



THE
JERE BEASLEY REPORT

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Beasley Allen

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Attorneys at law

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I. CAPITOL OBSERVATIONS

We closed our law office on Jan. 18 to honor the memory of Dr. Martin Luther King. In 1983, President Ronald Reagan signed into law the bill creating a national holiday honoring Dr. King's memory and historical achievements. This holiday was first observed in 1986 in most states. There was significant opposition, however, in several states to honoring the memory and legacy of the Civil Rights activist. It was not until 2000 that the holiday was observed in all 50 states.

Dr. King, without any doubt, played a pivotal role in ending the legal segregation of African-American citizens in our nation. I will never forget the "I Have a Dream" speech delivered by Dr. King in our nation's capital on Aug. 28, 1963. I was a very young lawyer living in Tuscaloosa at that time. The speech came at a time when race relations in America—and especially in the South—were not good. This was one of the best—and most effective for a cause—speeches in our nation's history. The speech was a masterpiece and brought a nation to the reality that changes were badly needed. Unfortunately, not all of our citizens were ready for change and the struggle for equality continued. Hopefully, we all learned valuable lessons during that struggle.

I grew up in the segregated South and have to admit that too many good people sat back and accepted "Jim Crow laws" that held American citizens down simply because of the color of their skin. That was wrong and totally unacceptable. While we have made significant progress in this country over the years, there is still much to be done in race relations. Sadly, our nation seems to be more divided today than it was during the time when Jimmy Carter was in the White House. I am totally convinced that all Americans must work together to eliminate all aspects of racism that linger on in this country. If we fail in that regard, our nation and all citizens will pay the consequences. It's time for Dr. King's dream to become a reality.

God has blessed America, but all too often we tend to take those blessings for granted. We should listen and consider the words of Abraham Lincoln who said that "a house divided against itself

cannot stand." Those words were spoken in 1858 before he was elected president. Because of the subject matter, the speech created a great deal of controversy. While Lincoln was referring to slavery more than 150 years ago, the premise of his statement holds true today. We must put our differences aside, join hands, and make America truly "the land of the free" and "the home of the brave." It might do us all good to find a copy of Dr. King's "Dream" speech and reflect on his words.

My prayer today is for a nation whose people will see fit to honor God and to work together—in harmony—to make this country a better place for all. It's time for all of us to put our divisions and differences aside and, when we do that, America will become a shining beacon on a hill for all to see. Truly—at that time—we will all be free at last!

II. MORE AUTOMOBILE NEWS OF NOTE

DEE MILES SELECTED TO SERVE ON VOLKSWAGEN MDL PLAINTIFFS STEERING COMMITTEE

Beasley Allen Principal Dee Miles has been appointed to the Plaintiffs Steering Committee (PSC) for the multidistrict litigation (MDL) involving the Volkswagen emissions cheat litigation. Dee, who is head of Beasley Allen's Consumer Fraud and Commercial Litigation section, is one of 22 lawyers appointed to the PSC out of more than 150 who applied. The litigation is consolidated under U.S. District Judge Charles Breyer in the U.S. District Court for the Northern District of California.

Judge Breyer heard from lawyers throughout the day on Jan. 21 as they petitioned for a spot on the PSC. The selected group was dubbed the "Dream Team" by The Recorder, a legal news publication, whose reporter Ross Todd live tweeted from the courtroom throughout the selection process. Dee's selection to the PSC is a testament to his experience in complex national litigation. Todd reported that at the hearing Judge Breyer said, "I don't pick law firms, I pick lawyers."

Dee has been appointed by Federal District Judges to serve in a leadership role for the Plaintiffs in numerous Multi-district Litigations throughout the country, charged with the awesome responsibility of coordinating the litigation for the entire country on certain cases such as the Toyota sudden unintended acceleration MDL, Target Data Breach MDL, the Home Depot Data Breach MDL, the Blue Cross Blue Shield Antitrust MDL, and the Takata airbag MDL. Miles has also served as lead class counsel in several class actions such as *Robertson v. Liberty National Life Insurance Company*, *Gadson v. American Medical Security Insurance Company* and *Gouche v. Transamerica*

IN THIS ISSUE

I.	Capitol Observations	2
II.	More Automobile News Of Note.	2
III.	More On The Gulf Coast Disaster.	11
IV.	Drug Manufacturers Fraud Litigation.	11
V.	Court Watch.	12
VI.	The Corporate World.	13
VII.	Whistleblower Litigation	13
VIII.	Congressional Update	16
IX.	Product Liability Update	16
X.	Mass Torts Update	17
XI.	Business Litigation.	19
XII.	An Update On Securities Litigation.	20
XIII.	Employment and FLSA Litigation	20
XIV.	Premises Liability Update.	21
XV.	Workplace Hazards	22
XVI.	Transportation.	23
XVII.	Environmental Concerns	24
XVIII.	Update On Nursing Home Litigation	26
XIX.	An Update On Class Action Litigation.	26
XX.	The Consumer Corner	29
XXI.	Recalls Update.	32
XXII.	Firm Activities	37
XXIII.	Special Recognitions	37
XXIV.	Favorite Bible Verses	37
XXV.	Closing Observations	38
XXVI.	Parting Words	39

Life Insurance Company; just to name a few. Dee had this to say about his selection:

It's an honor to be selected by Judge Bryer to serve the court in a leadership role on the Plaintiffs' Steering Committee. This VW case is one of the worst cases of fraud on the public we have ever seen in the automobile industry's history. It is a privilege to help lead the prosecution of these claims against VW with some of this country's most talented lawyers.

Volkswagen is the subject of several class action lawsuits after it was revealed proprietary software installed by the company disguised true nitrogen oxide (NOx) emissions on more than 11 million diesel vehicles. In September, the Environmental Protection Agency (EPA) cited Volkswagen and its affiliates Audi AG and Volkswagen Group of America, alleging VW and Audi diesel cars from model years 2009-2015 include a "cheat device." The device is able to detect when a vehicle is undergoing emissions testing, and adjust emissions levels to within Clean Air Act limits. However, when the car is operating during normal driving conditions, emissions were found to be as much as 40 times higher than federal limits allow.

Volkswagen has admitted to writing the cheat code into the software of nearly half a million diesel vehicles it sold in the U.S. The emissions cheat device was found to affect the 2009-2015 models of the Jetta, Beetle, Audi A3, Golf and Passat.

Judge Breyer appointed Elizabeth Cabraser with Leiff Cabraser Heimann & Bernstein, based in San Francisco, Calif., to chair the PSC. The case is *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, case number 3:15-md-02672, in the U.S. District Court for the Northern District of California.

Sources: The Recorder, Law360 and BeasleyAllen.com

FORMER FBI DIRECTOR MUELLER ELECTED TO SETTLE VW FRAUD SUITS

Former FBI director Robert S. Mueller will serve as settlement master for the hundreds of consolidated cases in California federal court that seek damages from Volkswagen over its use of illegal

software to cheat U.S. emissions standards. U.S. District Judge Charles S. Breyer lauded Mueller for his "integrity, good judgment, and relevant experience," noting that the former FBI head also served as a U.S. attorney in California's Northern District. Judge Breyer has this to say:

There is an urgent need to determine if all or some of the pending matters can be resolved by the parties sooner rather than later. [Mueller's] government and private practice experience makes him uniquely qualified to work with and earn the trust of the parties.

Those parties include, not only the German automaker and the large number of Volkswagen owners and dealers who have filed claims, but also the federal government and state attorneys general. Mueller became director of the FBI exactly one week before the 9/11 terrorist attacks and held the post through 2013. That made him the longest-serving director since J. Edgar Hoover. He is now a partner with the WilmerHale law firm. Judge Breyer noted that Mueller won't make any decisions as settlement master, but will instead "facilitate settlement discussion" in a case that already involves more than 500 Plaintiffs and could affect more than 500,000 Americans.

Volkswagen has admitted fault and revealed that the software came pre-loaded in millions of its diesel vehicles around the world. Interestingly, Volkswagen has blamed a handful of managers for the decision. Two CEOs have also resigned in the wake of the scandal. As we have reported, the U.S. Judicial Panel on Multidistrict Litigation consolidated the claims against Volkswagen in California federal court in December.

Source: Law360.com

JUSTICE DEPARTMENT SUES VOLKSWAGEN OVER EMISSION CHEATING

The Justice Department filed suit last month against Volkswagen over its emissions-cheating software found in nearly 600,000 vehicles sold in the United States, potentially exposing the company to billions in fines for clean air violations. The civil complaint against the German automaker, filed on behalf of the Environmental Protection Agency (EPA) in U.S. District Court in Detroit,

alleges the company illegally installed software designed to make its "clean diesel" engines pass federal emissions standards while undergoing laboratory testing. The vehicles then switched off those measures to boost performance in real-world driving conditions, spewing harmful gases at up to 40 times what is allowed under federal environmental standards. John C. Cruden, the assistant attorney general for the Justice Department's Environment and Natural Resources Division, stated:

Car manufacturers that fail to properly certify their cars and that defeat emission control systems breach the public trust, endanger public health and disadvantage competitors. The United States will pursue all appropriate remedies against Volkswagen to redress the violations of our nation's clean air laws alleged in the complaint.

As we have reported, the automaker is in the midst of negotiating a massive mandatory recall with U.S. regulators and potentially faces more than \$18 billion in fines for violations of the federal Clean Air Act. The company and its executives could also still face separate criminal charges, while a raft of private class-action lawsuits filed by unhappy VW owners are pending.

The federal lawsuit alleges that Volkswagen intentionally tampered with the vehicles sold in the U.S. to include what regulators call a "defeat device," a mechanism specifically designed to game emissions tests. Under the law, automakers are required to disclose any such devices to regulators. Because Volkswagen kept its suspect software secret, the lawsuit alleges the company's cars were sold without a valid "certificate of conformity" issued by EPA to regulate new cars manufactured or imported into the country.

In addition to producing far more pollution than allowed, experts say the excess nitrogen oxide and particulate emissions from the more than half-million VW vehicles had a human cost. A statistical and computer analysis by the Associated Press estimated the extra pollution caused somewhere between 16 and 94 deaths over the last seven years, with the annual toll increasing as more of the diesels were on the road. Cynthia Giles, Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance, stated:

With today's filing, we take an important step to protect public health by seeking to hold Volkswagen accountable for any unlawful air pollution, setting us on a path to resolution. So far, recall discussions with the company have not produced an acceptable way forward. These discussions will continue in parallel with the federal court action.

On Jan. 15 the U.S. Judicial Panel on Multidistrict Litigation transferred the Department of Justice's lawsuit from Michigan to the California federal court. It will be considered there with the 482 other cases against the company.

Source: Associated Press

VOLKSWAGEN REFUSES TO TURN OVER DOCUMENTS

In a most interesting development, despite earlier promises of transparency, Volkswagen has been very slow to turn over internal documents to regulators investigating the emissions cheating scandal. Volkswagen says that German privacy laws block their disclosure. On Jan. 19, several state attorneys general made this development known. Former Volkswagen CEO Martin Winterkorn had said that the automaker would fully cooperate with agencies "with transparency and urgency." But attorneys general for New York and Connecticut—which, along with 24 other states, have launched a probe into the scandal—say that the company has been "loath to work" with them, citing German privacy laws behind its refusal to turn over executives' emails and other documents. It looks like discovery through the civil courts will have to obtain what Volkswagen refuses to turn over.

Source: Law360.com

THE EPA AND ONE STATE AGENCY REFUSE TO ACCEPT VOLKSWAGEN'S DIESEL RECALL PLAN

The U.S. Environmental Protection Agency (EPA) and California air quality regulators have rejected the proposed recall plan submitted by Volkswagen to fix the diesel cars it fitted with software to cheat emissions standards. In a move backed by the EPA, the California Air Resources Board (CARB) sent a letter to Volkswagen Group of America Inc.

saying it was rejecting the automaker's plan to repair 2-liter diesel vehicles sold in California between 2009 and 2015. It was stated that the plan lacked sufficient detail and the proposed repairs did not contain the depth of information required for a technical evaluation. The letter said further:

VW's submissions are incomplete, substantially deficient and fall far short of meeting the legal requirements to return these vehicles to the claimed certified configuration.

Neither did the recall plan adequately address the overall impact to vehicle performance, emissions and safety, according to CARB. The Environmental Protection Agency agreed with California regulators' assessment that VW's recall plan was deficient. The EPA stated:

EPA agrees with CARB that Volkswagen has not submitted an approvable recall plan to bring the vehicles into compliance and reduce pollution. EPA has conveyed this to the company previously.

The California agency also notified VW of 13 specific violations of California air quality regulations in connection with the automaker's use of a defeat device in the cars, including failure to comply with state emissions standards. CARB Chair Mary D. Nichols had this to say:

Volkswagen made a decision to cheat on emissions tests and then tried to cover it up. They continued and compounded the lie and when they were caught they tried to deny it. The result is thousands of tons of nitrogen oxide that have harmed the health of Californians. They need to make it right. Today's action is a step in the direction of assuring that will happen.

It appears that Volkswagen will have its corporate hands full for a long time trying to deal with all of its problems. We are pleased that Dee Miles from Beasley Allen will be in a position in the MDL to help assure that complete justice is done.

Source: Law360.com

VOLKSWAGEN MAY BUY BACK 115,000 U.S. CARS

It was reported last night that Volkswagen may end up buying back more than 100,000 cars in the United States. It was reported that Volkswagen may buy back some 115,000 cars in the U.S. as a result of the growing emissions scandal. News of a possible mass buyback first came out in the German press and was later reported in the U.S. by Reuters. The report said the automaker is planning to either refund the purchase price of up to a fifth of the diesel vehicles affected or offer a new car at a significant discount.

The remainder of the vehicles will likely require significant repairs through the dealership. The reports come just a day after the Justice Department sued Volkswagen. The vehicles thought to be part of any buyback would be older models equipped with 2.0 liter diesel engines that are harder to retrofit to reach compliance, the reports noted. It will be interesting to see what happens relating to this new development.

Source: Reuters and AL.com

GM MUST HAVE SELECTED THE BELLWETHER TRIAL IN THE MDL

The so-called bellwether trial in the GM faulty ignition switch multidistrict litigation (MDL) was a disaster from the get-go. The trial in the New York federal court ended abruptly with the Plaintiff dismissing his case. It is not unusual for issues to arise with individual cases in complex litigation, especially one involving a high number of claims like the GM multidistrict litigation. But how in the world this case could have been selected by the Plaintiffs' MDL leadership is a complete mystery. It should have been a GM pick and we worked with The Cooper Firm on the landmark Melton case that revealed the GM cover-up of the defect and led to the initial recall. There are a tremendous number of good cases that should have been the bellwether trial. Why one of those cases wasn't selected defies logic. While the MDL dealt with issues on a single case, our two firms have made sure our GM clients' cases are moving forward successfully. We are confident that we will be able to represent them effectively despite what happened in New York. The case selected as the Bellwether case for trial in the MDL should never have

been filed, much less selected as the case to try in the MDL. I suspect we haven't heard the last about why the case was selected to be the Bellwether choice for the PSC.

AUTO RECALLS IN THE U.S. PASSED 51 MILLION IN 2015

The National Highway Traffic Safety Administration (NHTSA) announced on Jan. 21 that automakers recalled 51.3 million vehicles in the United States last year, the second-highest ever, in 868 separate recall campaigns. NHTSA and automakers have come under harsh criticism on auto safety issues from Congress and others in the wake of General Motors' delayed recall of 2.6 million vehicles for ignition switch defects linked to hundreds of deaths. NHTSA is now pressuring automakers to recall more vehicles more quickly—and has imposed record-setting fines. As a result, last year's recall campaigns numbered the most in U.S. history.

In 2014, NHTSA said automakers recalled a record 63.9 million vehicles in 803 campaigns—led by GM's recall of 26 million vehicles. The agency reclassified about 12 million vehicles that were recalled first in 2014—mostly for defective Takata airbags—and were recalled in 2015. NHTSA Administrator Mark Rosekind said at the Washington Auto Show:

Massive recalls are still a prominent feature of the safety landscape. NHTSA has made major efforts in the last year to improve our processes for identifying vehicle defects, and that effort will continue.

For the last few weeks, automakers have been saying they are going to do more to improve auto safety. In addition, NHTSA has announced the launch of its "Safe Cars Save Lives" advertising campaign to raise awareness among the public of the actions needed to keep people safe from vehicle safety defects. The year-long digital ad campaign, accompanied by online video and information resources, is aimed at convincing owners to use NHTSA's VIN lookup tool regularly to check for uncompleted recalls. Hopefully the automakers and NHTSA, working together, will make our highways safer. At least they will have that opportunity.

Source: Insurance Journal

GM MODELS TOP THE SAFETY INSTITUTE'S QUARTERLY VEHICLE SAFETY WATCH LIST

The Safety Institute has released its latest quarterly Vehicle Safety Watch List with General Motors vehicles taking 10 of the top 15 potential problem slots. Eight of the GM models on the list were identified with potential electrical issues and were previously subject to GM's ignition switch recalls. The Watch List, based on analysis of the Early Warning Reporting (EWR) claims submitted by vehicle manufacturers to the National Highway Traffic Safety Administration (NHTSA), is intended to identify potential motor vehicle safety defects that merit additional engineering and statistical review.

EWR data provide broad categories for the claims reported to manufacturers. Investigation of the underlying issues that led to these claims is needed to understand whether additional recall actions may be needed by manufacturers. A review of complaints to NHTSA shows consumers reporting potential electrical failures such as stalling and failed steering in GM models even after the vehicles have been repaired in recall campaigns. Sean Kane, founder and President of The Safety Institute, had this to say:

After GM was exposed for its cover-up of ignition switch defects and the company recalled millions of vehicles to address the problems, this new analysis shows some potentially troubling developments that need immediate attention.

I believe the public is finally realizing how important adequate regulation by NHTSA really is. When a person reads that one automaker (GM) in one year recalled more than 30 million vehicles they are shocked. It's essential that the public be kept informed so folks can become advocates for safety.

Source: Safety Institute

GENERAL MOTORS FIGHTS TO CREATE A LIABILITY WALL IN THE IGNITION SWITCH CASES

General Motors LLC is attempting to get the Second Circuit Court of Appeals to uphold a bankruptcy court's ruling that bankruptcy protections block most car owners seeking to sue "New GM" over the ignition switch defect. Lawyers for GM say the consumers seeking to

hold the new company liable aren't entitled to "special treatment." The appellate court was told by GM that the consumers are asking for an "extraordinary, one-sided 'do-over' " of what they label as "a necessary deal that girded the national economy." Some will refer to what the government did as a "bailout." GM said in a brief filed with the Court:

The sale would not have occurred without this liability shield, and if there were no sale, the impact on appellants and the public—the resulting loss of jobs, the negative cascading effect on the vulnerable domestic economy, and the loss of value for Old GM creditors (and many others)—would have been catastrophic.

GM is trying to convince the court that the ignition switch claims are solely against Old GM. This is according to the latest iteration of the company. Three groups of consumers had urged the Second Circuit in November to overturn U.S. Bankruptcy Judge Robert Gerber's April 2014 ruling that General Motors is protected from most of the suits. This is a recap:

One group, owners and lessees of cars made by "Old GM" who seek to recoup economic losses after it was revealed that both Old GM and New GM purposefully hid the ignition switch defect, said the New York bankruptcy court correctly held in its April 15 ruling that they were entitled to actual notice of the sale order and injunction that separated out Old GM's liabilities from the assets New GM bought. U.S. Bankruptcy Judge Robert Gerber had agreed that they were denied notice under due process because of GM's knowledge of the defect during bankruptcy hearings, but the ignition switch plaintiffs say he erred when he ruled that they weren't prejudiced by that lapse.

Another group of consumers, a proposed class that filed suit in May claiming that GM's general counsel knew about the defect when the company filed for bankruptcy in 2009, backed the ignition switch plaintiffs in their own brief. These consumers said that they were prejudiced because they had no opportunity to even try to persuade the government or the bankruptcy court to carve out a provision in the

sale order to protect victims of “GM’s massive fraud.” They are also prejudiced because the judge’s ruling bars them from suing the reborn company for its pre-bankruptcy actions.

And a third group of consumers who are asserting claims against New GM based on non-ignition switch hazards in cars made by Old GM also urged the Second Circuit to reverse the bankruptcy court’s ruling. However, they argue that the bankruptcy court lacked subject matter jurisdiction to render its decision to bar them from asserting claims against New GM for non-ignition switch defects in Old GM cars.

GM’s wrongful cover-up of a known defect was made known to the public, but only after a decade of cover-up. The ignition switch defect caused hundreds of deaths and injuries and led to subsequent recalls that ultimately affected about 30 million GM vehicles. The Plaintiffs have claimed that their due process rights were violated when GM did not disclose the latent defect during the reorganization process.

Source: Law360.com

FAMILY OF WOMAN KILLED BY TAKATA AIR BAG SHRAPNEL SEEKS TO REOPEN SUIT

The family of a Virginia woman who was killed by shrapnel from a Takata Corp. air bag is attempting to reopen a lawsuit they previously settled over her death based on allegations the company knew the device was defective. Gurjit Rathore, 33, died in December 2009 when a mail truck hit her Honda Accord and the air bag in her car deployed, shooting metal into her chest and neck. The lawsuit was settled for \$3 million. The death was one of the first of nine connected to shrapnel from Takata air bags and I believe it’s the first in which Plaintiffs are seeking to reopen a settled claim after new disclosures that reveal the company hid what it knew about the defect. This is exactly what happened in the Melton case against General Motors.

Takata didn’t disclose evidence that the company manipulated test results before the family settled the lawsuit. Lawyers representing the Plaintiffs said in a statement that they are seeking to set aside the settlement and order

Takata to provide evidence produced in later air bag lawsuits. Hopefully, their efforts will be successful.

Sources: *Insurance Journal* and *Bloomberg News*

ANOTHER AIRBAG DEATH REVEALS FLAWS IN U.S. RECALL SYSTEM

A tragic death in July of last year involved a young driver in Pennsylvania. The Honda vehicle involved in the tragic event was under recall. From 2010 to 2012, Honda Motor Co. said it made multiple attempts to notify the owner of a 2001 Accord that the car’s airbag was faulty and needed replacing. The car had been sold to another person and the needed repairs hadn’t happened. The vehicle crashed and the Takata Corp. airbag shattered, fatally injuring the driver.

Reportedly, the day before the accident Honda had mailed the new owner yet another recall notice. The latest fatality linked to a Takata airbag—nine have occurred in the U.S. and one outside the country, with about 100 people injured—highlights a flawed recall system that all too often fails to lead to critical repairs and can take years to complete. Meanwhile, cars can be legally sold and registered without recall fixes having to be performed. Senators Richard Blumenthal, a Connecticut Democrat, and Edward Markey, a Massachusetts Democrat, said in a joint statement:

The identification of yet another preventable death—this time a young boy and well after when this safety defect was first made known—reiterates the urgent need for swift recall of all cars with these potentially defective airbags.

About 2 million vehicles with the defective airbags are being recalled each month. With almost three-quarters of the 19 million vehicles under the recall still unrepaired, the fixes could still take another seven months to complete. And that may be optimistic, based on the rate of repairs in previous recalls.

On average, only about 70 percent of vehicles covered under recalls are repaired, said Clarence Ditlow, Executive Director of the Center for Auto Safety, a Washington-based advocacy group. The rate for older vehicles such as those involved in the Takata recall is much lower, about 50 to 60 percent. Ditlow said:

Not every single owner shows up the first day to get it fixed. Some people will fit it in with their next trip for service or when they have time in their schedule. You have to get a sense of urgency in the consumer.

The National Highway Traffic Safety Administration (NHTSA) has expanded its recall to include additional models made by Subaru Co., Mazda Motor Corp. and Honda Motor Co., and appointed an independent monitor to oversee Takata’s response, said spokesman Gordon Trowbridge. “This young person’s death is tragic and it underscores why we are continuing to work so hard to get these defective deflators off the road,” Trowbridge said. “Despite the unprecedented publicity surrounding these recalls, there are still vehicles under recall with parts available for repairs that have not been fixed.” Honda, in a statement, said it was investigating the crash in Pennsylvania and urged car owners to get their recalled vehicles repaired as soon as possible.

As we have previously reported, Takata reached a consent decree spanning five years with NHTSA on Nov. 3, agreeing to pay fines of \$70 million, fire some employees and phase out the chemical explosive linked to the failures. If the company doesn’t meet its terms, it will be subject to additional fines of as much as \$130 million, which would total the largest civil penalty in NHTSA’s history.

The consent decree included installing an independent monitor, to be paid for by Takata. John D. Burretta, a partner with the law firm Cravath, Swaine & Moore LLP and former principal deputy assistant attorney general in the Department of Justice Criminal Division, has been selected for the job, Trowbridge said. Burretta previously served as the chief of the organized crime and racketeering section of the U.S. Attorney’s office for the Eastern District of New York, and on its national security unit.

During his 10 years he was with the Department of Justice, Burretta held a number of roles, including chief of staff and director of the agency’s Deepwater Horizon Task Force. As you know, the Task Force handled the BP 2010 oil spill in the Gulf of Mexico. Ditlow said: “The independent monitor has a steep uphill climb to figure this out. People are dying.”

The pace of the Takata recall is completely unacceptable and a massive dis-

appointment. Automakers dragged their feet and didn't report the extent of the risks. NHTSA also moved too slowly after it began receiving reports. But Trowbridge said that NHTSA has taken steps to speed up the recall, such as including deadlines for action in its consent order with the company. For example, he said manufacturers in states with high humidity, which has been linked to the airbag failures, must have enough parts on hand by March to complete all repairs. Trowbridge added:

We've got kind of a mess on our hands here and everybody acknowledges this. This is not going to get done fast enough to satisfy us or, frankly, we think the manufacturers that are involved.

Ditlow said that law changes that would make recall completion rates higher have consistently been fought by the industry. A measure contained in transportation legislation earlier this year would have required used car dealers to perform all outstanding recalls before selling vehicles. It was taken out of the bill before it passed.

NHTSA also could push suppliers harder to make replacement parts available, Ditlow said. Some auto manufacturers have told customers they won't be able to repair airbags on certain vehicles until the middle of 2016, Ditlow said. "Are parts available for every single Takata recall? The answer to that clearly is no," he said. Motorists can check to see if their vehicles are on the recall list at a NHTSA-run website, safercar.gov. Repairs under the recall are free.

Source: *Insurance Journal*

TAKATA EMAILS SHOW BLATANT COVER-UP OF DEADLY AIRBAG PROBLEM

"Happy Manipulating!" This is how an engineer at automotive parts supplier Takata responded in an email regarding tests on the company's airbags. Takata airbags have been linked to nine deaths in the United States, resulting from the airbag exploding with deadly force. The airbags have been known to deploy with violent force even in very minor crashes, sending shrapnel into the passenger cabin.

The email, dated July 6, 2006, was among many recently unsealed as the result of a lawsuit brought by a Florida woman who was paralyzed after the Takata airbag in her 2001 Honda Civic

deployed with excessive force in a 2004 accident and included in an investigative report published in *The New York Times*. However, Takata did not begin recalling vehicles for potentially defective airbags until June 2014, after a lawsuit was filed against General Motors by a woman who was blinded by an exploding airbag in her car. The lawsuit prompted GM to recall 33,000 Chevrolet Cruz sedans in North America.

But that was just the tip of the iceberg. The recall prompted an investigation by the National Highway Traffic Safety Administration (NHTSA) into both driver- and front-side passenger airbags. Other automakers began following GM's lead, with Toyota, Honda, Mazda and Nissan all issuing vehicle recalls for potential Takata airbag defects by the end of June.

In October, NHTSA took the unprecedented action of warning 7.8 million U.S. drivers about potential dangers posed by Takata airbags. The list continues to grow. In September, NHTSA sent letters to companies including Mercedes-Benz, Jaguar-Land Rover, Suzuki, Tesla, Volvo Trucks, Volkswagen, and Spartan Motors requesting information on which vehicles are equipped with Takata inflators.

The defective airbags have been linked to nine deaths worldwide, including the death of a pregnant woman in Malaysia, and more than 100 injuries. Police reports indicate that some victims of Takata's exploding airbags resembled homicide victims for the nature and severity of their injuries.

Eight U.S. deaths have occurred in Honda vehicles. In November, Honda Motor Company said it would no longer use Takata as its airbag supplier, saying testing data from the manufacturer had been "misrepresented and manipulated." On the same day, NHTSA fined Takata \$70 million for its handling of the airbag problem, also citing data manipulation.

On Jan. 22, NHTSA announced a 10th death in a 2006 Ford Ranger pickup truck. It is the first death to occur in a vehicle made by an automaker other than Honda. Following confirmation of the 10th death linked to the Takata airbags, regulators also expanded the recall, adding 5 million more vehicles to the 19 million that were already under recall, extending it to include Volkswagen and Mercedes-Benz. To date, Takata's airbag recall is one of the largest and most complex recalls in history, affect-

ing airbag inflators in 24 million U.S. vehicles made by 14 auto manufacturers.

In the "manipulating" memo, *The New York Times* reports that Takata airbag engineer Bob Schubert used the line as he told a colleague that he had been repeatedly told to alter data as a matter of practice, saying he was told by those in his company that this was just "the way we do business in Japan." He warned his colleague that test data had been altered so significantly that it would qualify as fraudulent, but freely admitted he continued to manipulate reports to disguise true results about how airbag inflators were performing. Takata has not disputed that it manipulated test data, but continues to deny the manipulation has any relation to the massive airbag recalls.

Sources: *New York Times*, RightingInjustice.com, BeasleyAllen.com

NHTSA ADDED FOUR CAR MODELS TO TAKATA AIR BAG RECALLS

The National Highway Traffic Safety Administration has added four new models to the airbag recalls from Takata—Honda CR-Vs, Mazda6s and Subaru Legacy and Outback. The additions were part of the Takata recalls that have dominated the automotive world for months. As of January, the recall had expanded even further, involving air bag inflators in 24 million cars from 14 automakers. NHTSA anticipates the recent group will add "a few hundred thousand vehicles" to the total. Some of these vehicles have been covered by previous recalls. Some of them may be covered by previous driver's-side recalls. ... In some of these cases we're going to be asking them to take action twice." The actual total could be considerably higher than NHTSA's estimate. In a separate statement, Honda said the CR-V addition accounted for 127,000 new inflators, and Subaru spokesman Michael McHale said that Subaru's expansion amounts to 340,000 new cars.

All four recalls involve passenger-side airbags. Subaru had not yet previously involved the 2006-2008 Legacy or Outback under its Takata recalls, but the CR-V and Mazda6 were already under other Takata recalls. It's all part of the massive crisis for Japan's Takata, a major automotive supplier. It's recognized that when exposed to high heat and humidity for long periods, Takata's ammonium

nitrate airbag inflators can cause a reaction that propels metal shrapnel into occupants as the airbags deploy. Explosions involving the air-bag inflators have been blamed for nine deaths in the U.S. and one overseas. NHTSA says it has found five new passenger-side inflators that ruptured under testing for cars under recall and adds the following model years and models to the recall list:

- 2005-2008 Mazda6
- 2002-2004 Honda CR-V
- 2005-2008 Subaru Legacy
- 2005-2008 Subaru Outback

Experts say the risk of an inflator rupture is highest in regions of high absolute humidity, but recalled cars can still carry the risk long after moving away. As of Dec. 4, 27.3 percent of recalled Takata driver's-side airbag inflators and 25.8 percent of Takata passenger inflators had been repaired, Trowbridge said. By March, NHTSA will require all automakers to have enough parts on hand to repair inflators in high-humidity regions. NHTSA anticipates automakers will be on track to meet that target, and about 70 percent of the replacement inflators come from non-Takata suppliers.

APPELLATE COURT GIVES CAR SAFETY GROUP ACCESS TO CHRYSLER DOCUMENTS

The Ninth Circuit Court of Appeals has ruled that a federal trial judge used the wrong standard when he refused a request by the Center for Auto Safety to unseal documents in a now-settled class action accusing Chrysler Group LLC of concealing defective power systems in some models. The appellate court threw out an order denying the Center's motion for an injunction to make the disputed documents publicly available and said Chrysler must present "compelling reasons" to keep them sealed.

The majority opinion stated that U.S. District Judge Dean D. Pregerson applied the "good cause" standard, instead of the deceptively similar-sounding "compelling reasons" standard, when deciding to keep the seal in place. Those standards come into play when courts are asked to unseal documents attached to motions that aren't related to the merits of a case. Judge Pregerson's ruling didn't give enough weight to the "strong preference for public

access," according to the appellate court. U.S. Circuit Judge John B. Owens wrote:

While simplicity has its virtues, it also has its vices. Here, permitting the public's right of access to turn on what relief a pleading seeks—rather than on the relevance of the pleading—elevates form too far beyond substance and overreads language in our case law.

Four car owners brought the case in 2013, claiming that their Jeep Grand Cherokee, Dodge Durango and Dodge Grand Caravan vehicles suffered from a host of screwy power problems, which ranged from failing to start or stalling in traffic, to headlights and windshield wipers acting with a mind of their own. Before the parties settled last year, the Center moved to intervene and unseal the documents, which included a proposed warning for Chrysler to release to drivers. The Center said it intended to use the unredacted versions to support a petition for the National Highway Traffic Safety Administration to launch an investigation into the alleged defect.

Judge Pregerson said there was good cause to keep the seal in effect, citing concerns about exposing Chrysler's trade secrets among other issues, and importantly, determined that the preliminary injunction motion was nondispositive, meaning the good cause standard applied under Ninth Circuit precedent. While the circuit court agreed that the motion was "technically" nondispositive, the court said that the issue of public access is more directly determined by whether a motion was closely related to the merits of a case. The court said in that regard:

Public access will turn on whether the motion is more than tangentially related to the merits of a case. While many technically dispositive motions will fail this test, some will pass.

There was a dissenting opinion criticizing the majority for unfairly "invent[ing] a new rule" that conflicted with the court's existing two-part bright line rule, meant to balance the public's interests against a party's privacy protections. The majority of the court obviously disagreed. The Center said in a statement that the decision was a "huge victory" for transparency and public safety. The organization said:

In this case, the plaintiffs filed a preliminary injunction motion, arguing that the sealed documents reveal a defect so dangerous that the court should order Chrysler to warn millions of its drivers. Now, thanks to this decision, it's much more likely that the public will be able to see those documents for themselves.

U.S. Circuit Judges Sandra S. Ikuta and John B. Owens sat on the panel along with U.S. District Judge William K. Sessions. The Center was represented by Jennifer D. Bennett and Leslie Andrea Bailey of Public Justice PC. I agree with the Center's position and believe the American people would too if they were familiar with the court's ruling. It's very important that people are kept informed on matters such as this one that affect public policy.

Source: Law360.com

NHTSA SAYS CHRYSLER HAS FIXED CAR HACKING RISK

The National Highway Traffic Safety Administration has closed investigations into Chrysler's parent company and Harman International Industries Inc. This follows the agency's investigation into a software vulnerability that left Fiat Chrysler America (FCA) vehicles susceptible to hackers. The vulnerability came to light following a media report that described a Jeep's radio, windshield wipers and transmission as being manipulated remotely by hackers. The news prompted a recall of 1.4 million vehicles in July and subsequent investigation.

The NHTSA Office of Defects Investigation (ODI) closed its investigation on Jan. 5, saying that it appears the automaker has remedied the problem, and its office could not find any complaints or field reports that indicated steering and braking effects like those described in the media report. In a statement, NHTSA said:

There were no confirmed incidents of hacking in any of the records reviewed by ODI. The remedies completed by Sprint and FCA appear to have eliminated vulnerabilities that might allow a remote actor to impact vehicle control systems.

The FCA vehicles under review contained a Harman Kardon “infotainment” system. Harman International acknowledged an additional 2.8 million vehicles, including those manufactured by Audi AG and Bentley Motros Ltd. contained a similar operating system. As a result, the NHTSA conducted an investigation into Harman along with FCA, but found the vulnerabilities identified by FCA were not present because they used different hardware components and software than the FCA vehicles. The other Harman infotainment systems also included more security features to help prevent hacking, the NHTSA determined.

NHTSA said that based on its review of documents submitted during the investigation, it does not appear that other automakers were affected by the same software vulnerabilities as FCA. Coinciding with the news report about Jeep hacking, Sens. Edward J. Markey, D-Mass., and Richard Blumenthal, D-Conn., introduced the Security and Privacy in Your Car Act, or SPY Car Act. The legislation calls for the NHTSA, in cooperation with the Federal Trade Commission (FTC), to develop cybersecurity standards for vehicles, aimed at preventing and mitigating hacking and at ensuring data security.

Sources: Law 360 and *The Detroit News*

TOYOTA ASKS 8TH CIRCUIT TO THROW OUT \$11.4 MILLION FATAL CRASH VERDICT

Toyota has asked the Eighth Circuit Court of Appeals to throw out an \$11.4-million verdict awarded in a suit blaming an unintended acceleration defect for a fatal car crash, which subsequently led to a man’s imprisonment on vehicular manslaughter charges, claiming the verdict was based on inadmissible evidence. The automaker said that a Minnesota federal judge improperly admitted other unintended-acceleration incidents as evidence without any proof that they resulted from the same defect and claimed that the three victims’ relatives have no case without an expert’s flawed conclusion that those incidents were “similar.”

Javis Trice-Adams was killed in the collision, along with his 9-year-old son. His niece, 7-year-old Devyn Bolton, died of her injuries 18 months after their vehicle was rammed from behind in 2006 by a 1996 Toyota Camry operated by Koua Fong Lee, who was transport-

ing several family members at the time and spent more than two years in prison as a result of the crash.

After Toyota was forced to recall millions of vehicles because of the defect, Lee was released from prison in 2008. He claimed, along with Bolton’s next of kin, that the Camry suffered from an overheating problem that caused its throttle to stick, just as in other crashes highlighted in a report by expert John M. Stilson. Toyota said that U.S. District Judge Ann D. Montgomery should have granted its motion for judgment as a matter of law, claiming that the report was flawed and that the other evidence—including testimony that Lee tried repeatedly to apply the brakes—wasn’t enough to prove the Camry was defective.

After the jury found against Toyota last February, Judge Montgomery upheld the verdict over the company’s objections, along with prejudgment interest, which brought the damages to about \$13 million. But Toyota contends that it shouldn’t have to pay the interest because the damages awarded to Bolton’s estate didn’t distinguish between past and future damages. Minnesota law was said not to allow prejudgment interest on a lump sum. There were also other arguments by Toyota relating to damages issues. “A trustee cannot assert a claim on which the decedent could not have recovered had she lived,” Toyota said, asking the court to affirm a \$130,000 offset for Trice if it does not grant a new trial.

The Plaintiffs are represented by Bill Markovits, Louise Roselle, Christopher D. Stock and Eric Kmetz of Markovits Stock & DeMarco LLC, Michael B. Padden of Padden & Associates LLC, Kenneth R. White of the Law Office of Kenneth R. White PC, and Anne Brockland and Amy Collignon Gunn of The Simon Law Firm PC.

Source: Law360.com

FEDERAL JUDGE RULES IN DEFECTIVE DODGE CLUTCH SUIT

An Oklahoma federal judge dismissed all but one of the claims in a proposed class action seeking to blame FTE Automotive and other car parts companies for allegedly defective clutches sold to a pre-bankruptcy Chrysler and used in more than one million Dodge trucks and other vehicles. U.S. District Judge Stephen P. Friot did allow the claim of

contractual indemnity against Stoneridge Inc. to survive. The group of drivers’ remaining four warranty, product liability and tort claims, which amounted to all of the claims against FTE Automotive USA Inc., were dismissed. The judge ruled that those claims were either time-barred—and not effectively tolled under state law—or failed under the economic loss doctrine.

Judge Friot rejected Stoneridge’s arguments against contractual indemnity, however, finding that a purchase contract for the clutches between it and FTE was broad enough to hold Stoneridge liable in a case of this sort. The judge wrote:

As an initial matter, the court notes that the indemnity clause at issue here contains some extraordinarily inclusive language. The parties do not dispute that Michigan law also applies to the claim [and] under Michigan law, a third party must be an intended beneficiary of a contract in order to enforce it.

Judge Friot went on to say that an “objective review” of the indemnification provision in the contract clearly shows Stoneridge agreed to indemnify users of goods, in this case clutches for a manual transmission, from “all damages” related to the goods. The order makes clear that Plaintiffs are intended third-party beneficiaries of the contract.

Judge Friot refused to give the Plaintiffs leave to amend their dismissed claims. Plaintiffs filed their complaint against the companies in late 2014, led by Plaintiff Rickey Royal, over their roles in a vertical chain of manufacture of the clutches at issue. Royal claimed he was forced to partially pay for repairs to his 2006 Dodge Ram’s clutch safety interlock switch after his vehicle rolled forward without the clutch being pressed.

Reportedly, Arrow manufactured wire compression springs purchased by Stoneridge for use in the manufacture of clutch switches, which were sold to FTE. FTE then sold the clutch switches to various U.S. automakers, including Chrysler. Other drivers included in the action, all owners of Dodge Rams equipped with CSIS parts manufactured and sold to Chrysler from the mid-1990s through 2014, have experienced no

actual trouble with their clutches, but asserted claims on future economic loss.

Plaintiffs also claim owners of vehicles with the purportedly defective part had complained as early as 1999, and that the Defendants met in January 2000 to discuss increasing the part's durability, but did nothing. In 2003, it is alleged that Arrow sought permission to change the design of the springs in the clutch switch, but the changes were not implemented until 2007.

The National Highway Traffic Safety Administration (NHTSA) began an investigation into the allegedly defective clutches in 2014 after a child was killed when another child started a Dodge Ram without pressing the clutch. A subsequent nationwide recall was ordered, with Chrysler agreeing to either replace the CSIS for free or reimburse drivers who have incurred costs of repair related to the issue.

Royal is represented by R. Chris Cowan of the Cowan Law Firm, Simone G. Fulmer of Fulmer Group PLLC, Jeffrey T. Embry and George Cowden IV of Hossley & Embry LLP and Benjamin L. Barnes. The case is in the U.S. District Court for the Western District of Oklahoma.

Source: Law360.com

FORD FACES NEW NHTSA PROBE OVER DOORS THAT WON'T CLOSE

The National Highway Traffic Safety Administration has opened an investigation into Ford's newer compact Focus cars. This comes after NHTSA received dozens of complaints that car doors fail to latch and are even prone to opening without warning while driving. The agency launched the investigation Jan. 16 into Ford Motor Co.'s Focus models made between 2012 and 2013 after receiving 73 complaints in recent months from drivers saying their car doors will not close or do not stay closed.

A few drivers claim they have been forced to physically tie the door closed from the inside in order to ensure it stays shut, while several others said they have stopped driving the car entirely for fear of the doors continuing to open while driving. According to NHTSA records, only one driver has reported injury from the possible defect, which was caused when a door rebounded when pushed to close and struck the driver.

NHTSA's Office of Defects Investigation said the initial investigation will allow it to "further analyze the scope, frequency and consequence of the alleged incidents." The agency also said the problem "appears similar" to what forced Ford to recall more than 500,000 cars last year in four separate recalls. In May, Ford launched a recall of about 156,000 additional vehicles that were included in an April recall of about 390,000 2012 to 2014 Ford Fiestas and 2013 to 2014 Ford Fusion and Lincoln MKZ vehicles after the NHTSA found they could all be affected by faulty door latches that blocked doors from closing and could also release while the cars were in motion.

Those recalls followed one in January and one in March of 205,000 Ford Taurus sedans and 213,000 Ford Explorer and Police Interceptor SUVs, respectively, over the same defective door latch. In relation to those vehicles, Ford said the door issues were likely caused by a broken pawl spring tab, which can lead to doors that cannot be closed properly. Two drivers involved in the earlier recalls complained of soreness after being struck by rebounding doors, but NHTSA received hundreds of complaints over the issue and began an initial investigation into Fiesta models in September 2014. The Office of Defects Investigation (ODI) also called into question the efficacy of warning signals in the car, since numerous claims said car doors opened while driving.

Source: Law360.com

GM SUED OVER ALLEGED STEERING FLAW IN CRUZE AND MALIBU VEHICLES

A class action lawsuit was filed against General Motors in a California federal court last month. It's alleged that the automaker's Chevy Cruze, Chevy Malibu and Buick Verano suffer from a steering defect that could make the cars veer dangerously as well as lower their resale value. The lead Plaintiff, Briana Mendoza, claims the steering wheel in her Chevy Cruze locks up and requires turning the wheel with extra force, which could make the car turn sharply when the wheel comes unstuck. Mendoza says GM is aware of the issue affecting the three models from years 2011 through 2014, but has refused to fix the issue in violation of warranty and consumer protection laws. The complaint says:

The steering system is one of the most important components for vehicle control and safe driving. A defective steering system has serious consequences for the handling, maneuvering and stability of the class vehicles while in operation and can contribute to car accidents and potential injury or death.

Mendoza claims the vehicle's electronic power steering system locks in the straight position after the car has been traveling a long distance on a straight highway. After that happens, the driver has to exert more pressure to the wheel to free it from its stuck position and is in danger of exerting too much force, causing the wheel to turn too far and the car to suddenly veer, the Cruze owner says. GM issued a service bulletin via the National Highway Traffic Safety Administration (NHTSA) in November of 2014, offering to repair the bug at no cost to owners. The letter asked drivers who had experienced the issue to bring their cars to dealerships.

However, it's alleged that GM used the same defective parts to fix the problem, meaning it would likely manifest again after the car's limited warranty expired, and that the automaker should have issued a full recall to fix the steering systems in all of the potentially affected vehicles. Mendoza claims GM should have known about the defect via its testing process and customer complaints. GM's handling of the issue coupled with its probable prior knowledge violated California's Consumer Legal Remedies Act, Unfair Competition Law and Song-Beverly Consumer Warranty Act.

The automaker allegedly breached its express and implied warranties in violation of the Magnuson-Moss Warranty Act. The Plaintiff seeks to represent a California and national class of Cruze, Malibu and Verano owners whose cars dropped in value because of the defect, and aims to recover damages or secure an injunction requiring the automaker to fix the steering flaw, along with punitive damages.

In 2014, GM faced similar allegations in another proposed class action by a Chevy Volt driver alleging his steering wheel locked up at high speeds. The automaker settled the claims in May before the suit reached the class certification phase. The Plaintiff in this case is represented by Michael Louis Kelly, Behram V. Parekh and Heather Baker

Dobbs of Kirtland & Packard LLP. Counsel information for GM was not immediately available. The case is in U.S. District Court for the Central District of California.

Source: Law360.com

III.

MORE ON THE GULF COAST DISASTER

JUDGE BARBIER APPROVES ADDITIONAL SEAFOOD DISTRIBUTIONS

There was a bit of significant news coming out of the BP litigation last month. On Jan. 7, 2016, Judge Carl Barbier approved Claims Administrator Patrick Juneau's recommendations to pay out the balance of the \$2.3 billion Seafood Compensation Program (SCP) Fund established by the historic BP settlement. Unlike other portions of the economic settlement which are not capped, BP agreed to pay this entire capped fund to eligible commercial fisherman. To accomplish this, multiple distributions have been and will be made until the SCP fund is depleted.

The initial round of SCP payments expended approximately \$1.1 billion of the SCP Fund. In December 2014, the Claims Administrator released \$500 million of the remaining \$1.2 billion in the First Supplemental Distribution. Despite some SCP claims not receiving a determination in the First Supplemental Distribution and an even smaller handful who have not received an initial determination, the Claims Administrator has agreed to begin additional distributions to pay the remaining funds. The balance, expected to be between \$600 million and \$700 million, will be distributed according to the same formula used in the First Supplemental Distribution.

The Claims Administrator proposed to complete the additional distributions in two parts: a "Supplemental Distribution Round Two" and a "Residual Distribution." The Supplemental Distribution Round Two, estimated to be worth \$15 million, will include approximately 300 claimants whose claims were finalized after the First Supplemental Distribution and those requiring a "true up" on payment(s) awarded in the First Supple-

mental Distribution. Once the Supplemental Distribution Round Two is completed, the Residual Distribution will proportionally pay out the remaining funds, which are estimated to be worth \$600 million.

We are pleased with the Claims Administrator's handling of these distributions to the Gulf's commercial fishermen. Their fertile fishing grounds were horribly impacted by the oil spill, and they are justifiably concerned over the still unknown environmental effects caused by chemical dispersants. The Claims Administrator's decision to begin supplemental distributions while only a small handful of SCP claims remain pending is the most efficient manner to distribute these funds.

IV.

DRUG MANUFACTURERS FRAUD LITIGATION

U.S. SUPREME COURT ALLOWS \$124 MILLION PENALTY AGAINST RISPERDAL DRUGMAKER TO STAND

The U.S. Supreme Court declined last month to hear a Johnson & Johnson subsidiary's appeal of a \$124-million penalty imposed by South Carolina after a jury found the drugmaker had improperly marketed the anti-psychotic drug Risperdal and concealed its risks. The court's decision not to hear the appeal filed by Johnson & Johnson's Janssen Pharmaceuticals means a South Carolina Supreme Court ruling from June that reduced the penalty to \$124 million from \$327 million remains intact. Janssen's lawyers said that, among other things, the award violated the prohibition on "excessive fines" under the U.S. Constitution's Eighth Amendment. The U.S. Chamber of Commerce had asked the justices to hear the case.

The state appeals court upheld the jury's finding about the marketing of Risperdal. In reducing the amount of the penalty, the state court cited a provision in South Carolina law that no action can be taken in such cases after three years of the discovery of unlawful conduct. South Carolina filed its complaint in April 2007. The state had sought civil penalties on two claims. The first arose from the content of the

written material of Risperdal prescriptions since 1994. The second centered on alleged false information contained in a 2003 letter Janssen sent to South Carolina's prescribing physicians.

Risperdal, launched by Johnson & Johnson in 1994, is used to treat conditions including schizophrenia, bipolar disorder and irritability in people with autism. The drug and other anti-psychotic treatments have also been linked to side effects such as strokes, diabetes and weight gain.

Source: *Insurance Journal*

U.S. SUPREME COURT REFUSES TO HEAR J&J APPEAL OF \$140 MILLION MOTRIN VERDICT

The U.S. Supreme Court has declined to review a \$140 million jury verdict over inadequate warnings on Johnson & Johnson's Children's Motrin in favor of a teenager who had developed a life-threatening skin condition. The verdict had been upheld by Massachusetts' highest court. The pharmaceutical giant had argued in its petition for *writ of certiorari* that claims by Samantha Reckis and her parents that J&J's Children's Motrin gave the child a horrific skin condition, requiring multiple hospital stays and surgeries since she was 7 years old, should have been preempted by the Supreme Court's 2009 decision in *Wyeth v. Levine*. That ruling, which held that U.S. Food and Drug Administration (FDA) approval of a medication does not shield its maker from liability. That opinion also held that manufacturers cannot be held liable for not including a label that "clear evidence" indicates the FDA would not have approved.

Industry groups, including the Biotechnology Industry Organization, the Consumer Healthcare Products Association and the Pharmaceutical Research and Manufacturers of America, had backed J&J's contention that Reckis' claims were preempted, contending in a pair of amicus briefs that the upheld verdict presents "a square challenge" to the FDA's regulatory authority.

Plaintiff Reckis was represented in the state trial and appellate proceedings by Bradley M. Henry, Leo V. Boyle, Michael B. Bogdanow and Victoria Santoro of Meehan Boyle Black & Bogdanow PC. They did an excellent job in this case. The case is in the Supreme Court of the United States.

Source: Law360.com

WEST VIRGINIA SUES PRESCRIPTION DRUG WHOLESALE FOR "FLOODING" STATE

West Virginia's Attorney General Patrick Morrisey has accused one of the nation's largest pharmaceutical drug wholesalers of flooding the state with tens of millions of prescription pills in violation of state law. His lawsuit was filed against San Francisco-based McKesson Corp. Among other things, the lawsuit alleges violations of state consumer protection laws and the Uniform Controlled Substances Act. The Attorney General said the company failed to detect, report and stop the flood of suspicious prescription drug orders into the state, contributing to widespread drug abuse. Attorney General Morrisey said further:

This failure is one cause of many for the state's prescription drug overdose rate, decreased worker productivity and the wasteful expenditure of precious state resources.

An investigation by the Attorney General's office found that McKesson delivered about 99.5 million doses of hydrocodone and oxycodone to West Virginia between 2007 and 2012. The company's shipment of 10.2 million doses to Logan County alone in southern West Virginia would have provided more than 276 doses to every resident in the county, according to the office. In Mingo County, McKesson shipped 3.4 million doses in 2007.

According to the Centers for Disease Control and Prevention (CDC), West Virginia leads the nation in the rate of fatal drug overdoses. The state's rate was 28.9 overdose deaths per 100,000 people in 2010, most of those involving prescription drugs. In 1999, the state's fatal overdose rate was 4.1 per 100,000 people. Former state Attorney General Darrell McGraw filed a lawsuit in Boone County Circuit Court in 2012 accusing multiple distributors of sending excessive amounts of prescription painkillers to southern West Virginia pharmacies. The lawsuit remains active, and the Attorney General said he would like to merge it with the complaint against McKesson. General Morrisey said further:

The flooding of prescription pills into our state is a very serious problem that involves all parts of the pharmaceutical supply channel. No one group or industry

sector is solely responsible for this problem; a solution must involve many actors, including doctors, pharmacies, wholesalers, manufacturers and government bodies.

In 2012, McKesson agreed to pay \$151 million to West Virginia, 28 other states and the District of Columbia to settle a lawsuit alleging the company inflated prices of hundreds of prescription drugs, causing state Medicaid programs to overpay millions of dollars in reimbursements. The agreement settled allegations the company deliberately inflated drug prices by as much as 25 percent from 2001 to 2009.

Source: *Insurance Journal*

BARD LOSES APPEAL OF \$2 MILLION PELVIC MESH VERDICT

C.R. Bard Inc. lost its appeal of a jury's \$2 million verdict in a bellwether trial that found the medical device maker liable for a woman's injuries from defective vaginal mesh implants when the Fourth Circuit found the trial court properly decided which evidence to exclude. A three-judge panel turned down several arguments from Bard over whether evidence involving safety warnings for its Avaulta Plus transvaginal mesh device was properly excluded and evidence involving U.S. Food and Drug Administration (FDA) clearance properly included in the trial assessing the company's responsibility for Donna Cisson's injuries.

The court affirmed that the \$1.75 million in punitive damages, in comparison with \$250,000 in compensatory damages, wasn't excessive. Ms. Cisson won the multidistrict litigation (MDL)'s first bellwether trial in August 2013, in which she claimed that after being implanted with the Avaulta Plus device to treat her rectal prolapse, she suffered bleeding, spotting, rectal pain, bladder spasms and pain during sexual intercourse. Ms. Cisson and the other bellwether Plaintiffs each required invasive follow-up procedures to remove loose pieces of mesh that damaged their pelvic region, according to court records.

Ms. Cisson's suit is one of four bellwethers in the West Virginia MDL and is the first to go to trial in federal court out of a group of suits brought by thousands of women over injuries allegedly caused by the implants, which are used to treat pelvic organ prolapse or stress

urinary incontinence. Johnson & Johnson unit Ethicon Inc., Boston Scientific Corp. and Endo Pharmaceuticals unit American Medical Systems Holdings Inc. also face separate multidistrict litigation in West Virginia over their own implants.

Ms. Cisson is represented by Elliot H. Scherker, Lori G. Cohen, R. Clifton Merrell II, Sean P. Jessee, Daniel I.A. Smulian, Brigid F. Cech Samole and Jay A. Yagoda of Greenberg Traurig LLP and Melissa Foster Bird of Nelson Mullins Riley & Scarborough LLP.

Source: Law360.com

V. COURT WATCH

SUPREME COURT DECLINES ANOTHER CHALLENGE TO AFFORDABLE CARE ACT

The U.S. Supreme Court has once again refused to take up a new constitutional challenge to the Affordable Care Act. The high court rejected an appeal that claimed lawmakers used flawed legislative procedures to pass the measure. Opponents of President Barack Obama's health care law were seeking to get a court that has upheld core parts of the measure twice since 2012, most recently in June, to change course. In the latest case, they argued that the law violated the constitutional requirement that revenue-raising legislation start in the House before proceeding to the Senate.

In declining to hear that contention, the high court all but ensured that the Affordable Care Act, or Obamacare, will remain intact through the November election. The rebuff leaves health care as one of the core issues in the presidential and congressional campaigns. I suspect the Republican candidates for president wanted the issue to stay alive since it appears "most" of them "don't like" our current president very much.

Source: *Insurance Journal*

VI. THE CORPORATE WORLD

JPMORGAN SETTLES "LONDON WHALE" CASE FOR \$150 MILLION

Manhattan U.S. District Judge George B. Daniels gave preliminary approval last month to the \$150-million settlement that would end civil fraud litigation tied to JPMorgan Chase & Co.'s disastrous \$6 billion "London Whale" trading fiasco. Judge Daniels set a May deadline for objectors to come forward. The move came after the \$209 billion bank and lead Plaintiffs, including the Ohio Public Employees Retirement System, noted that the money had already been placed in escrow and was ready to be disbursed to thousands of class members.

In 2014, at the motion-to-dismiss stage, Judge Daniels reduced the size of the case by cutting loose three individual Defendants and limiting the Plaintiffs' claims to statements made by Dimon and Braunstein at an April 2012 earnings conference call. The suit claims JPMorgan violated the Securities Exchange Act by misleading investors about the riskiness of the bank's derivatives trading, which led the bank's stock to drop when the losses were disclosed.

Investors who bought the bank's common shares between April 13 and May 21, 2012, will be part of the settling class. Other "London Whale" civil suits, including employee pension and derivative claims against JP Morgan, have been dismissed. Two former JPMorgan traders, Javier Martin-Artajo and Julien Grout, face criminal charges for allegedly concealing the "London Whale" losses. But neither has been brought to the United States. The bank settled with U.S. and British regulators in 2013. The Plaintiffs are represented by Daniel L. Berger of Grant & Eisenhofer PA, Salvatore J. Graziano of Bernstein Litowitz Berger & Grossmann LLP and Andrew L. Zivitz of Kessler Topaz Meltzer & Check LLP.

Source: Law360.com

ERNST & YOUNG AND STARR SETTLE LEHMAN FRAUD CASE

Ernst & Young and the investment firm managed by former AIG CEO

Maurice "Hank" Greenberg have settled the firm's lawsuit accusing Ernst & Young of helping Lehman Brothers hide tens of billions of dollars in fixed-income securities. The parties had agreed in principle to settle the lawsuit filed in 2011 by Starr International USA Investments LC. The parties asked the court to stay the case, saying they expect to finalize the settlement very soon. The case was slated to go before a jury in April.

Starr's initial lawsuit claimed that Ernst & Young handed the collapsed investment bank clean audits year after year even though it knew Lehman used allegedly fraudulent transactions to make its risks appear lower than they actually were. The company said had the accounting firm properly evaluated Lehman, Starr never would have purchased \$200 million worth of the bank's securities, the company said.

Starr International is represented by Banks Brown, Allison Elizabeth Fleischer, Andrew Bennett Kratenstein, Audrey Lu, John J. Calandra and Michael Robert Huttenlocher, Jr., of McDermott, Will & Emery LLP. The case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

VII. WHISTLEBLOWER LITIGATION

HOSPITALS SETTLE WHISTLEBLOWER COMPLAINT ALLEGING MEDICARE BILLING FRAUD

The U.S. Department of Justice (DOJ) announced recently that it reached settlements totaling \$28 million with 32 hospitals in 15 states, resolving allegations that they routinely billed Medicare for minimally invasive kyphoplasty spinal procedures. These settlements were the tenth to be reached with health care providers to resolve allegations stemming from a whistleblower lawsuit filed in 2008 by Craig Patrick and Charles Bates, two former employees of Kyphon, the developer of a method to repair spinal compression fractures usually caused by osteoporosis on an outpatient basis.

According to the Justice Department, the False Claims Act lawsuit filed by Patrick and Bates has resulted to date in

approximately \$105 million being recovered from more than 130 hospitals. In most cases, kyphoplasty can be performed safely and effectively as an outpatient procedure without any need for a more costly inpatient hospital admission. However, almost all of the hospitals that settled with the Justice Department in December and in previous settlements routinely billed Medicare for kyphoplasty as inpatient procedures rather than as outpatient procedures, strictly to increase Medicare reimbursements.

Patrick, the former reimbursements manager for Kyphon, and Bates, a former regional sales manager for Kyphon in Birmingham, Ala., received an award of \$4.75 million as their share in the latest round of settlements. The men have received multiple multi-million whistleblower awards since federal prosecutors chose to intervene in the case, including a \$14-million award in 2008 when Kyphon (now a part of Medtronic) settled with the federal government for \$75 million. U.S. Attorney William J. Hochul Jr., who helped prosecute the case, had this to say:

As has been shown throughout this successful investigation, we will never allow hospitals to put profits ahead of patients. Decisions regarding potential procedures should be made using sound medical judgment only, not with an eye toward increasing Medicare reimbursements.

This is just another example of how important the whistleblowers are. Without them, wrongdoers in Corporate America get away with massive frauds, costing U.S. taxpayers hundreds of millions of dollars.

Sources: U.S. Department of Justice, CBS News, Law360

457 HOSPITALS SETTLE FALSE CLAIMS ACT LAWSUIT FOR MORE THAN \$250 MILLION

On Oct. 30, the U.S. Department of Justice (DOJ) announced that it was settling one of the largest whistleblower lawsuits in the United States. This suit involved 457 hospitals in 43 states. Seventy settlements were reached amounting to more than \$250 million, which also makes this lawsuit one of the most significant recoveries to date. The DOJ alleged that for seven years these hospitals were committing fraud against

the Medicare program. The allegation involved implantable cardioverter defibrillators (ICDs), a device that is implanted and connects to the heart. It works similar to the external defibrillators; however, an ICD is small enough to be implanted. An ICD costs nearly \$25,000 and is covered under Medicare if certain conditions are met. An ICD is not allowed to be implanted within 40 days of the patient having a heart attack or within 90 days of the patient having a bypass/angioplasty. The waiting period is designed to give the heart a chance to improve function on its own without the use of an ICD.

The DOJ alleges that these 457 hospitals have been implanting ICDs during the prohibited waiting periods. Therefore, patients who might not have needed ICDs have been receiving ICDs, and Medicare has been paying for them. In regards to the 70 settlements, Benjamin Mizer, Principal Deputy Assistant Attorney General, stated, “[w]e are confident that the settlements announced today will lead to increased compliance and result in significant savings to the Medicare program while protecting patient health.”

The majority of the settling Defendants were named in a whistleblower lawsuit brought under the False Claims Act (FCA). As their reward for helping the government combat health care fraud, these whistleblowers received more than \$38 million from the settlements. As this \$250-million settlement demonstrates, the government is very serious about combating health care fraud, and the FCA continues to not only be a powerful tool but also a vehicle for private citizens to join the war on fraud and possibly be rewarded for doing so. Since January 2009, the United States has recovered more than \$26.2 billion through FCA cases and, out of that \$26.2 billion, \$16.4 billion was collected from cases involving fraud against federal health care programs. The whistleblower incentives—rewards—have helped the government:

- detect more fraud,
- ensure money intended for health care is properly spent on health care, and
- deter other companies from committing the same fraud.

If you are aware of fraud being committed against the federal or state governments, you could be rewarded for

doing the right thing by reporting the fraud. If you have any questions about whether you qualify as a whistleblower, feel free to contact a lawyer at Beasley Allen for a free and confidential evaluation of your claim. There is a contact form on the firm’s website (www.beasleyallen.com), or you may email one of the lawyers on our whistleblower litigation team: Andrew Brashier, Archie Grubb, Larry Golston, or Lance Gould at 800-898-2034 or by email at Andrew.Brashier@beasleyallen.com; Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com or Lance.Gould@beasleyallen.com.

Source: U.S. Department of Justice

WHISTLEBLOWER FILES SUIT AGAINST GSK CLAIMING STUDY MISTAKES

A former GlaxoSmithKline (GSK) employee who handled statistics for clinical studies has filed suit against the life sciences giant. The whistleblower suit was filed in New Jersey, contending the employee was fired for speaking out about unreliable study results that have underpinned the deceptive marketing of a smoking cessation product. Alexandre Selmani, who served as one of GSK’s managers of biostatistics for smoking reduction and cessation, accuses the company of illegal and deceptive marketing of NiQuitin oral strips as an advanced and superior treatment method for one-time smokers looking to kick the habit. It’s alleged that GSK has acted under false pretenses based on the results of studies that were marred by mistakes. The complaint said:

Selmani’s objections to and refusal to ratify the studies based on the statistical analysis and the publication of same that was incorrect (which he reasonably believed was in violation of GSK policies and a perpetration of fraud on the public) was the motivating factor for GSK’s retaliatory action against Selmani.

Selmani complained about mistakes with the statistical methodology of studies involving NiQuitin and other products starting in December 2012, and he says GSK retaliated against him with lower performance ratings, lower salary increases, sabotaged work and ultimately his termination in October. It appears he was fired as a result of his calling out mistakes that were being

made for NiQuitin oral strips and other products.

The whistleblower in this case was trying to protect ultimately the consumers from buying products that were fraudulently advertised because the studies that proved their effectiveness were flawed.

Selmani is suing GSK under New Jersey’s Conscientious Employee Protection Act. He also names several individuals with the company as Defendants, including Mitchell Kotler, who was the director of biostatistics and Selmani’s direct manager; GSK CEO Andrew Witty; Liam Kennedy, GSK’s head of biostatistics; and Emma Walmsley, the CEO of GSK Consumer Healthcare. A spokeswoman for the company declined comment on Wednesday. The following is alleged in the complaint:

GSK hired Selmani in 2006, and he saw a steady stream of positive performance evaluations and salary increases until his whistleblowing activities began in 2012, according to the complaint. That year, Selmani discovered numerous mistakes that undercut the quality of studies that were part of a so-called smokers health project that Kotler was conducting. Nothing was done to correct the mistakes after Selmani approached Kotler and a vice president with his concerns. However, Selmani contends that he didn’t drop the issue. In 2013, he sent an email to Witty regarding mistakes in the studies “which had the capacity to cause negative consequences and potential health and safety issues for the general public.”

However, Selmani’s concerns were ignored and the studies were made public the following year, the complaint said. Those activities and other alleged whistleblowing surrounding study problems were met with comments from Kotler such as “your future is not with GSK” and attempted interference with his work, according to the complaint. In 2015, Kotler handed Selmani a performance review with the lowest possible score, which was followed by Selmani’s termination later that year. There was no reason offered for that termination.

Selmani is represented by Natalie A. Zammitti Shaw and Rosemarie Arnold of the Law Offices of Rosemarie Arnold. The case is in the Superior Court of New Jersey, Morris County.

Source: Law360.com

TAKEDA EXECUTIVES SAID TO HAVE ADMITTED TO ACTOS SCHEME

A former GlaxoSmithKline (GSK) executive, who is now a whistleblower, told a Massachusetts federal court last month that Takeda Pharmaceutical executives admitted to a kickback scheme “for the diabetes drug Actos.” He contends that the acknowledgement overrides Takeda’s demand for proof of specific claims. Opposing a motion to dismiss, Peter P. Lawton, the former GSK director of patent life-cycle maximization, said that top-level Takeda executives told him during three job interviews in 2009 that they were paying off physicians to prescribe Actos to treat prediabetes, even though the drug hadn’t been approved for such use. Because the executives knew the specifics of the illegal scheme, Lawton said, individual claims aren’t necessary to prepare a proper defense. He stated in that regard:

Where unlawful conduct is orchestrated at the highest levels of the company, the contention that defendants do not know enough about the unlawful conduct to mount a defense rings hollow. Similarly, where top executives have admitted unlawful conduct, there is little risk that the company will be unjustly accused.

The Takeda executives involved included its general counsel for U.K. business, its acting head of European patents, its head of global patents and the chief operating officer of its European pharmaceutical business, according to the suit. Lawton, who left GSK in 2003 after working there for 20 years, sued Takeda in February 2014. In August of 2014, the government declined to intervene. Takeda and co-defendant Eli Lilly and Co. asked for the suit to be dismissed in November, contending Lawton failed to state a claim.

The FDA has not approved Actos for prediabetes, and the Takeda executives allegedly told Lawton that it knew it wouldn’t be approved. Lawton says that Takeda and Eli Lilly from 2000 through

2011 paid doctors to give continuing education presentations touting the scientifically proven benefits of Actos for prediabetes, using studies written by the Japanese drugmaker. He contends that up to 1,000 speakers were paid \$2,000 to \$3,000 per speech to promote the off-label use.

Lawton says the doctors whom Takeda allegedly paid off didn’t bring up the fact that the drug had been proven to increase the risk of bladder cancer and heart problems. Takeda’s sales representatives also used false information to persuade doctors to prescribe the drug, the suit claims. Lawton says that between 2003 and 2011, Actos’ sales increased to \$3.3 billion from \$1.3 billion, including claims from Medicare and Medicaid. It’s further alleged in the suit that since the drug was not medically necessary, the claims were false. Lawton added: “Without defendants’ off-label marketing campaign, few if any doctors would have prescribed Actos to healthy patients for the prevention of diabetes.”

Lawton, in his court filing, responded to Takeda’s claim that his suit can’t overcome the so-called public-disclosure bar, which bars relators from bringing False Claims Act suits based on prior public disclosures. Takeda had argued that disclosures in two cases—the *Allen v. Takeda* multidistrict litigation and *U.S. ex rel. Ge v. Takeda*—barred Lawton’s claims. But Lawton responded by saying:

The Allen case, which alleges that Actos can cause bladder cancer, differs in that it doesn’t involve off-label marketing and, further, that discovery in Allen had not started until after Lawton’s suit was filed. The Ge case revolved around Takeda’s alleged failure to report the adverse effects and bladder cancer risks related to Actos, which is unrelated to the kickback and off-label marketing claims in his own suit.

Lawton is represented by John Rudolf Low-Beer and David E. Kovel of Kirby McInerney LLP and Scott McConchie of Sherin and Lodgen LLP. The case is in the U.S. District Court for the District of Massachusetts. It will be interesting to see how this case fares as it progresses through the courts.

Source: Law360.com

ARCHITECTURAL FIRM PAYS \$3 MILLION TO RESOLVE CRIMINAL AND CIVIL CLAIMS

On Jan. 5, 2016, the Department of Justice (DOJ) announced that Novum Structures LLC (Novum) agreed to pay \$3 million to resolve criminal and civil allegations arising from improper use of federal funds. Novum, an architectural firm based in Wisconsin, used foreign materials on building projects funded by the federal government. The use of foreign materials in Novum’s federally funded projects violated contractual provisions, which included various domestic preference statutes.

The domestic preference statutes at issue are referred to as “Buy America” requirements. The goal of “Buy America” provisions is to advance the U.S. economy by ensuring federal money devoted to building or transit projects is being used to promote American businesses. These provisions can be quite broad, coming into effect if federal monies are received to fund any portion of the project. In the Novum matter, the architectural firm entered into contracts that involved both government buildings and transit projects, which were partly paid for with federal funds. Therefore, Novum submitted false claims by knowingly using foreign materials for those projects.

Moreover, it was alleged that Novum falsified documents relating to some of the federally funded projects so as to hide the use of foreign materials. These allegations were brought by Brenda King, a whistleblower, under the *qui tam* provisions of the False Claims Act (FCA). The False Claims act permits private individuals to sue on behalf of the government when the government itself is being defrauded. The False Claims Act also provides incentives for private individuals to do the right thing and report the fraud. These incentives include rewarding the whistleblower with an amount ranging from 15 to 30 percent of the funds recovered by the government. In this case, King will receive \$400,000 for her role in bringing Novum’s fraud to the Government’s attention.

Are you aware of fraud being committed against the federal government, or a state government? If so, the FCA can protect and reward you for doing the right thing by reporting the fraud. If you have any questions about whether you qualify as a whistleblower, you can contact a lawyer at Beasley Allen for a free and confidential evaluation of your

claim. There is a contact form on this website, or you may email one of the lawyers on our Whistleblower Litigation Team: Andrew Brashier, Archie Grubb, Larry Golston or Lance Gould at 800-898-2034 or by email at Andrew.Brashier@beasleyallen.com, Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com or Lance.Gould@beasleyallen.com.

Sources: <http://www.justice.gov/opa/pr/wisconsin-architectural-firm-plead-guilty-and-pay-3-million-resolve-criminal-and-civil-claims> and Third Party Contacting Guidance, 2008 WL 4534439

VIII. CONGRESSIONAL UPDATE

LOTS OF FIGHTS SET TO ERUPT IN CONGRESS

Lawmakers were facing several divisive policy fights when they returned to Washington last month. Republican leaders in both chambers will be put to the test as they seek to protect their vulnerable incumbents and put forward a legislative agenda aimed at the general election. The challenge is particularly acute for Senate Majority Leader Mitch McConnell, who is trying to protect his 54-seat majority on an election year map that clearly favors Democrats. The following are some issues that will result in some fights for the lawmakers in the New Year.

Refugees

Legislation over refugees—this being an elective year—will be involved in both the House and Senate. The Senate will have round two in its battle over refugees. Republican lawmakers have called for blocking President Obama's plan to resettle up to 10,000 Syrian refugees. Sen. McConnell has pledged to take up legislation dealing with the refugee acceptance program during the first quarter of 2016, though it's unclear what the proposal will contain. The GOP leader has already put a House-passed bill on the Senate calendar that would restrict Syrian and Iraqi refugees, meaning it could come up for a vote. But the House bill has received fierce push-back from Senate Democrats. Sen. Dick Durbin, the Democratic whip, suggested that the "fevered pitch" that surrounded the bill when it passed in November has subsided. "It doesn't stand up to reason that we're focusing

on 70,000 people that are vetted for two years," Sen. Durbin said. He believes Senate Democrats would be able to block the refugee bill from getting the 60 votes needed to move forward.

Immigration

The immigration issue will result in lots of politically motivated legislation. This is an election year issue and one that won't go away. Hopefully some of what's proposed will be constructive.

Guantánamo Bay and ISIS

As President Obama heads into his final year in the White House, lawmakers are poised to review two of his foreign policy priorities: fighting the Islamic State in Iraq and Syria (ISIS) and closing Guantánamo Bay. Speaker Paul Ryan suggested before Christmas that Congress could take a second look at passing a war powers resolution against ISIS. The President says he already has the legal authority to fight ISIS, but has pushed Congress for an explicit authorization that would update the language passed after the 9/11 attacks. While both parties have expressed support for an ISIS resolution, no one has put forward a proposal that has been able to overcome the deep divisions on the war.

Separately, a battle is brewing between congressional Republicans and the Obama administration on closing the prison at Guantánamo Bay. The administration is preparing a plan to close the prison camp, but Republicans say it is effectively dead on arrival. To underscore their stance, Republicans have sent multiple bills to the president's desk—including an end-of-the-year spending bill—that would block the administration from moving the detainees to any prison in the United States.

Gun control

Democrats are pushing new gun control legislation following a series of mass shootings in 2015. Senate Democrats are pledging to force a vote on several gun control proposals, including expanding background checks and closing the gun show "loophole."

Criminal justice reform

Supporters of a bipartisan Senate proposal to overhaul the criminal justice system are hopeful that the legislation can reach the floor in early 2016. The Obama administration has sought to keep momentum behind the issue, including meeting with House and Senate lawmakers to discuss the proposals put forward.

Appropriations

Congressional leaders have pledged to restore "regular order" in 2016, meaning that both chambers would pass 12 individual spending bills and then work out their differences in conference.

Election Year Issues

There will be all sorts of problems arising from the fact that 2016 is an election year. Most say that will keep anything of consequence wanted by the Obama Administration from passing. Hopefully, this year will be an exception. The GOP should want a productive session because of their fear that Donald Trump will be the nominee for the party. But the further he goes the stronger Trump gets, so that should make the GOP bosses very nervous.

There will be many other battles in the next eight months in Congress—due to this being an election year—and many of them will be political in nature. Hopefully, the peoples' interest will be considered in Congress throughout that time right up to the General Election. Of course, when I think about it, most everything in Congress is politically motivated.

Source: MSN.com

IX. PRODUCT LIABILITY UPDATE

EXPLODING HOVERBOARDS: THE HOTTEST HOLIDAY GIFT CATCHES FIRE

What was once an invention that existed only in our imaginations thanks to the boarding skills of Michael J. Fox in *Back to the Future*, the hoverboard

now not only exists, but it became the hottest holiday gift of 2015. Today's hoverboard does not actually hover above the ground. Instead, it is really nothing more than a hands-free, self-balancing scooter. When parents bought these hoverboards for their children at Christmas, none of them could have imagined that a seemingly harmless scooter would become such a cause for concern.

In fact, the hoverboard is more than just a concern—it is a serious fire hazard. The U.S. Consumer Product Safety Commission (CPSC) has counted 22 hoverboard fires in 17 states. A hoverboard created a house fire in South Carolina just after Christmas. Two teens at the home received hoverboards for Christmas. One teen had just finished charging his board when the batteries combusted and flew about 20 feet across the living room, lighting a chair on fire and burning the carpet. Officials say no one was injured, and the fire caused no structural damage to the home.

So, what is causing the hoverboard to catch fire? It could be something as small as the lithium-ion battery inside the hoverboard. Lithium-ion batteries have long led to explosions in electronic devices such as smartphones and laptops. While lithium-ion batteries hold a lot of energy, which is essential for powering electronics, they also carry the risk of fire if they become overheated. This is why some of the hoverboard fires have started while the hoverboard is plugged into a charger.

Last month, an Augusta, Ga., fire department issued a warning about potential fire dangers after they had to respond to a fire caused by a hoverboard. The fire department says in a news release that it responded to a fire at a house on Christmas Day. A resident had placed the self-balancing scooter outside. The device was heavily burned on the side that holds the charger. Inside the home, firefighters found black burn marks on two walls and the floor of the dining room. Officials say no one was injured, and the fire caused no structural damage to the home. The release says owners shouldn't overcharge hoverboards, and to keep an eye on them while they are charging. They advise people to use one plug per socket, and allow the device to cool off before charging.

But fire is not the only safety hazard we are seeing with hoverboards. Hospitals are seeing an increase in serious

injuries, such as concussions, fractures, abrasions, and internal organ damage, caused from falling off the hoverboard. Riders should wear the same protective gear they wear with rollerblades and skateboards. However, at this point, there are no safety standards in place for hoverboards, which provides no incentive for manufacturers to design a safer product.

Because of these safety concerns, some cities, airlines, and colleges have banned the use of hoverboards. Our lawyers will continue to monitor the development of these safety concerns and will advocate for safety regulations governing these defective products. If you need more information on this subject, contact Stephanie Monplaisir at 800-898-2034 or by email at Stephanie.Monplaisir@beasleyallen.com.

GOODYEAR HAVING MORE TROUBLE WITH ITS RV TIRES

I have written on numerous occasions about the Goodyear G159 RV tire and the wrecks, injuries and deaths it caused. Goodyear originally designed the G159 RV tire for metro pickup and delivery trucks, such as those used by UPS. Vehicles that are used in urban settings and not for extended trips at highway speeds for several hours. The design features that made the G159 RV 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.

Our lawyers learned during litigation that Goodyear sold the G159 as a RV tire until it could replace it with a tire that it designed for RV's, the G670. Unfortunately, the G670 is starting to experience failure's and cause injuries and deaths like its predecessor. We learned in the numerous cases we handled against Goodyear that it decided to sell the G159 as a RV tire because in the late 1990's, it did not make a tire specifically for RVs and was developing an RV tire, the G670 RV. The G670 is sold in two sizes. The larger tire, the 295/80, is made by Goodyear at its Dunlop plant in Buffalo, New York. The other size, the 275/70, is made at a traditional Goodyear plant. Unfortunately, the 670 RV made at the Dunlop plant is beginning to gain notoriety for failing and causing injuries and deaths. In the last few years,

over 15 lawsuits have been filed against Goodyear relative to the Dunlop made 670.

Remarkably, the Dunlop made 670 is designed more like the G159 than the 670 which Goodyear boast as its RV tire. The Dunlop tire tread depth is thicker, its top belt is wider and its inner liner is thinner, less than half of the 670 made at the Goodyear plant. Further, as we have learned in other tire cases, the Dunlop plant is notorious for bad manufacturing processes.

Based on what we are seeing, it is becoming apparent that Goodyear failed to learn anything from its experiences with the G159. RV owners need to take caution when causing the Dunlop made 670. If you need more information, contact Rick Morrison, the lead lawyer in our firm on tire litigation, at 800-898-2034 or by email at Rick.Morrison@beasleyallen.com.

X. MASS TORTS UPDATE

OUR FIRST TALC TRIAL IN ST. LOUIS

We will start our first talc trial in St. Louis this month. The trial involving Johnson & Johnson and Luzenac America was scheduled to commence on Feb. 1 and at press time it was still on. This case involves J&J's talcum powder products, the companies knowledge of the risk of ovarian cancer and the failure by J&J to warn users of the risk. To this day, both J&J and Luzenac America has never warned women who use the products about the cancer risk. Luzenac did issue a warning, however, it went to J&J. The trial is expected to last for about three weeks. We currently represent 6,200 individuals in this litigation, and this trial is important—not just to all clients—but also to thousands of victims and their families.

ACTOS SETTLEMENT PROGRAM

The Actos Settlement Program became effective on Oct. 7, 2015, after the requisite number of eligible claimants elected to participate in the settlement program instead of pursuing individual lawsuits in court. In fact, more than 97 percent of the eligible

Actos claimants elected to participate in the Settlement Program. Claims Packages, which included all core medical records necessary to prove an Actos-related injury as identified in the Actos Master Settlement Agreement, were due to be submitted to the Actos Claims Administrator on Jan. 8, 2016.

The Claims Administrator has started the review process for both the completeness of the claims submitted and substantive reviews of the medical records. We anticipate receiving point award notices from the Claims Administrator on the claims we submitted on behalf of our client in the coming months. If you have any questions about the terms of the settlement or the status of a particular claim, contact Liz Eiland, Liz.Eiland@beasleyallen.com, or Roger Smith, Roger.Smith@beasleyallen.com, at 334-269-2343.

FDA RECLASSIFIES TRANSVAGINAL MESH AS HIGH-RISK DEVICE

As of Jan. 4, 2016, surgical mesh used to repair pelvic organ prolapse (POP) transvaginally, known as transvaginal mesh or TVM, has been reclassified by the U.S. Food and Drug Administration (FDA) from a class II, moderate-risk, to a class III, high-risk device. Manufacturers of devices that are already on the market will have 30 months to submit a premarket approval (PMA) application demonstrating the safety and effectiveness of their devices. Manufacturers of new devices will be required to submit a PMA before devices are approved. This is a most significant victory for TVM victims.

First cleared by the FDA for use as a class II device in 2002, the FDA states that in the past several years there has been a significant increase in the number of reports of adverse events associated with the use of mesh for transvaginal POP repair, saying they've received thousands of reports of complications. Commonly reported problems include severe pelvic pain, pain during intercourse, infection, bleeding, organ perforation and urinary problems from mesh eroding into surrounding tissues.

The FDA issued safety communications warning doctors and consumers regarding these devices in both 2008 and 2011, and in 2011 an advisory panel determined that more data was needed to establish the safety of these devices. The following year, the FDA issued

orders to manufacturers to begin post-market surveillance studies, culminating in the two orders issued this week, reclassifying the devices as class III, high-risk, and requiring manufacturers to submit a PMA application.

In the press release on the U.S. Department of Health and Human Services website, William Maisel, M.D., M.P.H., deputy director of science and chief scientist for the FDA's Center for Devices and Radiological Health said:

These stronger clinical requirements will help to address the significant risks associated with surgical mesh for repair of pelvic organ prolapse. We intend to continue monitoring how women with this device are faring months and years after surgery through continued postmarket surveillance measures.

The FDA ruling confirms what we have been seeing from injured women in this litigation—transvaginal mesh used to treat pelvic organ prolapse is responsible for serious, chronic injuries for the women in which it was implanted. The biggest tragedy in these cases is that these injuries could have been avoided if these products had been properly tested, and patients and doctors had been fully informed about the risk involved in using transvaginal mesh. The FDA should focus the same scrutiny on devices used to treat stress incontinence, classify those devices as high risk and require manufacturers to conduct clinical trials. We suspect that the results of those clinical trials will further establish that the risks of chronic pain and urinary dysfunction are unacceptably high and that polypropylene mesh is an unsuitable product to be implanted in the female pelvis.

Source: U.S. Food and Drug Administration

COURT REFUSES TO GRANT RISPERDAL PLAINTIFF A NEW DAMAGES TRIAL

A Pennsylvania state judge has a bid for a new damages trial being sought by a Wisconsin man who won \$500,000 from a Johnson & Johnson unit in December after a jury agreed that his use of the antipsychotic drug Risperdal had caused him to grow female breasts. Judge Kenneth Powell in the Philadelphia County Court of Common Pleas rejected arguments that Plaintiff Timothy Stange was entitled to a new

damages trial due to both judicial error in pretrial orders and the judge's refusal to give requested jury instructions. Judge Powell did not issue an opinion alongside his order rejecting the post-trial motion.

The verdict against Janssen Pharmaceuticals Inc. was the third in a string of victories that Plaintiffs have racked up in litigation in Philadelphia over both alleged side effects of the powerful antipsychotic drug, as well as the company's purported attempts to hide the risks it posed to adolescents. There are more than 1,600 Risperdal cases pending as part of a mass tort program in the court. As part of a post-trial motion that Stange filed last month seeking a new damages trial, he claimed that a pretrial order entered by the supervising judge of the Risperdal mass tort program had improperly barred Plaintiffs across all cases from pursuing punitive damages.

The motion also argued that Judge Powell had failed to give instructions to the jury about the possibility of ongoing damages from mental anguish from the bullying that Stange has faced. Stange ultimately underwent a mastectomy to have the breast tissue removed. "The error was prejudicial because it foreclosed future damages which, in light of evidence of record, would have amounted to significant additional compensation," Stange said in his brief.

While Judge Powell rejected Stange's bid for a new damages trial, he did grant a motion adding just over \$35,000 in delay damages to the \$500,000 verdict handed down by the jury last month. The judge likewise rejected a post-trial motion from J&J seeking judgment in its favor notwithstanding the verdict on grounds that plaintiffs had not proven the inadequacy of Risperdal's warning label. A Janssen spokeswoman told Law360 that it plans to appeal the verdict to the Pennsylvania Superior Court. Stange is represented by Thomas Kline of Kline & Specter PC and Christopher Gomez of Sheller PC. The case is *Timothy Stange v. Janssen Pharmaceuticals Inc. et al.*, in the Court of Common Pleas of Philadelphia County, Penn.

Source: Law360.com

LAWMAKER CALLS FOR CRIMINAL PROBE INTO DEATHS LINKED TO GYNECOLOGICAL DEVICE

Rep. Mike Fitzpatrick is asking the U.S. Food and Drug Administration

(FDA) Office of Criminal Investigations to find out why Johnson & Johnson unit Ethicon did not report to the agency concerns that its gynecological tool used to perform hysterectomies and myomectomies (uterine fibroid removal) could cause the spread of uterine cancer, worsening the odds of survival.

Power morcellators are surgical tools fitted with a tube-like blade that shreds uterine fibroids or entire uteruses inside the uterine cavity and removes them through a small incision in the abdomen. In April 2015, the FDA warned that the procedure could spread undiagnosed uterine cancer, known as uterine sarcoma, making the disease more difficult to treat. In November 2015, the agency followed up by placing a black box warning on the device and urging doctors not to use morcellation on “most women” due to the risk of cancer spread.

Fitzpatrick is also asking that investigators question why Brigham and Women’s Hospital in Boston, Rochester General Hospital, and the University of Rochester (New York) Medical Center did not report patient deaths that were linked to power morcellation. Medical facilities are required to report a suspected medical device-related death to the FDA within 10 days after it is determined that a device may have caused or contributed to the serious injury or death of a patient.

Likewise, medical device manufacturers are required to report any deaths or serious injuries suspected to be linked to their devices within 30 days. Fitzgerald says that since neither the hospitals where the deceased patients underwent power morcellation nor manufacturers of the device reported any serious injuries or deaths, the current reporting regulations may be ineffective.

The first report the FDA received about cancer spread concerns with power morcellators was from a family member whose wife had disseminated uterine cancer suspected to have been caused by power morcellation. “Had the regulations worked as intended, it is likely many women’s lives could have been spared from the horrific consequences of morcellation,” Fitzpatrick said.

In 2006, a Pennsylvania pathologist notified Ethicon that about one in 300 women who underwent hysterectomies using power morcellators were later diagnosed with a type of uterine cancer known as uterine sarcoma. However,

Ethicon never reported the information to the FDA.

Source: Bloomberg BNA

BAXTER INTERNATIONAL’S NEW CEO FACES NEW YEAR WITH NEW RECALL

No doubt when Jose Almedia took over as CEO of Baxter International in the first week of 2016, he was hoping the new year would bring a clean slate. It hasn’t turned out that way. As he took the helm, the company was issuing another recall involving its intravenous (IV) solutions. The latest recall involves two lots of solutions used to replenish electrolytes and increase caloric supply in patients after a confirmed customer complaint that a bug was floating in bags of the solution.

Baxter suffered through 2015 with repeated product recalls and quality control issues plaguing its IV solutions and other products, with problems ranging from leaking containers to contamination with mold or other particulate that could result in serious patient injury or death. Lowlights of the recalls include:

- Fifteen lots of IV solutions due to presence of particulate in the solutions that could lead to inflammatory reactions and other adverse events
- Four product codes of Vascu-Gard peripheral vascular patches, because customers could not discern the smooth side of the patch from the rough side. A mix-up in patch placement could lead to thrombosis and embolism.
- 140,000 bags of sodium chloride due to the presence of mold, which if injected into patients could cause serious adverse events.
- One lot of IV solutions because the containers were leaking, particulate was seen in the solutions, and port protectors were missing.

The latest recall involves 0.9% Sodium Chloride Injection used as a source of water and electrolytes or a priming solution for hemodialysis procedures, and Dextrose Injection, a source of calories and water for hydration. Both are commonly used in patients in health care settings. Injecting solutions containing such particulate matter could block blood vessels, resulting in stroke, heart attack or damage to vital organs, as well

as cause allergic reactions, local irritation and inflammation in tissue and organs.

In the past two years, the company has also been hit with FDA warning letters over questionable manufacturing practices at its plant in Jayuya, Puerto Rico. Baxter has paid millions in recent years to correct problems and settle lawsuits related to tainted products.

Sources: Fierce Pharma, *Chicago Tribune*

XI. BUSINESS LITIGATION

APPLE SEEKS \$180 MILLION MORE IN PATENT DAMAGES FROM SAMSUNG

Shortly after Samsung paid Apple more than \$548 million for infringing the patents and designs of the iPhone, Apple asked a U.S. court to force its biggest smartphone rival to pay more. Apple Inc. claims Samsung Electronics Co. Ltd. owes nearly \$180 million in supplemental damages and interest. These further damages relate to five Samsung devices that infringed Apple’s patents and were sold after a 2012 jury verdict finding Samsung liable in the dispute.

The long-running dispute dates back to 2011, when Apple sued Samsung alleging the South Korean electronics company violated its patents and copied the look of the iPhone. After the 2012 verdict, Samsung was ordered to pay \$930 million. In May a U.S. appeals court stripped about \$382 million from that total, saying Cupertino, Calif.-based Apple could not protect the phone’s appearance through trademarks. Samsung paid Apple the bulk of the judgment, \$548.2 million, on Dec. 14.

In a case that has come to epitomize the global smartphone war, Apple and Samsung have more battles ahead. Another trial over remaining damages related to the appeals court decision is set to go ahead next March in San Jose, Calif., federal court. Samsung has also appealed the case to the U.S. Supreme Court. The company said Apple was compensated far more than it deserved for patents on designs of the iPhone’s front face, bezel and application icons. The high court must first decide whether or not to accept the case for review. The case is *Apple Inc. v.*

Samsung Electronics Co. Ltd in the U.S. District Court for the Northern District of California.

Source: Reuters

POLAR AIR CARGO TO PAY \$100 MILLION IN CARGO ANTITRUST MDL

Polar Air Cargo LLC will pay \$100 million to settle claims it conspired with other carriers to fix the price of air cargo services. This brings the total amount of settlements in the multidistrict litigation (MDL) to more than \$1.14 billion. The settlement by Polar Air—as well as Atlas Air Worldwide Holdings Inc., which owns 51 percent of the company, and Polar Air Cargo Worldwide Inc.—will be the second-largest payment from any settlement in the litigation.

So far, the class has entered into settlements with 25 Defendant groups, 22 of which total \$848 million and have been granted final approval. The three remaining Defendants in the litigation—Air China Ltd., Air India Ltd. and Air New Zealand Ltd.—are set to go to trial in September.

Korean Air Lines Co. Ltd.'s \$115 million settlement tops the list as the largest deal to date, which was approved in October, along with settlements worth more than \$90 million by both Singapore Airlines Ltd. and China Airlines Ltd., as well as a \$65 million deal with Cathay Pacific Airways Ltd. U.S. District Judge John Gleeson approved the settlements after finding that they were fair to the thousands of companies that purchased air cargo services directly from the airlines and claimed the carriers participated in the plot to hike rates.

EVA Airways Corp. has previously agreed to pay \$99 million to settle the class action claims. Nippon Cargo Airlines Co. Ltd. agreed in December 2014 to pay \$36.55 million, and Asiana Airlines Inc. settled for \$55 million in October 2014. Other settlement amounts include \$92.4 million by Singapore Airlines Ltd., \$115 million by Korean Air Lines, \$15.8 million by El Al Israel Airlines Ltd., an \$87 million settlement with Air France-KLM and an \$85 million deal with Deutsche Lufthansa AG, among others. The settlement class, which was approved in the court's preliminary approval order in May 2014, includes all persons or entities who purchased airfreight services for shipments

to, from or within the U.S. directly from any of the Defendants or their parents or subsidiaries between Jan. 1, 2000, and Sept. 11, 2006.

The multidistrict litigation dates to 2006, when consumers brought more than 90 lawsuits against more than two dozen airlines after the U.S. Department of Justice (DOJ) and the European Commission began investigating the air freight industry. According to the DOJ, the conspirators used meetings, conversations and other communications to determine the rates the airlines should charge for various routes. The government says the airlines and former executives then imposed the agreed-upon rates and participated in subsequent meetings in the U.S. and other countries to enforce the price-fixing plots. Although both direct and indirect purchasers initially brought suits, the Second Circuit upheld the dismissal of indirect-purchaser Plaintiffs in 2012, saying that federal aviation law preempted price-fixing claims brought against foreign carriers under state antitrust statutes.

In November, the Second Circuit blocked Polar Air Cargo, along with remaining defendants Air China, Air India and Air New Zealand, from challenging the newly won certification of a class of customers, saying an appeal was unwarranted.

The class is represented by Robert N. Kaplan, Gregory K. Arenson and Gary L. Specks of Kaplan Fox & Kilsheimer LLP, Hollis L. Salzman and Meegan Hollywood of Robins Kaplan LLP, Howard J. Sedran and Austin B. Cohen of Levin Fishbein Sedran & Berman, and Michael D. Hausfeld, Brent W. Landau, Hilary K. Scherrer and Melinda R. Coolidge of Hausfeld LLP. The case is in the U.S. District Court for the Eastern District of New York.

Source: Law360.com

XII. AN UPDATE ON SECURITIES LITIGATION

KRAFT WHEAT MARKET MANIPULATION SUITS MOVE FORWARD

In April 2015, the United States Commodity Futures Trading Commission

(CFTC) filed a complaint against Kraft Foods Group, Inc. and Mondelez Global, LLC and accused the companies of trying to drive down high cash prices for soft red winter wheat, used in snack products like Wheat Thins, by falsely signaling massive demand in the futures market. The claims include violation of the Commodity Exchange Act and the regulations thereunder.

Mondelez and Kraft allegedly bought \$90 million of the December 2011 contracts—tantamount to a six-month supply—never intending to take delivery, according to the CFTC. Their intent was to compel the market to lower cash wheat prices in response to the companies' long position. When those price shifts occurred, Mondelez and Kraft earned more than \$5.4 million in profits and savings, according to the agency. The Defendants moved to dismiss two counts in the complaint, but in late December, the federal judge denied the Motion to Dismiss allowing the claims to move forward. The case is *U.S. Commodity Futures Trading Commission v. Kraft Foods Group Inc.*, 15-cv-02881, U.S. District Court, Northern District of Illinois.

Source: www.cftc.gov

XIII. EMPLOYMENT AND FLSA LITIGATION

EMPLOYMENT BACKGROUND CHECKS AND CREDIT CHECKS UNDER THE FAIR CREDIT REPORTING ACT

Have you applied for a job and been turned down because of a background report? A federal law, the Fair Credit Reporting Act (FCRA) requires employers to get your permission to run a background check before hiring you. Employment background reports may include credit history or public record history, such as criminal convictions, driving records, bankruptcies, and judgments. Employers use this information to determine whether to hire you, promote you, or keep you as an employee.

Did you get the job? If you answered no, then you need to know that the employer must comply with the FCRA before turning you down for the job or promotion. First, the employer must get

your permission before running a background check. The authorization must be separate from the employment application.

Second, if the employer uses the background report to deny you the job or promotion, then the employer must give you a pre-adverse action notice, a copy of the background report, and a summary of your rights under the FCRA before turning you down. The adverse action notice must also include the name, address, and telephone number of the background report company, a statement that the background report company did not make the decision, a notice of your right to dispute false information, and the right to obtain a free report from the background report company.

If the employer does not get your permission to get your credit report or background report, fails to provide you with the appropriate summary of your rights, or pre-adverse action notice and a copy of the background report, you may be entitled to actual damages and attorney fees.

The background reporting company also has to comply with the FCRA. When a background report company sends the employer a report that has negative information, such as tax liens, convictions, or judgments, the background reporting company has to notify you that it provided your information to the employer or prospective employer.

Have you received notice that a background reporting company has reported negative public information to your employer or prospective employer? You have the right to dispute false information to the background reporting company. If the background reporting company does not delete the false information, then you may be entitled to actual damages, including denial of employment or promotion.

For further information on cases under the FCRA you can contact Archie Grubb or Andrew Brashier, lawyers in our firm's Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Archie.Grubb@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

Sources: Information obtained from RA Micah Adkins and Fair Credit Reporting Act, 7th ed., Nat'l Consumer Law Center (2010).

CANTOR FITZGERALD AGREES TO PAY \$140,000 IN WORKER OVERTIME SUIT

Cantor Fitzgerald Securities Inc. has agreed to pay \$140,000 to settle claims from a technical support employee who said the company tried to force him and tech support colleagues to sign away their rights to overtime. The proposed settlement resolves a proposed collective and class action filed six months ago by a support employee who says he was owed \$100,000 for overtime and was offered half in exchange for signing away his overtime rights—and that several other employees were encouraged to cut similar deals.

Puente, a voice support analyst in the offices of Cantor Fitzgerald and affiliates since 2008, filed the suit in July. He says his bosses knew that he and other non-management staff in the information technology department had been misclassified as exempt from overtime pay under the Fair Labor Standards Act and asked them to submit records of all overtime worked between 2008 and 2014. After Puente submitted evidence that he was owed \$100,000 in back pay, however, the human resources department offered to pay him \$51,000 for overtime work performed between 2012 and 2014. When asked why he wasn't being paid for all six years' worth of overtime, Puente alleges that Patricia Drete, human resources director, couldn't answer the question.

In September, the court sent the suit, which also names affiliate entities BGC Technology Markets LP, Espeed Markets LP and Newmark Grubb Knight Frank, to the court's mediation program. By December, the parties met in a mediation session, and by Jan. 6 had notified the court that they had reached a compact. During the negotiations, Cantor Fitzgerald had argued that Puente's overtime didn't exceed \$70,000 and that he couldn't recover damages because the company inadvertently, and not willfully, classified him as exempt.

Puente contended he was owed about \$237,000 total from the company, including his original overtime number and damages, plus attorneys' fees. What they ironed out was Puente's lawyers would receive \$40,000 of the \$140,000 fund, with Puente getting the balance. The agreement has to clear final approval from the court. Puente is represented by Bradford D. Conover and Molly Smithsimon of Conover Law Offices. The suit is in the U.S. District

Court for the Southern District of New York.

Source: Law360.com

XIV. PREMISES LIABILITY UPDATE

PREMISES LIABILITY OVERVIEW

Premises liability claims are some of the most common accident cases. Factually, these claims are all different, but the general principles and evaluation looks the same. When most people hear the term premises liability claim, they likely think of slip-and-fall and trip-and-fall cases. Although these are likely some of the most common premises liability cases, this area of law covers a much broader spectrum than that. Other common types of premises liability cases include building or structure collapse, falling merchandise, swimming pool accidents, inadequate maintenance, and inadequate security to name a few.

In Alabama, no matter what type of premises accident occurs, the initial inquiry into whether a valid premises liability claim exists must start with determining the injured person's status on the property. The reason this is so important is that the duty that the landowner owes to the person that comes onto their premises depends on the visitor's status. Everyone on another's property is deemed to either be a business invitee, licensee, or trespasser. The level of care a landowner owes to those on his property is based on the status of the visitor.

The most obvious example of a business invitee is someone going onto the property of another to conduct some type of business transaction such as a customer at a store or restaurant. Landowners owe the highest duty of care to business invitees. They are required to exercise due care to keep the property in a safe condition and to warn invitees of any danger the owner knows or should have known about. Intuitively, those who invite others onto their property for financial gain owe those visitors a high duty of care to ensure their safety. This firm has handled countless premises liability cases involving slip and fall, trip and fall, falling merchan-

dise, structure collapse and countless other variations of accidents that occurred to business invitees.

The next highest duty of care is owed to licensees. A licensee is one who comes onto a property as a guest with either the knowledge or implied permission of the property owner. This typically takes the form of a person visiting another's home, or when one visits a business for a non-business purpose. The person responsible for maintaining the property in these situations must not intentionally injure the licensee, and must repair or warn against any known danger. With licensees, the property owner has to correct or warn about known dangers, whereas with invitees, the property owner must actively check for dangers. Licensee premises liability cases often involve building or structure collapses at residential homes and apartment complexes.

The final category—trespassers—is owed the lowest threshold of care. Trespassers are people on the property of another without the permission or knowledge of the owner. Landowners simply have a duty not to intentionally injure an adult trespasser. However, one situation where a landowner can be held liable for injuries to a trespasser is when the landowner lays a trap intending to harm a trespasser. Another situation where a landowner may be held liable to a trespasser is if the trespasser is a child that is somehow attracted or lured onto the property. The most common example of this is a landowner being held liable for failing to protect children from falling into an uncovered pool. If someone has a pool, dangerous machinery, or other hazardous items on the property, it is important to take reasonable steps to ensure children are protected from those dangers.

After determining what the visitor's status was on the property, it is important to determine whether the relevant standard of care was violated. This inquiry is somewhat subjective depending on the facts and circumstances of the case. However, one of the most effective ways to determine whether the landowner violated the standard of care is to identify any codes or standards that may apply. Often times there are building codes or safety standards that apply.

Standards and codes that may offer guidance include Occupational Safety and Health Administration (OSHA) standards, American Society for Testing and

Materials (ASTM or ASTM International) standards, local building codes, American with Disability Act (ADA) Codes and many others. If any code or standard on point is violated, you have a strong argument that the landowner failed to meet the standard of care for invitee and licensee cases. In cases with serious damages, it is also good practice to hire an expert in the given area to explain why the code or standard is applicable and further, how the landowner's failure to adhere to that standard created a hazard.

Premises liability cases may conjure ideas of minor slip-and-fall accidents. However, these claims can be large and the litigation hard fought depending on the facts and circumstances. As with any personal injury claim, it pays to put in work investigating the accident thoroughly and researching the applicable laws, codes and standards. If you need more information on the subject of Premises Liability, contact Evan Allen, a lawyer in our firm's Personal Injury/Products Liability Section, at 800-898-2034 or by email at Evan.Allen@beasley-allen.com.

\$21.5 MILLION VERDICT FROM CRUISE LAWSUIT THROWN OUT BY JUDGE

A federal judge has thrown out the \$21.5 million verdict that a passenger was awarded after being hit in the head by a sliding glass door on a cruise ship in 2011. James Hausman was on an eight month world cruise in 2011 when an automatic sliding door by the pool hit him in the head. He was diagnosed with a mild traumatic brain injury and post-concussive syndrome. His wife said he has experienced fatigue and dizziness ever since the incident and has also had problems with memory loss. Hausman filed his lawsuit against Holland America Line. A jury awarded him \$21.5 million in October 2015.

Barbara Rothstein, a U.S. District Judge, threw out the verdict and ordered a new trial based on new evidence. Hausman's former assistant came forward and said that he deleted emails that could have hurt his case. The judge said that the emails should have been turned over to the cruise line's lawyers instead of being deleted. A new trial date has not yet been set.

Source: CruiseFever.net

XV. WORKPLACE HAZARDS

A LOOK AT MINING SAFETY

Mining has been an established industry in this country since the late 1700s. Unfortunately for miners, it is a very dangerous job. We've seen mining accidents and recovery efforts play out on the news and recently, a movie was made about a well-known mining accident. Whether underground or surface mining, miners must deal with working in environments that expose them to hazards such as collapsing structures, falling debris, elevated heights, extended depths and heavy machinery. Because mining is so dangerous, the industry is heavily regulated. Whereas the Occupational Safety and Health Administration (OSHA) is dedicated to workplaces that span a vastly wide range, the mining industry is specifically regulated by the Mine Safety and Health Administration (MSHA). MSHA works to reduce injuries, illnesses and death through strong enforcement, education, training and technical support to the mining industry.

In the event of a deadly or serious accident at a mining facility, MSHA requires immediate notification and has the authority to stop all mining activities to investigate the incident. MSHA investigators are very good at their jobs and usually can identify the cause of an incident. More importantly, MSHA will usually find a regulation that was violated or ignored. Sadly, the mining operator's failure to follow federal regulations dealing with miner safety is commonly a direct or circumstantial cause of an accident. Fortunately, MSHA statistics indicate that the number of mining fatalities have been steadily decreasing; however, any preventable death is one too many. MSHA estimated that approximately 366,584 people worked in the mining industry in 2014. During that same year MSHA issued more than 121,400 Citations and Orders. Through MSHA's inspection and enforcement efforts, there have been less than 50 U.S. mining fatalities per year in the last five years. While the falling number of deaths is encouraging, it is extremely difficult to tell a family that they lost a loved one because the

mining operator failed to follow clear and simple regulations.

To be fair to the industry, not all accidents are caused solely by a mining operator's failure to follow regulations. Oftentimes another entity either caused or contributed to a fatal incident. Mining operations require multiple contractors to be onsite. Although the mining operator is ultimately responsible, contractors can also engage in conduct or fail to follow safety procedures that cause or lead to injury or a fatality.

In addition to contractors, entities are often called onsite to maintain or erect structures that are essential to mining operations. A faulty installation or inspection can lead to a collapse or other incidents that cause injury. Finally, a defectively designed product could also lead to injury or death at mining facilities. Just like OSHA focuses on the employer following an accident, MSHA focuses on the mine operator. A thorough investigation into every aspect of an incident is necessary to properly advise a client or their family.

We currently have mining accident cases filed and are investigating others. One case in Alabama resulted in a significant brain injury requiring our client to obtain 24-hour assistance with activities of daily living for the remainder of his life. We are also currently investigating an incident that occurred outside the state of Alabama resulting in the loss of life. In each instance, MSHA cited the mine operator for violations of regulations designed to prevent the very accident that occurred. In one of these cases, an entity other than the mine operator also engaged in conduct that caused and/or contributed to the fatality-causing event. We will keep you updated on the progress of these litigations. If you need any information at this time, contact Kendall Dunson, a lawyer in our Personal Injury/Products Liability Section, at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com.

FAMILIES OF THREE MEN KILLED IN NORTH CAROLINA SCAFFOLDING COLLAPSE FILE LAWSUIT

The families of three workers who were killed when scaffolding collapsed at a Raleigh, N.C., high-rise building have sued four companies connected with the project. The lawsuit was filed last month on behalf of the three men. The three men fell to their deaths on March 23, 2015. They were dismantling

a mast climber on the 11-story Charter Square building when the exterior lift system collapsed. It's claimed in the lawsuit filed in Durham County Superior Court that four companies contributed to the victims' wrongful death. A fourth worker was treated for serious injuries. John Edwards represents the families.

Source: *Insurance Journal*

OSHA IS INVESTIGATING AN EXPLOSION AT A DOW CHEMICAL LAB

The Occupational Safety and Health Administration (OSHA) is investigating a chemical explosion at the Dow Chemical Co. in North Andover that critically injured four people. State Fire Marshal Stephen D. Coan said the explosion, which occurred Jan. 7, was in a lab where employees were working with trimethyl-aluminum—a chemical used to make LED lights that is highly reactive with water. At some point, the chemical—which is usually housed in glass vials inside metal containers—came into contact with water and caused a “violent explosion in that laboratory,” according to the fire marshal. He said: “something went terribly wrong with the process.” The explosion is being classified at this preliminary stage as an industrial accident. There will be an extensive investigation into whether Dow Chemical was in compliance with the state's “enhanced” chemical process regulations.

Source: *Boston Herald*

TRUCKING CO. TO PAY \$700,000 TO SETTLE DRIVER OVERTIME CLAIMS

California trucking company S.S. Skikos has agreed to pay \$700,000 to settle a proposed class action brought on behalf of nearly 200 truck drivers who accused the company of several federal and state labor law violations. The proposed settlement will resolve 187 S.S. Skikos Inc. employees' claims that the Santa Rosa, Calif.-based company didn't pay them for working overtime, deprived them of required meal and rest periods and in general didn't pay them for all hours worked. The 187 employees, nonexempt truck drivers, are expected to receive a net \$417,690 from the \$700,000 settlement.

The settlement class encompasses truckers who worked for S.S. Skikos

from April 27, 2011, through the date the California federal court gives the instant agreement preliminary approval. The Plaintiffs are represented by Carolyn Hunt Cottrell and Nicole Nellen Coon of Schneider Wallace Cottrell Konecky & Wotkyns LLP and Karen C. Carrera and Virginia Villegas of Villegas Carrera LLP. The case is in the U.S. District Court for the Northern District of California.

Source: Law360.com

XVI. TRANSPORTATION

TECHNOLOGY AND RAIL SAFETY TOP NTSB WISH LIST OF TOP 10 PRIORITIES IN 2016

Improvements in technology for all modes of transportation and a priority on rail safety topped the National Transportation Safety Board (NTSB) 2016 “Most Wanted” list. In particular, the NTSB emphasized the necessity for implementing automatic-braking technology for rail transportation known as Positive Train Control (PTC), as well as phasing out old rail tank cars that carry flammable liquids such as crude oil and ethanol.

Congress approved measures to mandate implementation of PTC in 2008, and the system was supposed to be in place by the end of 2015. The issue gained the national spotlight in May 2015, when a Philadelphia Amtrak train took a curve too fast and derailed, resulting in eight deaths and more than 200 injuries. However, Congress delayed the deadline late last year, citing budget restraints. In a statement, NTSB board member Robert L. Sumwalt said:

Every day that PTC is not in place we run the risk of another Amtrak crash. Is it going to take another five year or another three years for it to be implemented? If that's the case, that's unacceptable.

The importance of phasing out old rail tank cars is underscored by a rail disaster that occurred in Lac-Mégantic, Canada, in 2013, when a runaway tanker truck derailed and burst into flames, killing 47 people and burning down more than 30 buildings in the town. NTSB Chairman Christopher A. Hart told *The Washington Post*:

We've been lucky thus far that derailments involving flammable liquids in America have not yet occurred in a populated area. But an American version of Lac-Megantic could happen at any time. Instead of happening out in the middle of a wheat field, it could happen in the middle of a big city.

Also on the rail safety wish list is improved rail transit safety oversight. This issue was brought to the forefront in January 2015, when one person died and dozens were injured when cars on Washington, D.C.'s Metro line went dark and filled with smoke. The catastrophe that occurred just outside Washington's L'enfant Plaza Metro Station exposed a number of safety issues including insufficient oversight by local rail transit systems.

The complete list of NTSB Most Wanted Transportation Safety Improvements for 2016 is as follows:

- Reduce fatigue-related accidents—this includes both commercial and individual transportation, and encompasses all modes of travel.
- Improve rail transit safety oversight.
- Promote availability of collision avoidance technology in highway vehicles—this also includes commercial vehicles such as trucks and buses, as well as passenger vehicles.
- Strengthen occupant protection—this priority would address all occupant restraint systems in passenger and commercial vehicles.
- Disconnect from deadly distractions—removing unnecessary distractions is the first step in safely operating any vehicle.
- Prevent loss of control in flight in general aviation—through the use of education, technologies, flight currency, self-assessment and vigilant situational awareness in the cockpit.
- Promote the completion of rail safety initiatives—including Positive Train Control (PTC) and improved tank car design.
- End substance impairment in transportation—includes both alcohol and drugs.
- Require medical fitness for duty—this would create a comprehensive

medical certification system for all safety-critical personnel across all modes of transportation.

- Expand use of recorders to enhance transportation safety—ensure all categories of aircraft, trains, ferries, buses and other public transportation are equipped with critical technology to help investigators learn what happened in a crash and prevent future accidents.

Sources: NTSB, *The Washington Post*

XVII. ENVIRONMENTAL CONCERNS

THE FUTURE OF THE FIRM'S TOXIC TORTS SECTION

I have been asked by several lawyers from outside the firm what direction our Toxic Torts Section will now take with the BP litigation beginning to wind down. The answer is there will not be a significant slowdown of activity in the Section. The lawyers will be placing emphasis on serious injury occupational toxic exposure cases while continuing our work on large environmental disasters which unfortunately continue to occur. Occupational exposure is a major threat to the health and safety of our work force, and oftentimes it can take years to develop illnesses related to an exposure. These can be very difficult cases and selection is extremely important. Below are some of the cases our lawyers are currently investigating around the country:

- **Severe Lung Disease:** Perhaps no other condition is more prevalent in the occupational setting than severe lung disease. On a daily basis, workers can be exposed to heavy metal dust or extremely toxic substances that over time render their lungs completely useless. Our toxic torts section is reviewing cases where exposure to chemicals or substances caused serious lung disease (either of the obstructive or restrictive variation), permanent lung scarring, a lung transplant or death. Some examples of conditions include:
 - **Mesothelioma** as a result of exposure to asbestos. There is no

cure for mesothelioma, and, oftentimes, the disease does not manifest until decades after exposure.

- **Berylliosis or Chronic Beryllium Disease** (sometimes misdiagnosed as sarcoidosis) as a result of exposure to beryllium or metals alloyed with beryllium. Beryllium is arguably the most toxic substance on earth, and it is manufactured and used in a variety of fields as an alloy in copper, aluminum, nickel, and as a component in tech devices, golf clubs, x-ray machines, and in specialty air planes and rockets. Berylliosis can cause complete failure of the lungs, where death can occur without a lung transplant.
- **Bronchiolitis Obliterans** (also called "popcorn lung"). This is another dreadful disease that causes complete lung failure, necessitating either a lung transplant or death. The condition has been known to develop due to occupational exposure to diacetyl, which is a flavoring additive in popcorn, candies, crackers, chocolate, deserts, food mixes, syrups, sauces, soft drinks, chewing gum, ice cream, butter and as a flavoring agent for coffee. Aside from diacetyl, bronchiolitis obliterans can also result from exposure to high levels of fiberglass and styrene.
- **Pulmonary Fibrosis.** Pulmonary fibrosis can be a very serious disease that can cause lung failure, the need for a lung transplant and death. Upon diagnosis, a physician may perform a bronchoscopy that reveals the presence of metal dusts and materials in the lungs or fibrosis that caused the disease.
- **Cancer Caused By Toxic Exposure:** Another major focus for this group will be on cancer caused by toxic exposure. There are a number of extremely dangerous toxins in the workplace that can cause harm to workers. Some of the cases we are investigating involve the following scenarios:
 - **Benzene:** Benzene is one of the most toxic substances on the

planet, and it is known to cause a rare blood cancer called Acute Myeloid Leukemia (“AML”, also called Acute Myelogenous Leukemia) in workers exposed to products containing benzene, including paints, a number of solvents, oil, gas, resins, brake fluids, floor treatment chemicals, and in commercial cleaners (particularly in carpet cleaners), to name a few.

- **Formaldehyde:** Formaldehyde is a known carcinogen, and medical research has found that the chemical causes sinonasal and nasopharyngeal cancers.
- **Trichloroethylene:** Trichloroethylene (TCE) is a chlorinated solvent once widely used as a metal degreaser, dry cleaning agent, chemical intermediate and extract. A known carcinogen, TCE use has declined significantly since the late 1980s but the effects of handling the dangerous solvent can still manifest today. Kidney cancer is the illness of primary concern.

For more than a decade, our Toxic Torts Section has been one of the most successful environmental groups that represent Plaintiffs in the nation. The cases it works on are often extremely challenging and costly to litigate, but they are also some of the most important because they hold bad actors responsible for endangering our citizens with toxic substances. Some of the Section’s past successes include:

- **The Private Litigant Oil Spill Cases:** Rhon Jones served as a steering committee member and was a key player in negotiations that brokered an uncapped, private settlement that BP currently values in excess of \$11 billion. Lawyers in our section have represented thousands of individuals across the Gulf of Mexico and recovered millions in compensation.
- **The State of Alabama and Governmental Oil Spill Settlements:** The Section was responsible for litigating and negotiating the State of Alabama’s \$2.3 billion settlement with BP in what is considered to be one of the most significant pieces of litigation to ever touch Alabama. Rhon Jones also assisted in the larger governmental settlement negotiations, which when

including Alabama’s portion, was valued to be \$18.7 billion and the largest environmental settlement in United States history.

- **The Monsanto Settlement:** The Section brokered the \$700 million Monsanto settlement. The settlement was the consequence of Monsanto exposing thousands of citizens in Aniston, Ala., to PCB, and is the largest private individual environmental settlement in United States history.
- **The TVA Coal Ash Settlement:** The Section played a leadership role in the TVA coal ash litigation. Before the *Deepwater Horizon* oil spill, the TVA coal ash spill was considered one of the largest environmental disasters in United States history. The case settled for \$27.8 million.
- **The Hot Fuel Litigation:** The Section held a steering committee position in the national Hot Fuel MDL against the largest oil companies in the world over the sale of motor fuel. The cases survived class certification, and settlements currently exceed \$20 million.
- **The Carbon Black Litigation:** The Section achieved numerous settlements and a \$20 million-plus verdict that survived numerous appeals over carbon black pollution contamination in Alabama and Oklahoma.
- A number of significant, confidential settlements, including cases involving property contamination, economic losses, and environmental product defects.

Presently, the Section is comprised of six lawyers (four principals and two associates) and 18 support staff personnel. I will set out below a little more information about the lawyers:

- **Rhon Jones:** Rhon has practiced with the firm for more than 20 years and has played a role in settlements totaling \$30 billion on a wide variety of environmental and non-environmental disputes. He is the section head of our Toxic Torts group, and his record-setting performances have been chronicled in publications across the country, including *The New York Times*, *The Wall Street Journal*, *Lawdragon*, *Super Lawyers*, and *Best Lawyers*, to name a few. Based on his accomplishments, Rhon is arguably the top environmental

attorney representing Plaintiffs in America.

- **John Tomlinson:** John, a Principal, joined Beasley Allen in 2002 and was a key negotiator in the landmark, multi-billion dollar *Deepwater Horizon* oil spill private settlement. Prior to joining the Section, John represented clients defrauded by banks and other financial institutions, and recovered millions in compensation while working in our Firm’s Consumer Fraud Section. In 2010 and again in 2013, John was selected as Beasley Allen’s Lawyer of the Year in the Toxic Torts Section.
- **Chris Boutwell:** Chris joined Beasley Allen in 2008 and is a Principal with the Section. Chris has represented clients against some of the largest chemical companies in the nation on property contamination disputes, and he played a major role in structuring the oil spill steering committee’s environmental case. He is currently lead attorney on behalf of consumers in a class action against manufacturers and retailers that deceptively advertise their “flushable” wipes as flushable. He is an AV-rated attorney, is a recognized “Rising Star” by *Super Lawyers* for the last three years, and has been designated lawyer of the Year in the Section in 2011 and 2015.
- **Parker Miller:** Parker joined the firm in 2008 and is a Principal in the Section. Parker served as Beasley Allen’s second chair to the oil spill steering committee, and was co-lead litigator on behalf of the State of Alabama in its \$2.3 billion oil spill case against BP. He also held a leadership role in the Hot Fuel MDL in Kansas, and has successfully represented clients in a wide variety of significant cases, including environmental product defect and personal injury. He is an AV-rated attorney, a designated “Rising Star” by *Super Lawyers*, and has been profiled by *Law360* as one of the top lawyers in the nation younger than 40. He was selected as Lawyer of the Year for the Section in 2012 and 2014.
- **Grant Cofer:** Grant joined the firm in 2012 as an Associate and is a graduate of Harvard Law School. He has previously served as co-counsel on behalf of local governments and municipalities in the oil spill litigation, where he worked to recover millions in com-

pensation for his clients. In addition, Grant has spent a significant amount of time counseling businesses and individuals affected by the oil disaster. He also played a major role in the Hot Fuel MDL.

- **Ryan Kral:** Ryan is a graduate of the University of Alabama School of Law and our newest Associate. Since joining Beasley Allen, Ryan has spent a significant portion of his time representing clients devastated by the Deepwater Horizon oil spill. In addition, Ryan is very active in the “flushable wipes” class action litigation in Florida, and he has previously worked extensively in the Hot Fuel MDL.

Sandra Walters is the Section Head Administrator and she does an excellent job in that important role. There are too many support staff personnel to mention them individually. I will say, however, that they have done outstanding work and are most valuable to the Section. We are excited about our Toxic Torts Section’s focus on severe injury occupational exposure. If you have any questions about the cases we are investigating, contact Rhon Jones or Parker Miller at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com and Parker.Miller@beasleyallen.com.

XVIII. UPDATE ON NURSING HOME LITIGATION

ASSISTED LIVING FACILITIES

Approximately 13 percent of Alabama citizens are older than 65. As our population ages, more and more people are seeking assistance with daily care. One option is an assisted living facility. The Alabama Department of Public Health (ADPH) regulates these facilities, and defines them broadly as an “entity that provides, or offers to provide, residence and personal care to two or more individuals who are in need of assistance with activities of daily living.” Assisted living facilities are commonly referred to as retirement homes, senior homes, or the like.

These facilities are distinct from nursing homes, primarily because they

do not provide the same level of health care to the residents. Most of these facilities may have a nurse who checks on residents daily, and they are required by the ADPH to ensure that the residents are “under the direction and supervision of a physician.” This physician is typically the private physician of the resident, with whom the nurse or staff should make contact, as needed, for the proper care of the residents.

More direct, the facility is required to “provide general observation and health supervision of the residents sufficient to develop awareness of changes in all residents’ health conditions and physical abilities, and awareness of the need for medical attention and nursing services.” In other words, the facility’s staff should be adequately trained to oversee a resident’s well-being and to take prompt and necessary action to obtain the appropriate medical care. Typically, this means having the person transferred to a hospital, though in appropriate circumstances on-site care or getting the resident to their doctor may be appropriate.

Assisted living facilities are required to have policies and procedures that address matters such as: (1) Abuse, neglect and exploitation management; (2) admission and continued stay criteria; (3) guidelines for discharge; (4) the services the facility is capable to provide; (5) medication assistance; (6) provisions of meals; etc. The ADPH requires that assisted living facilities maintain adequate staff “to meet the care needs of all residents” and must screen staff to ensure those persons are appropriately qualified to care for the needs of senior citizens.

The assisted living facility is required to evaluate whether a senior citizen can be properly cared for and monitored while at the facility. If not, the facility must undertake measures to have the resident “transferred or discharged to an appropriate setting.” For those individuals who can be safely monitored at the facility, the facility is required to have a plan of care to oversee the care and meet the medical and health needs of the resident.

In this day and age of competition for insurance, Medicare, Medicaid and private-pay dollars, all too often some assisted living facilities will hold onto a resident longer than it should and beyond its means to appropriately and safely care for that patient. In those instances, the facility may become liable

for harm, injury or death of the resident. Lawyers in our firm’s Personal Injury/Products Liability Section review potential cases against assisted living facilities. If you need more information, contact Ben Locklar, a lawyer in our Personal Injury/Products Liability Section, at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

Source: <http://www.hpm.umn.edu/nhregsplus/ALF%20by%20State/Alabama%20ALF.pdf>

XIX. AN UPDATE ON CLASS ACTION LITIGATION

SUPREME COURT ISSUES IMPORTANT RULING FOR CONSUMERS

Consumers won an important victory in the U.S. Supreme Court recently when the court ruled that companies can’t evade class action claims by offering full relief to the named class representative. In a 6-3 ruling authored by Justice Ruth Bader Ginsburg, the Court rejected Defendant Campbell-Ewald Co.’s argument that Plaintiff Jose Gomez’s class action suit under the Telephone Consumer Protection Act (TCPA) was moot since it offered him \$1,503 for each unsolicited text message he received. This offer represented more than three times the statutory amount of \$500 per violation, but Gomez rejected the offer since it provided no relief to other class members.

Campbell-Ewald, an advertising partner with the U.S. Navy, appealed to the Supreme Court after the Ninth Circuit ruled in 2014 that the company could be liable for text messages it sent to about 100,000 people in 2006. The Ninth Circuit rejected the Defendant’s attempt to strategically offer individual Plaintiffs the relief necessary to make them whole at the outset of the litigation in order to avoid a potential multi-million dollar class action judgment or settlement in the future. Justice Ginsburg wrote:

We hold today, in accord with Rule 68 of the Federal Rules of Civil Procedure, that an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obliga-

tion. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists.

Justice Ginsburg continued, with respect to class actions, "While a class action lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted."

The justices additionally held that Campbell-Ewald's status as a government contractor did not entitle it to immunity from claims brought under the TCPA. "When a contractor violates both federal law and the government's explicit instructions as here alleged, no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation," the majority ruled. The decision resolves a circuit split on the settlement offer issue. It marks a follow-up to the high court's 2013 decision in *Genesis Healthcare Corp. v. Symczyk*. In the *Genesis* case, the justices refused to rule on the question of whether full settlement offers effectively end putative class actions because the Plaintiff in that case did not dispute that the offer mooted her individual claims.

The case, *Campbell-Ewald Co. v. Gomez*, is in the Supreme Court of the United States. The Plaintiff was represented by Suzanne L. Havens Beckman and David Parisi of Parisi & Havens, LLP, and Adina H. Rosenbaum of Public Citizen's Litigation Group, among others. Beasley Allen is involved in a number of class action cases filed throughout the country. For more information on our nationwide class action practice, contact Dee Miles, Archie Grubb, or Andrew Brashier at 800-898-2034 or by email at Dee.Miles@beasleyallen.com, Archie.Grubb@beasleyallen.com, Andrew.Brashier@beasleyallen.com.

Sources: Law360.com

HOSPITAL PAYS \$156 MILLION TO SETTLE PENSION FRAUD SUITS

Mississippi-based hospital system Singing River Health Services has agreed to pay \$156 million to settle federal class actions and two state suits accusing it of failing to make annual required contributions into a retirement fund. Singing River Health Services Foundation agreed to make about \$149.5 million in contributions over 35 years into a retirement

trust and pay the Plaintiffs' lawyers more than \$6.5 million to settle claims in three consolidated federal class actions and two state suits accusing the organization of underfunding its retirement plan and not disclosing the true state of affairs.

Lucy Tufts, a lawyer with the Mobile firm Cunningham Bounds, one of the law firms representing the plan beneficiaries, said in a statement that the settlement agreement is the product of a "lengthy and intense" negotiation process and that the beneficiaries and their counsel are proud of the agreement. She added:

By restoring all of the funds that SRHS for years failed to contribute to the trust, we have achieved a result for the employees and retirees that no one would have predicted this time last year.

In the first suit filed against the large hospital system in December 2014, the Plaintiffs accused it of underfunding its defined-benefit retirement plan by nearly \$150 million between 2009 and 2014. The complaint included a handful of claims, including contract claims and claims under the Employee Retirement Income Security Act (ERISA), among others. Two additional federal suits followed in January, and by June the federal suits were consolidated. The parties engaged in three separate mediations before agreeing on a settlement. The government of Jackson County, where Singing River is located, was not a party in the litigation, but according to Ms. Tufts, it was involved in the settlement negotiations early on because it had an interest in the conclusion of litigation. The county will pay about \$14 million to support indigent care and prevent default on a bond issue.

As a result of the agreement, the state court will also monitor Singing River's activities with respect to the retirement fund, and any trustees named as Defendants in the suit will have claims against them settled. The settlement is subject to approval by Special Fiduciary and the federal and state courts for the two state cases included in the agreement. Singing River still faces six state suits that are currently pending. The not-for-profit corporation administers two hospitals and operates smaller facilities and has more than 2,400 employees and 600 retirees, making it one of the largest employers in Jackson County, according to court filings.

The plan beneficiaries are represented by Lucy E. Tufts of Cunningham Bounds LLC and Jim Reeves and Matthew G. Mestayer of Reeves & Mestayer PLLC and Steven L. Nicholas. The federal cases are *Jones et al v. Singing River Health Services Foundation et al*; *Cobb et al v. Singing River*; and *Lowe et al v. Singing River*, all in the U.S. District Court for the District of Southern Mississippi. The state cases are *Broun et al v. Singing River*, and *Lay v. Singing River*, in the Chancery Court of Jackson County, Miss.

Source: Law360.com

MADOFF FEEDER SUIT ENDS WITH \$55 MILLION PwC SETTLEMENT

PricewaterhouseCoopers LLP (PwC) has agreed to pay \$55 million to settle a class action lawsuit that claimed it failed to recognize and alert investors to red flags in funds invested in Bernie Madoff's Ponzi scheme. This brings an end to seven years of litigation. PwC Canada and PricewaterhouseCoopers Accountants NV, or PwC Netherlands, agreed to pay \$55 million to owners of shares or limited partnership interests in Fairfield Greenwich Ltd.-managed funds that were invested in Bernie L. Madoff Investment Securities LLC to end claims they were negligent in auditing the funds and failed to recognize red flags in the Ponzi scheme. The settlement was reached just before the case would have headed to trial.

The settlement is pending approval. The remaining Defendants have already reached settlements with the investors. With the PwC settlement, the total recovery by investors in the suit will be at least \$235 million. Named Plaintiffs Pasha and Julia Anwar first filed suit in New York state court in December 2008, later bringing the suit to federal court and consolidating their claims with a class of about 1,000 individuals and businesses who alleged they lost at least \$7.5 billion to the Ponzi scheme as a result of their investments with Fairfield Greenwich.

U.S. District Judge Victor Marrero certified the class for the first time in February 2013, but that certification was vacated by the Second Circuit in June 2014. Judge Marrero granted certification a second time in March 2015, accepting investors' arguments that their relationship with PwC and co-Defendant Citco Group Ltd. was close

enough to establish a “duty of care” under New York law. PwC and Citco initially said they would challenge the certification order, but Citco reached a \$125 million settlement with the investors in August, ending claims the fund manager helped funnel investors’ money into Madoff’s Ponzi scheme.

The parties first agreed in principle to the settlement in November 2015, seeking to avoid a trial scheduled for Jan. 4 in which PwC was the sole remaining Defendant. Fairfield Greenwich and GlobeOp Financial Services LLC, which provided fund management services, previously settled out of the case in 2013. GlobeOp agreed to pay \$5 million, paid by its insurance carriers, while Fairfield Greenwich paid \$80.25 million. The Second Circuit upheld the Fairfield Greenwich deal in June 2014 in the face of a challenge from PwC and Citco. There is \$30 million from the Fairfield Greenwich deal being held in escrow while the fund litigates claims brought by the trustee overseeing the liquidation of BLMIS, meaning the total settlement fund for the feeder fund investors could reach more than \$255 million if the trustee’s claims are unsuccessful.

The lead Plaintiffs are represented by David A. Barrett, Stuart H. Singer, Howard L. Vickery II, Carlos Sires, Sashi Bach Boruchow and Eli J. Glasser of Boies Schiller & Flexner LLP, Robert C. Finkel of Wolf Popper LLP, and Christopher Lovell and Victor E. Stewart of Lovell Stewart Halebian Jacobson LLP. The case is in the U.S. District Court for the Southern District of New York.

Source: Law360.com

CREDIT SUISSE GETS COURT APPROVAL FOR \$110 MILLION SETTLEMENT IN MBS SUIT

A New York federal judge has given preliminary approval to a \$110-million settlement to resolve a class action brought by investors alleging Credit Suisse AG used misleading financial disclosure documents to trick them into purchasing \$1.6 billion in troubled mortgage-backed securities. U.S. District Judge Paul A. Crotty granted preliminary approval of the deal, which ends claims brought by the New Jersey Carpenters Health Fund (NJCHF) and other investors who had claimed that registration statements and other documents proffered by Credit Suisse concealed the quality of the underlying loans, an

alleged violation of underwriting standards. A final fairness hearing is scheduled for May 10. If final approval is granted, the settlement would end a suit dating to 2008. The parties told the court in November that they had reached a deal in principle.

Judge Crotty certified a class of an estimated 330 individual entities in August 2011 that purchased pass-through certificates from August 2006 to April 2007. Pass-through certificates are securities comprising an undivided interest in a pool of federally insured mortgages. The judge later barred certain 2006 and 2007 certificate holders from entering the class on the ground of lacking standing under the Securities Act since NJCHF had not bought from those trusts.

In January 2013, Judge Crotty reinstated some of those claims, citing the Second Circuit’s landmark *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.* decision, which held that funds stemming from the “same set of concerns” could be combined in securities lawsuits. In March 2014, Judge Crotty granted a motion to expand the class to include participants in an \$825 million mortgage-backed securities offering for so-called HEMT 2007-2 certificates. The judge ruled that while the claims raised by purchasers of those certificates were not directly tied to those of the already-certified class, they were similar enough to allow them to be included in the action. In opposing the expansion, Credit Suisse had argued that while the plaintiff might have standing under NECA, it would be inappropriate to integrate a “fundamentally different transaction” and a new set of affirmative defenses with the existing class. The investors are represented by Joel P. Laitman, Christopher Lometti, Michael B. Eisenkraft, Steven J. Toll and Times Wang of Cohen Milstein Sellers & Toll PLLC. The suit is *New Jersey Carpenters Health Fund et al. v. DLJ Mortgage Capital Inc. et al.*, in the U.S. District Court for the Southern District of New York.

Source: Law360.com

BMW’S \$30 MILLION MINI COOPER CLASS SETTLEMENT IS APPROVED

BMW of North America LLC has agreed to pay more than \$30 million to settle a proposed consumer class action over allegedly defective engines in Mini

Coopers. The total dollar amount the automaker will have to pay will depend on the number and nature of claims submitted by class members, who alleged vehicle owners had to pay thousands of dollars in repairs and replacement costs over a defect causing cars to suddenly quit without warning. Senior U.S. District Judge William H. Walls said in his opinion granting preliminary approval of the settlement. The parties had agreed to settle the case in November and Judge Walls noted that while neither party specified a total, it was estimated during oral argument before the court that the settlement’s value could exceed \$30 million. Judge Walls said that he granted preliminary approval because the proposed settlement “lacks obvious deficiencies and appears reasonable.”

Source: Law360.com

BANK OF AMERICA AGREES TO \$27.5 MILLION SETTLEMENT TO END OVERDRAFT FEE SUIT

Bank of America and a proposed class of millions of checking account holders have reached a \$27.5-million settlement resolving claims that the bank improperly imposed overdraft fees on authorized purchases. None of the \$27.5 million is set to revert back to the bank in any way, and the net settlement fund will pay approved class members in proportion of their wrongfully assessed fees, according to the settlement argument, but no payment will be less than \$5. The class includes any holder of a Bank of America checking account since May 25, 2011, who was charged an overdraft fee on an approved transaction with sufficient funds.

Bank of America has also agreed to provide a new and separate disclosure to account holders “to clarify the ... practices that gave rise to this litigation.” The case goes back to June 2014, when Bodnar filed her initial complaint over the bank’s practice of charging debit card users overdraft fees on authorized transactions when there were sufficient funds available in a given account to cover the purchases. She accused Bank of America of breaching the contracts it had with account holders by automatically assessing the improper overdraft fees, along with violations of various common law duties and Pennsylvania’s consumer protection statute.

Plaintiffs also asked the court to set a hearing on final approval of the settlement for no later than June. Plaintiffs

are represented by Hassan A. Zavareci and Jeffrey Kalief of Tycko & Zavareci LLP, Jeffrey M. Ostrow of Kopelowitz Ostrow PA, and James C. Shah of Shepherd Finkelman Miller & Shah LLP. The case is in the U.S. District Court for the Eastern District of Pennsylvania.

Source: Law360.com

JEEP TRANSMISSION DEFECT SUIT MOVED TO NEW JERSEY

A California federal judge refused to dismiss a proposed class action against FCA US LLC by Jeep drivers claiming the automaker hid widespread transmission problems, but she ordered the case transferred to New Jersey, where a similar class action has been proposed. Judge Virginia A. Phillips said FCA's two moves for dismissal of the case—based on claims that the drivers' allegations were insufficient to support the case and demands for a recall—are now moot because the case was transferred to New Jersey.

Lead Plaintiff Dolores Granillo sued FCA, the successor to the Chrysler Group, in state court in September on behalf of all owners and lessors of 2014 and 2015 Jeep Cherokee vehicles with a newly distributed nine-speed automatic transmission, but the automaker had the case removed soon after, citing more than 100 possible class members.

Granillo claims the transmission has numerous design and manufacturing defects, which started within a few months of purchase and can cause "a host of symptoms including difficulty in shifting, noisy shifting, harsh engagement of gears, sudden acceleration and deceleration, loss of power, premature transmission wear, and transmission failure," according to allegations in the complaint. Prior to FCA's launch of the new nine-speed transmission, Granillo claims the technology was "plagued with delays" caused by software glitches, but the automaker went ahead with the release of a transmission that now "operates erratically, causing numerous safety concerns," Granillo said in her initial complaint.

FCA has said more than 20,000 of the purportedly defective vehicles have been sold and the cost of replacing one transmission starts around \$4,000 and can exceed \$5,000. With Judge Phillips' order, Granillo's case will join that of 2014 Jeep Cherokee driver Stacy Oquendo, who in May filed a proposed

class action in New Jersey against FCA over similar transmission issues. Oquendo claims to have encountered numerous transmission problems with her Jeep, which FCA has been unable or unwilling to repair, while concealing the problems and "directing dealers to provide deceptive, false, or misleading explanations" for why repairs are not covered by a warranty.

Both cases are seeking unspecified damages on claims of breach of warranty and violation of the Magnuson-Moss Act, along with individual state consumer protection laws. Granillo is represented by Jordan L. Lurie, Robert Friedl, Terek H. Zohdy and Cody Padgett of Capstone Law APC. The New Jersey case is in the U.S. District Court for the District of New Jersey.

Source: Law360.com

CHIPOTLE FACES CLASS ACTION LAWSUIT FROM INVESTORS

A class action lawsuit has been filed against Chipotle Mexican Grill, accusing the company of providing misleading information to investors. The suit, filed in U.S. District Court by New York-based investor Susie Ong, states the troubled chain restaurant made "materially false and misleading statements" to investors, hid essential information regarding lack of quality controls and lied in public statements following an outbreak of customer illnesses.

The Denver-based company, Chairman M. Steven Eells, President Montgomery F. Moran and CFO John R. Hartung were named as Defendants in the lawsuit. The lawsuit cites an August incident in Simi Valley, Calif. that led to about 100 customers becoming ill from norovirus. It's alleged:

Health inspectors said that the restaurant in question contained dirty and inoperative equipment, equipment directly linked to the sewer, and other sanitary and health violations.

Chipotle had disclosed on Jan. 13 it had been served with a subpoena as part of a federal criminal investigation. The subpoena was issued as part of an inquiry by the U.S. Food and Drug Administration (FDA) Office of Criminal Investigations. Problems for the company began in August when 64 customers in Minnesota were sickened by salmonella. An E. coli outbreak in

October and November spread over nine states, sickening 53 customers. In December, 140 college students were infected with norovirus in Boston after dining at a Chipotle location. The company reported a 14.6 percent decline in sales in the final quarter of 2015, claiming \$14 million to \$16 million will be allotted to dealing with the contamination issues.

Source: Bignewsnetwork.com

XX. THE CONSUMER CORNER

MONITORING MEDICAL DEVICES

Last month, members of a Senate committee investigating multiple outbreaks of deadly superbug infections released a report detailing serious flaws in the U.S. Food and Drug Administration's policies for monitoring medical device safety. The devices at issue, known as closed-channel duodenoscopes, are regularly used in gastrointestinal procedures in hospitals throughout the world. Unfortunately, the design of the scopes makes it extremely difficult for them to be properly cleaned between uses. The report claims that in September 2013, doctors at a Seattle hospital "traced a cluster of antibiotic-resistant infections to a medical device" but inexplicably the FDA failed to issue any public notices regarding the issue until 2015.

This revelation from members of the Senate Committee on Health, Education, Labor and Pensions confirms allegations that Olympus Corp., the leading manufacturer of duodenoscopes, knew of the issues with the device but failed to notify U.S. hospitals and government agencies about the dangers. The report found that unlike open-channel duodenoscopes, closed-channel duodenoscopes can trap and transmit bacteria in tiny crevices and poor-quality sealing found at the end of the scope. The committee estimates that between 2012 and 2015, at least 141 patients in nine U.S. cities were infected due to the contaminated devices. The report also determined that Olympus repeatedly presented misleading information about the dangers of the faulty design and minimized the number of patient infections.

While the Government did begin to investigate the scopes in 2013, the report states that the FDA, “wasted valuable time” in obtaining information on whether the procedure for disinfecting the scopes was adequate. As early as 2013, the Dutch Health Ministry reported that Olympus did not have the data to show that their cleaning instructions worked consistently and effectively. Unlike the FDA’s monitoring of drugs, where they are able to quickly and accurately query information about serious problems, the FDA has no way to seek out independent information about problems linked to medical devices.

The report goes on to conclude that the agency “appears to have been left with such incomplete information that it was unable to develop an accurate sense of the frequency and severity of these outbreaks.” The committee has recommended that the FDA needs to quit depending on device manufacturers and hospitals to report problems caused by medical devices. Instead, the committee recommended that the reporting system should be changed so the devices have unique identifying numbers that can be tracked in pharmacy insurance claims and electronic health records.

If you need more information on any part of the above, contact Jake Jeter, a lawyer in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Jake.Jeter@beasleyallen.com.

FDA RECALLS DRUG-TAINTED WEIGHT-LOSS PRODUCTS

La Trim Plus, Jenesis and Oasis are among weight-loss products with undeclared drugs that federal health officials say consumers should stop using immediately to prevent possible life-threatening interactions with other medications. Sellers nationwide—online and in stores—market the products as natural aids to gain fitness and health. The undeclared ingredients are sibutramine, an appetite suppressant, and phenolphthalein, an ingredient once used in over-the-counter laxatives, the U.S. Food and Drug Administration (FDA) said in a news release. The agency said sibutramine, known to increase blood pressure, endangers patients with a history of coronary artery disease, congestive heart failure, arrhythmias or

stroke. Phenolphthalein could cause cancer with long-term use, officials said, as well as gastrointestinal disturbances and irregular heartbeat.

A Dangerous Concoction, the FDA said in a subhead of an article describing its findings in analyzing 15 different products containing the ingredients sibutramine and phenolphthalein. Sellers of the products tell consumers they will become thirsty and need to drink more water, according to Gary Coody, FDA’s national health fraud coordinator. He added that the sellers won’t tell consumers that’s a side effect of sibutramine. Instead, they will tell them that they may not feel well because they’re detoxifying their body. But the person isn’t feeling well because of the side effects of sibutramine. The recalled products are set out below:

- Asset Bold La Trim Plus Ultimate Formula
- Asset Extreme Oasis Xcel
- Evolve Prime Xcel Advanced
- Infinity Slime-X Zi Xiu Tan
- Jenesis Slim Trim U

The distributor is notifying its customers to dispose of or return the recalled products to it, Bee Extremely Amazed, 85205 Sportsmans Club Road, Jewett, OH 43986. Bee Extremely Amazed has posted an online form, and consumers can also contact the distributor at sales@beextremelyamazed.com or at 844-427-6553. To report adverse reactions or quality problems with the products, consumers can inform the FDA via an online form or request a form by calling 800-332-1088.

Source: Live5news.com

SHOULD EMPLOYEES HAVE TO FACE SIGNING ARBITRATION AGREEMENTS OR RISK LOSING THEIR JOBS?

Employees of the music equipment retailer Guitar Center have been told they must sign mandatory arbitration agreements or they will lose their jobs. The agreement, a copy of which was obtained by The Huffington Post, forces employees to relinquish their rights to sue the company in class action lawsuits over wage violations, workplace discrimination and unjust firings, among other disputes. Sean Lynch, a sales employee at the company’s Las Vegas store, said he and his colleagues were told they must sign the agreement by end of day Friday or they forfeit their jobs. “It was imposed on us and we have

absolutely no choice,” Lynch told HuffPost.

Arbitration agreements have become highly controversial for the way they hamstring employees and weaken their legal power. By sending disputes to an arbitrator, they force workers to pursue their claims individually and outside of court, preempting any collective action. And even though they’re supposed to be neutral third parties, arbitrators are often cozy with the companies that workers are squaring off with, as *The New York Times* detailed in a recent series.

Corporations are increasingly demanding that employees and consumers agree to mandatory arbitration, whether signatories realize it or not. Nowadays, the clauses are often tucked into welcome packets as boilerplate for new hires to sign. But in the case of Guitar Center, it appears the new policy is being imposed suddenly on longtime employees like Lynch, who says he has worked for the company for seven years. He and his co-workers learned about the agreements in December when they signed in to do routine computer training. The PowerPoint-style sessions are usually devoted to matters like music equipment or workplace safety, he said. But in this case, the session was all about arbitration, and why it was good for the company and the worker.

In a question-and-answer sheet on the new policy, Guitar Center says that going to an arbitrator is “less costly, less formal, friendlier and faster” than going through the courts. The document assures a “fair and impartial process,” and notes that Guitar Center will pick up the tab for the arbitration (though not for the employee’s lawyer, if he or she chooses one). The company is clear that the agreement is mandatory: As a condition of new or continued employment, all new and current associates are required to electronically acknowledge and agree to be bound by the Arbitration Program and related agreement.

Lynch circulated a petition in his store and he submitted it to management. He plans to sign the arbitration agreement, but not without protest. Lynch said he can’t afford to lose his job and that his “my main concern with it is that it’s ‘do it or else.’”

It’s reported that Guitar Center has been wrapped up in a “nasty labor dispute” with the Retail, Wholesale and Department Store Union (RWDSU), which provided the arbitration docu-

ments to HuffPost. In 2013, RWDSU won elections at three Guitar Center stores, including Las Vegas, but the union is still without a contract at any of them. The general counsel of the National Labor Relations Board (NLRB) accused the company of refusing to bargain in good faith, leading to a recent two-week trial. A decision hasn't yet been issued. The NLRB has declared that such mandatory agreements "illegally infringe" on a worker's right to "protected concerted activity" with colleagues. While Guitar Center's agreement says workers can still pursue certain claims, such as unemployment insurance or workers' compensation, the language rules out a strikingly broad array of situations—including "any other violation of federal, state or local law."

Arbitration should never be allowed unless the parties all agree pre-dispute to submit claims to arbitration. But the courts haven't always seen fit to agree with that principle. Arbitration is bad for consumers and employees. In my opinion, it can't be justified.

Source: *Huffington Post*

A SIMPLE—BUT EFFECTIVE—EXPLANATION OF HOW BAD ARBITRATION IS



Arbitration that is forced on working men and women is Corporate America's way of closing the court house door to victims of corporate wrongdoing and abuse. While it can't be justified, it's a reality. A cartoon by Dan Wasserman, which appeared on AL.com recently, is as good an argument against forced arbitration as I have ever seen. It explains arbitration extremely well.

The more working men and women learn about how bad arbitration is for them, the more vocal their opposition will become. There are many examples of how Corporate America uses arbitration to their advantage in disputes with employees.

Source: Dan Wasserman

HEARTBURN PILLS LIKE PRIOLOSEC, PREVACID AND NEXIUM ARE LINKED TO KIDNEY DISEASE RISK

Popular heartburn medications such as Prilosec, Prevacid and Nexium could lead to an increased risk of chronic kidney disease, according to a recently released report. Researchers at John Hopkins University said the drugs, known as proton-pump inhibitors (PPI), appear to significantly elevate chances of the disease. The study, set to be published in the journal *JAMA Internal Medicine*, involved more than 250,000 people. Chronic kidney disease can lead to kidney failure and about 13 percent of people in the U.S. suffer from the disease.

As many as 15 million Americans use PPI, which are available both by prescription and over-the-counter in both name-brand and generic forms. "They're very, very common medications," Morgan Grams, an epidemiologist at the Johns Hopkins Bloomberg School of Health, told NPR. The link to kidney disease wasn't seen in medications such as Zantac and Pepcid, which block heartburn in a different way than the PPIs.

Dr. Grams said the study doesn't prove the drugs cause chronic kidney disease and stressed that more research is needed. Experts stressed, however, that the drugs should only be used when needed. "Patients should only use PPIs for (U.S. Food and Drug Administration)-approved indications, and not to treat simple heartburn or (indigestion)," according to Dr. Pradeep Arora, a nephrologist and associate professor at the SUNY Buffalo School of Medicine and Biomedical Science in Buffalo, N.Y.

Source: AL.com

EXPERTS IDENTIFY TOP THREE CYBER SECURITY RISKS FOR 2016

Every year, U.S. citizens are faced with new challenges in the realm of cyber security. Protecting one's personal information from the grasp of hackers can be difficult considering how quickly cyber-criminals adapt to various cyber safeguards. Kaspersky Lab, an international cyber security group headquartered in Russia, reported that approximately 34.2 percent of all computer users experienced at least one Web attack during 2015. Fortunately, statistics like these can give us hints to the top three cyber security threats to guard against in 2016.

DATA BREACHES

Anyone previously unfamiliar with data breaches has probably learned about them in the past three years. When the massive Target data breach exposed the personal information of up to 110 million customers at the end of 2013, headlines trumpeted about what exactly data breaches were and how hackers had been secretly targeting major retailers' point-of-sale (POS) terminals to access customer card information.

In order to keep consumers from being so vulnerable to POS data breaches, banks have switched from magnetic striped cards to EMV cards, also known as "chip cards." Unlike the old cards that hold all of the data needed to commit fraud, the computer chip within the EMV cards work as a microprocessor that creates a new transaction code upon each use. EMV technology was responsible for cutting down on similar cyberattacks in Europe, prompting the U.S. to make the switch last year.

Since then, cybercriminals have moved their sights from retailers and hotel chains to medical data breaches. The Anthem insurance data breach last year opened the eyes of cyber security experts nationwide as more than 100 million patient records were exposed. Once hackers get their hands on people's private medical information, they are able to sell it on the black market at premium prices due to its short supply. Now hospitals, insurance providers and other medical service specialists are

scrambling to ramp up their digital security to face a new year filled with uncertainty.

RANSOMWARE

Ransomware might not be new, but that's not preventing hackers from actively tricking computer users into downloading the malicious software. The goal of ransomware is to make its way onto a user's computer, usually through "phishing" emails with questionable links or downloads, and then encrypt files so the user is unable to open them. If the ransomware successfully encrypts the computer's files, the only way to regain access is to pay a ransom to the hacker.

Smartphones and tablets aren't immune to ransomware, as they, too, can be held ransom if the user opens a malicious text, email or app. The only way to keep ransomware off of your computer and personal electronic device is to be vigilant about what's malicious and what's not. Use caution when downloading any file or app, and make sure the source is legitimate and trustworthy. Users can also prepare for an attack by backing up their device's files regularly. That way if worst comes to worst, they can wipe their drive completely and then restore their files.

BROWSER PLUG-INS

Web browsers are a must for any computer user, so it comes as no surprise to learn that cybercriminals are now attempting to slip a virus into a browser's files by means of a plug-in installation. Adobe Flash became notorious throughout 2015 for exposing web surfers to a number of malicious ads, causing the company to release a seemingly endless string of emergency patches. Thankfully, most computer users don't need Flash as much as they used to thanks to new technology like HTML5. Social media giant Facebook even made the switch from Flash to HTML5 in order to better protect its clients from malicious software downloads.

By thinking before you click and doing some research on how hackers are currently obtaining data, protecting

you and your personal information online becomes a simple exercise in good judgement. If you would like to read more about different cyber security threats, there is a good article on the CNBC website at <http://www.cnbc.com/2015/12/28/biggest-cybersecurity-threats-in-2016.html>.

Sources: Kim Komando, CNBC

XXI. RECALLS UPDATE

We are again reporting a large number of safety-related recalls. We have included some of the more significant recalls that were issued in January. 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.

TAKATA AIRBAG RECALL EXPANDS BY 5 MILLION AS DEATH TOLL HITS 10

U.S. safety regulators recently announced yet another round of recalls for vehicles outfitted with faulty Takata airbag inflators. This came on the heels of the 10th death related to the exploding bags. The recall, which consists of 5 million additional vehicles, brings the total number of cars affected to 24 million and the total number of faulty airbags to 28 million, according to a report from Reuters. Issues with the ammonium nitrate propellant used to inflate the airbags have caused vehicle steering wheels to explode, launching shrapnel at the driver, which has led to injuries and death.

The latest victim of Takata's exploding airbags was a Georgia man who was driving a Ford Ranger pickup truck in December. This was the ninth death in the U.S. and the first one in the world to happen in a non-Honda vehicle. While the majority of the cars recalled thus far are from Honda, this latest recall includes, for the first time, Mercedes-Benz, Saab, Volkswagen and Audi. Repeat offenders include Ford, Honda, Mazda and BMW. The first reported rupture of a Takata airbag happened more than a decade ago and more are expected, including an additional 4

million vehicles that require additional testing of side airbags, according to NHTSA. It's estimated that tens of millions more cars will be recalled in the coming years.

FORD RECALLED ALMOST 400,000 FORD RANGER PICKUPS

Ford Motor Company has recalled almost 400,000 Ford Ranger pickup trucks due to Takata airbag problems. The affected vehicles are all 2004-2006 Ford Rangers built in the U.S. Since this issue was going to printer when we got the notice to these recalls, we don't have any further information at this time. You can go to www.ford.com and click on safety recalls at the bottom of the page and enter your VIN to see if your truck is in the recall. You can also go to NHTSA's VIN lookup at vinrcl.safercar.gov/vin/.

MAZDA TO RECALL 375,000 MORE CARS OVER TAKATA AIR BAG DEFECT

Mazda North American Operations has recalled nearly 375,000 additional vehicles over a discovery that more air bag inflators made by Takata Corp. could be defective. Vehicles being recalled include Mazda's 2004 model RX-8, 2003 to 2008 model Mazda 6 and 2006 to 2007 Mazdaspeed6, according to National Highway Traffic Safety Administration (NHTSA) documents, totaling 374,519 cars in all. Mazda previously recalled 540,000 of the same models in June, but found recently that additional vehicles may be prone to air bag rupture. The inflators in the front passenger air bags are susceptible to rupture in the event of a crash necessitating the deployment of the front passenger air bag. In the event of a crash ... the inflator could rupture, with metal fragments striking the vehicle occupants, potentially resulting in serious injury or death.

About 280,000 Mazda 6 cars in China were also recalled in September over the same air bag issue. Mazda's latest recall is barely a blip on the radar screen when you consider the almost 20 million vehicles were recalled in recent months by a dozen automakers attempting to avoid additional harm from Takata's faulty air bags, causing deaths and injuries. The affected vehicles contain a total of nearly 23 million air bag infla-

tors that need to be replaced, and roughly 4 million of those vehicles have defective air bags on both the driver's side and the passenger's side, which regulators have said are at greater risk of exploding with age and exposure to high humidity.

RENAULT RECALLS 15,800 DIESEL CROSSOVERS TO FIX EMISSIONS GLITCH

Renault is recalling 15,800 Captur models to fix pollution-control systems and will offer voluntary emissions-system updates for about 700,000 vehicles as the automaker seeks to avoid a Volkswagen-type crisis. The recall will probably be limited to the 110-hp diesel version of the Captur subcompact crossover, the company said. Renault will also offer an engine software patch to owners of about 700,000 diesel vehicles to reduce NOx emissions. The engine adjustments will be available for vehicles with the latest Euro 6 generation of diesel engines, the automaker's chief competitive officer, Thierry Bollere, told reporters in a briefing at Renault's headquarters west of Paris.

McLAREN P1 SPORTS CAR RECALLED FOR FAULTY HOOD LATCH

Luxury sports car maker McLaren Automotive has recalled 122 of its P1 hybrid vehicles, which sell for more than \$1 million each, due to the potential for the hood to open while the vehicle is in motion. NHTSA said the affected vehicles have a secondary hood latch that might not re-engage properly, meaning the hood can open while the vehicle is moving if the primary latch is inadvertently released. Certain model year 2014-2015 P1 hybrid vehicles manufactured between March 1, 2013, and October 31, 2015, are affected by the recall, according to the recall notice. McLaren said in documents filed with the recall notice that a pre-sale vehicle inspection identified a failure in the secondary hood latch in March. The automaker said it quickly introduced a process change to carry out additional checks on the hood latch.

An investigation later revealed that the attachment holes fitted on the vehicle for the latch were misaligned with the attachment holes on the latch due to the supplier operator's error. The automaker ultimately introduced a

design change in June to improve the latch even though it was confident its pre-delivery inspection would catch any distorted latches, McLaren said. It concluded at the time that no further action was required for vehicles already in the field.

A customer reported, however, that the hood of his car opened while the vehicle was moving, prompting McLaren to conduct a recall. The luxury car maker said it will notify vehicle owners so dealers can replace the hood latch at no cost. The National Highway Traffic Safety Administration (NHTSA) said 122 vehicles are affected by the recall. According to McLaren, only 375 McLaren P1 production cars were made. The global split of the P1 numbers puts 34 percent, or 128 vehicles, in the Americas, suggesting that the 122 affected vehicles constitutes most, if not all, of the P1s present in the States.

SUZUKI RECALLING DL 1000 MOTORCYCLES

Suzuki Motor of America, Inc. (Suzuki) is recalling certain model year 2014 DL1000 motorcycles manufactured Jan. 17, 2014, to June 5, 2014, and 2015 DL1000 motorcycles manufactured Nov. 5, 2014, to Feb. 6, 2015. The ignition switch terminals of the affected vehicles may corrode if they come into contact with liquid such as salt water. As a result, the motorcycle's electrical power may be disconnected or the switch may be bypassed, preventing the engine from being shut off with the ignition key. If electrical power is lost, the engine would stall, increasing the risk of a crash.

Suzuki will notify owners, and dealers will install a cover for the ignition switch connector, and any corroded ignition lead wire and wire harnesses will be replaced. These repairs will be performed free of charge. The recall was expected to begin Jan. 22, 2016. Owners may contact Suzuki customer service at 714-996-7040. Suzuki's number for this recall is 2A53. Owners may also contact the National Highway Traffic Safety Administration Vehicle Safety Hotline at 888-327-4236 (TTY 800-424-9153), or go to www.safercar.gov.

BRITAX ANNOUNCE RECALLS OF INFANT CAR SEATS DUE TO FALL HAZARD

Britax Child Safety Inc., of Fort Mill, S.C., has recalled its Britax B-Safe 35 and B-Safe 35 Elite infant car seats and travel systems. The car seat carry handle can crack and break allowing the seat to fall unexpectedly, posing a risk of injury to the infant. This recall involves Britax B-Safe 35 and B-Safe 35 Elite infant car seat and travel systems manufactured between Oct. 1, 2014, and July 1, 2015. The product can be used as a rear-facing only car seat and as an infant carrier. The car seat/carriers have a canopy, black shell and base, and were sold in a variety of colors. The Britax logo is printed on both sides of the seat shell and on the carry handle grip. Model numbers and the date of manufacture (DOM) are printed on a label located at the back of the infant car seat/carrier shell. Britax has received 74 reports of handles developing fractures, cracks and/or breaking while in use, including one report of an infant who received a bump on the head when the carrier fell to the ground.

The seats were sold at Babies R Us, buybuy BABY, Target and other stores nationwide and online at Amazon.com, Diapers.com and other online retailers from November 2014 to January 2016 for between \$210 and \$250. Consumers should immediately stop carrying the car seat by the handle until the repair is installed. All consumers who have previously registered their product with Britax will automatically receive a free repair kit. To register to receive a repair kit or verify registration, visit www.bsaf-e35recall.com. Consumers can continue to use the car seat when secured in a vehicle or on a stroller. Contact Britax at 800-683-2045 from 8:30 a.m. and 5:45 p.m. ET Monday through Thursday, 8:30 a.m. to 4:45 p.m. ET on Friday, or by email at Britax.Recall@britax.com. Consumers can also visit the company's website at www.us.Britax.com and click on "Safety Notice" at the top right of the page. Photos available at <http://www.cpsc.gov/en/Recalls/2016/CPSC-NHTSA-and-Britax-Announce-Recall-of-Infant-Car-Seats/>

WALMART RECALLS RIVAL GRIDDLES DUE TO SHOCK HAZARD

About 330,000 Rival brand griddles have been recalled by Walmart Stores

Inc., of Bentonville, Ark. The heating element can crack and water can get inside, posing a shock hazard when the griddle is plugged into an electrical outlet. This recall involves Rival brand electric griddles with model number XJ-14207. The griddles are black and measure 20 inches long by 10.5 inches wide. "Walmart" and the model number are printed on a label molded into the bottom of the griddle. "Rival" is printed on the outside edge of the griddle and on the griddle's temperature dial.

The griddles were sold exclusively at Walmart stores nationwide and online at Walmart.com from July 2015 through December 2015 for about \$20. Consumers should immediately unplug and stop using the recalled griddles and return them to any Walmart store for a full refund. Contact Walmart at 800-925-6278 between 7 a.m. to 9 p.m. CT Monday through Friday, 9 a.m. to 9 p.m. CT on Saturday and between 12 p.m. and 6 p.m. CT Sunday, online at www.walmart.com and click on "Product Recalls" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Walmart-Recalls-Rival-Griddles/>

PIER 1 IMPORTS RECALLS SWINGASAN CHAIRS AND STANDS DUE TO FALL HAZARD

Pier 1 Imports of Fort Worth, Texas, has recalled its Swingasan® chairs and stands. The suspension hardware on the chair and stand can break, or the stand can become unstable during use, posing a fall hazard. Consumers should immediately stop using the chairs and stands and contact Pier 1 Imports for a free repair kit or return the chair and stand to a Pier 1 Imports store for a full refund. There is no repair kit for the Podasan Mocha and Orange Swingasan chairs. The chairs and stands were sold separately. The chair hangs from a steel stand and is made of a wrought iron frame covered with woven plastic wicker. It was sold in various colors and designs. The stands are made of steel and were sold in four colors. Pier 1 Imports has received 101 reports of incidents with the chairs and stands. This includes 93 reports of the chair with stand becoming unstable during use and tipping over, resulting in 23 injuries. There have been eight reports of the suspension hardware failing, including four reports of injuries.

The chairs were sold exclusively at Pier 1 Imports stores nationwide and online at www.Pier1.com from January 2010 through August 2015 for between \$200 and \$400 for the hanging chair and stand. Contact Pier 1 Imports toll-free at 855-513-5140 from 8 a.m. to 7 p.m. CT Monday through Friday, 9 a.m. to 5 p.m. CT Saturday or 10 a.m. to 6 p.m. CT Sunday or online at www.pier1.com and click on "Product Notes & Recalls" at the bottom of the page for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Pier-One-Imports-Recalls-Swingasan-Chairs-and-Stands/>

COST PLUS WORLD MARKET RECALLS TOVIN CHAIRS DUE TO FALL HAZARD

About 1,800 Tovin Chairs have been recalled by Cost Plus Management Services Inc., of Oakland, Calif. The legs on the chair can bend or break, posing a fall hazard to the user. This recall involves upholstered Tovin chairs sold in a black and white print. The chairs are 32 inches tall by 23 inches wide, and have a wooden frame with clear floor glides. SKU number 507667 is printed on a UPC sticker affixed to the underside of the chair. Cost Plus World Market has received five reports of the chair legs bending or breaking. No injuries have been reported.

The chairs were sold exclusively at Cost Plus World Market and World Market stores nationwide and online at www.worldmarket.com from July 2015 through October 2015 for about \$240. Consumers should immediately stop using the recalled chair and return it to any Cost Plus World Market or World Market store for a full refund. Contact Cost Plus World Market toll-free at 877-967-5362 from 7 a.m. to midnight ET daily or online at www.worldmarket.com and click on "Product Recalls" for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Cost-Plus-World-Market-Recalls-Tovin-Chairs>

STEELCASE RECALLS CHAIRS DUE TO FALL HAZARD

About 17,000 "Rocky" model swivel chairs have been recalled by Steelcase Inc., of Grand Rapids, Mich. The screws connecting the seat and back to the base of the chair can detach, posing a

fall hazard to the user. This recall involves 12 models of Steelcase "Rocky" style swivel chairs manufactured between 2005 and 2015. The molded polypropylene chairs were sold in black and white with the option of an upholstered seat and back, seat only or no upholstery. The chairs have a foldable seat, molded-in arms and either a four-star wheel base or a five-star wheel base. Model numbers can be found on the underside of the seat. The company has received 311 reports of incidents, including one report of an injury.

The chairs were sold by Steelcase independently owned dealers nationwide from August 2005 to June 2015 for between \$500 and \$1,550. Consumers should immediately stop using the recalled chairs and contact Steelcase to arrange for a free repair. Contact Steelcase at 800-210-5109 between 8 a.m. and 5 p.m. ET Monday through Friday or online at www.steelcase.com <<http://www.steelcase.com>> and click on "Rocky Chair Recall" for more information. Consumers can also email Steelcase at retrofits@steelcase.com <<mailto:retrofits@steelcase.com>>. Photos available at <https://www.cpsc.gov/en/Recalls/2016/Steelcase-Recalls-Chairs/>

WEST ELM RECALLS 6,000 BAR AND COUNTER STOOLS DUE TO FALL HAZARD

Retailer West Elm is recalling 6,000 saddle bar and counter stools due to a potential fall hazard. The U.S. Consumer Product Safety Commission (CPSC) announced the recall on Tuesday after receiving six reports of the stool legs breaking. One injury was reported. A total of 16 models are part of in the recall, including eight bar stools and eight counter height stools. In addition to the 6,000 units, the recall covers 100 sold in Canada. Made in China, they were sold at West Elm stores, online at www.westelm.com and from the West Elm catalog from July 2013 through November 2015. Single stools retailed from \$370 to \$500, and a set of two retailed from \$740 to \$1,000. Consumers should immediately stop using the recalled stools and contact West Elm for information on returning the items for a full refund. The store is also contacting known purchasers directly. West Elm, a unit of Williams-Sonoma, can be contacted toll free at 844-824-8911 from 7 a.m. to midnight Eastern time daily.

More information also is available online at www.westelm.com by clicking on the Safety Recalls section under the "About Us" link at the bottom of the page.

ALTAR'D STATE RECALLS MONOGRAMMED COFFEE MUGS DUE TO FIRE HAZARD

Creative Co-Op, Inc., of Memphis, Tenn. has recalled about 14,000 Monogrammed Coffee Mugs. The coffee mugs are mislabeled as microwave safe. If microwaved, the metallic paint accents on the coffee mugs can spark, posing a fire hazard. The recall involves white ceramic 16-ounce coffee mugs with gold-painted monograms and accent rims. The mugs have a textured design resembling a golf ball, and a "rope" style handle. "Microwave/Dishwasher Safe" is printed in a black panel on the bottom of the coffee mugs. The company has received one report of a coffee mug sparking during microwaving. No injuries have been reported.

The mugs were sold at Altar'd State stores nationwide from October 2015 through December 2015 for about \$15. Consumers should immediately stop using the recalled coffee mugs and contact Altar'd State for instructions on returning the product for a full refund. Contact Altar'd State at 800-284-7348 from 9 a.m. to 5 p.m. ET Monday through Friday or online at www.altardstate.com and click on "Monogrammed Coffee Mug Recall" for more information. Photos available at <https://www.cpsc.gov/en/Recalls/2016/Altard-State-Recalls-Monogrammed-Coffee-Mugs/>

IKEA RECALLS TOY DRUMS AND DRUMSTICK SETS DUE TO CHOKING HAZARD

About 2,000 LATTJO Tongue drums and 1,300 LATTJO Drumstick sets have been recalled by IKEA North America Services LLC, of Conshohocken, Penn. The rubber ball on the drumsticks can detach or be unscrewed, posing a choking hazard. The recall includes LATTJO Tongue Drum and LATTJO Drumstick set. The LATTJO Tongue Drum is a solid birch rectangular-shaped drum with a turquoise-dot print on the front and two solid red circles on top. The drum measures about 8 inches long by 2-3/4 inches wide by 2-3/4 inches deep. The drum comes with a seven-inch mallet with a turquoise painted

handle and black rubber ball on the end. IKEA and LATTJO are printed on a label on the bottom of the drum.

The LATTJO Drumstick set includes two solid birch drumsticks, two brushes and two mallet-type drumsticks with black rubber balls on the ends. The set was sold in a turquoise polyester roll-up pouch with a red and white striped fabric panel in the center. The pouch measures about 15 inches long by 10 inches wide. IKEA and LATTJO was printed on a label attached to the pouch. IKEA has received six reports of the rubber ball on the end of the drumsticks detaching or being unscrewed. These reports were from staff in IKEA stores in Germany, Denmark, Spain and the Netherlands. No incidents or injuries have been reported in the United States.

They were sold exclusively at IKEA stores nationwide and online at www.ikea-usa.com from November 2015 through December 2015 for about \$10 for the LATTJO tongue drum and \$15 for the LATTJO drumstick set. Consumers should immediately take the recalled drum and drumstick sets away from children and return them to IKEA for a full refund. Contact IKEA toll-free at 888-966-4532 anytime or online at www.ikea-usa.com and click on Press Room at the bottom of the page then Product Recalls at the top of the page for more information. Photos available at <https://www.cpsc.gov/en/Recalls/2016/IKEA-Recalls-Toy-Drums-and-Drumstick-Sets/>

BRITAX RECALLS STROLLERS AND REPLACEMENT TOP SEATS DUE TO CHOKING HAZARD

Britax Child Safety Inc., of Fort Mill, S.C., has recalled its Britax B-Ready strollers. The foam padding on the stroller's arm bar can come off in fragments if the child bites the arm bar, posing a choking hazard. This recall involves Britax B-Ready strollers and B-Ready replacement top seats that were sold separately. The B-Ready strollers have a silver or black frame with a solid-colored top seat in a variety of colors. The Britax logo is on the stroller's side hinges and foot rest. B-Ready is printed on the sides of the stroller frame.

The stroller's model number and date of manufacture are printed on a label on the stroller's frame between the front wheels or on the inside frame that connects to the back right wheel. The

replacement top seats were sold separately in a variety of colors and fit into the stroller's frame. The replacement top seat's model number and date of manufacture are printed on a black label on the right side tube above the adjuster button, under the fabric cover. Britax has received 117 reports of children biting the arm bar foam padding, including five reports of children choking or gagging on foam fragments.

The strollers were sold at Babies R Us, buybuy Baby, Target and other stores nationwide and online at Amazon.com, Diapers.com and other websites from April 2010 through January 2016 for about \$500 for the stroller. The replacement top seats were sold by Britax from April 2010 through January 2016 for about \$150. Consumers should immediately remove the arm bar from recalled strollers and replacement top seats and contact Britax for a free black, zippered arm bar cover and a warning label to apply to the strollers and replacement top seats. Consumers can continue to use their strollers without the arm bar attached. Contact Britax at 800-683-2045 from 8:30 a.m. to 5:45 p.m. ET Monday through Thursday and from 8:30 a.m. to 4:45 p.m. ET on Friday, by email at Britax.Recall@britax.com or online at www.us.britax.com and click on Safety Notice at the top right, or www.B-ReadyRecall.com for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Britax-Recalls-Strollers-and-Replacement-Top-Seats/>

CHILDREN'S COUGH SYRUP RECALL

Perrigo Company has recalled boxes of its grape- and cherry-flavored children's cough syrups after discovering a potential defect with the dosing cups. The global company, which specializes in over-the-counter products, has recalled two batches of its children's guaifenesin grape liquid (100mg/5mL) and three batches of children's guaifenesin DM cherry liquid (100mg guaifenesin and 5mg dextromethorphan HBr/5 ml) in 4-ounce bottles with a dosage cup. Perrigo said some cups have incorrect dose markings. Chairman and CEO Joseph C. Papa said the company has not received reports of accidental overdose related to the medication. "There have been no reports of adverse events to Perrigo as a result of the incorrect dosage markings," he said. "Perrigo is

taking this action to maintain the highest possible product quality standards for our retail customers and consumers.” Children who overdose on guaifenesin DM may experience hyper excitability, rapid eye movements, changes in muscle reflexes, ataxia, dystonia, hallucinations, stupor, and coma. Other effects have included nausea, vomiting, tachycardia, irregular heartbeat, seizures, respiratory depression, and death. Recalled lots, along with their corresponding branded labels, are listed below:

GUAIFENESIN GRAPE LIQ 4 OZ

Label	Lot number	Expiry
H.E.B	5LK0592	08/2017
CVS	5MK0340	08/2017

GUAIFENESIN DM CHRY LIQ 4 OZ

Label	Lot number	Expiry
Sunmark	5LK0528, 5LK0630	03/2017
Rite-Aid	5LK0528, 5LK0630	03/2017
Topcare	5LK0528, 5LK0630, 5LK0779	03/2017
Kroger	5LK0528, 5LK0630	03/2017
GoodSense	5LK0528	03/2017
Dollar General	5LK0630	03/2017
Care One	5LK0630	03/2017
CVS	5LK0630	03/2017

If you have purchased one of the recalled products, call 888-345-0479 from 8 a.m. to 10 p.m. ET Monday through Friday or visit mucusreliefrecall.com. You may report adverse reactions or quality problems through the U.S. Food and Drug Administration’s Adverse Event Reporting program: Online: www.fda.gov/medwatch/report.htm; Regular Mail: use postage-paid FDA form 3500 available at: www.fda.gov/MedWatch/getforms.htm, then complete and return to the address on the pre-addressed form. Fax: 1-800-FDA-0178

CHERYL & Co. RECALLS JINGLE BELL ORNAMENTS DUE TO LACERATION HAZARD

About 25,000 box sets of Cheryl’s Jingle Bell ornaments with cookies and confections have been recalled by Cheryl & Co., of Westerville, Ohio. The decorative cutouts on the ornament have sharp metal edges that pose a laceration hazard to consumers. This recall involves Cheryl’s Jingle Bell ornaments that were sold with 64 cookies and con-

fections. The round aluminum ornaments measure approximately 4 inches in diameter, have four snowflake cutouts and were sold in a set of eight units per box (two each of red, green, gold and silver). QVC has received 140 reports of consumers who received finger cuts while handling the ornaments, including four consumers who required stitches.

The ornaments were sold exclusively by QVC televised shopping programs and online at QVC.com from November 2015 to December 2015 for about \$55. Consumers should immediately stop using the recalled ornaments and return them to QVC for a full refund. Consumers are urged to use caution while handling the product. QVC will mail all known customers instructions for returning the product. Contact QVC at 800-367-9444 between 7 a.m. and 1 a.m.

ET daily or visit the company’s website at www.qvc.com and click on Product Recalls for more information. Photos available at <http://www.cpsc.gov/en/Recalls/2016/Cheryl-And-Company-Recalls-Jingle-Bell-Ornaments/>

WALT DISNEY PARKS AND RESORTS INFANT BODYSUITS RECALLED DUE TO CHOKING HAZARD

Parents who recently purchased (or received as a gift) a Darth Vader or Disneyland 60th Anniversary infant bodysuit are being asked to stop using the bodysuit and to contact Walt Disney Parks and Resorts for instructions on returning the bodysuits for a full refund. According to the Consumer Product Safety Commission (CPSC), the snaps on the bodysuits can detach, posing a choking hazard to young children. This recall involves two styles of infant one-piece bodysuits with a three snap button closure. The garments are 100 percent cotton. The Darth Vader Infant Bodysuits were sold in five sizes: 3M, 6M, 12M, 18M and 24M. The garment has a gray body with black sleeves, light saber with the text: “If you only knew the power of THE DARK SIDE.”

The Disneyland 60th Infant Bodysuits have a light blue body with royal blue sleeves and trim. The artwork on the front of the bodysuit includes Mickey Mouse, Goofy, Donald Duck and Pluto in front of the Disneyland Castle. The Disneyland 60th bodysuits were sold in

four sizes: 6M, 12M, 18M and 24 M. The text on the front of the garment reads “60th Disneyland Resort, Diamond Celebration.” These bodysuits were sold at Walt Disney World® Resort in Lake Buena Vista, Florida, Disneyland® Resort in Anaheim, California, the Treasure Ketch Shop on the Disney Wonder® and Mickey’s Mainsail located on the Disney Magic®, Disney Dream® and Disney Fantasy® cruise ships from February 2015 through November 2015 for about \$20.

Parents and caregivers are asked to contact Walt Disney Parks and Resorts toll-free at 844-722-1444 from 9 a.m. to 5:30 p.m. ET Monday through Friday, or online at www.disneyarks.com, and click on “Recall Notice” for more information.

BEEF PRODUCTS RECALLED DUE TO “EXTRANEOUS WOOD”

Huisken Meat Company, a Sauk Rapids, Minn., establishment, is recalling approximately 89,568 pounds of beef products that may be contaminated with extraneous wood materials. The Sam’s Choice Black Angus Vidalia Onion items were produced on various dates between Nov. 19, 2015, and Dec. 9, 2015.

The following products are subject to recall: 2-lb. boxes containing 6 pieces of “Sam’s Choice Black Angus Beef Patties with 19% Vidalia® Onion.” with Use By dates 05/17/2016; 05/29/2016; and 06/06/2016. The products subject to recall bear establishment number “EST. 394A” inside the USDA mark of inspection. These items were shipped to retail locations nationwide. The foreign material originated with an incoming ingredient and was discovered during production. There have been no confirmed reports of adverse reactions due to consumption of these products. Anyone concerned about an injury or illness should contact a healthcare provider. Consumers who have purchased these products are urged not to consume them. These products should be thrown away or returned to the place of purchase. Consumers with questions about the recall can contact Debbie Green, Customer Service Manager, at (618) 857-4011

Once again there have been a fairly large number of recalls since the last issue. We mentioned some auto recalls in other sections and didn’t include them in the recalls section. While we

weren't able to include all of the recalls 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 and www.RightingInjustice.com. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

XXII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

DEBORAH DRINKARD

Deborah Drinkard has been with the firm for 15 years as a Medical Records Coordinator for Melissa Prickett in our Mass Torts Section. Deborah is married to Lamar. She has two girls, Rebecca and Ryan, three stepchildren, nine grandchildren and eight great-grandchildren. Deborah says she loves spending time with her family. She has a sister who she says is very dear to her that also works at the firm, Pamela Murphy. Deborah loves working in the yard and taking walks in the woods with her grandkids. She has 18 goats on her farm in China Grove and really enjoys them. She is a Nascar fan—especially Jeff Gordon—and loves Alabama football. We are fortunate to have Deborah with the firm.

WILLIE FRED GAMBLE

A veritable fixture at Beasley Allen is Mail Clerk, Fred Gamble. As he makes his rounds a few times each day to deliver mail, paperwork and packages, or to run errands for lawyers and employees, Fred, who is known as "Big Popi," always makes time to greet the folks around him. If it's your birthday, you may be lucky enough to be treated with a special "Happy Birthday" song! In addition to his regular job duties, Fred takes special pleasure in the opportunity Beasley Allen provides him to participate in a number of mission works. His projects range from helping the homeless, participating in Sheriff's Department programs for at-risk chil-

dren, and volunteering at the Salvation Army, to raising funds for his Forgotten Children ministry through seasonal Boston butt sales.

Fred says his closest family is his work family, and his church family at St. James United Methodist Church, and he is delighted to get to spend his working days around those people he feels closest to. He says he takes great joy from the fellowship he feels at work, and he especially likes the opportunity to sing to someone, or if he sees that someone is having a bad day, to tell them a funny story or a joke to try to brighten their day. In his off time, Fred likes to hunt, fish and go to the movies. We are fortunate to have "Big Popi" with us and without a doubt "Big Popi" has been a blessing to lots of folks. We have truly been blessed by his being with us.

XXIII. SPECIAL RECOGNITIONS

ABOTA NAMES RANDALL COLE 2015 TRIAL JUDGE OF THE YEAR

The Alabama Chapter of the American Board of Trial Advocates (ABOTA) has named Alabama's longest-serving state judge, Circuit Judge Randall Cole, as recipient of its 2015 Trial Judge of the Year Award. "I was quite humbled by that," Judge Cole told AL.com of the inaugural award. He added: "It was surprising but very much appreciated."

ABOTA is known as a national association of experienced trial lawyers, made up of both Plaintiff and Defense lawyers, as well as judges, dedicated to protecting the jury system and educating Americans on the importance and history of the right to trial by trial. Although the Alabama Chapter only has 109 members, the organization claims approximately 7,300 lawyers as members across the nation.

Frank Stakely, President of the Alabama Chapter of ABOTA, said because the jury system has been under attack in recent years, the association wanted to take the opportunity to "highlight as a role model those judges who do it the right way." Frank stated for AL.com:

The lawyers who practice in his court think highly of him. He

reads motions, timely rules, and follows the law irrespective of the popular opinion. Though he is from a rural part of the state, make no mistake: His reputation for honor, integrity and ethics and for being a great judge is a statewide reputation.

Judge Cole has presided over numerous high-profile cases in Alabama, including the sentencing of a woman to death for her conviction in the 1982 slaying of a 13-year-old, and the 1997 rape of a 10-year-old girl by the former mayor of Crossville, Ronald West.

Judge Cole is known as one of the creators of drug courts, which aim to keep those with addiction problems out of jail and in recovery if possible. He also serves on the Judicial Inquiry Commission, which was responsible for investigating and bringing ethics charges against Alabama Supreme Court Chief Justice Roy Moore in 2003, and has served as its chairman for nearly a decade.

Having taken the oath of office back in 1974, Judge Cole has seen many changes over the course of his four decades on the bench. One of the most notable changes he mentioned is the introduction of the Internet, which has allowed for paperless court filings and legal web searches in place of fumbling with books. Another change, he notes, is back when Judge Cole first took the bench, the only reasons eligible for divorce were claims of cruelty or adultery; however, claims of incompatibility have now been added to the list.

Judge Cole, a very young 72, has announced that he plans on retiring in three years at the end of his current term due to Alabama's mandatory retirement rules for judges. He and his wife Barbara, a retired teacher, have raised one son together, who is now a surgeon in Fort Payne, Ala. Judge Randall Cole is an outstanding judge and a great American and he is certainly deserving of this award.

Source: AL.com

XXIV. FAVORITE BIBLE VERSES

Sandra Walters, who is the Section Head Administrator for the firm's Toxic

Torts Section, sent in her favorite verse for this issue.

For I am convinced that neither death nor life, neither angels nor demons, neither the present nor the future, nor any powers, neither height nor depth, nor anything else in all creation, will be able to separate us from the love of God that is in Christ Jesus our Lord. Romans 8:38-39

Kristi Smith, a Legal Assistant in our Toxic Torts Section, said Joshua 1:9 had special meaning to her. While she battled cancer, she says her dad would remind her of the verse.

Have I not commanded you? Be strong and courageous. Do not be afraid or discouraged for the Lord your God will be with you wherever you go. Joshua 1:9

Kim Owen, a Legal Assistant working with David Dearing in the firm's Toxic Torts Section, supplied Matthew 28:1-5. Kim says these scriptures tell her that God still sends angels and He still moves stones.

After the Sabbath, at dawn on the first day of the week, Mary Magdalene and the other Mary went to look at the tomb. There was a violent earthquake, for an angel of the Lord came down from heaven and, going to the tomb, rolled back the stone and sat on it. His appearance was like lightning, and his clothes were white as snow. The guards were so afraid of him that they shook and became like dead men. The angel said to the women, "Do not be afraid, for I know that you are looking for Jesus, who was crucified. Matthew 28:1-5

Courtney Hill, a Staff Assistant in the firm's Mass Torts Section, sent in 2 Corinthians 12:9. She says this verse speaks so much life to her. She says that even when we think what we're going through may be unbearable, God tells us to rest upon Him and He will give us the strength to make it through. It is so relieving to know that God loves us that much that not even the worst thing can take us down if we trust in Him. It's through our weakest moments in our lives that God's grace is shown. The power of Jesus' grace is not fully seen until weakness is fully acknowledged. The moment we are overwhelmed with

absolute helplessness, is the moment we are ready to hear Jesus say, *I'm all the grace you need.*

But he said to me, "My grace is sufficient for you, for my power is made perfect in weakness." Therefore I will boast all the more gladly about my weaknesses, so that Christ's power may rest on me. 2 Corinthians 12:9

Angela D. Talley, a Legal Assistant to Mike Crow in the firm's Personal Injury/Products Liability Section, says John 14:6-7 is her favorite verse because it is the truth. She says it's the only way to the Father and salvation.

Jesus saith unto him, I am the way, the truth, and the life: no man cometh unto the Father, but by me. John 14:6-7

Angie M. Taylor, a Legal Secretary in the Mass Torts Section, reminds us that Love is mentioned in the Bible 310 times—131 in the Old Testament and 179 in the New Testament. God loves us so much that He sent Jesus to die for our sins to reconcile us to Him so we can have a one-on-one relationship with our Father God now and forever. Angie says her favorite verse is Corinthians 13: 7-8.

Love bears all things, believes all things, hopes all things, endures all things. Love never ends. As for prophecies, they will pass away; as for tongues, they will cease; as for knowledge, it will pass away. Corinthians 13:7-8

XXV. CLOSING OBSERVATIONS

GOVERNMENT SCIENTISTS SAY 2015 THE WARMEST YEAR ON RECORD

Government scientists say average surface temperatures on Earth were higher last year than any time since modern record keeping began in 1880. Average temperatures in 2015 were 0.23 degrees Fahrenheit and 0.13 Celsius higher than the previous record set in 2014. That much of an increase has happened only once, in 1998. Scientists from NASA and NOAA (the National Oceanic and Atmospheric Administra-

tion) released the findings today. Both agencies analyzed the available data independently, NASA said.

El Nino, the warming effect caused by warmer Pacific Ocean waters, did cause some of the global surface warming, scientists said. But they said the planet's average surface temperature is 1.8 degrees Fahrenheit warmer than the late 19th century, and they attribute that to increased carbon dioxide and other "human-made emissions into the atmosphere."

"Last year's temperatures had an assist from El Niño," Goddard Institute for Space Studies Director Gavin Schmidt said, "but it is the cumulative effect of the long-term trend that has resulted in the record warming that we are seeing." NASA Administrator Charles Bolden said:

Climate change is the challenge of our generation, and NASA's vital work on this important issue affects every person on Earth. Today's announcement not only underscores how critical NASA's Earth observation program is, it is a key data point that should make policy makers stand up and take notice—now is the time to act on climate.

Not every part of the world saw the record temperatures, a fact NASA attributed to "weather dynamics." For example, the 48 contiguous states saw only the second-warmest temperatures on record in 2015. Nevertheless, I believe that anybody—and that includes lots of "politicians"—who doesn't believe in climate change will soon have to at least "question" their position. It's quite clear that those who should know—the scientific community—see climate change as real and a most serious problem.

Source: AL.com

OUR MONTHLY REMINDERS

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

2 Chron 7:14

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

Edmund Burke

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

Isaiah 10:1-2

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

Martha Washington (1732—1802)

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

Louis Brandeis, 1937
U.S. Supreme Court Justice

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

Vincent Lombardi

XXVI. PARTING WORDS

A great deal is being written about football, both at the NFL and college levels, and that will continue. The NFL playoffs are generating tremendous

interest and that will be followed by the Super Bowl. Of course recruiting will also be a hot topic through signing day on the third of this month. That will be followed by weeks of evaluations of the signing classes by the schools. In Alabama, the SEC schools will be the topic of conversation. The classes signed by Auburn and Alabama will be described daily. We will be hearing lots of talk about “stars,” with the emphasis being on 5-stars. Sometimes it’s good to step back and look at football in a different perspective.

I read an article written on Jan. 13 by Jeff Shearer featuring Dr. Rob Pate, a four-year starter for Auburn, who graduated in May of 2002. Rob was a great player making All-SEC as a safety and is now an optometrist. He has been very successful in his professional life. Rob and his wife Dana have five children.

Rob spoke at a banquet on the night before the 29th Alabama-Mississippi All-Star game played in December in Hattiesburg, Miss. His audience was made up of 80 of the best senior football players in Alabama and Mississippi, along with their parents and coaches. Rob’s message was one that all young folks need to hear. While he shared lessons learned in athletics, Rob also shared his strong faith openly and without reservation. Interestingly, Rob had played in the All-Star game 18 years ago, serving as captain for his team. Significantly, Rob did not spend his 10 minutes discussing his own athletic career, but instead gave a message to the audience that is much more important, especially to the young All-Stars.

Rob made 10 points during his speech and I will list them for your edification. Rob said: “First and more importantly, center your life around God; choose your friends wisely; be your own advocate; have fun and stay hungry; expect change because it will come; expect adversity because it will come; keep in touch with your teammates from this game; keep in touch with your families, your high school coaches and teammates; from this point forward, consider yourself on a long-term job interview;

and have an eternal perspective.” Rob had lots to say under each of his 10 points. I encourage you to get Jeff’s article and read it.

I am told the players listened to every word spoken by Rob Pate. They could identify with him and that is extremely important. Jeff Shearer had this to say about Rob’s talk: “In his 10-minute address, Pate’s 10-point presentation so captivated the crowd, it was as if he were the quarterback in the huddle in the final minute of a tie game.” Jeff called the talk “a teachable moment for the All-Stars.” Most all of these young athletes will go on to play in college. Looking back, I wish I had heard a talk like this before I headed off to my first year in college.

My prayer today is for more men and women like Dr. Rob Pate, who are willing to share their faith with young people and are not hesitant to do it. A person like Rob Pate—a former athlete—who has been successful after graduating, can motivate and inspire youngsters. It’s very important for young people to hear the message the 80 All-Stars heard from Rob. I encourage each of us to be encouragers and especially for youngsters. God will bless our efforts. These verses will help us.

Therefore everyone who bears these words of mine and puts them into practice is like a wise man who built his house on the rock. The rain came down, the streams rose, and the winds blew and beat against that house; yet it did not fall, because it had its foundation on the rock. Matthew 7:24-25

We have this hope as an anchor for the soul, firm and secure. It enters the inner sanctuary behind the curtain. Hebrews 6:19

Those who live according to the flesh have their minds set on what the flesh desires; but those who live in accordance with the Spirit have their minds set on what the Spirit desires. Romans 8:5

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