010, and Oct. 27, 2012. The class would be limited to those employees who worked overtime during any given week, and earned commissions as part of their pay that week. Approximately 2,600 employees participating in the settlement would receive an average payout of about $1,400 under the terms of the agreement.

Lowe's Pays $9.5 Million In Settlement Of Overtime Class Action

Lowe's Home Centers Inc. has agreed to pay $9.5 million to end human resources (HR) managers' class action allegations that they were not actually managers and that Lowe's misclassified them as exempt from overtime pay requirements. Lead Plaintiff Lizeth Lytle's suit, initially filed in August 2012, claimed the company classified its human resources managers as exempt from the Fair Labor Standards Act (FLSA) overtime requirements, but that their duties were not as sophisticated as their title suggested and they should not be classified as exempt. Although given the title of manager, Lowe's human resources managers, who number as many as 1,745, lack discretion to make meaningful decisions and do not supervise employees. The managers maintained that the employees' duties actually include menial tasks such as operating cash registers, cleaning bathrooms, greeting customers and sweeping floors.

TD Bank To Pay $10 Million To Settle Overtime Class Action

TD Bank NA has agreed to pay $9.9 million to settle a class and collective action alleging that the bank has failed to pay assistant store managers overtime wages. A motion has been filed seeking preliminary approval for the settlement. It was alleged that TD Bank had improperly classified the class members as exempt from federal and state overtime requirements.

The Plaintiffs filed suit against TD Bank in February 2013 and subsequently filed two amended complaints, the most recent of which asserted claims for violations of the Fair Labor Standards Act (FLSA) and New York, New Jersey and Pennsylvania wage-and-hour laws. Despite the class members' managerial job titles, they perform nonexempt, nonmanagerial duties, such as serving as bank tellers, counting money in the vault and opening and closing branches.

Source: Law360.com

XVIII. PREMISES LIABILITY UPDATE

Beasley Allen Lawyer Files Lawsuit On Behalf Of Two Families Affected By Legionnaires Disease

A personal injury lawsuit has been filed by two Jefferson County, Ala., families. Clayton Wheat and Tony Renta, along with several members of a girls' softball team, became ill after a weekend stay at the Sleep Inn & Suites in Prattville-Millbrook. A number of the individuals who stayed at the Sleep Inn & Suites, including several who were part of the girls' softball team, became ill. Several of those individuals have tested positive for Legionnaires disease, is a severe respiratory disease caused by the bacterium *Legionella*.

Guests at a hotel or motel expect a reasonable amount of care to be taken in regards to health and safety. It's alleged that the hotel's water system and cooling system have not been properly maintained and that the infected were unknowingly exposed to bacteria-laden water, mist and air at the hotel. The Wheat and Renta families were in the area for a local softball tournament. Shortly after the tournament weekend, at least 14 people became sick with flu-like symptoms including difficulty breathing, elevated temperature, body aches, dizziness, headaches, and chills.

Legionnaires disease is typically contracted by inhaling or ingesting *Legionella* bacteria. The bacteria can also cause related illness, such as Pontiac fever, pneumonia, and other serious and sometimes permanent health conditions. *Legionella* bacterium is commonly found in water or in mist. If water sources are not properly cleaned or treated, those who come in contact with the contaminated water can ingest the dangerous bacteria and become seriously ill or die. *Legionella* can also form in air conditioning duct systems and be inhaled by others who are exposed to the mist from those systems. *Legionella* cannot be transmitted from person to person. The Defendant named in the lawsuit is Choice Hotels International, Inc., doing business as Sleep Inn & Suites Millbrook-Prattville. Ben Locklar, a lawyer in our firm's Personal Injury/Product Liability Section, is the lead lawyer for the plaintiffs. The lawsuit was filed in the U.S. District Court for the Middle District of Alabama.

Judge Approves Settlement In Texas Brine Sinkhole Lawsuit

A federal judge in Louisiana has approved $48.1 million settlement in a consolidated class action in which a group of property owners and residents accused Texas Brine Co. LLC of causing a potentially dangerous sinkhole two years ago. A hearing was held on the fairness, adequacy and reasonableness of the proposed settlement, which had been reached earlier this year. U.S. District Judge Jay C. Zainey announced after the hearing that he would grant final approval of the agreement. Seven class members appeared in support of the agreement. A status conference is set for Oct. 23.

The Plaintiffs accused Texas Brine and an Occidental Petroleum Corp. unit of causing the multi-acre sinkhole that emerged in August 2012 in the swamplands of Bayou Corne, La., following the alleged collapse of an underground salt dome cavern excavated by Texas Brine. The sinkhole, 422 feet deep and 372 feet wide, allegedly released a foul diesel odor and created a salt water slurry containing diesel fuel, according to court papers. The class includes an unspecified number of property owners, lessees and residents in the mandatory evacuation area and all business operators and owners either physically in or operating mainly within the area who suffered actual damages allegedly caused by the sinkhole event.

The lead case in the consolidated class action, filed in August 2012, alleged product liability, negligence and Clean Water Act claims against Houston-based industrial brine producer Texas Brine, accusing the company of causing the release of "toxic, noxious and harmful materials." The sinkhole, which resulted in a declaration of a statewide emergency and a mandatory evacuation of the area, was said to be the result of the failure of a defectively designed salt cavern. Texas Brine had been used as a deposit for naturally occurring radioactive material produced as a byproduct of its salt drilling activities.

Source: Law360.com

Texas State Fire Marshal Releases West Explosion Report

The Texas State Fire Marshal issued a report last month that dealt with improvements in the response to large, complex fires following the 2013 fire and deadly explosion of a fertilizer plant in West, Texas. While the cause of the deadly fire remains undetermined, the 55-page report, intended to be a guide to prepare future firefighters in handling large, complex fires, outlined a number of suggestions to reduce the risk to fire personnel and prevent injuries when fighting these types of fires. We have written on this incident in previous issues and updated things in the National Section of this issue.

As you may recall, the fire involved a 12,000-square-foot wood frame seed and fertilizer building at the West Fertilizer Plant, known as the Bulk Processing Plant, which had no fire resistance rating. According to the report:

> The building contained bins of ammonium nitrate pellets—about 20-30 tons—and other bulk chemicals. As the fire raged, the building's roof collapsed and an explosion rocked the city of approximately 2,800 people. The blast killed 10 firefighters and five civilians. Several firefighters suffered serious injuries and more than 200 civilians were injured, the report noted.
>
> The explosion created a 90-foot wide and 10-foot deep crater and destroyed or damaged 500 structures in a 37-block area. Pieces of debris were documented as far away as 2.5 miles and the reported noted that the explosion registered 2.1 on the earthquake Richter scale.
>
> Destroyed buildings included three schools, a West EMS building, a nursing home, an apartment complex and several single family homes. Three West Volunteer Fire Department fire trucks were also destroyed by the fire and explosion.
>
> Insured losses as a result of the fire and explosion were estimated to be $100 million. Improvements were recommended in fire department operations indicating that during the West fire, communication was lacking and senior level personnel didn't take a unified command. There was "unstructured emergency operations lacking in direction and supervision."
>
> - The West VFD was not trained or equipped to conduct an operation of this complexity, involving a large commercial occupancy filled with hazardous materials that possessed explosive properties.
> - The residential fire attack used was not adequate for this type of large, complex fire. Neither the City of West, nor McLennan County has adopted fire or building codes. The state of Texas Local Government Code only allows counties with a population of 250,000 or more or those adjacent to counties with that population to adopt a fire code.
> - Besides improved communications among fire personnel, outlined training recommendations and legislative considerations were outlined regarding current fire and building codes as well as sprinkler requirements.

The Uniform Fire Code wasn't published until 1971. This was after the building's construction, which was in the 1960s. In addition, at the time the building was constructed there were no requirements for sprinklers.

Source: *Claims Journal*

Judge Upholds $2.6 Jury Award To A Florida Tourist

A judge has upheld a $2.6 million jury award to a Kansas tourist in a lawsuit against Volusia County, Fla. The Plaintiff, Erin Joynt, suffered a skull fracture when she was run over by a truck driven by a lifeguard employed by Volusia County. The county had appealed part of the verdict handed down by a jury in favor of Ms. Joynt. She was injured while lying on the beach in 2011. The County had appealed a $600,000 portion of the verdict awarded for compensation for future medical bills and earning capacity. Ms. Joynt was also awarded $500,000 for past suffering and $1.5 million for future suffering. Reportedly, the county may still decide to seek a reduction in other amounts that made up the verdict. The Plaintiff was represented by John M. Phillips, a Jacksonville, Fla., lawyer. He did a very good job for his client in this case.

Source: *Claims Journal* and *Daytona Beach News-Journal*

$27 Million Verdict Returned In Texas Against McDonald's

A $27 million jury verdict was returned in a Texas court against McDonald's Corp. last month. The case involved a claim that lax security at one of the company's restaurants led to the deaths of two teenagers. The victims in the case were Denton James Ward, 18, who was beaten to death by a mob at a McDonald's in February 2012, and his girlfriend, Lauren Bailey Crisp, 19, who died in a traffic accident in a futile attempt to take Ward to a hospital.

The families of both teens filed suit against McDonald's, claiming the restaurant chain didn't protect patrons at its College Station, Texas, location even though local police had been repeatedly called to break up fights there. The state court jury in Bryan, Texas, awarded the Ward family $16 million and the Crisp family $11 million.

It was proved that the restaurant where the attack occurred had repeatedly drawn police attention for large unruly crowds and fighting during late-night hours. It appears that police had responded more than 200 times to complaints at this McDonald's location in the previous three years. Chris Hamilton, a lawyer with Standly & Hamilton, represented the Crisp and Ward families.

Source: *Insurance Journal*

XIX. WORKPLACE HAZARDS

This month I will give a summary in this section of activity in investigations and fines by The Occupational Safety and Health Administration. In each of these cases listed, one or more safety violations were found by OSHA. In several of the reported fines by OSHA, terms are used relating to the violations involved. While you may be familiar with these terms, I will set out the definitions:

- A "repeat violation" is issued when an employer previously has been cited for the same or a similar violation of a standard, regulation, rule or order at any other facility in federal enforcement states within the last five years.
- A "serious violation" occurs when there is substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known.

The following are a sampling of some of the OSHA investigations resulting in fines against companies that were guilty of violations:

New Safety Directive Issued By OSHA On Communication Tower Work

The Occupational Safety and Health Administration (OSHA) has updated its Communications Tower directive regarding the use of hoist systems used to move workers to and from workstations on communication towers. This follows an alarming increase in preventable injuries and fatalities at communication tower work sites. More fatalities occurred in this industry in 2013 than in the previous two years combined.

This disturbing trend appears to be continuing, with nine worker deaths occurring so far in 2014. The directive outlines the proper use of hoist and other fall arrest systems and includes detailed information on how to hoist people safely. The directive updates a 2002 enforcement policy, which only covered the hoisting of workers to workstations during new tower erection activities.

The updated policy covers any work on a communication tower—including both maintenance and new construction—that involves the use of a hoist to lift workers from one elevated workstation to another. The release of the new directive is the latest in a series of actions OSHA has taken to improve cell tower safety.

The agency is collaborating with the National Association of Tower Erectors and other industry stakeholders to ensure that every communication tower employer understands how to protect workers performing this high-hazard work. OSHA sent a letter to communication tower employers urging compliance and strict adherence to safety standards and common-sense practices. OSHA has also created a new web page targeting the issues surrounding communication tower work.

This outreach follows a November 2013 memo to OSHA's compliance officers and regional administrators mandating increased attention, education and data collection on the industry. OSHA continues to investigate past incidents and will issue the results as they become available. Communication towers are on the agency's regulatory agenda and OSHA expects to issue a Request for Information later this year.

Source: *Claims Journal*

Company Cited In Fatal West Virginia Cell Tower Collapse

OSHA has cited an Oklahoma company after two cellphone towers collapsed in West Virginia and killed three people. The agency cited S and S Communication Specialists Inc. for two serious violations stemming from the February incident at Clarksburg. Officials say the company was modifying a cellular communication tower when the tower fell and weakened a second tower, which also collapsed. Two company employees and a volunteer firefighter died. Two other people suffered serious injuries. OSHA assessed a $7,000 penalty for each violation. The company will have 15 business days to respond.

Source: *Claims Journal*

OSHA Says Safety Violations Continue At Oklahoma Oil Refinery

OSHA has cited an Oklahoma oil refinery with five repeat and three serious violations for continuing to expose workers to unsafe conditions. As a result, OSHA imposed a fine of $184,800 on Holly Refining & Marketing-Tulsa LLC. The federal safety agency said a February 2014 follow-up inspection showed Holly Refining & Marketing was continuing to expose workers to hot surfaces of refinery process equipment, falls from heights and other hazards at its crude oil refinery. The five repeat citations, with a penalty of $170,500, were issued for failing to ensure that:

- Workers were protected from contact with hot surfaces of refinery process equipment.
- Floor grating in the processing unit was secure and level.
- Ladder floor openings and open-sided floors were guarded to prevent falls from heights.
- Electrical equipment and wiring were maintained in a safe condition.

Similar violations were cited in 2009. Three serious violations, with a penalty of $14,300, were cited for failing to ensure anchoring of posts and framing for fall protection railings were complete and effective; to ensure floor holes in walking and working surfaces were guarded or covered; and to ensure metal fan blades were guarded effectively.

Source: OSHA

Texas Plastics Plant Fined $174,000 For Safety And Health Violations

Plastic Systems LLC, located in El Paso, Texas, was cited by OSHA for 21 safety and health violations, including six repeat, for failing to develop adequate lockout/tagout procedures to control the unexpected startup of the company's plastic injection molding machines. The proposed penalties by OSHA total $174,240. The inspection was conducted in February 2014 after a safety referral was made during a health inspection initiated under the Combustible Dust National Emphasis Program.

The six repeat violations, with a penalty of $112,860, were cited for failing to address specific lockout/tagout techniques for the servicing and maintenance of machinery and conduct annual inspections of these techniques and procedures. The employer failed to ensure workers had operable portable fire extinguishers and were trained to use them. Improper maintenance resulted in electrical hazards, including conductors with damaged insulation.

Plastic Systems was cited previously in a 2011 inspection at the El Paso facility. The remaining 15 violations, including 11 serious with a penalty of $61,380, were cited for failure to ensure workers knew the type and magnitude of energy that needed lockout control; provide machine guarding on injection molding machines; maintain electrical components and equipment in a manner that complies with safety requirements; properly record injuries and illnesses; adequately distribute portable fire extinguishers; and replace damaged circuit breaker boxes.

Source: OSHA

Macy's Fined $1 Million For Decapitation Of Warehouse Employee

Macy's Inc. has agreed to pay a $950,000 fine and undergo a safety audit in connection to the decapitation of an employee in 2009 at a Los Angeles area distribution center. The Cincinnati, Ohio-based retail giant pled no contest to corporate criminal liability on August 11. As part of a negotiated settlement, the company will be required to conduct a pre-approved audit of equipment in all of its facilities in California. The employee was decapitated and crushed in 2009 in modified equipment used to consolidate waste.

The case, investigated by the California Occupational Safety and Health Administration, involves the July 2009 death of 65-year-old employee Roy Polanco. He was operating a cardboard baling and compactor machine at a distribution center in East L.A. when he fell into the machine's unguarded opening. He was crushed to death and decapitated by the machine's hydraulic compacting arm. The distribution centers use the balers to compact waste for recycling, and the one the employee was using had been modified to operate without interruption.

Macy's, in addition to paying the fine, is required to conduct an audit of all of the balers and compactors at its facilities across the state. The procedure and methodology of the audit is subject to approval from the district attorney's office, according to the settlement. As part of the settlement, Macy's waives its right to appeal its no contest plea and speedy trial rights until August 2015.

This is not the only employment-related lawsuit in which Macy's has been ensnared recently in California. In July, a putative class action was filed in federal court, as a group of consumers accused the retailer of illegally collecting personal information at in-store checkouts. The case is *People of the State of California v. Macy's Corporate Services Inc.* in the Superior Court of the State of California.

Source: Law360.com

XX. TRANSPORTATION

Settlement For Family Of College Student Killed In Crash After Alabama National Championship Game

A settlement was reached last month in a lawsuit filed in the Circuit Court of Montgomery County, Ala., for the wrongful death of Natalie Baine, a student at the time at The University of Alabama. Ms. Baine was killed in an automobile crash on Jan. 8, 2013, when the car she was riding in collided with a charter bus and another vehicle. The driver of the vehicle in which Ms. Baine was riding was too fatigued to drive, but did so anyway, with tragic results. The details of the settlement are confidential, at the request of the Defendants.

Our firm continues to mourn with our clients over the loss of their daughter. Natalie's parents wanted this lawsuit to help prevent this sort of thing from ever happening to anyone again by getting the word out about the dangers of fatigued driving. As we have learned in litigation over the years, fatigue is every bit as dangerous as drunk driving. The problem is made worse when what little sleep you do have is impaired by alcohol. The world needs to know how important it is to get quality rest prior to driving any motor vehicle. We promised this family that we would help them through the hardest time in their lives.

The occupants of the vehicle in which Natalie was a passenger were returning from the Alabama v. Notre Dame National Championship game in Miami, Fla., which was held on the night of Jan. 7, 2013. After the game, the driver and the owner of the vehicle stayed up late partying and celebrating the win at a bar in South Beach before waking up on the morning of Jan. 8 to drive home. In fact, the two young men had been drinking and getting very little sleep for the entire time they were in Miami. Chris Glover, a lawyer in our firm's Personal Injury/Products Liability Section, was the lead lawyer in the case for the Baine's family.

Illinois Transport Company Settles Fatal Crash Suit For $2.7 Million

SCR Medical Transportation Paratransit Services, a company that transports the disabled, has settled a lawsuit with the family of a woman passenger killed in a Chicago crash. The family of Ella Mae Williams will receive $2.7 million from SCR. The 58-year-old Williams, a diabetic who required a wheelchair, was killed in March 2013 when the SCR van she was riding in hit a light pole. According to the lawyer for Williams' family, the driver, LeRoy Stevenson, claimed he swerved to avoid a pedestrian. However, the dash-cam video appears to show the driver falling asleep at the wheel before the crash. SCR holds a contract with PACE, a suburban Chicago bus agency.

Source: *Claims Journal*

XXI. ENVIRONMENTAL CONCERNS

$27.8 Million Settlement Finalized In TVA Coal Ash Spill

Lawyers at Beasley Allen are pleased to announce that U.S. District Judge Thomas Varlan has approved the settlement agreement in the ongoing lawsuit against the Tennessee Valley Authority. The TVA has agreed to pay $27.8 million to victims of the massive coal ash spill that decimated the area around the TVA's Kingston Fossil Plant in December 2008. A 2012 ruling by Judge Varlan had found that TVA was liable for the spill, which occurred when a dike burst at a coal ash containment pond. The resulting deluge of more than a billion gallons of toxic sludge knocked homes from their foundations and contaminated the Emory and Clinch rivers. Beasley Allen lawyers Rhon Jones, who heads up the firm's Toxic Torts section, and Grant Cofer, a lawyer in the Section, are representing the Plaintiffs in this litigation. Rhon had this to say about the settlement:

> *This settlement represents the culmination of more than five years of litigation and negotiations and through this agreement, those who deserve it can receive compensation from TVA. This is important for every property owner impacted by this terrible tragedy.*

The final settlement agreement will allow more than 800 residents and property owners affected by the coal ash spill to hold TVA accountable for the impact to their way of life. Cleanup efforts continue even years after the spill, with total costs expected to exceed $1.2 billion. The Environmental Protection Agency (EPA) has described the spill as one of the worst environmental disasters of its kind. The TVA coal ash spill released more than a billion gallons of toxic sludge over 300 acres in East Tennessee within the course of minutes. It is estimated there is at least 500,000 cubic yards of coal ash still remaining on the bottoms of the Emory and Clinch rivers. Sludge from the coal ash containment pond contains toxic substances including arsenic, lead, mercury and other heavy metals.

If you need more information on this settlement, contact Rhon Jones or Grant Cofer at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or Grant.Cofer@beasleyallen.com.

Deepwater Fracking Raises Environmental Concerns

Hydraulic fracturing, referred to as fracking, has been in the news a fairly good bit over the past year. But interestingly, I find that few folks even know what it really is. I will address one of the areas of concern. Offshore fracking appears to be the next frontier of oil companies to boost profits at the expense of safety and environmental concerns. Fracking is the process of drilling and injecting fluid into the ground at a high pressure in order to fracture shale rocks to release natural gas and crude oil trapped inside. While this procedure has been around for decades, only recently has technology advanced to the point where offshore fracking is feasible. This environmentally controversial method of drilling has been widely condemned as a source of groundwater contamination. However, the main concern now is how that debate will play out as oil companies move offshore.

Major oil companies such as BP, Shell, and Chevron Corp. stand to make billions in profits with the expansion of their offshore fracking endeavors. But, as profits soar, so will the risks to the environment and habitats in which these companies are hoping to drill. While new fracking operations have commenced off the coasts of Brazil and Africa, the real concern is in the Gulf of Mexico, where wells more than 100 miles from the shore must negotiate hazardous water depths of a mile or more. With an expected growth of more than 10 percent by the end of 2015, fracking in the Gulf of Mexico is rapidly expanding, but at what costs? Miyoko Sakashita, Oceans Director at the Center for Biological Diversity, had this to say:

> *The concern is that chemicals used in the fracking fluid that's released in the Gulf could harm sea life or upset the ecosystem. One of the key problems is nobody has really looked at the environmental impacts of offshore fracking, and we find that incredibly concerning. Nobody knows what they've been discharging and in what amounts.*

According to companies and regulators, the treated wastewater used to fracture the shale rocks is then dumped overboard into the vast expanse of the Gulf of Mexico, where dilution supposedly renders it harmless to the vast ecosystem of sea life below the ocean's surface. However, a spokesperson for the Environmental Protection Agency (EPA) was not aware of any studies having been done on the impact of offshore fracking. The practice has long been viewed as "a somewhat short term discharge and often mixed with other discharges."

Along with the immediate contamination concerns, fracking operations have been repeatedly linked with the increase of earthquakes near fracking wells. William L. Ellsworth, U.S. Geological Surveyor at the Earthquake Science Center, observed:

> *Human-induced earthquakes have become an important topic of political and scientific discussion, owing to the concern that these events may be responsible for widespread damage and an overall increase in seismicity. It has long been known that impoundment of reservoirs, surface and underground mining, withdrawal of fluids and gas from the subsurface, and injection of fluids into underground formations is capable of inducing earthquakes.*

While companies such as BP have a history of acting with profits as their main priority, it is time that they take a step back and properly evaluate their actions before they once again cause irreparable damage to our Gulf Coast community and environment. If you need more information on this subject, contact John Tomlinson, a lawyer in our firm's Toxic Torts Section, at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com. John has been actively involved in the BP oil spill litigation over the past three years.

Source: *Bloomberg News*

EPA Should Update Fracking Pollution Regulations

In a related matter involving hydraulic fracturing (fracking), but dealing with inland issues, a recent report from the Governmental Accountability Office is significant. A U.S. Environmental Protection Agency (EPA) program that prevents pollutants associated with fracturing from contaminating groundwater in eight states, including California, Pennsylvania and Texas, is outdated and lacks sufficient muscle, according to the report released. According to the government watchdog, the EPA has not evaluated emerging risks such as overpressurization of geologic formations and potential contamination of potable groundwater by diesel fuels, leaving many states without the tools necessary to ensure their programs are effective.

GAO's report noted that the EPA, which largely agreed with the GAO's findings, has only in February of this year updated its guidance for the program, issuing updated recommendations for oil and gas hydraulic fracturing activities that use diesel fuels. The EPA also must do more to incorporate changes to state program requirements into federal regulations, the report said, noting that such steps are necessary to ensure that it has appropriate enforcement authority for all state program requirements. The report stated further:

> *Without incorporating these requirements and changes into federal regulations, EPA cannot enforce them if a state does not take action or requests EPA's assistance to take action.*

The GAO report also stressed the importance of on-site evaluations of the programs conducted by the states that were evaluated in the report, including Colorado, Kentucky, North Dakota, Ohio and Oklahoma, which the agency has neglected due to lack of funding.

Other problems noted in the report centered on the agency's data collection efforts for the program. For example, data the agency collects to determine whether states are complying with the program is typically difficult to summarize. That's because many states submit the information on paper, rather than electronically. Additionally, forms were sometimes submitted with missing data and it wasn't clear whether the blank fields represented actual missing data or zeros, the report said.

The GAO report also noted that different states are known to interpret the instructions on the forms differently, particularly when evaluating the amount of significant noncompliance and the alleged contamination of aquifers. In determining whether a well had contaminated an underground aquifer, different state agencies informed the GAO that some reported the incident only if it was confirmed as coming from a well, while other states would report these instances without confirmation.

To address these issues, the GAO recommended that the EPA also focus its efforts on improving the collection of this data to ensure that it is consistent, complete, and can be effectively evaluated at the national level. The report noted that the EPA took umbrage with the GAO's recommendation that the agency incorporate state program requirements and changes to state program requirements into federal regulations, saying it would cost the agency "considerable effort" to determine whether the new rules would comply with the Safe Drinking Water Act.

The GAO report notes that as of 2012, there were more than 170,000 of these wells in the United States, located in states as diverse as California, New Mexico, Oklahoma, Pennsylvania, Texas and Virginia. The fluids, which consist largely of salt water and may contain pollutants such as chlorides, hydrocarbons, and naturally occurring radioactive materials, are blasted deep into these wells into underground rock formations that are usually below aquifers that provide potable water. Known as Underground Injection Control class II program, the regulations provide safeguards to ensure that the fluids do not leak into the surrounding aquifer.

Other types of wells that are included in the program are disposal wells, where brines and other fluids brought to the surface during fracking are disposed of, and storage wells, which hold liquid petroleum products as part of the U.S. Strategic Petroleum Reserve.

Source: Law360.com

XXII. THE CONSUMER CORNER

Beasley Allen Lawyers Seek To Hold Capacitor Manufacturers Liable For Their Illegal Price-fixing Scheme

Lawyers in the Consumer Fraud Section at Beasley Allen, in cooperation with other national firms, have filed an antitrust class-action suit against Panasonic, TDK Corp., and approximately 20 other capacitor manufacturers alleging the existence of illegal agreements to fix prices for aluminum, tantalum, and film capacitors. The complaint, filed in a New Jersey federal court on Aug. 1, 2014, describes actions by the Defendants dating back to 2007 and continuing until March 2014, when U.S., Japanese, and other nations' antitrust authorities publicly revealed their investigations. EIQ Energy Inc., a San Jose, Calif.-based solar electronics manufacturer, claims that it and other direct purchasers of the Defendants' capacitors were harmed by the Defendants' agreements to fix prices at artificially inflated levels. In the suit, Beasley Allen attorneys are seeking treble damages on behalf of direct-purchasers.

Capacitors are ubiquitous in electronics. Their main purpose is to regulate and govern the flow of electrical currents through a device and insure there is adequate charge available to the device to perform the tasks we require. Although capacitors are critical to the functionality of electrical devices, they are mostly miniscule in size. For example, a typical smart-phone contains 300-500 capacitors while a typical computer has between 100 and 700. Their cost on an individual basis reflects that size, but because of the sheer number necessary for modern devices, the cost adds up quickly. The average price per unit over the last five years has been $0.01178, or just $11.78 per thousand units. But, when combined, capacitors were a $16 billion industry in 2013. While the increased cost of capacitors likely trickles down to affect every consumer—there are very few people today that do not own a single electronic device—that change in price to consumers is small compared to what a direct purchaser faces when purchasing in bulk.

Despite the size and low cost of capacitors, the market for capacitor manufacturing is difficult to enter. The necessary investment for manufacturing is not only very high (possibly in the millions of dollars), but the relatively low cost per capacitor means a manufacturer has to begin production with bulk purchasers already lined up—a daunting requirement for profitability considering the market control existing manufacturers maintain. Thus, there have been no new capacitor manufacturers during the class period alleged in the complaint. Normally, when goods are priced above fair-market competitive levels, new manufacturers would swarm to the market, but these inhibitions to market entry make collusion among the Defendants easy—they do not have to worry about an influx of competitors if they raise prices too much.

Lawyers at Beasley Allen are not alone in seeking to hold Panasonic, TDK Corp., and the other manufacturers legally responsible for their damaging actions. Several U.S. and foreign government antitrust agencies have recently revealed they are also investigating the illegal scheme. Global coordinated antitrust investigations are taking place in the United States, China, Korea, Japan, Taiwan, and Europe on these issues.

U.S. law allows the first company involved in criminal antitrust violations that self-reports to have full immunity from criminal prosecution and limitations on civil liability. One such manufacturer, believed to be Panasonic, came forward and revealed the plot, admitting its own participation in the price-fixing agreements. Once the investigations and the Defendants' illegal actions became public, lawyers at Beasley Allen, along with the other national firms we are working with, moved quickly to recover damages for the injuries and damages caused to direct purchasers.

If you need additional information on this litigation, contact Dee Miles, who heads up our firm's Consumer Fraud Section, or Rebecca Gilliland, a lawyer in the Section, at 800-898-2034 or by email at Dee.Miles@beasleyallen.com or Rebecca.Gilliland@beasleyallen.com.

Sources: http://www.law360.com/classaction/articles/563980?nl_pk=03236d8b-03b5 and the complaint.

NHTSA Probes 50,000 Spyder Motorcycles Over Fire Risk

The National Highway Traffic Safety Administration is investigating more than 50,000 Can-Am Spyder vehicles after reports of two fires that occurred while the three-wheel motorcycles were in operation. NHTSA's Office of Defects opened a preliminary evaluation into reports that Bombardier Recreational Products Inc.'s 2008-14 Spyder models can catch fire. The probe will affect an estimated 52,408 motorcycles. According to NHTSA, Bombardier has conducted three safety recalls to address defects that could result in a fire from the vehicles at the center of the investigation but that the two recent fires seem to be unrelated to the issues covered by the previous recalls.

Source: *Claims Journal*

Capital One And 3 Others Settle TCPA Action For Record $75 Million

Capital One Financial Corp., and three collections agencies, have agreed to pay almost $75.5 million to settle a consolidated class action lawsuit. It was alleged the defendants used an automated dialer to call customers' cellphones without consent. This is said to be the largest settlement ever under the Telephone Consumer Protection Act (TCPA). U.S. District Judge James F. Holderman has given preliminary approval to the settlement. The bank and Leading Edge Recovery Solutions LLC, Capital Management Services LP and AllianceOne Receivables Management Inc., under the settlement, will collectively pay $75,455,098.74 into a settlement fund and change their practice of cold-calling customers' cellphones. The court's order said:

> *The court has conducted a preliminary evaluation of the class settlement agreement for fairness, adequacy, and reasonableness. Based on this preliminary evaluation, the court finds that the class settlement agreement is fair, reasonable, and adequate, and within the range necessary for preliminary approval.*

Capital One will pay $73 million into the fund, Leading Edge will pay almost $1 million, AllianceOne will pay $1.4 million, and CMS will pay more than $24,000. The settlement also requires Capital One to undertake practice changes with respect to how it contacts customers on their cellphones to ensure compliance with the TCPA.

The settlement class consists of all people in the U.S. who received a call from Capital One's dialers to a cellphone from an automatic telephone dialing system with an attempt to collect on a credit card debt from January 2008 to June 2014 and those who received calls from participating vendors from February 2009 to June 2014. The court has scheduled a hearing for final approval in December. Plaintiffs are represented in this case by Jonathan D. Selbin, Daniel M. Hutchinson and Douglas Ian Cuthbertson of Lieff Cabraser Heimann & Bernstein LLP and Matthew R. Wilson of Meyer Wilson Co. LPA. They did a very good job.

Source: Law360.com

Bass Pro Pays $6 Million To Settle Recorded Call Lawsuit

Bass Pro LLC, the outdoor sporting goods company, will pay more than $6 million to settle a putative class action accusing the retailer of illegally recording customer calls without their consent. U.S. District Judge Cynthia Bashant, sitting in California, has approved the settlement agreement. The preliminary approval of the agreement resolves a suit filed by a customer who alleged the retailer recorded a conversation between him and a Bass Pro customer service representative. It was contended that the employee divulged financial information, including the customer's credit card information. In addition to the $6 million cash award, under the agreement the retailer will stop recording calls without customer consent. The court order says:

> *The proposed settlement ... reflects a change in defendants' business practices, in place beginning March 28, 2013, in which they will not record any inbound telephone calls from California area codes without first giving notification at the outset of the call that the call may be recorded.*

Lead Plaintiff Geoffrey McDonald claims Bass Pro recorded at least one conversation where he told a customer service representative sensitive information, without being informed that his conversation would be recorded. The suit, which was removed to federal court in April 2013, alleged that the outdoor retailer, in the year prior to the filing of the complaint, had a regular practice of recording incoming and outgoing telephone communications with customers without notifying the customers that the communications would be recorded, in violation of California privacy laws. McDonald filed the suit on behalf of all California residents who have had a least one phone conversation with a live Bass Pro customer service representative that was recorded without notification. In the order granting preliminary approval to the settlement, Judge Bashant also granted conditional class certification.

According to the court's order, the settlement agreement applies to California residents who had at least one Bass Pro phone call recorded between March 14, 2012, and April 3, 2013. Approximately 94,600 improperly recorded calls were found during discovery, of which 30,000 individuals could be identified, according to the order. The $6 million settlement will be broken down into $1.8 million in attorneys' fees, $150,000 in litigation costs and $20,000 in service-payment deductions, leaving $4 million to be paid to class members.

Source: Law360.com

Van Ru Credit To Pay $2.3 Million To Settle TCPA Suit

Van Ru Credit Corp. has agreed to pay $2.3 million, or $1,600 per class member, to settle allegations that it placed prerecorded calls to Plaintiffs' phones without consent. This has been called one of the largest per-member Telephone Consumer Protection Act (TCPA) class settlements ever. Arizona federal judge Stephen M. McNamee approved the settlement under which Van Ru agreed to pay class members $1,600 each to settle the suit. Lead Plaintiff Nivea Ritchie filed suit in January 2013, alleging Van Ru placed unsolicited calls on behalf of debt collectors Palisades Collection LLC and Asta Funding Inc.

The suit was filed in Arizona federal court alleging Van Ru placed prerecorded calls to the wrong consumers' cellphones by using an inaccurate skip trace vendor, in violation of the TCPA. Class members receiving payments under the settlement include all people in the U.S. whose cellphones Van Ru called using an automatic dialing service from Jan. 1, 2012, to May 31, 2012. Ms. Richie will receive $12,000 from the settlement fund for her role as class representative. Class members received, on average, 3.3 calls from Van Ru and are receiving the maximum settlement permitted under the TCPA. There are about 9,042 potential class members, but only those who submit claims will receive payment.

Source: Law360.com

Chase Bank Will Pay $34 Million To End TCPA Class Action

Chase Bank USA will pay $34 million to settle a class action alleging it violated the Telephone Consumer Protection Act (TCPA) by placing calls to consumers' cellphones without consent. U.S. District Judge Gary Feinerman preliminarily approved the settlement, under which each class member will receive between $20 and $40, to end the litigation. It was alleged that Chase and JP Morgan Chase Bank NA placed calls and sent texts or voice alerts to consumers' cellphones through automatic dialers. The court's order finds that "The settlement agreement substantially fulfills the purposes and objectives of the class action, and provides substantial relief to the settlement class." The settlement class is broken down into two subclasses:

- the alert call subclass consisting of Plaintiffs who received text messages or voice alerts and
- the collection call subclass consisting of Plaintiffs who received calls, according to the order.

The agreement comes after more than two years of "hard-fought" litigation in the case, which consists of three consolidated actions, according to the Plaintiffs' motion for approval of the settlement. This is not the first time JP Morgan has settled TCPA litigation alleging it made automated calls without consent. In January 2012, it agreed to pay between $7 million and $9 million to settle two proposed class actions claiming it illegally made automated calls to residential loan holders' cellphones without consent. Under the 2012 settlement, the company would set up a settlement fund that would be used to pay out between $25 and $500 to proposed class members, up to $3 million to proposed class counsel and $5,000 to the two proposed class representatives.

Source: Law360.com

Federal Appeals Court Backs Tougher Meat-Labeling Rules

An en banc panel of the D.C. Circuit has upheld a new, firmer set of meat-labeling regulations handed down by the U.S. Department of Agriculture (USDA) in a decision that appears to expand the right of the government to require certain disclosures by companies in the interest of informing consumers. In a 9-2 decision, the court lined up with an earlier unanimous ruling from a three-judge panel that struck down a challenge to the USDA rules aimed at settling a trade dispute with Canada and Mexico, rejecting assertions from domestic industry groups that the rules compel corporate speech in violation of the First Amendment.

Source: Law360.com

Sysco To Pay $20 Million To Settle Unsafe Food Handling Charge

Sysco Corporation, the largest U.S. food distribution company, along with its seven California Operating Companies (OpCos), will pay almost $20 million dollars in restitution, costs and penalties for the company's illegal practice of holding perishable foods—such as seafood, milk and raw meat—in unrefrigerated sheds. Reportedly, Sysco food trucks would deliver some small food orders to unrefrigerated and unsanitary sheds. That food would then be picked up later by other employees who would use their personal vehicles to deliver the unsafely held food to restaurants, hotels, hospitals and schools.

In addition to paying $15 million in penalties, Sysco agreed to pay more than $4 million in restitution, including a $1 million food contribution to food banks throughout California and $3.3 million for the cost of a 5-year statewide program that will fund inspectors for the enforcement of food transportation laws. Sysco is also now required to develop a comprehensive food safety program to ensure that these practices are not repeated.

Source: *Corporate Crime Reporter*

U.S. Retailers Warned About Hacking Software

The Homeland Security Department has reported that more than 1,000 U.S. retailers could be infected with malicious software lurking in their cash register computers, allowing hackers to steal customer financial data. Businesses of all sizes were urged to scan their point-of-sale systems for software known as "Backoff," which was discovered last October. It had been explained in detail by the agency how the software operates and how retailers could find and remove it. In August, United Parcel Service said it found infected computers in 51 stores. UPS said it was not aware of any fraud that resulted from the infection, but said hackers may have taken customers' names, addresses, email addresses and payment card information. The company apologized to customers and offered free identity protection and credit monitoring services to those who had shopped in those 51 stores.

While Backoff was discovered in October, it appears that the software wasn't flagged by antivirus programs until August. Jerome Segura, a senior security researcher at Malware Bytes, a cybersecurity software firm, said that the way that Backoff works is not unique. The program gains access to companies' computers by finding insufficiently protected remote access points and duping computer users to download malware. These are tricks that have long been in use and are often automated.

According to Segura, the hackers deploying the program have become increasingly sophisticated about identifying high-value computer systems after they have broken into them. The hackers have developed malware that is specifically for credit cards and can evade antivirus programs.

It's believed that by using Backoff selectively, rather than distributing it widely on the Internet, the hackers have been able to escape detection for a longer period. Following Homeland Security's warnings in July, however, companies are much better able to probe their own computers for Backoff. So-called chip and pin technology would allow for more secure transactions than the magnetic strip cards that most Americans use now. This technology has already been adopted in Europe and elsewhere.

It's certain that by improving card technology and updating malware detection, retailers will be able to better defend themselves. Sequra says by limiting what portions of their systems can be accessed remotely, companies can limit the damage that hackers can do. But the bottom line is retail businesses must gear up, make all necessary changes, and do a better job of protecting their customers.

Source: *Insurance Journal*

XXIII. RECALLS UPDATE

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

GM Recalls 185,000 SUVs Over Fire Risk

General Motors Co. has recalled almost 185,000 sport utility vehicles (SUVs) with faulty power window switches and is telling customers to keep them outside because they might catch on fire. GM told the National Highway Traffic Safety Administration (NHTSA) in a recall report received July 2 that fluid can enter and corrode the driver's door master power window switch module, and potentially lead to a short-circuit causing the power door lock and power window switches to function intermittently or become inoperative.

The 184,611 affected vehicles are certain model year 2005 to 2007 SAAB 9-7x; 2006 Chevrolet Trailblazer EXT and GMC Envoy XL; and 2006 to 2007 Chevrolet Trailblazer, GMC Envoy, Buick Rainier and Isuzu Ascender vehicles. The company told the NHTSA that since a fire might even occur while the vehicles aren't in use, owners should park them outside until the fix is eventually made. It said the short might also lead to overheating, which could melt parts of the door module and result in odor, smoke or fire.

At press time, parts required for the fix were not available. The dealer repair procedure, according to GM, is being finalized and will be issued soon. Customer advisory letters were to have been mailed last month. A second letter will be sent when parts are available in the fourth quarter, according to GM.
Interestingly, the disclosure of the recall filing came two days after NHTSA said it had found that some owners of recalled GM vehicles receive inaccurate results when they attempt to use GM's vehicle identification number search system to obtain recall information. NHTSA has told GM to fix the problem and to inform consumers. The agency has also urged consumers who learned through the system that their vehicle was not affected by any recall to check again or to contact GM by phone to get "accurate information."

GM Recalls Some 2013-14 Chevrolet Cruzes For Axle Issue

General Motors has recalled certain 2013 and 2014 Chevrolet Cruzes with 1.4L turbo gasoline engines to replace a right front axle half shaft that can fracture and separate without warning during normal driving. The interconnecting tubular bar on the front right axle half shaft on some of these vehicles may not meet GM specification and could fracture and separate. If this occurs while driving the vehicle, steering and braking control would be maintained. However, the vehicle would lose power to the wheels and would coast to a stop.

If a vehicle with a fractured half shaft is parked on an incline without the parking brake applied, the vehicle could move unexpectedly, resulting in a possible crash or injury to pedestrians. GM says it's aware of several dozen half shaft fractures through warranty data covering about 172,000 cars and about 2,500 service parts in the U.S. that were used to fix Cruzes with manual transmissions that were recalled in September 2013. GM is unaware of any crashes or injuries related to this condition. Repairs will be made free of charge.

GM Recalls Full-size Trucks To Inspect Transmission Fitting

General Motors has recalled 2014 Chevrolet Silverado 1500 and GMC Sierra 1500 pickups, and 2015 Chevrolet Suburban and Tahoe and GMC Yukon and Yukon XL SUVs equipped with a 6-speed automatic transmission. The recall will involve approximately 490,200 trucks and SUVs. GM says it has determined that these vehicles may have a transmission oil cooler line that is not securely seated in its fitting. If the line is not securely seated and transmission oil leaks from the fitting, the oil could contact a hot surface and result in a vehicle fire. GM says it's aware of three incidents and no injuries. GM dealers will inspect the fittings for leaks.

GM Issues Five More Recalls Covering 269,000 Vehicles

General Motors has issued five recalls covering about 269,000 U.S. vehicles, from 2013 Cadillac ATS sedans for a seat belt glitch to older-model Saturn Vue crossovers for a problem with the key coming out when the ignition is not turned off. The recalls bring GM's total for the year to 66 covering more than 29 million vehicles globally. The recent recalls in the United States are:

- 202,115 2002-04 Vues because the key can be removed when the ignition is not in the "off" position. GM said it is aware of two crashes and one injury that could be related to the defect. Dealers will inspect the vehicles and replace the ignition cylinder and key set if necessary.
- 48,059 2013 ATS sedans and 2013 Buick Encore crossovers for a potential problem with lap belt pretensioner cables that may fail to lock into place, which could cause "increased occupant movement in certain accidents." GM said it is unaware of any related crashes or injuries. Dealers will replace both front outboard lap belt pretensioners.
- 14,940 2014-15 Chevy Impala LT and LTZ sedans to fix a latch on the console storage bin, which may open during a rear crash. GM said the condition increases the risk of injury to occupants in such an accident, although it knows of no related crashes or injuries. GM told dealers on Aug. 1 to stop delivery of the affected Impalas until the "inertia" latch on the console is replaced.
- 1,968 2009-10 Chevrolet Aveo and 2009 Pontiac G3 subcompacts for a brake fluid problem "that could lead to longer brake pedal travel, and/or reduced braking performance," GM said. GM said it issued a customer-satisfaction program in 2012 to fix the condition, but upgraded it to a recall. The company said it is unaware of any related crashes or injuries.
- 1,919 2014 Chevrolet Spark minicars for potentially loose left or right lower control arm attaching bolts. GM is advising owners to have their cars transported to Chevrolet dealerships for inspection. The company said it is unaware of any related crashes or injuries.

GM Announces Imported Cadillac And Camaro Recall In China

General Motors Co. and its main Chinese partner have recalled nearly 20,000 imported Cadillac SRX sport utility vehicles and Chevrolet Camaros to replace defective seat bolts. GM says the defect might allow seats to descend to their lowest position, possibly causing a safety hazard. The company did not say how many of each type of vehicle were being recalled. In total it is recalling 19,836 vehicles. This was GM's third recall in China in 14 months. In December, the company and its main Chinese partner recalled 1.5 million vehicles to replace a fuel pump bracket. In May 2013, they recalled imported SRX sport utility vehicles to adjust nuts on wheels.

Hyundai Is Recalling 883,000 Sonatas

Hyundai has recalled its popular Sonata midsize sedan to fix problems with the gear shift levers. The recall covers 883,000 cars from the 2011 through 2014 model years. The Korean automaker says the automatic transmission shift cable can separate from the shift lever. If that happens, the lever may not show the correct gear, increasing the risk of a crash. Also, if the driver stops the car and puts the transmission in "park," the car may still be in gear and could roll away, injuring drivers, passengers or bystanders, Hyundai said in documents posted Wednesday by the U.S. National Highway Traffic Safety Administration (NHTSA). Other symptoms include an inability to start the car because it can't be shifted into park.

Hyundai has received 1,171 warranty claims about the problem, plus seven other reports with related symptoms. The documents don't say if there have been any crashes or injuries. The Sonatas being recalled were made from Dec. 11, 2009 through May 29, 2014. The Sonata is Hyundai's second-best-selling car in the U.S. so far this year. First is the compact Elantra. Hyundai will notify owners by letter between now and the end of September. Dealers will inspect the shift cables and repair the connection if needed. Owners with questions can call Hyundai customer service at (800) 633-5151.

Hyundai Recalls 420,000 Cars For Tire, Oil And Brake Problems

Hyundai Motor Co. has recalled about 420,000 vehicles for safety defects, including a spring that could puncture a tire, an oil leak and a brake line problem. About 225,000 model year 2001-2006 Santa Fe vehicles that are registered and operated, or were originally sold and registered, in 20 "salt belt" states including Illinois, Michigan and New York may experience front coil spring corrosion from road salt, causing the coil spring to fracture and make contact with the tire, Hyundai said. the company said in a letter to the National Highway Traffic Safety Administration (NHTSA):

> *If the front coil spring fractures due to corrosion it could cause the coil spring to make contact with the tire, possibly puncturing the tire and increasing the risk of a vehicle crash.*

Hyundai is also recalling about 133,000 model year 2011 Sonata vehicles manufactured from Dec. 11, 2009, through Sept. 1, 2010, because they may experience a brake fluid leak from the two brake lines that connect the brake system's master cylinder to the hydraulic electronic control unit due to an insufficient seal between the inner brake hose and metal brake line-fitting. If the brake lines leak brake fluid, longer stopping distance will be required, increasing the risk of a vehicle crash, the company said.

The company is also recalling about 61,000 model year 2007-2012 Veracruz vehicles. The affected vehicles may experience an oil leak from the front cylinder bank valve cover gasket. If there is a sufficient amount of oil dropped onto the alternator, the alternator will be damaged, causing the charging system to become inoperative.

> *If the alternator is damaged, the engine will lose power, and the vehicle will stop operating while being driven. An unexpected failure of motive power while driving increases the risk of a crash.*

Hyundai says "there have been no reported accidents or injuries associated with any of the conditions." The company will have the vehicles inspected and, if necessary, fixed at no cost to the owner. In May, the company recalled more than 140,000 Tucson compact sport utility vehicles from model years 2011 to 2014 because the air bag may not be securely attached to the steering wheel. According to documents on the NHTSA website, the air bag assembly installed in the steering wheel may become loose from its mounting and result in an increased risk of injury to the driver in the event of a crash.

VW Recalls Nearly 19,000 Routan Minivans Over Ignition Defect

Volkswagen AG has recalled more than 18,500 Routan minivans in the U.S. for an ignition defect similar to the one that General Motors has had to deal with this year. The recall, which affects model year 2009 Routan vehicles, will address a defect that can inadvertently allow the ignition key to slip into the "off" or "accessory" position in bumpy road conditions, turning off the engine and disabling air bags and other safety systems. Volkswagen, Europe's largest carmaker, was to begin taking the vehicles in for repairs last month after initially reporting the recall to NHTSA on July 1st.

The Routan minivans at issue were actually manufactured by Chrysler Group LLC, which notified Volkswagen in June that the ignition defect impacts 2009 Routan models. The move came as part of an expansion of a 2011 recall of Chrysler and Dodge minivans and all-wheel drive vehicles, which also included some 2010 Routans and now encompasses nearly 900,000 vehicles in all, according to NHTSA documents. The 18,526 vehicles included in the latest recall brings the total number of Routans recalled over the ignition defect to 31,270.

Jaguar Land Rover Recalls 41,000 SUVs Over Air Bag Issue

Jaguar Land Rover North America LLC has recalled almost 41,000 sports utility vehicles over an issue that may cause the front seat passenger air bags to not fully deploy in the event of a crash. The luxury automaker told NHTSA it is conducting a safety recall of 17,095 Land Rover LR2 vehicles and 23,539 Range Rover Evoque vehicles because a component within the electronic system that detects whether passengers are sitting in the front side passenger seat may fail, resulting in the air bag being totally or partially disabled.

Land Rover will notify owners of the issue, with its dealers updating the restraint control module free of charge. The recall was to begin on August 30. The automaker joins the ranks of Toyota Motor Corp., Mazda Motor Corp. and Nissan Motor Corp. as the latest company to initiate a recall over an alleged defect that affects vehicles' air bag deployments. Based on reports, it appears Jaguar Land Rover's recall stems from a problem within the electric component of its passenger seat detection technology. Most of the recent recalls pertain to allegedly defective ignition switches in air bags manufactured by Takata Corp.

11,000 Kawasaki Off Road Vehicles Recalled For Rider Injury Risk

Kawasaki has recalled about 11,000 off-road vehicles because debris can cut through the foot rest area and hurt riders' legs. The recall is for 2012 and 2013 Kawasaki Teryx4 750 vehicles with four-wheel drive. They were sold at Kawasaki dealers from October 2011 to July 2013 for about $13,400.

The U.S. Consumer Product Safety Commission (CPSC) said that there have been four reports of debris breaking through the floor boards of the vehicles. Two riders reported injuries to their toes and thighs. Owners of the recalled vehicles should stop using it and contact a Kawasaki dealer, or call 866-802-9381 to get a free repair. Kawasaki will install floor board guards and replace damaged floor boards on the recalled vehicles.

Dynacraft Recalls Avigo Youth Bicycles Due To Fall Hazard

Dynacraft BSC Inc., of American Canyon, Calif., has recalled about 3,100 of its Avigo 20 Inch Turn N' Burn Youth

Bicycles. The front wheel on the bicycle can detach, posing a fall hazard. This recall involves 20 inch Avigo Turn N Burn youth bicycles with model number 8107-62. The model number and date of manufacture, "08202013," are printed on a data label on the frame's seat tube. The bicycles have a silver frame, blue handlebars and black front fork with blue accents, hand brakes and a kickstand. The serial number can be found etched on the frame on the underside of the bottom bracket shell. Further details on Serial numbers included in the recall can be found at: http://www.cpsc.gov/en/Recalls/2014/Dynacraft-Recalls-Avigo-Youth-Bicycles/. Dynacraft says it has received one report of a consumer who fell and sustained scrapes and abrasions when the front wheel detached.

The bicycles were sold at Toys "R" Us stores nationwide and online at ToysRUs.com between September 2013 and June 2014 for $130. Consumers should immediately stop using the recalled bicycle and contact Dynacraft to arrange for a free repair. Contact Dynacraft at 800-551-0032 from 7 a.m. to 4 p.m. PT Monday through Friday or online at www.dynacraftbike.com and click on "Owners," then select "Warnings/Recalls."

Vizio Recalls 245,000 Televisions Over Tipping Stands

Vizio Inc. has recalled 245,000 of its 39-inch and 42-inch flat-panel televisions because the stands can fail and cause the TVs to unexpectedly tip over, injuring consumers. According to the recall report filed with the Consumer Product Safety Commission (CPSC), the company has received 51 reports that its LED flat panel E390-B0, E390i-B0 or E420i-B0 televisions have tipped, but says no injuries have been reported. Vizio said the issue does not affect customers who have the television sets mounted to their walls, but "all customers with affected television units should still follow the directions in [the] notice to obtain a replacement stand for future use." The company is extending the standard one-year warranty for the televisions, which were sold from December to June, to two years from the purchase date and is also replacing the stands on the affected televisions. The televisions were sold at Best Buy Co. Inc., Meijer Inc., Target Corp., Walmart Stores Inc. and other retail stores across the country, according to the CPSC.

Customers can enter their television's serial number on Vizio's website to determine whether their product is affected by the recall, Vizio said. A 2012 CPSC report found that 349 consumers, mostly children younger than age 9, were killed between 2000 and 2011 when televisions, appliances or furniture toppled onto them. The agency also estimated that more than 43,000 consumers are injured each year in tip-over incidents.

Furniture that can tip over easily cause safety hazards. The CPSC in January 2013 announced a recall of 18,300 children's dressers made by Bexco Enterprises Inc. for its Million Dollar Baby brand, as well as dressers from Gemme Juvenile Inc., because three children have died after the furniture tipped over on them. The recalled dressers were sold at JCPenney and independent juvenile specialty stores nationwide and online at Amazon.com, BabiesRUs.com, BabyUniverse.com and other online retailers from January 2006 through June 2010 for between $230 and $300.

PetSmart Recalls Top Fin Plastic Aquarium Heaters Due To Electrical Shock Hazard

About 33,000 aquarium heaters have been recalled by PetSmart Inc., of Phoenix. The heaters are insufficiently grounded, posing a risk of electrical shock to the consumer. This recall involves all 50-, 100-, 150-, 200- and 250-watt Top Fin brand plastic aquarium heaters. The heaters are black cylinders about 1 1/2 inches in diameter and about 13 inches tall. Recalled heaters have model number HT50, HT100, HT150, HT200 or HT250. Lot numbers for the recalled heaters are 1839, 1901, 1903, 1904, 1907, 1908 and 1910. "Top Fin," "Premium Aquarium Heater," the model number and the heater's wattage are printed on the side of the heater near the top. Below that, the lot number is printed beneath the words "Made in China."

The heaters were sold exclusively at PetSmart stores nationwide from March 2014 to April 2014 for between $27 and $37. Consumers should immediately stop using the heater, unplug it, remove it from the aquarium and return it to any PetSmart store for a full refund. Call PetSmart toll-free at 888-839-9638 from 8 a.m. to 5 p.m. MT Monday through Friday or online at www.petsmart.com and click on News Room under About PetSmart at the bottom of the page, then click on Product Notices & Recalls for more information.

SolarWorld Recalls Solar Systems with Copper Grounding Lugs Due to Electrocution, Electric Shock or Fire Hazard

SolarWorld Solar Systems have been recalled by Distributor: SolarWorld Americas, of Camarillo, Calif,, a subsidiary of SolarWorld AG, of Bonn, Germany. SolarWorld solar panels installed with bare-copper grounding lugs can corrode, which could result in a faulty ground circuit, posing an electric shock, electrocution or fire hazard. This recall includes SolarWorld solar systems installed with bare-copper grounding lugs installed after June 1, 2010. These solar systems use energy from the sun to generate electricity within a system circuit. The installation instructions for SolarWorld solar systems sold after June 1, 2010 called for the use of GBL-4DB lugs for grounding. SolarWorld has revised these installation instructions to explicitly call for tin-coated lugs, specifically Ilsco part number GBL-4DBT. "T" is for tin-coated and indicated by the silver color of the lug. The company has received one report of corrosion related to the bare copper lugs. No injuries have been reported.

The panels were sold by SolarWorld installers and distributors, or other distribution companies from June 2011 to June 2014 for about $1,000 to $10,000 depending on system size. Customers may be able to identify from the ground whether a tin-coated lug (silver) or a bare-copper lug (brown) has been used on their solar panels. Consumers who can identify the improper lugs should contact SolarWorld for replacement. If customers cannot determine which grounding lugs were used, they should contact SolarWorld to have an authorized SolarWorld agent inspect the installation and replace the lugs with tin-coated grounding lugs or equally safe alternative remedy at no cost to consumers. SolarWorld is requesting that distributors and others remove SolarWorld's installation instructions dated before June 2014 from their websites or other commercial information sources. Contact SolarWorld toll-free at 877-360-1787 from 9 a.m. to 6 p.m. PT Monday through Friday or online at www.solarworld-usa.com and click on the "Product Safety" tab for more information.

Vornado Air Recalls Electric Space Heaters Due to Fire and Burn Hazards

About 79,000 electric space heaters have been recalled by Vornado Air, LLC, of Andover, Kan. The heater can overheat and cause the units to melt, catch fire and ignite nearby items, posing a fire and burn hazard to consumers. This recall involves Vornado VH110 Whole Room Vortex electric space heaters sold in two colors, black and white. The heaters measure about 10.5 inches high, 9 inches deep and 10.5 inches at the base growing narrower at the top. The on/off switch and the high/low heat settings are located on top of the unit. The Vornado logo appears with a gray "V" on the front of the unit. Recalled heaters have the numbers 1 and 3 as the fourth and fifth digits of the serial number. The model and serial numbers appear on a silver decal located on the bottom of the unit. Vornado has received 29 reports of units overheating and melting, including seven reports of heaters catching fire, resulting in one report of smoke inhalation and one report of property damage caused by soot and smoke.

The heaters were sold at Bed Bath & Beyond, Home Depot, Menards, Orchard Supply, Target and other retailers nationwide and online at Vornado.com and Amazon.com from June 2013 through May 2014 for about $60. Customers should immediately turn off and unplug the electric space heater and contact Vornado for instructions on how to receive a free replacement unit, including free shipping. Contact Vornado toll-free at 844-205-7978 from 8 a.m. to 5 p.m. CT Monday through Friday or online at www.vornado.com and click on the recall graphic in the lower right corner of the homepage for more information. Photos available at: http://www.cpsc.gov/en/Recalls/2014/Vornado-Air-Recalls-Electric-Space-Heaters/

Harris Products Group Recalls Welding Torch Handles Due To Fire Hazard

Harris Products Group, of Gainesville, Ga., has recalled its welding torch handles, which can leak oxygen or fuel, posing a fire hazard. This recall involves two models of torch handles that were sold under the Lincoln Electric® and Harris Products Group® brand names. The torch handles are used in welding. They are gold in color and made out of brass. Welding torch model numbers include 18-5 and 85. Manufacture date codes include FM, GA, GB and GC. The model number and date code are stamped on the torch handle at the end closest to the flame.

The torch handles were sold individually and also as part of the following kits. Units with "0" above the word "Harris" and to the right of the rivet head are not included in this recall. A complete listing of Kit Model Numbers included in this recall can be found at: http://www.cpsc.gov/en/Recalls/2014/Harris-Products-Group-Recalls-Welding-Torch-Handles/. Consumers should immediately stop using the recalled torch handles and contact Harris Products Group to receive a free replacement at 800-447-6906 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.harrisproductsgroup.com and click on Recall for more information.

ESL And Interlogix Hard-Wired Smoke Alarms Recalled

ESL and Interlogic brand 400/500 series smoke detectors have been recalled by the manufacturer Fyrnetics Limited of Hong Kong, China. This recall includes about 141,000 in U.S. and 13,000 in Canada. Radio frequency interference can cause the smoke detectors to fail to alert consumers of a fire. This recall involves 33 models of the 400 and 500 series Edwards (ESL)-branded and Interlogix smoke detectors hard-wired into a security system. Edwards and Interlogix smoke detectors are identical. The 2-wire or 4-wire detectors are round, white and measure 6 inches across by 2 inches high.

The smoke detectors were made for professional installation and used primarily in commercial buildings, schools, hotels/motels, apartments, dormitories and homes as part of the fire alarm system. Recalled units have date codes 13084 through 14059 with the first two digits representing the year, for example: 13 for 2013 and 14 for 2014; and the last three digits representing the day of the year, for example: 084 is the 84th day of 2013, which is March 25, 2013. The initials ESL, the date code and one of the following model numbers are printed on a label on the back of the detector's cover and on the product's packaging.

400 series: 429AT, 429C, 429CAD, 429CRT, 429CST, 429CT, 429CTAD, 449AT, 449C, 449CRT, 449CSRH, 449CSRT, 449CST, 449CSTE, 449CT and 449CTE.

500 Series: 511C, 518C, 521B, 521BXT, 521B-10PKDMP, 521B-10PKG, 521BXT-10PKG, 521BXT-DMP-10PKG, 528B, 528CRXT, 541C, 541C-10PKG, 541CXT, 541CXT-10PK and 548C.

The alarm systems were sold at alarm system, security equipment and electrical equipment contractors, dealers and installers for use in fire alarm systems for commercial buildings, hotels/motels, apartments, dormitories and homes from March 2013 to February 2014. The cost of the individual detectors varies between $30 and $50. The cost of the integrated alarm or security systems varies greatly. Customers should immediately contact their security or fire system provider to determine if any of their units are included in the recall. If so, they will receive free replacement and free installation of new smoke detectors.

Consumers should not take the alarms out of service until the replacement alarm has been installed. Only professional installers should remove and replace these units. Contact Edwards at 800-655-4497 select option 5, from 8 a.m. to 5:30 p.m. ET Monday through Friday or online at www.edwardsfiresafety.com and click on Contact Us. Contact Interlogix toll-free at 855-286-8889 select option 2, from 5 a.m. to 5 p.m. PT Monday through Friday or online at www.interlogix.com and click on Customer Service for more information.

Johnson Outdoors Diving Recalls Dive Computers Due To Injury Hazard

Scubapro Aladin2 dive computers, commonly referred to as Aladin Square dive computers, have been recalled by Johnson Outdoors Diving Inc., of El Cajon, Calif. The dive computer can leak and stop working, posing a risk of injury due to decompression sickness. This recall involves the Aladin2 wrist dive computer that monitors depth, dive time, decompression status and temperature. The computer is 3 inches by 3 inches, rectangular, black, and mounted on a black wristband. SCUBAPRO is stamped on the top of the face frame and Aladin2 is printed in white on the bottom of the face frame. The serial number is stamped in white on the back of the unit and ends with 003. The company has received four reports that the dive computers leaked and stopped working. No injuries have been reported.

The computers were sold at authorized Scubapro dealers nationwide from March 2014 through June 2014 for about $450. Consumers should immediately stop using the dive computers and return them to an authorized SCUBAPRO dealer or contact Johnson Outdoors Diving for a free replacement toll-free at 877-467-6675 from 10 a.m. to 7 p.m. ET Monday through Friday or online at www.scubapro.com and click on "Aladin Square Recall" for more information

Ace Bayou Bean Bag Chairs Recalled Because Of Suffocation and Choking Hazards

Ace Bayou Bean Bag Chairs have been recalled because of suffocation and chocking hazards. The zippers on the bean bag chairs can be opened and children can then crawl inside, get trapped and suffocate or choke on the bean bag chair's foam beads. A voluntary standard requires non-refillable bean bag chairs to have closed and permanently disabled zippers. Two deaths have been reported. A 13-year old boy from McKinney, Texas, died and a 3-year-old girl from Lexington, Ky., died after suffocating from lack of air and inhaling the chair's foam beads. Both children were found inside the chairs.

The recalled bean bag chairs have two zippers that can be unzipped and opened, including one of the exterior cover and other directly underneath that zipper. The recalled chairs with zippers that open were sold in a variety of sizes, shapes, colors and fabrics. They include round or L-shaped, vinyl or fabric, and are filled with polystyrene foam beads. They were sold in a variety of colors, including purple, violet, blue, red, pink, yellow, Kelly green, black, port, navy, lime, royal blue, turquoise, tangerine and multi-color. The round bean bag chairs were sold in three sizes, 30, 32 and 40 inches in diameter. The L-shaped bean bag chair measures 18 inches wide by 30 inches deep by 30 inches high. "ACE BAYOU CORP" is printed on a tag sewn into the bean bag chair's cover seam. They were made in China.

The recalled bean bag chairs were sold at Bon-Ton, Meijer, Pamida, School Specialty, Wayfair and Walmart stores and online at Amazon.com, Meijer.com and Walmart.com before July 2013 for between $30 and $100. Consumers should check their bean bag chairs for any zippers that can open, take those that can open away from children immediately and contact Ace Bayou for a free repair kit to permanently disable the zippers so that they cannot be opened.

Bexco Recalls Franklin & Ben Mason 4-In-1 Convertible Cribs Due To Fall And Entrapment Hazards

Bexco Enterprises Inc., of Montebello, Calif., has recalled the Franklin & Ben Mason 4-in-1 Convertible Cribs. The crib front can separate from the side panels and create a hazardous gap that can allow a child to fall out or become entrapped between the front and side panels. This recall includes Franklin & Ben Mason style 4-in-1 style cribs model number 5601 that were manufactured from January 2012 through August 2012. The model number and the date of manufacture are printed on a label on the inside of a side panel of the crib. Listed on the label as a "serial number," the following purchase order numbers are included in the recall: H004522, H004546, H004548 or H004777.

The cribs have solid wood sideboards and wood rails on the front and back of the crib in varying heights and can convert to a daybed, toddler bed or full-sized bed. There is a storage drawer at the base of the crib with two metal knobs. The recalled cribs were sold in weathered gray and rustic brown, and measure 57 inches long by 33 inches wide by 51 inches high. The firm has received 14 reports of the front separating from the side panels of the crib. No injuries have been reported.

The cribs were sold at juvenile products specialty retailers nationwide from January 2012 through June 2014 for between $600 and $700. Consumers should immediately stop using the recalled cribs and contact the firm for a free repair kit. In the meantime, parents are urged to find an alternate, safe sleeping environment for the child, such as a bassinet, play yard or toddler bed depending on the child's age. Contact Franklin & Ben, a division of Bexco, toll-free at 888-673-6652 8:30 a.m. to 5:15 p.m. PT Monday through Friday. Consumers can also visit the company's website at www.franklinandben.com and click "Safety Recall" to request a repair kit.

Samson International Recalls Bar Stool Due To Fall Hazard

About 800 Spencer Bar Stools have been recalled by the manufacturer Samson International, High Point, N.C. The footrest can crack, compromising the strength of the bar stool, posing a fall hazard. This recall involves bar stools with a dark brown walnut finish wood with a brown leather padded back and swivel seat cushion. The stools have four legs with a footrest connecting each leg and measure 21 inches wide, 48 inches high and 23 inches deep. This recall includes stools with Samson item number M3216604 and Customer item number 845275 found on the bottom of the seat cushion.

The stools were sold exclusively at Costco regionally in the Dallas and San Francisco areas from May 2014 through June 2014 for about $150. Consumers should immediately stop using the recalled bar stools and return them to the Costco store where the item was purchased for a full refund. Contact Samson International at 800-488-3001 from 8 a.m. to 5:30 p.m. ET Monday through Friday, e-mail at returns@samsoninternational.com or online at www.samsoninternational.com and click on the "Alert: Product Recall" tab located on the upper right corner of the home page.

J&J Unit Recalls Hysterectomy Device Over Cancer Fears

Johnson & Johnson unit Ethicon Endo-Surgery Inc. has asked doctors to return a surgical device used in a now controversial hysterectomy procedure that the U.S. Food and Drug Administration has warned could spread cancerous tissue into a patient's abdomen. Johnson & Johnson executed a worldwide withdrawal of its Morcelex device following a recent meeting with the FDA. The agency is weighing regulatory actions to reduce the risk of cancer spread during uterine fibroid removal procedures.

In April, Ethicon said it had suspended the sale, distribution and promotion of the morcellation devices "while the role of morcellation with symptomatic fibroid disease is redefined by the FDA and the medical community," according to a company statement issued that month. Laparoscopic power morcellation, one technique used to treat mostly non-cancerous fibroids, uses a device to break uterine tissue into fragments that can be removed through an incision in the stomach, according to the FDA. Although uterine fibroids are common and usually benign, they may occasionally be cancerous, the agency said.

Typically, power morcellators are used to cut the fibroid or uterine tissue into pieces that can be pulled out through abdominal incisions. But according to FDA data, approximately one in every 350 women with fibroids could have a uterine sarcoma and slicing up the cancerous tissue could allow it to spread and reduce a patient's long-term survival rate. Of the 500,000 hysterectomies performed every year, approximately 11 percent are done using power morcellators via laparoscopic surgery, according to the FDA. However, the regulator did note that these laparoscopic surgeries may still be the best available for some patients, and it's leaving those decisions up to the individuals and their health care providers.

If women with such unsuspected cancerous fibroids undergo morcellation, there is a risk of spreading those cancerous fragments beyond the uterus, making such cancers harder to treat, the agency warned in April. Although the regulator didn't remove the nearly two dozen approved power morcellators from the market, it warned doctors to consider other treatment methods for symptomatic fibroids rather than using the tool to remove fibroids or a woman's uterus laparoscopically.

The first suit over the product was filed in May against Ethicon in New York federal court. Plaintiffs Brenda Leuzzi and George Leuzzi, who filed the suit, claim that Brenda was diagnosed with cancer after undergoing a robot-assisted hysterectomy with morcellation in 2012 and that the company did not adequately test its Morcelex product for potentially dangerous side effects.

USDA Recalls 7.5 Tons Of Applegate Frozen Chicken Nuggets

The U.S. Department of Agriculture (USDA) has issued a recall for more than 15,000 pounds of Applegate Naturals frozen chicken nuggets after complaints of small pieces of plastic found in the meat. The USDA's Food Safety and Inspection Service announced the recall pertaining to 8-ounce boxes of Applegate Naturals Chicken Nuggets produced on Feb. 5, 2014, at a facility in Gainesville, Ga., run by Perdue Farms. The nuggets were shipped nationwide.

The recall comes after Applegate on Aug. 8 voluntarily withdrew the chicken nugget packages, which have a "best before" date of Feb. 5, 2015. The problem was discovered after Applegate received consumer complaints of small pieces of plastic in the nuggets, the USDA said. No injury or illness from eating the nuggets has been reported. The USDA upgraded Applegate's voluntary withdrawal to a Class II recall because many consumers may still have the products in their possession.

The company has confirmed that 30,468 packages of the chicken nuggets with the Feb. 5, 2015 "best before" date could be contaminated. No other packages or products are believed to be affected, including Applegate's gluten-free chicken nuggets or any other breaded chicken products, the company said. Consumers with the recalled chicken nuggets can return them to the store where they were purchased for a full refund, Applegate said.

It should be noted the USDA defines Class II recalls as "a potential health hazard situation in which there is a remote probability of adverse health consequences from eating the food." The USDA in July released a final rule designed to overhaul poultry plant inspections. From reports, I am not sure anybody is satisfied with the new rule. The measure changes the lay of the land for poultry inspections.

- First, it requires poultry companies to take stricter food safety measures.
- Second, it sets up a controversial voluntary program for Food Safety and Inspection.

Service inspectors would give up positions in the earlier stages of a chicken inspection line—handing over the job of looking for and sorting out chickens with quality defects to corporate employees—in order to focus on the end of the line. It will be interesting to see what happens to the new rule.

Peanut And Almond Butters Recalled For Salmonella Risk

Several nSpired Natural Foods Inc. peanut and nut butter products sold at stores nationwide, including some almond butters sold at specialty grocers Trader Joe's Co. and Whole Foods Markets IP LP, have been recalled for possible salmonella contamination. The company, a subsidiary of The Hain Celestial Group, Inc., issued the recall after being notified by the U.S. Food and Drug Administration that the potential risk of salmonella contamination was discovered after routine testing. The recall affects certain retail lots of Arrowhead Mills Peanut Butters, MaraNatha Almond Butters and other specific private-label nut butters packaged in plastic and glass jars.

As we have previously reported, Salmonella can cause serious infections that manifest themselves in symptoms such as fever, diarrhea, nausea, vomiting and abdominal pain, and can be fatal in young children, elderly or others with weakened immune systems. Both companies noted that customers who purchased the recalled products may receive a full refund. The affected products were distributed across the U.S. and Canada, as well as in Hong Kong, the United Arab Emirates and the Dominican Republic. The products were also available on the Internet.

Once again there have been a large number of recalls since the last issue. While we weren't able to include all of them in this issue, we included those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm's web site at www.BeasleyAllen.com/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.

XXIV. FIRM ACTIVITIES

MIKE CROW

Mike Crow, who has been with the firm since 1983, is in our Personal Injury Section. He mainly handles car and truck litigation, premise liability cases, and has developed a special interest in brain injury cases. Mike has been successful in litigating against the "Big Box Stores," such as Wal-Mart, Home Depot and others, and he gained a wealth of knowledge of their practices and procedures. Mike also has handled several cases against a local School Board for section 1983 violations and Title IX violations. These cases range from young female students being sexually assaulted by a substitute teacher to the local school board failing to have and implement a Title IX policy.

Mike is a member of the Montgomery County Bar Association grievance committee, where he has served for the past 10 years. In 2009, Mike was appointed to serve on the Alabama State Bar committee Disciplinary Commission. Mike is a member of the American Association for Justice (AAJ) Interstate Trucking Litigation Group, and the Plaintiffs Interstate Trucking Lawyers of America. He also has been selected for inclusion on the Best Lawyers in America list, and was named to the prestigious Super Lawyers list. Mike is also on the Jimmy Hitchcock Committee, which annually selects an outstanding Christian student athlete from the local community.

Mike is on the Executive Committee of the Auburn University at Montgomery Basketball Booster Club, which is responsible for raising funds for the basketball program. As a former player at AUM, Mike works hard to help the program. He has recently been appointed to the Board of Directors for Capital City Juniors, a travel volleyball club based in Montgomery, for girls ages 8-18. Mike is also an active member of the Frazer United Methodist Church. He served on the Board of Stewards through 2010 and recently was appointed to a three-year term on the Staff Parish Committee.

Mike is married to the former Marla Taylor of Hope Hull, Ala., and they have two children, Case and Carson Anne. They attend Frazer United Methodist Church in Montgomery. Mike is an avid Waterfowl hunter. He also is active in Retriever Field Trials, where he judges events across the country and campaigns two of his own Labrador Retrievers. Mike currently serves as President of the Montgomery Retriever Club.

Mike is a very good lawyer who takes his representation of persons in need seriously. He is well-respected by lawyers and judges around the state. We are blessed to have Mike with the firm.

SHANNA MALONE

Shanna Malone, who has served as the Editor for the *Jere Beasley Report* for the past seven years, is responsible for helping to put the report together each month. Currently, the report goes to more than 45,000 persons each month. Shanna started with the firm in 2002 and originally worked as a Public Relations Coordinator. But in 2007, Shanna went to part-time status and began working strictly as Editor of the Report. This change was so that she could stay home with her children.

Shanna graduated from Troy State University with a Bachelor of Science in Print Journalism and Public Relations in August of 1999. She is married to Shannon Malone, and they have two daughters, 12-year-old Sydney and 10-year-old Shelby along with one son, 5-year-old Steven. The family attends Union Baptist Church in Honoraville, where Shanna is actively involved in the Children's Ministry.

Shanna is a very good employee who has done outstanding work in all of her roles with the firm. She is now involved in putting out information that we believe helps folks keep up with current events in law and also warns of hazards and dangerous conditions that might otherwise go unnoticed. We are blessed to have Shanna with us in her current position.

KRISTEN PIATEK

Kristen Piatek, who came to the firm in 2009, currently works as an Accountant II in our Accounting Department. She works on a variety of important tasks that help to keep the rest of the firm running effectively. Kristen is a good, hard-working employee, who enjoys her work. She is dedicated to making sure things work well in our Accounting Department.

Kristen has two children, Lexy, in college and, Justin, an 11th grader at Montgomery Catholic. They are members of St. Bede Catholic Church. Kristen has qualified for and competed in equestrian show jumping competitions on the state, regional, and national levels. She keeps busy horseback riding, volunteering at her church and in her son's school. She also helps with the Humane Shelter and the Montgomery County 4H equestrian group. Kristen enjoys the beach, lake, reading, snow skiing, camping, hiking, gardening and the time she spends with her children. Kristen is a very good, hard-working employee. We are fortunate to have Kristen with us.

JANET PAIR WELCH

Janet Pair Welch, who has more than 30 years of experience in the legal field, joined the firm in March 2008. She currently works as a Legal Assistant to Navan Ward in our Mass Torts Section. Janet works on the metal-on-metal hip implant litigations and the knee implant litigations. These litigations involve thousands of victims who have had defective hip and knee implants causing severe pain, metal poisoning and, in some cases, revision surgeries. Janet was also involved in the Celebrex/Bextra litigation and Permax/Dostinex litigation.

Janet, who graduated from Jefferson Davis High School in Montgomery, earned her Bachelor of Science in Criminal Justice from Troy University. She enjoys running, working out and camping in the RV. One of her biggest accomplishments was qualifying for and running the 2008 Boston Marathon. Janet is married to David Welch and has two stepchildren, Wesly and Sydney. Janet is a good, hard-working employee who is dedicated to helping clients obtain justice. We are fortunate to have Janet with us.

Seat Check Saturday Coming Up This Month

The time has come for the annual Seat Check Saturday event in Montgomery. For the last five years, our firm has worked with Safe Kids USA to bring awareness to National Child Passenger Safety Week. We are very excited about the response to our September 13 campaign and we hope anybody in the River Region will join us. The seat check event gives parents and child caregivers the opportunity to have their child safety seats installed or inspected at no cost.

This year, the event will be held Saturday, Sept. 13. Qualified seat installation experts will be on hand to inspect and install child safety seats from 9 a.m. -noon at The Shoppes at EastChase in Montgomery. As we have previously reported, motor vehicle accidents remain the leading cause of death for children ages 3 to 14. Properly installed car seats and booster seats can reduce the risk of serious and fatal injuries by more than half. The information set out below indicates how serious this matter is:

- Seven children die each day as a result of improperly fastened child seats;
- 85 percent of child seats are not installed according to manufacturers specifications;
- Nearly one-third of child seats are not suitable for the vehicles in which they are installed.

For information on a nearby seat inspection site, you can visit the Safe Kids USA website and click on the link that says "In Your Area." This will provide you with information about Safe Kids Coalition groups in your area, and allow you to search for a seat inspection site near you.

National Child Passenger Safety Week is sponsored annually by the National Highway Traffic Safety Administration (NHTSA). You can find more information about child safety seats and vehicle safety at the NHTSA website. The Centers for Disease Control and Prevention (CDC) also has a helpful website with information about child safety seats. If you would like more information on this subject, contact Helen Taylor, Public Relations Coordinator for our firm, at 800-898-2034 or by email at Helen.Taylor@beasleyallen.com.

Beasley Allen Fall Blood Drive

As I have mentioned before, we have held many blood drives near our downtown offices. This year we held a successful spring drive and have committed to a second event to be held on Sept. 30. One unit of blood can save up to three people! This is an easy way to help and I encourage you to sign up for our American Red Cross blood drive or donate locally.

XXV. SPECIAL RECOGNITIONS

Lisa Blue Baron Sworn In As President Of National Trial Bar

Lisa Blue Baron, an exceptional lawyer from Dallas, Texas, was sworn in as the President of the American Association for Justice (AAJ) at the organization's annual convention in Baltimore, Md. AAJ is the world's largest trial bar, working to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others. It is quite an honor to be elected to head up the organization. Lisa is well-qualified to lead AAJ and all of us at Beasley Allen are confident that she will be an outstanding president.

AAJ's new set of officers, with Lisa as President, includes President-Elect Larry Tawwater of the Tawwater Law Firm, P.L.L.C., in Oklahoma City, Okla.; Vice-President Julie Braman Kane of Colson Hicks Eidson in Coral Gables, Fla.; Secretary Kathleen Nastri of Koskoff Koskoff & Bieder, PC in Bridgeport, Conn.; Treasurer Elise Sanguinetti of Sanguinetti Law in Oakland, Calif.; and Parliamentarian Bruce H. Stern of Stark & Stark of Lawrenceville, N.J. We wish Lisa and all of the new officers the very best.

As the world's largest trial bar, the American Association for Justice (formerly known as the Association of Trial Lawyers of America) works to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others—even when it means taking on the most powerful corporations. Visit http://www.justice.org/newsroom.

XXVI. FAVORITE BIBLE VERSES

Jessica Stapp, an employee in our Mass Torts Section, says she knows she can do all things through Jesus Christ. Jessica reminds us that God has blessed each of us in so many ways—and that we should strive to use that knowledge for empowerment to do things that without Jesus we would never be able to accomplish.

"Not that I speak in regard to need, for I have learned in whatever state I am, to be content: I know how to be abased, and I know how to abound. Everywhere and in all things I have learned both to be full and to be hungry, both to abound and to suffer need. I can do all things through Christ who strengthens me."

Philippians 4:11-13

Gil Melendez, who is the Executive Director of the House of Prayer, located in Montgomery, sent in two of his favorite scriptures this month. Gil says that as we live a life of praise, gratitude, and thankfulness it affects others in a positive manner.

"One thing have I desired of the Lord, that will I seek after: that I may dwell in the house of the Lord all the days of my life, to behold the beauty of the Lord, and to inquire in His temple."

Psalm 27:4

"And he hath put a new song in my mouth, even praise unto our God: many shall see it, and fear, and shall trust in the Lord."

Psalm 40:3

Jenna Day, a lawyer with our firm's Toxic Torts Section, also furnished a message from the Book of Psalms for this issue. Jenna says she loves the encouraging truth from this message:

"Preserve me, O God, for in you I take refuge.

"I say to the Lord, 'You are my Lord; I have no good apart from you.'

As for the saints in the land, they are the excellent ones,in whom is all my delight.

"The Lord is my chosen portion and my cup; you hold my lot.

"The lines have fallen for me in pleasant places; indeed, I have a beautiful inheritance.

"I bless the Lord who gives me counsel; in the night also my heart instructs me.

"I have set the Lord always before me; because he is at my right hand, I shall not be shaken.

"Therefore my heart is glad, and my whole being rejoices; my flesh also dwells secure.

"You make known to me the path of life; in your presence there is fullness of joy; at your right hand are pleasures forevermore."

Psalm 16: 1-3, 5-9 & 11

Navan Ward, a lawyer in our firm's Mass Torts Section, sent in his two favorite scriptures for this issue. He says that the verse in Romans reminds him that no matter what obstacles, issues, or burdens that the devil throws our way, we have the comfort that when we allow God to be with us, the devil stands no chance of defeating us.

"What then shall we say to [all] this? If God is for us, who [can be] against us? [who can be our foe, if God is on our side?]"

Romans 8:31

Navan says that a verse in Hebrews reminds him that we must always be a walking billboard and representative of Jesus Christ. He says we must be this way because God needs us to be an example to others. Navan reminds us that God is always in our presence. Therefore, we should treat everyone with the utmost respect and honor, no matter how they may appear on the outside.

"Do not forget or neglect or refuse to extend hospitality to strangers [in the brotherhood-being friendly, cordial, and gracious, sharing the comforts of your home and doing you part generously], for through it some have entertained angels without knowing it."

Hebrews 13:2

Mac Moorer, a Barbour County native, now lives in Jefferson County. He is a member of the Lightfood, Franklin & White law firm. Mac sent in a scripture for this issue. He says the verses in Proverbs are his Mother's favorite

"Trust in the Lord with all your heart, And lean not on your own understanding; In all your ways acknowledge Him, And He shall direct your paths"

Proverbs 3:5-6

XXVII. CLOSING OBSERVATIONS

Public Citizen Provides Protection Against Dangerous Drugs

If you are not familiar with a publication, *Worst Pills/Best Pills News*, put out by Dr. Sidney Wolfe. I suggest that you check it out. Dr. Wolfe served as Medical Director of The Health Research Group at Public Citizen for years before he recently stepped down. This dedicated medical doctor's goal has been to warn consumers about dangerous prescription drugs and to keep these drugs from the market. In fact, Dr. Wolfe has warned the Food and Drug Administration on numerous occasions about drugs that should not be approved and put on the market for sale. Fortunately, Dr. Wolfe, who is still with Public Citizen, and still working hard to protect the public.

A prime example of a warning from Dr. Wolfe involved the diabetes drug, Rezulin, which was approved by the FDA in 1997. This drug was banned by the FDA three years later and for good reason. By that time Rezulin had already caused hundreds of cases of liver damage, including 63 reported deaths. The publication *Worst Pills, Best Pills News* had warned of Rezulin's potential danger a year and a half earlier, when Dr. Wolfe petitioned the FDA to ban the medication in 1998. Unfortunately, the FDA didn't listen.

The Health Research Group at Public Citizen has helped to remove 25 dangerous drugs from the market. I would recommend that any person who is interested in their health and safety subscribe to *Worst Pills, Best Pills News*. Persons who already subscribe know how valuable the life-saving drug-safety information is that the publication provides. Dr. Wolfe says that the FDA is not the gold-standard agency it once was and I totally agree with him. For this reason, Public Citizen has had to step up its efforts to keep the public safe. In addition to keeping folks informed, the consumer advocacy group also does the following on behalf of the public:

- Public Citizen formally petitions the FDA for stronger drug-safety standards. For example, in 2013, the FDA granted Public Citizen's petition calling for the agency to propose new regulations to allow generic drug manufacturers to promptly update their product labeling to include newly acquired safety information. When finalized, the rule will provide added protection to the tens of millions of people who regularly use generic drugs, which make up 84 percent of all dispensed prescription drugs.

- Public Citizen formally petitions the FDA to remove unsafe drugs from the market or issue black box warnings. For drugs approved between 1975 and 2000, partly because the FDA sped up the approval process to accommodate the demands of the drug industry, one in five new drugs has to be removed from the market or receive a black box warning after FDA approval. One in five!

- Public Citizen closely monitors the FDA and its drug-approval process that is, unfortunately, heavily dependent on industry financing. For fiscal year 2014, the FDA budget provides the agency with more than $1 billion in total drug industry user fees, which now include fees for generic drugs. This means that more than 60 percent of the total FDA budget for the review and oversight of drugs comes directly from drug companies. Because of this unhealthy financial relationship, Public Citizen has had to further increase the speed and intensity with which they petition the FDA to ban or relabel drugs, pointing to the urgent need to supplement the inadequate FDA (and congressional) oversight of the drug industry.

- Public Citizen testifies regularly as medical experts at FDA advisory committee meetings about the safety of drugs, trying to stop dangerous drugs from being approved or arguing for them to be banned.

- Public Citizen takes an active role in stopping Congress from destroying Medicare.

These critical, life-saving activities by Public Citizen are expensive, and the subscription fee for *Worst Pills, Best Pills News* doesn't begin to cover their cost. That's why I hope you will see fit to make a financial gift to help pay for the research behind Public Citizen's newsletter and the group's continuing efforts to keep unsafe drugs off the market. You can get more information by going to www.worstpills.org. Unlike most other publications or websites, Public Citizen does not accept money or advertisements from drug companies. This makes sure that Public Citizen can remain independent—with their judgment not clouded by commercial interests—and free to protect the public. Public Citizen's only obligation is to the public. You can help Public Citizen continue to help folks by making a contribution to *Worst Pills, Best Pills News*. You can do this by sending a check to Public Citizen at 1600 20th Street NW, Washington, D.C. 20009 and designate it for the publication.

Jim Brady Was A Great American

Jim Brady, who was critically wounded during the assassination attempt on President Ronald Reagan, died last month at age 73. Jim was shot and left partially paralyzed when a deranged person tried to shoot the president in Washington, D.C., on March 30, 1981. As we know—all too well—since that time gun violence has become a most serious problem in this country. Not only are there shootings of individuals, but mass killings have become commonplace.

As the incidents of such senseless violence increased, Jim and his wife Sarah became tireless advocates for sensible gun laws. They established the Brady Campaign to Prevent Gun Violence. Their work helped create legislation requiring background checks for handguns bought from federally licensed dealers. On Nov. 30, 1993, President Bill Clinton signed into law the Brady Handgun Violence Prevention Act, more commonly called the "Brady Bill." This law is credited with preventing more than 2 million attempts to purchase firearms at gun stores by prohibited buyers.

In 1996, Jim Brady received the Presidential Medal of Freedom, the highest civilian award in the United States, in recognition of his work advocating against gun violence. In 2000, the White House Press Briefing Room was dedicated as the "James S. Brady Press Briefing Room" in his honor. Although he never worked as press secretary after the shooting, Jim kept the title for the remainder of President Reagan's presidency.

In December 2000, the Boards of Trustees for Handgun Control and the Center to Prevent Handgun Violence voted to honor Jim and Sarah Brady's hard work and commitment to gun control by renaming the two organizations "The Brady Campaign to Prevent Gun Violence" and "The Brady Center to Prevent Gun Violence." Jim served as an Honorary Member of the Board of Trustees of both the Brady Campaign and Center to Prevent Gun Violence.

Unfortunately, it seems that over the past few years, we take one step forward and then two steps back, as more and more often we are hearing about events involving mass shootings that are only becoming more common. In fact, the reports are almost daily with the news no longer being a shock. That's a sad commentary on our times.

Meanwhile, we are left to answer some difficult questions. How can we stop this tide of violence? How do we balance upholding our Second Amendment freedoms of responsible gun ownership, and effectively keep firearms out of the hands of those who shouldn't have them? Where do our answers lie? Regardless of how one feels about the political debate over gun control, I believe all should agree that Jim Brady was a great American. I can say—without hesitation or reservation—that he was!

Sources: *Washington Post,* americansforresponsiblesolutions.org, BradyCampaign.org

Some Monthly Reminders

If my people, who are called by my name, will humble themselves and pray and seek my face and turn from their wicked ways, then will I hear from heaven and will forgive their sin and will heal their land.
2 Chron 7:14

All that is necessary for the triumph of evil is that good men do nothing.

Edmund Burke

Woe to those who decree unrighteous decrees, Who write misfortune, Which they have prescribed. To rob the needy of justice, And to take what is right from the poor of My people, That widows may be their prey, And that they may rob the fatherless.

Isaiah 10:1-2

I am still determined to be cheerful and happy, in whatever situation I may be; for I have also learned from experience that the greater part of our happiness or misery depends upon our dispositions, and not upon our circumstances.

Martha Washington (1732—1802)

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

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

Vincent Lombardi

XXVIII. PARTING WORDS

By the time you read this issue I hope and pray that the situation in Ferguson, Mo., has quieted down. The fatal shooting of a young man by a police officer and the events that followed caused Ferguson to become somewhat of a battleground for several days. The shooting of the unarmed teenager is now the subject of a grand jury. Unless a person was present and witnessed the incident, it's impossible to know with certainty what actually happened. For that reason, I won't make a judgment on what happened or why it happened. I refuse to judge either the police officer or the young man who died. I do know, however, that others are and they have a right to do so.

I fully support the rights of persons to assemble and demonstrate. However, I cannot condone the violence and criminal activity that became a part of what should have been peaceful demonstrations in Ferguson. It's my hope and prayer that the criminal justice system will function properly and will find out exactly what happened on the night of the shooting. It is up to those in positions of authority to make sure that the system works fairly and justly. But regardless, we must all take a look at the strained racial relations in our country.

This incident, and especially that which occurred in the following days in Ferguson, should make all of us realize that we have to deal with a most serious issue in the United States of America. Racial relations are not what they should be. Unfortunately, the racial divisions in America were growing wider long before the incident at Ferguson.

There is still racial prejudice in this country and that is a crying shame. We must take steps to bring folks together. People of faith have a direct responsibility to work in harmony to bring about better relations between whites and blacks. We are all God's children and we cannot be happy with the manner in which we on occasion treat each other. As the title of the song that I mentioned several days back says, "Why can't all of God's children get along." The sad truth is that we simply don't get along as we must as followers of Jesus Christ. I have to believe that we get along, but it will require individuals to have a change of heart.

It's been decades since a 1963 march on Washington where Dr. Martin Luther King's "I Have a Dream" speech was delivered. Have we as a nation lived up to Dr. King's vision of a land where each person would be judged by the content of their character rather than the color of their skin? If asked, how would you answer that query?

Dr. King's message was based on love, which can overcome hate, and non-violence. Our need for Jesus is truly the great equalizer of the races. Regardless of the color of our skin, we all are sinners in need of a savior. We all stand before God—not on the basis of racial identity—but on our true and unbridled love for Jesus. All of the races of the world—all of the cultures of the world—need the same Savior and His name is Jesus. So I ask this question: "Why can't all God's children get along?"

My prayer is that Christian brothers and sisters—of all colors, black, brown, red, yellow and white—will find in their hearts a sincere desire to get along! The following scriptures will help each of us put things in the proper perspective.

"And we know that all things work together for good to those who love God, to those who are called according to His purpose." Romans 8:28

"What then shall we say to these things? If God is for us, who can be against us?" Romans 8:31

"Let us therefore come boldly to the throne of grace, that we may obtain mercy and find grace to help in time of need." Hebrews 4:16

"A new commandment I give to you, that you love one another; as I have loved you, that you also love one another. By this all will know that you are my disciples, if you have love for one another." John 13:34-35

"Finally, be strong in the Lord and in his mighty power." Ephesians 6:10

Finally, with all of the problems facing the United States of America—both at home and abroad, consider how great it would be to have a nation that is totally united, working with a common purpose for the public good. If that could happen just imagine how things would be. My prayer is that it will come about.

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