THE JERE BEASLEY REPORT

JUNE 2017

Beasley Allen

BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
Attorneys at law

helping those who need it most since 1979

Distributed to over 40,000 subscribers each month

BeasleyAllen.com

I CAPITOL OBSERVATIONS

The Stalemate In Washington Hurts All Americans

Congress has been virtually locked down since the Trump Administration began in January. Nothing of significance has passed both houses of Congress and been signed into law. Neither does it appear that things will change any time soon. The Trump Administration has shown that it doesn't have the ability to govern. All of the missteps by President Trump and those very close to him have made Congress' job very difficult. There is a great deal of frustration today over the state of affairs in our nation's capitol and that frustration is definitely justified.

From the very beginning, the Trump Administration has taken an "anti-regulation" stance, which is totally against the interests of all Americans. A prime example was the executive order signed by the president on Jan. 30 that directs federal agencies to repeal two federal regulations for every new regulation passed. Many of Trump's cabinet appointees have promised to strip away protections in place that have benefited both consumers and businesses.

The administration also is using federal preemption as a tool in a blatant attempt to destroy the courts and to take power away from state governments. As the Hightower Lowdown reports, on the chopping block are rules and regulations meant to "ensure workplace safety, provide consumer protection, establish sanctuary cities, expand voting rights, pre-empt air and water pollution, reduce gun violence, maintain public oversight of for-profit charter schools, improve children's health, and mitigate climate change." Thus far, it's quite clear that there is an agenda that is very much against ordinary citizens.

The president, as well as his appointees in critically important positions, appear determined to destroy the environment. To deny global warming and claiming it to be a hoax with all of the scientific evidence telling us that it is real is very troubling. Our nation should be taking the lead in controlling carbon emissions. Instead, we are now doing exactly the opposite. Hopefully, the president will do an about face and face reality. He has a responsibility to do so. A failure in that area of concern will put this and future generations at great risk from a health and safety perspective.

One of the major issues facing the new administration involves health care. Donald Trump pledged that as president he would support the Republican agenda to do away with the Affordable Care Act (ACA) (otherwise known as "Obamacare") and replace it with a new plan that he promised would offer "cheaper, better" health care that still assured broad coverage for all.

The American Health Care Act (AHCA) (now known as "Trumpcare") was first presented by House Republicans on March 6, 2017, as a budget reconciliation bill. By tying it to the federal budget, the bill couldn't be filibustered, and it could be passed by a simple majority. Trumpcare aims to repeal parts of the ACA that are tied to the federal budget, such as the "individual mandates" that require every person to have insurance or pay a fine. The House of Representatives passed Trumpcare on May 4 in a very close vote. It now appears the Senate will write its own version of the bill instead of passing the current House bill. Therefore, it's back to the drawing board for Trumpcare.

The federal budget also contains some surprising cuts and most disturbing cuts. They include drastic cuts to Social Security, Medicare and Medicaid—all programs Trump pledged to preserve while on the campaign trail. Specifically, the proposed budget targets Social Security Disability Insurance and possibly Social Security's Supplemental Security Income. The budget also includes $800 billion in cuts to Medicaid, which the Congressional Budget Office estimates would eliminate coverage for 23 million people by 2026. The budget proposes to repeal a tax on high-income Americans that funds the Medicare part A trust fund. That is a gift to the super rich and is an anti-American as it gets.

Meanwhile, the entire governmental process is hamstringed by the ongoing investigations into an ever-growing list of claims that the Administration has been illegally influenced by Russia. The growing scandal includes claims that President Trump divulged top-secret information to visiting Russian officials. If true, this is a most serious charge against a sitting president of the United States. The Justice Department has appointed a special counsel, former FBI head Robert Mueller, to conduct an independent investigation into charges of corruption.

Is it possible, at this point, to get past both partisan politics and the increasing clouds of concern for the ethical conduct of government to make progress on the real issues that really affect Americans? While it appears doubtful, miracles can happen—so pray for a major miracle.

Sources: *The Washington Post*, Public Citizen, *The Hightower Lowdown* and *The New York Times*

II. MORE AUTOMOBILE NEWS OF NOTE

Automakers Pay $553 Million To Settle Takata Air Bag MDL

Automakers Toyota, Subaru, Mazda and BMW have agreed to pay a combined $553.6 million to settle allegations in pending multidistrict litigation (MDL) over dangerously defective Takata Corp. air bags. Under the terms of the settlements, BMW of North America LLC will pay $131

IN THIS ISSUE

million, Subaru of America Inc. will pay $68,262,257 and Mazda North American Operations agreed to pay $75,805,050. Toyota Motor Corp. will be on the hook for $278,500,000. These settlement are meant to accelerate the removal of dangerous air bag inflators from 15.8 million affected vehicles and will provide compensation to class members for economic losses resulting from the recall, such as for rental cars, and a customer support program that includes an extended warranty.

Peter Prieto, a lawyer with Podhurst Orseck PA, who is one of the lead attorneys representing the Plaintiffs, said the settlement will help educate consumers about the urgent need to have their air bags replaced while providing them with compensation for their economic losses. Podhurst Orseck PA:

> *The low number of recalls to date demonstrates the need for a settlement of this type, and we look forward to accelerating the removal of defective Takata air bags from the roads. We appreciate the efforts of Toyota, BMW, Mazda and Subaru to do right by their customers in reaching these agreements, and we look forward to the court's approval so implementation can begin soon.*

The settlement covers more than 9 million Toyota vehicles, 2.6 million Subaru vehicles, 2.3 million BMW vehicles and 1.7 million Mazda vehicles. The automakers, in a statement, urged customers to log on to the National Highway Traffic Safety Administration's (NHTSA) recall website to see if their vehicles are affected. The four automakers are the first to settle in multidistrict litigation over the largest auto recall in the nation's history. As we have reported, Takata's air bag inflators have been linked to at least 11 deaths in the U.S. Takata has faced massive global recalls of its air bag inflators, which allegedly have a tendency to explode. The cheap but volatile ammonium nitrate that inflates the bags can misfire, especially in humid conditions, blasting chemicals and shrapnel at passengers and drivers.

The Plaintiffs will continue to pursue their claims against Ford, Nissan and Honda. Takata has pled guilty to wire fraud and agreed to pay $1 billion in fines and restitution and acknowledged that it ran a scheme to use false reports and other misrepresentations to convince automakers to buy air bag systems that contained faulty, inferior or otherwise defective inflators. The Plaintiffs are represented by Podhurst Orseck PA, Baron & Budd PC, Colson Hicks Eidson, Power Rogers & Smith PC, Boies Schiller & Flexner LLP and Lieff Cabraser Heimann & Bernstein LLP, and Beasley Allen, among others.

The pressure is now on the remaining three car manufacturers in the MDL litigation to settle the claims against them. Ford, Nissan and Honda should have gotten a very strong message from the settlements by Toyota, Subaru, Mazda and BMW since everything is against them. It will be extremely difficult for the three remaining companies to try cases before a jury.

The case is *In re: Takata Airbag Products Liability Litigation* (case number 1:15-md-02599) in the U.S. District Court for the Southern District of Florida.

Source: Law360.com

Cost Of VW 3-Liter Settlement Hits Record $17.5 Billion

U.S. District Judge Charles Breyer said last month he will approve a $1.2 billion settlement ending claims Volkswagen AG installed emission-cheating software on its pricier 3.0-liter-engine vehicles. This is the latest in a series of settlements for VW totaling more than $17 billion. The settlement with drivers of 88,500 3.0-liter cars is worth an estimated $1.2 billion, and under a related consent decree with the U.S. Department of Justice, Volkswagen will pay an additional $225 million to mitigate the environmental effects of nitrogen oxide pollution.

Another $327.5 million settlement that resolves claims between drivers and parts manufacturer Robert Bosch GmbH for its role in designing the emissions cheat software also received approval from Judge Breyer on the same day. The 3.0-liter settlement comes after an October $14.7 billion settlement over the 2.0-liter vehicles, which includes $2.7 billion for environmental remediation. Those consumer settlements, in addition to the $1.6 billion settlement with dealers reached in January, made the total $17.5 billion. This is "the largest civil penalty ever under the Clean Air Act," according to Department of Justice lawyer Josh Van Eaton, who represented the U.S. Environmental Protection Agency (EPA) in the matter. Van Eaton hopes the litigation "sends the message to Volkswagen and to others considering gaming the system that it does not pay to cheat."

The multidistrict litigation stems from the Environmental Protection Agency's discovery in 2015 that the German automotive maker was selling diesel cars equipped with software designed to evade federal nitrogen oxide emissions standards in violation of the Clean Air Act. Van Eaton reminded the court during the hearing that the emissions cheating and the cover-up was "so egregious, it was criminal," with the company pleading guilty to conspiracy and obstruction of justice charges. VW's behavior demonstrated "contempt not just for the law but for the Americans who breathe the air," Van Eaton said.

It took a tremendous amount of work to make these settlements happen. Judge Breyer praised VW, the Plaintiffs' Steering Committee and the government. He had this to say:

> *Some are critical, asking, Why do we need 21 lawyers in a case where Volkswagen had conceded liability? We wouldn't be here today without the unique and significant skills of all the lawyers in plaintiffs' steering committee.*

However, not everyone is happy with the settlement. Four objectors spoke during the hearing before Judge Breyer, saying the settlement was prejudicial to lessees and to people still paying off their cars, that the payout disparity between 3.0-liter and 2.0-liter vehicles was unfair; because it was negligent in not catching the emission test software in the first place and that the EPA shouldn't profit from the deal.

The deal approved divides the 3.0-liter cars into two "generations" according to engine type. VW has already determined it can't fix older "Generation One" cars. Owners will get to individually decide whether to sell their vehicles to VW or have them modified to be more fuel-efficient. They will also get cash compensation ranging from $7,755 to $13,880. Lessees will be able to opt out of their leases.

VW remains uncertain of whether it can make the remaining "Generation Two" cars fully compliant with the emissions standards they were originally certified for. If a fix is found, VW will implement it and drivers will get a cash compensation ranging from $7,039 to $16,114. If not, owners will have the option to sell their cars back to VW and lessees will be able to opt out of their leases. That could bring the compensation total up to $4.04 billion.

Steering committee chair Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein LLP said each subclass had a less than 1 percent objection rate, and that "the proof is in the pudding." She said:

> *We couldn't negotiate a settlement with every single situation in mind. We did the best we could. The buyback values for virtually all members should put them in a situation they would be in if not for the emissions scandal.*

Judge Breyer agreed, overruling the objections. He subsequently issued his order approving the settlement.

The Plaintiffs are represented by Lieff Cabraser Heimann & Bernstein LLP, Boies Schiller & Flexner LLP and Robbins Geller Rudman & Dowd LLP, among others. The case is *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices and Product Liability Litigation* (case number 3:15-md-02672) in the U.S. District Court for the Northern District of California.

Source: Law360.com

Judge Denies VW Arbitration Bid In Engine Defect Suit

In another matter, Volkswagen will not be allowed to force a proposed class action over an alleged engine defect into arbitration. A New Jersey federal judge ruled last month, finding that the automaker wasn't actually a party to the arbitration agreement car owners signed with Volkswagen dealerships. In his opinion, U.S. District Judge Jose L. Linares said that in order to force arbitration, he would first have to find that there was a valid arbitration agreement, and, if so, that the dispute falls within the scope of that agreement.

Volkswagen had argued that the vehicle owners had signed purchase and lease agreements that included an arbitration clause. However, Judge Linares sided with the drivers, who said Volkswagen itself wasn't involved in the contracts. That was undisputed and quite clear. Instead, Judge Linares said the papers were signed by the Plaintiffs and the various dealers from which they obtained their vehicles. The Judge added:

> *Basic contract law requires parties to be in privity with each other in order for them to enforce the terms of a contract. Since the parties never personally entered into an agreement with each other, no privity of contract between plaintiffs and defendant can be established.*

Both sides conceded that Volkswagen wasn't a party to the agreements. Without that, the judge said the company can't enforce the arbitration clause. Although some courts have allowed third parties like Volkswagen to force arbitration in certain cases, those situations were always due to a close relationship among the parties involved. Judge Linares said that relationship isn't present in the instant suit.

Judge Linares also refused to dismiss the vast majority of the drivers' claims in the first consolidated complaint. The vehicle owners seek to represent anyone in the U.S. who bought or leased a 2008 through 2013 model year Volkswagen or Audi vehicle with one of two types of 2-liter diesel engines that contained an allegedly defective timing chain system. The timing chain system synchronizes the moving parts within an engine, and, if it fails, it can cause loss of power or engine failure and possibly result in expensive repairs or parts replacements. The defect is in the part of the chain that keeps it at the proper level of tension. Part of the mechanism that keeps the chain taut during startup can fail, causing the chain to jump and ruin parts of the engine. The drivers said Volkswagen knew about the defect, or should have known, for six years.

The Plaintiffs are represented by Carella Byrne Cecchi Olstein Brody & Agnello PC, Kessler Topaz Meltzer & Check LLP, Kantrowitz Goldhamer & Graifman PC, Thomas P. Sobran PC, Mazie Seater Katz & Freeman LLC, McCuneWright LLP, Seeger Weiss LLP and Baron & Budd PC. The case is *In re: Volkswagen Timing Chain Product Liability Litigation* (case number 2:16-cv-02765) in the U.S. District Court for the District of New Jersey.

Source: Law360.com

III. DRUG MANUFACTURERS LITIGATION

Johnson & Johnson Agrees To Pay $400,000 To Oregon In Motrin Lawsuit

Johnson & Johnson has agreed to pay more than $400,000 to the State of Oregon in a lawsuit over hundreds of bottles of flawed Motrin capsules sold in that state. John Kroger, Oregon's Attorney General in 2011, sued the conglomerate and a pair of subsidiaries during his tenure, saying they exposed consumers to defective supplies of the pain reliever and violated the state's unlawful trade practices act. This settlement requires the Defendants to pay the state $406,100, excluding lawyer fees and the pending lawsuit.

Johnson & Johnson learned at the end of 2008 that its Motrin caplets failed to properly dissolve and were thus ineffective pain relievers. But the company didn't file an official recall to alert customers. Instead, Johnson & Johnson hired a contractor to go to stores across the nation and purchase the defective Motrin. While the company eventually launched a formal recall, that was more than a year after discovering the faulty batch of Motrin. The recall is also the result of pressure from the U.S. Food and Drug Administration (FDA).

As you may recall from a prior issue, the trial judge had initially dismissed the case in 2012, but the Oregon Court of Appeals sent it back to the trial court in 2015. It is now settled.

Source: *Oregonian*

Merck Will Pay $60 Million In Settlement Of Pay-For-Delay Litigation

Merck & Co. Inc. and Upsher-Smith Laboratories Inc. have agreed to pay $60.2 million to settle multidistrict litigation (MDL) accusing the companies of a pay-for-delay scheme for the potassium supplement K-Dur. On May 23, U.S. District Judge Stanley B. Chesler gave preliminary approval to the settlement, which was agreed to in February. This comes "after more than 17 years of litigation and four rounds of mediation" over direct purchasers' claims that the companies had wrongly kept K-Dur's generic competition off the market. Pursuant to the settlement, the Defendants will pay $60.2 million into an escrow fund for the class members.

The MDL revolves around settlements Merck reached with Upsher-Smith and Baxter International Inc. unit ESI Lederle Inc. in which the generics manufacturers pushed back their release of generic forms of K-Dur 20, which treats potassium deficiencies, including those that stem from taking diuretics to treat high blood pressure. The Plaintiffs, which included drug retailers Walgreen Co., Rite Aid Corp. and CVS Pharmacy Inc., had contended that the drug companies had entered a reverse-payment agreement that delayed the entry of low-cost generic versions of K-Dur 20 until September 2001, keeping the price of the brand-name drug artificially high in violation of the Sherman Act.

The Plaintiffs are represented by Deborah S. Corbishley of Kenny Nachwalter PA, Barry L. Refsin of Hangley Aronchick Segal Pudlin & Schiller, Scott E. Perwin and Lauren C. Ravkind of Kenny Nachwalter PA, Peter Pearlman of Cohn Lifland Pearlman Herrmann & Knopf LLP, David F. Sorensen of Berger & Montague PC and Bruce E. Gerstein, Joseph Opper and Kimberly Hennings of Garwin Gerstein & Fisher LLP. The case is *Hip Health Plan, et al. v. Schering-Plough et al.*, (case number 2:01-cv-01652) and the MDL is *In Re: K-Dur Antitrust Litigation* (case number 1419). Both of the cases are in the U.S. District Court for the District of New Jersey.

Source: Law360.com

IV. COURT WATCH

Supreme Court Decision Will Result In More Suits Against Banks

A ruling by the U.S. Supreme Court last month will definitely have an effect in litigation between cities and banks under the Fair Housing Act (FHA). The ruling was in a case over the impact of predatory lending practices on local communities. The court's decision has been referred to as "a mixed-bag ruling," with each side able to claim a victory of sorts. Tony Mauro, writing for the *National Law Journal,* stated:

> *Civil rights and civil liberties groups applauded the court's 5-3 decision affirming that Miami has standing to claim in court that it was harmed by the discriminatory lending practices of banks targeting minority borrowers.*

However, banks were relieved on a second issue. The high court unanimously agreed that Miami must meet a high standard of proof to establish that the banks' actions caused the city's injuries. The court vacated and remanded the case back to the U.S. Court of Appeals for the Eleventh Circuit which had ruled in favor of Miami on the standing issue and also on the "proximate cause" issue. The 11th Circuit had found that all of the harms Miami suffered, such as lower property tax revenue and higher costs of city services, were "foreseeable." The Supreme Court stated that foreseeability alone was not enough to sustain a claim for damages.

Lawyers in our firm's Consumer Fraud & Commercial Litigation Section believe that the ruling will encourage cities to file suit against lenders. The court pretty well laid out something like a roadmap for cities. Lawsuits similar to Miami's have been filed in Miami and also in Cobb County and DeKalb County in Georgia.

There was a great deal of interest in this appeal. For example, a brief was filed in the case by 26 cities across the nation. The following are some observations about the court's opinion:

> *Brianne Gorod, chief counsel of the Constitutional Accountability Center, said, "The key takeaway from the court's opinion is that Miami and other cities have standing to sue—that's a win for Miami. To be sure, it would have been better for Miami had the court affirmed on the proximate cause issue, as well, but the court's opinion leaves no doubt that the Eleventh Circuit can conclude on remand that there is proximate cause."*
>
> *Kristen Clarke, president of the Lawyers' Committee for Civil Rights Under Law, also applauded the decision, while calling the proximate-clause finding "a small step backward." Clarke said, "Our nation is still wrestling with the collateral consequences of the foreclosure crisis. Today's Supreme Court decision reinforces the critical role that states and cities must play in holding banks and other actors accountable for actions that continue to harm communities, particularly minority communities that have borne the brunt of the crisis."*

Justice Stephen Breyer, writing for the majority in the consolidated cases of *Bank of America v. City of Miami and Wells Fargo & Co. v. City of Miami*, said long-standing court precedents established that "the city's claimed injuries fall within the zone of interests that the FHA arguably protects. Hence, the city is an 'aggrieved person' able to bring suit under the statute." But Judge Breyer also wrote:

> *The housing market is interconnected with economic and social life. A violation of the FHA may, therefore, 'be expected to cause ripples of harm to flow' far beyond the defendant's misconduct. … Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel.*

Banking and business groups also filed briefs in the case warning that a broad interpretation of standing could invite a flood of litigation not only from cities, but from plumbers and grocers who lost income because of neighborhood foreclosures. The American Banking Association stated in a brief: "According to the Eleventh Circuit … the category of potential FHA plaintiffs is essentially limitless."

Chief Justice John Roberts Jr. joined Justices Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan in the majority. Justice Clarence Thomas dissented in part, joined by Justices Anthony Kennedy and Samuel Alito Jr. Justice Neil Gorsuch did not participate in the case.

It will be most interesting to see what results from this most significant opinion from the highest court in the land. In my opinion there will be a sharp increase in this litigation. Lawyers in our firm's Consumer Fraud & Commercial Litigation Section are taking a strong look at these cases.

Source: *National Law Journal*

Alabama Supreme Court Tailors Hospital Lien Impairment To Actual Damages

Under Alabama law, hospitals that provide care or treatment to an injured person in the State of Alabama have a lien for the reasonable charges for such care against any future judgments or settlements. If the injured person accepts a settlement without satisfying the hospital lien, the hospital "shall be entitled to a civil action for damages on account of such impairment, and in such action may recover from the one accepting such release or satisfaction or making such settlement the reasonable cost of such hospital care, treatment and maintenance." Ala. Code § 35-11-372. The Alabama Supreme Court recently interpreted this statute to determine how to calculate a hospital's lien impairment.

In *Ex parte Alfa Mutual Insurance Company (Ala. April 28, 2017), the Alabama Supreme held that a hospital could only recover the actual amount of damages due to the impairment and not the entire hospital lien. In that case, Ms. Abaney Wright was insured by Alfa when she became involved in a car accident. She was admitted to USA hospital and later died from her injuries. Alfa paid Ms. Wright's parents $2,000 for funeral expenses under a medical-payment-benefit provision in the parents' automobile-insurance policy. Alfa then sent $2,000 to USA's counsel, but USA did not accept the money. USA sued Alfa for lien impairment, and the Circuit Court awarded USA the amount of its entire lien ($26,438.50 plus $5,166.69 in attorneys' fees).* The circuit court awarded damages based on the entirety of USA's lien without respect to the amount otherwise owed by Alfa under its policy. Alfa appealed.

The Alabama Supreme Court held that a hospital is not entitled to recover automatically the full amount of its lien whenever there has been an impairment of any magnitude. The damages must be caused by the impairment. That means the hospital does not get back its entire lien but the difference between the amount the hospital actually recovered and the amount it could have recovered absent impairment. Awarding the hospital a windfall due to a minor impairment does not comport with the impairment statute. Since the injured person's claim against Alfa for funeral expenses was only $2,000, the damages for impairment could only be $2,000. The Alabama Supreme Court reasoned:

The purpose of the lien statute is to induce hospitals to receive a patient injured in an accident, without first considering whether the patient will be able to pay the medical bills incurred. The purpose of the statute is not to precipitate additional litigation, provide a windfall for hospitals, or saddle insurers with uncontracted-for liability in the event they pay a policy benefit that happens to be subject to a hospital lien.

Source: *Ex parte Alfa Mutual Insurance Company*, p. 13 (quotations and citations omitted). For more information on this case, contact Stephanie Monplaisr, a lawyer in our firm, at 800-898-2034 or by email Stephanie.Monplaisir@beasleyallen.com.

V. WHISTLEBLOWER LITIGATION

False Claims Act Ensures Taxpayers Receive A Fair Deal

I have been asked by several of our readers how the False Claims Act (FCA) came about. Perhaps we need to take a brief look at the history of the Act. It was during the Civil War when President Lincoln ratified the FCA, and it was during the Gettysburg Address when Lincoln proclaimed our government to be "of the people, by the people, [and] for the people." American citizens fund the tax pool, which the government uses to benefit the public through government programs. Therefore, when an organization or individual defrauds the government, they are actually stealing from that very tax pool. When this occurs, taxpayer-funded programs no longer have the money needed to do the job required to aid the public. The FCA, by detecting and deterring fraud, replenishes and protects the tax pool by ensuring that taxpayers receive a fair deal when the government negotiates.

A case in point occurred this past March. In that case, CA Inc., a New York information technology management software and service company, agreed to pay $45 million to settle FCA claims alleging the company violated this underlying principle of fair deals. It was alleged that CA Inc. violated the FCA by making false statements and claims during the negotiation and administration of a General Service Administration (GSA) contract.

Assistant Attorney General Chad A. Readler, who is in the Justice Department's Civil Division, had this to say:

[CA's settlement] demonstrates [the government's] continuing vigilance to ensure that contractors deal forthrightly with federal agencies when seeking taxpayer funds. [The government] will take actions against contractors who withhold information and cause the government to pay more than it should for commercially available items.

At the time CA contracted with the GSA, the contractors were required to fully and accurately disclose how they conducted business in the commercial marketplace. The reason for this discloser was so that the GSA could use the information to negotiate a fair price for the government agencies purchasing CA products and services. This particular contract also had a price reduction clause that required CA to reduce the prices charged to the government if the prices to commercial customers improved. The FCA allegations against CA were:

- CA failed to fully and accurately disclose its discounting practices.
- CA, instead, provided false information concerning the discounts it gave its customers.
- CA violated the price reduction clause by not providing the government with the required discounts when the commercial discounts improved.

As stated by the GSA Inspector General, Carol Fortine Ochoa, "GSA contractors must be honest and forthcoming when doing business with the federal government. American taxpayers deserve a fair deal."

The government fights the war against fraud not with soldiers but with ordinary citizens—courageous men and women—who do the right thing and blow the whistle. The FCA not only provides an avenue, through the *qui tam* provision, for ordinary citizens to blow the whistle on fraud, but the Act also provides incentives and protection. These incentives include 15 to 30 percent of the damages recovered by the government, and the protection stems from the anti-retaliation provision that prohibits employers from retaliating against whistleblowers. Dani Shemesh, a former CA employee, filed the case against CA under the *qui tam* provision of the FCA. Shemesh is to receive more than $10 million for her share of the settlement.

Are you aware of fraud being committed against the federal government, or against 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 on our firm's Whistleblower Litigation Team for a free and confidential evaluation of your claim. Members of the team include: Archie Grubb, Larry Golston, Lance Gould and Andrew Brashier. You can call them at 800-898-2034 or reach them by email at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com. You may also contact Beasley Allen for a free copy of Lance Gould's book, Whistleblowers: A Brief History and a Guide to Getting Started.

Sources: U.S. Department of Justice, abrahamlincolnonline.org

HealthMarkets Faces FCA Law Suit Over "Junk" Insurance

A False Claims Act (FCA) lawsuit has been filed against HealthMarkets Inc. alleging the company orchestrated a scheme to dupe customers into buying its "junk" supplemental insurance and cheated the government in the process. This suit was filed in Florida federal court and the complaint alleges that HealthMarkets—owned by a consortium led by the Blackstone Group LP—and several subsidiaries took advantage of serving as a web broker under the Affordable Care Act (ACA) to coax people into choosing qualified health insurance plans with the lowest premiums, leaving room in their budgets for the company's junk additional insurance. The suit alleges:

In so doing, HealthMarkets violated the Affordable Care Act and accompanying regulations, submitted false claims to the government, and made false certifications to the government, all in violation of the False Claims Act.

According to the complaint, the damages to the government were about $90 million paid to HealthMarkets in 2013 and about $111 million paid in 2014 for enrolling individuals in qualified plans, as well as unknown damages for the years since.

A relator identified as John Doe originally filed the suit in April 2016. After the federal government declined to intervene, U.S. District Judge Mary S. Scriven unsealed the complaint on May 9. It was alleged in the suit that HealthMarkets was among the more than 30 web brokers who entered into agreements to help with enrolling individuals in qualified health plans under the ACA, which requires issuers or insurers to provide a minimum amount of basic benefits. Brokers act as private distribution channels, offering a choice of qualified

plans from multiple insurers, and can enroll individuals through their own websites if they agree to certain consumer protections, such as complying with privacy and security standards. The following allegations were made in the complaint:

> It's claimed by the realtor that HealthMarkets broke its promise to comply with the ACA and accompanying regulations, instead orchestrating a scheme to exploit the ACA for its own profit, the relator alleges. The company created a website to attract people looking for qualified health insurance plans and then used their personally identifiable information to sell its own junk supplemental insurance, which provides very little coverage.
>
> After the consumers gave their information, HealthMarkets' agents steered them to plans with the lowest monthly premiums—and the highest out-of-pocket costs—to make more room in their budgets for its additional insurance, the relator says. The agents were paid commissions based on consumer enrollment, receiving more money for purchases of the supplement products. And despite regulations requiring agents to be licensed to sell insurance, HealthMarkets didn't seem to care whether that was the case.
>
> HealthMarkets also instructed agents to adjust consumers' income to increase government subsidies. For instance, if an applicant reported a lower income than he or she actually made, the government would pay additional subsidies and thus, lower the cost of a qualified health plan, freeing up money for HealthMarkets' supplemental insurance. In this way, HealthMarkets violated the FCA claiming that, "when brokers enroll applicants into a [qualified health plan], web brokers receive a commission from the issuers who [receive] payment from the federal government for providing a QHP to the applicant."
>
> HealthMarkets wasn't eligible for those funds because of its intentional violations of the ACA and accompanying regulations, like requirements that brokers are licensed and use personally identifiable information only for authorized purposes. This isn't the first time HealthMarkets has come under fire for making illegal profits through the sale of its supplemental insurance.
>
> HealthMarkets and its controlling shareholders, Blackstone and Goldman Sachs Group Inc., were sued by a number of state attorneys general a few years back for allegedly misleading consumers into buying junk insurance that left policyholders with poor coverage.

The complaint, now unsealed, seeks three times the amount of damages to the government plus civil penalties of between $5,500 and $11,000 for each false claim, as well as the maximum allowed reward for the relator and attorneys' fees and costs. The relator is represented by Steven G. Wenzel of Wenzel Fenton Cabassa PA and Shauna B. Itri of Berger & Montague PC. The suit is *United States ex rel. John Doe v. HealthMarkets Inc. et al.,* (suit number 8:16-cv-00831) in the U.S. District Court for the Middle District of Florida.

Source: Law360.com

DOJ Investigating J&J Over Arthritis Drugs And Copayments

Johnson & Johnson has disclosed to investors that its Janssen Biotech Inc. is under investigation by the U.S. Department of Justice (DOJ) in connection with a False Claims Act (FCA) case related to two of its arthritis drugs. Johnson & Johnson also reported a separate investigation by the U.S. Attorney's office in Massachusetts over copayment support programs. The company said in a 10-K filing with the U.S. Securities and Exchange Commission (SEC) that Janssen Biotech in March received a civil investigative demand from the DOJ over a False Claims Act investigation. The request concerned "management and advisory services provided to rheumatology and gastroenterology practices that purchased Remicade or Simponi Aria," two biologic prescription drugs used to treat rheumatoid arthritis, among other conditions.

Remicade is one of J&J's top-selling drugs, used to treat arthritis and a number of other immune-mediated inflammatory diseases, according to J&J. Sales of the drug in 2015 made up 9.4 percent of the company's total annual revenue, bumping up to approximately 9.7 percent of the company's total revenues the following year, according to the company's 2016 annual report. In April, the 10-K said that J&J received a subpoena from the U.S. Attorney for the District of Massachusetts. The request sought a range of documents broadly related to pharmaceutical copayments for Simponi, a self-injectable biologic for treating arthritis, Olysio, a treatment for hepatitis C, and Stelara, a biologic used to treat psoriasis and Crohn's disease. It was stated in the 10-K:

The subpoena also seeks documents relating to average manufacturer price and best price reporting to the Centers for Medicare and Medicaid Services related to those products, as well as rebate payments to state Medicaid agencies.

Federal prosecutors in Massachusetts have previously investigated drug companies with regard to patient assistant programs and copayment programs, including Valeant Pharmaceuticals International Inc. in October 2015. This year, medical companies like Regeneron Pharmaceuticals Inc. and Biogen Inc. have reported receiving information requests about their nonprofit patient assistance programs.

In January DaVita Inc. and Fresenius Medical Care, which provide the majority of funding to the American Kidney Fund, reported they were subpoenaed by federal prosecutors in Massachusetts over charitable donations to fund dialysis treatments. J&J's 10-K also said it received a subpoena from the office in February of this year regarding its payments to nonprofit charities that provide financial assistance to Medicare patients. However, the drug giant said that it's not alone in similar probes. That was confirmed by the subpoena which said: "Multiple pharmaceutical companies have publicly reported receipt of similar subpoenas and ongoing inquiries."

Based on all of the above, it appears the investigation is far-reaching in scope. Having dealt with J&J in litigation, nothing that company does would surprise me. However, it looks like they have "corporate company" in this area of concern.

Source: Law360.com

26 States Rejoin FCA AstraZeneca Suit Over Seroquel

A New York federal judge has reinstated the False Claims Act (FCA) claims of 26 states, Washington, D.C., and the city of Chicago in a whistleblower suit accusing AstraZeneca PLC of hiding safety information about antipsychotic drug Seroquel. U.S. District Judge Frederic Block reinstated the claims in a one-paragraph order, saying his decision was made in light of an April 26 letter from the New York Attorney General's Office on behalf of the Plaintiff states and cities. Judge Block also said that AstraZeneca and other related Defendants can file new motions to dismiss any of those claims.

All of the states' issues relating to these claims date back to March 31. That was when relator Allison Zayas, once a sales contractor for AstraZeneca, agreed during oral arguments to withdraw her state law claims without prejudice. On April 6, New York wrote to the court, saying that under

state false claims laws, Ms. Zayas, the whistleblower, didn't have the authority to withdraw the state law claims.

Six days later, Ms. Zayas acknowledged in her own letter that she lacked such authority and withdrew her consent to dismiss the claims. The states' April 26 letter then asked Judge Block to reinstate the claims. The states also said in that letter that they agree with Ms. Zayas that state law claims won't overly complicate issues at trial or prove unduly burdensome in litigation, since her case stems primarily from a common set of facts.

Ms. Zayas has alleged that Seroquel may pose a risk to patients' heart health and that AstraZeneca misrepresented the danger of prescribing it to patients who were also using other drugs that pose the same cardiac risks. The danger in question is so-called "QT prolongation," which refers to unusually long electrical processes in the heart. The specific prescriptions at issue were reimbursed by Medicare from 1997 to 2009.

AstraZeneca had based its defense on the U.S. Supreme Court's 2016 ruling in *Universal Health Services v. Escobar,* which created a new test for determining "material" billing misconduct under the FCA. The drug company argued that studies about Seroquel's risks were publicly available to the federal government, so they must not have been important to determining reimbursement. The U.S. Department of Justice, however, (which has not intervened in the case) rejected that argument in a letter to the court. Judge Block eventually ruled in mid-April that the whistleblower had made plausible allegations of a "complex fraudulent scheme" and kept alive parts of her complaint.

The case is *U.S. ex rel. Zayas v. AstraZeneca Biopharmaceuticals Inc., et al.,* (case number 1:14-cv-01718) in the U.S. District Court for the Eastern District of New York.

Source: Law360.com

VI. PRODUCT LIABILITY UPDATE

Product Liability & Personal Injury Litigation Update

Lawyers in our firm's Product Liability and Personal Injury Section handle cases involving catastrophic injuries and deaths arising out of any type of accident, including car crashes, 18-wheeler accidents and industrial and workplace accidents. Potential product liability claims are often overlooked by some lawyers when investigating what many view as routine accidents. In many motor vehicle crashes, some defect—either design or manufacturing—played a major role in causing the accident. A product liability claim focuses on whether or not the product is defective. An entire product may be defective or it may be that a component part of the product contains the defect. The product may well contain design, manufacturing, or warning defects. In some cases, it will be a combination of these problems. Personal Injury Claims include heavy truck litigation, nursing home litigation, slip and falls and automobile accidents. Below are just a few of the type of cases our firm handles on a regular basis.

Takata Airbags

In late February, Takata pled guilty and agreed to pay $1 billion for concealing a defect in millions of its airbag inflators. At least 11 deaths in the U.S. have been linked to the defective airbags. "For over a decade, Takata lied to its customers about the safety and reliability of its ammonium nitrate-based airbag inflators," Acting Assistant Attorney General Kenneth Blanco said in a statement.

The potential dangers posed by these air bags are that the airbags can unexpectedly explode with excessive force, causing serious injury or death to occupants. The defect is linked to the air bags' inflator systems, which can shoot metal fragments from the devices into the car like shrapnel. Airbags on both the driver's and passenger's side can explode, even as a result of a fender-bender or other minor collision. Tokyo-based Takata is one of the world's largest automotive suppliers. It manufactures airbags, safety belts, steering wheels and other auto parts for a variety of automakers. Vehicles containing the defective airbags include certain models made by Toyota, Honda, Mazda, BMW, Nissan, Chrysler, Audi, Volkswagen and General Motors. Cole Portis, Ben Baker, and Chris Glover, lawyers in the Section, are involved in these cases.

GM Ignition Switch Litigation

General Motors (GM) has recalled more than 17 million vehicles related to a defective ignition switch problem, which can leave a vehicle without power and the driver unable to control the vehicle in sudden and dangerous situations. Court documents and other evidence reveal that GM knew about the ignition switch problem as early as 2001.

Lawyers in the Section have handled numerous claims involving the GM ignition switch defect. Some of those claims were settled through the GM Ignition Switch Compensation Fund. Others were settled directly with GM lawyers. Recently, the United States Supreme Court declined to review a lower-court ruling that the company was liable for claims for deaths or injuries arising before it filed for bankruptcy in 2009. This means many of the other outstanding claims can be filed in federal and state courts and proceed to trial. Cole Portis, Graham Esdale, and Ben Baker in the Section are involved in these cases. We are working with Lance Cooper in the case.

Heavy Trucking Accidents

There are significant differences between handling an interstate trucking case and other car wreck cases. It is imperative to have knowledge of the Federal Motor Carrier Safety Regulations, technology, business practices, insurance coverages, and to have the ability to discover written and electronic records. Expert testimony is of utmost importance. Accidents involving semi-trucks and passenger vehicles often result in serious injuries and wrongful death. Trucking companies and their insurance companies almost always quickly send accident investigators to the scene of a truck accident to begin working to limit their liability in these situations.

Chris Glover, a lawyer in the Section, has represented numerous folks who have been seriously injured or lost a family member as a result of the wrongful conduct of a trucking company. He most recently wrote and had published a book that explains how to properly litigate a heavy trucking case. The book is titled An *Introduction to Truck Accident Claims: A Guide to Getting Started*. The book covers topics including the basics of trucking regulations and requirements, how to prepare for your case, potential Defendants including the carrier, the broker and the driver; and common issues that arise in commercial vehicle litigation, such as hours of service, fatigue, maintenance and

products liability. This book is available free to attorneys in either hard copy or downloadable digital format. For your free hard copy, call us at 800-898-2034. The book also can be downloaded at chrisglover-law.com/book.

Tire Defects

Tire failure can result in a serious car crash causing serious injury or death to the car's occupants. Air, heat and sunlight can cause the rubber in tires to break down. When a tire is defective, potentially serious problems like detreads and blowouts can occur long before the tire would be expected to wear out. If the tire failure is the result of design or manufacturing defects, and the manufacturer is aware of the problem, they have an obligation to alert consumers to the potential danger.

One serious problem with tires is that they wear down on the inside as they age, but they look brand new on the outside. Despite the dangers of tire aging, the National Highway Traffic Safety Administration (NHTSA) has still refused to establish a tire aging standard. A tire aging standard would make it easier for consumers to determine the tire's age. Right now, the only way to determine the age of a tire is to decipher the cryptic code on the tire's sidewall. Also, a tire aging standard would make it mandatory for tire centers to take tires out of service at a specified date, regardless of what the tire looks like on the outside.

Our lawyers are also seeing a huge influx of defectively designed tires from China. We recently filed a case in North Carolina where a Chinese brand tire failed, causing a wreck and a lifelong truck driver to suffer serious injuries. As more and more of the products we buy, including tires, are being made in China and other foreign countries, the "importers" role is becoming more critical. In too many instances, "importers" are not taking the appropriate steps to assure that foreign tire makers' tires are safe, despite the NHTSA standards requiring them to do so.

Under Federal law, "importers" must take steps to assure that the tires they import are free of defects. Good manufacturing processes require "importers" to conduct on-site inspection(s) of a foreign tire makers' facilities to assure that adequate testing, manufacturing, quality control and other measures are in place. Further, "importers," once they import tires into this country, should perform random sampling, testing and inspection of foreign tires before they distribute and/or sell the tires to consumers in this country.

In one recent case, we learned that, while a company was importing more than 400,000 tires a month, it was doing nothing to insure that the Chinese tires it imported, sold and profited from were safe. The importer never inspected the manufacturing plant, never observed any tire testing and never checked to see if the Chinese manufacturer employed any quality control measures for its tires and plants. Further, the importer never performed one post-"import" inspection, test and/or took any other step relative to one single tire it sold despite the federal requirements to do so. This conduct is particularly troubling when you consider how important tires are to our safety. Companies that import tires, or any product for that matter, should be held accountable when they do nothing to insure these products are safe for American consumers. Our Product Liability Section has pursued numerous claims against both tire manufacturers and importers of the defective Chinese tires. If you have questions regarding a potential tire case, contact Cole Portis or Ben Baker at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Ben.Baker@beasleyallen.com.

Bad Boy Buggy Litigation

Greg Allen, the Senior Product Liability Lawyer in our firm, continues to handle cases involving injuries from the off-road vehicle known as the Bad Boy Buggy. The Buggy was initially designed by a gentleman who owned an auto salvage yard in Natchez, Mississippi, but the company was sold a couple of times and now is owned by Textron, Inc.

The Bad Boy Buggies are currently marketed for hunting and utility work but they are designed very poorly. They are unstable on uneven terrain. The static stability factor of the Bad Boy vehicles is very low, which is caused by a design that has a narrow track width and a high center of gravity. The vehicles are also very heavy primarily because of the weight of the numerous batteries located internally. When the Bad Boy vehicle turns over, it has the potential to cause significant injuries.

As of today, the Bad Boy Buggies are still not equipped with doors or adequate measures to prevent "leg-out injuries." Yamaha performed a recall on all of its Rhino vehicles in 2007 because it was seeing numerous leg-out injuries when the vehicles tipped over. The primary problem was that, in a side-by-side vehicle, the driver or passenger will reflexively put their foot out as the vehicle tips. The vehicle typically still has forward momentum as the tip-up occurs, so as the occupant plants his foot on the ground, the foot/leg will be pulled under the backside of the vehicle. Quite often, this causes severe fractures and even amputations.

While Bad Boy has now upgraded its design to add a shoulder net and seatbelt, its foot-out protection is still very bad. Textron added a trip bar in the foot well area, which it claims is a foot-out preventative device. But Textron has performed no testing on the vehicle to see if the trip bar is effective. The vehicles have no protection for occupants who are younger, or of short stature, because their legs may not be long enough to reach the area where the leg-out device is located. These vehicles need doors and netting to prevent leg-out and arm- and hand-out injuries.

Hopefully, Textron, Inc. and its subsidiary Textron Specialty Vehicles, Inc. will recognize the design flaw and start equipping their vehicles with doors and other proper safety devices to reduce the danger. In the meanwhile, some very bad and defective vehicles are in use and are an extreme hazard for folks who use them.

If you have any questions about a specific Bad Boy accident or need information on the ongoing litigation, contact Greg Allen, our firm's Senior Product Liability lawyer, at 800-898-2034 or by email at Greg.Allen@beasleyallen.com. Greg has successfully handled a number of cases involving the Bad Boy Buggy and currently has several in court.

Industrial Accidents And Workplace Defects

Each year, thousands of workers are injured or killed at their workplace. Although a state's workers' compensation system places limitations on the

ability of employees to hold employers accountable for these work-related injuries, many people do not realize that there may be another available source of recovery. Injuries in the workplace are often caused by defective products, such as a machine where a dangerous nip-point is not properly guarded nor is the employee warned of the dangerous nip-point. If a product causes an on-the-job injury, a product liability suit may be brought against the product's manufacturer. Catastrophic injuries, deaths, and amputations unfortunately too commonly occur from defective products found in the work place.

Our firm handles numerous product cases each year that arise in the context of an accident that occurred on the job or in the workplace. Currently, Kendall Dunson, a partner here at the firm, is handling a tragic case that occurred in Tennessee. While working in the maintenance department for his employer, the employee was setting up a roll stack on an extruder. The roll stack is one machine in an entire line. The roll stack consists of three large rollers. The middle roller is the master and the other two are slaves. While working to get the rollers in sync, he was pulled through the rollers and his head was crushed leading to his death. No one saw the incident but the rollers were found spinning at maximum rate. The rollers have in-running nip points which should have been guarded, but, in this tragic case, the nip-points were not guarded. The manufacturer outfitted the rollers with a stop pull cord along the edges and at the top and bottom of the roll stack. But the roll stack is so large that someone standing in the middle of the roll stack cannot reach the pull cord. The roll stack was defective and unreasonably dangerous for lack of adequate guarding and/or a presence sensing device which would have prevented this needless death. For more information contact Kendall Dunson or Evan Allen at 800-898-20345 or by email at Kendall.Dunson@beasleyallen.com or Evan.Allen@beasleyallen.com.

Aviation Accidents

Soaring through the sky at hundreds of miles an hour, thousands of feet above the ground in an airplane or helicopter leaves little room for error. One small mechanical problem, misjudgment or faulty response in the air can spell disaster for air passengers and even unsuspecting people on the ground. This is why it's crucial for the aviation industry, including manufacturers, pilots, mechanics and air traffic controllers, to adhere to the highest possible standards at all times.

Statistics indicate mechanical failures cause up to 22 percent of aviation crashes. Historically, aircraft manufacturing defects, flawed aircraft design, inadequate warning systems and inadequate instructions for safe use of the aircraft's equipment or systems have contributed to numerous aviation crashes. In such cases, the pilot may follow every procedure correctly but still be unable to avert disaster. Mike Andrews, a lawyer in our firm's Personal Injury/Products Liability Section, has handled numerous cases involving defects found in aircrafts. Two defective aviation cases that Mike is handling are most interesting.

One case involves a crash of the V22 Osprey in Hawaii resulting in death of a young Marine. The Osprey has a long history of defects involving the aircraft's hydraulics and software. This crash resulted from the engines ingesting sand, which was kicked up into the air by the downwash from the Osprey's rotor-blades as it attempted to land. The aircraft is equipped with a filtration system referred to as an engine air particle separator, which is intended to prevent sand and other particle ingestion. However, the system is faulty. Bell and Boeing have tried various iterations and designs but have not yet implemented a safe and effective filter. Several crashes have resulted in deaths and serious injuries.

The second case involves the crash of a light aircraft off the coast of Georgia. Two inexperienced pilots were attending flight school in North Carolina and were assigned to fly an aircraft to Jacksonville, Florida, to the flight school maintenance facility. Unfortunately, the aircraft was dispatched with inoperable equipment. Specifically, the pilots were sent up in an aircraft which had faulty vacuum pumps—one was completely inoperable and the other failed in flight. The vacuum pumps provide the pilots' horizon and orientation information while in flight. Without such information, pilots lose spatial awareness and become disoriented. Due to the inoperable and faulty equipment, the plane crashed, killing both student pilots. For more information contact Mike Andrews at 800-898-20345 or by email at Mike.Andrews@beasleyallen.com.

Non-Auto Product Defects

Lawyers in the Section also handle litigation involving defective products such as smoke detectors, flammable clothing, industrial equipment, and heaters just to name a few. Most of the time, family members do not suspect that a defective product is the cause of a death or injury, and manufacturers readily blame the victim's actions. Our firm has discovered that defective products are increasingly a major cause of unexpected deaths and injuries. LaBarron Boone, who handles Product Liability litigation, has successfully handled several of these types of cases and has been leading a campaign to make smoke detectors safer and more effective. Contact LaBarron if you have any questions about a potential case.

Premises Liability Litigation

Premises Liability Cases can involve claims arising out of falls caused by a foreign substance on the premises, falls caused by a part of the premises, as well as injuries caused by falling items. Specifically, in a case involving a foreign substance on a floor, a Plaintiff must establish that the foreign substance caused the fall and that the Defendant premises owner had notice or should have had notice of the substance at the time of the accident. The law is different when injuries are caused by part of the premises which is in a dangerous condition, such as part of a doorway, curb, or stairs, or where the injury is caused by a display created by a store employee.

In situations where the injury is caused by part of the premises or a display that was set up by the store, proof of notice is not a prerequisite but the Plaintiff must still prove the injury was caused by a defective or dangerous condition. Injuries caused by falling objects most often involve items falling from displays that are either part of the premises, or were set up by the store. If the falling object is the result of a display set up by the store or some part of the premises falling, then the customer does not have to prove notice. Mike Crow and Julie Beasley in our Section have extensive experience in handling premises liability cases. If you need any guidance or have any questions,

contact Mike or Julie at 800-898-2034 or by email at Mike.Crow@beasleyallen.com or Julia.Beasley@beasleyallen.com.

Nursing Home Litigation

One of the most vulnerable segments of society is our senior citizens. As our population ages, more and more individuals are admitted to nursing homes and long-term care facilities. Our firm reviews and files cases in state courts, federal courts, and arbitration tribunals against nursing homes as a result of negligent medical and nursing care provided to nursing home residents. Currently, our firm is handling cases involving bed sores, falls, chokes, and medication errors. Ben Locklar in our Section has handed numerous cases involving patients who have died or been severely injured by the negligent acts of nursing homes. If you have any questions regarding these types of claims, Ben would be happy to discuss them with you. He can be contacted at 800-898-2034 or by email at Ben.Locklar@beasleyallen.com.

A Product Warning May Not Always Be Enough

We wrote about safety and health warnings on products in last month's issue. There is no question that warnings on products serve an important role. If they are understandable, conspicuous, and presented in a way to reflect a potential hazard, they can provide us important information about the safety risks associated with using a product. Unfortunately, many companies would prefer to stop at a warning, and this failure to do more is often at the core of a products liability case.

Indeed, time and time again, lawyers see situations where product users are severely injured or killed when the hazard that killed them could have easily been designed out of the product altogether. Decades ago, the hazard hierarchy for product design was developed to ensure that design engineers not only worked to foresee hazards associated with using the products they create, but that they try to either eliminate or safeguard against the hazards in addition to warning about them. Under the hazard hierarchy, if the product manufacturer identifies a hazard associated with using the product, the manufacturer should:

- First, seek to eliminate the hazard entirely.
- Second, and only if it is not feasible to eliminate the hazard, to safeguard against the hazard, either by using a safer alternative or by incorporating a safety device.
- Third, and only if it is not feasible to eliminate or safeguard against the hazard, may the manufacturer rely on a warning.
- Fourth, and oftentimes in addition to the above but not in replace of the above, train the user.
- Fifth, and oftentimes in addition to the above but not in replace of the above, to use protective gear and clothing.

Naturally, the hazard progression is ordered from the most effective means to respond to a hazard to the least effective. Therefore, it is unreasonable for manufacturers to suggest that a user was warned about a hazard, and that the user should have avoided an accident associated with the hazard, when the manufacturer knew about the hazard and could have designed the product in a way that would have either eliminated the hazard altogether or safeguarded the user from harm. If you need more information on this subject, contact Parker Miller, a lawyer in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at Parker.Miller@beasleyallen.com.

Takata Airbags: Why Manufacturers Are Now Telling People To Not Sit in The Passenger Seat For Up To A Year

The Takata airbag debacle just seems to get worse and worse with each passing day. In the last several months, we have been alerting the public to the never-ending list of vehicles being recalled because of the dangerously defective airbags. Last month, we reported about a more scary announcement that Mitsubishi, Toyota and Volkswagen confirmed that they are selling new vehicles with defective airbags. Let that sink in—car manufacturers are selling new cars knowing that they contain defective and dangerous airbags.

Manufacturers, frustrated with the delay in getting replacements for the defective airbags, are now telling folks to just not sit in the passenger seat of certain vehicles. I recently ran across this article in *The Consumerist* telling a Subaru vehicle owner who received warnings from Subaru to not let anyone sit in the passenger seat of the car because of the defective airbag and because a replacement for the defective airbag may take up to year for the consumer to receive. Here is the article:

For the better part of two years, carmakers have been notifying owners of vehicles included in the massive shrapnel-shooting Takata airbags recall. Given the sheer volume of airbags involved, it's understandable that not all repairs can be done right away, but some drivers are finding out that they may not only have to wait a year for the fix, they shouldn't have anyone else in the front seat with them during that time.

Reader Henry tells Consumerist he recently received such a recall notice concerning his 2009 Subaru Forester. The notice alerted Henry that the passenger side frontal airbag could be defective, but that a new part for the vehicle would not be available until March 2018. Oh and, by the way, he was instructed not to drive with a passenger in the front seat.

According to the recall notice posted with the National Highway Traffic Safety Administration (NHTSA), the vehicles are equipped with certain airbag inflators assembled by Takata. In the event of a crash necessitating the deployment of the safety devices, the inflators may rupture with enough force to spew pieces of metal at occupants.

For those unfamiliar, Takata's airbag inflators use an ammonium nitrate propellant. If the device is exposed to humidity and related temperature swings over a period of time the chemical can combust violently, rupturing the inflator when the airbag deploys in the event of a crash.

While the recall notice Henry received isn't out of the ordinary for carmakers affected by the Takata recall, he was concerned by the year wait for parts and the directive not to allow someone to occupy the passenger seat for that period of time. "This is not acceptable," Henry tells Consumerist. Why the long wait? Henry isn't alone in waiting for his vehicle to be repaired; millions of consumers have already received notice that their cars are affected by the defect, but unable to be fixed at the moment. This is because of the large nature of the recall and the tens of millions of new inflators needed.

To address the massive campaign, NHTSA issued a consent order in November 2015 that outlined the handling of the recall, breaking

repairs into prioritization groups. The groups were created based on risk factors such as age, geography and climate, inflator position—whether it was in the driver's side or passenger side—and precession of two recalled inflators.

Regardless of these circumstances, every defective air bag inflator must be—and will be—replaced. We ask for your understanding while the air bags that pose a higher risk to their vehicle's drivers and occupants are replaced first.

That first group, deemed to have a much greater risk of rupturing, includes vehicles with older inflators that have experienced prolonged exposure to hot and humid conditions. This did not include Henry's 2009 Forester.

Instead, his vehicle is included in the third priority group, a rep for NHTSA tells Consumerist. As part of the agency's coordinated remedy action, manufacturers of vehicles in priority group 3 are the last slated for repairs.

NHTSA has amended its coordinated remedy program several times as more vehicles have been identified as being affected by the Takata defect. While the earliest version of the order required vehicles in the third group to be fixed by Dec. 31, 2017, later versions moved the completion dates to as far out as 2019. "NHTSA is prioritizing Takata air bag repairs to ensure that vehicles with air bags that pose a higher threat to safety are fixed first while simultaneously working to ensure that parts are available to repair every affected vehicle as quickly as possible," a rep for the agency tells Consumerist. Despite the slow-moving repairs, NHTSA has urged all manufacturers affected by the recall to make customer safety their number one priority.

Perhaps that's why Subaru directed Henry and others not to haul around passengers behind the defective Takata airbag. The notice Henry received not only describes the Takata issue in his Forester, but directed him and other owners not to allow others to sit behind the defective airbag. "Until this repair is performed, do not allow passengers to ride in the front passenger seat," the notice states in bold lettering. Let's take a look at what the automaker is telling its customers:

WHAT YOU SHOULD DO

Parts are not available at this time. The National Highway Traffic Safety Administration (NHTSA) has ordered automakers to accelerate the production of remedy parts, and to prioritize repairs for vehicles according to risk factors identified through testing. You will be contacted when parts supply is sufficient, which we anticipate to be by March, 2018.

UNTIL THIS REPAIR IS PERFORMED, DO NOT ALLOW PASSENGERS TO RIDE IN THE FRONT PASSENGER SEAT.

If you are unable to preclude passengers from riding in the front passenger seat, please be sure to ask your Subaru retailer about possible options for alternative transportation until your vehicle is repaired.

A representative for Subaru tells Consumerist this isn't an unusual directive, as other carmakers have issued similar warnings. "This is a typical situation for all makers with Takata bags," the rep said. "The driver bag in a Subaru is not Takata where other makers have both driver and passenger."

For instance, in 2014, Toyota urged owners of some vehicles to keep passengers out of the front seat until repairs could be made. That recall involved vehicles in high humidity areas, which had been deemed the most susceptible to dangerous ruptures. Toyota said at the time it would disable affected airbags and advised customers not to use the front passenger seat until a replacement inflator is installed. NHTSA has since advised against disabling the airbag. "It is far more likely that, if you are involved in a crash, your airbag will perform properly and protect you than it will rupture and cause harm," the agency says on its Takata website. "An airbag that is purposely disabled has a 100 percent chance of failing to provide any protection in a crash." As for Subaru, the company is erring on the side of caution with its warning, adding that it's not a "perfect situation," but "at least with Subaru we can say it's safe to drive the vehicle until the repair."

Except you'll be driving around alone, or like a chauffeur with your passengers in the backseat. Of course, that's not always a viable option, you know, if you have a family of five or planned a road trip with a group of your friends. If you can't avoid driving around with a car full of people, you essentially have two options: continue driving or get a rental/loaner. NHTSA notes on its Takata recall FAQ page that the vast majority of Takata air bags will perform as expected. This suggests that you could take your chances driving around in the vehicle.

If you "don't feel comfortable continuing to drive your vehicle before the recall repair has been performed on your vehicle, you should contact your dealer and ask for a loaner until an interim or a final repair is completed," NHTSA suggests. However, a person with the agency told Consumerist that it is completely up to the carmaker's discretion whether or not to provide a loaner vehicle to owners affected by the recall. In fact, dealers and manufacturers are not required to provide you a loaner car, but it can never hurt to ask.

According to Subaru's notice to Henry, owners who can't avoid driving others around in the passenger seat should reach out to the carmaker for alternative options. This could include a loaner vehicle. A spokesperson for Subaru told Consumerist that the carmaker has "limited loaner vehicles for special situations." The company did not provide specifics on what a "special situation" constitutes.

As of March 31, NHTSA says that 14.35 million Takata airbags have been replaced under the recall campaign. Of those, 7.5 million were located on the driver's side, while 6.85 million were passenger-side airbags. As for Subaru, NHTSA says 27.58 percent of recalled airbags have been fixed; that's a total of 309,862 passenger-side airbags. To find out if a vehicle is affected by the recall owners are urged to enter their individual VIN on the National Highway Traffic Safety Administration's Safercar.gov/vin database.

Lawyers in our firm are handling a number of claims involving the recalled Takata airbags that caused shrapnel-related injuries. If you have any questions or have a case involving these claims, you can contact Ben Baker or Chris Glover, lawyers in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at Ben.Baker@beasleyallen.com or Chris.Glover@beasleyallen.com. There is a great deal of additional information relating to this subject, but due to space limitations we couldn't include all of it in this issue. Ben and Chris will be glad to talk with you on all that we have learned.

Source: *The Consumerist*

Imported Tires Pose A Threat To Consumer Safety

Though a February vote by the U.S. International Trade Commission (ITC) determined the nation's domestic truck and bus tire industry has not suffered material injury due to Chinese imports, American consumers are definitely being harmed. Design defects in tires imported from foreign countries, particularly China, are injuring and killing American drivers.

As more and more of the products we buy, including tires, are being made in China and other foreign countries, the "importers" role is becoming more critical. In too many instances, importers are not taking the appropriate steps to assure that foreign makers' tires are safe—despite the National Highway Traffic Safety Administration (NHTSA) standards requiring them to do so—with life-altering or life-ending consequences. For example, lawyers at Beasley Allen have handled a number of cases involving Chinese tire manufacturers, including an ongoing wrongful death action against a defective heavy truck tire.

Under federal law, importers must take steps to assure that the tires they import are free of defects. Good manufacturing processes require importers to conduct on-site inspection(s) of a foreign tire maker's facilities to assure that adequate testing, manufacturing, quality control and other measures are in place. Quite simply, once foreign tires are imported into the U.S., importers should perform random sampling, testing and inspection before they distribute and/or sell the tires to American consumers. But that rarely seems to be the reality. In one of our recent cases, we learned that, while a company was importing more than 400,000 tires a month, it was doing nothing to insure that the Chinese tires it imported, sold and profited from were safe. The importer never inspected the manufacturing plant, never observed any tire testing and never checked to see if the Chinese manufacturer employed any quality control measures for its tires and plants. The importer also never performed one post-import inspection, test and/or took any other step relative to one single tire it sold—despite the federal requirements to do so.

This conduct is particularly troubling when you consider how important tires are to our safety. For many of us, vehicles are our main form of transportation to and from work, school and the grocery store, meaning daily life hinges on vehicles working properly and being safe. Companies that import tires—or any product for that matter—should be held accountable when they do nothing to insure their products are safe for American consumers.

Lawyers in our firm have handled numerous claims against both tire manufacturers and importers of defective Chinese tires that demonstrate the high costs when companies fail to value consumer safety over profit. Ben Baker, a lawyer in our Personal Injury & Products Liability Section, is experienced in handling claims involving tire failure. For more information, contact Ben at 800-898-2034 or by email at Ben.Baker@beasleyallen.com. Ben also recently wrote a book, *Tire Litigation: A Primer*, which is available free to lawyers. To order your copy or download a digital copy, visit benbakerlaw.com/book.

VII. MASS TORTS UPDATE

Plaintiff Is Successful In Latest Talcum Powder Trial Against Johnson And Johnson

For a fifth time, Johnson and Johnson has been found liable for a Plaintiff's ovarian cancer caused by her perineal use of Johnson's Baby Powder and Shower to Shower products. After another month-long trial, a jury in St. Louis awarded more than $110 million to a Virginia woman, the largest talcum powder verdict so far. Imerys Talc America, Johnson's talc supplier, was also found negligent and guilty of conspiring with Johnson and Johnson to suppress relevant science and unduly influence industry regulators.

Lois Slemp, 62, proved that more than four decades of talc use caused or contributed to cause her ovarian cancer, which had grown to the size of a basketball by the time of her first surgery. Then, after seven months of apparently successful chemotherapy, the cancer returned, this time metastasizing to her liver. She was actually undergoing a second regimen of agonizing chemotherapy during the trial and was physically unable to attend. She was forced to testify by audio deposition, and she is still courageously battling the disease at this time.

The four-man, eight-woman jury deliberated for 10 hours before awarding Ms. Slemp $5.4 million in compensatory damages and $105 million in punitive damages against Johnson and Johnson, and $54,000 in compensatory damages and $50,000 in punitive damages against Imerys. Previous verdicts against these Defendants awarded plaintiffs $70 million, $72 million and $55 million. The Defendants have only prevailed in one of six trials.

During the Slemp trial, we called a number of prominent scientists and researchers from the fields of epidemiology, gynecology, toxicology, and pathology, who all testified that more than 20 well-designed studies show a statistically significant association between ovarian cancer and genital talcum powder use. In addition, our experts were able to explicitly describe how talc particles can migrate from the perineum through a woman's reproductive tract, and implant in the tissue of the fallopian tube, ovaries and other adjacent organs. The talc particles then cause a toxic reaction which can damage cells, causing neoplastic changes that can develop into cancer.

There was one distinguishing characteristic that was different in this trial from past trials. This time, not only did our expert pathologist find talc particles in Ms. Slemp's reproductive tissue, he also found a tremolite asbestos fiber, a well-known carcinogen. Johnson and Johnson's body powder products were known to be contaminated with asbestos prior to the mid-1980s. Interestingly, however, based on post-trial interviews with jurors, we learned the jurors were not as troubled by the presence of asbestos as we expected them to be. It was the presence of talc particles, and the evidence regarding the toxicity of talc, that was their primary focus of causation.

We also called an expert from the cosmetics industry who testified about cosmetic regulatory matters and appropriate business practices for cosmetic companies. Through this expert, the jury was shown a cache of internal documents evidencing J&J and Imerys's full awareness of the ovarian cancer risk associated with their body powders, as well as all of their concerted efforts over 30 plus years to shape and suppress the science so as to conceal the risk from the public. Beasley Allen's

lead trial counsel Ted Meadows had this to say:

> *Once again we've shown that these companies ignored the scientific evidence and continue to deny their responsibilities to the women of America. They chose to put profits over people, spending millions in efforts to manipulate scientific and regulatory scrutiny. I hope this verdict prompts J&J to acknowledge the facts and help educate the medical community and the public about the proper use of their products.*

Beasley Allen's next talc trial is scheduled to start this month. Plaintiffs have moved for a multi-Plaintiff trial, which at press time remains under consideration by the Court. The Slemp trial team was composed of Beasley Allen lawyers Ted Meadows, Danielle Mason, David Dearing and Ryan Beattie; Allen Smith of the Smith Law Firm; and Jim Onder and Wylie Blair of the St. Louis firm Onder, Shelton, O'Leary & Peterson, LLC. We also have an invaluable support team of paralegals and legal assistants and other support staff. It takes a large team of highly skilled and dedicated professionals to take on a giant corporation like Johnson & Johnson. The commitment of our trial team is evidenced by our success to date. It's unclear how many sizable verdicts it will take for Johnson & Johnson and Imerys to start warning unsuspecting women about the ovarian cancer risk associated with the perineal use of their talc-based body powders. But until then, Beasley Allen will continue to take the fight to them.

I will now give an update on the MDL Talc Litigation. The talcum powder multidistrict litigation (MDL) is in New Jersey federal court where approximately 300 cases are pending. The MDL continues to advance. Judge Freda Wolfson ruled earlier this year that she will consider general causation in the MDL prior to the scheduling of individual bellwether trials. Before the general causation proceeding starts, however, Plaintiffs have the opportunity to pursue additional discovery, which is ongoing.

The Plaintiff Steering Committee's recent discovery efforts are yielding significant results. For example, Plaintiffs recently learned that the Johnson & Johnson Defendants did not include terms such as "cancer," "ovary," "carcinogen," and the like in their search to identify responsive internal documents. Judge Wolfson ordered J&J to search with additional relevant terms and these searches produced thousands of additional documents. In addition, Plaintiffs have identified other relevant documents that have not yet been produced. The Court has ordered that all responsive documents be produced within 90 days.

Individual Plaintiffs may file cases directly in the MDL using a Short Form Complaint (CMO No. 2). In addition, an abbreviated service process is outlined in CMO No. 3. For cases transferred to the MDL, a Short Form Complaint must be filed within 30 days from the date the case is transferred. Plaintiffs Fact Sheets and other case-specific discovery are not required at this time.

I will also give you an update on California Talc Litigation. There are 123 cases in the California coordinated proceeding, *Johnson & Johnson Talcum Powder Cases, Judicial Council Coordinated Proceeding* No. 4877. These cases are assigned to Judge Maren E. Nelson. Science Day was held by Judge Nelson on March 7, 2017. The first California trial is scheduled to begin on July 17, 2017. *Sargon* (the state court equivalent of *Daubert*) science hearings are scheduled to begin on June 26. We believe the talc litigation is going well in all fronts. The arrogance of J&J—considering all that has happened in this litigation—is difficult to understand.

Xarelto Litigation Update

Despite a setback last month in the first Xarelto bellwether trial, the future of the Xarelto multidistrict litigation (MDL) looks very bright. Currently, there are approximately 14,000 individual Xarelto cases consolidated before U.S. District Judge Eldon Fallon in the United States District Court for the Eastern District of Louisiana (the MDL court). As we have stated, Xarelto is an anticoagulant (blood thinner) initially approved in 2011 to reduce the risk of deep vein thrombosis (DVT) and pulmonary embolism (PE) following knee and hip replacement surgery. It was later approved to reduce the risk of stroke in patients with non-valvular atrial fibrillation (A-fib) and for treatment of DVT and PE. Xarelto carries a significant risk of severe, uncontrolled internal bleeding and it has been linked to gastrointestinal bleeds, rectal bleeds, brain hemorrhages, and bleeding-related deaths.

Judge Fallon is presiding over four initial bellwether trials—the first of which began on April 24 and ended May 3 with a Defense verdict. The Plaintiff in that case, Joseph Boudreaux, started taking Xarelto in January 2014 to control his atrial fibrillation (irregular heartbeat) and that within a matter of weeks he was hospitalized for dangerous gastrointestinal bleeding that required multiple blood transfusions. Mr. Boudreaux contended that Janssen Pharmaceuticals, Johnson & Johnson and Bayer (the Defendants) defectively designed Xarelto by failing to develop a coagulation-monitoring test specifically calibrated to Xarelto that would allow doctors to assess the coagulation status of patients. He also said that the Defendants failed to warn and adequately instruct doctors about the ability to measure Xarelto's anticoagulant effect on patient's blood with currently available lab tests.

Ultimately, the jury decided that Mr. Boudreaux's prescribing doctor received adequate instructions for the safe use of Xarelto. This is due in no small part because of the doctor's testimony that he would have prescribed the drug for Mr. Boudreaux regardless of the warnings he was (or wasn't) given. While this result was certainly disappointing for our client, it is hardly an indicator of future trial results, given the unique testimony of Mr. Boudreaux's prescribing doctor.

Andy Birchfield, our Mass Tort Section Head and the Xarelto MDL Co-Lead Plaintiffs' Counsel, is hard at work trying the second bellwether case in Judge Fallon's court. This second trial, which started on May 30, involves Joseph Orr, Jr., a Louisiana resident who filed suit on behalf of his deceased wife, Sharyn Orr. Tragically, Sharyn Orr suffered a fatal brain bleed while taking Xarelto. She was just 67 years old at the time of her death.

Mrs. Orr started taking Xarelto in February 2014 for treatment of chronic atrial fibrilation. On April 24, 2015, Mrs. Orr suddenly became severely ill. She was transported to the hospital by ambulance, where her condition continued to deteriorate to the point that she became nonresponsive. CT-scans of her head revealed she was suffering from an extensive, acute hemorrhage in her brain.

Because of the unknown level of Xarelto in Mrs. Orr's system and the lack of a reversal agent for the drug, her doctors were unable to "green light" surgery upon her arrival at the hospital. The next day, after any remaining Xarelto had cleared her system, her doctors performed a procedure to drain the excess blood from her brain. Unfortunately, the procedure came too late and Mrs. Orr's neurologic condition continued to worsen until she passed away on May 4, 2015, with her family by her side. Hopefully, Mrs. Orr's family will prevail in this case. Based on the facts and the science, I believe that will happen with justice being served.

$20 Million Pelvic Mesh Verdict Returned Against J&J In Philadelphia

A Pennsylvania state jury recently returned a $20 million verdict against Johnson & Johnson over injuries suffered by a New Jersey woman after receiving a vaginal mesh implant. This is the third consecutive eight-figure award against Johnson & Johnson in the pelvic mesh mass tort program in Philadelphia County court.

The Plaintiff, Peggy Engleman, was awarded $2.5 million in compensatory damages and $17.5 million in punitive damages after a three-week trial. She claimed that a TVT-Secur medical device manufactured by J&J's subsidiary Ethicon was defective and that the company had failed to warn of its risks. In the event some don't know, the TVT-Secure is a transvaginal mesh tape that is used to treat stress incontinence, a condition that results in the leakage of urine when physical activity such as coughing, sneezing, running or heavy lifting puts pressure on the bladder. Engleman, who filed her lawsuit in 2013, had the device implanted in 2007. Ms. Engleman testified that the TVT-Secur failed within a month and her urinary dysfunction returned. In addition, the polypropylene mesh eroded through her vagina, and though she has undergone three removal procedures, her treating physicians have been unable to completely remove the mesh.

The 56-year-old New Jersey resident said she now has chronic vaginal pain, pelvic floor spasms and permanent urinary dysfunction. Ms. Engleman, in a statement said: "I'm happy I could be a voice for other women. It's been a nightmare, and I feel justice was truly served today."

The TVT-Secur product was first put on the market in September 2006, but Engleman's lawyers said J&J had received numerous reports of high failure rates from countries all over the world. Benjamin Anderson of Cleveland-based Anderson Law Offices, who was the lead Plaintiff's counsel, said in a statement:

> *This jury sent a strong message today to Johnson & Johnson that they continue to bear in courtrooms across the country—our communities deserve better than these dangerous mesh devices and putting profits before safety will not be tolerated.*

Two previous trials in Philadelphia handled by Shanin Specter of Kline & Specter have already resulted in a pair of damage awards against Ethicon totaling some $26 million. A 2015 case produced a $12.5 million verdict for an Indiana woman and a 2016 case led to a $13.5 million for a New Jersey woman. The pelvic mesh mass tort program still has 183 cases pending.

Engleman is represented by Benjamin Anderson of the Anderson Law Offices, Bryan Aylstock and Daniel J. Thornburgh of Aylstock Witkin Kreis & Overholtz PLLC and Chris Gomez of Kline & Specter PC. The case is Engleman v. Gynecare et al (case number 140305384) in the Court of Common Pleas of the State of Pennsylvania, County of Philadelphia.

Source: Law360.com

A Report On Bone Cement Used In Knee Replacement Surgeries

Joint damage caused by arthritis or injury can make even the simplest tasks seem impossible. Knee replacement surgery is generally a highly effective treatment of degenerative joint disease, and one of the most successful procedures in all of medicine, with survival rates of more than 90 percent at 10-19 years of follow-up.

More than 600,000 knee replacements are performed each year in the United States, and that number is expected to exceed 3 million by 2030. Because of the sheer volume of surgeries performed, surgeons and hospital administrators are looking for products to increase operational efficiency. One of the ways that many hospitals and surgeons have attempted to streamline the surgical process is by changing the type of bone cement used during the procedure.

During knee replacement surgery, doctors attach components of the new knee joint to the femur (thigh bone) and tibia (shin bone), using an epoxy cement. This bone cement comes in two separate components—a powder and a liquid that have to be mixed together. High-viscosity cement (HVC) boasts shorter mixing and waiting times and longer working and hardening phases. These shorter times mean that surgeons can handle and apply the cement earlier than with low- or medium-viscosity cements.

Although high-viscosity cement may be more convenient to use, there is mounting evidence that the bond it produces is not as strong. Researchers have observed more early failures with the use of high-viscosity bone cement, even when used in combination with a previously well-performing implant. A 2016 case series evaluated 13 cases of tibial component debonding (where the implant fails to adhere to the cement interface on the shin bone) in implants performed with high-viscosity cement.

The study authors believe that these implant failures were likely related to the use of high-viscosity cement, after finding no instances of aseptic loosening or tibial component debonding in cases using the same implant and non-high viscosity cement. Study authors advised that surgeons should be aware of the possibility of debonding of the tibial component when using HVC. Another case series report from 2013 observed only nine early failures out of 3,048 total knee replacements—all of the failures involved high viscosity cement.

There are key differences between HVC and non-HVC that may contribute to the observed differences in outcomes. First, high-viscosity cement has only about half the intrusion depth of non-HVC. Additionally, researchers have observed superior mean pore size and total porosity in non-HVC in comparison to the HVC. These differences may play a significant role in the strength of the bond between the cement and bone and the cement and the implant.

High viscosity bone cements are another example of manufacturers bypassing the usual approval path, which requires an independent demonstration of safety and effectiveness. Instead, manufacturers use the 510k approval process and claim that these high-viscosity bone cements are "substantially equivalent" to the low-viscosity cements that have been in use for decades.

Lawyers in Beasley Allen's Mass Torts Section are currently investigating cases involving early knee implant failure associated with high-viscosity bone cement. If you or a loved one has experienced complications from knee replacement surgery, (including new onset chronic pain, instabilitly, or loosening or debonding of the tibial component) contact Roger Smith or Liz Eiland, lawyers in our Mass Torts Section, at 800-898-2034 or by email at Roger.Smith@beasleyallen.com or Liz.Eiland@beasleyallen.com.

Sources: American Academy of Orthopaedic Surgeons, *Beyond Surgery Day: The Full Impact of Knee Replacement*, http://www.anationinmotion.org/value/knee/; He, Shulin, et al, *Comparative Handling, Intrusion and Antibiotic Elution Characteristics of Simplex HV bone cement*, http://www.ors.org/Transactions/60/1849.pdf; Hazelwood, KJ et al, Knee, *Case series report: Early cement-implant interference fixation failure in total knee replacement*, https://www.ncbi.nlm.nih.gov/pubmed/25795544; Kopinski, JE et al, J. Arthroplasty, *Failure at the Tibial Cement-Implant Interfact With the Use of High-Viscosity Cement in Total Knee Arthroplasty*, https://www.ncbi.nlm.nih.gov/pubmed/27155996; and The Stone Clinic, Total knee replacement surgical technique, http://www.stoneclinic.com/tkrillustration.

Taxotere Lawsuits Centralized In Louisiana Federal Court

Taxotere cases filed in United States federal courts have been consolidated before Judge Kurt D. Engelhardt in the United States District Court for the Eastern District of Louisiana. The cases are part of multidistrict litigation (MDL) as ordered by the Judicial Panel on Multidistrict Litigation. Multidistrict litigation is a consolidation of civil cases transferred from different jurisdictions around the country to a single United States District Court to achieve certain pre-trial efficiencies. The aim of this consolidation is to preserve judicial resources, eliminate duplicities in the fact-finding process, and prevent inconsistencies in pre-trial rulings.

In April 2017, Judge Engelhardt entered a pretrial order allowing Plaintiffs to file their lawsuits directly in the MDL, which should help to make the filing process more efficient. As of April 17, 2017, there were 949 Taxotere lawsuits pending in the MDL Court.

Taxotere (docetaxel) is a chemotherapy drug approved in the treatment of breast cancer, non-small cell lung cancer, advanced stomach cancer, head and neck cancer and metastatic prostate cancer. It is administered intravenously, and is a member of a family of drugs called taxanes. It is used to try to prevent cancer cells from growing and dividing.

When Sanofi-Aventis started manufacturing Taxotere, it marketed and promoted it as more potent and effective than Taxol, a competing chemotherapy agent distributed and produced by Bristol-Myers Squibb. Sanofi-Aventis intentionally developed Taxotere to be twice as strong as Taxol in an effort to claim a large market share in the highly profitable chemotherapy market segment. However, Taxotere has been found to be significantly more dangerous and linked to a higher number of side effects as compared to Taxol. Additionally, Taxol can be used at lower doses than Taxotere with similar effects.

In 2007, Sanofi-Aventis issued a press release touting the efficacy of Taxotere based on a clinical study, GEICAM 9805. However, Sanofi-Aventis failed to inform the U.S. Food and Drug Administration (FDA), health care providers, and the public that in the GEICAM 9805 study permanent hair loss persisted into the follow-up period (10 years and five months was the median follow-up) and was observed to be ongoing in 9.2 percent of the patients taking Taxotere.

Hair loss during chemotherapy is expected. It is a very common side effect of fighting cancer. However, patients undergoing chemotherapy with Taxotere were not warned they could potentially experience permanent hair loss. Permanent hair loss is an extremely debilitating condition, especially for women. The permanent loss of hair is more than cosmetic. For cancer survivors it is a constant reminder of their struggle and a completely unnecessary result of chemotherapy treatment.

Lawyers at Beasley Allen continue to investigate, review and file cases involving women that have suffered permanent hair loss following chemotherapy with Taxotere. For more information, contact Beau Darley, Melissa Prickett, or Liz Eiland lawyers in the firm's Mass Torts Section, at 800-898-2034 or by email at Beau.Darley@beasleyallen.com, Melissa.Prickett@beasleyallen.com or Liz.Eiland@beasleyallen.com.

Sources: Pretrial Order No. 37, *In re: Taxotere (Docetaxel) Prods. Liab. Litig.*, MDL No. 2740 (E.D. La. Apr. 6, 2017). and PR News Wire

Benzene Plaintiffs File Brief On Punitive Damages In Appeal Of $3.52 Million Jury Verdict

Benzene Plaintiffs who were awarded $3.52 million by an Iowa federal court jury have filed their brief in the appeal of the verdict, maintaining that the court erred when it vacated the jury's punitive damage award.

Plaintiff Cheri Dahlin originally filed suit in Iowa state court on behalf of her deceased husband Dean Dahlin, who was employed as a commercial truck driver for Dahlien Transport Inc. from 1990 to 1992 and for A&R Logistics Inc. from approximately 1992 to 1995. During the course of his employment, Dahlin loaded, transported and unloaded benzene-containing products from a petro-chemical facility located in Clinton, Iowa, to a municipal dock storage facility in South Clinton, Iowa. It was contended that as a direct result of the exposure, Dahlin developed myelodysplastic syndrome, which eventually developed into acute myeloid leukemia.

A jury found for the Plaintiffs, awarding $3.52 million, consisting of $1.76 million actual damages and $1.76 million as punitive damages. The federal court eventually vacated the entire award of punitive damages. However, the full amount of the actual damages was allowed to stand. In reaching the decision, the court opined that two questions on the verdict sheet that the Defendants argued resulted in conflicting answers did in fact cover different grounds and deserved different answers.

In their brief filed in the 8th Circuit U.S. Court of Appeals, the Plaintiffs argued that exemplary damages in Iowa are not awarded as a matter of right and, rather, that the decision to award them rests in the factfinder. The brief stated:

> *The evidence throughout the trial consistently demonstrated Lyondell decision making and wrongful conduct, and the jury decided such conduct was committed with a willful and reckless disregard for the safety of DAC tanker truck drivers, including [plaintiff] Dean Dahlin. … Lyondell knew benzene was a carcinogen, knew it presented a hazard at the premises in question, knew how to protect tanker drivers like Dean Dahlin, yet proceeded with conscious indifference as to his health and safety while failing to provide any safety measures that would eliminate this risk. This case meets the standard for punitive damages under Iowa Code 668.1(1)(a) …*

The Plaintiffs were represented at trial by Keith E. Patton and David J. Baluk of Shrader & Associates in Houston; and Robert Gallagher Jr. and Peter Gierut of Gallagher Millage & Gallagher in Bettendorf, Iowa.

John Tomlinson, a lawyer in our Toxic Torts Section, is investigating benzene exposure cases and has filed a number of benzene cases. If you need more information on this subject contact John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

Source: *Harris Martin's* Jan 2017

International Tribunal Finds Monsanto Guilty Of Crimes Against Humanity

Recently, the International Monsanto Tribunal, based in Hague, Netherlands, declared that Monsanto's activities do not just adversely affect the world's access to food, but also negatively affect the human right to health—and that the company is also guilty of "perverting scientific freedom." The Tribunal describes itself as "an international civil society initiative to hold Monsanto accountable for human rights violations, for crimes against humanity, and for ecocide."

After hearing the testimonies of 30 witnesses and experts from five continents, the tribunal, consisting of five internationally acclaimed judges, stated that the company's seed empire adversely affects the world's access to food, and that by manufacturing and distributing substances such as PCBs(polychlorinated biphenyls) and glyphosate, Monsanto has infringed on the public's right to high standards of health.

Additionally, the tribunal found that Monsanto perverts scientific freedom by practicing forms of intimidation, pressuring governments, and discrediting legitimate scientific research that supports public health and environmental protection.

As the tribunal explains, Monsanto has been profiting from their creation of destructive and harmful compounds since the early 20th century. These toxic products, like PCBs, Agent Orange, Lasso and Roundup, have created untold damage to the environment and made thousands upon thousands of people sick. In addition to spreading poisonous chemicals around the globe, Monsanto also advocates and promotes deleterious and unsustainable farming practices that contribute to the following problems:

- Soil degradation,
- depletion of water resources,
- species extinction,
- reduced biodiversity, and
- the displacement of small farms.

In addition to all that, Monsanto's business of seed patenting threatens food freedom and sovereignty. This is a huge problem that for some reason hasn't received the media coverage it deserves.

As critics of Monsanto point out, the biotech company has spent enormous amounts of money to defend itself against lawsuits brought by its victims. However, thus far legal action has yet to inspire the company to change its ways. Critics also claim that Monsanto is guilty of lobbying governments and regulatory agencies to keep its products on the market, and to keep scrutinizing eyes at bay.

While the ruling from the International Monsanto Tribunal is not legally binding, there is hope that their verdict will inspire other governments and agencies to get on board. The fact that an international body has found Monsanto guilty of crimes against humanity, violations of human rights and for ecocide is a tremendous step forward toward the goal of ending the corporation's reign of harm.

John Tomlinson, a lawyer in our Toxic Torts Section, has filed Roundup cases in both state and federal courts and is currently investigating other Roundup exposure cases. If you need more information on this contact subject, John at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

Sources: ANH-USA.org, Monsanto-Tribunal.org
Newstarget –May 5 2017

VIII. BUSINESS LITIGATION

Kimberly-Clark Sues Halyard Over $350 Million Verdict Duty Claim

Kimberly-Clark Corp. has filed suit against spinoff Halyard Health Inc. with the issue being who must pay a $350 million or more punitive damages award for fraudulent claims about the safety of surgical gowns. The Plaintiff claims in the lawsuit that Halyard Health should pay. The complaint was filed in Delaware Chancery Court one day after Halyard claimed in a new California Superior Court lawsuit that its 2014 spinoff agreement "does not expressly state" that Halyard must indemnify Kimberly-Clark for fraud, willful wrongdoing or punitive damages in a case that produced an overall judgment of more than $454 million.

A jury in the U.S. District Court for the Central District of California returned a verdict against Kimberly-Clark for about $3.9 million in compensatory damages, plus interest, in addition to $350 million for falsely representing the liquid barrier protection of its MicroCool surgical gowns. The same jury found Halyard liable for more than $261,000 in compensatory damages and $100 million in punitive damages.

Lawyers for the class said the companies marketed the gowns as "impermeable" and effective against pathogens like Ebola, putting health care workers at substantial risk. Kimberly-Clarke says that Halyand must pay because of an indemnification agreement. Kimberly-Clark also claims that Halyard accepted Delaware as the two companies' litigation forum in its spinoff agreement. According to Kimberly-Clark, a distribution agreement that detailed spinoff terms included a listing of current or potential post-spinoff litigation, with the California gown lawsuit included as a Halyard liability.

Bahamas Surgery Center's class claim in the faulty gowns suit was filed two days before Kimberly-Clark and Halyard signed the spinoff's distribution agreement. Halyard, in its California action however, disputed Kimberly-Clark's contentions relating to intimidation. It stated:

The distribution agreement does not clearly, explicitly and unmistakably state that Halyard will assume or indemnify Kimberly-Clark's liability for its own fraud or for any of the categories of conduct required to support an award of punitive damages against a corporation.

Kimberly-Clark said Securities and Exchange Commission (SEC) filings by Halyard after the spinoff mention both the gown litigation and Halyard's indemnification duties. The company asked the Chancery Court for declaratory relief and a ruling that Halyard's "clear and unequivocal statement of its intention not to perform its duty to indemnify" amounted to breach of contract. The jury in the original lawsuits issued its outsized punitive damage awards after a trial that included documents, email and other evidence showing that Kimberly-Clark knew as early as 2012 that its protective gowns were failing performance and safety tests. The company nevertheless continued to market the gowns as impermeable and safe.

Both companies said they plan to contest the verdict. Halyard also claims that California law and public policy also prohibit indemnification for punitive damages. The Delaware suit is *Kimberly-Clark Corp., v. Halyard Health Inc.* (case number 2017-0332) in the Court of Chancery of the State of Delaware. The California suit is *Halyard Health Inc. v. Kimberly-Clark Corp.* (case number BC659662) in the Superior Court of the State of California for the County of Los Angeles.

Source: Law360.com

IX. INSURANCE AND FINANCE UPDATE

Travelers Responsible For $2 Million For Firefighter's Injuries

A New Jersey state appeals court has ruled that a Travelers policy issued to a tenant should cover a $2,296,000 judgment against a building owner for injuries suffered by a Newark firefighter who fell through a glass panel on the roof of the property. A three-judge appellate panel reversed a 2012 trial court order finding that NSPC Inc. was not entitled to coverage as an "additional insured" under a Travelers Property Casualty Company of America policy issued to Jenson & Mitchell Inc. A lawsuit had been filed against NSPC and J&M by the firefighter Kevin Killeen and his wife, alleging negligent maintenance of the property.

The appellate judges determined that the additional insured provision provided coverage to NSPC for "liability arising out of the ownership, maintenance or use" of

the premises leased by J&M. The panel said: "The roof, a vital part of the Branford Street Property, is a part of the 'premises' leased to J&M." Following the lower court's ruling, Killeen and NSPC agreed that NSPC's assets would be immune from judgment leading to an "arbitrated final judgment" entered in favor of Killeen and against NSPC for $2,296,000.

Under the agreement, Killeen had been assigned all of NSPC's rights under the Travelers policy, including the right to appeal the July 11, 2012, order. Killeen did appeal that ruling. In agreeing with Killeen's argument that NSPC is entitled to coverage because the roof was part of the premises leased to J&M, the appellate panel remanded the matter for the entry of an order granting summary judgment to Killeen on behalf of NSPC.

The incident occurred on July 26, 2009, when Killeen, then a Newark Fire Department battalion chief, and other firefighters were fighting a fire in a building in Newark, which is adjacent to the property owned by NSPC. At that time, J&M leased the property for the purpose of operating a truck repair business.

After climbing a ladder to access the roof of the building on the property that was on fire Killeen stepped through a translucent-glass roofing panel and fell 25 feet onto the concrete floor below. Killeen sustained serious injuries in the fall and is now unable to work. Killeen and his wife filed the lawsuit against NSPC and J&M in Essex County Superior Court in 2010. NSPC filed a third-party complaint against Travelers, seeking coverage under the policy issued to J&M. NSPC and Travelers filed competing summary judgment motions over "the coverage issue."

The trial court granted summary judgment in favor of Travelers and dismissed the third-party complaint, finding that NSPC was not entitled to coverage because the lease obligated NSPC to maintain the roof. In handing down its ruling, the trial judge said:

> *Plaintiff's complaint alleges that NSPC was negligent in its maintenance or repair of the roof. The lease between the parties allocates this potential liability to NSPC and expressly provides that NSPC is to indemnify J&M for any such liability. Thus, the lease cannot be read as obligating J&M to obtain insurance coverage protecting NSPC from this liability and the Travelers policy, in turn, does not provide such coverage.*

On appeal, Travelers contended that the lease meant NSPC was not entitled to coverage, stating that "the lease does not obligate additional insured coverage for a condition over which NSPC retained sole responsibility—the roof—and for which it agreed to indemnify J&M where liability arose out of NSPC's negligence." The appellate panel rejected the insurer's argument, finding that the Travelers policy clearly shows that NSPC is entitled to coverage. The panel said:

> *The policy was clear and unambiguous, therefore resort to the lease was unnecessary. NSPC is entitled to coverage under the terms of the Travelers policy.*

The Killeens are represented by Jason A. Daria and John M. Dodig of Feldman, Shepherd, Wohlgelernter, Tanner, Weinstock & Dodig LLP. The case is *Kevin Killeen and Noel Killeen v. Jenson & Mitchell Inc. et al*, (case number A-0001-15T3) in the Superior Court of New Jersey, Appellate Division.

Source: Law360.com

X. PREMISES LIABILITY UPDATE

Weak Safety Standards And Bad Corporate Conduct Led To Exxon Refinery Blast

The U.S. Chemical Safety Board (CSB) has concluded that a 2015 explosion at a Torrance, California, refinery which at the time was then owned by Exxon Mobil Corp could have been prevented. CSB Chair Vanessa Allen Sutherland said in a statement:

> *This explosion and near miss should not have happened. The CSB's report concludes the unit was operating without proper procedures.*

The CSB found that weaknesses in the Torrance refinery's safety program led to the blast. The blast blew a large piece of debris 80 feet (24.38 m) to nearby alkylation unit settler tanks containing toxic hydrofluoric acid, which the board called a "near-miss event."

Four workers suffered minor injuries and part of the refinery underwent a lengthy shutdown, contributing to an increase in the state's gasoline prices. The Torrance refinery supplies 20 percent of the gasoline in Southern California and 10 percent statewide. The CSB board found that the explosion occurred when volatile hydrocarbons flowed backward through an idled gasoline-producing fluidic catalytic cracking unit (FCCU) to a pollution control device called an electrostatic precipitator (ESP). The generation of sparks by the ESP ignited the hydrocarbons setting off the explosion. The board, which has no regulatory authority and does not assess fines, found that the FCCU was operating without pre-established limits for a shutdown. The agency also said Exxon relied on safeguards that it could not be sure were working and that a critical safeguard failed.

Residents near the refinery want local and state officials to ban the use of hydrofluoric acid in making octane-boosting gasoline additives. Hydrofluoric acid is a highly toxic chemical that can kill or seriously injure at a concentration of 30 parts per million. As a gas it forms a ground-hugging cloud. The board said it has asked a federal court to enforce subpoenas requiring Exxon to provide information about safeguards to prevent or mitigate a release of hydrofluoric acid.

PBF Energy Inc. (PBF), which acquired the refinery last year, according to spokesman Michael Karlovich "has already implemented a number of measures that address the CSB's recommendations." He said in a statement: "We plan to complete two studies later this year that will address the remaining recommendations."

The CSB determines root causes of chemical plant accidents and provides recommendations to companies, industry organizations and regulatory agencies. Exxon should be held accountable for its wrongdoing. It apperas that other state and federal agencies will have to do that. Hopefully, somebody will!

Source: Reuters

$41.6 Million Verdict Returned In Offshore Rig Damage Lawsuit

A jury in Harris County, Texas, has returned a $41.6 million verdict in favor of Prime Natural Resources in its lawsuit involving a coverage dispute with insurer Lloyd's of London. The dispute was over damage caused to a drilling rig in the Gulf of Mexico during Hurricane Rita in 2005. The jury awarded Prime damages, first on six findings of bad faith by Lloyd's of London in adjusting and handling the claims and for bad faith knowingly committed by the insurer. The total verdict was about $41.6 million, including $1.6 million in attorney's fees.

Ward Goolsby, who represented Prime, told Law360 that the case was one of first impression. He said no lawsuit regarding this specific type of policy had ever been tried to a jury before. Goolsby said this case centered on a dispute between Prime and the insurer over whether the costs it

was trying to recoup were related to damage to the well or damage to the platform. He said the jury's verdict sends a clear message to the energy industry that it can rely on these policies to be made whole following hurricanes and storms that regularly strike in the Gulf of Mexico.

John Zavitsanos, a lawyer who also represented Prime, said during trial that the argument of Lloyd's—that certain parts of the well were not actually part of the well—was akin to saying the bumper is not part of a car, or that icing is not part of a cake. "It was those kind of common, every day sort of metaphors that helped the jury clue in that they're selling a story that just doesn't add up," Goolsby said, explaining the jury adopted Prime's argument that the well included more than Lloyd's interpretation.

Goolsby also said at least five of the jurors worked in the energy industry, and some had experience in well completion. That background knowledge, he said, also helped in the jurors' reaching the verdict in Prime's favor because the jurors believed their "intelligence was being insulted" on the issue of what constitutes a well.

In March 2015, Texas' First Court of Appeals held that Lloyd's of London could withhold nearly $5 million in coverage from Prime, after finding the policy insuring the offshore drilling assets damaged during 2005's Hurricane Rita did not cover "platform repair" or "debris cleanup costs." In this lawsuit, Prime was not seeking platform-related costs. Prime had asked an appellate court to decide whether the trial court erred in granting summary judgment to a group of Lloyd's underwriters and declaring that certain sections of the policy didn't provide coverage. The appellate court declined to overturn the lower court's judgment, finding that neither of the two policy sections cited by Prime covered the costs to replace, repair or refurbish the platform or platform equipment, or to remove platform debris.

Prime alleged that the insurer issued a one-year policy in April 2005 covering a Prime well and platform. Months later, Hurricane Rita struck, bending the well at a more than 90-degree angle, toppling the platform and damaging the attached pipeline. Repair costs exceeded $17 million, which Prime said was "unambiguously covered" under the policy. The trial court granted Lloyd's summary judgment after the insurer said it paid coverage limits on the platform it deemed to be a total loss. Lloyd argued that Prime was attempting to recover additional costs not covered by the policy. The trial court agreed and ruled for Lloyd.

Prime later appealed, contending that although Lloyd's had paid about $4 million in repair and cleanup costs, maxing out the limits of coverage available under a provision of the policy covering the drilling platform, Prime was entitled to the additional $4.7 million for restoring the damaged well. But Lloyd's argued those policy provisions were never triggered because there was no evidence that the wells posed a danger. Lloyd's argument was:

- Safety valves closed off the flow of hydrocarbons when the disaster struck, and Prime was later able to temporarily seal off the wells while repair and cleanup operations were ongoing.
- The policy offered coverage only for repairs needed to wells spilling out of control.
- Prime underinsured its own platform and was trying to improperly recharacterize platform debris removal as being insurable under the policy's well restoration provisions.

The jury rejected these arguments and found for Prime, finding that Lloyd acted in bad faith. Prime Natural is represented by John Zavitsanos, Foster C. Johnson, Sammy Ford IV and Edward Goolsby of Ahmad Zavitsanos Anaipakos Alavi & Mensing PC and Randy Roach of Roach & Newton LLP. The case is *Prime Natural Resources Inc. v. Certain Underwriters at Lloyd's, London Syndicate* (case number 2015-51137) in the 129th District Court in Harris County, Texas.

Source: Law360.com

XI. WORKPLACE HAZARDS

Employees Deserve A Safe Working Environment

Product liability cases focus primarily on the design of the machine. When dealing with industrial accidents, the design question is generally whether the manufacturer provided adequate guarding or detection technology. Recently, we have filed a major case where the conduct of the employer might overshadow the design of the machine. I have dealt with many cases where the manufacturer offered adequate guarding or detection technology; however, the employer either intentionally bypassed the safety devices, never installed the devices, or failed to make repairs after the safety devices were neutralized due to mechanical reasons.

More often than not, employees do not appreciate the dangers to which they are exposed. However, in the event that employees do appreciate the danger of working with or near machinery with neutralized safety devices, what should they do when they are asked to operate machines with unguarded hazards?

Lawyers in our firm recently opened a file involving injuries to four separate employees while working on the same machine. The press in question was sold with adequate guarding and sensor technology. The sensor included photo-eye beams that would not allow the press to activate if any part of the operator's body is in harm's way. After the last injured employee contacted our office, we directed him to call the Occupational Safety and Health Administration (OSHA) to report his incident along with the other injuries. OSHA conducted a surprise inspection and found the machine's safety devices to be inoperable. OSHA also interviewed all of the injured employees along with the employer's management and maintenance crew. We expect OSHA to find that safety regulations were violated because multiple employees were required to operate machinery knowing that safety devices were inoperable.

Even after OSHA's investigation, one of the injured employees was asked to operate the subject press even though the safety devices were still inoperable. We instructed the employee to report the employer's conduct to OSHA again. Obviously, the employee is concerned he will lose his job or will suffer consequences if the employer discovers he instigated the inspection.

All employees and the lawyers who represent injured employees should be aware of OSHA's Whistleblower protections. If an employer retaliates against an employee who engages in protected activity relating to workplace safety, the employee can file a complaint with OSHA. If OSHA finds that the employer participated in retaliatory conduct, OSHA could issue an Order requiring the employer to reinstate the employee, pay back wages, restore benefits, and other possible remedies to make the employee whole. Just like in other OSHA actions, the employer would have the right to appeal any OSHA Orders.

In addition to OSHA Whistleblower protections, some states, like Alabama, have statutory and common law remedies in place that prevent an employer from taking employment action against an employee for exercising their rights.

If an employee contacts a lawyer expressing concern with working on or near machinery with bypassed or inoperable safety devices, they should advise them

to refuse until the safety devices are repaired and to immediately contact OSHA. The alternative is to expose themselves to hazards that could lead to death or serious bodily injury. Clearly, employees are primarily concerned with maintaining their employment so they can provide for themselves and their families. All too often, employees are killed or seriously injured through no fault of their own. More often than not, the employer compounds the injury or death by blaming the employee for the incident.

OSHA Whistleblower remedies and state laws preventing retaliation are there for a reason. Employees need to be aware of their rights and must have the courage to exercise their rights. If you need more information on workplace accidents and employee rights, contact Kendall Dunson, a lawyer in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com.

Fall Hazards Continue To Pose Risk To Workers

Falls are the leading cause of death in the construction industry, according to the Occupational Safety and Health Administration (OSHA). In 2015, the latest year data is available, falls resulted in the deaths of 350 construction workers. Each of those deaths was preventable. A slippery surface, a missing harness or a missing guard could possibly end a worker's life. To help increase knowledge of employer responsibility and reduce the number of fall deaths in the construction industry, OSHA has partnered with the National Institute for Occupational Safety and Health (NIOSH) and National Occupational Research Agenda (NORA)-Construction Sector on a nationwide outreach campaign to raise awareness among workers and employers about common fall hazards in construction.

As part of the campaign, OSHA and a number of key groups hosted the fourth annual National Fall Prevention Stand-Down May 8-12, 2017. The voluntary event encouraged employers to take a break on the jobsite and "have a conversation with employees about hazards, protective methods, and the company's safety policies and goals," according to OSHA's website. The campaign is a welcome step to reducing on-the-job fall injuries and deaths.

In New York, falls topped the list of causes of construction-related deaths due to New York City being the U.S. city with the highest fatal construction injury rate, according to the New York Committee for Occupational Safety and Health (NYCOSH)'s report, Deadly Skyline: An Annual Report on Construction Fatalities in New York State. The study states:

> *OSHA regulations around the proper construction of scaffolding and the mandatory and proper use of personal protective equipment like harnesses on active construction sites are intended to prevent workers from falling to their death. However, the failure of construction employers to take mandated fall prevention measures results in preventable worker fatalities.*

The study determined the most commonly found employer violations involved failing to take fall prevention measures. The experience our lawyers have had in workplace litigation confirms the study's findings.

Machine or equipment defects also play a role in compounding employer safety lapses. For example, our firm recently handled a suit on behalf of the family of a worker killed when his hanging basket fell during the construction of Montgomery, Alabama's Outer Loop Project. OSHA fined the employer $54,500 for four safety violations, including failing to provide the two men killed with required fall protection. We also filed a suit that was settled out of court against the basket's manufacturer for defective product design.

It is simple: Violating health and safety laws and allowing defectively designed machines on the market causes preventable workplace fatalities. Whether through using OSHA's Stand-Down week or other avenues, employers and manufacturers must create an open dialogue about safety and uphold safety regulations meant to allow everyone to make it home each night. If you need more information on this subject, contact Kendall Dunson, who handles workplace litigation for our firm, at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com.

XII. TRANSPORTATION

Recent Fiery Air Ambulance Helicopter Crashes Illustrate Danger Of Crashworthy Fuel Tank Loophole

In 2014, the Federal Aviation Administration (FAA) issued new regulations for helicopter safety, as discussed previously in a prior issue of this Report. Many of the new, stricter regulations were aimed at addressing the major causes of helicopter emergency medical services (HEMS) crashes. While HEMS owners and operators have been implementing the new safety regulations, one problem persists and continues to claim the lives of pilots and patient passengers—dangerous fuel tanks.

It is a problem that changed David Repsher's life on July 3, 2015. David was a flight nurse on Air Methods Flight for Life AS350B3e that day and Heliweb.com reported that he accompanied flight paramedic Matt Bowe and pilot Pat Mahaney on a seemingly routine trip aboard the medical helicopter. As the helicopter was departing St. Anthony's Summit Medical Center in Frisco, Colorado, a problem occurred that sent the aircraft into a tailspin and after struggling to regain control for more than 30 seconds, it crashed to the ground in the hospital's parking lot.

The incident was captured on surveillance video and showed that the three crew members survived the crash. However, just seconds after the crash, fuel that leaked from the ruptured tanks ignited. All three crew members barely escaped the flames before the helicopter burst into a ball of fire. Pat succumbed to his injuries within a few days of the crash while Matt was released from the hospital soon after the tragic incident. However, Dave was burned on almost 90 percent of his body.

After a year in the hospital, countless surgeries and other procedures and following several near-death experiences, Dave was released from the hospital. While he was still alive and thankful, his ravaged body no longer reflected the athletic outdoorsmen he was before the crash. Months spent in a medically induced coma dropped his weight from 180 pounds to 89. The strong antibiotics he needed to fight off infection destroyed his kidneys, requiring him to have four hours of dialysis five nights a week for the rest of his life or until he can find a donor.

An in-depth investigation into the dangerous fuel tanks by Denver, Colorado, NBC affiliate KUSA 9News explains how the tragic turn in Dave's life could have been prevented. The KUSA investigative team discovered that despite a decades-old solution, a federal loophole allows even modern helicopters to use fuel tanks with dangerous designs.

In 1968, at the height of the Vietnam War, the U.S. Army Aeromedical Research Laboratory noted that Army Chief of Staff General Harold K. Johnson invested $3 million into research and development of a crashworthy fuel system. By this time in military aviation, military leaders had learned that the fuel tank design was often the culprit for the fiery helicopter crashes that claimed the lives of many pilots. If the plastic encasement was not crashworthy

the tanks would crack on impact, releasing fuel. The volatile atmosphere would not need much to spark a hot, fast burning fire, igniting the aircraft into a ball of flames. Industry insiders compare the flimsy design to a large milk jug.

In the 1970s, the U.S. military began incorporating safer alternative fuel tank designs like the Robertson Crashworthy Fuel System or the "Robbie Tank," according to the National Aviation Hall of Fame. The fuel system was first used in the Army's Bell UH-1 Huey helicopter in April 1970. The alternative design with its "ballistically tolerant, self-sealing fuel cells" is safer and has been credited with saving thousands of lives. Before the new design, 40 percent of Army pilot fatalities occurred in severe crashes that resulted in fires. Retired Army Colonel Dennis Shanahan told KUSA that by 1976, when he began researching the issue, every Army helicopter was equipped with newer and sturdier designed fuel tanks. Yet, helicopter manufacturers continue to resist making the same upgrades on civilian helicopters despite the National Transportation Safety Board (NTSB) and FAA's efforts.

For example, the Flight for Life AS350 helicopter Dave was riding on when it crashed was manufactured by Airbus in 2014. However, the first AS350 was certified in 1977. A 1994 FAA mandate carved out a loophole to pacify helicopter manufacturers more concerned with their bottom lines than keeping passengers safe. The mandate required all helicopters certified after 1994 to be fitted with a crash-resistant fuel system when it is manufactured. Therefore, while the aircraft was approximately only a year old, legally it was still able to fly with flimsy fuel tanks since it was certified nearly 20 years before the mandate.

The cost of the upgrades, which is the equivalent of one to two percent of the manufacturing cost, is still considered steep by helicopter manufacturers. Industry experts estimate the cost to retrofit an existing helicopter is approximately $100,000 while the current price of the AS350 helicopter, for example, is $1.6 million. And, following a March 2016 Safety Recommendation Report issued by the NTSB, manufacturers still have the option not to retrofit. Although it recommended retrofitting all helicopters, it stopped short of requiring the action.

As of last summer, nearly 84 percent (4,700 of the 5,600) of the helicopters manufactured since the 1994 mandate do not use crash-resistant tanks.

Sources: *Jere Beasley Report,* KUSA 9News, U.S. Army Aeromedical Research Laboratory, National Aviation Hall of Fame, National Transportation Safety Board

XIII. HEALTHCARE ISSUES

Amputation Risk Leads To Boxed Warning On Diabetes Drugs

The U.S. Food and Drug Administration (FDA) is requiring a black-box warning for Janssen Pharmaceuticals' diabetes medications Invokana and Invokamet. The FDA said the drugs can increase the risk of patients needing to have their legs or feet amputated and that the drugs must have this very strong warning.

The FDA had first sent out an alert a year ago that patients in clinical trials for the drugs were twice as likely to need amputations as those on a placebo. Now the FDA, on May 16, issued the final results from two clinical trials. Canagliflozin, which the Johnson & Johnson unit sells as Invokana, Invokamet and Invokamet XR, is used to treat Type 2 diabetes. The tests revealed the following:

- According to the first clinical trial, known as CANVAS, 5.9 out of 1,000 patients on the drug needed an amputation over a year, while the placebo's numbers were 2.8 out of 1,000 patients.
- The second trial, CANVAS-R, showed 7.5 out of 1,000 patients needed an amputation when on the drug compared to 4.2 on the placebo.

Most of the amputations involved the foot or a toe, with some others involving legs, the FDA said, adding that some patients needed more than one amputation. The FDA said in a safety communication:

> *Patients taking canagliflozin should notify your health care professionals right away if you develop new pain or tenderness, sores or ulcers, or infections in your legs or feet. Talk to your health care professional if you have questions or concerns. Do not stop taking your diabetes medicine without first talking to your health care professional.*

Janssen said in a statement that patients who had amputations before starting the drug were most likely to need another one.

Invokana was the first in a class of drugs known as sodium-glucose cotransporter 2, (SGLT2) inhibitors. The drug was approved amid concerns about cardiovascular health and bone safety, and the FDA has since updated Invokana's and Invokamet's warning labels to reflect risks of bone fractures.

The drugs' labels—as well as the labels of other SGLT2 inhibitors—have also been revised to disclose risks of a blood disorder and urinary tract infections. Other drugs in the class include AstraZeneca PLC's Farxiga and Xigduo XR and Boehringer Ingelheim GmbH and Eli Lilly and Co.'s Jardiance and Glyxambi.

Source: *Law360.com*

XIV. ENVIRONMENTAL CONCERNS

EPA Guidelines For PFOs And PFOA

In May 2016, the U.S. Environmental Protection Agency (EPA) issued new lifetime health exposure guidelines for perfluorooctane sulfonate (PFOS) and perfluorooactanoic acid (PFOA). After the EPA issued the new exposure limits, an advisory warning was provided to eight systems in Alabama. The EPA advisory focused on PFOA and PFOS, man-made chemical compounds that are used in the manufacture of non-stick, stain-resistant, and water-proofing coatings on fabric, cookware, firefighting foam, and a variety of other consumer products. Exposure to the chemicals over time, even in trace amounts, could promote serious health problems, the EPA warns.

Town Of Centre Files PFC Contamination Lawsuit

The Water Works and Sewer Board of the Town of Centre, Alabama, has filed a lawsuit against carpet and textile companies, manufacturers, and chemical suppliers for contaminating its water supply with various perfluorocarbons (PFCs). These entities are responsible for discharging two specific PFCs, perfluorooctane sulfonate (PFOS) and perfluorooactanoic acid (PFOA), upstream of Centre's intake site on Weiss Lake and the Coosa River. These compounds are used in the manufacture of non-stick, stain-resistant, and water-proofing coatings on fabric, cookware, firefighting foam, and other consumer producers.

These chemicals were discharged from numerous facilities located in Dalton, Georgia, which is known as the "Carpet Capital of the World." The EPA acknowledged these entities are responsible for the PFC concentrations in the area and, accord-

ing to Centre, are the source of the contaminants that impacted its water system. Centre also sued 3M and Dupont, which manufactured PFOS and PFOA until they were phased out of production.

In May 2016, the EPA issued a new drinking water lifetime health advisory for PFOS and PFOA of 70 parts per trillion. The agency warned that exposure to elevated levels of these compounds, which accumulate over one's lifetime, can lead to a number of health problems including testicular cancer, kidney cancer, ulcerative colitis, thyroid disease, high cholesterol and pregnancy-induced hypertensions.

PFCs persist in the environment for years without degrading and, as a result, can accumulate with repeated exposure. Despite this persistency and the documented health hazards, PFCs are not regulated under the Safe Water Drinking Act. Between 2013 and 2015, the EPA tested for PFCs under the third Unregulated Contaminant Monitoring Rule and found them present in 194 water systems nationwide. The EPA found that 64 of those systems contained PFC levels over the EPA's health advisory.

Water systems have filed lawsuits nationwide against both the manufacturers and the sources of the contamination to recoup expenses associated with testing, purchasing alternative sources of water, and permanent filtration systems.

Representing the Town of Centre are Beasley Allen lawyers Jere Beasley, Rhon Jones, Rick Stratton, Grant Cofer and Ryan Kral, together with Roger H. Bedford of Roger Bedford & Associates in Russellville, Alabama. Lawyers in our firm previously filed suit on behalf of the Water Works and Sewer Board of the City of Gadsden for PFC contamination and is investigating other PFC contamination cases. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, Grant Cofer or Ryan Kral, lawyers in our firm's Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, Grant.Cofer@beasleyallen.com, or Ryan.Kral@beasleyallen.com.

Judge Approves $5 Million Settlement Over Contaminated Water In North Alabama

A federal judge has approved a partial settlement in a lawsuit over contaminated drinking water in north Alabama. The Decatur Daily reports that U.S. District Judge Abdul Kallon has approved a $5 million payment by Daikin America to end its part of the case. Most of that payment will help pay for a temporary filtration system for Tennessee River water.

Carl Cole, a lawyer representing the West Morgan-East Lawrence Water Authority, says the settlement is only the start as Plaintiffs seek more money from 3M Co., the main defendant. 3M and other companies say they followed environmental regulations. The water system claims manufacturers released chemicals that led to a temporary drinking water ban last year. The utility says chemicals have returned to safe levels.

Sources: Associated Press and *The Decatur Daily*

Energy Companies Should Disclose Chemicals Used In Fracking Operations

Farm and ranch owners in Montana are suing the Montana Board of Oil and Gas Conservation over rules that allow energy companies to keep the chemicals they use for hydraulic fracking a secret. The Board's rules do not require companies to provide specific information about the chemicals used until fracking operations are complete or if the chemicals are declared a trade secret. The suit says this violates Montana's constitution, which guarantees a right to know and the right to a clean and healthful environment.

The Safe Drinking Water Act was amended in 2005 to exclude fracking from the Underground Injection Control Program, so drillers are not required to disclose their components. Although fracking fluid is mostly comprised of water, other constituents include friction reducers, surfactants, gelling agents, acids, corrosion inhibitors, antibacterial agents, sand and clay stabilizers. Fracking fluid could also pick up other chemicals imbedded in the ground such as salt, heavy metals, radium, and uranium before it returns to the surface for disposal. This fluid is usually pumped into on-site pits, transported away, or disposed by injection into specifically drilled deep wells.

The lawsuit may be stayed, however, because a bill aimed at changing the disclosure laws is making its way through the Montana state legislature. The bill clarifies which chemicals may be considered a proprietary trade secret and requires companies to disclose certain chemicals used in fracking fluid. Some environmental groups say the bill does not go far enough by failing to require the disclosure of chemicals before fracking occurs and not calling for baseline testing of wells to monitor any contamination from fracking.

Between 4,000 and 7,000 wells have been fracked in Montana. In 2015, 65 percent of oil production and 39 percent of natural gas production in the state involved fracking. As reliance on natural gas increases, we can expect to see a commensurate increase in fracking operations. Hopefully, oil and gas companies will continue to improve their operations to mitigate any damages they may cause. If not, we need state legislatures and governmental agencies to provide proper oversight to ensure no environmental catastrophe occurs.

Source: *The Missoulian*

Government Records Reveal Petroleum Spills And Leaks In New York

Two environmental advocate groups recently released an analysis of government information concerning petroleum spills in New York that allegedly came from Exxon Mobil Corp. and its predecessors. The analysis found that there was a significant failure to adequately clean up petroleum spills at a vast array of facilities ranging from pipelines to gas stations.

In particular, the analysis highlighted oil leaks from an old 315-mile pipeline reportedly built from Olean, New York, to Bayonne, New Jersey, by the Standard Oil Company, a corporate predecessor of ExxonMobil. Oil releases were reported in a number of communities in New York and New Jersey. Based on up-to-date information contained in publicly available records, many of these oil releases have never been cleaned up to state standards.

These reports of oil and gasoline spills from facilities owned or operated by ExxonMobil or its corporate predecessor are documented to have polluted rivers, waterways, groundwaters and residential areas. At some locations within these sites, reports have identified petroleum up to approximately 20 feet deep. Some of the pollution levels at these sites reportedly exceed state clean-up standards by more than a thousand-fold.

In addition, the environmental groups released information noting that a large oil spill in Brooklyn that occurred along a creek has not been fully cleaned up despite it being around for many years. The New York Department of Environmental Conservation has a website dedicated to the spill, which highlights years of work aimed at remediation.

The analysis also noted that ExxonMobil or its corporate predecessors reportedly have more than 3,500 spills that do not meet state clean-up standards at existing or former gas stations or other locations all over New York. These releases may pose pollution threats to properties, rivers, waterways, wetlands and water supply sources. At least 157 public water supply wells have reportedly been polluted by

MTBE (methyl tertiary butyl ether), a toxic chemical reportedly added to gasoline previously sold in New York State by ExxonMobil and other companies.

The analysis focused solely on Exxon and its predecessors and was conducted via regulatory information compiled through the state's Freedom of Information Law, according to the announcement. If you need more information on this subject, contact William Sutton at 800-898-2034 or by email at William.Sutton@beasleyallen.com.

Sources: Law360 and New York Public Interest Research Group

Chysotile Asbestos Blocked From Rotterdam Convention's List Of hazardous Substances

Despite asbestos being banned in more than 55 countries around the world, the known human carcinogen continues to negatively affect human health, even in places where it has been long banned. This is due to the unregulated demolition or remodeling of aging buildings. However, some countries—including the United States—still openly allow the use of asbestos in certain products and manufacturing processes, despite its known health risks. Last month, the anti-asbestos cause, which aims to increase regulation and create a global ban on the carcinogen, suffered an unfortunate blow at the 2017 Rotterdam Convention.

Every other year the Rotterdam Convention is held as "a binding multilateral treaty to protect global human health and the environment through restrictions on international trade in hazardous chemicals and pesticides," according to a news release. May 5 marked the end of the 2017 Rotterdam Convention, held in Geneva, Switzerland, and of the 157 countries that have ratified the treaty, six blocked the addition of chrysotile asbestos—the only asbestos type not currently included—onto its Prior Informed Consent (PIC) list of hazardous substances. The convention requires total consensus in order to add a chemical to the PIC list.

Though the list does not ban a substance, it does require exporters to establish protocol to inform purchasers of the health hazards associated with the product, requiring consent from the destination country before export. Russia, India, Kazakhstan, Kyrgyzstan, Zimbabwe and Syria blocked chrysotile asbestos from being added to the list. Richard Lemen, Ph.D., MSPH, Assistant Surgeon General (ret.), Rear Admiral, USPHS (ret.) in an Asbestos Disease Awareness Organization (ADAO) press release, stated:

Chrysotile asbestos is recognized by every leading world scientific body as a cause of asbestosis, lung cancer and mesothelioma, as have all other forms of commercially used asbestos that are currently listed on the PIC List. The pandemic of asbestos-induced diseases that the world is currently experiencing will continue to grow as thousands more uninformed users of this cancerous material will face disease and death in their future. The action of these few countries represents a callous disregard for human dignity and life.

Asbestos, associated with direct occupational exposure or indirect "take-home" exposure, has been linked to the development of lung cancer and more rarely mesothelioma, a difficult to diagnose and deadly cancer that can develop after just one exposure to asbestos fibers. It can affect the lining of the heart, lungs or abdomen and rarely has a survival rate of longer than a year and a half after diagnosis. In the United States, mesothelioma deaths continue to rise, with occurrence rates in young people found to be higher than expected in the latest Centers for Disease Control and Prevention (CDC) report. Steps to prevent innocent lives from being lost to this preventable disease clearly are still needed.

If you believe you have a claim based on asbestos exposure that could entitle you to compensation, contact Rhon Jones, head of our firm's Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com

Sources: Global Asbestos Action Alliance, CDC, Asbestos Disease Awareness Organization

Monsanto Deliberately Hid Roundup's Link To Cancer

Ongoing multidistrict litigation (MDL) in California has shed new light on the deception surrounding popular herbicide Roundup. More than 250 million pounds of the product's main ingredient, glyphosate, is used on home gardens, crops and roadsides each year, making it by far the most widely used herbicide in America. Court documents from the ongoing MDL reveal that Monsanto, the maker of Roundup, not only did not disclose the dangers of its cash-cow product, but actively concealed them.

The New York Times reports internal Monsanto documents released in federal court suggest the company ghost-wrote research on Roundup's safety that was later attributed to academics. In addition, emails suggest a senior official in the Environmental Protection Agency (EPA) stopped a review of glyphosate, a phosphonate compound that has no color or smell, that was scheduled to be conducted by the United States Department of Health and Human Services. An email reportedly states the company's contact at the EPA said, "If I can kill this, I should get a medal," referring to the pending review.

Monsanto's internal records were unsealed as part of a MDL consolidated in the United States District Court for the Northern District of California containing more than 45 suits claiming Roundup use resulted in the development of non-Hodgkin's lymphoma (NHL). The suits come as the State of California won its own court battle earlier this year against Monsanto to list glyphosate as a human carcinogen and require the company to label its weed killer as a possible cancer threat.

The use of the glyphosate has increased 15-fold since Roundup was first introduced in 1974, according to research in Environmental Sciences Europe. This shows Roundup has a major market share in the chemical herbicide business, and, unsurprisingly, it appears Monsanto's decisions to hide the possibility of glyphosate being a human carcinogen—particularly linked to the development of NHL—is due to corporate greed. When arguing against California placing a warning label on Roundup, Monsanto argued the labels would have "immediate financial consequences," according to the Associated Press. This is yet another prime example of a large company placing profit over health and safety and putting the lives of folks at risk.

Despite the mounting evidence, including the International Agency for Research on Cancer (IARC) listing glyphosate as "probably carcinogenic to humans," Monsanto is still waiting for its day in court and maintaining glyphosate is not carcinogenic. Meanwhile, it is consumers—the folks who use the product in their jobs as farmers, landscapers and gardeners—who are paying the ultimate price.

John Tomlinson, a lawyer in our firm's Toxic Torts Section, is actively investigating cases where landscapers, farmers, groundskeepers or commercial gardeners used commercial grade Roundup and developed non-Hodgkin's lymphoma. John can be reached at 800-898-2034 or John.Tomlinson@beasleyallen.com. He will be glad to talk with you on this subject.

Sources: *New York Times*, Associated Press, International Agency for the Research on Cancer and Environmental Science Europe

Occupational Asthma Is Now The Most Frequently Diagnosed Work-Related Lung Disease

According to the Centers for Disease Control and Prevention (CDC), occupational asthma has overtaken asbestosis as the leading cause of new work-related lung disease. Occupational asthma is asthma caused or worsened by breathing in chemical fumes, gases, dust, or other substances on the job. More than 20 million U.S. workers are regularly exposed to substances that can cause airway diseases, including asthma.

A group of chemicals called "isocyanates" is the most common cause of occupational asthma. Workers can be exposed to isocyanates in a number of occupations, including spray foam insulation installation, spray-on truck bed lining application, and automobile and airplane painting. The National Institute for Occupational Safety and Heath (NIOSH) estimates that approximately 280,000 workers are exposed to isocyanates annually.

In addition to breathing in vapors or mists, skin exposure to isocyanate liquids, resins, or droplets can lead to dangerous health consequences. Some workers who are exposed to isocyanates can become "sensitized" and eventually develop an allergy to isocyanates. When a worker has become sensitized, even small exposures to isocyanates can cause dangerous lung reactions—the most common of which is occupational asthma.

Asthma symptoms can occur while an individual is at work and may take several hours or days to appear. Once a worker begins to experience symptoms, continued exposure to isocyanates can worsen the asthma or even progress to a chemical bronchitis with severe bronchospasms. If a worker becomes sensitized to isocyanates, any exposure, even at very low levels, can produce an asthma attack that may be life-threatening.

Developing occupational asthma and a sensitization to certain chemicals can result in long-term lung damage, loss of wages, disability, or even death. Severe lung impairment can occur even after a worker wears respiratory protection and takes medication to treat his condition. Thus, those who become sensitized could unknowingly put their lives in danger despite taking all the necessary precautions.

Lawyers at Beasley Allen are currently investigating potential claims on behalf of workers exposed to isocyanates and other dangerous chemicals at work and now suffer from occupation asthma or other related illnesses. If you would like more information, you can contact Chris Boutwell, a lawyer in our firm's Toxic Torts Section, at 800-898-2034 or by email at Chris.Boutwell@beasleyallen.com. He will be glad to help you.

XV. UPDATE ON NURSING HOME LITIGATION

The Nursing Home Ombudsman

One often underutilized resource available to nursing home residents and their families are the state and community ombudsmen. In 1985, the Alabama legislature passed the Long-term Residential Health Care Recipient Ombudsman Act. This Act, found in Alabama Code at §§ 22-5A-1 through 22-5A-7, established representatives who are to be available to those who may need assistance while in a long-term care facility. This Act arose as a result of federal requirements placed upon the state agency on aging, namely, the Older Americans Act of 1965.

Ombudsmen are selected by the Agency on Aging, a division of the Department of Senior Services. Upon being selected, the ombudsmen undergo specified training and are provided the guidelines they are to follow in investigating various complaints.

According to the Alabama Act, "[t]he State Ombudsman and the [Department of Senior Services] are … authorized to investigate complaints concerning health care, domiciliary and residential care facilities." The State Ombudsman is authorized to establish guidelines to "promote the well-being and quality of life of long-term residential health care recipients." The State Ombudsman also is authorized to establish guidelines for the respective community ombudsmen to assist them in fulfilling their function in the various long-term care facilities.

Community ombudsmen are trained and authorized "[t]o receive, investigate, respond to, and attempt informally to resolve complaints made by or on behalf of recipients;" "[t]o report immediately instances of fraud, abuse, neglect, or exploitation…;" [t]o serve as a third-party mechanism for protecting the health, safety, welfare, and human rights" of patients; and to perform other critical functions, such as collecting data and information on the respective facilities.

Pursuant to the Act, residents of nursing homes or their family member must be provided written information advising them of the availability of an ombudsman at the time of admission to the facility. If a resident or family members submits a complaint about the care at the nursing home, the ombudsman is statutorily required to investigate the complaint. If the ombudsman determines there is an issue that must be corrected, he or she is to report his or her findings to the facility's administrator. If remedial action is not taken, the community ombudsman is required to report the noncompliance to the appropriate authorities, which may include the Department of Senior Services or the state licensure board for nursing homes.

The website www.alabamaageline.gov provides a helpful summary of the responsibilities of the ombudsman. Generally, this person is authorized to investigate complaints and to investigate any problem areas in a long-term care facility. The ombudsman is a vehicle to encourage better patient care and practices and is to be an advocate for change in the industry. The Alabama Department of Senior Services provides similar information at www.alabamadementia.gov.

While nursing homes should be providing the ombudsman contact information to new residents and their families, this information is also typically posted in a common area on a bulletin board for anyone to observe. In fact, employees and visitors to the facility may also use this service to express concerns with a facility or with patient care.

If a person believes an ombudsman needs to be involved in investigating issues with a nursing home, the person is encouraged to notify the appropriate state agencies. The complaint can be filed with www.alabamaageline.gov or by calling the agency at 800-243-5463. Other available resources are the Nursing Home Complaint Hotline (800-356-9596); the Assisted Living Complaint Hotline (866-873-0366); or the Department of Human Resources of Elder Abuse Hotline (800-458-7214).

Currently, Alabama's State Ombudsman is Virginia Moore-Bell. She can be contacted through the Alabama Department of Senior Services at 770 Washington Avenue, RSA Plaza, Suite 470, Montgomery, AL 36130. Our firm encourages those with issues to reach out to the community ombudsman over the respective nursing home. Many times, issues that exist in nursing homes can be resolved in this manner. Moreover, it is essential that data and information be collected by the Agency on Aging in order to improve the nursing home care provided in Alabama.

If you need more information on nursing home litigation contact Ben Locklar, a lawyer in our Personal Injury & Products Liability Section, at 800-898-2034 or by

email at Ben.Locklar@beasleyallen.com. Ben handles nursing home litigation for our firm, and he will be glad to talk with you.

Elderly Resident Sues Texas-Based Nursing Home Over Abusive Snapchat Video

A nursing home located in Austin, Texas, has been sued by an elderly resident who says an employee at the facility posted videos on the internet that show a person smearing "feces on her body and face." The family of Mary McCaughan, who is 83 years old, filed the lawsuit in Travis County State District Court against Regency IHS of Windsor Duval, LLC and Regency Integrated Health Services, LLC. The woman and her son are asking a judge to award damages for bodily damages suffered by the resident.

The lawsuit says Carlos Alberto Santa Cruz, a certified nurse aide at Windsor Nursing and Rehabilitation Services of Duval, is "a despicable human being who proved himself to be someone who has no business caring for another helpless and defenseless human being." The aide allegedly photographed the woman's naked body and posted video on Snapchat showing a person smearing feces on her. A Snapchat photo shows a person tickling the woman's nose to make her touch her face with her hand.

McCaughan's son says that his mother has advanced Alzheimer's disease and can barely move, talk or comprehend what is going on. The nursing home never should have hired Cruz, the lawsuit says, because he has an arrest history for fraud, marijuana possession and criminal mischief. But his hiring was not the only misstep, the lawsuit says. Rather than notify authorities, it's alleged the nursing home "lied, denied and covered up the abuse."

State authorities concluded an initial investigation on March 31, according to a spokeswoman for Health and Human Services Commission, who said a report will be available to the public once the findings are finalized. These investigations typically focus on the facility rather than individuals, according to the spokeswoman. The lawsuit comes as state lawmakers are trying to shine light on bad nursing homes after data has shown the facilities have gotten a free pass from the state government. In fiscal 2016, the state imposed 51 administrative penalties on nursing home facilities, which committed 18,089 violations during that time, according to state officials. At press time, a bill had been approved by the Texas Senate and was awaiting action in the House.

Source: *American-Statesmen*

XVI. AN UPDATE ON CLASS ACTION LITIGATION

Big Banks' $165 Million Settlement Gets Initial Approval In NovaStar MBS Suit

A New York federal judge has given preliminary approval to a $165 million settlement to be paid by Wells Fargo, Deutsche Bank and the Royal Bank of Scotland. This puts them one step closer to resolving a class action over their underwriting of $7.7 billion worth of mortgage-backed securities (MBS) issued by bankrupt subprime lender NovaStar.

U.S. District Judge Deborah A. Batts gave her initial approval to the settlement, which would end long-standing claims from investors, including union pension funds, which allege that Deutsche Bank Securities Inc., RBS Securities Inc. and Wachovia Capital Markets LLC—now Wells Fargo Advisors LLC—lied in offering documents on securities issued by NovaStar Mortgage Inc. The court will hold a settlement hearing on Sept. 13 to determine whether the settlement should get final approval.

According to the settlement, Plaintiffs would receive $30.84 per $1,000 of face value of the securities they purchased. This is in line with previous residential mortgage-backed securities settlements. The dispute stems from 2006, when NovaStar issued six securities tied to residential MBS. The securities, which together held more than $7.7 billion in assets, were underwritten by Deutsche Bank, RBS and Wachovia.

By June 2009, more than half of the mortgages behind the securities had defaulted during the housing collapse, causing massive investor losses, according to the suit, which a pension fund filed in June 2008. The class action alleged that offering documents filed when the securities were issued failed to disclose that NovaStar had abandoned its underwriting standards to increase the number of mortgages it could originate. The suit was ultimately revived by the Second Circuit Court of Appeals in March 2013. Judge Batts granted class certification under a third amended complaint in November.

The Plaintiffs are represented by Joel P. Laitman, Michael B. Eisenkraft and Christopher Lometti of Cohen Milstein Sellers & Toll PLLC. The case is *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group PLC, et al.*, (case number 1:08-cv-05310) in the U.S. District Court for the Southern District of New York.

Source: *Law360.com*

J.C. Penny Settles Shareholder Lawsuit For $97.5 Million

J.C. Penney has reached an agreement to settle a shareholder class action lawsuit for $97.5 million. The case stems from a period in 2013 when the Plano-based company was struggling to survive from a failed attempt to transform the department store. The lawsuit, *Alan B. Marcus, Individually and on Behalf of All Others Similarly Situated, v. J.C. Penney Company, Inc., et.al.*, is pending in the U.S. District Court for the Eastern District of Texas.

The retailer was accused of lying about its financial health. A Texas federal judge was asked to stay the litigation. It was about two months after U.S. District Judge Robert Schroeder adopted a magistrate judge's ruling certifying a class of J.C. Penney investors, that the two sides reached a settlement.

The lawsuit alleged that J.C. Penney publicly assured investors that its business was improving and that it saw no need to raise capital. The statements made by former chief executive officer Mike Ullman and chief financial officer Ken Hannah in August and September 2013 misled investors regarding the company's liquidity prior to the announcement of a public stock offering in September 2013, the lawsuit said. Penney issued 84 million shares of stock and raised $800 million to get it through a cash crunch it found itself in after CEO Ron Johnson's tenure. Ullman returned to lead Penney in April 2013.

Investors, who first filed suit in October 2013, claim that their decision to purchase stock within the class window was the result of false statements made by J.C. Penney executives in August 2013 about how much cash the company would have on hand at the end of the year. The class, led by the National Shopmen Pension Fund, includes investors who purchased company stock from Aug. 20 to Sept. 26, 2013.

The newly issued stock diluted the 220 million shares outstanding. The company had $5.8 billion in debt and its interest payments have climbed to $400 million a year. Penney says it "denies the allegations in the lawsuit, but is entering into this settlement to eliminate the uncertainties, burden and expense of further protracted litigation." The $97.5 million settlement will be funded by insurance and will have no financial impact to the company. The settlement remains subject to final documen-

tation and approval of the District Court following notice to class members.

In September 2013, a Goldman Sachs report on the retailer's liquidity issues, as well as J.C. Penney's subsequent announcement of plans to issue nearly $1 billion in new shares to deepen its reserve, caused the company's stock price to drop, according to the suit.

A September 2016 report and recommendation from U.S. Magistrate Judge K. Nicole Mitchell found that the then-proposed class had "sufficiently pled" its claim that J.C. Penney was aware of undisclosed facts that would undermine the assertions made in its financial statement, including the company's claim that it "did not see conditions for the rest of the year" that would require J.C. Penney to raise its liquidity.

The class is represented by X. Jay Alvarez, James A. Caputo, Rachel A. Cocalis, Jonah H. Goldstein, Robert R. Henssler Jr., Danielle S. Myers and Hillary B Stakem of Robbins Geller Rudman & Dowd LLP, and Claire A. Henry and Jack W. Hill of Ward Smith & Hill PLLC. The case is *Marcus v. J.C. Penney Co. Inc. et al.* (case number 6:13-cv-00736) in the U.S. District Court for the Eastern District of Texas.

Sources: Law360.com and Dallasnews.com

Wells Fargo Settles Race Bias Suit For $35.5 Million

An Illinois federal judge has approved on a $35.5 million settlement between Wells Fargo Advisors LLC and a class of the bank's African-American employees. This ends the class's claims of discriminatory treatment with changes to programs they said encouraged racial disparities. U.S. District Judge Harry D. Leinenweber granted final approval to the agreement, which ends nearly four years of litigation over Wells Fargo policies that the employees said excluded African-American financial advisers from the most successful teams and the most lucrative accounts.

In addition to individualized monetary awards for the class of more than 360 people, the approved settlement will stop the bank from requiring racial discrimination claims to be arbitrated and puts in place several new programs to combat racial bias. Those programs are really what the suit was about, according to Lance Slaughter, a first vice president and investment officer at Wells Fargo, who served as lead Plaintiff.

The changes, which will be in place for four years, include the establishment of a $500,000 business development fund for African-American financial advisers in the bank's private client and wealth brokerage groups. The agreement instructs bank executives to examine their demographic data and initiate opportunities for African-American financial advisers, as well as designate specific recruiters and coaches for African-American employees.

Under the settlement, Wells Fargo's senior executives will also collaborate with the company's African-American employees to get feedback on its diversity efforts. The class members, which include all African-Americans who were employed as financial advisers or financial adviser trainees at Wells Fargo between September 2009 and December 2016, can file a claim and have a hearing with a group of neutral administrators appointed to award money out of the class fund on an individual basis, according to the agreement. The suit, which was first filed in 2013, accused the bank of "systemic, intentional race discrimination" through the implementation of policies that segregated its workforce and disparately impacted its African-American employees.

In April 2014, Wells Fargo moved to compel some of the named Plaintiffs to resolve their claims in arbitration, saying they signed employment agreements that specifically required them to arbitrate any discrimination claim they had against the bank. The employees fought back, arguing that the Financial Industry Regulatory Authority rules under which Wells Fargo operates bar the bank from requiring its employees to arbitrate class action claims. In August 2014, Judge Leinenweber denied the bank's motion.

Wells Fargo appealed to the Seventh Circuit, but the court held in a separate case that arbitration agreements with class action waivers are illegal under the National Labor Relations Act, an issue that is currently pending before the U.S. Supreme Court. The parties announced they had reached a settlement in December 2016, and got initial approval from Judge Leinenweber in January.

Judge Leinenweber granted class counsel's motion for fees and Plaintiff awards, approving the lawyers' request for 25 percent of the fund, or a little more than $8.8 million, according to the agreement. The five named Plaintiffs, some of whom still work at Wells Fargo, according to class counsel, will each receive $175,000 for their work on the case. They attended each mediation session, and the ones still working at Wells Fargo will be a part of the settlement's implementation going forward.

The class is represented by Linda D. Friedman, Suzanne E. Bish, George S. Robot and Patricia A. Bronte of Stowell & Friedman Ltd. The case is *Slaughter et al. v. Wells Fargo Advisors LLC* (case number 1:13-cv-06368) in the U.S. District Court for the Northern District of Illinois.

Source: Law360.com

Home Depot Settles Investor Suit Over Data Breach

Investors in The Home Depot Inc. have settled their shareholder derivative suit against members of the retailer's board of directors over a 2014 customer data breach. The proposed settlement information was filed in a Georgia federal court. The shareholders, who had accused current and former members of the board of breaching their duty of loyalty to the home improvement retailer by not preventing or immediately remedying the data breach, agreed to a series of policy reforms to settle the lawsuit just months after the investors had filed an appeal in the Eleventh Circuit, according to the docket.

Among other things, the reforms include documenting the responsibilities of Home Depot's chief information security officer, maintaining an executive committee focused on data security, and requiring regular reports on the retailer's information technology budget, including how much of that is spent on cybersecurity measures, according to the proposed agreement. The investors said in the filing:

> *These provisions make data security a corporate focus and improve the company's ability to prevent and respond to future attacks.*

The settlement constitutes an appropriate resolution of this litigation of substantial complexity and is well within the range of possible approval, thereby satisfying the test courts typically employ in reviewing a settlement for preliminary approval." The settlement also calls for Home Depot to pay up to $1.125 million in attorneys' fees to the lawyers who represented the investors.

The suit filed in August 2015 relates to the massive customer security breach in 2014 that compromised the financial data of up to 56 million Home Depot customers, resulting in a net loss to the company of $152 million, with a total cost exposure as a result of the breach expected to reach nearly $10 billion. In the suit, shareholders Mary Lou Bennek and Cora Frohman claimed the board members had breached their duty of loyalty by failing to institute necessary controls to guard against a security breach or to take immediate measures to address one, court records show.

In November, however, U.S. District Judge Thomas W. Thrash Jr. dismissed the shareholders' claims, finding they couldn't

pursue their derivative suit against current and former officers including former chairman and CEO Francis Blake and executive vice president and chief information officer Matthew Carey. The judge said the Plaintiffs could not show beyond a reasonable doubt that most of the board faces substantial liability because it "consciously failed to act in the face of a known duty to act." Judge Thrash wrote in that decision, "This is an incredibly high hurdle for the Plaintiffs to overcome, and it is not surprising that they fail to do so."

The shareholders are represented by Marshall P. Dees and Corey Daniel Holzer of Holzer & Holzer LLC, Stuart Jay Guber of Faruqi & Faruqi LLP, Kenneth Bryant Hodges III of Ken Hodges Law and Willem Frans Jonckheer, Miranda Kolbe, Noah Schubert and Robert Schubert of Schubert Jonckheer Kolbe & Kralowec LLP. The case is *In re: The Home Depot Inc. Shareholder Derivative Litigation* (case number 1:15-cv-2999) in the U.S. District Court for the Northern District of Georgia.

Source: Law360.com

WEN Hair Care Line Settles For $26.3 Million In Hair Loss Suit

A celebrity stylist's hair product company and a class of consumers who claim using the products caused their hair to fall out have agreed to a $26.25 million settlement in a California federal court to end three years of litigation. WEN by Chaz Dean Inc. and the products' manufacturer, Guthy-Renker LLC, both based in the Los Angeles region, and the class of potentially millions of consumers agreed to the settlement after protracted litigation over whether the companies were negligent in failing to warn consumers about the adverse effects of using their products. It was also claimed the Defendants violated unfair competition and false advertising statutes.

The proposed settlement, which also requires WEN to include a warning label on its Cleansing Conditioner, establishes two avenues of relief for class members:

- those who simply bought the products and are eligible to receive a flat $25 refund, and
- those who used the product and experienced hair loss or scalp pain, who can make injury clams and receive up to a maximum of $20,000.

The settlement class covers individuals who bought WEN hair care products between Nov. 1, 2007, and Aug. 1, 2016.

The basis for the claims in the suit is consumers' complaints that use of the WEN products, particularly the Cleaning Conditioner, was causing substantial hair loss that continued after stoppage of use. It caused some people to lose up to a third of their hair. Sold through such purveyors as Amazon, QVC and Sephora, WEN bears the imprint of celebrity Los Angeles stylist Chaz Dean, and markets its hair care line as "a revolutionary way to cleanse and hydrate the hair."

A related action is pending in California federal court against the same Defendants on similar allegations. That suit accuses the companies of continuing to sell the products while failing to warn consumers of the known risks of use of the products.

The consumers are represented by Neville L. Johnson, Douglas L. Johnson and Jordanna G. Thigpen of Johnson & Johnson LLP; William H. Anderson, Charles J. LaDuca and Michael J. Flannery of Cuneo Gilbert & LaDuca LLP; and Brian W. Warwick and Janet R. Varnell of Varnell & Warwick PA. The case is *Amy Friedman et al. v. Guthy-Renker LLC et al.*, (case number 2:14-cv-06009) in the U.S. District Court for the Central District of California.

Source: *Law360.com*

Walmart Sued By Pregnant Workers

Two former Walmart employees have filed suit against the country's largest retailer, accusing it of ignoring the accommodation requests made by pregnant workers. The proposed class action lawsuit was filed in federal court in Illinois by two Walmart employees who said the company ignored requests by pregnant women while granting accommodations to workers with disabilities. If expanded, the class could include as many as 50,000 women who worked at Walmart while pregnant during the time the retailer's former policies were in place.

The suit alleges Walmart's old policy violated federal law requiring employers to treat pregnancy as a temporary disability and provide accommodations for such things as heavy lifting or climbing ladders. The U.S. Supreme Court ruled in 2015 that employers must treat pregnant workers the same as those with other disabilities or medical conditions. Walmart denies the claims.

Source: Reuters

XVII. THE CONSUMER CORNER

Bank Not Allowed To Force Arbitration Of Payday Loan Suit

The Fourth Circuit Court of Appeals has refused to let BMO Harris Bank arbitrate claims that it collected illegal payday loans through a tribal lender, labeling the arbitration agreement as a calculated attempt to skirt federal laws. A three-judge panel upheld a lower court's finding that an arbitration agreement between Great Plains Lending LLC and a North Carolina man was unenforceable, saying the contract's terms take the "plainly forbidden step" of requiring tribal law jurisdiction, to the exclusion of federal and state law. The panel wrote:

> *Great Plains purposefully drafted the choice of law provisions in the arbitration agreement to avoid the application of state and federal consumer protection laws.*

North Carolina resident James Dillon took out a payday loan in 2012 from Great Plains, a lender owned by the Otoe-Missouria Tribe of Indians. Although North Carolina law prohibits interest rates over 16 percent, Great Plains charged Dillon an interest rate of 440 percent because it had no physical presence in the state. When applying for the loan, Dillon electronically signed a contract that included an arbitration agreement. The agreement required that Otoe-Missouria tribal law be applied to any claims, while disclaiming the application of state or federal law. Dillon later filed a putative class action alleging the payday lender had issued illegal loans. But he did not sue Great Plains. Instead, Dillan accused financial institutions, including BMO Harris Bank, of facilitating the illegal loans in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act.

The district court denied BMO's attempt to arbitrate the allegations against it, using a then-newly issued Fourth Circuit Court of Appeals opinion in *Hayes v. Delbert Services Corp.* to come to its decision. In the *Hayes* appeal, the Fourth Circuit ruled an arbitration agreement between a consumer and Western Sky Financial LLC was unenforceable because it renounced the authority of federal law by exclusively requiring tribal law jurisdiction. The agreement was an "integrated scheme to contravene public policy," the appellate court said in its opinion.

The Fourth Circuit echoed that reasoning in its opinion, saying Great Plains' agreement contains many of the same provisions deemed unenforceable in the Hayes appeal. Great Plains took a calculated step to avoid federal law with its contract, the panel said. The panel said:

> *Just as we did in Hayes, we interpret these terms in the arbitration agreement as an unambiguous attempt to apply tribal law to the exclusion of federal and state law.*

Dillon is represented in this case by Hassan A. Zavareei of Tycko & Zavareei LLP. The case is *James Dillon v. BMO Harris Bank NA* (case number 16-1362) in the U.S. Court of Appeals for the Fourth Circuit.

Source: Law360.com

CPSC Warns Against LayZ Hoverboards After Deadly Fire

The U.S. Consumer Product Safety Commission (CPSC) has called for consumers to stop using LayZ Boards, which are more commonly known as hoverboards, after they caused a fire that killed two girls in Harrisburg, Pennsylvania, in March. For those who don't know what a hoverboard is, it's a scooter without handlebars.

The CPSC urged consumers to stop charging and using the hoverboards and bring them to recycling centers that can dispose of the lithium-ion battery safely. The agency noted that the product is different from hoverboards known as "Lazyboards." The battery-powered products have two wheels, no handlebars and a pivoting platform for the rider's feet, according the CPSC. The words LayZ Board are on that platform. More than 3,000 of the products have been imported into the U.S. from Shenzhen, China.

The CPSC has recalled more than 500,000 hoverboards from various manufacturers to date, all for fire hazards, according to the agency's website. LayZ was not among them. The March 10 fire killed two sisters: 10-year old Savannah Dominick and 3-year-old Ashanti Hughes. Sadly, a firefighter also died on his way to their house in a car crash. Authorities say the board overheated as it was being recharged, sparking the fire.

Sources: *Law360.com* and the *Philadelphia Inquirer*

Nationwide Sues Hoverboard Importer And Sellers Over Fire

Nationwide Mutual Insurance Co. has sued a hoverboard importer and sellers in a New York federal court on behalf of a policyholder whose home caught fire after she brought home the toy. Nationwide says that importer Cherytek LLC and reseller and distributor Liberty Seamless Enterprises Inc., and another seller should have to pay for the damage caused to Catherine Burton-Girardi's house on May 22, 2016. The suit says:

> *A defectively designed and manufactured hoverboard overheated, thereby causing the fire. The fire caused substantial damage and destruction to both Burton-Girardi's home and her property, it claims—at least $75,000 worth.*

Nationwide, headquartered in Columbus, Ohio, is standing in Burton-Girardi's shoes in the lawsuit. A "minor relative" of Burton-Girardi bought the hoverboard some time before May 22, 2016, Nationwide says, from hoverboard seller Shaun Marks of Elmira, New York, who is also a Defendant.

Nationwide believes that Rochester-based Cherytek imported the hoverboard and then sold it to Knoxville, Pennsylvania, based Liberty Seamless, which sold it to Marks. Claims in the suit are for strict product liability, including failure to warn Burton-Girardi of the danger posed by the hoverboard, and negligence. The negligence claim is quite detailed as to the possible nexus of the negligence: It could have come from "design, manufacture, assembly, testing, installation and inspection" or a host of other sources, like failing to exercise a reasonable level of care, the suit says. There is also a count for breach of implied warranty of merchantability.

The case is *Nationwide Mutual Insurance Co. v. Cherytek LLC et al.*, (case number 1:17-cv-00422) in the U.S. District Court for the Western District of New York.

Source: *Law360.com*

Wells Fargo Raises Fake Account Estimate To 3.5 Million

Wells Fargo & Co. has increased the estimated number of unauthorized checking, savings and credit card accounts that its employees allegedly opened over the past 15 years to 3.5 million. This is from documents filed in a California federal court last month. The San Francisco-based bank and a class of account holders estimate that between 2002 and 2017 Wells Fargo employees have opened approximately 3.5 million unauthorized accounts, replacing the previous 2.1 million estimate. But the account holders cautioned that the higher number was calculated based on public information, negotiations and discovery and it could be an overestimate. The lower 2.1 million estimate was originally reported by regulators last year, based on the bank's internal analysis of accounts opened and credit card applications submitted between May 2011 and July 2015.

The brief said an additional 1.4 million unauthorized accounts could have been opened as early as 2002. That was the year, according to a recent bank internal investigation, that Wells Fargo executives first noticed employees opening accounts without customer authorization. The brief filed incorporates the larger estimate to calculate a maximum recovery amount. Wells Fargo announced in April that it expanded a $110 million class action settlement over allegedly fraudulent account generation to include claims stretching to May 2002 and bringing the total settlement amount to $142 million. Since then, the deal has received pushback from a separate group of Plaintiffs with potential future claims who argued to the court that the settlement would exclude them from the deal. If approved, the settlement would mark an end to a bevy of litigation following a Consumer Financial Protection Bureau (CFPB) investigation that uncovered more than 5,000 Wells Fargo employees tried to meet aggressive sales targets by opening millions of bank accounts and credit cards without customers' knowledge.

In September, Wells Fargo agreed to pay the CFPB $185 million in civil penalties, but that agreement didn't preclude dozens of Wells Fargo customers from pursuing class action claims over the bank's sales practices. In February, Wells Fargo's board of directors voted to fire four senior managers in connection with an ongoing investigation stemming from the scandal. The scandal also forced the resignation of then-Wells Fargo Chairman and CEO John Stumpf, as well as his forfeiture of a total of $69 million in unvested compensation. Additionally, Carrie Tolstedt, the former head of Wells Fargo Community Bank, where the problems occurred, was fired and saw $66.3 million in compensation clawed back.

Meanwhile, at least 12 putative class actions have been filed over the bank's retail practices, including the instant suit, and approximately 5,300 employees were fired as a result of the problematic sales practice. A hearing on the settlement's preliminary approval was scheduled for May 18 in San Francisco.

The Plaintiffs are represented by Derek W. Loeser, Gretchen Freeman Cappio, Daniel P. Mensher, Jeffrey Lewis and Matthew J. Preusch of Keller Rohrback LLP. . The case in which the settlement

was reached is Jabbari et. al. v. Wells Fargo & Co. et al., (case number 3:15-cv-02159) in the U.S. District Court for the Northern District of California.

Smokers Can Rely On Engle To Prove Liability

The Eleventh Circuit Court of Appeals gave smokers a big win last month. The court held that federal law does not bar smokers from using the landmark Engle tobacco class action's jury findings to establish strict liability and negligence claims. The appeals court, sitting *en banc*, reversed an earlier panel ruling that had said Earl Graham, whose wife died of smoking-related lung cancer and was part of the original *Engle* class, could not rely on the jury's conclusions in *Engle v. Liggett Group Inc.*, including that smoking causes certain diseases and that tobacco companies hid smoking's dangers.

The original *Engle* jury came back with a $145 billion verdict against tobacco companies on behalf of a class of about 700,000 Floridians. The Florida Supreme Court overturned that decision in 2006 and decertified the class, but allowed class members to bring individual suits using the jury's findings.

In Graham's suit against the tobacco companies, a federal district judge decided that Graham could rely on the *Engle* findings for his claims. A jury came back with a $2.75 million award against R.J. Reynolds that was later reduced to $550,000, and a $275,000 award against Philip Morris, taking into account that Graham's wife was 70 percent at fault, according to court documents. But an Eleventh Circuit panel in April 2015 found that the claims wrongly imposed a duty on all cigarette makers that they breached every time they put a cigarette on the market. That result was inconsistent with Congress' aim to give consumers the right to choose whether to smoke, the panel said. The panel's ruling was a significant win for tobacco companies, as it was the only court thus far to bar Plaintiffs from using *Engle* findings to support their claims. But the Eleventh Circuit decided in January 2016 to rehear the case at Graham's request. The result was a huge win for smokers and their families.

Graham is represented by Elizabeth J. Cabraser, Robert J. Nelson, Jordan Elias, Sarah R. London, Jerome Mayer-Cantu and Kenneth S. Byrd of Lieff Cabraser Heimann & Bernstein LLP, Norwood S. Wilner, Janna M. Blasingame and Richard J. Lantinberg of The Wilner Firm PA, and Samuel Issacharoff of New York University. The case is *Graham v. R.J. Reynolds Tobacco Co. et al.*, (case number 13-14590) in the U.S. Court of Appeals for the Eleventh Circuit.

Source: *Law360.com*

Called By Dish Network? You May Be Eligible For $1,200

A judge in North Carolina has increased an award for some customers contacted by Dish Network. This move could make Dish liable for as much as $60 million in payouts. U.S. District Judge Catherine Eagles said Dish and its agent Satellite Systems Network "willingly and knowingly" violated the Telephone Consumer Protection Act (TCPA), which limits telephone solicitations and requires companies to abide by the Do Not Call List. More than 220 million Americans have numbers registered on the list.

In January, a jury in Greensboro, North Carolina, awarded $400 each to more than 50,000 people on the Do Not Call List who had filed suit against Dish. Judge Eagle tripled the award from the class action lawsuit to $1,200 a person. The suit, filed by Dr. Thomas Krakauer of Bahama, North Carolina, claimed Dish made 51,119 calls to 18,066 phone numbers. It appears this was the first jury trial on a class-action case alleging Do Not Call violations.

The settlement covers people who received telemarketing calls from Dish or Satellite Systems between May 1, 2010, and Aug. 1, 2011. To be eligible, customers must have been on the Do Not Call list for 30 days before receiving the calls or be on the internal do-not-call list for either company.

Source: AL.com

Studies Show E-cigarettes Contain Toxic Chemicals

Independent testing commissioned by the Australian Competition and Consumer Commission (ACCC) revealed the presence of carcinogens and toxic chemicals, such as formaldehyde, acetaldehyde and acrolein, in certain e-cigarette products. An Australian federal court ordered three online e-cigarette retailers to pay penalties for making false and misleading claims about the carcinogens in their products. This is believed to be the first time a regulator anywhere in the world has successfully taken action for false and misleading claims about carcinogens in e-cigarettes.

The Joystick Company Pty Ltd, SocialLites Pty Ltd, and Elusion Australia Ltd were ordered to pay penalties for breaching consumer law. All three retailers admitted the conduct alleged by the ACCC and consented to the amounts of the penalties. The ACCC has written to more than 30 Australian e-cigarette suppliers reminding them of their Australian Consumer Law (ACL) obligations, in particular to ensure information provided to consumers is accurate.

Separate testing conducted by Japanese scientists showed that some e-cigarettes contain 10 times the level of cancer-causing carcinogens than regular cigarettes. When the Japanese Ministry of Health commissioned the research, the researchers also found formaldehyde and acetaldehyde in many e-cigarette products. In addition, the researcher found that e-cigarettes can fuel potentially life-threatening drug-resistant pathogens. This discovery comes from a lab study that tested the vapor from e-cigarettes on live methicillin-resistant Staphylococcus aureus (MRSA) and human cells.

Formaldehyde is classified by the World Health Organization (WHO) International Agency for Cancer Research (IARC) as a Group 1A carcinogen, meaning there is sufficient evidence to show it is carcinogenic to humans. Acetaldehyde is classified as a Group 2B carcinogen by the IARC. That classification is applied to a chemical agent that has been evaluated as being possibly carcinogenic to humans. Acrolein is classified as a toxic chemical. It is also listed as a dangerous poison in Schedule 7 of the Poisons Standard of the Therapeutic Goods Act 1989.

Earlier in 2015, the WHO advised governments to ban the sale of e-cigarettes to underage people because they posed a serious threat to them. The UN health agency said that although there is a lack of evidence regarding the damage caused by e-cigarettes, there was still enough evidence "to caution children and adolescents, pregnant women, and women of reproductive age" about their use. The WHO also added that e-cigarettes should be outlawed from indoor public spaces. It is quite obvious that the use of e-cigarettes, especially with young people, is increasing. Hopefully, the federal government will take action to help put a stop to the use of e-cigarettes or at the very least to require strong warnings.

Source: *The Guardian*

XVIII. 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 May 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.

Toyota Recalls 250,000 Tacoma Pickups Over Oil Leaks

Toyota has recalled about a quarter-million pickup trucks to fix a defect that could cause vehicles to leak oil and potentially increase the risk of a crash. The Japanese automaker is recalling 228,000 U.S. units of the 2016 and 2017 model-year Toyota Tacoma. The recall includes about 250,000 units worldwide. The recently redesigned Tacoma, a mid-size pickup crucial to Toyota's lineup, could leak oil, possibly damaging the rear differential. That could "result in noise and reduced propulsion" and in some cases "could seize, resulting in a loss of control of the vehicle and increasing the risk of a crash," according to Toyota.

It is not known whether Toyota had received any complaints of crashes or injuries connected to the defect. The company said it would check vehicles for oil leakage and replace parts if necessary. If no oil leakage is found, fasteners will be tightened to prevent damages. Toyota said it would begin notifying customers this month they are affected and eligible for free repairs. Owners can also find information on recalls of Toyota, Lexus and Scion vehicles at Toyota.com/recall.

Fiat Chrysler To Recall 1.28 Million Trucks Over Airbag Problem

Fiat Chrysler will recall 1.28 million pickup trucks over a software issue with the vehicles' crash-detecting sensors that may cause the failure of side airbag deployment and seat belt tensioning in a rollover. The vehicles involved are model year 2013-2016 Ram 1500s and Ram 2500s, as well as model year 2014-2016 Ram 3500s. Certain conditions, such as driving off-road, debris striking the vehicle while driving or even a crash prior to a rollover, can cause sensors to trigger a fault within the occupant restraint controller, which determines when to deploy airbags. If that happens, the side curtain airbags and the seat belt pretensioners will be disabled, the National Highway Traffic Safety Administration (NHTSA) said in its recall notice.

If these two safety features are disabled, truck occupants face an increased risk of injury if a crash occurs, NHTSA said. Documents attached to the agency's notice showed that Fiat Chrysler is aware of at least two injuries and one death that are possibly related to this issue. About 1.02 million vehicles in the U.S. are affected, as are 216,007 vehicles in Canada, 21,668 in Mexico and 21,530 elsewhere. The company said, that every one of these trucks is expected to have the same problem.

The company will notify owners and expects the recall to officially begin on June 23. Fiat Chrysler dealers will update each truck's software free of charge, the company said. A warning light may notify drivers of the problem, and Fiat Chrysler said that normal functions can be restored by turning the truck off, then on again, but urged customers to follow the instructions on their recall notices and get the software fixed at a dealership.

Fiat Chrysler first became aware of a possible problem in early December, when the company's general counsel told its vehicle safety and regulatory compliance organization about pending litigation involving a 2014 Ram 1500 that was involved in a rollover where the airbags and pretensioner didn't work. On March 20, the company's safety and compliance group, along with engineering and a parts supplier, analyzed the crash and the data from the occupant restraint controller, determining that the sensor that would have deployed the truck's airbags was disabled during the crash prior to the rollover. Fiat Chrysler decided to institute a voluntary recall on May 2, the NHTSA said.

Hyundai And Kia Ordered To Recall 240,000 Cars

Hyundai Motor Co. and its affiliate Kia Motors Corp. have agreed to the South Korean government's order to recall 240,000 cars for safety issues raised by a whistleblower. This is the first time the country's transportation authority has mandated a vehicle recall. Previously, Hyundai and Kia had rejected calls for a voluntary recall, saying that the defects—which cover problems with fuel hoses, vacuum pipes and parking brake lights—didn't involve safety, according to media reports. The country's transport ministry has reportedly also asked prosecutors to probe whether there is evidence that there was a cover-up at the automakers. Hyundai said in a statement that there were no reported injuries or accidents from the issues behind the recall. "Safety is always Hyundai-Kia's number one priority and we make decisions on recalls or any other customer protection steps in compliance with regulators around the world and stringent internal procedures," the automaker said.

The recall affects 12 models, including the Hyundai Elantra, Sonata and Santa Fe, according to news reports. The whistleblower is Hyundai engineer Kim Gwangho, according to media reports, who has worked for the automaker for 25 years. He is reportedly the first whistleblower to flag problems in South Korea's automotive industry and made allegations about 32 issues to regulators there. Kim also traveled to the United States last year to report safety problems to the U.S. National Highway Traffic Safety Administration (NHTSA); he reportedly said that the company was lagging on addressing an engine problem that raised the risk of crashes.

Kia and Hyundai recently recalled 1.4 million vehicles in the U.S., Canada and South Korea due to a risk that the engines can fail and stall, potentially causing a crash. According to the automakers, metal debris left over from engine manufacturing can clog oil bearings, which causes temperatures to rise in the engines and the bearings to fail, which could make the car stall while running. A worn connecting rod bearing will also make a knocking noise from the engine, causing warning lights to appear in the dashboard, according to the documents. "If the warnings are ignored and the vehicle is continued to be driven, the bearing may fail and the vehicle could stall while in motion," Kia said in one document posted on NHTSA's website.

Last month's recall includes 2013 and 2014 Hyundai Santa Fe Sports and Sonatas, as well as 2011 through 2014 Kia Optimas, Kia Sportages from 2011 to 2013 and Kia Sorentos from 2012 through 2014. The recalled cars all have either 2-liter or 2.4-liter engines, and the vehicles in the U.S. were all made at a Hyundai plant in Montgomery, Alabama. The companies will be mailing car owners, telling them to bring their cars to a dealer, which will inspect and replace the engine assembly, if necessary. The repairs will be free of charge. Owners also will be reimbursed for previous repair expenses.

VW Expands Porsche And Audi SUV Recall For Fire Risk

Volkswagen AG is broadening a recall for a fuel pump defect that can cause fires to include nearly 300,000 Porsche and Audi vehicles. The fuel pump flange on some Porsche Macan models, as well as Audi Q5 and Q7 SUVs, might crack and cause a fuel leak and possibly a fire, according to documents dated May 3 and posted on the National Highway Traffic Safety Administration (NHTSA) website. There are about 240,500 Audis and 51,500 Porsches

included in the expanded recall. Those comprise Audi Q5s made between July 2012 and March 2017, as well as Q7s made between May 2012 and July 2015.

For Porsche, the recalled cars are Macan S and Macan Turbo vehicles from years 2015 to 2017. The recall will start July 2 and consumers can bring their cars to a dealership, where a protective film will be applied to the fuel pumps. The pumps will be replaced if there are cracks.

This past fall, Volkswagen recalled about 281,500 VW and Audi vehicles in the U.S. in three separate campaigns over fuel pump issues. The largest of Volkswagen AG's three recalls concerned more than 143,000 model year 2009 to 2012 Audi Q5 and 2007 to 2012 Audi Q7 SUVs with gasoline engines that may develop cracks in the filter housing of the fuel pump, which is part of the fuel cap flange. "Our investigations do not show a distinct cause of the fissures," Volkswagen said in its safety recall report to NHTSA. "However, we do have indications for an outside contamination by a liquid material corroding the structure of the flange," VW added.

Audi first became aware of the problem in fall 2015 when NHTSA began to receive an increased number of reports of fuel smell or leaks in Q5 and Q7 vehicles. Additional testing located the source of the problem. One of the recall campaigns covered 110,000 2015 and 2016 Volkswagen Golf, SportWagen and GTI models and Audi A3 sedans and A3 cabriolet vehicles of all engine types. According to Volkswagen, the issue stems from a possibly compromised suction pump. Normally, the pump is designed to remove fuel from the engine's evaporative emissions system, but the fault causes fuel to flow directly into the system instead. In this instance, fuel could accumulate in the system and leak through the charcoal canister filter element, causing a fire in the presence of an ignition source. Volkswagen said at the time the faulty suction pumps were caused by a manufacturing issue, and the automaker will replace them free of charge. The smallest of the recalls covered more than 28,000 2012 and 2013 model year Audi A6 and A7 sedans with gasoline engines with fuel hoses that may break down over time, causing a fuel leak. Audi said the pumps lost pressure and became porous for unknown reasons.

Polaris Recalls Two Off-Road Models Due To Fire Hazard

A fire hazard has prompted Polaris Industries Inc. to recall two models of recreational off-highway vehicles (ROVs), the U.S. Consumer Product Safety Commission (CPSC) said. The engine can overheat, and the turbo system's drain tube can loosen, possibly causing a fire. The Minnesota-based company said it received 19 reports of the ROVs catching fire, resulting in six burn injuries. One of the fires, occurring in Utah's American Fork Canyon, caused severe burns on a young child and destroyed 15 acres of forest land, the commission reported.

People should immediately stop using the ROVs and contact Polaris to schedule a free repair. All model-year 2016 Polaris RZR XP Turbo and RZR XP 4 Turbo ROVs need to be returned. Vehicles were purchased at dealers nationwide between August 2015 and July 2016. The 2016 RZR XP 4 Turbo is one of the recalled models.

The recall includes nearly 13,000 vehicles, including 2,230 ROVs recalled in December. "Polaris" is stamped onto the front grille of the ROVs, sold in blue, gray, orange and red. "RZR" is printed on the rear box or on the right and left rear fenders and "Turbo" on the hood or on the right and left front fenders.

At least 900 deaths over a four-year period were related to all-terrain vehicles or ATVs being ridden on paved roads or parking lots, according to the safety commission. During the same period, nearly 3,000 deaths and 490,000 injuries related to ATVs and ROVs were reported. Overturning is a common risk when driving an off-road vehicle on a paved surface, since ATVs and ROVs are designed for off-road terrains. These vehicles are also more likely to collide with cars, trucks and other vehicles, the commission said.

The agency reminded the public that riders need to wear helmets and protective gear, including boots, gloves, eye protectors, long pants and long-sleeved shirts, and seat belts must be used. Most ATVs are designed for one rider; passengers should never exceed seats. Riders younger than 16 should not drive adult vehicles, and children cannot ride as passengers unless their feet touch the floor in a sitting position, the safety agency said.

Horizon Hobby Recalls Remote-Controlled Model Vehicles Due To Fire Hazard

Horizon Hobby LLC, of Champaign, Ill., has recalled about 18,600 ECX Circuit, Ruckus, and Torment remote-controlled model vehicles. The vehicle's electronic speed control (ESC) can fail and short circuit, posing a fire hazard. The recall involves the Dynamite 40-Amp FWD REV Brushed ESC—DYNS2201. It is the Electronic Speed Control (ESC) that comes in the remote controlled hobby model vehicles ECX 1/10 LiPo Circuit, Ruckus and Torment models with the following models numbers: ECX03130T1, ECX03130T2, ECX03131T1, ECX03131T2, ECX03133T1, ECX03133T2, ECX03154. The model numbers can be found on the product box or in the owner's manual for each vehicle. The model vehicles measure about 18 inches in length and 12 inches in width and are hobby grade remote control models for ages 14 and up.

Horizon Hobby has received 19 reports of the ESC in the model truck and cars catching fire. No injuries or property damage has been reported. The model vehicles were sold at Horizon Hobby stores nationwide and online at www.horizonhobby.com from October 2016 through December 2016 for about $180. Consumers should immediately stop using the recalled product and contact Horizon Hobby for instructions on receiving a free replacement ESC. Contact Horizon Hobby at 800-338-4639 from 8 a.m. to 7 p.m. CT Monday through Friday, 8 a.m. to 5 p.m. CT on Saturday, and 12 p.m. to 5 p.m. CT on Sunday or online at www.horizonhobby.com and click on Product Recalls at the bottom of the page for more information.

Carrier And Bryant Recall Heat Pumps Due To Fire Hazard

About 23,300 Carrier Greenspeed™ and Bryant Evolution Extreme™ Heat Pumps have been recalled by Carrier Corporation, of Jupiter, Florida. The capacitors in the fuse boards in the heat pumps can stop working causing the unit to overheat, posing a fire hazard. This recall involves 2, 3, 4, and 5 ton size heat pump units sold under the Carrier Greenspeed and Bryant Evolution Extreme brand names. The units are used for cooling and heating homes. The Carrier Greenspeed model numbers are: 25VNA024, 25VNA036, 25VNA048, and 25VNA060. The Bryant Evolution Extreme model numbers are: 280ANV024, 280ANV036, 280ANV048, and 280ANV060. The model number can be found on the unit nameplate (or rating plate) located on one side of the unit's exterior. On the Bryant unit, there is a label on top of the unit that reads "Bryant Evolution System." Carrier has received 41 reports of the heat pumps overheating. No injuries, fires or property damage have been reported.

The pumps were sold at Sears stores and HVAC dealers nationwide from June 2011 through August 2016 for between $12,000 and $18,000. Consumers should contact Carrier or Bryant for instructions on receiving a free replacement fuse board installed by authorized Carrier or Bryant technicians. Contact Carrier toll-free at 844-864-

8233 from 8 a.m. to 5 p.m. ET Monday through Friday, or online at www.carrier.com or www.bryant.com and click on "Product Safety Recall" for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Carrier-and-Bryant-Recall-Heat-Pumps

Honeywell International Recalls SWIFT® Wireless Gateway Sold With Fire Alarm Systems Due To Failure To Communicate In Fire

Honeywell International Inc., of Northford, Connecticut, has recalled 900 SWIFT wireless gateways sold with fire alarm systems. The smoke detectors connected to the gateway can fail to activate properly when significant environmental contaminants are present, posing a risk that consumers will not be alerted to a fire. This recall involves the SWIFT wireless gateway sold with fire alarm systems. The gateways are round, white and measure eight inches in diameter. The gateways are the bridge between the fire alarm control panel and the detectors. These systems are used primarily for indoor or covered areas in commercial buildings, such as in office buildings, hotels, industrial facilities, and apartment complexes. The model number and date codes are printed on the back of the gateway on a white label on the circuit board.

The fire alarm systems were sold at Honeywell distributors nationwide between October 2014 and December 2016 for about $440 for the fire alarm system. Contact Honeywell for an update of the firmware on the SWIFT wireless gateway(s) installed on the system. Commercial building customers should continue using the recalled detectors until the firmware is updated. Contact Honeywell at 800-289-3473 from 8 a.m. to 5 p.m. ET Monday through Friday or online at http://hwll.co/CPSCsafety and click on Safety Recall for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Honeywell-International-Recalls-SWIFT-Wireless-Gateway-Sold-with-Fire-Alarm-Systems

Cordless Electric Lawn Mowers Recalled Due To Fire Hazard

Sunrise Global Marketing, of Mooresville, North Carolina, has recalled about 28,000 cordless electric lawn mowers. The circuit board in the lawn mower can short circuit and catch fire, posing a fire hazard to users. This recall involves Kobalt and Greenworks brands of cordless electric walk-behind lawn mowers. The recalled lawn mowers have four wheels (two smaller ones in the front and two larger ones in the back), a 40-volt max lithium ion battery and a deck width of 20 inches. Both models have a large label on the rear bag door area with a serial number, model number and date code. The Kobalt brand mowers also have an item number on the label. "Kobalt" or "Greenworks" is printed on the side of the bag. The company has received 12 reported incidents with the recalled lawn mowers including five reports of fires. No injuries have been reported.

The lawn mowers were sold at Lowe's and other retailers nationwide and online at Amazon.com, Lowes.com and other websites from May 2014 through July 2016 for about $350. Consumers should immediately stop using the recalled lawn mowers, remove the battery and contact Hongkong Sun Rise Trading for a free repair. Contact Hongkong Sun Rise Trading toll-free at 888-266-7096 from 9 a.m. to 5 p.m. ET any day or online at www.greenworkstools.com and click on "Important Safety Notice" at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Cordless-Electric-Lawn-Mowers-Recalled

Extech Recalls Digital Clamp Meters Due To Electrocution Hazard

About 1,700 digital clamp meters have been recalled by FLIR Commercial Systems Inc., of Goleta, California, owner of Extech. The meters can fail to give an accurate voltage reading, resulting in the operator falsely believing the electrical power is low or off, posing an electrocution hazard. This recall involves Extech digital clamp meters with model numbers EX650, EX655, MA160, MA61, and MA63. These models are all AC/DC clamp meters, which are electrical testing devices that measure AC/DC voltage, resistance, capacitance, frequency, temperature, continuity, and diode. Serial numbers in the following format are included in the recall: R15XXXXXXX to R17XXXXXXX. Only serial numbers in this range are included in the recall. The "EXTECH" logo and the model number are printed on the front of the unit and the serial number on the back. The digital clamp meters are green and orange. Extech received two reports of clamp meters displaying an incorrect voltage reading. No injuries have been reported.

The meters were sold at Grainger, Platt Electric Supply stores and industrial and electrical distributors and wholesalers nationwide and online at Amazon.com and other websites from January 2016 through April 2017 for between $110 and $230. Consumers should immediately stop using the recalled digital clamp meters and contact Extech for a free replacement meter. Contact Extech toll-free at 855-239-8324 from 9 a.m. to 5 p.m. ET Monday through Friday, by email at meter.recall@extech.com, or online at www.extech.com and click on Safety Notices at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Extech-Recalls-Digital-Clamp-Meters

HoMedics Recalls Massagers Due To Electric Shock And Burn Hazards

HoMedics USA LLC, of Commerce Township, Michigan, has recalled about 400,000 HoMedics handheld massagers. The cord can break near the base of the massager and expose the wires, posing electric shock and burn hazards. This recall involves three models of handheld massagers, HHP-375H, HHP-250 and the PA-MH-THP. All models of the massagers have a 120 VAC, 60 HZ power cord. "HoMedics" is printed on the massagers. The HHP-375H model Handheld Dual Node Percussion Massager with Heat is white with a gray handle or black with a gray handle. The massager has three sets of interchangeable nodes. The HHP-250 model Handheld Hot and Cold Massager is white with a gray stripe or gray with a blue stripe. The massager has three, five or eight interchangeable nodes. The PA-MH-THP model Handheld Compact Percussion Massager with Heat is white on the bottom of the base with gray on top. The massager has two sets of interchangeable nodes.

All manufacturing dates for all three models are included in the recall and the item date code can be found in either one of the cord prongs or in the rating label located on the underside of the product. Date codes can be identified as a 4-digit number WWYY where WW is the sequential week of the year and YY is the last two digits of the manufacturing year.

HoMedics has received 140 reports of exposed wires, sparks, smoking and some shooting flames coming from the massagers. There have been 15 reports of burn injuries to consumer's fingers and other parts of the body.

The massagers were sold at Bed Bath & Beyond, Macy's, Rite-Aid, Walmart and other stores nationwide and HSN from August 2013 through February 2017 for between about $30 and $50. Consumers should immediately stop using the recalled

massagers and contact HoMedics for instructions on removing the cord and to receive a refund in the form of a credit for any replacement product from the company. Contact HoMedics toll-free at 888-803-0509 from 7 a.m. to 6 p.m. CT Monday through Friday or online at http://www.homedics.com and click on the Product Recall tab for more information. Photos available at https://cpsc.gov/Recalls/2017/HoMedics-Recalls-Massagers-Due-to-Electric-Shock-and-Burn-Hazards

Goodman Recalls Furnaces Due To Electrical Shock Hazard

About 4,100 gas-fired furnaces have been recalled by Goodman Manufacturing Company L.P., of Houston, Texas. The blower motor is not grounded, posing an electrical shock hazard to individuals servicing the units. This recall involves 80 percent efficiency gas-fired furnaces sold under the Goodman, Amana and Daikin brand names used with home heating and cooling systems. The recalled products have model numbers beginning AMEH80, DM80HE, and GME8, and serial numbers beginning 1609, 1610, 1611 and 1612. The brand name is shown on the outside of the furnace, and the serial number is located on the label found by opening the furnace door.

The furnaces were sold at Goodman, Amana and Daikin heating and cooling equipment dealers nationwide from September 2016 through January 2017 for between $850 and $1,150. Consumers should immediately contact Goodman for a free repair. Contact Goodman toll-free at 888-770-7126 from 7 a.m. to 6 p.m. CT Monday through Friday or online at www.goodmanmfg.com and click on "Product Recall" at the bottom right hand corner of the page for more information. Photos available here https://cpsc.gov/Recalls/2017/Goodman-Recalls-Furnaces

Pier 1 Imports Recalls Chalk Note Mugs Due To Burn Hazard

About 15,300 Chalk Note Mugs have been recalled by Pier 1 Imports Inc., of Fort Worth, Texas. The mugs can crack when filled with hot liquid, posing a burn hazard to users. This recall involves the Pier 1 Imports Chalk Note Mugs that can be written on with chalk. The stoneware mugs were sold in black and measure 5.25 inches tall by 5 inches in diameter. "Stoneware" and "Pier 1 Imports" are printed on the bottom of the mug. The company has received reports of eight mugs cracking when filled with a hot liquid. No injuries have been reported.

The mugs were sold exclusively at Pier 1 Imports stores nationwide and online at Pier1.com from March 2016 through April 2017 for about $8. Consumers should immediately stop using the recalled mugs and contact Pier 1 Imports for a full refund or merchandise credit. 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. Pictures available here: https://www.cpsc.gov/Recalls/2017/Pier-1-Imports-Recalls-Chalk-Note-Mugs

Michaels Recalls Ceramic Travel Mugs Due To Burn Hazard

Michaels Stores Procurement Co. Inc. (MSPCI), a subsidiary of The Michaels Companies Inc., of Irving, Texas, has recalled about 27,000 ceramic travel mugs. The mug's lid does not fit securely and can cause liquids to leak from the bottom of the lid when tilted, posing a burn hazard. Also, the mug does not have a silicone hand wrap so the consumer could burn their hand on the side walls of the mug. This recall involves Michaels private brand Celebrate It™ ceramic travel mugs with a silicone lid. The mugs measure about 6.5 inches tall and hold about 16 ounces of liquid. The travel mugs have four designs:

- Motherhood the greatest adventure (lime green lid)
- MOM (lime green lid)
- Blue floral (turquoise lid)
- Pink floral (pink lid)

Only ceramic mugs with SKU number 508992 and UPC code 886946619458 printed on a label on the bottom of the mugs are included in the recall. The company has received one report of the lid leaking. No injuries have been reported.

The mugs were sold at Michael's stores nationwide from March 2017 through April 2017 for about $8. Consumers should immediately stop using the recalled mugs and return them to any Michaels store for a full refund. Contact Michaels at 800-642-4235 from 9 a.m. to 7 p.m. CT Monday through Friday or online at www.michaels.com and click on "Product Recalls" at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Michaels-Recalls-Ceramic-Travel-Mugs

Night Lights Recalled By AM Conservation Group Due To Fire Hazard

AM Conservation Group Inc. of Charleston, South Carolina, has recalled about 37,000 Luminescent night lights. The night lights can overheat, posing a fire hazard. This recall involves luminescent night lights Model 2017-G, a square-shaped night light with a rounded top. The night light glows green when plugged into an electrical outlet. The back of the night light has a metallic sticker with the "UL" logo on it. If the UL label has a number on it beginning with the letter H or I followed by seven numbers, it is included in this recall. The night lights were given free to consumers, individually and in energy conservation kits. The company is aware of 14 incidents of the night lights smoking or smoldering. No injuries have been reported.

The recalled night lights were distributed as free promotional products by various companies between November 2016 and March 2017. Consumers should immediately stop using the recalled night lights and contact the company for a free replacement. Contact AM Conservation Group toll free at 866 878-1060 from 8 a.m. to 5 p.m. CT Monday through Friday or visit www.amconservationgroup.comand click on "Product Recall" for more information.

Pictures available here: https://www.cpsc.gov/Recalls/2017/Night-Lights-Recalled-by-AM-Conservation-Group

Sportex Recalls Salt Rock Lamps Due To Shock And Fire Hazards

Sportex US, of New York, has recalled about 3,900 Lumiere Salt Rock lamps. About 80,000 lamps were previously recalled in January 2017. The dimmer switch and/or outlet plug can overheat and ignite, posing shock and fire hazards. This recall involves Lumière brand Rock Salt Lamps in three styles: Basket of Rocks, Carnival of Lights and Rock of Gibraltar. The lamps are pink in color and are mounted on a wooden base or in a black metal basket. The lamps were sold in black cardboard boxes with a photo of the lamp on the front of the box and the UPC bar code number on the bottom of the box.

The lamps were sold at Home, Christmas tree shops, Michaels and other stores nationwide from July 2016 through December 2016 for between $15 and $30. Consumers should immediately stop using the lamps and return them to the store where purchased to receive a full refund or a replacement kit. Contact Sportex at 800-652-3490 from 9 a.m. to 5 p.m. ET Monday through Thursday or online at www.sport-

exus.com and click on "Salt Rock Lamps" at the bottom of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Sportex-Recalls-Salt-Rock-Lamps

Osprey Recalls Child Backpack Carriers Due To Fall Hazard

Osprey Child Safety Products LLC and Osprey Packs Inc., of Cortez, Colorado, has recalled about 82,000 Poco child carriers. A child seated in the carrier can slip through the leg openings, posing a fall hazard to children. This recall involves all models of Poco, Poco Plus and Poco Premium child backpack carriers manufactured between January 2012 and December 2014. The nylon child carriers were sold in three colors: "Romper Red," "Koala Grey," and "Bouncing Blue." They have a metal frame and a gray padded child's seat inside. The production date is stamped on a black label sewn into the interior of the large lower zippered compartment on the back of the carrier. Recalled carriers have a production date code of S12SBPR1, S12SBPR1B, S12SBPR2, S12SBPR3, S12SBPR4, F12SBPR1, F12SBPR2, S13SB IPO, S13SBPR1, S13SBPR2, S13SBPR3, S13SBPR4, F13SBPR1, F13SBPR2, F13SBPR3, S14SBPR1, S14SBPR2, S14SBPR3, S14SBPR4, S14SBPR5. "Osprey" is printed on the fabric above the kick stand. The model name is printed on the back at the bottom. Osprey has received four reports of children falling through the carrier leg openings, resulting in one report of a skull fracture and one report of scratches to the head.

The packs were sold at REI and specialty outdoor stores nationwide and online at Amazon.com from January 2012 to December 2015 for between $200 and $300. Consumers should immediately stop using the recalled carriers and contact Osprey for a free Seat Pad Insert for use along with the existing safety straps to secure the child in the carrier. Consumers who previously received and installed the free Seat Pad Insert in their carriers are not required to take further action. Contact Osprey toll-free at 866-951-5197 from 8 a.m. to 5 p.m. MT Monday through Friday, email at pocoseatpad@ospreypacks.com or online at www.ospreypacks.com and click on "Poco Safety Notices" on the navigation bar at the top right hand corner of the page for more information. Pictures available here https://www.cpsc.gov/Recalls/2017/Osprey-Recalls-Child-Backpack-Carriers.

VanMoof Recalls Bicycles Due To Fall And Impact Hazards

VanMoof USA Inc, of Brooklyn, New York, has recalled about 375 VanMoof B and S series bicycles, The front fender bolts do not break when an object gets stuck between the front tire and the front fender/mud guard, posing fall and impact hazards. This recall involves VanMoof B-Series and S-Series commuter-style bicycles manufactured between 2014 and 2016. All S series bikes have a grey anodized frame and all B series bikes have a white powder coated frame. There are—for both Series 3 frame types—a straight frame, a straight frame with an integrated chain lock, and a dropdown frame. B-Series and S-Series serial numbers are stamped on the bottom bracket of the bicycle between the pedals on the bottom of the bicycle. The company has received two reports of riders injured when road objects created an obstruction between the bike fender and the front wheel. In both instances, the fender remained intact, because the stainless steel fender bolts did not break off. One instance resulted in bruises, scratches and a broken arm. In the second instance, the rider suffered a concussion.

The bicycles were sold at Aika Trading, Calhoun Cycle, Orange Pedal, The Garage OTR, Seattle E-bike and other bicycle stores nationwide and online from January 2014 through December 2016 for about $800. Consumers should immediately stop using the recalled bicycles and contact VanMoof to receive free replacement nylon bolts for the front fender and installation instructions. The repair can be completed by the consumer without assistance. Contact VanMoof toll-free at 855-623-6673 from 9 a.m. to 7 p.m. ET Monday through Friday, email fenderbolt@vanmoof.com, or online at www.vanmoof.com or support.vanmoof.com on the top-right of the homepage of the website next to the language menu.

Profile Design Recalls Bicycle Handlebar Stems Due To Loss Of Control And Crash Hazard

About 9,700 Cobra S handlebar stems have been recalled by Profile Design LLC, of Carson, California. The bicycle handlebar stems can corrode and break, causing the rider to lose control and crash. This recall involves Profile Design Cobra S carbon-wrapped black handlebar stems sold individually and as original equipment on the following Fuji, Jamis and Scott bicycle models: Fuji 2009 D-6 Pro, Fuji 2010 D-6 Pro, Fuji 2010 D-6 Matt Reed, Jamis 2010 Xenith T2, Scott 2008 CR1 Plasma LTD (model# 209562), Scott 2009 Plasma Premium (model # 212052) and Scott 2010 Plasma Premium (model # 215722). The stems were sold in seven lengths or sizes including 60 mm, 70 mm, 80 mm, 90 mm, 100 mm, 110 mm and 120 mm. "Profile Design" and "Cobra S" are printed in white on the black handlebar stems. Only black stems are included in this recall. The firm has received at least 10 reports of the bicycle handlebar stems corroding and breaking, including one report of an injury to a rider when the bicycle stem broke causing the rider to lose control.

The handlebars were sold at Independent bicycle stores nationwide from January 2007 through December 2013 for about $200 for the stem sold individually and between $2,000 and $6,000 for bicycles sold with the stems as original equipment. Consumers should immediately stop using bicycles with the recalled handlebar stems and contact Profile Design for instructions to receive a free replacement stem. Contact Profile Design toll-free at 888-800-5999 from 9 a.m. to 5 p.m. PT Monday through Friday or online at www.profile-design.com and click on "Recall Notices" for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Profile-Design-Recalls-Bicycle-Handlebar-Stems

Dynacraft Recalls Ride-On Toys Due To Fall And Crash Hazards

About 20,000 Surge and Tonka battery-operated ride-on toys have been recalled by Dynacraft BSC Inc., of American Canyon, California. The acceleration pedal on the ride-on toys can stick, posing fall and crash hazards. This recall involves three models of 12V battery-operated ride-on toys, including Surge 12V Camo 4X4, Surge 12V XL Quad and Tonka 12V Mighty Dump trucks. The model number, batch number, serial number and the date code, formatted as "MMDDYYYY," are printed on a label on the bottom of the ride-on toy. Dynacraft has received 19 reports of pedals sticking, including seven reports of minor injuries; abrasions, cuts and bruises.

The Surge 12V Camo 4X4 was sold at Walmart nationwide between June 2016 and March 2017 for about $300. The Surge 12V XL Quad sold at Academy Sports + Outdoors stores nationwide from September 2016 through March 2017 for between $150 and $200. The Tonka 12V Might Dump Truck was sold at Toys R Us stores nationwide and online at ToysRUs.com from July 2016 through November 2016 for about $350. Consumers should immediately take the recalled ride-on toys away

from children and contact Dynacraft to receive a free replacement foot pedal with installation instructions. Consumers in need of assistance with the repair can bring the ride-on toy to an authorized service center for a free repair. Contact Dynacraft at 800-551-0032 from 7 a.m. to 4 p.m. PT Monday through Friday or online at www.dynacraftwheels.com and click on "Product Recalls" for more information.

Pictures available here: https://www.cpsc.gov/Recalls/2017/Dynacraft-Recalls-Ride-On-Toys

Cabrinha Recalls Kiteboard Control Systems Due To Injury And Fall Hazards

About 2,900 Cabrinha Kiteboard control systems have been recalled by Cabrinha Kites, a subsidiary of Pryde Group Americas, of Doral, Florida. The point of connection between the lower front line with the landing line can break, causing a loss of kite control, posing injury and fall hazards. The component subject to recall is the stainless steel POWER BRACKET SEAT (PBS) and the lower front line that connects with the landing line on the Overdrive 1X Recoil with Fireball or Quickloop, Overdrive 1X Trimlite with Fireball or Quickloop, 1X Trimlite with Fireball or Quickloop and the Chaos 1X Control system models. The stainless steel PBS is mounted on the top of the depower mainline between one of the lower front lines and the landing line. The PBS is used as a stopping point for one of the flying lines while allowing the activation of the 1X security landing line. Model numbers included in the recall are: KS7CSODFR, KS7CSODQR, KS7CSODFC, KS7CSODQC, KS7CSFXFC, KS7CSFXQC and KS7CSCHFX. Only models with "2017 1X" printed on a cloth tab attached to the bungee line restrainers at the end of the bars are included in this recall. The company has received six reports of the stainless steel PBS component breaking. No injuries have been reported.

The systems were sold exclusively at Watersports stores nationwide from July 2016 through March 2017 for about $550. Consumers should immediately stop using the recalled kiteboard control systems and return them to the place of purchase to receive a free replacement kit with instructional guide. A video on how to install the replacement plastic power-bracket is available here: https://www.youtube.com/watch?v=vZasOj9v6Yw. Contact: Cabrinha at 808-893-0286 from 9 a.m. to 4 p.m. HT (Hawaii Time) Monday through Friday or online at www.cabrinhakites.com and click on the "Safety Alert" at the top of the page for more information. Pictures available here: https://www.cpsc.gov/Recalls/2017/Cabrinha-Recalls-Kiteboard-Control-Systems

Combi USA Recalls Stroller And Car Seat Combos Due To Fall Hazard

About 1,000 Combi Shuttle Travel System (stroller and car seat combos) have been recalled by Combi USA, Charlotte, North Carolina. The car seat can disengage from the stroller's frame, posing a fall hazard to infants. This recall involves Combi Shuttle model strollers and car seats, which when used together are called a travel system. The strollers and car seats have model number 6100027 or 6100100 printed on a label on the base of the car seat and stroller's leg. The car seat and stroller were sold in titanium (silver) and red chili (red) colors. Combi is printed on the front of the stroller and the car seat. Shuttle is printed above the model number.

The stroller and car seats were sold at online at Amazon.com, Babies R Us.com, Target.com and other online retailers from June 2015 through September 2016 for between $350 and $400 for the stroller and the car seat when sold together. Consumers should stop using the recalled strollers with the car seats attached and contact Combi for a free repair, which consists of straps to secure the car seat to the stroller. Consumers can continue to use the strollers and car seats separately. Contact Combi USA toll-free at 844-332-6730 from 8 a.m. to 5 p.m. ET Monday through Friday or online at www.combiusa.com and click on "Safety Notifications" at the bottom of the page for more information. Combi USA will contact consumers who registered their products. Pictures available here: https://www.cpsc.gov/Recalls/2017/Combi-USA-Recalls-Stroller-and-Car-Seat-Combos

Pier 1 Imports Recalls Temani Wicker Furniture Due To Violation Of Federal Lead Paint Standard

About 2,500 Temani ivory wicker chair, settee and ottoman sets have been recalled by PT Gimex Furniture Manufacturing Co., of Indonesia. The paint used on the wicker furniture can contain excessive levels of lead, which is a violation of the federal lead paint standard. This recall involves the Pier 1 Imports Temani collection, which includes a chair, settee and ottoman. They are ivory colored, made of rattan wicker, and were sold without a cushion. The chair measures 29 inches wide, 29.5 inches deep and 35.5 inches high, the settee measures 51.5 inches wide, 29.5 inches deep and 35.5 inches high, and the ottoman measures 27 inches wide, 18 inches deep and 16 inches high. The furniture has a Pier 1 Imports logo on the underside of each chair, settee and ottoman. The recall involves only the ivory-colored Temani collection.

The chairs were sold exclusively at Pier 1 Imports stores nationwide and online at www.Pier1.com from March 2014 to April 2017 for between $140 and $560. Consumers should stop using the recalled furniture immediately and return it to any Pier 1 Imports store for a full refund or a merchandise credit. 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. Pictures available here: https://www.cpsc.gov/Recalls/2017/Pier-1-Imports-Recalls-Temani-Wicker-Furniture

Hobby Lobby Recalls Easter And July 4th Light-Up Spinner Toys Due To Choking And Ingestion Hazards

Hobby Lobby Stores Inc., of Oklahoma City, Oklahoma, has recalled about 43,400 Easter and July 4th-themed Light-Up Spinner Toys. The battery cover can detach and expose the small coin cell batteries, posing choking and ingestion hazards to young children. This recall involves children's battery-powered, light-up spinner toys sold in two themes: Easter and July 4th. The Easter-themed toys were sold in blue with a pink bunny on the dome and yellow with a yellow and orange chicken on the dome. The July 4th spinners are red with white stars painted on the blue dome. "Hobby Lobby" and item number 9130033 or 9130082 is printed on the spinner handle. The spinners are powered by three LR44 coin cell batteries. Hobby Lobby has received one report of a 14-month-old child who ingested the battery. An X-ray was conducted and the battery passed through.

The toys were sold at Hobby Lobby and Mardel stores nationwide from February 2017 to April 2017 for about $5. Consumers should immediately take the recalled spinners away from children and return them to the nearest Hobby Lobby or Mardel store. Consumers with a receipt will receive a full refund and consumers without a receipt will receive a store credit. Contact Hobby Lobby Stores at 800-326-7931 between 9 a.m. and 6 p.m. ET Monday through Friday, or online at www.hobbylobby.com and click on the Recall tab for more information. Pictures available here: https://www.cpsc.gov/

Recalls/2017/Hobby-Lobby-Recalls-Easter-and-July-4th-Light-Up-Spinner-Toys

Douglas Recalls Plush Toys Due To Choking Hazard

About 25,000 plush toys have been recalled by Douglas Company Inc., of Keene, New Hampshire. The plastic eyes on the plush toys can detach, posing a choking hazard. This recall involves the Oliver™ the Bear, Chewie™ the English Bulldog, and Charlotte™ the Fox model plush toys. Oliver the Bear is a brown and tan stuffed bear, with a blue t-shirt that reads "Oliver the Bear" and a red, removable cape. Chewie is a stuffed, brown and white English Bulldog with a blue patch sewn on the chest that reads "Chewie." Charlotte is a stuffed, brown, black and white Fox with removable blue cape. Each of these toys has a sewn-in label with the words "DOUGLAS® the cuddle toy." Douglas has received two reports of the plastic eyes detaching or loosening. No injuries have been reported.

The toys were sold at specialty toy and gift stores nationwide from July 2014 to April 2017 for about $20. Also distributed by UnitedHealthcare Children's Foundation (UHCCF) to various individuals and organizations. Consumers should immediately take the recalled plush toys away from young children and contact the company to receive a free replacement product or a full refund. Contact Douglas at 800-276-4029 from 9 a.m. to 7 p.m. ET Monday through Friday or online at www.douglastoys.com and click on Product Recall for more information.

Pictures available here: https://www.cpsc.gov/Recalls/2017/Douglas-Recalls-Plush-Toys

Nature's Truth Recalls Iron Supplement Bottles Due To Failure To Meet Child-Resistant Closure Requirement

Nature's Truth LLC, of Ronkonkoma, N.Y. has recalled about 520 Nature's Truth Slow Release Iron Supplements. The packaging is not child-resistant as required by the Poison Prevention Packaging Act. The tablets inside the bottle contain iron, which can cause serious injury or death to young children if multiple tablets are ingested at once. This recall involves Nature's Truth Slow Release 45mg Iron Supplement bottles. The 60-count, coated tablets were sold in a green bottle with a green flip top cap. "Nature's Truth," "SLOW RELEASE IRON" and "45 mg" are printed on a yellow label on the bottle. Lot number 29672 and the January 2019 [EXP 01/2019] expiration date are printed on the right side of the bottle.

The bottles were sold at Quick Chek stores in New Jersey and independent pharmacies nationwide from February 2017 to March 2017 for about $6. Consumers should immediately place recalled bottles out of the reach of children and return them to the place of purchase for a full refund or a replacement bottle. Contact Nature's Truth toll-free at 844-544-1030 from 8 a.m. to midnight ET Monday through Saturday and 9 a.m. to 6 p.m. ET Sunday, by e-mail at customerservice@naturestruthproducts.com, or visit the firm's website at www.naturestruthproducts.com for more information. Pictures available

Bradshaw International Recalls Coffee Presses Due To Laceration Hazard

About 85,000 coffee presses have been recalled by Bradshaw International Inc., of Rancho Cucamonga, California. The glass beakers can break during normal use, posing a laceration hazard to users. This recall involves Bialetti coffee presses with a glass beaker in a plastic frame with a stainless steel metal plunger. The coffee presses were sold in blue, green, black and red and hold eight cups of water. The plunger is stainless steel metal and mesh with a polypropylene lid and handle in matching color to the frame. The coffee press exterior measures 6.5 inches by 9.5 inches and the interior of the glass beaker measures 7 inches by 3.75 inches. The polypropylene lid has 14 vents in the bottom of the rim to strain fluids, while pouring. The Bialetti icon and logo are printed on each side of the frame and "Bialetti" is printed on the top of the plunger. The date stamp of March 2017 or earlier is printed on the underside of the plunger in a dial date code. (Dial date codes are read from the center of the circle outward. The two numbers in the center of the circle represent the year of production. The arrow in the circle points to the month of production on the outer circle.) The company has received three reports of the glass beakers breaking and cutting fingers, resulting in two consumers needing stitches.

The coffee presses were sold at Fred Meyer, Kroger, Ross, Target, HomeGoods and other specialty and grocery stores nationwide and online at Amazon.com from July 2016 through March 2017 for between $15 and $20. Consumers should immediately stop using the recalled coffee presses and contact Bradshaw International for a free replacement coffee press. Contact Bradshaw International toll-free at 877-614-9571 from 8 a.m. to 5 p.m. PT Monday through Friday or online at www.bradshawintl.com and click on "Recalls" for more information.

Publix Recalls Dip For Possible Glass Fragments

Publix is recalling 16-ounce plastic containers of artichoke and spinach dip sold at Publix stores in Florida, Georgia, South Carolina, North Carolina, Alabama and Tennessee due to the possibility they could contain small glass fragments. "As part of our commitment to food safety, potentially impacted product has been removed from all store shelves," Publix spokeswoman Maria Brous said. "We were made aware of potentially impacted product through customer complaints." The Florida retailer said customers may return the product for a full refund.

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

XIX. FIRM ACTIVITIES

Beasley Allen Lawyer Appointed Co-Lead Counsel In Banner Life Insurance Class Action

Dee Miles, who is the head of our firm's Consumer Fraud & Commercial Litigation Section, has been appointed co-lead counsel in the class action litigation involving Banner Life Insurance Company. He will serve with George W. Walker, III, a very good lawyer with The Finley firm in Atlanta and Columbus, Georgia. The case is filed in federal court in the District of Maryland. The Honorable Richard D. Bennett, United States District Judge, who

is overseeing the litigation, also granted the Plaintiffs' discovery order.

The lawsuit alleges Banner Life Insurance Company is implementing unfounded cost of insurance increases. The complaint alleges Banner implemented this scheme ultimately to benefit shareholders and rid Banner of near-term liabilities it has accrued due to its wrongful use of captive reinsurance companies. Dee had this to say:

> *This is a very important case and we are honored to have been named co-lead counsel. We look forward to getting the discovery and moving this case toward class certification.*

The scheme involved Banner Life and its parent corporations, Legal and General America, Inc. (LGA) and Legal and General Group PLC (L&G), and misdirected funds set aside to pay policyholders' death claims into wholly owned captive reinsurance companies. This created a false surplus on the balance sheet and allowed L&G to pay stockholders more than $800 million in dividends.

In 2015, in order to find new cash with which to fund future dividends, and delay the inevitable financial disaster that could occur because of its near-term liabilities, Banner Life sent a letter to policyholders informing them that dramatic cost of insurance increases would be necessary. They justified the increase by saying the company "did not adequately account for future experience," i.e. the number and timing of death claims, how long people would keep their policies, how well the company's investments would perform, and the cost to administer policies. As a result of its fraudulent activities, Banner Life policies did not perform adequately or build cash value, but were instead being eroded. Eventually, policyholders were forced to forfeit their policies or allow their cash value to be taken in order to offset damages. Banner Life in effect raided the policies of the accumulated investor savings.

Banner Life investors and Class Members are seeking relief under breach of contract, unjust enrichment, conversion and fraud theories. Lawyers at Beasley Allen also are filing complaints against other companies alleging similar wrongful activity. If you have seen this practice by any life insurance company, there may be a claim that our firm would be willing to investigate. You can contact Andrew Brashier or Rachel Boyd, lawyers in our Consumer Fraud and Commercial Litigation Section, at 800-898-2034 or by email at Andrew.Brashier@beasleyallen.com or Rachel.Boyd@beasleyallen.com.

XX. SPECIAL RECOGNITIONS

Rebecca Gilliland Meets Challenges Head-On

When Rebecca Gilliland enlisted in the U.S. Marine Corps, she knew she was taking on the challenging physical endurance requirements the Corps is known for and also dealing with a male-dominated environment. Women make up less than seven percent of the Corps and even fewer women are among the ranks within Rebecca's particular classification as a Celestial Navigator. In fact, Rebecca was only the fifth female to graduate from the Marine Aerial Navigation School. Although she was enlisted, Rebecca was able to navigate C-130s alongside commissioned officer pilots.

Growing up, Rebecca thought she would follow in her father's steps and become a physician. However, after leaving the military and while completing college, she felt a calling to enter the law enforcement field. This soon led to law school and the practice of law. Rebecca found law to be a perfect fit because of the mind-challenging issues that arise and the opportunities lawyers have each day to empathize with clients and to help them solve problems.

As a second-year law student, Rebecca was a Beasley Allen law clerk and one of her first assignments was no walk in the park. She joined the Average Wholesale Price (AWP) litigation team, which was representing several states against major pharmaceutical manufacturers. The companies provided inflated prices for pharmaceutical reimbursement and defrauded the states and taxpayers. The companies' fraudulent actions were costing the states millions of taxpayer dollars. One of Rebecca's first assignments was to draft a brief opposing the pharmaceutical giants' Motion to Dismiss. She credits her effective completion of this challenging assignment as her springboard for success in the firm.

Rebecca's passion and expertise in research and writing has also benefited our firm and especially her team in the Consumer Fraud & Commercial Litigation Section. The section continues to work with various states to recover state funds, but one of Rebecca's major cases right now is one of, if not the, largest antitrust cases she will ever face. The case involves mega insurance provider Blue Cross Blue Shield of Alabama and other Blue Cross Blue Shield entities.

Through agreements not to compete with affiliates in other states, Blue Cross—a heavy-hitter—is able to block competition and set prices for both reimbursement to medical service providers like physicians and hospitals and premiums paid by consumers at any price they choose. It is a practice that not only hurts physicians like Rebecca's dad, but also hurts consumers held captive by strong-arm, fraudulent business practices. The Blue Cross case is part of an anti-trust multidistrict litigation (MDL).

Fraud-based MDL cases are less common than other types of MDLs, but do provide leadership opportunities for lawyers. As we recently reported, few women have access to these MDL leadership opportunities, but the firm breaks with industry standard because of its inclusive environment. Rebecca plans to take advantage of these leadership opportunities as they become available. She plans to be part of a steering committee in the future, guiding the work of MDLs.

Rebecca is still motivated most by helping clients find justice. She believes she is "helping those who need it most" even more than if she had opted to become a doctor. Rebecca had this to say:

> *The Beasley Allen Law Firm's culture far exceeds the expectations people have of lawyers. Cases aren't just about making a profit—they are truly about the people and how we can help them.*

Rebecca says it is this kind of environment that sets Beasley Allen apart from other firms and allows female attorneys to utilize their talents and strengths and to flourish. To contact Rebecca about the cases mentioned or other claims involving issues of Consumer Fraud, email Rebecca.Gilliland@beasleyallen.com or call 800-898-2034.

Atlanta Office Lawyer Navan Ward To Be Featured In AAJ Magazine

Navan Ward, who joined Chris Glover earlier this year to open our new offices in Atlanta, will be featured in this month's edition of Trial Magazine, the official publication of the American Association for Justice (AAJ). The article examines the opportunities for African American and other minority lawyers in the legal field.

In 2016, Beasley Allen was named by Law360 as one of the Top 10 firms in the United States for black lawyers. Among the top 10, Beasley Allen also was recognized for having the highest percentage of

African American partners. Navan had this to say:

When you have diversity within a firm, you bring in different points of view. That helps us relate to clients, and it helps us understand how juries feel. Beasley Allen provides an environment where anyone can be successful if they want to be. A lot is required out of all our lawyers, but each of our successes is the firm's success.

In addition to his work in Georgia, Navan is active nationally as an officer in AAJ. He is completing his service as Parliamentarian and will be elected (unopposed) as Treasurer at AAJ's annual meeting in Boston in July.

Navan is the firm's lead lawyer on the metal-on-metal hip implant litigation, which involves thousands of victims who have defective hip implants causing severe pain, metal poisoning, revision surgery and, in some cases, permanent injury. Navan was appointed Co-Lead Counsel for the Plaintiffs Executive Committee in the Biomet M2a Magnum Hip Implant Products Liability multidistrict litigation (MDL). He also was selected to the Plaintiffs Steering Committee (PSC) for the DePuy "ASF" Hip Implant Recall MDL, as well as to the PSC for the DePuy "Pinnacle" hip replacement MDL. Navan has been instrumental in assisting with global settlements and/or jury verdicts related to those litigations in excess of $5 billion for clients throughout the country.

Navan was named Beasley Allen "Litigator of the Year" in 2013, and was selected as the Mass Torts Section "Lawyer of the Year" in 2012 and 2015. He has received the AAJ Distinguished Service Award in 2012 and 2015, and in 2014 was named recipient of the AAJ Wiedemann & Wysocki Award. Navan is a talented lawyer who has a passion for the law and is totally dedicated to his clients. We are blessed to have him with us.

Members of AAJ can access the current issue of *Trial Magazine* on the organization's website at justice.org. You can reach Navan at our Atlanta office, located at 4200 Northside Parkway, Building One, Suite 100, Atlanta, Georgia, 30327, by phone at 800-898-2034 or email Navan.Ward@beasleyallen.com.

XXI. FAVORITE BIBLE VERSES

Kathy Eckermann, my Executive Assistant, furnished a very timely scripture for this issue.

So do not worry, saying, 'What shall we eat?' or 'What shall we drink?' or 'What shall we wear?' For the pagans run after all these things, and your heavenly Father knows that you need them. But seek first his kingdom and his righteousness, and all these things will be given to you as well. Therefore do not worry about tomorrow, for tomorrow will worry about itself. Each day has enough trouble of its own. Matthew 6:31-34

Theresa Perkins, one of our Legal Assistants, furnished three verses this month. All of them gave us hope.

For I know the plans I have for you, declares the Lord, plans to prosper you and not to harm you, plans to give you hope and a future. Jeremiah 29:11

"I am the resurrection and the life. The one who believes in me will live, even though they die; 26 and whoever lives by believing in me will never die." John 11:25-26

Come to Me, all you who labor and are heavy laden, and I will give you rest. Matthew 11:28

Melissa Prickett, a lawyer in our Mass Torts Section, sent in verses. She says "I believe God gives us different verses at different times in our lives. These are a few of my favorites right now."

Trust in the Lord with all your heart, and lean not on your own understanding. In all your ways submit to Him, and he will make your paths straight. Proverbs 3:5-6

"For I know the plans I have for you", declares the Lord, "plans to prosper you and not to harm you, plans to give you hope and a future." Jeremiah 29:11

"Love is patient, love is kind. It does not envy, it does not boast, it is not proud. It does not dishonor others, it is not self-seeking, it is not easily angered, it keeps no record of wrongs. Love does not delight in evil but rejoices with the truth. It always protects, always trusts, always hopes, always perseveres." 1 Corinthians 13:4-7

Melissa says being a mother is one of the greatest blessings she has been given. She says this verse encourages her.

"Train up a child in the way he should go; even when he is old he will not depart from it." Proverbs 22:6

XXII. CLOSING OBSERVATIONS

Loosening Rx Regulations Spells Danger For People

The Trump Administration says it wants to get medications to consumers faster by pushing for less regulation and faster approvals. However, a move like that could have dire consequences for public health, says Dr. Joseph Ross, an Associate Professor of Medicine at Yale School of Medicine. Dr. Ross and colleagues published a study in the *Journal of the America Medical Association* (JAMA) that found one-third of medications approved by the Food and Drug Administration (FDA) from 2001 to 2010 had major safety issues years later. That is very significant and also quite troubling. Instead of weakening regulation, the government should be doing a better job.

It should be noted that 71 of the 222 drugs approved during that period of time were either withdrawn from the market, required to add a "black box warning" regarding side effects, or were the subject of a safety announcement about new risks. Again this information is apparently being ignored by the Trump Administration.

For example, Zelnorm was one of the 222 drugs approved by the FDA from 2001 to 2010, and one of three during that time period to be pulled from the market due to safety concerns. The others include the anti-inflammatory drug Bextra, which was also linked to cardiovascular risks, and the psoriasis drug Raptiva, which was linked to a rare and fatal infection that causes brain damage. Another 68 drugs approved during that decade required a black box warning regarding side effects or a safety announcement about new risks, according to Dr. Ross's study.

Admittedly, this is a difficult spot to be in. Medications can improve or even save lives. But it takes years for thorough testing of these drugs to flesh out potential side

effects. Longer-term studies and those involving larger pools of people are better indicators. Often, the FDA has approved drugs based on studies involving 1,000 people or less and lasting just six months or less. That is totally inadequate and there should be no dispute over that assessment.

It took a median of 4.2 years after approval for most safety concerns to come to light. Most often, "concerning side effects" appear among psychiatric drugs, biologic drugs, and drugs that were pushed through the approval process in an accelerated programs. These programs are designed to allow for earlier approval of drugs that treat serious conditions and fill an unmet medical need. The drug industry has abused this system quite often, to the detriment of public health.

Dr. Caleb Alexander, co-director of the Johns Hopkins Center for Drug Safety and Effectiveness, who did not participate in the study, said that the research should give patients a more realistic view of the medication they are taking. He said:

All too often, patients and clinicians mistakenly view FDA approval as (an) indication that a product is fully safe and effective. Nothing could be further from the truth. We learn tremendous amounts about a product only once it's been on the market and only after use among a broad population.

The Trump Administration is playing politics with drug regulation and that's very dangerous. Poor regulation will result in consumers being put at risk.

Sources: *Law360.com* and NPR

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

XXIII. PARTING WORDS

You will have received this issue after we have all observed Memorial Day in some manner. Our firm was closed for Memorial Day. All of our folks needed the additional time to spend with their families. I have always considered this holiday to have special significance. Unfortunately, like many other holidays, the real meaning of Memorial Day is sometimes ignored. It's good to be reminded of its true meaning and significance.

There are many families in this country who know firsthand why Memorial Day is so important and significant. This holiday is to remember and honor the people who died serving in our nation's armed forces. Over a million Americans have lost their lives defending our country. It's very important that we honor the memory of those American heroes and never forgot their service and sacrifice.

My prayer today is for those families who because of their loss fully understand the significance of Memorial Day.

To view this publication on-line, add or change an address, or contact us about this publication, please visit our Website: BeasleyAllen.com

218 COMMERCE STREET (36104)
POST OFFICE BOX 4160
MONTGOMERY, ALABAMA 36103-4160
(334) 269-2343
TOLL FREE
(800) 898-2034
TELECOPIER
(334) 954-7555
WEB PAGE
www.BeasleyAllen.com

RETURN SERVICE REQUESTED

Jere L. Beasley, Principal & Founder of the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is one of the most successful litigators of all time, with the best track record of verdicts of any lawyer in America. Beasley's law firm, established in 1979 with the mission of "helping those who need it most," now employs over 75 lawyers and more than 175 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 35 years.

Beasley Allen
BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
Attorneys at law
helping those who need it most since 1979