I. CAPITOL OBSERVATIONS

More on Post-Citizens United Decision Giving

Since we first wrote on the effects on political giving by corporations resulting from the U.S. Supreme Court’s shocking decision in the Citizens United case, there have been some most interesting developments. The High Court has, by inventing free speech rights for corporations, unleashed a torrent of corporate political spending. This flies in the face of what most lawyers—including this writer—think when reading the first three words of the U.S. Constitution. Surely “We the People” wasn’t intended by the authors of the Constitution to mean “We the people and corporations,” or was it? Nevertheless, the Court has created a monster that threatens to wrest control of our democracy from “the people” and turn it over to huge corporations.

In just two years since Citizens United came out, Big Oil, Wall Street banks, drug companies, other special interests, along with “anonymous donors,” have poured over $4 billion into Congressional campaigns alone. That should shock even a Tea Party zealot—that is, if that zealot isn’t named Koch or happens to be some other fat cat billionaire. Now this same bunch is spilling hand-over-fist to capture the job market.

Those were some of the candid criticisms levied by the former Florida Governor as he expressed frustration with his own party and its presumptive presidential nominee. Gov. Bush made this most interesting observation:

Ronald Reagan would have—based on his record of finding accommodation, finding some degree of common ground, similar to my dad—they would have had a hard time if you define the Republican Party—and I don’t—as having an orthodoxy that doesn’t allow for disagreement. Back to my dad’s time or Ronald Reagan’s time, they got a lot of stuff done with a lot of bipartisan support that right now would be difficult to imagine happening.

It was refreshing to hear Gov. Bush say publicly what lots of Republican leaders are saying privately. But unfortunately, what the well-respected former Governor had to say will be drowned out by all of the SuperPac spending between now and November. Source: The Bloomberg View

II. A REPORT ON THE GULF COAST DISASTER

Oil Spill Court-Supervised Settlement Program A Major Improvement Over the GCCF

There has been a very big change in how claimants will be paid due to the massive settlement that took place in the PSC. New offices opened in five states in early June that will help businesses and residents still waiting to settle claims for financial losses two years after the BP Deepwater Horizon oil spill. The 18 offices are located along the Gulf Coast and include Mobile and Gulf Shores in Alabama. There are still a good number of residents and businesses whose claims were either denied or who did not file a claim.

The Court-Supervised Settlement Program, which is administered by Louisiana lawyer Pat Juneau, is already receiving positive marks for its efficient process and transparency. The Settlement Program has officially taken over from Ken Feinberg’s Gulf Coast Claims Facility (GCCF). While it is still too early to pinpoint the legacy of
the most recent oil spill claim center, one thing is for certain—the new settlement program is showing that it will be a major improvement over the GCCF, and that’s good news.

The new Settlement Program, as well as the administrator, will be overseen by a truly neutral third party—Federal Judge Carl Barbier of the Eastern District of Louisiana. Whether fair or not, the GCCF often suffered from the perception that BP controlled the GCCF’s purse strings when claims were paid. The Settlement Program has also been quick to listen to and resolve filing procedure issues in the claims process. While no one can dispute the difficult job Feinberg faced as administrator of the GCCF, the GCCF was notoriously slow in responding to even the most severe filing concerns.

Instead of reviewing claims in a BP-friendly manner as the GCCF did, the new Settlement Program will review claims in the light most favorable to the claimant. In addition, the new Settlement Program is designed to eliminate the disparate treatment Gulf Coast residents received in the GCCF, where a difference in geographic location or GCCF accounting group could mean the difference in whether a claim was paid.

Transparency is a major improvement in the new Settlement Program. For much of the GCCF’s tenure, the real formulas and economic zones for compensation were kept secret from claimants. Frustration ran rampant because, aside from a boiler-plate letter that didn’t really describe a deficiency, claimants were often left in the dark as to how their claim was calculated and why it was denied for payment. In the new Settlement Program, claimants will instantly know whether their claim falls into a zone for compensation. In addition, based on the zone of compensation, a claimant will know the precise method for calculating his or her claim. In effect, the Settlement Program’s rigorous attention to detail will eliminate the vast number of negative surprises folks received in the GCCF.

Economic claims in the new Settlement Program can expect to receive more favorable treatment than they did in the GCCF. For instance, a claimant can focus in on “loss” months while ignoring “gain” months in many instances. The impact of business expenses on damage claims is significantly improved in the new Settlement Program as compared to the GCCF’s—where a claimant could see a sizeable, legitimate claim cut in half due to the GCCF’s aggressive method of offsetting profits with certain expenses.

Aside from some seafood harvesting-related claims, the GCCF failed to take into account the threat of future risk. In the new Settlement Program, almost all economic claims are assigned a “risk transfer premium,” whereby base damages are multiplied by a number to account for future risk. Even the application of the risk transfer premium is improved over the GCCF’s risk multiplier. Instead of simply multiplying the base damage by a multiple, as the GCCF would do, the new Settlement Program also adds the base amount back on top of the based damage times the multiple.

A host of claims are compensable in the new Settlement Program that were rarely, if ever, compensated in the GCCF. For example, most Gulf-front property owners will be entitled to a “loss of use and enjoyment” of the property. Subsistence and property damage claimants will finally have a true system for compensation. Many businesses that suffered damage that the GCCF would not find “related” to the tourism or fishing industry can be compensated if they meet the economic tests set out in the Settlement Program. This means that title companies, car dealerships, boating companies, golf courses, gas stations, and many other businesses that suffered a decrease in profits from the oil spill in Louisiana, Mississippi, Alabama, the eastern-most counties of Texas, or the western-most counties of Florida will now be compensated.

Many observers believe Mr. Feinberg performed as best he could, given the difficult job he had with the GCCF. However, we believe the new Settlement Program will be a major improvement for Gulf Coast claimants over the GCCF. Thus far, that has been true. Hopefully, things will continue to get better. If you have any questions about the new program, contact Parker Miller at 800-998-2034 or by email at Parker.Miller@beasleyallen.com.

**LIMITATION TRIAL IN OIL SPILL CASE ON TRACT TO BEGIN IN JANUARY 2013**

Recently, Judge Carl Barbier set a new Limitation trial in New Orleans for January 14, 2013. As we reported previously, the original trial date for the Limitation trial had to be continued because of the global settlement resolution reached between the Plaintiffs’ Steering Committee (PSC) and BP. That settlement was a monumental accomplishment by the PSC and came about in record time.

The new trial will progress in an identical three-phase manner as the previously-set trial last Spring. BP will remain a focal point in the case along with Transocean, Halliburton, Cameron and others. The phases will remain the same—in Phase I, the trial will focus on “blowout liability,” where the parties will put on evidence to establish which Defendants were responsible for the initial explosion aboard the Deepwater Horizon. Phase II will concentrate on quantifying the volume of the oil spilled and efforts to cap the well (also known as source control). Phase III will focus on post-spill cleanup, including the application of dispersant, boom and skimming operations.

The private economic, seafood, property and medical claims were resolved with some exceptions. Significant federal, state and local government claims remain against all Defendants—including BP. The federal government is seeking billions in fines and penalties resulting from the spill, as well as criminal prosecutions against certain officers and employees of the Defendants. This amount will exceed $20 billion according to most estimates.

Putting aside the obvious proof of Defendant culpability that will help in establishing compensatory and punitive damages for government claims, a major determining factor in federal fines and penalties will be Phase II trial testimony on the Macondo well’s spill rate during the disaster. BP and the other Defendants will most assuredly fight to keep the spill rate as low as possible at trial, as fines and penalties are tied to the amount of oil spilled in the Gulf of Mexico.

The States of Alabama and Louisiana continue to work with the federal government and the PSC to hold the Defendants accountable at trial. At press time neither Mississippi nor Florida had filed in the MDL. Hopefully they will very soon. Attorney General Luther Strange and his staff have done a good job in representing the State at the MDL level. Alabama is well-positioned to make a strong case against BP and others. Not to be forgotten, numerous local government claims remain in the MDL, and will benefit from the Limitation trial. Our firm currently represents numerous county governments and municipalities along the Gulf Coast, and those claims are progressing well.

Meanwhile, the Gulf States, in conjunction with the federal government, continue to work through the Natural Resource Damage Assessment (NRDA) phase. The NRDA process will assess the damage to the Gulf environment as a result of the oil spill, and will establish a protocol for the responsible parties to repair the environmental damages.
III. DRUG MANUFACTURERS FRAUD LITIGATION

AN UPDATE ON THE AWP LITIGATION

As we have previously reported, our firm represents eight states in the Medicaid Fraud Litigation—commonly referred to as the AWP Litigation—and I am pleased to report that we have been very successful on behalf of our clients. Thus far, we have settled cases in several of the states for over $600 million against a number of drug manufacturers. In addition, there are currently $118 million in verdicts that are on appeal. The facts in the cases in all of the states are the same and the fraudulent conduct by the drug companies is identical. There can be no doubt about the intent of the drug companies. They intended to cheat the states and to overcharge for their drugs sold to the Medicaid agencies in each state. Based on what we have learned, I believe the companies really thought they could get away with it.

Our most recent verdict was against Sandoz in Mississippi and it was for $78 million. We have a case set for the State of Louisiana against Sandoz in March of 2013. The State of Alabama has an $88 Million verdict on appeal against Sandoz that has been in the Alabama Supreme Court for a very long time. We hope to get a favorable decision from the Court in that case. Another case was tried in Kentucky by another law firm against Sandoz resulting in a $16 million verdict.

The Alabama Supreme Court has previously reversed jury verdicts in three cases against three different drug companies. The combined total of these verdicts was $275 million. The Court’s action in those cases was extremely difficult to understand. The cases dealt with brand companies. Obviously, courts in other states and in the federal system have ruled quite differently.

A direct result of success in the AWP litigation has been the direct change in which drugs are priced to the states. No longer do the companies use AWP. If nothing else, this result will save the states millions annually according to projections. Dee Miles and the lawyers in his Section have done a tremendous job in the AWP Litigation.

SUPREME COURT OF UTAH RULING

Our firm received a favorable opinion involving AWP litigation from the Utah Supreme Court last month. This was a major development for cases filed by our firm on behalf of the State of Utah. We are working with the Attorney General and some good Utah law firms in the Utah litigation.

IV. PURELY POLITICAL NEWS & VIEWS

THIS PRESIDENT HAS A VISION FOR AMERICA

The Presidential election this year presents a make-or-break moment for middle-class Americans. In this election, the voters will have a choice between two fundamentally different visions of how to grow the economy. The path Mitt Romney and his Republican allies want to take us down is exactly the one that led this country’s economy to the crisis in 2008. We must reject those policies and embrace the President’s vision of growing the economy, not from the top down, but from the middle class out to all American citizens. The choice couldn’t be clearer on the issues most important to all Americans, especially...
those in the middle-class. Let’s take a look at President Obama’s vision for America:

**Better Education:** We need to invest in good teachers and help more students go to college and get job training—not pack kids into classrooms and slash scholarships.

**More, Cleaner Energy:** We need to invest in promising new sources of energy to create a market for innovation and good jobs of the future—not go back to relying on foreign oil.

**Leading Through Innovation:** We need to invest in our best scientists, researchers, and entrepreneurs so they innovate here—not cede new ideas to countries like China and India.

**Job-Creating Infrastructure:** We need roads, bridges, ports, and broadband technology that attract businesses that will create jobs here—not more pet projects and bridges to nowhere.

**Fair, Simple Tax Reform:** We need to reward businesses that create jobs here instead of rewarding outsourcing. The wealthiest must be asked to pay their fair share again and not sacrifice investments critical to the middle class.

All of us know this economic crisis didn’t start in 2008. For almost a decade before, things weren’t working the way they should have been and our economy was in trouble. The American people saw costs for everything from health care to education rising faster than wages. Good-paying, middle-class jobs were becoming harder to find, as more and more companies moved production overseas. We were allowing U.S. manufacturing jobs to leave this country and go to countries like Mexico. In short, those in control of our national government had our economic and fiscal policies totally out-of-kilter.

The GOP solution was the same then as it is now—massive tax cuts benefitting the wealthy, rolling back regulations on risky behavior for Wall Street and banks, and drastic cuts to services that the middle class depends on, such as Medicare, education, and job training. A decade ago, President Bill Clinton left a record surplus. But the Bush Administration put two wars, two huge tax cuts, and the Medicare prescription program on a credit card, and handed President Obama a trillion dollar deficit and an out-of-control economic crisis when he took office. To put it mildly, our country was in a big mess. The President—in spite of GOP roadblocks in Congress—got down to work and now things are heading in the right direction. But there is more to do.

Now Gov. Romney and his allies want to take us back to those same, disastrous policies: budget-busting tax cuts for the wealthy and free rein for Wall Street to write its own rules. Gov. Romney’s failed formula was tried for most of the last decade. I must concede the formula benefitted a few—the super-rich—but it exploded the deficit, crashed our economy, and devastated the middle class. It didn’t grow our economy, create good jobs, or pay down our debt. In fact, it did the opposite. The sad reality is that Gov. Romney really doesn’t have a plan of his own. All he has to offer is a watered-down version of the Bush-Cheney plan that came very close to causing a devastating depression. The plan didn’t work then and neither will it work this time.

Independent economists have confirmed that the plan adopted by Gov. Romney—if put in effect—wouldn’t cut the deficit. Nor would it create a single job—in fact, it would slow growth and push us back into recession.

The President has laid out a very different vision, one where everyone—no matter who they are, where they are from, or how big their bank account is—pitches in together to rebuild the foundations of our country and economy. Instead of another $250,000 tax cut for millionaires, President Obama believes we should pay down our debt and invest in the things needed to grow the economy and strengthen the middle class. That means restoring and upgrading our crumbling infrastructure, investing in education, and paying down our debt responsibly. It will also ask the wealthiest Americans to pay a little more and they can certainly afford to do so. This approach requires tough choices and shared sacrifice—exactly how the American economy was built in the first place.

**The Fall Election Will Be Very Close**

It has been written that the Presidential election this year will feature the most ideologically polarized election since the race in 1980 between Ronald Reagan and Jimmy Carter. But as Jeb Bush so aptly stated, President Reagan wouldn’t make it with the current bosses who control the GOP. Those who control the Republican Party, backed by big-money interests, have put the party under the tight fist of the radial right. Those men will do great damage to America if the GOP is able to take control in Washington next year. This is a threat that I believe should concern the overwhelming majority of Americans. Once folks figure out who is controlling Gov. Romney—financing and running his campaign—I am convinced they will reject him.

But no one should discount the potential destructiveness of a victory by Mitt Romney. It definitely could happen because of the massive SuperPAC spending on his behalf. The widespread media assumption that the Robotic Romney is really a “Massachusetts moderate” who adopted extreme positions to placate the Republican bosses would be irrelevant even if it were true. A Romney victory would most certainly be accompanied by GOP control of all three branches of government, with the party’s right-wing majority in the House driving the agenda. Grover Norquist, who is sort of like the GOP’s version of the Wizard of Oz, made this statement related to the party’s nominee:

*We are not auditioning for fearless leader…. We just need a president to sign this stuff.*

That pretty well tells me that it doesn’t really matter who the GOP nominee is. The Koch brothers, Norquist and Karl Rove will even take Gov. Romney as their nominee, a man they wouldn’t really want—that is, if his record made any difference. But clearly it doesn’t. The “stuff” they would pass—already endorsed by Gov. Romney—includes repeal of the modest reforms enacted over the past few years:

- rules to police corporations after the Enron scandal and banks after the financial collapse;
- repeal of healthcare reform, stripping some 30 million people of coverage;
- budget cuts that would gut almost all domestic functions of the government, from education to child nutrition to safeguarding clean air and water; and
- an end to Medicare and Medicaid as we know these programs.

If Gov. Romney is elected, those making over $1 million a year would receive an average tax break of $250,000 under his plan. A Romney victory would also allow the Republican extreme right to roll back social progress, constrict voting rights, continue to destroy the middle-class and exacerbate racial divides. We would see the offensive against labor and workers’ rights get even meaner and the restriction of workers’ rights curtailed even more. Corporate America would be rid of any semblance of effective regulation, resulting in manufacturers of products and drugs being able to completely ignore safety and health concerns. That would mean more defective
products and more dangerous drugs getting to the market. I don’t believe any of this would be good for America by any stretch of the imagination.

President Obama has fought the extreme right’s proposals, arguing long and hard for public initiatives to save the middle class and to revive the American dream. He has made equality with fairness and justice for all a central theme of his campaign for reelection. But the President has made it clear that he will defend needed tax hikes on the wealthy and will attempt to make Corporate America pay its fair share of taxes. He will make investments in areas vital to our future—from education to new energy—an absolute necessity for the American people. The leadership of the National Republican Party set out on the very day Obama was elected to make sure he was a one-term President. Since that day they have opposed the President on every single thing he attempted to do for the American people.

We will now experience the most expensive election in our history for the highest office in the land. I only hope that middle-class citizens fully realize that which is at stake for them and become fully engaged in the campaign for the candidate of their choice. If they support a candidate and vote according to what’s in their best interest, their candidate surely won’t be named “Mitt.” The future of our democracy depends on the middle-class picking the right man. There is no room for error this time!

V. COURT WATCH

FOREIGN INSURANCE COMPANIES SEEK TO EVADE ALABAMA’S WRONGFUL DEATH STATUTE

Last year Greg Allen, a lawyer in our firm, obtained a jury verdict in a wrongful death case in state court for $5,250,000. In that case, our client’s sister was killed when the textile warper she was using at work pulled her into the rotating parts. The Defendants’ insurance company, which is incorporated in Sweden, refused to pay the judgment against the Defendants. The insurance company argued that its insurance policy did not cover punitive damages. In Alabama, a Plaintiff’s sole remedy for wrongful death is punitive damages.

By denying coverage of our client’s claim, the insurance company is seeking to evade Alabama’s Wrongful Death Statute, which limits a Plaintiff’s remedy for wrongful death to punitive damages. An insurance policy that excludes punitive damages for wrongful death violates Alabama’s strong public policy of valuing all human life the same. Alabama’s Statute seeks to prevent all homicides, and doesn’t take into account the victim’s age, station in life or financial condition. It doesn’t matter how much money the victim made or would make when he or she died as a result of a wrongful act. While insurance companies generally have the right to limit their coverage as the insurer sees fit, it is well-established in Alabama that an insurance policy that covers wrongful death cannot exclude punitive damages. Any other interpretation of Alabama’s public policy would in effect make it cheaper for parties to kill an individual than to injure them.

Alabama is the only jurisdiction that does not compensate the survivor for the wrongful death of the decedent. Lawyers in our firm have handled hundreds of these unique cases since the firm’s founding. This issue is before a federal court now and we believe we have a very strong legal argument that will prevail. If you would like additional information on this issue, contact Stephanie Stephens, a lawyer in our Personal Injury Section, at 800-898-2034 or by email at Stephanie.Stephens@beasleyallen.com.

THE ADMISSIBILITY OF EXPERT TESTIMONY IN ALABAMA

As of January 1, 2012, Alabama’s standard with respect to the admissibility of expert testimony has changed. In the past, expert testimony admissibility was governed by a standard known as the Frye test, which was adopted from a United States Supreme Court case entitled Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The Frye test required evidence based upon a scientific principle to be “generally accepted” within its scientific field to be admissible in court. In the latest tort reform package, the Alabama Legislature adopted the Daubert standard for the admissibility of scientific evidence.

In Daubert v. Merrell Dow Pharmaceuticals, the United States Supreme Court created a new test which required trial courts to determine whether the methods underlying the scientific expert testimony were reliable. To determine reliability, the Court listed several factors for trial courts to consider:

- whether the theory or technique has been exposed to peer review and publication;
- the known or potential error rate associated with a particular technique;
- whether there were standards that controlled a particular technique’s operation; and
- Frye’s general acceptance test.

As amended, Alabama adopted this new test. Ala. Code § 12-21-160 states as follows:

(a) Generally. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Scientific evidence. In addition to requirements set forth in subsection (a), expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if:

(1) The testimony is based on sufficient facts or data;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case.

The Alabama Supreme Court followed by adopting this new statute into Rule 702 of the Alabama Rules of Evidence, the rule of evidence that applies to expert testimony. The new rule of evidence states:

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:

(1) The testimony is based on sufficient facts or date;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case.

The provisions of this section (b) shall apply to all civil state-court actions commenced on or after January 1, 2012.
criminal actions, this section shall apply only to non-juvenile felony proceedings in which the defendant was arrested on the charge or charges that are the subject of the proceedings on or after January 1, 2012. The provisions of this section (b) shall not apply to domestic-relations cases, child-support cases, juvenile cases, or cases in the probate court. Even, however, in the cases and proceedings in which this section (b) does not apply, expert testimony relating to DNA analysis shall continue to be admissible under Ala. Code 1975, § 36-18-30.

(c) Nothing in this rule is intended to modify, supersede, or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996 or any judicial interpretation of those acts.

Under the amended Rule 702, non-scientific experts’ testimony will be admissible if it meets the requirements of Rule 702(a), while scientific expert testimony must comply with Rule 702(b), the Daubert test. It remains to be seen how courts will interpret “scientific evidence.” Will courts interpret this term differently under the Daubert test than they did under Frye? Frye did not apply to all expert testimony or to all scientific evidence. Frye was implicated only when the expert testimony was both scientific and novel.

All other expert testimony was governed by Alabama Rules of Evidence 702, which requires the expert to be qualified by “knowledge, skill, experience, training, or education” and that the testimony “assist the trier of fact to understand the evidence or determine a fact in issue.” Daubert will be triggered with all scientific evidence and will apply to the expert’s methodology and conclusions, regardless of whether the scientific evidence is also novel. This may mean that some expert testimony that escaped Frye’s application may not escape from Daubert application.

But practitioners and courts should not panic when it comes to applying this new law. As one learned scholar noted, determining what is “scientific evidence” is a “task [that] is not new to Alabama courts.” It was stated:

Because the Frye general accepted test also applies to scientific evidence only, Alabama courts were required to make the same distinction under Frye. Accordingly, a well-developed line of Alabama judicial authority exists that address whether a specific type of expert or evidence is considered “scientific” for purposes of applying the Frye standard. Previous Alabama case law developed under the Frye standard will remain instructive-if not controlling-for determining whether expert testimony is scientific and subject to Rule 702(b)’s Daubert-based inadmissibility standard. The language used in Rule702(b) to describe scientific evidence subject to the Daubert standard—“expert testimony based on scientific theory, principle, methodology, or procedure”—is the same language Alabama Courts have used when describing scientific testimony to the Frye standard.

Professor Robert J. Goodwin, Associate Dean at Cumberland School of Law who authored the above statement, worked closely with the Alabama Legislature in adopting this new standard. Professor Goodwin certainly provides an authoritative voice on how courts and practitioners should interpret and apply this new standard. Still, with any new evidentiary standard adopted, there will always be concerns of misapplication and misunderstandings related to the interpretation of a new evidentiary standard. However, if lawyers are prepared and knowledgeable about the intended application of this rule, the change will not be as traumatic as initially feared. If you need more information on this subject, contact Dana Taunton, a lawyer in our firm, at 800-898-2034 or by email at Dana.Taunton@beasleyallen.com.

VI. THE CORPORATE WORLD

THOMAS JEFFERSON’S CONCERN WAS PROPHETIC

If Thomas Jefferson were around today I don’t believe he would be surprised to see how the big banks in the U.S. have been operating. In fact, he would probably say that he saw it coming years ago and warned the American people. A combination of the lack of strong regulation and some very bad legislation passed by Congress has allowed the big banks to get away with a great deal and in the process they have run roughshod over many of their customers. The fact that the banks were greedy and politically powerful also played a role in this. Let’s take a look at a few things said by Mr. Jefferson and then consider how accurate his opinions have turned out to be.

I believe that banking institutions are more dangerous to our liberties than standing armies. Already they have raised up a money aristocracy that has set the government at defiance. The issuing power (of money) should be taken from the banks, and restored to the people to whom it belongs.

Thomas Jefferson, 1802

If the American people ever allow private banks to control the issue of their currency, first by inflation and then by deflation, the banks and corporations that will grow up around them will deprive the people of all property until their children will wake up homeless on the continent their fathers conquered. I hope we shall crush in its birth the aristocracy of the moneyed corporations, which dare already to challenge our Government to trial of strength and bid defiance to the laws of our country.

Thomas Jefferson, 1802

The big banks must be reined in and we must quit treating them like they are “too big to fail.” That sort of thinking by the federal government was a major factor in our economy taking such a beating over the past decade. Strong regulation of the big banks is an absolute necessity.

JP MORGAN SHOULD HAVE KNOWN BETTER

I have been rather surprised that there has not been more public outrage over the recent performance of J P Morgan that resulted in a loss of over $2 billion. But the more I think about it, its highly questionable actions didn’t just happen overnight. The risky business practices by this huge bank have been going on for a long time. Perhaps the American People have heard and read so much about the big banks and their questionable activities, that JP Morgan losing $2 billion was just another day at the office for them.

The explanations before Congressional panels last month by CEO Jamie Dimon were neither inspiring nor adequate. One thing apparent from the hearing was that many in Congress are so connected to the banking industry they are forced to handle big bosses from the industry with “kid gloves” when they appear before Congressional panels. This should have been a time for tough questions and a demand for real answers that would have led toward mean-
ingful solutions. I got the impression from media reports that nothing of substance happened during the hearings.

**WHISTLEBLOWERS KEEP BIG BANKS IN CHECK**

Lawyers in our firm continue to investigate violations of the False Claims Act across the country. A violation of the False Claims Act occurs when any person, business, or entity defrauds the federal government of the American taxpayers’ money. False Claims Act violations are generally reported by internal whistleblowers who step forward and do the right thing by reporting the fraud. Successful whistleblowers are entitled to a portion of the damages recovered by the federal government.

The majority of large Wall Street banks received a government bailout of taxpayers’ money as a result of the Troubled Asset Relief Program (TARP). Without TARP funds, these large banks would have not survived the Great Recession. Despite receiving taxpayers’ money, several large banks are still conducting questionable and illegal mortgage practices that greatly contributed to the Great Recession and led the TARP Program in the first place.

One such bank is Citigroup. This big bank settled with the federal government and Sherry Hunt, former employee and whistleblower, in February 2012 for $158.3 million to resolve a False Claims Act case. Mrs. Hunt received $31 million out of the settlement paid by Citigroup for her role as the whistleblower.

Mrs. Hunt was a Vice President at Citigroup and was responsible for overseeing mortgage underwriters. Her duties included protecting Citigroup from fraud and bad investments. She witnessed mortgages with doctored tax forms, phony appraisals, missing signatures and other missing documents required by law. She witnessed this conduct before, during, and even after the financial crisis and into 2012. When Mrs. Hunt was asked to reduce her reports of defective loans, she refused to lie and decided to file a False Claims Act complaint. Five months later, in January 2012, the Justice Department intervened in her case and Citigroup settled within a month.

Citigroup, which took $45 billion in bailouts, along with the other big banks that took bailouts, must be held responsible and made to abide by U.S. securities laws and banking regulations. These Wall Street big banks, which only survived because of help from the average American on Main Street, can’t be allowed to continue to cheat and defraud taxpayers through their

illegal mortgage practices. It’s bad enough that these banks were bailed out by taxpayers and are enriched by foreclosing on unfortunate homeowners, they now want to profiteer even more on those taxpayers’ backs by defying the laws and regulations designed to protect homeowners and ultimately the taxpayers.

Fortunately, the False Claims Act allows citizens who know of fraudulent schemes against the government the right to file a complaint and recover between 15% and 30% of the ultimate recovery. If you have any information regarding the rampant fraud occurring in the banking industry, healthcare industry, and government contracting, please let us know. Andrew Brashier, a lawyer in our firm, has been very busy investigating False Claims Act cases. He may be reached at 1-800-898-2034, or 334-269-2345 or Andrew.Brashier@BeasleyAllen.com. Source: Bloomberg

**ST. JUDE MEDICAL TO PAY $3.65 MILLION TO SETTLE FALSE CLAIMS CHARGE**

St. Jude Medical will pay $3.65 million in settlement to resolve civil allegations under the False Claims Act that the company inflated the cost of replacement pacemakers and defibrillators purchased by the Departments of Defense and Veterans Affairs. St. Paul, Minn.-based St. Jude Medical develops, manufactures and distributes cardiovascular and implantable neurostimulation medical devices. The settlement resolves allegations that St. Jude actively marketed its pacemakers and defibrillators by touting the generous credits available should a device need to be replaced while covered under warranty.

At the same time, it appears St. Jude knew that it failed to grant appropriate credits to the purchasers of devices in a large number of cases where a product was replaced while still under warranty. As a result, the United States contended that St. Jude submitted invoices to Department of Veterans Affairs hospitals and Department of Defense military treatment facilities that overstated the cost for replacement pacemakers or defibrillators.

The civil settlement resolves allegations initially brought by two whistleblowers in federal court in the District of Massachusetts under the qui tam (whistleblower) provisions of the False Claims Act. As we have previously stated, this Act allows private citizens to bring civil actions on behalf of the United States and share in any recovery. As part of the resolution, the whistleblowers in this case will receive $730,000 from the settlement amount. Source: The Corporate Crime Reporter

**ORTHOFIX TO PLEAD GUILTY AND PAY $42 MILLION**

Orthofix Inc., a Texas-based manufacturer of medical devices, will pay $42 million to settle civil and criminal charges relating to its marketing and sale of a bone growth stimulator device to the federal government. The settlement was the result of a whistleblower lawsuit filed on behalf of Jeffrey Bierman, a Midwest health care consultant, who brought the allegations to the government’s attention in 2003. The whistleblower will receive $9,243,251—a 27 percent share of the civil recovery of $34.23 million False Claims Act settlement.

Orthofix Inc., a subsidiary of Orthofix International NV, will also plead guilty to a federal crime and pay the United States a $7.77 million criminal fine. Non-invasive bone growth stimulators are supposed to help bones heal by applying a weak electrical current or ultrasonic wave to a fracture or surgical site. They are worn by patients over a cast, brace or clothing for between two and six months in most cases. Medicare pays approximately $4,000 to purchase each device, which incidentally costs about $100 to manufacture.

It was alleged in the lawsuit that Orthofix falsified Certificates of Medical Necessity and other documents supporting claims to Medicare and gave kickbacks to doctors, their staffs, patients, and independent sales agents to get orders for the devices. It alleges further that Orthofix failed to comply with a Medicare requirement that suppliers advise patients of a monthly rental option rather than have the government pay the $4,000 purchase price for a new device every single time. Utilizing the rental approach would have saved Medicare millions of dollars on devices that were used for only a few months. It made absolutely no sense to pay $4,000 to purchase a device for short-term use when a short-term rental would work.

The lawsuit alleges that Orthofix routinely waived the patient’s 20 percent copayment of approximately $800 in order to get patients who might otherwise refuse the devices because of the high cost to accept them. But the company then overcharged for the devices when making claims to Medicare. Similar allegations are made in ongoing cases against the four other manufacturers—Biomet, Inc., DJO Incorporated, Orthologic Corp. (a predecessor company of DJO), and Smith & Nephew, Inc.
The company pleaded guilty to a felony of obstruction of a federal audit. The criminal guilty plea involved its failure to disclose information concerning its practices regarding certificates of medical necessity to a Medicare contractor during a June 2008 audit. Five individual Orthofix employees had previously pled guilty to criminal charges in connection with this matter. As part of the settlement, Orthofix also agreed to enter into a corporate integrity agreement with the Office of Inspector General of the Department of Health and Human Services, which provides for procedures and reviews to be put in place to avoid and promptly detect conduct similar to that which gave rise to this matter. Susan J. Waddell, Special Agent in Charge of the Office of Inspector General of the U.S. Department of Health and Human Services New England region, had this to say:

**Criminals intent on placing profits from federal health programs over and above compliance should expect to tangle with authorities. Orthofix blatantly ordered sales staff to disregard Medicare rules, and conveniently looked away when medical records were altered and even forged.**

Neil Getnick, a lawyer with the Manhattan-based law firm Getnick & Getnick LLP, represented the whistleblower. He had this to say about the fraudulent conduct:

_The business models of the makers of bone growth stimulators are strikingly similar. Not only has Medicare been grossly overcharged, but the industry is plagued by kickbacks, falsified medical records and other illegal conduct designed to get orders and get claims paid. Medicare has lost hundreds of millions of dollars to fraud, and we intend to recoup that as we move forward with the remaining defendants._

I have to wonder how much longer the American people will tolerate Corporate America cheating the taxpayers when corporations contract with the government on programs designed to help folks—not hurt them. Hardly a week passes when a corporation settles with the Justice Department, pays a fine, and then keeps on doing business with the government.

**U.S. SETTLES LAWSUIT AGAINST CHRISTUS SPohn HEALTH SYSTEM CORP.**

Christus Spohn Health System Corp., a Texas-based hospital system, has paid $5 million to settle a false claims lawsuit. The settlement involved alleged violations of the False Claims Act, according to U.S. Attorney Kenneth Magidson. The allegations included inappropriately admitting patients to “inpatient status” for “outpatient procedures.” The settlement resolves allegations that six Christus Spohn hospitals in and around Corpus Christi, Texas, submitted false claims to the Medicare program by using “inpatient codes” for procedures that should have been billed under an “outpatient code.” Inpatient codes allow the hospitals to collect more money from the Medicare program than they would have using outpatient codes.

The six hospitals included Christus Spohn Hospitals in Corpus Christi—Shoreline, Corpus Christi—Memorial, Corpus Christi—South, Alice, Beeville and Kleberg. The investigation leading to the settlement began in March 2008 after Christus—Shoreline’s former director of case management filed a lawsuit under seal under the qui tam provisions of the False Claims Act alleging the six hospitals were submitting false claims to the Medicare program by billing for services that should have been performed on an outpatient basis as if they were more expensive inpatient services.

It was alleged that these hospitals were routinely billing outpatient surgical procedures as if they required an inpatient level of care, which greatly increased the amounts paid to these hospitals by the Medicare program. These patients were often discharged from the hospital in less than 24 hours. The investigation was conducted by the Department of Health and Human Services—Office of Inspector General. Assistant United States Attorney Andrew A. Bobb managed the investigation and conducted the settlement negotiations.

**$5.4 MILLION SETTLEMENT IN WHISTLEBLOWER CASE**

Carl Crawley filed a lawsuit in 2009 alleging that he witnessed “widespread, systematic” Medicare fraud “on a daily basis” while working for Rural/Metro of Central Alabama, the Bessemer subsidiary of Rural/Metro Corp. of Scottsdale, Ariz. The whistleblower’s lawyers and federal prosecutors announced last month that the Medicare fraud suit against the multistate ambulance company had been settled with the company’s agreement to pay more than $5.4 million to settle. Joyce White Vance, U.S. Attorney for the Northern District of Alabama, had this to say in a statement:

_The resolution of this lawsuit means millions of taxpayer dollars that were used to reimburse false claims by Rural/Metro’s ambulance service have been recovered._

In 2011, the U.S. Attorney’s office filed a complaint to intervene in the whistleblower suit. The settlement concerns allegations in Alabama, Kentucky and Tennessee. Rural/Metro Corp., which operates in 20 states, admitted no wrongdoing as part of the settlement. Mr. Crawley had filed the _qui tam_ complaint, a lawsuit on behalf of the whistleblower and the government, alleging wrongdoing by his employer in the company’s performance of a government contract or regulation. It has been pointed out that “if it hadn’t been for Mr. Crawley bringing this matter to the government’s attention, the government would not have known about the fraud in these other areas as well.” That’s always the case in whistleblower litigation.

The U.S. Department of Health and Human Services aided in the investigation. The lawsuit involved reimbursements for ambulance trips by dialysis patients in several states. It was contended that Rural/Metro filed bills falsely claiming that the patient either was confined to bed, or the ambulance trip was medically required. It was alleged in the complaint:

_Medicare and Medicaid would not have paid these claims if they bad known that the patients’ conditions did not meet Medicare and Medicaid's requirements for reimbursement of ambulance transportation._

The settlement only resolves the civil lawsuit, and does not affect any federal tax or criminal liability, according to the agreement. Crawley, who worked for the ambulance company in 2008 and 2009, now is pursuing a criminal justice degree in college. Birmingham lawyers Henry Froksin and Jim Bayer represented Mr. Crawley, the whistleblower in the lawsuit, and they did a very good job.

Source: _The Birmingham News_
Facebook has reportedly agreed to pay $10 million to settle a lawsuit concerning its Sponsored Stories advertisements. The settlement brings an end to the lawsuit that alleged Facebook’s Sponsored Stories benefited from its users’ “likes” without giving them compensation or a chance to opt out. It was reported in late May that a settlement had been reached, but no details were given on how much Facebook would have to pay. Now we have learned that the social network would have to pay $10 million. The lawsuit was brought by five of Facebook’s users in 2011. If successful, it could have resulted in billions of dollars in loss for the social network.

Sponsored Stories show up on Facebook for its users, showing them information taken from their friends. This information can include friends’ pictures, names and likes tagged to products and companies. The lawsuit called the advertisements a “misleading advertising scheme.” A Facebook lawyer, Michael Rhodes confirmed the settlement, saying that the $10 million will be given to charity. The settlement must have court approval to become final.

Sources: Reuters, Bloomberg and The Los Angeles Times

VII.

PRODUCT LIABILITY UPDATE

Another Osprey Crashes and Burns

In the most recent crash involving the military’s plagued V-22 Osprey tiltrotor aircraft, five airmen on board an Air Force special operations CV-22 were seriously injured. Their Osprey crashed during a routine training mission in the Florida panhandle last month. The latest in a long string of incidents involving the Osprey, this is the second crash within the past two months. According to military statements, the Florida crash occurred during a gunnery training mission involving two Osprey planes flying in formation. Col. Jim Slife, commander of the 1st Special Operations Wing at nearby Hurlburt Field, observed:

When the lead aircraft turned around in the gun pattern, they did not see their wingman behind them, so they started a brief search and found the aircraft had crashed right there on the range.

The aircraft was found located upside down on the ground, on fire, and with significant crash damage. Surprisingly, although it is built almost entirely of composite materials, the entire aircraft was not consumed in the fire. All five crewmen were hospitalized with injuries.

As has become customary in these crashes, several mishap boards will investigate and issue reports on the causes of the crash. Typically, it may be some time before the cause of the crash becomes public. A safety panel is investigating, but its findings will not be released. A separate accident investigation board will also be convened, and parts of its findings may be made public. This crash comes just two months after a Marine Corps version of the aircraft, an MV-22 Osprey, went down during a training exercise in Morocco. Two Marines were killed and two others severely injured.

Interestingly, the military put on hold its plan to deploy Marine Ospreys to a city in Japan after local officials objected because of the aircraft’s bad safety record. As we have reported in the past, this aircraft certainly has a checkered history. An Air Force CV-22 crashed in Afghanistan in April 2010, killing three service members and a civilian contractor. That crash was blamed on pilot error. Although the Ospreys officially went into service with the Marines and Air Force in 2006, our office began learning how dangerous this aircraft is when we represented the widow of a Marine killed during a crash in North Carolina in December 2000.

On December 11, 2000, during a routine training flight near a North Carolina Marine base, four Marines were killed when their MV-22 Osprey aircraft failed and crashed. At the time of that crash, approximately 30 people had already been killed in the Osprey aircraft, with most of the deaths involving Marines. Then Secretary of Defense Dick Cheney suspended the program in 1991 because his administration felt the program was too expensive, that the Osprey was not a safe aircraft, and that the needs of the military were being met by other heavy-lifting helicopters.

The Clinton Administration lifted the stay on the V-22 and the Osprey was delivered to the military for operational evaluation beginning in 1999. Since that time there have been multiple crashes and deaths. The aircraft involved in our December 2000 crash was assigned to the Naval Air Station at New River, N.C. The Marines assigned to the Osprey unit were hand-picked based upon their abilities and service records. In short, they were the best of the best.

During our investigation of the crash, we learned that while the Osprey was in flight on December 11, 2000, a weakness in one of the lines supplying hydraulic pressure to the left engine catastrophically failed and ruptured. Over 30 gallons of hydraulic fluid was blown out of the ruptured line in approximately three seconds, completely emptying the primary hydraulic system. The onboard flight control computer sensed a sudden hydraulic pressure loss and provided warning lights to the pilots onboard. These pilots, who were the best in the Marine Corps, correctly pressed the re-set button several times as the warning lights continued to flash.

Unfortunately, there was a design flaw in the computer software and the aircraft ultimately crashed because of the hydraulic failure defect and the software defect. Sadly, we learned that the Osprey manufacturers and contractors had failed to test the software in combination with a failure of the hydraulic system. After the December 2000 crash, which killed the four Marines, the entire fleet of V-22 Ospreys was grounded.

Following the Osprey crashes in the early 2000 time frame, the manufacturers redesigned the Osprey in an attempt to save the program. Although some of the problems that were discovered as a result of the crashes were addressed, the recent crashes of the new design highlight the fact that this aircraft is still plagued with problems regardless of the generation or branch of the military involved. As the military works through the various mishap investigations and information becomes available, we will keep you updated. If you would like more information on the Osprey and all of the problems this aircraft has encountered, contact either Mike Andrews or Cole Portis, lawyers in our firm, who are very familiar with the Osprey problems, at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com or Cole.Portis@beasleyallen.com.

Tire Service Centers Ignore Manufacturers Warnings Regarding Tire Aging

Lawyers in our firm have successfully handled numerous lawsuits against large tire service centers and/or tire dealers for their unreasonable conduct in placing unsafe tires on their customers’ vehicles. In each case the tire later failed, causing severe injury or death. Whether tires are new, used, or have been removed for rotation or repair, a tire service center has an

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obligation to its customers that the correct tire is installed on the vehicle and that the tire is not unsafe or dangerous.

Most consumers know very little about tire safety and depend on their tire dealers and/or service centers for advice which makes the tire service centers’ policies, procedures, training and expertise critical to their customers’ safety. Unfortunately, the larger tire service centers continue to ignore adopting simple safety policies which would save lives when their customers look to them for safety advice.

A current tire safety issue that is being ignored by most tire service centers is placing older tires on vehicles despite their knowledge of the dangers of “aged tires.” Most, if not all, of the large retail tire service centers and dealers such as Wal-Mart, Sears, Pep-Boys and Discount Tires have received service warnings from various tire and vehicle manufacturers against placing older or “aged tires” on vehicles. For example, in October 2005, Firestone issued a technical service bulletin warning its dealers and retailers against placing tires more than ten years old on vehicles, regardless of the tread depth or appearance. Michelin did the same in 2006. Several other tire makers followed suit and warned tire service centers against placing any tires older than ten years, including the spare, on a vehicle because of the dangers it could present to their customers.

The car manufacturers have issued warnings since 2005 as well. Ford Motor Company issued a warning in 2005 advising against the use of tires older than six years. Ford’s warning states “tires degrade over time, even when they are not being used...you should replace the spare when you have replaced the other road tires due to the aging of the spare tire.” In its warning, Chrysler says:

*Tires and spare tire should be replaced after six years, regardless of the remaining tread. Failure to follow this warning can result in sudden tire failure...resulting in serious injury or death.*

To our knowledge, Discount Tire is the only major tire service center to follow the warnings of tire and car manufacturers advising against placing older tires on vehicles. Discount Tire has adopted a policy that it will not only warn its customers of the dangers of using older tires, it will not place a tire more than ten years old on a vehicle. That certainly speaks well for this company and its bosses.

Unfortunately, Discount Tire is the only major tire service center to heed the manufacturers’ warnings of the dangers of aged tires. The other major tire service centers, despite their knowledge, continue to ignore warnings and will often place older tires such as spares on a customer’s vehicle. Further, tire service centers like Wal-Mart will not even inform their customers of the warnings provided to them by the tire and car manufacturers concerning the use of older tires. This is particularly troubling when the manufacturers have repeatedly acknowledged that they expect their tire dealers to follow their advice, inform their customers of the dangers of aged tires, and not place them on vehicles for their customers’ safety.

In addition, Wal-Mart has acknowledged that it provides no training for its tire technicians on tire aging or how to read the tire date, which is embedded in the cryptic DOT code molded on the tire sidewall. That is shocking and cannot be tolerated. The average customer can’t determine, without specific instructions, how old a tire is. That creates a most serious problem and points out how important it is for corporations like Wal-mart to do its duty.

Until tire service centers start to follow the manufacturers’ recommendations concerning the dangers of “aged tires,” their customers will continue to be placed at risk because of unsafe tires being on their vehicles. If you need additional information on this subject, contact Rick Morrison, a lawyer in our firm who has handled a number tire cases, at 800-898-2034 or by email Richard.Morrison@beasleyallen.com.

Sources: New York Times and Good Morning America

### Sunscreen Causes Second-Degree Burns

Most Americans believe there are two essentials to any summer backyard bar-b-que, and those are a grill and sunscreen. Unfortunately, when these two seemingly harmless objects are combined, they can create serious permanent injury. If you doubt it, just ask Brett Sigworth. Brett, who is from Massachusetts, suffered second-degree burns when he sprayed sunscreen on his skin and then walked over to his grill. Of course, even if he was aware of the danger of spraying the sunscreen near the grill, he had no idea that the sunscreen could be flammable after sprayed on the skin. The Banana Boat aerosol spray can had this warning, “Flammable, don’t use near heat, flame, or while burning.” But, the can failed to warn that the sunscreen could still be dangerous after it was applied.

According to Banana Boat, while this incident is rare, it’s being taken seriously. The company claims that it is unaware of any prior incidents of its sunscreen catching fire after being applied. But Dr. Darrell Rigel, a clinical professor of dermatology at New York University, says it’s plausible. The sunscreen itself is not what is flammable. It’s the alcohol in the aerosol can that can be dangerous if it is not completely evaporated. Dan Dillard, CEO of the Burn Prevention Network, agreed that the sunscreen probably was not fully absorbed into Brett’s skin when he approached the grill. He observed:

*As he approached the flame, the charcoal simply caught the vapor trail and it follows the vapor trail to where the bulk of the substance is, which is on his body.*

Brett doesn’t plan to sue Banana Boat, but he wants to make sure that folks are aware that the same thing could happen to them. Brett had this to say about what happened to him:

*I think if people were told this is flammable for two minutes on your skin, people wouldn’t use it. It was so scary, and I just wouldn’t want to see it happen to anybody else.*

Our firm has successfully handled cases involving flammable products. If you would like additional information on this issue, contact Stephanie Stephens, a lawyer in our Personal Injury section, at Stephanie.Stephens@beasleyallen.com or at 800-898-2034.

Sources: New York Times and Good Morning America

### VIII. MASS TORTS UPDATE

#### J&J To Stop Selling Pelvic Mesh Products That Are Involved With Lawsuits

Johnson & Johnson (J & J) announced last month that it plans to stop selling certain surgical mesh products used in women to repair pelvic organ prolapse. As we have written in previous issues, these surgical mesh implants have caused serious injuries to women and resulted in hundreds of lawsuits being filed. The company sent a letter to judges in New Jersey and West Virginia, who are overseeing lawsuits filed against the company, letting them know it plans to stop marketing the Gynecare TVT Secur, Gynecare Prosima, Gynecare Prolift and Gynecare Prolift+M over the

next four months. All four of these products are composed of polypropylene mesh.

Pelvic organ prolapse is extremely common, affecting at least half of all women who have given birth and many women who have never been pregnant. Prolapse affects women as young as in their 30s as well as in their 70s and 80s. Pelvic organ prolapse occurs when the muscles and ligaments supporting a woman’s pelvic organs weaken and a pelvic organ slips out of place or prolapses. Prolapse can involve the bladder, uterus, vagina, or rectum.

Traditionally, doctors repaired pelvic organ prolapse using sutures or stitches. In the late 1980s, doctors began using polypropylene mesh to lift the organs back into place. These procedures involved an abdominal incision. In the late 1990s, doctors began to place the polypropylene mesh through an incision in the vaginal wall. The transvaginal placement of mesh has led to numerous problems. Discovery has shown that mesh placed transvaginally often breaks down in the body and/or becomes deformed. This can lead to chronic infection, incontinence, pain, erosion of the mesh into the vaginal wall, painful intercourse, and autoimmune issues, among other things. Over 200,000 women had transvaginal procedures for the repair of pelvic organ prolapse in 2011 alone. Untold thousands of women over the past ten-12 years have had these procedures.

In spite of all of the evidence to the contrary, J&J still claims the mesh products are safe and says there will be no recall. In an interesting media statement, the company said its decision to discontinue these products was based on “their commercial viability in light of changing market dynamics, and is not related to safety or efficacy.”

Based on our involvement in this litigation, I can say without reservation that J & J made some very bad decisions concerning the use of the transvaginal mesh implants. The FDA said 10 percent of women experienced erosion or exposure of the mesh within 12 months of having the mesh implanted, though it is probable that the percentage is as high as 25 percent. More than half of these women required follow-up surgery to remove the mesh. In fact, Lana Keeton, a Florida woman, had 17 surgeries to remove the mesh that was implanted in 2001. She started a group, Truth in Medicine, to work on this issue. Ms. Keeton has been very active in this fight.

It is significant that the FDA saw no evidence that using mesh led to better outcomes than traditional surgery with stitches. Due to safety concerns with these products and others like them, the FDA’s Office of Surveillance and Biometrics previously ordered Johnson & Johnson and five other manufacturers to conduct safety testing of these products. J&J apparently hopes the FDA will waive that requirement since it’s taking the products off the market. Consumer safety advocates hailed the announcement by J&J as a victory for women. It clearly was.

Between 2008 and 2010, the FDA received more than 1700 reports of adverse events involving pelvic organ mesh repair kits made by J&J and other companies. As a result, a large number of product liability lawsuits have been filed to hold the manufacturers accountable. In its last quarterly filing with regulators, J&J said the “number of pending product liability lawsuits continues to increase,” and that the company has set aside money to pay for litigation costs associated with the mesh. Federal cases against J&J were consolidated in the Southern District of West Virginia. The state cases in New Jersey have been centralized in a state court in Atlantic County.

MDLs were created against American Medical Systems, Inc. (MDL No. 2325); Boston Scientific Corp. (MDL No. 2326); and Johnson & Johnson (MDL No. 2327). Since 2010, Judge Joseph B. Goodwin has also been overseeing a MDL against another Transvaginal mesh manufacturer, C.R. Bard, Inc. That case is in re: Avaulta Pelvic Support Systems Product Liability Litigation, MDL No. 2187.

These companies know they will never be able to prove safety and efficacy of these devices in the studies mandated by the FDA in January. Public Citizen and other groups, including Truth in Medicine, have lobbied the FDA on the risks of mesh in recent years. Mesh products initially were seen as a high-tech improvement over traditional surgery, which also can have complications. Since similar mesh was already used in other types of surgery, the products received fast-track approval from the FDA without the tests that the agency requires for first-of-a-kind devices. That means there was no safety testing and the results have caused great harm to many unsuspecting women. The companies failed to inform the medical community of the potential for harm.

Our firm is representing a large number of women who have suffered severe injury. Complications from the transvaginal placement of the mesh include erosion of the mesh into vaginal tissue, organ perforation, pain, infection, painful intercourse, and urinary and fecal incontinence. Leigh O’Dell, a lawyer in our Mass Torts Section, was appointed by Judge Goodwin in April as a member of the Plaintiffs’ Steering Committee for all four MDLs. If you have any questions about this litigation, you can contact Leigh at 800-898-2034 or by email at Leigh.Odell@beasleyallen.com.

Sources: Associated Press and Wall Street Journal

**Product Issues Are Not New With Johnson & Johnson**

Johnson & Johnson’s problem with its mesh products isn’t the first time Johnson & Johnson has been faced with similar issues. In August 2010, Johnson & Johnson and its subsidiary DePuy Orthopedics announced the recall of parts used for hip replacements after studies pointed to an unusually high rate of revision surgeries connected to the devices. An estimated 93,000 people are affected by the recall. Patients are reporting problems within as little as five years after receiving the hip implants, which use metal-on-metal parts.

Folks with the implants are reporting problems including pain, swelling and problems walking. The hip implant has shown that it may loosen from the bone, cause fractures in the bone where it is implanted, or dislocate. The devices also are linked to a condition called metallosis, or metal poisoning resulting from metal shavings from the devices entering the bloodstream. Navan Ward, a lawyer in our Mass Torts Section, was appointed by the MDL Court to the Plaintiff’s Steering Committee. If you have questions about DePuy cases, you can contact Navan at Navan.Ward@beasleyallen.com.

**Actos Update**

Hundreds of Actos lawsuits have now been filed in the Actos MDL, which is pending in the Western District of Louisiana. Andy Birchfield, Section Head of our firm’s Mass Torts Section, has been appointed to the Plaintiff’s Steering Committee (PSC) for this litigation. The PSC is charged with overseeing how the Actos litigation progresses through the MDL/federal court system.

We are pleased with how the Actos litigation has advanced to date. The U.S. District Judge Honorable Rebecca F. Doherty is innovative and open to new ideas and procedures. At the outset of the litigation, Judge Doherty involved numerous special masters to handle various aspects of the litigation. The special masters have already worked behind the scenes with both sides to quickly and efficiently reach agreements on complex procedural and legal issues.

Judge Doherty has invited lawyers to file bundled complaints, complaints that can
include unlimited numbers of individual Plaintiffs in each complaint, with only one filing fee to be paid per complaint. The Clerk’s Office will separate the individual claims and assign individual case numbers after the complaint is filed. This will prove to be a significant financial benefit to the attorneys filing cases in this litigation and their clients.

The PSC has successfully negotiated with Takeda for a short and simple Plaintiff Fact Sheet. For those that are not involved in MDL litigation, the Plaintiff Fact Sheet must be completed by every Plaintiff filing a claim, usually within 30 to 45 days following the filing of a complaint. The Plaintiff Fact Sheet is oftentimes the only written discovery allowed.

The PSC is also making significant progress in retaining numerous, top-notch, world-renowned medical experts. Lawyers in our Mass Tort Section continue to investigate and file claims on behalf of numerous individuals who have been diagnosed with bladder cancer following long-term exposure to Actos. Contact Roger Smith, a lawyer in the Section, or April Worley, his legal assistant, if you have a claim you would like for us to review or if you have any questions regarding the Actos litigation. You can reach them at 800-898-2034 or by email at Roger.Smith@beasleyallen.com or April.Worley@beasleyallen.com.

EXPIRING TWO-YEAR STATUTE OF LIMITATIONS MAY SOON LIMIT POTENTIAL ASR PLAINTIFFS’ RECOVERY

Time may be running out to bring a claim against DePuy Orthopaedics and its parent, Johnson & Johnson, for persons residing in states that have two-year statutes of limitation. It’s possible that the two-year statutes of limitations will run this August for recipients of DePuy’s ASR XL Acetabular System or an ASR Hip Resurfacing System.

For our non-lawyer readers, statutes of limitations are designed to ensure that claims are filed promptly and that parties do not have to litigate issues based on old documents and potentially faulty memories. Because personal injury cases proceed in state courts and are governed by state law, statutes of limitations differ state-by-state. Many states provide for a two-year statute of limitation in personal injury/product liability cases. Failure to file suit within the prescribed time frame is disastrous.

The date on which the statute of limitations begins to run is often either the date of injury or the date when the Plaintiff knew or should have discovered that the injury occurred. In the ASR litigation, DePuy will likely argue that the limitations period began on the date of the recall, August 24, 2010, because that is when most recipients should have realized that they might have been injured. Based on the recall date, potential plaintiffs in states with a two-year statute will have until August 23, 2012 to file their hip replacement lawsuits. After that, DePuy may move to dismiss any lawsuits in those two-year statute of limitations states. The result of having a hip replacement lawsuit dismissed because the statute of limitations expired is that the Plaintiff will have to accept whatever DePuy offers via its recall reimbursement program operated by Broadspire, Inc.

Additionally, manufacturers may also attempt to use the August 2010 ASR recall date as a measure in other metal-on-metal hip litigation. As a result, potential Plaintiffs implanted with a DePuy Pinnacle, Wright Conserve or Biomet M2A-Magnum may be completely barred from relief after August 23, 2012. Expired statutes of limitations will completely bar relief in non-ASR lawsuits because DePuy’s reimbursement program compensates ASR recipients only.

Consequently, anyone implanted with a metal-on-metal hip device should consult a hip replacement lawyer as soon as possible, even if their device has not caused them any problems. Based on recent studies concerning metal-on-metal hip implants, there is a grave possibility that most ASR recipients will eventually experience complications from the all-metal device.

Anyone implanted with a metal-on-metal hip implant should have his or her case investigated to determine its merits. If you need more information, contact Navan Ward, a lawyer in our firm who is heavily involved in this litigation, at 800-898-2034 or by email at Navan.Ward@beasleyallen.com.

MEDTRONIC PROMOTED OFF-LABEL USE OF GRAFT DEVICE

A newly-filed lawsuit alleges that a Medtronic bone graft device is defective when used in an off-label manner and that the company knew about it, but continued to promote the off-label use. Patricia Caplinger alleges in her lawsuit that she underwent spinal surgery in 2010 in which the Infuse Bone Graft made by Medtronic was implanted through her back. She now suffers continuous back and leg pain and muscle paralysis causing foot drop, which led to a torn ligament in her knee, and is at a significantly higher risk of cancer, according to allegations in the suit.

According to her complaint, filed on June 4 in U.S. District Court for the Western District of Oklahoma, the device was approved by the Food and Drug Administration for implants through the abdomen only. It’s alleged that Medtronic downplayed the risks of known complications of implanting through the back, including ectopic bone growth, back and leg pain, and risks of sterility and cancer. The lawsuit also claims that Medtronic paid influential physicians to promote the off-label use by other physicians, and that the company omitted adverse event reports in its sponsored studies. It’s alleged further that:

A number of patients say they have been harmed in off-label uses of Infuse, which is approved by the FDA only for anterior-approach surgery in a small section of the spine in the lower, or lumbar, region. At least 280 reports of adverse events involving Infuse have been made to the FDA. Approximately 75 percent of those reports involve off-label use.

The suit alleges product defect, failure to warn, negligence and fraud, and seeks compensatory and punitive damages. James W. Dobbs of Rhodes, Dobbs & Steward in Edmond, Okla., represent the Plaintiffs.

IX. BUSINESS LITIGATION

CVS AND RITE AID SUE PFEIZER OVER DEPRESSION DRUG

CVS Caremark Corp. And Rite Aid Corp. have filed an antitrust lawsuit accusing Pfizer Inc. And Teva Pharmaceutical Industries Ltd. of conspiring to keep generic versions of the popular antidepressant Effexor XR off store shelves. The lawsuit escalates court battles over alleged delays in the launching of generic versions of Effexor XR. The suit comes just six months after several other large retailers filed an antitrust lawsuit making similar claims. In a complaint filed on June 12th in federal court in Trenton, N.J., CVS and Rite Aid accused Pfizer’s Wyeth unit of scheming to block generic versions of Effexor XR for at least two years after its marketing rights to the original compound lapsed in June 2008.

The Plaintiffs said Wyeth accomplished this by obtaining fraudulent patents, engaging in sham litigation against Teva and 16 other generic drug makers, and scheming
with Teva to keep cheaper generic equivalents off the market and prolong Teva’s generic exclusivity rights. It was alleged that U.S. sales of Effexor XR topped $2.5 billion annually during this period. The Plaintiffs say they have sustained “substantial injuries to their business and property in the form of overcharges.” CVS and Rite Aid are seeking triple damages and other remedies. Rite Aid’s Brooks and Eckert units are also among the Plaintiffs.

Pfizer and Teva have rejected the claims in the December lawsuit, which was filed in the same court by Walgreen Co., Kroger Co., Safeway Inc., Supervalu Inc. And HEB Grocery Co. Effexor XR is used to treat depression and anxiety disorders. Its chemical name is venlafaxine hydrochloride. Pfizer’s global sales of Effexor XR totaled $129 million from January to March. Sales fell 37 percent from a year earlier and have been declining because of generic competition. Pfizer is based in New York; Wyeth has operations in Madison, N.J.; and Israel-based Teva has U.S. operations in North Wales, Pa. CVS is based in Woonsocket, R.I., and Rite Aid in Camp Hill, Pa. The case is Rite Aid Corp et al. v. Wyeth Inc et al, U.S. District Court, District of New Jersey, No. 12-03525.

Source: Chicago Tribune

X.
AN UPDATE ON SECURITIES LITIGATION

NEW YORK CITY PENSION FUND SUES WAL-MART OVER MEXICAN BRIBERY ALLEGATIONS

The pension funds of New York City are the latest group to file a derivative lawsuit against Wal-Mart Stores Inc., based on reported allegations of bribery in Mexico and a possible cover-up by Wal-Mart officials. The suit, filed in Delaware Chancery Court, alleges that Wal-Mart’s officers and board of directors breached their fiduciary duty to both the company and shareholders by failing to properly handle claims of alleged bribery and apparently attempting to cover up details of the issue. The issue was brought to light by the New York Times in an April report which said that management at Wal-Mart de Mexico, or Walmex, allegedly orchestrated bribes of $24 million to help it grow quickly in the last decade, and that Wal-Mart’s top brass tried to cover it up. New York City Comptroller John C. Liu said in a statement:

Rooting out the directors and executives responsible for the current crisis would be a first step, but Wal-Mart also needs corporate governance reforms and an independent board that will protect outside shareholders and safeguard against another breakdown of internal controls.

The lawsuit comes after the California State Teachers’ Retirement System, or CALSTRS, filed a derivative lawsuit in Delaware Chancery Court in early May. In total, 11 derivative complaints were filed in April and May in Delaware and Arkansas tracking the allegations, according to a story in the New York Times. A securities lawsuit was also filed by the City of Pontiac General Employees Retirement System in Tennessee.

It should be noted that in a derivative lawsuit, Plaintiffs seek a recovery for the company, not shareholders. The pension funds are seeking to essentially stand in the shoes of Wal-Mart and sue the company’s executives and directors for damage they have done to the retailer. Such lawsuits often result in changes in corporate governance.

Wal-Mart says it’s in the early stages of a full and independent investigation, which will take time. The bribery issue is also being investigated by the U.S. Department of Justice, the U.S. Securities and Exchange Commission and a number of government agencies in Mexico. Wal-Mart said in early June that, while it could not predict the outcome of the various suits, it did not believe that the outcome would have a material effect on its financial conditions or results of operations. It remains to be seen if the company’s assessment is accurate.

It should be noted that the New York City Comptroller’s Office was among a group of shareholders that voted against certain board members in Wal-Mart’s recent election. It previously said that it voted its shares against Chairman Robson Walton, Chief Executive Michael Duke, former CEO Lee Scott, current audit committee chairman Christopher Williams, and audit committee director Arne Sorenson. While several directors received many more votes against them than usual, they were still elected with a majority of votes cast in their favor. It was alleged in the lawsuit that the New York City funds held 5.6 million Wal-Mart shares as of March 31 and collectively have more than $121 billion in assets. Fifteen of Wal-Mart’s 16 current board members are named as Defendants in the lawsuit. Marissa Mayer, who recently joined the board, is not listed as a Defendant.

Along with Comptroller Liu, the trustees of the New York City pension funds include the New York City Employees’ Retirement System, the Teachers’ Retirement System, the New York City Police Pension Fund, the New York City Fire Department Pension Fund, and the Board of Education Retirement System.

Source: Insurance Journal

BEAR STEARNS PAYS $275 MILLION TO SETTLE SHAREHOLDER LAWSUIT

Bear Stearns has agreed to a $275 million settlement in a nationwide shareholder lawsuit arising out of the near-collapse of the former Wall Street investment bank. The settlement resolves claims that Bear Stearns and several officials, including former Chief Executive James Cayne, misled investors about the company’s deteriorating financial health before it was acquired by JP Morgan Chase & Co. The lead Plaintiff, the State of Michigan Retirement Systems, filed the settlement papers last month with the U.S. District Court in Manhattan and is requesting preliminary court approval of the settlement.

Source: Insurance Journal

BARNES & NOBLE’S RIGGIO SETTLES SHAREHOLDER SUIT

Leonard Riggio, the founder and chairman of Barnes & Noble Inc., has agreed to forgo $29 million from a sale of one of his companies to the book retailer in order to settle a shareholder lawsuit. The lawsuit stemmed from a 2009 agreement by Barnes & Noble, the largest U.S. bookstore chain, to buy back Barnes & Noble College Bookellers Inc for $514 million from Riggio. Shareholders sued Riggio, Barnes & Noble’s largest investor, alleging the deal overvalued the college bookstores and enriched Riggio at the expense of shareholders.

The transaction was one example of alleged poor corporate governance cited by investor Ron Burkle when he launched a proxy fight for a slate on the bookseller’s board in 2010. Burkle was the company’s second-largest investor at the time, but has since reduced his stake in the company to less than 1 percent. Analysts at the time questioned the wisdom of acquiring a chain with more than 600 bricks and mortar stores as more students and other book buyers were migrating toward digital book formats. Same-store sales at the college bookstore chain, which has 641 stores, are expected to be flat for the full year which ended in April and for which
the company reported earnings on June 19th.

Currently, Riggio owns 29.8 percent of Barnes & Noble shares, according to reports. In April, Microsoft Corp said it was taking a 17.6 percent stake in a new Barnes & Noble subsidiary made up of its Nook digital business and its college bookstore chain. The lawsuit was a derivative action, meaning the shareholders essentially stepped into the shoes of the company to pursue Riggio for the harm done to Barnes & Noble. The recovery will benefit Barnes & Noble, and its shareholders will only benefit indirectly.

The settlement is subject to approval by Delaware Court of Chancery judge Leo Strine. The case is In Re Barnes & Noble Stockholder Derivative Litigation, Delaware Court of Chancery, No. 4813.

Source: Chicago Tribune

XI.
INSURANCE AND FINANCE UPDATE

GOV. ROBERT BENTLEY BELIEVES MORE INSURANCE REFORMS ARE NEEDED IN ALABAMA

We wrote in the June issue about the seven insurance bills passed by the Alabama Legislature in the Regular Session this year. That was a good start in the movement designed to protect state property owners. But Gov. Robert Bentley believes more work needs to be done. At a news conference on June 13th, Gov. Bentley said he hopes to use money from the Restore Act to help homeowners pay to retrofit houses to make property safer from storms and to reduce insurance rates. Governor Bentley said he understands that there is a difference in rates being charged to coastal property owners. He pointed out that the insurance companies are charging coastal homeowners and businesses much more for identical coverage as compared to premiums charged in other parts of the state.

The rate unfairness especially hurts working men and women and retirees in counties like Mobile and Baldwin. Many in those counties have insurance rates so high they can't afford them. It was noted that higher insurance rates are one of the biggest obstacles to economic recovery on the Gulf Coast. It's obvious that while the bills passed are good and a step in the right direction, more needs to be done.

The Governor said a special commission on insurance is scheduled to complete a report with recommendations on additional reforms in about one month. Baldwin County Probate Judge Tim Russell, a former state insurance commissioner, is chairman of the Governor's Affordable Homeowners Insurance Commission. One possibility being studied would be to use about $200 million for a pool to help Mobile and Baldwin County property owners pay for damages after a disaster.

If the Restore Act passes in Congress—which is no certainty—some of those funds, paid by BP as compensation for oil spill losses, could help pay insurance costs. Gov. Bentley said that some of that money could also be used for a program similar to one in Florida, in which homeowners could be compensated for the cost of making their homes more storm-resistant. Retrofitting houses would also help reduce insurance costs by cutting the amount of claims. The Governor said the seven bills will give tax breaks to companies that provide insurance coverage in coastal areas and make insurance packages easier to understand.

Insurance companies will also have to provide the state Department of Insurance with information on the number of policies written, premiums collected and losses due to claims. Sen. Ben Brooks, R-Mobile, one of the sponsors of the insurance package bills, said the effort is a major start in insurance reform. He had this to say:

My view is that this is a really significant step in our long journey to a comprehensive reform package, the biggest single step in a year that we've had.

Hopefully, legislators in other parts of Alabama will realize that more needs to be done to help solve the insurance problems unique to the coastal communities. Gov. Bentley and the Legislature should be commended for what has been done so far. But they should finish the job when the next opportunity arises.

Source: AL.com

$146 MILLION AIG WORKERS' COMP SETTLEMENT

State regulators around the country are finally collecting their share of a multimillion dollar settlement reached with American International Group (AIG) that was agreed to in 2010. The settlement was based on the company's misreporting of workers' compensation premiums for the years 1985 to 1996. In December 2010, AIG agreed to pay state regulators a total of $100 million in fines and another $46.4 million in premium taxes and assessments after a multistate probe begun in 2008 found the insurer hid at least $2.12 billion in workers' compensation premiums by attributing the money to other lines of insurance and thereby lowering its assessments and taxes. Florida Insurance Commissioner Kevin McCarty, representing the states as president of the National Association of Insurance Commissioners (NAIC), stated:

AIG systematically underreported workers' compensation insurance premium by putting this premium into the general liability or commercial automobile liability categories. The practical effect of this misreporting was to report premium in lines of business with lower residual market obligations or premium tax rates and assessments.

Florida was one of the lead states conducting the examination along with Delaware, Indiana, Massachusetts, Minnesota, New York, Pennsylvania and Rhode Island. All states and the District of Columbia participated. There had been previous examinations by New York's Attorney General in 2006 and officials in Indiana, Minnesota and Rhode Island. These examinations helped the Plaintiffs build their case in the latest filing.

Florida's share of the settlement will be $5.6 million in fines and penalties with an additional $8.7 million being split among several state agencies. The agencies include the state's Division of Workers' Compensation and the Florida Workers' Compensation Insurance Fund. Pennsylvania Insurance Commissioner Michael Consedine said that his state will collect more than $16.8 million including $8.6 million in fines, $4.6 million in premium taxes and assessments, and $3.6 million to the Workers' Compensation Security Fund. Other states receiving payments include California, which will receive $15.6 million in fines and penalties; Texas will receive $12.8 million; Illinois will get $3.7 million; Massachusetts will get $3.4 million; New Jersey will receive $3.3 million; and Michigan will get $3.2 million.

A federal judge approved the settlement with the states in December 2010. But before the settlement could take effect, AIG had to resolve several other outstanding conditions. One was a $450 million settlement with some of AIG's competitors over residual market levies. That settlement was reached in February. Another condition called for AIG to pay out $25 million to several insurance guaranty asso-
rivals hurt by its underreporting. The com-

action settlement with several of AIG’s

al’s appeal. But

that class action, it has expressed disap-

assurance's formal approval of the $450 million class-

in any event, it’s good to see the states

mutual will be successful on its appeal. But

settlement amount and filed an appeal, hoping

to get more. The $450 million is based on

the court’s calculation that AIG underre-

ported $2.1 billion in premiums. But

Liberty Mutual claims AIG should be held

accountable for underreporting more than

$6 billion in business. Rich Angevine,

spokesperson for Liberty Mutual, made this

statement:

Liberty Mutual remains committed
to making sure that AIG is held
accountable for knowingly under reporting workers compensation pre-
miums to various insurance pools
for more than two decades. The set-
tlement was negotiated by conflicted
parties and is unfair because it based
$2.1 billion in under reported
premium, far less than the $6 billion
in actual amount uncovered in the
litigation.

It will be interesting to see if Liberty Mutual will be successful on its appeal. But in any event, it’s good to see the states finally being paid in their settlement, which won’t be affected by Liberty Mutual’s appeal.

Source: Insurance Journal

INOSRERS MAY MANIPULATE SYSTEMS IN EFFORT TO UNDERPAY INJURY CLAIMS

A new report released by the Consumer Federation of America (CFA) has found computerized claims’ systems used by

most of the nation's largest auto insurance companies can be easily adjusted to make

broad-scale “lowball” claims payments to

injured claimants. Considering estimates

by the organization that 75,000 to 100,000

auto insurance claims were filed during the

Memorial Day weekend alone, the contro-

versial findings easily affect thousands if

not millions of insurance consumers. During a June 4 teleconference, Mark Romano, CFA's claims project director, explained that the handling of injury claims has changed dramatically. Where evaluations were once based on the judg-

ment of claims adjusters, the new system being used by the companies relies on

accurate data input and tuning of comput-
erized software systems. Mr. Romano had this to say about the report:

This report is a wake-up call for con-

sumers and regulators who are not

aware of the many ways that com-

puter claims software can be manip-

ulated to produce unjustifiably low

injury payments to consumers and
tens of millions of dollars in illegiti-
mate 'savings' for insurers.

Romano had been the “subject matter

expert” on the Colossus injury claims eval-

uation system at Allstate and Encompass

insurance companies for almost ten years. Colossus, considered the dominant claims

ystem on the market, is sold by Computer

Sciences Corporation (CSC). The report,

“Low Ball: An Insider’s Look at How Insur-

er Can Manipulate Computerized Systems
to Broadly Underpay Injury Claims”,

details the history of the use of Colossus and

similar software products by automobile

insurance companies. The report describes

how the programs are set up, “tuned” to

reach particular claims payment monetary

goals, and adjusted over time.

According to Romano, while these

systems can be used to achieve consistency in

injury claim evaluations, they can also

be easily manipulated to save insurers bil-

lions more by underpaying claims. He

made this additional and most interesting

observation:

When CSC and its competitors talk
publicly about computer-based

claims systems, they stress that the

programs allow insurers to more

consistently evaluate bodily injury

claims. Consistency is a legitimate

goal, but these companies tell a dif-

ferent story behind closed doors. Soft-

ware marketing representatives

acknowledge that the real reason

insurance companies are willing to

invest millions in these systems is

that they can dial down claims pay-

ments to thousands of consumers at

time, regardless of whether these

payouts are fair. Many of the con-

cerns about Colossus and similar

programs have focused on the poten-
tial for insurers to manipulate these

systems directly in order to reduce

claims payouts. But insurers can also

use many techniques to unjustifiably

lower payments in a more subtle

manner, by putting biased or incom-

plete information into the system.

The report identifies specific techniques that insurers may use to directly and indi-

rectly produce “lowball” values for claims.

Direct manipulation by an insurer may include:

• reducing tuning across the board; and

• selectively removing or excluding higher

cost claims from the tuning sample.

There can also be indirect manipulation

by insurers. For example, indirect manipu-

lation by an insurer may include:

• Requiring adjusters with no formal

medical education to select injury codes

for a less severe injury, resulting in sub-

stantially lower settlement payments;

• Encouraging adjusters to downplay or
even ignore the final prognosis code that

may indicate a claimant’s need for future

medical treatment; thus lowering pay-

ments; and

• Encouraging the use of comparative neg-

ligence to reduce settlement payments.

The report includes excerpts from recently released court records in a class

action lawsuit, Hensley v. Computer Sci-

ences Corporation, that provide insight into company marketing tactics. In that
case it was shown how insurers could
adjust Colossus to produce virtually any

claims payment reduction they wanted, whether or not it was justified. Also, one

CSC executive reportedly told the court

that Colossus could be “tuned” up or down

like a water spigot to achieve a particular

level of savings, such as 15 percent, for all

claims. A CSC executive told the court that

on average Colossus achieved savings of

around 19 percent on overall claims

payouts for some of its insurer clients.

Insurance Services Office (ISO), a competi-
tor of CSC, claimed that it could maintain

even higher savings over time through the

use of its product, Claims Outcome

Advisor.

According to CFA, CSC misled regulators about the purpose of Colossus, claiming

the main function of the product was to

achieve consistent payouts rather than

bring about enormous claims

savings. According to J. Robert Hunter,

CFA’s director of insurance, former federal insurance administrator and Texas Insur-

ance Commissioner, CSC marketing materi-

als noted that 13 of the top 20 insurance

companies use Colossus. It was reported

that CSC even altered its advertising
message when the company determined the word “savings” was viewed negatively. The company was said to have substituted for “savings,” the word “consistency.”

Hunter provided recommendations to state insurance regulators on how to better protect consumers from insurers that manipulate settlement payments through Colossus and similar systems. His recommendations were for the states to:

- Directly regulate companies that sell claims adjustment software products.
- Examine and monitor use of computerized claims assessment systems by major insurers immediately.
- Require insurers to notify claimants in writing that a computerized claims assessment was used to process their claim and to provide a copy of the report generated by the system to claimants.

Hunter believes most market conduct examinations are superficial at best and he says that explains why market conduct exams haven’t revealed this manipulation of data. He had this to say about NAIC’s examination:

*The NAIC examination of computer adjustment systems was incomplete and flawed. They only investigated a single company, Allstate, which used only one of these systems, Colossus. And their agreement with the company did little to change bow Allstate adjusted Colossus to make claims payments or to protect consumers from potential abuses.*

It will be most interesting to see how the automobile insurance industry reacts to this report. My guess is they won’t like it very much. Hopefully, at least some of the State Insurance Commissioners will pay attention to the report.

Source: Claims Journal

**GEICO Being Investigated For Improperly Charging Multiple Deductibles**

Lawyers in our firm are currently investigating the conduct of GEICO for improperly charging multiple deductibles to automobile insurance policyholders. That practice is contrary to the language contained in its insurance policy. Under the terms of most GEICO automobile insurance policies, in the event of a claim under the “collision” coverage, “losses arising out of a single occurrence shall be subject to no more than one deductible.” We have learned, however, that GEICO has been charging or assessing policyholders more than one deductible if two or more vehicles, covered under the same policy, are involved in a collision.

Thus, if a family member collides one vehicle into a separate family vehicle, and both autos are covered under the same policy, GEICO’s practice has been to assess two deductibles, despite the clear language in its policy. Any person who has been charged multiple deductibles by GEICO for a collision claim involving two or more vehicles covered by the same policy, should contact a lawyer for more specific advice. If you need more information or this subject contact Bill Hopkins, a lawyer in our Consumer Fraud Section, at 800-898-2034 or by email at Bill.Hopkins@beasleyallen.com.

Source: Insurance Journal

**WELLPON To Settle Class Action Over Anthem Demutualization**

Health insurer WellPoint Inc. has agreed to pay $90 million to settle a class-action lawsuit against its Anthem unit over claims that the company failed to fairly compensate former members when Anthem was converted in 2001 from a mutual company into a stock company. If approved by a U.S. federal judge in Indianapolis, the settlement would resolve all claims asserted by the class. The case had been scheduled for trial on Monday in federal court in Indianapolis. The lawsuit was filed in 2005.

The Plaintiffs will send settlement notices to class members, with checks to be mailed to class members starting as soon as the settlement becomes final and fully in effect. The class represented in the suit consisted of more than 700,000 residents of Indiana, Ohio, Kentucky and Connecticut who were the owners of Anthem before it demutualized in 2001. They were entitled to receive cash compensation equal to the fair value of their ownership interests when the company converted from a mutual company to a stock corporation. Ohio lawyer Eric Zagrans represented the class Plaintiffs in the lawsuit and he did a very good job.

Source: Insurance Journal

**OUR FIRM IS INVESTIGATING DENIAL OF PIVIT TREATMENT FOR DIABETICS BY INSURANCE COMPANIES**

Many diabetics across the country have been prescribed a treatment by their physicians called Pulsatile Intravenous Insulin Therapy, otherwise known as “PIVIT.” Many insurance companies, and in particular the Blue Cross Blue Shield family of insurance companies, have denied insurance coverage and reimbursement to policyholders and physicians for the PIVIT treatment, claiming the treatment is “experimental” or “investigational.” Very few, if any, medical doctors today would call PIVIT experimental or investigational treatment. I am told that all doctors prescribing this treatment believe it’s medically necessary for their patients.

While it’s true the federal Medicare program, under the Center for Medicaid Services (CMS), still does not approve reimbursement for PIVIT for Medicare patients, at least one Administrative Law Judge in the State of California has ruled that the California Public Employees Retirement System (CALPERS) is required to provide coverage and reimbursement to patients and medical providers for PIVIT treatment. Lawyers in our firm are currently investigating the denial of insurance coverage and reimbursement by insurance companies for PIVIT treatment. If you or someone you know has been denied insurance coverage, reimbursement or authorization to proceed with PIVIT treatment by an insurance company, and would like more information, contact Bill Hopkins at 800-898-2034 or by email at Bill.Hopkins@beasleyallen.com.

Source: Claims Journal

**WAL-Mart EQual Pay Claims Approach 2,000**

You will recall that the U.S. Supreme Court ruled a year ago against a class action approach by female employees at Wal-Mart. Now almost 2,000 women have filed individual employment discrimination claims against Wal-Mart in the aftermath of the High Court’s decision. So rejecting the equal pay and failure-to-promote class action hasn’t stopped the women. Former and current Wal-Mart employees have filed 1,975 pay and promotion charges with the U.S. Equal Employment Opportunity Commission. A news release by the two lead attorneys for the women stated:

*That nearly 2,000 women across the country have filed charges over the past year making similar claims of...*
sex discrimination against Wal-Mart is a striking testament that the problems that gave rise to the original case are ongoing and that the evidence of discrimination remains widespread.

Last summer in Wal-Mart Stores v. Dukes, the Supreme Court scuttled what would have been the largest employment discrimination class action in U.S. history. In 2004, a California federal judge certified a class of more than 1.5 million current and past Wal-Mart employees who alleged that the nation’s largest private employer discriminated against them on the basis of their sex by denying them equal pay or promotions. The Supreme Court in Dukes concluded in a divided opinion that the Plaintiffs’ claims were not capable of class-wide resolution. Since the decertification of the nationwide class, women in 48 states have filed EEOC charges against Wal-Mart, according to the news release.

“The fact that EEOC charges were filed in every single Wal-Mart region in the nation demonstrates the widespread and pervasive nature of Wal-Mart’s pay and promotion discrimination against its women employees,” said co-lead counsel Brad Seligman in a statement. Seligman is senior counsel for the Impact Fund, a California nonprofit dedicated to consumer rights. According to the release, Florida leads the list of EEOC filings against Wal-Mart with 284, followed by Alabama with 142 and Georgia with 119. Montana and Vermont are the only states without a Wal-Mart Plaintiff.

Now that the nationwide class action is at an end, Plaintiffs are also attempting to pursue regional class actions against the retail giant. The press release said that regional class actions were filed in California and Texas in October 2011, and “numerous” other class actions are expected to be filed in other states throughout 2012. Joseph Sellers, along with Brad Seligman, each from the Washington law firm, Cohen Milstein Sellers & Toll, are the co-lead counsel for the women in this litigation.

Source: Lawyers USA Online

**Olympus Whistleblower Settles His Own Case**

Former Olympus Corp. Chief Executive Michael Woodford will receive 10 million pounds (1.2 billion yen, $15.4 million) in a settlement over his dismissal from the Japanese camera and medical equipment maker. Olympus disclosed the amount of the settlement last month, following approval from its board. Woodford, a Briton, was fired in October after he blew the whistle on what has been described as dubious accounting practices at Olympus.

The Tokyo-based company has now acknowledged it hid 117.7 billion yen ($1.5 billion) in investment losses dating back to the 1990s. After being fired, Woodford filed suit in a British court, accusing Olympus of unlawful firing and discrimination in not treating him the same way as a Japanese executive. The executives at the company met without hearing from him and fired him, according to Woodford.

The image of Olympus has been badly tarnished over its handling of Woodford’s whistleblowing. The company faces another high-profile whistleblowing case, unrelated to the accounting scandal, from a Japanese employee Masaharu Hamada. Three former Olympus executives, including the company’s ex-chairman, were arrested earlier this year on suspicion of orchestrating the accounting cover-up. The company has carried out its own investigation of its problems and is pursuing some executives for damages.

Woodford, a rare foreigner to lead a major Japanese company and the first at Olympus, says he would like to return to work in Japan. Obviously, his plans don’t include Olympus. Reportedly, Woodford has become sort of a hero in Japan. Outspoken people are rare in that country and Japanese whistleblowers like Hamada have often been treated as outcasts.

Source: Huffington Post

**Hilton Hotel Agrees To Pay Workers $2.5 Million To Settle Claims**

The Hilton Hotel which is located near Los Angeles International Airport has agreed to pay its workers $2.5 million to settle a lawsuit alleging that the hotel withheld wages, did not pay overtime, and failed to provide meal and rest breaks to about 1,200 workers. The suit, filed in 2008, covers all hourly employees who worked at the hotel from 2004 to 2011. With more than 1,230 guest rooms, the Hilton Los Angeles Airport is one of the largest hotels in Los Angeles. One of the hotel’s employees, a cook, said “for years, we’ve felt like machines, only here to make more and more money for the owners of the Hilton LAX.” It was reported that the hotel’s employees considered the settlement to be a huge victory, with one employee saying they won “justice and respect.”

The case included allegations claiming that the hotel failed to pay employees for the time spent preparing for work and putting on and taking off uniforms that were required to be left at the hotel. Workers also alleged that they were required to fill out time sheets saying they took breaks whether they did or not. Tom Walsh, president of UNITE HERE Local 11, the union representing 20,000 hospitality workers in Southern California, had this to say:

Since this lawsuit was filed, hundreds of workers at hotels near LAX have won union contracts that guarantee breaks and workers’ right to negotiate fair wages and benefits. I hope this expensive lawsuit teaches the Hilton LAX owners to respect the workers who make it successful.

Hotel owners and operators should follow the law, treat their employees fairly, and by doing so, avoid litigation. The California law firm of Hadsell, Stormer, Keeny, Richardson & Renick, in Pasadena, Calif., represented the employees and they did a very good job for them.

Source: Los Angeles Times

**$25 Million Awarded To Steelworker In Racial Suit**

A New York jury returned a $25 million verdict last month in a racial discrimination lawsuit. Elijah Turley, a longtime employee at a steel plant, says he still remembers the stuffed monkey with a noose around its neck found hanging from his driver’s side mirror. He also remembers the “KKK” and “King Kong” graffiti on the walls of the Lackawanna steel plant where he worked for 14 years. And if that wasn’t bad enough, there were the racial slurs from co-workers. The federal court jury awarded Turley $25 million in damages after finding his former employers and their executives liable for a culture of racial discrimination that one of his lawyers said was reminiscent of the 1950s. Mr. Turley’s lawyer told the jurors in his closing argument:

It’s absolutely shocking that a case like this is in court in 2012. It should be viewed as atrocities and intolerable in a civilized society. This case is about the breakdown of a man. He wanted to be treated equally, treated equally in a culture that hadn’t changed since the ’50s.

The jury’s unanimous decision followed a three-week trial at which Turley, an African-American, testified about a series of incidents during his time working at the former ArcelorMittal Steel plant in Lackawanna. Turley, a processor operator in the plant’s pickler department, testified that the incidents from 2005 to 2008 left him a
physical and emotional wreck and forever changed his life.

The jury found ArcelorMittal liable for allowing a “hostile work environment” to exist and for the “intentional infliction of emotional distress.” Production at ArcelorMittal’s plant in Lackawanna ended in 2009, but the company continues to operate dozens of other plants across the country. Ryan J. Mills, a lawyer with Brown & Keely, a law firm located in Buffalo, N.Y., represented Mr. Turley and he did a very good job in this case.

Source: Buffalo News

**University To Pay $650,000 To Settle Discrimination Lawsuit**

Washington State University has agreed to pay $650,000 to settle a racial discrimination lawsuit brought by two former employees of Chinese descent. The settlement will pay $325,000 each to Dr. Ying Li and her husband, Lihzong Yang. It also calls on the school to enact policies to prevent future discrimination. The Plaintiffs in the case, filed in federal court, contended that while working in WSU’s Laboratory for Bioanalysis and Biotechnology, they were subjected to overt discrimination by the lab supervisor based on their race and national origin.

The two employees said they were excluded from speaking Chinese at work and during breaks. After complaining, they said, they were segregated into seating arrangements with other non-white employees and excluded from numerous lab meetings. The lab supervisor accused of discrimination is “in the process of separating from the university,” WSU said in a news release. Dr. Li worked at WSU for nine years and Yang worked there six years. Both resigned when the discriminatory conduct would not stop.

The financial terms of the settlement were agreed to in March, but an investigation and negotiations with the federal Equal Employment Opportunity Commission only concluded last month. It appears that WSU promptly and thoroughly investigated the allegations. As a result, a university-wide anti-discrimination training program has been instituted, which is now mandatory for all employees. The University cooperated with the U.S. Equal Employment Opportunity Commission. It has now fully resolved this matter with both the former employees and with the EEOC.

But the EEOC concluded there was reasonable cause to believe that Dr. Li, Yang, and other Asian employees of the lab, were subjected to an illegal hostile work environment consisting of race and national origin harassment. As part of the resolution, WSU signed an agreement with EEOC allowing that agency to monitor the lab for two years to ensure an environment free of discrimination. It was unfortunate that Dr. Li and Mr. Yang had to enforce their legal rights. But when they did, WSU compensated the Plaintiffs fairly and the University is now working with the federal government to prevent this from happening in the future. Scott Blankenship, a lawyer with The Blankenship law firm, a premier litigation firm in Seattle, who represented the Plaintiffs in the case, had this to say:

*Dr. Li and Mr. Yang came to America from China expecting to live the American dream, not expecting to see bias and prejudice at a progressive institution like WSU.*

Their lawyer did a very good job for the Plaintiffs in this case. To the University’s credit, it appears it did the right thing, but only because of the lawsuit. I hope that those in charge of University affairs learned a lesson. I have to believe that they did.

Source: Associated Press

**No Overtime For Pharmaceutical Sales Representatives**

The U.S. Supreme Court ruled last month that pharmaceutical sales representatives are not subject to the overtime pay specified in the Fair Labor Standards Act. In a 5-4 decision, the court ruled in Christopher v. SmithKline Beecham Corp. That the employers of pharmaceutical representatives aren’t obligated to pay time-and-a-half wages if the sales reps work more than 40 hours a week. The FLSA established minimum wages and maximum work hours for employers and their workers, but specified that these requirements don’t apply to those working “in the capacity of an outside salesman.”

The Court said the sales representatives, Michael Christopher and Frank Buchanan, who were hired at SmithKline Beecham Corp. in 2003, qualified as outside salesmen in their work. Their work, according to the Court, included obtaining commitments from physicians to prescribe prescription medications. The Court’s majority found that the petitioners fit the description in other ways, too:

- they were awarded “incentive pay”—an uncapped amount that was based on their sales in assigned territories—on top of their base salary.

Justice Samuel Alito noted in the majority opinion that the FLSA exempted outside salesmen from overtime pay because they “typically earned salaries well above the minimum wage” and received other benefits. Justice Alito wrote for the majority in the opinion:

*Petitioners—each of whom earned an average of more than $70,000 per year...are hardly the kind of employees that the FLSA was intended to protect. And it would be challenging, to say the least, for pharmaceutical companies to compensate detailers for overtime going forward without significantly changing the nature of that position.*

In the dissenting opinion, Justice Stephen Breyer said pharmaceutical representatives don’t qualify as outside salesmen because they “do not promote their ‘own sales’ but, rather, ‘sales made, or to be made, by someone else.’” That surely makes sense, but apparently it didn’t bother the Justices in the majority.

Source: www.politico.com

**Merrill Lynch Fined For Overcharging Customers**

The Financial Industry Regulatory Authority has fined Merrill Lynch $2.8 million for overcharging customers with fees for failing to provide timely trade confirmations. The financial regulatory agency fined Merrill Lynch, Pierce, Fenner & Smith after it found the broker overcharged nearly 95,000 customer accounts with fees totaling more than $32 million from April 2003 to December 2011. Brad Bennett, the regulator’s chief of enforcement, said in a release:

*Investors must be able to trust that the fees charged by their securities firm are, in fact, correct. When this is not the case, investor confidence is threatened.*

The agency said Merrill Lynch has since returned the overcharges, with interest, to affected customers. FINRA also found that Merrill Lynch failed to send customers trade confirmations for more than 10.6 million trades in over 230,000 customer accounts from July 2006 to November 2010. Merrill Lynch is a division of Bank of America Corp. In a statement, the firm
blamed the problems on operational issues primarily due to improper coding of accounts. It said they have improved their systems to address these issues and that affected clients were reimbursed. On other occasions, Merrill Lynch also failed to deliver certain proxy and voting materials, margin risk disclosure statements, and business continuity plans, according to FINRA.

Source: The Huffington Post

XIII.
PREDA TORY
LENDING

FDIC INVESTIGATING BANK-ORIGINATED PAYDAY LOANS

Anyone who has read previous issues of the Report has probably figured out that I'm not a real big fan of the payday lending industry. In fact, I consider this industry to be much like a cancer on working men and women, and especially on our nation's lower income citizens who receive a pay check. It now appears banks are becoming active in this area of concern. Federal regulators have commenced an investigation into the practice—one that banks don't like to talk about—and that's because in-house payday loans aren't something most folks would expect to find in a real bank. These high-interest, short-term loans—once only offered at storefront corner shops and check cashiers—are now finding a home in a number of banks. Martin Gruenberg, acting chairman of the FDIC, told Americans for Financial Reform, a consumer lobby group, last month:

The FDIC is deeply concerned about these continued reports of banks engaging in payday lending and the expansion of payday lending activities under third-party arrangements.

It's good to see the FDIC getting involved. It appears the big banks are increasingly offering the types of services that typically have not been available at real banks. Instead, storefront lenders or check cashiers were the source of these loans. Interestingly, but not surprisingly, bank-issued payday loans are rarely advertised. I can understand why a bank wouldn't want to be compared to the typical payday lending operation. Then becoming blood-sucking payday lenders is not something real banks would want the public to know about.

The FDIC, according to Gruenberg, will now investigate banks that make payday loans. He expressed concern over the use of outside software used to administer these loans in a May 29 letter to the consumer group. The letter was a response to a February petition from Americans for Financial Reform, signed by more than 200 organizations and individuals, asking the federal regulator to stop banks from offering these services. The petition charged that advance loans by banks, including Wells Fargo, Fifth Third, Regions and US Bank, are structured like payday loans with high interest rates and balloon payments, and undermine the law in areas where payday lending has been restricted or prohibited.

Advance deposit loans at banks allow account holders to receive an early loan on a direct deposit or paycheck. Last year, Regions Bank started offering its Ready Advance product, instant loans of $50 to $500. The bank charges $1 for every $10 borrowed. Repayment is deducted automatically from the next occurring direct deposit. Wells Fargo offers Deposit Advance loans, charging $7.50 for every $100 borrowed, but only in select states.

For some consumers, these products might be more affordable than a bank overdraft, a service that can provide a very short float at a cost of $35 per item. But that doesn't make a payday loan a good thing for a borrower. Consumer advocates have also been critical of overdraft fees, which the Consumer Financial Protection Bureau is investigating, and for good reason.

Fortunately for consumers, storefront payday lending has become an increasingly political issue for cities and states throughout the country. In May, San Jose, Calif., became the largest city in America to limit storefront payday lenders—joining the ranks of dozens of other cities and states that have taken steps to restrict the practice. Kathleen Day, a spokeswoman for the Center for Responsible Lending, believes the FDIC's investigation is significant in the push for stronger consumer protections for the controversial lending practice. It will be very interesting to see what comes from the investigation and what is done with the work-product. We will continue to monitor things in the payday lending industry.

Source: Huffington Post

PREMISES LIABILITY UPDATE

MORE THAN 50,000 TEXAS CITY RESIDENTS SUE BP

More than 50,000 Texas City residents have joined a class-action suit against BP PLC, alleging they got sick in 2010 from emissions released from a refinery that was the scene of a deadly explosion. Texas has also sued BP over the release, which occurred as the British oil giant was battling the catastrophic Gulf of Mexico spill. The Environmental Protection Agency is also investigating. It was reported that residents became ill from the release. But BP maintains the emissions didn't harm anyone. Texas says BP emitted 500,000 pounds of chemicals, including carbon monoxide and benzene, during April and May in 2010. BP recently entered into a $50 million settlement with the EPA over a 2005 explosion that killed 15 people at the Texas City refinery.

Source: Claims Journal

JUDGE APPROVES $3 MILLION SETTLEMENT IN KILLING AT GAS STATION

A $3 million settlement for the parents of a 21-year-old mentally disabled man who was killed during a gas station disturbance in 2010 has received court approval. Frederick Charles Jones Jr., who had schizophrenia, died after a clerk allegedly shot him on September 3, 2010, during a scuffle at a Kansas City convenience store. The 34-year-old clerk, Akbar A. Rana, fled to his home country, India, before prosecutors charged him with voluntary manslaughter and armed criminal action.

Lakhani Commercial Corp. Agreed to contribute $2.8 million to the settlement fund, while two other firms that supplied the station with products and marketing, Sunshine Energy LLC and Shell Oil Co., contributed $200,000 and $50,000 respectively. Stephen G. Dickerson from Blatin, Kan., and Jonathan T. Boulton, a lawyer with Boulton, Marin & Buschert in Kansas City, represented the victim's mother in the case and they did a very good job.

Source: Kansascity.com
LAW SU IT FILE D BY W ID OW OF MAN K I L LE D IN TENT COLLAPSE

We wrote last month about the accident that happened in the April 28 storm at Kilroy's Sports Bar in St. Louis, and stated that lawsuits had been filed. One such lawsuit was filed by the wife of a man killed. She has filed a wrongful death suit against the pub and the company that leased and installed the tent that collapsed on more than 100 patrons. Alfred Goodman, 58, suffered head and neck injuries when heavy wind gusts—estimated at up to 50 mph—lifted a party tent at the bar from its moorings and pushed it and its heavy metal posts against a railroad trestle. Mr. Goodman died from his injuries. Another 16 people were hurt and went to the hospital, and about 100 total were treated on the scene, for a range of injuries.

The Goodman lawsuit alleges that the bar was negligent in failing to properly inspect the tent and by allowing customers underneath it, even as weather forecasts warned of dangerous conditions. It also claims Sun Rental Inc. erred in installing and inspecting the tent. City rules require that tents covering at least 1,000 square feet for public use be strong enough for a 90 mph wind. There will be an issue with both the installation and the inspection of the tent. The tent itself will also be an issue insofar as its capacity to withstand high winds.

This is the third lawsuit stemming from the incident. Janet Martinez, 45, and Kurt Volk, 25, both of St. Louis, had previously filed personal injury lawsuits. Ms. Martinez claimed severe injuries, including a fractured cervical spine. In the Volk lawsuit, it was claimed his left shoulder was fractured and his shoulder joint was separated. These two suits made many of the same claims as the one filed in St. Louis Circuit Court by Shelley Goodman, Alfred Goodman’s wife of 36 years.

The incident prompted City Public Safety Director Eddie Roth to call for changes to safety regulations that would require evacuations of large public tents during warnings of severe weather. Kilroy’s had obtained a city permit for the tent. But city officials noted their inspectors have no way to test a public use tent for structural strength to make sure it can withstand 90 mph winds, an industry standard cited in the local ordinance.

On occasion, when an incident like the tent collapse occurs, resulting in the death of a person, the public reads the names of victims, but really knows very little about them. It might be worthwhile to mention a little more about this victim. Alfred Goodman, a retired ironworker and longtime St. Louis Cardinals fan, had been at the game with his brother. Like many fans, the two brothers went to Kilroy’s after the game. In this case, Alfred Goodman had been looking forward to the June 9th wedding of one of his three daughters. He had grown up on the farm his parents owned outside of Waterloo. He had worked on the McKinley and Jefferson Barracks bridges. He also had worked at the Chrysler plant in Fenton as a spot welder and he then attended an apprentice school for ironworkers. Goodman was a member of Iron Workers Local 392.

It will be interesting to see how these lawsuits develop. We will monitor their progress as they travel through the system. Source: St. Louis Today

U.S. STUDY SAYS DROWNING LEADING CAUSE OF CHILD DEATH

Drowning is a leading cause of accidental death for children under the age of five, according to a new study released recently by the U.S. Consumer Product Safety Commission. The study confirms that pools and spas are particularly hazardous for young children. The new study, which includes statistics from the U.S. Centers for Disease Control and Prevention, reports an annual average of 390 pool or spa-related drownings for children younger than 15 for the years 2007 through 2009. Further, the study estimates an annual average of 5,200 pool or spa-related emergency department-treated submersion injuries for children younger than 15, from 2009 to 2011.

The study—Pool and Spa Submersion Injuries 2011—was released by the Commission in conjunction with the kickoff of the agency’s “Pool Safely: Simple Steps Save Lives” campaign. Commission Chairman Inez Tenenbaum said in a news release that The Commission’s Pool Safely campaign has worked to prevent countless drowning. She says the Commission will continue to work “to save even more lives this year.” The study identifies three groups of children who are particularly at risk:

• Children younger than five represent nearly 75 percent of child drowning fatalities;
• African-American children ages five to 14 die from drowning three times more often than white children; and
• Hispanic children also have a higher risk of drowning.

The Pool Safely campaign is encouraging all parents and caregivers of children, especially African American and Hispanic children, to help them learn to swim and to take water safety seriously. The study revealed that 51 percent of the estimated injuries from submersion for 2009 through 2011, and 73 percent of the fatalities for 2007 through 2009 involving children younger than 15 years old, occurred at a residence. Residential incidents involving children younger than five accounted for 54 percent of the submersion injuries and 85 percent of the fatalities.

The study reported that 58 percent of fatalities involving children under 15 occurred in in-ground pools, and only 10 percent in portable pools. The Commission also released a report addressing the issue of so-called entrapment injuries caused by water circulation systems in pools and spas. According to Circulation/Suction Entrapments 2012, from 1999 to 2011 there were 106 victims of circulation entrapments in the U.S., including 12 fatalities. Only one of the reported fatalities involved an adult.

Source: Lawyers USA Online

XV. WORKPLACE HAZARDS

S O CIAL-MEDIA PO L ICIES CAN INFRI NGE ON W ORKERS’ RIGHTS

As social media such as Facebook and Twitter become more popular, so do policy directives of employers that try to curb employees’ activities. In a recently issued memo, the acting general counsel of the National Labor Relations Board voiced disapproval for several specific policies, arguing that they run afoul of labor law. The National Labor Relations Act guarantees workers certain rights, including the right to engage in concerted activities for mutual aid or protection. So, for example, an employee has the right to converse with other employees concerning the terms and conditions of their employment.

In an attempt to catch a wide array of activities that they perceive to be harmful, companies often draft social-media policies in an extremely broad manner—too broad in the mind of the acting general counsel. Policies admonishing employees to refrain from discussing confidential information, for example, in the opinion of the acting general counsel, are prohibited, as employees could reasonably construe such a policy as prohibiting them from discussing the terms and conditions of their employment.
Other policies considered problematic include instructing employees to ask a superior before posting questionable content, and prohibiting an employee from “friending” coworkers. Employers cannot require employees to gain permission before engaging in protected activities, and preventing “friending” would discourage communications, thus necessarily interfering with protected activity.

The moral of the story for employers is relatively simple: when drafting policies or handing out punishment for social-media activity, employers should pay attention to the National Labor Relations Act and follow its provisions. If you need additional information on this subject, contact Brad Smelser, a lawyer in our firm, at 800-898-2034 or by email at Brad.Smelser@beasley-allen.com.

$181 Million Jury Verdict In Case Involving Illinois Grain Elevator Blast

A federal jury found in favor of three workers against ConAgra Foods Inc. And a subcontractor last month and awarded $181 million in damages. The workers were severely injured in a 2010 explosion at a southern Illinois grain elevator. Omaha, Neb.-based ConAgra, one of the nation’s biggest food companies, says it will defend our actions and practices as this case concludes.

Jurors assessed a total of $100 million in punitive damages that will be divided between the three victims: John Jentz of St. Peter, Minn., Robert Schmidt of Hutchinson, Minn., and Justin Becker of Cedar Rapids, Iowa. Compensatory damages awarded by the jury include $41.5 million to Jentz, roughly $34 million to Becker and $2.9 million to Schmidt. Jentz was awarded an additional $1 million in punitive damages against Westside Salvage Inc., a co-Defendant in this case.

Source: Insurance Journal

OSHA Investigating Two Fatal Blasts At Mississippi Plant

Two workers were killed in an explosion last month at a Pascagoula, Miss., fertilizer factory. The explosion was the second in a specific part of the Mississippi Phosphates Corp. plant. OSHA is investigating both explosions. Jeffrey Simpson, 39, was killed on May 21. The company, based in Madison, Miss., said it is cooperating with all government agencies and gathering information to pinpoint the causes of both explosions. Mississippi Phosphates makes a widely used crop fertilizer known as diammonium phosphate, or DAP. Two other workers, Jeffrey Beck and Donnie Scudder, were injured and remained hospitalized.

In 2009, the Environmental Protection Agency cited the plant for improper safety equipment, improper storage, and chemical leaks on the ground. In February, the EPA and the company reached an agreement on corrective actions that company officials said would cost it about $2.5 million. OSHA says that the four serious violations it had identified in 2009 had been corrected, and that Mississippi Phosphates paid a fine of $5,000 for them.

Source: Insurance Journal

Michigan-Based Firm Cited For Safety And Health Violations At Ohio Plant

Brown-Campbell Co. has been cited for 19 alleged safety and health violations at its facility in Maple Heights, Ohio. Proposed fines total $64,400. OSHA said the citations include four repeat infractions. In December 2011, OSHA inspectors found workers were not provided protective clothing and that several machines lacked guarding at the specialty steel products company. Three repeat safety violations involve failing to provide welders with screens, protective clothing for employees exposed to metal sparks, and establish a lockout/tagout program to control the use of hazardous energy. A repeat health violation was issued for failing to provide employees with respiratory protection training. A repeat violation exists when an employer previously has been cited for the same or a similar violation of a standard, regulation, rule or order at any other facility in federal enforcement states within the last five years. Similar violations were cited in 2011 at the Chicago facility. Additionally, eight serious safety violations include failing to:

- protect workers from falls around open-sided floors;
- have properly trapped overflow piping for dip tanks;
- have electrically bonded portable containers when transferring liquid to the dip tanks;
- train employees on the use of portable fire extinguishers; and
- have a properly rated electrical disconnect box.

Violations for failing to adequately guard a shear, metal grating saw and bench grinder were also issued. Three serious health violations were issued for failing to institute a hearing conservation program and to label dip tanks with the name of hazardous chemicals and with the appropriate hazard warnings.

A definition of terms at this juncture may be helpful for our readers. A serious violation occurs when there is substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known. Brown-Campbell was also cited for three other-than-serious safety violations for failing to identify the load limit of an overhead storage area, adequately separate oxygen cylinders from combustible materials and close an unused opening in an electrical box. One other-than-serious health violation was cited for failing to provide respiratory protection training to workers using dust masks.

An other-than-serious violation is one that has a direct relationship to job safety and health, but probably would not cause death or serious physical harm. Brown-Campbell is based in Detroit and has additional warehouses in Cincinnati, Cleveland, Dallas, Memphis, Minneapolis and South Carolina. As is generally the case, the company has 15 business days from receipt of its current citations and penalties to comply, request an informal conference with OSHA’s area director or contest the findings before the independent Occupational Safety and Health Review Commission.

Source: Insurance Journal

$122,000 In Fines For Safety Violations At Arkansas Chemical Plant

Serious safety violations at a chemical plant in Arkansas have resulted in a proposed $122,000 in fines for an Indiana company. OSHA has cited West Lafayette, Ind.-based Great Lakes Chemical Corp. with 18 serious safety violations at the company’s El Dorado, Ark., facility for exposing workers to the unexpected release of bromine. OSHA’s Little Rock Area Office initiated an inspection in December under the agency’s Process Safety Management Covered Chemical Facilities National Emphasis Program, which is designed to reduce or eliminate workplace hazards associated with the catastrophic release of highly hazardous chemicals.

Process safety management standard violations include the company’s failing to
OSHA Cites AZZ Galvanizing Services in Mississippi

AZZ, Inc., doing business as AZZ Galvanizing Services in Richland, Miss., has been cited by OSHA for 22 safety and health violations following a December inspection after the agency received a complaint alleging hazards. The 17 serious safety and health violations cited include failing to:

- conduct inspections of lockout/tagout procedures;
- protect workers from trip and fall hazards; and
- protect employees from live electrical parts and hot surfaces.

Additional violations involve unapproved electrical cords in wet locations. Proposed penalties total $78,500. AZZ Inc., based in Fort Worth, Texas, offers corrosion protective services.

Source: Claims Journal

New York Plant Fined $233,000 By OSHA

Federal workplace safety officials levied fines against a hair care manufacturer of $233,000 for hazards at its upstate New York plant. The Occupational Safety and Health Administration says inspectors found 44 serious violations at the Zotos International plant in Geneva. The violations included unguarded moving machine parts, electrical hazards, a blocked exit door, unqualified employees working on live electrical parts, failing to develop safety plans, and inadequate training of employees. OSHA workers were overexposed to certain chemicals and there were inadequate preparations to prevent the release of a flammable liquid used in the production process. The company had 15 days to fix the problems or contest the findings. According to a Zotos spokesman, many problems were fixed immediately and the company is working with OSHA to resolve the others.

Source: Insurance Journal

$58,000 in Fines for Safety Hazards at Texas Manufacturing Plant

A manufacturing facility in Texas has been fined $58,000 by federal regulators for exposing workers to safety hazards. OSHA has cited Progressive Inc., located in Arlington, with 15 safety violations for exposing workers to machine guarding and electrical hazards. Thirteen serious violations involve failing to mark emergency exits; keep fire extinguishers mounted with unobstructed access; store compressed gas cylinders properly; guard belts and pulleys on machinery; properly adjust tongue and rest guards on grinders; and use permanent wiring instead of extension cords.

Two other-than-serious violations include failing to provide a load rating on an overhead storage location and to close unused openings on electrical boxes. Progressive Inc. is a division of Heroux-Devtek, which is headquartered in Longueuil, Québec, Canada. Progressive employs about 150 workers who develop, manufacture and repair commercial and military aerospace products.

Source: Insurance Journal

OSHA Orders Norfolk Southern To Pay Whistleblowers

Federal authorities have ordered Virginia’s Norfolk Southern Railway Co. To pay three employees more than $800,000. The workers were fired for reporting injuries on the job. OSHA also ordered the company to expunge the disciplinary records of the three whistleblowers, post workplace notices regarding whistleblower protection rights, and provide training about those rights. The firings by the company included:

- A worker in Greenville, S.C., was fired in August 2009 after reporting he was hurt when hit by the company’s gang truck.
- A Louisville, Ky., engineer was fired in March 2010 after reporting he tripped and fell in a locomotive restroom.
- In July 2010, a railroad conductor in Harrisburg, Pa., was terminated after reporting he blacked out and fell and hurt his head.

OSHA has not identified the workers and the company can appeal the findings. No employee should be fired for reporting an injury to his or her employer. That sort of thing can’t be tolerated.

Source: Claims Journal

XVI. TRANSPORTATION

Revised Hour of Service Rule—Stirring Some Controversy

In December of 2011, the Federal Motor Carrier Safety Administration published revised hour of service rules that apply to motor carriers and commercial motor vehicle drivers. The new rules became effective in February of 2012, although full compliance is not required until July 1, 2013. Since the enactment of the new rules, there have been disagreements between proponents of the new rule and those who are in opposition to the rule.

In February of 2012, a lawsuit was filed by two truck drivers, Advocates for Highway and Auto Safety, Public Citizen, and the Truck Safety Coalition. The suit seeks judicial review of the hour of service regulations, claiming the final rule does not reduce the 11-hour limit on consecutive driving to ten hours despite the Federal Motor Carrier Safety Administration’s acknowledgment that the ten hour rule is the preferred option.

Also in February of 2012, the American Trucking Association filed a petition in the Federal District Court of Appeals in the District of Columbia challenging the new rule. Bill Graves, the American Trucking Association president, observed:

The rules that have been in place since 2004 have contributed to unprecedented improvements in highway safety.

Graves states that the cost of the new rule outweighs the benefits noting that speed is a greater highway concern than fatigue. While speed is a problem, driver fatigue is a major safety issue. The Director of the Federal Motor Safety Administration calls the Hour of Service Rule change, “the culmination of the most extensive and transparent public outreach effort in our
agency’s history.” The revised rules are set out below:

- It limits the use of the “34 hour restart,” to once a week. This purpose of this change is to limit work to no more than 70 hours a week on average. Working long daily and weekly hours on a continuing basis is associated with chronic fatigue, a high risk of crashes, and a number of serious chronic health conditions in drivers.
- Truck drivers cannot work after eight hours without first taking a break of at least 30 minutes. Drivers can take the 30 minute break whenever they need rest during the eight hour window.
- The new rules retain the current 11 hour daily driving limit. However, the Federal Motor Carrier Safety Administration will continue to conduct data analysis and research and to further examine any risk associated with the 11 hours of driving time.
- The rule that requires truck drivers to maximize their weekly work hours to take at least two nights rest when their 24 hour body clock demands sleep the most. That is, according to Federal Motor Carrier Safety Administration research, from 1 am to 5 am. This rest required is part of the rule’s “34 hour restart” provision that allows drivers to restart the clock on their work week by taking at least 34 consecutive hours off duty.
- On duty time does not include any time resting in a parked vehicle. In a moving vehicle, on duty time does not include up to two hours in the passenger seat immediately before or after eight consecutive hours in the sleeper berth. This provision provides team drivers an opportunity to “keep the truck moving” by having driver “A” drive for ten hours while driver “B” obtains a full daily rest period without having to stay in the sleeper berth for ten straight hours.
- Trucking companies that allow drivers to exceed the 11 hour driving limit by three or more hours could be fined $11,000 per offense.
- Drivers who violate the hour of service rule could face a civil penalty of up to $2,750 for each offense.

The Court has consolidated the two lawsuits mentioned above and they are still pending. To date there has been no resolution of the issue. We will keep you advised on this subject. If you need additional information on the subject, contact Mike Crow at 800-898-2034 or by Mike.Crow@beasleyallen.com.

Sources: Federal Motor Carrier Safety Administration website and truckinginfo.com

APPLEBEE’S SETTLES ALCOHOL-RELATED LAWSUIT

Applebee’s has settled a lawsuit brought by the parents of a young Texas boy who suffered brain injuries when a drunk restaurant patron crashed into their car. The parents of Abdallah Khader, now six, sought $10 million from Kansas City, Missouri-based Applebee’s in their civil lawsuit. But since the amount of the settlement is confidential, the amount to be paid can’t be disclosed. The lawsuit accused workers at an Applebee’s Restaurant, located in Mansfield, Texas, of serving a man 25 drinks in less than two hours, causing him to drive drunk and crash into the Khaders’ car. The investigation by the family’s lawyers was largely responsible for the settlement.

The investigation located the alleged drunken driver’s receipts from Applebee’s, which showed he paid for nearly two dozen drinks in a two-hour span. Police determined the driver’s blood-alcohol level was more than three times Texas’ legal limit, which is 0.08%. The Khaders sued Applebee’s and the drunken driver, a repeat DUI offender who also faces criminal charges related to the crash, in the lawsuit. The driver’s criminal trial is pending. Abdallah Khader suffered damage to 80% of his brain in the crash. His family incurred massive medical expenses. The child will never be able to stand, sit up, walk or even speak. Their lawsuit asked for $10 million to cover round-the-clock medical care along with lost future earnings, mental anguish, and pain and suffering—all typical damages in a personal-injury case of this sort. You can only imagine what a life-care plan for the youngster would look like, considering his age and condition, but you can rest assured that the cost would be very high.

Texas has a Dram Shop Act, which like those laws in many other states, allows businesses to be sued for damages arising from serving too much alcohol to a customer who later causes a motor vehicle crash. Those who serve alcohol have a legal duty to do so responsibly and also to do so very carefully. The central issue is whether the customer was served alcohol after showing visible signs of intoxication. Of course, number of drinks served is always important. Though the amount of the settlement is confidential, the Khaders will now be able to pay for a special van and a nurse to take care of their son’s ongoing needs. Charles G. Aldous, a Dallas lawyer with the Aldous law firm, represented the family in this lawsuit and she did a very good job.

Source: Reuters

XVII. ARBITRATION UPDATE

HOPE FOR CONSUMERS SEEKING TO AVOID ARBITRATION

A recent decision in a case pending in a Mobile County Circuit Court resulted in a favorable development for consumers seeking to avoid arbitration. This was a case involving the purchase of an automobile. The decision by Circuit Judge Sarah Stewart in the case, Lucille Hope v. Dean McCrery Imports, was based on the fact that the dealer’s boilerplate language in sales documents did not use the same business name on the purchase order, the separate arbitration clause, and the bill of sale. The bill of sale referred to Victoria Enterprises as the seller, but Victoria Enterprises was not named in the arbitration agreement. The elderly Plaintiff in this case also presented a triable issue of fraud in the factum.

The trial court applied Sec. 3 of the Federal Arbitration Act, which allows a timely request for trial by jury to determine whether there was a meeting of the minds, and whether fraud in the factum voided the agreement to arbitrate. Recent U.S. Supreme Court precedent was persuasive that an arbitration clause is not binding on a nonparty to the agreement. The High Court ruled in EEOC v. Waffle House, 534 U.S. 279 (2002), that this is an issue governed by state law. Alabama law clearly limits the application of arbitration to “the signing parties.” See Jim Burke Automotive v. McGrue, 826 So. 2d 122 (2002).

The Plaintiffs were represented by Mobile lawyers Greg McAtee and Greg Buffalo. The case is scheduled for a jury trial in August. The jury is to first determine which of the Defendants in the case can take advantage of the arbitration clause. I appreciate very much these lawyers sending this information to be included in this case. They did a very good job in keeping a path toward justice open for and available to their client.
U.S. DRUG RECALLS COMMON, BUT NOT WELL-PUBLICIZED

The U.S. Food and Drug Administration recalls potentially harmful drugs about once every month, but the agency could do a better job of letting doctors and patients know about the recalls. This is according to a recently-released study published in the Archives of Internal Medicine. Over an eight-year span, researchers found that the FDA failed to send notifications for one in five of the most serious category of recalls through its two electronic systems used to alert doctors and the public.

The so-called Class I recalls, according to the FDA, are issued for drugs that, if taken, have the potential to cause “serious adverse health consequences or death.” An example is the 2008 recall of contaminated blood thinner heparin, which had caused serious reactions and some deaths in dialysis patients and was reported by the FDA. Dr. Joshua Gagne, from Brigham and Women’s Hospital in Boston, had this to say:

A good system would indicate all of the Class I recalls, and it wouldn’t necessarily communicate recalls the FDA deems less important, such as Class II and Class III.

Between 2004 and 2011, Dr. Gagne and his fellow researchers counted more than 1,700 drug recalls listed in the FDA’s enforcement reports. Of those, 91 were serious Class I recalls. During that time, the FDA issued about 2,900 announcements through its two electronic systems used to alert doctors and the public.

MedWatch, another system used by the FDA to report drug recall information, sent alerts for only 55 of the 91 recalled drugs and products. But the system sent alerts for only 55 of the 91 Class I recalls.

The FDA favored a tracking system that would scan medicine bottles individually, but has met with resistance from manufacturers, distributors and pharmacies over how to cover the cost of such a program. In any case, Dr. Gagne believes the FDA needs “a more specific system that only communicates all of the Class I information,” rather than the current system that spans recalls on everything from medical devices to food and veterinary drugs. I believe most American citizens would believe recall information should be communicated to both the medical community and the consuming public.

FDA WARNS ABOUT BENZOCAINE IN BABY PAIN GELS

It’s quite common for parents, especially mothers, to use medications to help out when babies start to teethe. When the pain is too much for a mother to bear, her inclination is to reach for something to soothe those sore gums and stop the pain. A new consumer update released by the Food and Drug Administration says babies and benzoic acid—an ingredient found in many over-the-counter pain gels and liquids—don’t mix. Benzoic acid is a local anesthetic found in products like Ambesol, Orajel & Baby Orajel, Orabase and Hurricane. According to the FDA, using benzoic acid products to stop mouth and gum pain can cause a rare and sometimes fatal condition called methemoglobinemia.

Methemoglobinemia is a blood disorder where the oxygen that’s carried through the blood to the tissue drops to dangerously low levels. It can cause death in severe cases. The FDA first sounded the alarm on these products in 2006. Since then there have been 29 reports of benzoic acid gel-related cases of methemoglobinemia. According to Kellie Taylor, an FDA pharmacist, 19 of those cases were in children, with 15 of the 19 involving children under the age of two.

The FDA issued another warning in 2011. Some of the symptoms to look for include pale, gray, or blue-colored skin, lips and fingernail beds, shortness of breath, headache, light-headedness, and rapid heart rate. Another FDA Pharmacist, Mary Ghods, had this to say about benzoic acid use:

Symptoms can occur within minutes to hours after benzoic acid use. They can occur after using the drug for the first time, as well as after several uses.

If a child experiences any of these symptoms after using these products, Ms. Ghods recommends seeking medical help immediately. According to the American Academy of Pediatrics, giving a child a chilled teething ring or gently massaging their gums with a finger are alternative ways to treat teething discomfort.

But it should be noted that it’s not just children who are affected. Adults who smoke, those with heart disease or respiratory problems like asthma, bronchitis or emphysema, are at increased risk of complications of methemoglobinemia. The FDA advises that consumers who have these products in their home must store them out of the reach of children. The agency also says to use products with benzocaine only when necessary—and then no more than four times a day. That seems to be good advice.

Source: thechart.blogs.com

SPRAY-ON TANS MAY NOT BE SAFE

According to a panel of medical experts, the active chemical used in spray tans, dihydroxyacetone (DHA), has the potential to cause genetic alterations and DNA damage. Ten of the most-current publicly available scientific studies on DHA were received by the panel. These studies included a federal report ABC News obtained through the Freedom of Information Act. Six medical experts in areas ranging across the fields of dermatology, toxicology and pulmonary medicine expressed their “concerns” after reviewing the literature and reports about DHA, the main chemical in the popular “spray-on” tan. The spray-on tan has conventionally been referred to as the “safe” alternative to tanning under ultraviolet lights.
The FDA originally approved DHA for “external” use back in 1977, when it was popular in tanning lotions. Those lotions, previously famous for turning skin orange, were never as popular as current products that produce better tans. In recent years, the use of DHA has exploded in the newer “spray” application of the product, which provides a more even tan for consumers. I’m reasonably sure the FDA never envisioned the chemical’s use in spray tan back in the 1970s. It should be noted that the use of DHA in ‘tanning’ booths as an all-over spray has not been approved by the FDA. That’s because safety data to support this use has not been submitted to the agency for review and evaluation.

The FDA warns consumers who spray tan that they are “not protected from the unapproved use of this color additive” if they are inhaling the mist or allowing it to get inside their body. The FDA recommends that “consumers should request measures to protect their eyes and mucous membranes and prevent inhalation” if they use the spray tan products.

ABC News found some tanning salons offering consumers advice that directly conflicts with what the FDA has recommended. ABC News also discovered many tanning salons across the nation wrongly telling consumers on their websites that DHA is so safe that it is “food grade,” and that it’s “approved for ingestion by the FDA.” They obviously are confused on what they are dealing with.

The FDA report received by ABC News contains a great deal of useful information. Agency scientists wrote in 1999 that, “New information regarding the genotoxicity and carcinogenicity of DHA has become available since the listing of DHA as a color additive.” In the report, agency scientists cited the “new information” discovered by non-FDA researchers who had tested DHA in laboratory settings and found it had the potential for what they called a “mutagenic” effect on genes.

The concerns coming from the panel of experts include whether there is a potential for cancer and other health effects such as birth defects. There appears to be enough concern to promote the FDA to require additional testing. A full review of the product’s safety is warranted that takes into account all potential health implications. The explosion in DHA’s use in spray tanning means many more people will be exposed to it in a manner that has never been subject to an FDA safety review.

The FDA says that no U.S. manufacturer has ever attempted to go through a safety review of DHA in spray tans. The agency told ABC News in an email that it does not step in to stop what it calls on its website “the unapproved use” of DHA because, the “FDA does not regulate the operation of commercial enterprises such as indoor or sunless tanning salons. It says this would be a function for OSHA or state/local public health regulators, much as for hair or nail salons. FDA has oversight responsibility for the safety of the cosmetic products and the devices [UVA light sources and beds] in the indoor tanning salons.” So it appears that some changes may be needed to give the FDA full authority to regulate this industry. It was reported that no state or local entity in the country regulates spray tans. ABC News did a very good job of investigative reporting in this matter. Because it contains much more good information, I suggest you get the entire story from ABC News.

Source: ABC News

XIX. ENVIRONMENTAL CONCERNS

MANUFACTURING PLANT EMITS CANCER CAUSING POLLUTANTS

It was reported last month that life-threatening toxins are leaking from a manufacturing facility in Lowndes County, Ala. The SABIC plastics plant on U.S. Highway 80 (the old GE Plastics plant) will have to pay $1 million dollars for failing to comply with federal environmental regulations. The chemicals coming from the plant have nearby residents concerned and apparently for good reason.

According to a report released by the Environmental Protection Agency, the SABIC plant recently violated 14 Clean Air Act requirements. Some of the violations include:

• Failure to monitor and repair leaking equipment
• Failure to comply with chemical plant regulations
• Failure to properly monitor potential leaks
• Failure to fix leaks in a timely fashion

The EPA’s report says the leaking pollutants can cause serious health effects such as cancer, reproductive issues and birth defects. Thus far, there have been no reports of illness. But there could be problems down the road. It could take five, ten or more years before the problems pop up.

SABIC executives released a statement:

I certainly hope it’s not going to be a problem because like Sam said, we have to live here. Protecting the environment and preserving our natural resources are important to the communities in which we operate and important to SABIC. 100% compliance is our goal with all applicable state and federal regulations and, where possible, we strive to go beyond regulatory compliance to achieve safety and environmental excellence for our employees and community. We continually strive to minimize our impact on the environment and implement projects to incorporate environmentally-friendly programs. Several of the manufacturing sites in the US were the subject of routine compliance audits initiated by the EPA in 2005. The EPA inspections broadly evaluated environmental compliance status, which was found to be very good in most areas. However, they revealed concerns in air compliance programs at two of the sites that we acquired in 2007. The company immediately began to address the concerns following the inspections and, in addition, implemented further programs to ensure full compliance going forward.

The EPA report says when SABIC complies with the regulations it will reduce hazardous emissions by 144 tons per year. We will continue to monitor this situation. Hopefully, it’s not as bad as it appears to be without more study and evaluation.

Source: WSFA News

ALABAMA POWER’S COAL-FIRED PLANT BLAMED FOR PREMATURE DEATHS

Pollution from Alabama Power’s coal-fired power plant in Greene County, Ala., contributes to between 49 and 100 premature deaths a year, according to a new report from the Environmental Integrity Project. The cost to society from those deaths is up to three times higher than the value of the electricity produced by the plant, according to EIP calculations. EIP worked with Boston University School of Public Health professor Dr. Jonathan Levy to produce the report, which used computer models similar to those used by the Environmental Protection Agency to predict the dispersion and the health impact of pollutants. When weighing the
Illinois Judge Gives Preliminary Approval To Herbicide Settlement

A federal judge in southern Illinois has given preliminary approval to a $105 million settlement between Syngenta and community water systems in six states over one of the chemical maker's popular agricultural herbicides. U.S. District Judge J. Phil Gilbert ruled that the settlement appeared to be “a good compromised result for the parties.” The agreement would settle a nearly eight-year-old lawsuit over weed-killer atrazine and help reimburse nearly 2,000 community water systems that have had to filter the chemical from their drinking water. Those water systems serve more than 52 million Americans in Illinois, Iowa, Indiana, Kansas, Missouri and Ohio.

Source: Claims Journal

NHTSA Expands Investigation Of Jeep SUVs

According to Clarence Ditlow, executive director for the Center for Auto Safety, it’s just a matter of time before Chrysler is forced to recall as many as 5 million Jeep SUVs built from 1993 to 2007. I was not surprised to learn that the automaker disagrees. Based on data from more than 21,000 rear-impact collisions involving Jeep Grand Cherokees and other models from those years, the automaker says the risk of gas tanks catching fire is no greater than in other SUVs. “The data demonstrates very clearly that the vehicles are no more likely to experience these rear-impact fire crashes than the peer vehicles,” according to David Dillon, Chrysler’s senior manager of regulatory affairs. Ditlow contends there is a risk because the fuel tank is located near the back of the vehicles. The fuel tanks of Jeep Grand Cherokees built after 2004 are located in front of the rear axle. Ditlow, whose Center for Auto Safety does extremely important work, had this to say:

"Just looking at the design, as a safety advocate, it doesn’t take a rocket scientist to realize an unshielded tank, hanging below the rear bumper, is unsafe."

NHTSA said last month it’s expanding its preliminary investigation into an engineering analysis, and will also look at Jeep Cherokees from the 1993 through 2001 model years, and Jeep Libertys from 2002 through 2007. An engineering analysis is a necessary step before the agency decides whether to require a recall. Ditlow and his group have asked NHTSA and Chrysler to recall 1993-2004 model-year Grand Cherokees since October 2009. NHTSA says on its website:

NHTSA’s assessment of the data collected during preliminary evaluation indicates that rear-impact-related tank failures and vehicle fires are more prevalent in the Jeep Grand Cherokee than in the non-Jeep peer vehicles.

Chrysler said that it is cooperating with the investigation and said it expects NHTSA will decide that a recall is unnecessary. In total, there have been more than 180 fatal crashes involving Jeep Grand Cherokees for the model years in question, Dillon said, but he claims not all of those crashes involved rear-end collisions. But Dillon did say Chrysler had found 25 fatal crashes for the Jeep Grand Cherokee that involved fires and rear-end collisions. Chrysler’s vehicles also met NHTSA’s crash standards, Dillon said, and he said they “feel confident these vehicles will be exonerated.”

If Chrysler is wrong, the company faces the prospect of dealing with a massive recall. As part of its 2009 restructuring, Chrysler assumed responsibility for safety recalls for vehicles it made before filing for Chapter 11 bankruptcy protection. However, the company is shielded from any lawsuits for crashes that occurred before the bankruptcy proceedings. That’s bad news for any person who owns a vehicle from Chrysler that’s involved in a highway crash occurred that before the bankruptcy.

Sean Kane, president of Safety Research and Strategies, is concerned that NHTSA’s decision to expand the number of vehicles could lead to a dismissal of the case without a recall. Kane, who is well respected in the safety field, observed:

"Frequently that is done as a tactic to try and minimize the numbers. If they spread out the accidents across more vehicles ... Then you have low number of incidents and that is a reason that the agency can use to not order a recall."
It will be interesting to see what developments with the FDA’s investigation. We will monitor this matter and keep our readers advised of future developments.

Source: Detroit Free Press

**Government Issues Motorcycle Helmet Safety Warning**

NHTSA is urging motorcyclists not to wear the 5XS brand, SA-08 model motorcycle helmet because it fails to meet federal head protection requirements. Officials said as many as 14,000 of the helmets were imported and sold by Tank Sports Inc. of California, which declared bankruptcy without completing a government-requested recall. NHTSA said that under federal testing, the helmets failed to meet penetration protection requirements. Both the outer shell and the inner liner in three out of four helmets were penetrated in NHTSA safety tests. The agency says it isn’t aware of any deaths or injuries involving the helmets. But, the agency advises motorcyclists to discard the helmets immediately and not to use them while riding.

Source: Claims Journal

**Child Seat Requirements Change With 2014 Rule**

Parents of many children ages three and up who should still be in child-safety seats will be warned not to use a federally-required child-seat attachment system when a new rule takes effect in early 2014. The rule requires child-seat makers to tell parents not to use the lower anchors required in cars since 2001 if children and their car seats have a combined weight of 65 pounds. That’s because the strength of the anchors cannot be guaranteed. Child seats typically weigh 15 to 33 pounds. So the new rule means some children as light as 32 pounds might not be able to use a system designed to make child seats easier to install and, therefore, safer. This child-seat system is known as LATCH (Lower Anchors and Tethers for Children).

Joseph Colella, one of five child-safety advocates who petitioned the National Highway Traffic Safety Administration to change the rule, says the anchor requirements are based on old child seats and outdated recommendations on how long kids should be in child seats. The Alliance of Automobile Manufacturers sought the change in the rule because limits weren’t factoring in how much seats weigh. Colella says carmakers aren’t able to guarantee the safety of heavier kids given the strength of LATCH anchors. The advocates believe the minimum strength requirements should be increased.

It was reported by USA Today that LATCH use and awareness are already low. A study last summer by the advocacy group Safe Kids Worldwide found child-seat checkpoint technicians were using the lower anchors to attach seats only about 30% of the time. And Safe Kids found just 30% of parents use the top tether straps, which prevent head injuries in crashes. Stephanie Tombrello of advocacy group SafetyBeltSafe, one of the petitioners, says that: “Disconnecting tethers when their use is needed ... could lead to a tragedy.” Colella's three-year-old niece died in a 1994 crash in a child seat that didn’t fit the car. That prompted him to push to make child seats more compatible with cars, an effort that resulted in the federal panel that recommended LATCH. He and all of the other safety-advocates should be commended for their work in this area of concern.

NHTSA believes LATCH is easier than a safety belt to tightly secure a child seat. Transportation Department spokeswoman Lynda Tran had this to say:

While LATCH makes it easier to properly install car seats in vehicles, it’s important for parents and caregivers to know that securing a child seat with a seat belt is equally as safe — and that they have the flexibility to use either system.

The American Academy of Pediatrics recommends children use car seats with harnesses through age eight. AAP’s recommendation and supporting research led child-seat makers to design more seats for children 65 pounds and over.

Source: USA Today

**AVIS, ENTERPRISE AND DOLLAR REFUSE TO SIGN PLEDGE TO STOP RENTING RECALLED CARS**

Sen. Barbara Boxer (D-California) joined the mother of two daughters who died in a rental car crash, last month to ask why three of the nation’s four major rental car companies refused to sign a pledge promising not to rent or sell cars under safety recall until those cars are fixed. Sen. Boxer said that only Hertz had agreed to the pledge, but that Enterprise, Avis and Dollar Thrifty had refused to sign. The Senator stated:

I want to say to America’s families: You demand that all these companies sign this simple pledge... Tell your families that Hertz is the only one that signed this pledge.

Cally Houck, whose daughters Jacqui and Raechel died in the fiery crash of an Enterprise rental car, said at the news conference that the law Sen. Boxer and Sen. Chuck Schumer (D.-New York) are proposing, which would ban the rental of recalled cars, is necessary because “we cannot depend on the industry to do the right thing.” She stated further: “You don’t rent or sell a car under safety recall. That’s all Sen. Boxer and Sen. Schumer are asking for.”

Representatives of Enterprise, Avis and Dollar Thrifty all responded to Sen. Boxer’s news conference by saying their companies address safety recalls in a timely fashion. All three companies claim they support federal legislation to ensure rental car safety. If they really do support it, the legislation should pass with little difficulty. I hope that will happen.

Cally Houck’s daughters, Raechel and Jacqui, died in 2004 when the Chrysler PT Cruiser they rented from Enterprise apparently began leaking steering fluid and caught fire before crashing into a truck. As we wrote in an early Report the car had been under safety recall for the potential fire hazard, but had still been rented to the sisters. The Houck family sued Enterprise, and after a lengthy legal fight, the company admitted fault and was required to pay $15 million in damages to the family.

After a report by ABC News, NHTSA launched an investigation to see how quickly rental car companies repair vehicles that have been recalled. The nation’s rental car companies together own more than 1.5 million vehicles, with hundreds of thousands subject to recall in any given year. Hertz, Avis Budget, Enterprise and Dollar Thrifty account collectively for more than 90 percent of the U.S. rental market.

Cally Houck should be commended for her fight to make rental cars safe for folks who rent these vehicles. She fought a tough fight to right the wrong that cost her two daughters their lives. Thank goodness this woman didn’t quit, but continued her fight to make all of the rental companies do the right thing.

Source: ABC News

**Settlement Approved In Ferrellgas Consumer Fraud Class Action**

United States District Judge Gary A. Fenner has granted preliminary approval to a settlement in a consumer fraud class-action lawsuit against Ferrellgas, which
sells propane under the Blue Rhino label, alleging that the company reduced the amount of propane in tanks in 2008 when energy prices rose and failed to inform customers. Propane cylinders are used for a wide variety of applications including gas grills, patio heaters, outdoor fireplaces, mosquito traps and more.

When energy prices soared in 2008, the price of propane gas increased. It was alleged in the lawsuit that Ferrellgas reduced the amount of propane in the tanks from 17 pounds to 15 pounds, in lieu of raising the price for a full tank. The complaint alleged further that Ferrellgas kept consumers in the dark about the switch, leading them to believe they were purchasing a “full” cylinder despite the reduced product volume.

On October 13, 2011, Judge Fenner granted preliminary approval to a settlement in the case for individuals who purchased a Blue Rhino propane gas cylinder between June 15, 2005, and October 6, 2011. The United States petroleum industry already suffers from a reputation problem and this scheme was another step in the wrong direction. Americans are struggling more than ever to fuel our vehicles and pay our utility bills, so there’s absolutely no room for dishonest dealings from other suppliers of petroleum goods.

Source: www.Lawyersandsettlements.com

CLASS ACTION SUIT FILED OVER COCHLEAR HEARING IMPLANTS

A class action has been filed alleging that cracks in the hermetic seal of cochlear hearing implants allow bodily fluid to seep into, causing the devices to fail. The devices are surgically implanted in a patient’s head and, together with an external behind-the-ear device, send electrical energy to a patient’s hearing nerves to produce sound. The Cochlear CI500 series implants were pulled from the market in a global recall in September of last year.

Scott A. Morgan, the Chicago-based lawyer who filed the class action, believes that approximately 25,000 devices have been implanted in patients, but he declined to estimate how big the class will be. The device is made by Australian company Cochlear Limited. The named Plaintiff in the suit, filed on April 18 in Illinois federal court, is Wyle Wade, father of a two-year-old daughter, K.W., who had a cochlear device implanted behind each ear at an out-of-pocket cost of $75,000.

The suit alleges strict product liability, negligence and breach of warranty. It seeks damages for the cost of the implants, then for removing them and replacing them with older models that did not have cracks, as well as punitive damages. The suit also asks for medical monitoring for Plaintiffs who have been implanted with the recalled devices. The Plaintiffs lived in India when the devices were implanted and service of the complaint is being made through The Hague.

An individual lawsuit against a different manufacturer, Advanced Bionics, alleges similar problems with its implant, the HiRes 90k implant. That suit, brought by the parents of Breanna Sadler, was filed in federal court in Kentucky. It alleges the child had to undergo risky open-head surgery to remove a defective implant that took in moisture. The action for product liability, negligence and fraud seeks $3 million in compensatory damages and $5 million in punitive.

Source: www.LawyersUSAonline.com

EGG PRODUCER KNEW OF SALMONELLA MONTHS BEFORE MASSIVE RECALL

It was reported last month that the egg producer whose eggs were linked to a nationwide salmonella outbreak that sickened nearly 2,000 people was told four months before the outbreak that hens at its farms were contaminated. A total of 550 million eggs were recalled. Documents that were obtained in a lawsuit by NuCal Foods, a California food cooperative, reveal that as of May 2010, Iowa State University’s Veterinary Diagnostics Lab had told the Iowa egg companies owned by Jack DeCoster that salmonella had been found in dead chickens and manure at three DeCoster plants. In addition to the civil suit, a federal grand jury in the Northern District of Iowa is investigating whether top DeCoster executives, including Jack DeCoster, continued to sell their products despite knowing they were unsafe. DeCoster, through his lawyers, has previously denied that he knowingly sold contaminated eggs.

The documents include reports sent from the Iowa State lab to a DeCoster manager on May 1 and May 11, in which an ISU scientist says salmonella had been found in three DeCoster plants and that 20 carcasses tested positive for salmonella. April emails showed 43 percent of DeCoster’s hen houses were testing positive for salmonella. A May 1 email, in which the ISU scientist tells a colleague that salmonella is “almost certainly” present in DeCoster eggs, was also obtained. The FDA contacted DeCoster’s Wright County Egg company on August 9, 2010 with notification that illnesses in three states had been linked to its eggs. Wright County initiated a recall within days, followed by a second DeCoster company, Hillandale Farms, a week later. A total of 550 million eggs were recalled from stores and from middlemen like NuCal.

Eggs from the DeCoster farms were ultimately linked by authorities to 1,939 confirmed cases of Salmonella Enteriditis, though the FDA estimates that tens of thousands of people were sickened. No deaths were reported as part of the salmonella outbreak and hopefully none occurred. According to a rule that went into effect in July 2010, egg producers who detect salmonella in their facilities must do further testing and destroy the salmonella or else make sure the eggs are not used for food. The NuCal lawsuit alleges that DeCoster continued to sell eggs after it was aware of the presence of salmonella, and seeks compensation for the eggs the cooperative had purchased.

Dr. Patrick Halbur, head of the ISU lab, said that the lab was not obligated to report the presence of salmonella to the government. He made this observation:

"We report the results to the submitting veterinarian unless it is what we call a reportable disease. Salmonella has been around for a long long time and is not on that list."

Dr. Halbur said the lab has no control over what the client does with the results of a salmonella test and that what the lab does “is make ourselves available to assist them with solving the problem.” Dr. David Acheson, former food safety chief at the FDA and now a health care consultant with Leavitt Partners, had this to say:

"The lab did the right thing. They passed [the information] on to the
ELEVEN E. COLI CASES REPORTED IN FOUR SOUTHERN STATES

Georgia officials, just beginning their investigation of an E. coli outbreak in early June, were said to have been racing against the clock to solve the food poisonings before the epidemic could spread. There were 11 cases at the time across four southern states. The death of an infant in New Orleans was linked to at least ten other cases of E. coli illness in Georgia, Florida, Louisiana and Alabama. The largest cluster of five sickened people, ranging in age from 18 to 52, is centered in Atlanta, home to the Centers for Disease Control and Prevention. J. Patrick O’Neal, who is with the Georgia Department of Health, said:

We know that these cases are all linked, and that would suggest that there was a common source somewhere along the way. We just don’t know where.

The infant, Maean Elizabeth Graffagnini, was 21 months old when she died at a hospital in New Orleans. Two others in the New Orleans area were also stricken at about the same time by the same strain of E. coli, known as 0145. The death of a young child is always difficult, but in this case it serves as a reminder of how serious E. coli is. Alabama public health officials have linked two cases to the outbreak. And a 22-year-old Florida woman’s illness has been traced to the same dangerous bacterium. Aside from the E. coli strain, all the cases have in common is that officials still have no idea what caused the illnesses.

Epidemiologists at CDC headquarters have been poring over data sent in from the states in search of a common factor that could pinpoint a cause. They believe the likely exposure to be a food source. But at press time this had yet to be confirmed. Unfortunately, quite often the contact source is not found. Those in public health are looking for any link between the affected people. What did they eat? Where did they go? Where did they shop? Because lives are at stake, it’s important to work around the clock on the matter.

It was said that for any E. coli outbreak at this time of year, suspicions immediately turn to undercooked ground beef. Safety experts advise consumers to cook ground beef to a temperature of 160 degrees. And, while they don’t know if that’s the problem with these cases, the CDC is reminding everyone to “wash their hands after handling poultry” and “clean all fruits and vegetables.” The period from April through September is what scientists call “high-prevalence season” for E. coli. As has been reported, E. coli are a common bacteria and not every strain is dangerous. But some, like those that carry the 0145 genetic fingerprint that is behind this outbreak in the four southern states, produce a deadly toxin known as shiga. This poison can cause violent reactions, including severe kidney damage and death.

Until quite recently, the federal government was not checking meat for the 0145 strain. But the U.S. Department of Agriculture, for the first time, began testing meat for six new strains of E. coli, including the strain causing this outbreak. In an unrelated case, a six-year-old boy in Millbury, Mass., died last month from kidney failure caused by E. coli. Massachusetts health officials said scientists have determined his illness was not caused by the same strain of E. coli as the clusters in the South. Officials in Tennessee said a recent E. coli case in that state was also unconnected.

BBB WARNS PARENTS AND STUDENTS AGAINST SCHOLARSHIP SCAMS

All parents with children in college know costs are rising and that more students are turning to financial aid to pay tuition. Better Business Bureau officials warn that some companies are out to take advantage of students and their parents. The organization issued a warning for companies with web sites, seminars or other schemes that promise to find scholarships, grants or financial aid packages for a fee. Officials said the companies may promise a money-back guarantee, but the conditions of the guarantee make it nearly impossible to get a refund. In other
SAFETY PROBES OPENED ON FORD EXPLORERS AND CHRYSLER 200s

Two more safety probes affecting Ford and Chrysler have been reported. Federal safety investigators are looking into complaints that the power steering can fail on 83,000 Ford Explorer SUVs from the 2011 model year. According to the National Highway Traffic Safety Administration, it has received 15 complaints in which drivers reported that it forced them to use more effort to steer the SUVs. NHTSA says no crashes or injuries have been reported. In some cases drivers got a warning message before the power steering quit. At times, restarting the SUVs corrected the problem. Messages were left Friday seeking comment from a Ford spokeswoman.

The Chrysler probe involves complaints about engine stalling in Chrysler 200 midsize sedans from the 2011 model year that have 3.6-liter V-6 engines. NHTSA says it has received 15 complaints that the engines stall without warning while coasting to a stop. A Chrysler spokesman Eric Mayne says the company is working with the government. He says engine performance can be affected by many things, such as software and fuel quality. Mayne says the 3.6-liter engine is in 12 Chrysler models and has traveled millions of miles without problems.

In both cases, the probes could lead to recalls. We will continue to monitor each of these investigations.

Source: Associated Press

KIA RECALLS NEARLY 73,000 RIOS FOR AIR BAG PROBLEM

Kia Motors America is recalling nearly 73,000 Rio (REE-Oh) small cars to fix an air bag problem. The National Highway Traffic Safety Administration says on its website that the recall affects cars from the 2006 to 2008 model years. A sensor mat inside the front passenger seat can crack and fail to detect whether a child is sitting in the seat. This means the air bag could inflate in a crash and injure the child. Cars are designed so air bags don’t inflate if a child is in the front passenger seat. Kia says in the documents that it doesn’t know of any injuries stemming from the problem. The cars were built between Feb. 20, 2005 and Dec. 9, 2007. Kia will replace the sensor for free starting in July.

Over time, with repeated flexing as the seat is used, Kia said the printed circuit board might fail, which could allow the air bag to deploy in a crash, possibly injuring the child. Last August, NHTSA informed Kia it noticed a “high repair trend” for the Rio and wanted to know whether there was a safety problem.

Kia has experienced other problems with malfunctioning seat sensors. Last September, the automaker agreed to recall about 10,600 of its 2007-8 Sorento crossovers because their seat sensors could malfunction when an adult was seated there. In that case the passenger air bag may not deploy in a crash. That recall came about two years after the agency began its investigation. Kia initially resisted the recall, claiming the problem was attributable to adult passengers not being centered on the seat cushion.

NHTSA disagreed, and in an unusual move, convened a defect panel review, a meeting of safety officials, that ultimately resulted in a vote to send Kia a letter formally requesting a recall. At that point Kia said it would recall the vehicles to avoid “a protracted dispute.” Kia described the Rio recall as voluntary, but once a manufacturer is aware of a safety problem it is legally required to inform NHTSA within five business days of its plan for a recall.

CHRYSLER ADDS TWO MODEL YEARS TO JEEP LIBERTY RECALL

Chrysler has added more than 137,000 Jeep Liberty SUVs to a safety recall. NHTSA says on its website that lower control arms in the rear suspension can rust and break, possibly causing a crash. The agency says Chrysler has added the 2006 and 2007 model years to the recall. It now totals nearly 347,000 vehicles. The recall covers vehicles in 20 states and Washington, D.C., where salt is used to clear snow and ice from the roads. The company says it knows of no crashes or injuries from the problem. Chrysler said in March that it was recalling about 200,000 Libertys from the 2004 and 2005 model years for the same problem. Chrysler says it will inspect the parts and replace them for free if needed. The company told NHTSA that as of February it had received no complaints about Liberty control arms from the 2006 or 2007 model years. But since April it has received eight reports of the problem, all from salt-belt states.

GM RECALLS CRUZE CARS OVER RISK OF ENGINE FIRE

General Motors has recalled its popular Chevrolet Cruze compact

car. The recall covers the 2011 and 2012 model years and affects more than 475,000 cars, which have ranked among the top-selling U.S. compacts over the past two years. The fires can ignite when fluids, mainly oil spilled when it is being changed, drip onto a hot plastic shield below the engine, according to the company. GM says it knows of 30 fires caused by the problem. Flames engulfed and destroyed cars in two cases reported to NHTSA. No injuries have been reported.

To eliminate the risk of fires, dealers will cut the shield to let the fluids drain to the pavement, GM said. The repairs take about 30 minutes and are free, the company said. Cruzes with completely worn-out manual transmissions also can leak fluid onto the shields in rare cases. The recall includes cars built from September of 2010 through May of 2012 at GM’s Lordstown, Ohio, assembly plant. They were sold in the U.S., Canada, and Israel.

**AIR MOVERS RECALLED BY EDIC DUE TO FIRE HAZARD**

About 53,000 Air movers/blowers have been recalled by EDIC, of Los Angeles, Calif. The air mover/blower’s internal electrical capacitor can fail and overheat, posing a fire hazard. EDIC is aware of four incidents involving fires that resulted in property damage. No injuries have been reported. This recall involves air movers/blowers that are used to dry floors in homes and other buildings. “Aqua Dri” is printed on the top of some of the air movers. Model “3004AD” or model “3004 ADxxx” (with additional letters) is printed on the serial number plate on the back of the units. Model numbers with “N” are not included in this recall.

The air movers’ plastic housing measures about 18 inches high by 18 inches long by 18 inches deep and has a 25-foot yellow electrical cord. The blowers were sold to flood remediation contractors and other service professionals nationwide from January 2003 through September 2011 for between $160 and $285. Users should immediately stop using the recalled air movers/blowers and contact EDIC for a free repair kit to be installed by users. For additional information, contact the firm toll-free at (888) 289-8720 between 8:30 a.m. Through 4 p.m. PT Monday through Friday, by fax at (323) 667-0144, by email at recall@edic-usa.com or visit the company’s website at www.EDIC-USA.com.

**FRIGIDAIRE GAS RANGE RECALLED DUE TO FIRE HAZARD**

About 185 Frigidaire Self-Clean Gas Ranges have been recalled by Frigidaire, of Charlotte, N.C. There can be a delayed ignition on the bake/broil features of the oven, posing a fire hazard. One incident was reported. No injuries or damage have been reported. This recall for inspection and/or repair involves Frigidaire Gas Ranges Model # LGGF3043KFM with serial numbers within the following range: V F 2 0 4 5 7 2 1 6 to VF20457555. The model and serial numbers are located near the base of the range just below the bottom right portion of the oven door. This gas range has five burners, stainless steel exterior and Frigidaire nameplate centered on the lower part of the oven door.

The ranges were sold exclusively at Lowe’s stores from February 2012 through March 2012 for between $800 and $1,000. Consumers with the recalled model and serial numbers should stop using the oven. For additional information, contact Frigidaire toll free at (888) 360-8556 between 9 a.m. and 5 p.m. ET Monday through Friday or visit the company’s website at www.selfcleangasrangerecall.com.

**ECHO BEAR CAT RECALLS HYDRAULIC LOG splitters**

About 120 ECHO Bear Cat log splitters have been recalled by Crary Industries Inc. of West Fargo, N.D. The end cap of the log splitter’s hydraulic cylinder can break away from the body of the log splitter, posing an impact hazard to the user or bystander. Crary Industries has received three reports of the hydraulic cylinder end caps detaching resulting in one injury from a cylinder reportedly striking a consumer in the head. This recall involves ECHO Bear Cat brand hydraulic log splitter with model numbers LS27270 and LS27270T, with a date code of 012908 stamped on the hydraulic cylinder. The model number is printed on the main beam of the log splitters. The date code is stamped on the hydraulic cylinder near the capped end. The log splitters are black and orange with ECHO Bear Cat printed on the hydraulic cylinder. The log splitters were sold at ECHO Bear Cat dealers nationwide from October 2007 through March 2012 for about $2,600. Consumers should immediately stop using the product and contact the nearest dealer for instruction on receiving a free replacement cylinder installed by an authorized dealer. For additional information, contact Crary Industries toll-free at (888) 625-4520 between 8 a.m. And 5 p.m. CT Monday through Friday, or visit the company’s website at www.bearcatproducts.com.

**CEILING MOUNTED LIGHT FIXTURES RECALLED BY THOMAS LIGHTING**

Thomas Lighting, of Elgin, Ill., part of Philips Consumer Luminaires Corporation, of Elgin, Ill., has recalled about 83,750 Thomas Lighting ceiling flush mount light fixtures. The fixture’s socket wire insulation can degrade, leading to charged wires becoming exposed, causing electricity to pass to the metal canopy of the fixture. This poses a fire and electric shock hazard to consumers. Thomas Lighting has received 11 reports of defective fixtures which resulted in the Arc Fault Circuit Interrupter (AFCI) tripping. No injuries have been reported to the firm.

This recall involves 28 different models of ceiling flush-mounted light fixtures manufactured between June 1, 2010 through November 25, 2010 with a diameter ranging from 7.5” to 13”. All affected fixtures have a round base or canopy affixed to the ceiling and a dome- or cylindrical-shaped cover. The recalled fixtures have a variety of finishes including metal and/or clear or frosted glass and contain one, two or three light bulbs. Canopies are a range of colors including white, bronze, brass (gold) and nickel. Most models have a nib in the center of the dome cover in the same color as the canopy. Although the manufacturer’s name, the fixture model number and production date can be found on a printed label on the ceiling-side of the fixture’s metal canopy, consumers are advised not to
remove the metal canopy from the ceiling in order to access this label.

The fixtures were sold at electrical distributors and lighting wholesalers nationwide from July 2010 through July 2011 for between $19 and $50 as Thomas Lighting products. Consumers should immediately stop using the light fixture, avoid direct contact with the fixture and contact Thomas Lighting to arrange for a free in-home repair of the fixtures by a qualified electrician. For additional information, contact Thomas Lighting at (800) 764-0756 between 9 a.m. And 5 p.m. ET Monday through Friday, or visit the company’s website at www.thomas-lighting.com.

**Bel Air Lighting Recalls Outdoor Wall Mount Lanterns**

About 99,700 Outdoor wall mount lanterns have been recalled by Bel Air Lighting Inc., of Valencia, Calif., Zhongshan De Gao Lighting Co. Ltd. And Zhongshan Huayi Lighting Co. Ltd., of Guangdong, China. An electrical short circuit can occur in the lanterns' internal wiring, posing a risk of fire, burn and electric shock to consumers. The firm has received seven reports of incidents, including two reports of lanterns catching fire. No injuries have been reported.

This recall involves outdoor wall-mount lanterns made of cast aluminum in a rust color with beveled glass. A question mark shaped piece of metal connects the lantern body to the wall-mount plate. The lanterns were sold at Lowe's stores under the Portfolio brand name with item number 253366 and at lighting showrooms with item number 44181. The brand name and item number are printed on the product’s packaging. Lanterns included in the recall are 19.25-inches tall by 9.75-inches wide by 9.25-inches deep and have a three-light candelabra base cluster inside. Part number “E194303” is printed on the base plate and on a label affixed to one of the light sockets. The lanterns were sold at Lowe’s stores and in lighting showrooms nationwide and at Lowes.com from June 2006 through May 2012 for about $48. Consumers should immediately stop using the lanterns and contact Bel Air Lighting for a free replacement lantern. For additional information, contact Bel Air Lighting at (888) 770-7018 between 7 a.m. And 6 p.m. CT Monday through Friday, or visit the company’s website at www.regcen.com/belairlighting.

**Nautilus Recalls Bowflex Dumbbells Due To Injury Hazard**

About 17,000 Bowflex® SelectTech® 1090 Dumbbells have been recalled by Nautilus Inc. of Vancouver, Wash. The weight selector dial on the units can fail, causing weight plates to fall when the dumbbell is lifted from its cradle, posing an injury hazard. Nautilus Inc. has received 16 reports of the weight selector dial failing, including three reports of injuries to the user’s foot or leg. These adjustable dumbbells are sold in pairs and can have a weight capacity of ten to 90 pounds. The word ‘BOWFLEX’ is written in grey along the top of each handle. A selector dial on each end of the cradle lists weights in red, starting at ten and increasing in increments of five. The red Bowflex logo is at the center of the dial. This recall involves units with a date-of-manufacture code in the serial number in the range of 1111 through 1136. The date code is the four-digit code following the letters “MAG” in the serial number. The serial number is on a white label on the bottom of the cradle. Lift the dumbbell from the cradle with all weights attached before turning over the base. Dumbbells with a black dot on the inside portion of the weight selector dial are not affected by this recall.

The dumbbells were sold at sporting goods stores, Nautilus.com and other online retailers from May 2011 through August 2011 for about $600. Consumers should stop using the recalled dumbbells immediately and contact Nautilus for a free repair kit. For additional information, contact Nautilus Inc. Toll-free at (800) 416-7271 between 8 a.m. Through 5 p.m. PT Monday through Friday, or visit the company’s website at www.bowflex.com

**Evenflo Recalls Convertible High Chairs Due To Fall Hazard**

Evenflo Inc., of Miamisburg, Ohio, has recalled about 35,000 Convertible high chairs in the United States. The activity tray on the high chair can unexpectedly detach and allow an unrestrained child to fall, posing a risk of injury to the child. Evenflo has received 18 reports of trays that detached, including eight reports of children who fell from the high chair and sustained bumps and bruises. This recall involves Evenflo high chairs that convert from a high chair to toddler-size table and chair. The convertible high chair can be identified by the model names and numbers listed below. Model numbers are located on a label on the lower portion of one of the high chair’s legs. The high chairs were sold at Toys “R” Us and Walmart stores nationwide and online at Walmart.com and Wayfair.com between December 2011 and June 2012 for about $40. Consumers with the recalled highchairs should immediately contact Evenflo for a replacement tray with installation and use instructions. For additional information, please contact Evenflo at (800) 235-5921 between 8 a.m. Through 5 p.m. ET Monday through Friday, or visit the company’s website at http://safety.evenflo.com.

**Strollers Recalled By Kolcraft**

Kolcraft Enterprises Inc., of Chicago Ill., has recalled Contours Options three- and four-wheeled strollers. This includes about 36,000 in the United States and 270 in Canada. A child or consumer’s finger can become caught in the opening formed when locking and unlocking the hinge mechanism which is used to adjust the handlebars on the strollers. This presents an amputation and laceration hazard to children and the adults handling the stroller. Kolcraft and CPSC have received five reports of injuries involving the hinge mechanism, including reports of three children whose fingertips were amputated and two adults whose fingers were either smashed or lacerated. This recall involves Kolcraft Contours Options three- and four-wheeled strollers. Strollers included in the recall have model numbers starting with ZL002, ZL005, ZL008, ZL015 and ZL018. On the ZL002 model, the model number and date of manufacture is printed on a sticker above the left wheel. On the ZL005, ZL008, ZL015 and ZL018 models, the model number and date of manufacture is printed on a label sewn into the edge of back of the stroller seat pad. The strollers were manufactured from
January 2006 through November 2009 and sold in various color schemes.

The strollers were sold at juvenile product specialty stores nationwide and online at Amazon.com, Target.com and ToysRUs.com from January 2006 to June 2012 for between $150 and $160. Consumers should immediately stop using the product and contact the company to receive a free repair kit. For additional information, please contact Kolcraft at (800) 453-7673 between 8 a.m. and 6:45 p.m. ET Monday through Thursday, 8 a.m. and 3:30 p.m. ET Friday, or visit the company’s website at www.kolcraft.com.

**COFFEE MAKER RECALL**

Black and Decker has recalled its Space Maker coffee makers. The handles of these under-the-cabinet coffee makers can break off, causing injuries. The coffee makers were sold at major national retailers from July 2008 through May 2012, and cost between $50 and $80. Applica Consumer Products, Inc., the distributor of the coffee maker, has received reports of over 1200 handles breaking and nearly 70 reports of cuts or burns. Model numbers for the recalled coffee makers are:

- SDC740
- SDC740B
- SDC740C
- SDC740RS
- SDC750
- SDC750D

The model number is printed on the underside of the coffee maker, directly below the water reservoir. Consumers should immediately stop using the coffee makers and contact Applica to exchange their coffee pot for a free replacement. For more information, contact Applica Consumer Products toll-free at (866) 708-7846 between 8:30 a.m. and 5 p.m. ET, or visit the company’s website at www.acprecall.com.

**TOYS R US IMAGINARIUM ACTIVITY CENTER RECALLED**

Toys R Us has recalled its Imaginarium 5-Sided Activity Center following eight reports that small wooden knobs have become detached from the toy posing a choking hazard, according to the Consumer Product Safety Commission. About 24,000 toys were sold nationwide and online at www.toysrus.com from August 2009 through September 2010 for about $25. The Imaginarium 5-Sided Activity Center has two triangle-shaped ends with a wooden multi-colored xylophone on one and a mirror on the other. The three sides are square-shaped and include moveable block letters, rotating gears and sliding shapes.

The name “Imaginarium” appears in a blue, oval-shaped logo underneath the mirror on one end. The second ‘i’ in the logo is dotted with a shooting star. The recalled product has model number 46284; Toys R Us item number 295909; and has the barcode number 000799985462841. The model number is printed on the back of the box, directly above the bar code. These numerical markings do not appear on the actual product. For additional information, contact Toys R Us toll-free at (800) 869-7787 between 9 a.m. and 11 p.m. ET Monday through Saturday and between 11 a.m. and 7 p.m. Sunday, or visit the company’s website at www.toysrus.com/safety

**CALIFORNIA INNOVATIONS EXPANDS RECALL OF FREEZER GEL PACKS DUE TO INGESTION HAZARD**

California Innovations Inc., of Toronto, Canada, has recalled Ice/Hot and Ice Gel Packs. This includes about 880,000 (about 248,000 units associated with lunch boxes and 55,000 associated with food carriers were previously recalled in January 2012). If the packs become damaged, they can leak gel that could contain diethylene glycol and ethylene glycol, which can cause illness if ingested in large amounts. The recalled products are Cryofreeze ice/hot packs and Arctic Zone ice packs. The packs are gel-filled plastic pouches with either transparent or opaque sealed wrappers. They are used to keep food hot or cold. The gel packs were sold separately and with a variety of lunch boxes, coolers and thermal carriers. Six gel pack styles are being recalled: Cryofreeze ice/hot packs in small and large styles. Both have opaque blue wrappers with the words “Cryofreeze,” “Ice Pack/Hot Pack,” “Non-toxic” and “Reusable” printed on the front:

- The small gel pack is 6 inches wide and 5.5 inches high. The large gel pack is 8.5 inches wide and 8 inches high.

Cryofreeze gel packs or a $5 cash refund for large (8.5-inch x 8-inch) Cryofreeze gel packs or a $5 cash refund for all other gel packs. For additional information, call California Innovations at (800) 722-2545 between 9 a.m. and 5 p.m. ET Monday through Friday, e-mail ci-recall@ca-innovations.com or visit the company’s website at www.californiainnovations.com.

**WELLESSE DIGESTIVE SUPPLEMENT RECALLED ON FEAR OF SALMONELLA CONTAMINATION**

Digestive 3-in-1 Health liquid dietary supplement has been recalled due to the possibility that one of the ingredients may be contaminated with Salmonella, according to the U.S. Food and Drug Administration. Botanical Laboratories is recalling 38 bottles of 35.8 oz Digestive 3-in-1 Health liquid dietary supplement and 275 bottles of 16 oz. Digestive Health 3-in-1 liquid dietary supplement, the release said. On May 29, Botanical Laboratories was
informed by a supplier that one of the ingredients in the supplements had tested positive for Salmonella. To date, raw material received and tested by Botanical Laboratories have tested negative for Salmonella. To date, no lots of the final product have tested positive for Salmonella.

The recall for the 16 oz. size includes bottles with “LOT 34441C (followed by a four digit time code) and an EXP 05/2014” jet coded on the bottom of the bottle. The 33.8 oz. size has “LOT 34552C (followed by a four digit time code) and a EXP 05/2014” jet coded on the bottom of the bottle. Both 33.8 oz. And 16 oz bottles were distributed nationwide through retail stores, and online retailers. The product was distributed after May 1, 2012. Consumers who have purchased the product with one of the above referenced lot numbers are urged to return it to the place of purchase for a full refund. Consumers with questions may contact the company at 1-800-232-4005.

**RECALL OF PASTA MIX PRODUCTS**

Bay Valley Foods has recalled approximately 74,000 cases of boxed pasta mix products manufactured by its subsidiary ST Specialty Foods, Inc. The recalled products include a seasoning blend manufactured by Kerry Ingredients & Flavours. The seasoning blend was manufactured by Kerry using lactic acid which may potentially contain small metal fragments.

There have been no reports of any injury or illness associated with these products. Consumers are advised to destroy any of the above-listed products, or return them to place of purchase for a full refund. Consumers with questions may contact Bay Valley Foods Consumer Response Department at 1-800-756-5781.

**BIG LOTS RECALLS PORTABLE CERAMIC SPACE HEATERS**

About 70,500 Portable Space Heaters and Portable Oscillating Space Heaters have been recalled by Big Lots, of Columbus, Ohio. The heaters can overheat and melt, posing a fire or electric shock hazard. Big Lots has received four reports of the product overheating and melting. There are no reports of injury, fire or property damage. This recall is of two models of 1500 watt Climate Keeper ceramic heaters. Both models have a fan, two dials on top, a wire mesh panel in front and the name “Climate Keeper” and a label on the bottom with the model number and ETL 3130679. Model #FH107A has grey plastic housing. Model #PTC-902T is an oscillating heater with silver-grey plastic housing, a molded handle on top of the heater and a small extra button between the two dials which controls the oscillation.

The heaters were sold exclusively at Big Lots stores nationwide from September 2010 through March 2012 for about $20 for Model #FH107A and $25 for Model #PTC-902T. Consumers should stop using the recalled product immediately and return it to a Big Lots store for a full refund. For additional information, contact Big Lots toll-free at (866) 244-5687 between 9 a.m. Through 5 p.m. ET Monday through Friday, or visit the company’s website at www.biglots.com.

If you need more information on any of the recalls listed above, visit our firm’s web site at www.BeasleyAllen.com/recalls. We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at Shanna.Malone@beasleyallen.com for more recall information or to supply us with information on recalls.

**XXII. FIRM ACTIVITIES**

**EMPLOYEE SPOTLIGHTS**

**BRANTLEY FRY**

Brantley Fry joined the firm in March 2009. Her practice includes class action, toxic tort cases pending before federal courts in the Southeastern United States. Brantley is currently working on TVA coal ash spill and BP oil spill litigation. She also reviews potential toxic tort cases on a regular basis.

Brantley says she has "always liked being outside, so conservation from an outdoor perspective has always been an interest." Her interest in environmental issues grew even more after she had children. She says she “cannot help but be concerned about the need for a clean environment to support children’s healthy growth and development.” Being an environmental lawyer allows Brantley to “fight for kids and adults whose lives have been turned upside down by toxic contamination.”

Brantley represents property owners and residents that were affected by the TVA coal ash spill in December 2008. This disaster involved the breach of a coal ash containment pond that spilled more than a billion gallons of coal ash sludge onto adjacent property and nearby waterways in Kingston, Tenn. Brantley was part of the trial team that tried the issues of liability in the phase one trial in Fall 2011. As of this writing, the court has not issued its ruling on the issue of liability in this case. Hopefully, it will come soon and will be favorable to our clients.

Brantley’s work on the BP oil spill litigation focuses mainly on representing government clients. As a result of the oil spill, local governments along the Gulf Coast sustained tax revenue losses due to the drop in tourism. The BP oil spill affected the lives and livelihoods of thousands of people along the Gulf Coast beginning in April 2010, when the Deepwater Horizon drilling platform exploded and sank in the Gulf of Mexico off the coast of Louisiana. Eleven workers were killed in the explosion and others injured. As all of us know—all too well—oil gushed from the broken wellhead for months before it could be capped. Chemical dispersants used in ocean clean-up efforts exacerbated the toxic toll on marine and human life along the coast.

The TVA coal ash spill and the BP oil spill are the two largest environmental catastrophes in U.S. history. Brantley’s work on these two important cases takes advantage of her decade-long experience working in environmental law. If you have any question about Brantley’s zeal for this field of law, let me dispel your doubts. She is a real champion for environmental work.

Brantley was born in Birmingham, Ala. in 1973. After graduating from high school at The Altamont School, Brantley graduated from Hollins College with a degree in Sociology. She then earned her law degree from the nation’s top environmental law program at Vermont Law School in 2000.

In connection with her environmental law practice, Brantley has represented a wide range of clients including individuals, non-governmental organizations (NGO’s), and governmental agencies. Her practice has focused almost entirely on environmental law and policy. As a federal contractor, she assisted federal agencies with regulatory analysis under the National Environmental Policy Act (NEPA), the Clean Air Act (CAA), the Clean Water Act (CWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),
James Lampkin joined our firm in April 2011, and he currently works in the Mass Torts section. He is working in the Hormone Replacement Therapy litigation, handling cases throughout the country. James grew up in Montgomery and graduated from Sidney Lanier High School in 1979. He attended the University of Alabama from 1979 through 1980 and transferred to East Tennessee State University, where he received his bachelor’s degree (political science) in 1985. James then attended law school at Cumberland School of Law. He was on the Cumberland Law Review and graduated with honors in 1989. James was admitted to the Georgia and Alabama State Bars in 1997 and to the Florida and Mississippi Bars in 1997.

James says he wanted to be a lawyer for as long as he can remember and never seriously considered any other profession. His grandfather, who raised James and his brother, worked on a part-time basis at the snack bar at the old Montgomery County Courthouse. James says she would come home talking about lawyers and judges who came into the snack bar. Her stories and her respect for those lawyers and judges, according to James, were a big influence on his decision to choose the law as a profession.

Upon graduation from law school, James moved to the Mobile/Baldwin County area where he began his legal career as a law clerk for United States District Judge Virgil Pittman. In 1991, James entered private practice with a civil defense firm in Mobile where he worked until 2011. During that period of time, James was a speaker at numerous legal seminars, including industry seminars, and authored numerous legal articles involving a variety of issues related to his practice and service to clients. He also served in several capacities, including as an instructor in deposition and trial training programs for younger lawyers.

James is licensed to practice in Alabama, Georgia, Florida and Mississippi as well as before all federal courts in Alabama, Mississippi, Georgia and the Northern District of Florida. He is also admitted to the United States Supreme Court, the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals. He is currently a member of the American Bar Association, the Alabama Association for Justice, the Montgomery Association for Justice, the Mobile County Bar Association and the Baldwin County Bar Association. James says the best part of being a lawyer is “helping people resolve problems.”

In 1991, James married the former Martha Grimes of Marion Junction, Ala. They have two children, Brooks and Ginny. The Lampkins were members of Spanish Fort United Methodist Church where James served in several leadership positions. Over the past several years, James volunteered his time in supporting the educational and sports programs at Spanish Fort High School. The family has now moved to Montgomery and they are currently looking for a church home here. James will be supporting the educational and sports programs at St. James School, where Ginny will begin the 10th grade in the Fall. Brooks will begin his freshman year at Auburn in the Fall.

In his spare time, James also enjoys hunting, fishing and other outdoor activities. He is an avid football fan and enjoys attending Bama games in Tuscaloosa. He enjoys working with his hands and solving mechanical issues as well. James’s father was a certified welder and was not able to teach James that skill before he passed away. But several years ago, James bought a welding machine and he and his son taught themselves how to weld. That was a tribute to James’s father. Ginny has designed several different bottle trees that they have created. James had this to say:

*I am a firm believer that as parents we are obligated to teach our children certain skill sets that will allow them to take care of themselves. My wife and children are the greatest people in my life next to my relationship with my Savior, Jesus Christ. The law is the great equalizer in our society and it helps ensure general civility. I truly believe that the ‘law’ should be impartial to all, and that everyone, regardless of their circumstances, is equal.*

We are highly pleased that James has joined our firm. He is a very good lawyer and we are blessed to have him on board.

**Benita Bunch**

Benita Bunch, who currently serves as a clerical assistant for Andy Birchfield, has been with the firm since December of 2000. Benita handles and participates in many interesting projects in the Mass Torts Section. She works closely with Genie Pruett, who is Andy’s Legal Secretary.

Benita has been married to Darrell Bunch for 34 years. They have two sons, each of whom is currently serving our country in the military—Brandon is in the Coast Guard and Blake is in the Air Force. Benita says she and Darrell are VERY proud of their sons. There are also four miniature dachshunds at the Bunch household. Benita calls Phoebe, Jeb, Dottie and Sadie her babies.

Benita and Darrell enjoy riding the country roads in their Mustang convertible any time they can. Most of their time away from work, according to Benita, is spent together, whether out riding and having a good time or just working around their home and property. Benita is a very good, hard-working employee and we are fortunate to have her with us.

**Christie Cook**

Christie Cook, who has been with the firm since March, currently works as a Legal Secretary to Ben Baker. Her duties include: calendaring, scheduling depositions, filing, indexing and organizing documents, and doing other tasks as requested by Ben. Christie has lived in Montgomery for a little over a year. She has three boys, twins who are four years old and a six year old. Her six-year-old son Chandler attends Blount Elementary and the twins Carter and Cole will attend preschool three days a week in the Fall. The family attends Vaughn Forest Church. Christie received her BS degree in Justice and Public Safety from AUM and has her paralegal certificate. She enjoys spending time with her family. During the summer, she says they enjoy going for evening walks, swimming and going to the beach. Christie also enjoys reading, camping and kayaking. Christie is another very good hard-working employee. We are fortunate to have her with the firm.

**Lauren Faulk**

Lauren Faulk, who came to the firm in May of last year as a temporary employee,
stress disorder, anger and even suicidal ideation, memory problems, post-traumatic stress, mood swings, have trouble concentrating, etc. A person with a TBI can suffer from depression, mood swings, have trouble concentrating, memory problems, post-traumatic stress disorder, anger and even suicidal ideation. These are often called the “silent disabilities” of TBI and they are very serious.

Carol has been very active in a number of organizations that promote head injury awareness. It is her hope that through education other people who suffer brain injuries, and their families, will get to understand the dangers of head injuries and their lasting efforts. Carol is active with the Alabama Head Injury Foundation (AHIF) and the Alabama Department of Public Health’s Head Injury Task Force. She has participated in helping promote Brain Injury Awareness Month, which is held in March each year, and is part of a speakers’ bureau that talks to groups and the media about TBI to help raise awareness.

Carol has also been active with the Crime Victims Task Force in the Attorney General’s office and with Victims of Crime and Leniency (VOCAL). She is working to strengthen penalties for juvenile offenders who cause serious physical injury, including TBI or death to their victims. Needless to say, all of us at Beasley Allen are very proud of Carol. She has been a real inspiration to lots of folks—especially those affected in some manner by a TBI—and she is certainly deserving of being honored.

XXIV. FAVORITE BIBLE VERSES

Clay Barnett, a lawyer in our Consumer Fraud Section, has been working very hard on the firm’s AWP Litigation. He furnished some verses for this issue. Clay told me he had heard the Matthew verses since he was a teenager, but that the verses finally made sense to him when he reached his 30’s. Clay says these are powerful verses and they are. The verses from Philippians also contain a good message for all lawyers. Incidentally, Clay was married recently to Elise Plauché Lirette, a doctor who practices in Montgomery with my good friend Dr. Steve Maddox. Clay and Elise are a couple who have started their marriage on a solid foundation.

Come to me, all you who labor and are heavy laden, and I will give you rest. Take my yoke upon you, and learn from me, for I am gentle and lowly in heart, and you will find rest for your souls. For my yoke is easy, and my burden is light.”

Matthew 11:28-30

Do nothing out of selfish ambition or vain conceit. Rather, in humility value others above yourselves, not looking to your own interests but each of you to the interests of the others.

Philippians 2:3-4

Kristie Smith, an employee in the firm, enjoys reading scripture that affects her children. Kristie sent a verse she especially likes for her children, Blake and Brooke, and which she says will work for any person with children. I totally agree with her and it is good for any parent.

For this reason, since the day we heard about you, we have not stopped praying for you. We continually ask God to fill you with the knowledge of his will through all the wisdom and understanding that the Spirit gives, so that you may live a life worthy of the Lord and please him in every way: bearing fruit in every good work, growing in the knowledge of God, being strengthened with all power according to his glorious might so that you may have great endurance and patience, and always giving joyful thanks to the Father.

Colossians 1: 9-12

Do not be anxious about anything, but in everything, by prayer and petition, present your requests to God. And the peace of God, which transcends all understanding, will guard your hearts and minds in Christ Jesus.

Philippians 4:19

Scarlette Tuley, a lawyer in our Consumer Fraud Section, sent in two verses for this issue. Scarlette specializes in securities litigation and does excellent work. She is not only a very good lawyer, but she is a good person and a dedicated Christian.

We can rejoice, too, when we run into problems and trials, for we know that they are good for us—they help us learn to endure. And endurance develops strength of character, and character develops the confident expectation of salvation. And this expectation will not disappoint us. For we know how dearly God loves us, because he has given us the Holy Spirit to fill our hearts with his love.

Romans 5:3-5

People judge by outward appearance, but the Lord looks at a person’s thoughts and intentions.

1 Samuel 16:7
Harry Truman will go down in history as having been a very good President. In fact, based upon what I have read about him over the years, he is one of my favorites. The man never lost the common touch and never forgot where he came from. That—in my opinion—says a lot about a person. I am setting out below an article written about President Truman that tells us a great deal about this man.

**President Harry Truman and Then There Was Truman...**

Harry Truman was a different kind of President. He probably made as many, or more, important decisions regarding our nation's history as any of the other 42 Presidents preceding him. However, a measure of his greatness may rest on what he did after he left the White House. The only asset he had when he died was the house he lived in, which was in Independence Mo. His wife had inherited the house from her mother and father and other than their years in the White House, they lived their entire lives there.

When he retired from office in 1952, his income was a U.S. Army pension reported to have been $13,507.72 a year. Congress, noting that he was paying for his stamps and personally licking them, granted him an ‘allowance’ and, later, a retroactive pension of $25,000 per year. After President Eisenhower was inaugurated, Harry and Bess drove home to Missouri by themselves. There was no Secret Service following them. When offered corporate positions at large salaries, he declined, stating, “You don’t want me. You want the office of the President, and that doesn’t belong to me. It belongs to the American people and it’s not for sale.”

Even later, on May 6, 1971, when Congress was preparing to award him the Medal of Honor on his 87th birthday, he refused to accept it, writing, “I don’t consider that I have done anything which should be the reason for any award, Congressional or otherwise.” As president he paid for all of his own travel expenses and food. Modern politicians have found a new level of success in cashing in on the Presidency, resulting in untold wealth. Today, many in Congress also have found a way to become quite wealthy while enjoying the fruits of their offices. Political offices are now for sale (e.g. Illinois).

Good old Harry Truman was correct when he observed, “My choices in life were either to be a piano player in a whorehouse or a politician. And to tell the truth, there’s hardly any difference!” I say dig him up and clone him!! This is not sent for discussion. Enjoy life now—it has an expiration date!

I have to wonder what President Truman would have to say about our present-day political climate. My guess is he would take on the bad guys and not back down one bit when confronted with their tactics. I believe we need more folks like Harry Truman in today’s political world. If he were around today, I believe he would stand up for the middle-class—not back down when attacked by the extreme right—and not be afraid to take on the Karl Roves of this era. Maybe some of our political leaders will read this and become inspired to follow President Truman’s example!

**Alabama Arise Needs Your Help**

I hope all of our Alabama readers are aware of the hard work done by Alabama Arise, a Montgomery-based organization, over the past several years. Now that the legislative session is over and summer is settling in, I would encourage our Alabama readers to support Arise. This group works extremely hard to protect the interests of the “poor” in Alabama and they try to make Alabama a better place for all Alabamians. The folks at Arise are smart, dedicated, hard-working and passionate about their work and the folks they work for.

The annual meeting of Arise will take place on Sept. 15th in Montgomery. Now is a great time for folks to join Arise. Arise members are integral to the work they do. Arise relies on members to be informed on the issues, spread the word to their community, and help advocate for needed legislation. Arise has to rely on members to inform them on needs in our state and which policy issues most need to be addressed. Arise needs your help if they are to make significant policy change in Alabama.

By becoming an Arise member, you not only support the work that they do, but you become part of the Arise process. Newsletters and fact sheets are available to help members stay informed and up to date. Members also help select issue priorities at Arise’s annual meeting. You can become a new member for only $15, and if you join before June 30th, you can participate in the annual meeting.

Arise has a “sister” organization, Arise Citizens’ Policy Project, (ACPP), which was founded in 1994. It’s a statewide nonprofit, nonpartisan coalition of 150 congregations and community groups and some 1,400 individuals united in their belief that low-income people are suffering because of state policy decisions. Go to www.arisecitizen.org for more information or you can call them at (334) 832-9060.

**Some Good 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.

2Chron7:14

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

Justice cannot be for one side alone, but must be for both.

Eleanor Roosevelt

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

Louis Brandeis, 1937

U.S. Supreme Court Justice

A reader sent me this poem recently, which I really like. It’s about a most important subject—“friends” and “friendship”—and it’s a good message:

If I could catch a rainbow, I would do it just for you.
And share with you its Beauty on days you're feeling Blue.

If I could build a Mountain you could call your very own
A place to find Serenity, a place to be alone, I'd do it just for you.

If I could take your Troubles, I would toss them in the Sea
But all these things I'm finding are Impossible for me.

I cannot build a Mountain or catch a Rainbow fair
But let me be what I know best, A Friend that's always there.

Anonymous

XXVI.
PARTING WORDS

With all of the turmoil and strife that we all see around the world, and unfortunately even in the United States, it’s very easy to become discouraged and wonder if it will ever end and if it does how will it end. It’s a product of human nature to have these feelings and doubts. But fortunately, God is still in control and we can find out in the Book of Revelation exactly how things will wind up for us in time. This book also has lots of strong encouragement for us as we go through our life on earth. A friend sent me a prayer by the Apostle Paul found in Eph. 3:14-21 that gives us some good guidelines. Paul provides hope for all of us as we deal with daily problems and adversity in our lives.

For this reason I bow my knees to the Father of our Lord Jesus Christ, from whom the whole family in heaven and earth is named, that He would grant you, according to the riches of His glory, to be strengthened with might through His Spirit in the inner man, that Christ may dwell in your hearts through faith; that you, being rooted and grounded in love, may be able to comprehend with all the saints what is the width and length and depth and height—to know the love of Christ which passes knowledge; that you may be filled with all the fullness of God. Now to Him who is able to do exceedingly abundantly above all that we ask or think, according to the power that works in us, to Him be glory in the church by Christ Jesus to all generations, forever and ever. Amen.

Eph. 3:14-21

That can be our prayer for our family, our friends and our neighbors. I pray that in years to come that each of us will desire to love our Lord more and be eager to learn His ways and as certain His will for our lives. We should want to grow stronger in Him and to allow more of His power to work in and through us. May we never forget that He is able to do so much more for us, in us, and through us than we could ever imagine or comprehend.

So in good times and bad, and for those times in between, let us all thank God in advance for all that He will do through us today, in the immediate future and in the years to come. We simply have to trust God—be obedient to His commands—and do His will in our lives. That may sound too simple for some of our readers, but I can tell you it’s a powerful truth and will work if we let it.

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Jere Locke Beasley, founding shareholder 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 50 lawyers and more than 200 support staff. Jere Beasley has always been an advocate for victims of wrongdoing and has been helping those who need it most for over 30 years.